IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOLDISTRICT,

Plaintiff,
vs.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,

Defendants.

JANE DOE, a minor, by and through her legal guardians JOYCE and JOHN DOE,

Intervenor Third-Party Plaintiff,
vs.

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOLDISTRICT, et al.,

Third-Party Defendants.

CASE NO. 2:16-cv-00524

JUDGE MARBLEY

MAGISTRATE JUDGE JOLSON

MEMORANDUM IN OPPOSITION OF THIRD-PARTY DEFENDANTS WILLIAM DODDS AND SHAWN WINKELFOOS TO THE MOTION FOR A PRELIMINARY INJUNCTION OF INTERVENOR THIRD-PARTY PLAINTIFF

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III. SUMMARY OF THE ARGUMENT

Pursuant to Local Rule 7.2(a)(3), Third-Party Defendants William Dodds ("Superintendent Dodds") and Shawn Winkelfoos ("Principal Winkelfoos") provide the following summary of arguments contained in their memorandum in opposition to the Motion for a Preliminary Injunction ("Motion") (Doc. 35):

This case is about the efforts of Third-Party Defendants School Board of Highland Local School District, Highland Local School District (collectively, "Highland"), Superintendent Dodds, and Principal Winkelfoos (collectively, "Defendants") to ensure a safe and secure learning environment for Third-Party Plaintiff Jane Doe ("Doe") as well as all the other students enrolled in Highland where they can learn, develop, and thrive and the competing efforts of Doe and her legal guardians, Third-Party Plaintiffs Joyce and John Doe (collectively, "Plaintiffs"), and other parties to improperly expand Title IX of the Education Amendments of 1972 ("Title IX") and the Equal Protection Clause of the Fourteenth Amendment ("Equal Protection Clause") to encompass the concept of "gender identity" in violation of both congressional intent and existing federal case law.

A. Plaintiffs Are Not Likely to Succeed On The Merits Of Their Title IX Claim (2-10).

Specifically, Plaintiffs ask this Honorable Court to rule that the term "sex" under Title IX incorporates the concept of "gender identity" and grant their Motion allowing Doe to access the girls' restrooms within Highland during the pendency of this case. However, Plaintiffs fail to meet their burden under the four prong test for determining whether to grant a preliminary injunction. *See* Mem. in Opp. at 1-2. Specifically, Plaintiffs do not have a strong likelihood of success on the merits with respect to this claim because Plaintiffs' invitation clashes with (1) the legislative intent of Congress; (2) the common understanding of the term when Congress enacted

Title IX; and (3) the United States Department of Education's ("Department of Education") own understanding of the term when promulgating regulations under Title IX that "sex" referred solely to the physiological differences between female and male students as determined at their birth. *See* Mem. in Opp. at 3-10.

B. Plaintiffs Do Not Have A Strong Liklihood Of Success On Their Title VII Arguments (10-13).

In fact, there is no United States Supreme Court or Sixth Circuit case that has ever recognized that the "based on sex" element of either Title VII of the Civil Rights Act of 1964 ("Title VII") or Title IX extends to an individual's transgender status alone. Plaintiffs' reliance on cases involving sex stereotyping is misplaced as sex stereotyping is distinct from transgender status and there is no evidence that any of Defendants' actions were motivated by Doe's failure to comply with societal expectations about what it means to act as a male.

C. Plaintiffs Are Not Likely To Succeed On The Merits Because Defendants Have Not Violated The Equal Protection Clause (13-24).

Similarly, Plaintiffs are not likely to succeed on the merits of their Equal Protection claim because (1) no Sixth Circuit Court has recognized that transgender status, in and of itself, is a suspect classification under the Equal Protection Clause and (2) Defendants have both a substantial and rational basis for providing separate toilet, locker room, and shower facilities on the basis of sex because doing so is expressly permitted under Title IX and federal case law recognizes that schools have a compelling interest in providing their students with a safe and comfortable environment for performing some of life's most intimate functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex.

D. Doe Will Not Suffer Irreparable Injury Without The Injunction (24-27).

With respect to the second element of the preliminary injunction standard, Doe will not suffer an irreparable injury if the Motion is not granted because (1) Defendants have recognized Doe's gender identity within the bounds permitted by law and (2) Defendants have implemented a safety plan to secure Doe's health and well-being. In fact, the safety plan approved less than a month ago indicates that Doe's suicidal ideations have been downgraded.

E. Issuance Of The Requested Injunction Will Cause Substantial Harm To Others (27-29).

With respect to the third element of the preliminary injunction standard, the issuance of an injunction will cause substantial harm to others as it would deny (1) the rights of other students to bodily privacy in the most intimate of settings and (2) the local control of Highland's elected board members and the community.

F. The Public Interest Will Not Be Served By Issuance Of the Requested Injunction (29).

With respect to the fourth element of the preliminary injunction standard, the public interest will not be served by the issuance of the requested injunction because Highland's restroom policy does not violate Title IX or the Equal Protection Clause. Indeed, maintaining sex segregated toilet, locker room, and shower facilities based on biological or birth sex is expressly permitted under Title IX.

IV. STATEMENT OF THE FACTS

Superintendent Dodds and Principal Winkelfoos incorporate the statement of the facts provided on pages two through 10 in the Board of Education of Highland Local School District's Response in Opposition to Intervenor Third-Party Plaintiffs' Motion for Preliminary Injunction (Doc. 61) as if fully set forth herein.

V. ARGUMENT

A. PRELIMINARY INJUNCTION STANDARD.

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.'" *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)). "A preliminary injunction is an extraordinary measure that has been characterized as 'one of the most drastic tools in the arsenal of judicial remedies.'" *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001) (quotation omitted). As a result, a preliminary injunction "should not be granted unless the movant, **by a clear showing**, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (omitting quotations) (emphasis in original).

The four factors on which a movant must make a clear showing in order to obtain a preliminary injunction are as follows:

(1) whether the movant has a strong likelihood of success on the merits;
(2) whether the movant would suffer irreparable injury without the injunction;
(3) whether issuance of the injunction would cause substantial harm to others; and
(4) whether the public interest would be served by the issuance of the injunction.

Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 542 (6th Cir. 2007).

All four factors weigh in Defendants' favor. Each factor is addressed below.

B. PLAINTIFFS DO NOT HAVE A STONG LIKLIHOOD OF SUCCESS ON THE MERITS WITH RESPECT TO THEIR TITLE IX CLAIM.

On pages 11 through 12 of the Motion, Plaintiffs assert that "[b]y treating [Doe] differently than other girls, including by not allowing her to use the girl's restroom, Highland is discriminating against her 'on the basis of sex' in violation of Title IX." This argument must be rejected because Title IX expressly permits differentiation on the basis of sex when an educational institution is maintaining separate living facilities, provided these facilities are comparable.

Specifically, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. However, not all sex-based distinctions are impermissible under Title IX. In fact, Title IX expressly permits the provision of separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Consistent with this statutory provision, the regulations implementing Title IX specify that an educational institution may maintain "separate toilet, locker room, and shower facilities on the basis of sex" — provided the facilities offered to "one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

As a result, federal statutory and regulatory provisions specifically permit Defendants to provide "separate toilet, locker room, and shower facilities on the basis of sex" — as was done in

this matter. 34 C.F.R. § 106.33. Indeed, Plaintiffs acknowledge this is the case, when they state that "under 34 C.F.R. § 106.33, school districts may provide separate restroom facilities 'on the basis of sex.'" Motion at 12.

In an effort to evade this clear regulatory pronouncement, Plaintiffs improperly declare that 34 C.F.R. § 106.33 does not apply to transgender students. Specifically, Plaintiffs contend that 34 C.F.R. § 106.33 does not apply to transgender students because the "based on sex" element of Title IX encompasses "gender identity," such that schools "may not compel transgender students to use a separate restroom or otherwise deny transgender students access to the same restrooms." Motion at 12. Plaintiffs' interpretation of the "based on sex" element in Title IX clashes with (1) the clear legislative intent of Congress; (2) the common understanding of the term when Congress enacted Title IX; and (3) the Department of Education's own understanding of the term when it promulgated 34 C.F.R. § 106.33 — i.e., that "sex" referred solely to the physiological differences between female and male students as determined at their birth. Each of these arguments is addressed below.

1. Congress Intended For Title IX To Prohibit Discrimination On The Basis of "Sex" — Not "Gender Identity."

The text, structure, and history of Title IX all demonstrate Congress's unambiguous intent to prohibit invidious discrimination on the basis of "sex," not "gender identity."

Indeed, the legislative history removes any doubt that Congress understood the term "sex" in Title IX to mean the physiological differences between females and males at their birth. When the law was debated, lawmakers focused on the effect that the law would have in ensuring that public educational institutions afforded women and men equal avenues for advancement. "Gender identity" was never mentioned during the debate. Members of Congress focused their attention instead on the implications of removing barriers "on the basis of sex" across public

institutions. Some feared, for example, that Title IX would force colleges to open sex-specific dormitories to both sexes. Specifically, when Senator Bayh first introduced Title IX, Senator Dominick asked about the scope of the law with respect to this very issue:

> Mr. DOMINICK. The provisions on page 1, under section 601, refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera. The words "any program or activity," in what way is the Senator thinking here? **Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here?** Or are we dealing with just educational requirements? I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot segregate dormitories anyway. **But suppose they want to segregate the dormitories; can they do it?**

117 Cong. Rec. 30407 (1971) (emphasis added).

In response, Senator Bayh explained that Title IX was in no way designed to eradicate or even modify the common practice of designating that males and females use private facilities based on their biological sex: "I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. [. . . .] We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated." *Id.*

Members of the House expressed similar sentiments. Representative Thompson, who was concerned about men and women using the same facilities, offered an amendment to clarify that Title IX did not mandate that men and women must share the same private facilities: "I have been disturbed however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes [. . .] The amendment simply

would state that nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex." 117 Cong. Rec. 39260 (1971).

This apprehension was based on the universal understanding — not once questioned — that the law's designation of "sex" was about biological or birth sex. The following year, when Title IX was passed, Senator Bayh reiterated that the legislation was not meant to compel men and women to share facilities: "These regulations would allow enforcing agencies to permit differential treatment by sex [. . .] where such treatment is absolutely necessary to the success of the program — such as [. . .] sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (1972). Thus, the legislative history demonstrates that Congress considered the statutory term "sex" in Title IX to reference the physiological distinctions between females and males and not gender identity.

Since the passage of Title IX, Congress has reaffirmed, on numerous occasions that the statutory term "sex" in both Title VII and Title IX refers to the physiological characteristics of females and males. *See, e.g., Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("Members of Congress have [. . .] on a number of occasions, attempted to amend Title VII to prohibit discrimination based upon 'affectional or sexual orientation.' Each of these attempts has failed"). In 1974, Representatives Bella Abzug and Edward Koch proposed to amend the Civil Rights Act to **add** the **new** category of "sexual orientation." H.R. 14752, 93rd Cong. (1974). Similar efforts have all been universally rejected. *See, e.g.*, H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979); *Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong. (2d Sess. 1982) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., author of bill); *Civil Rights Amendments Act of 1979:*

Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 96th Cong. (2d Sess. 1980) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., coauthor of bill).

Lawmakers have similarly debated proposals to **add** the **new** category of "gender identity" to Title VII and Title IX. *See* H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011); H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015).

All of these proposals were premised, and could only have been premised, on the understanding that the statutory term "sex" in both Title VII and Title IX refers to the physiological characteristics of females and males and does not encompass the concept of gender identity. Indeed, such proposals would make absolutely no sense if Title VII or Title IX's protections already extended to sexual orientation and gender identity.

If sweeping changes to Title VII and Title IX are to be enacted in direct conflict with this clear legislative history, then Congress has the right to deliberate on whether it wants such broad changes. "If Congress believes that transsexuals should enjoy the protection of Title VII [and Title IX], it may so provide. Until that time," fundamental changes to Title VII and Title IX should not be enacted through *Dear Colleague* letters or litigation designed to expand the law. *Ulane*, 742 F.2d at 1086.

Based on the foregoing, Plaintiffs are not likely to succeed on the merits because the legislative history demonstrates a clear Congressional intent to define the term "sex" in Title IX based on the physiological characteristics of females and males and not to incorporate the concept of gender identity.

2. The Common Understanding Of The Term "Sex" At The Time Congress Passed Title IX Referred To The Physiological Differences Between Males And Females — Not Gender Identity.

In addition to this clear Congressional intent, the ordinary, common meaning of the term "sex" at the time Congress enacted Title IX referred to the anatomical distinctions between females and males and not gender identity.

"It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning." *Ulane*, 742 F.2d at 1085. "Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions." *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting). *See also* THE RANDOM HOUSE COLLEGE DICTIONARY 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); WEBSTER'S NEW COLLEGIATE DICTIONARY 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); AMERICAN HERITAGE DICTIONARY 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change"); THE AMERICAN COLLEGE DICTIONARY 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished").

"Gender" and "gender identity," as distinctive terms and concepts, did not even begin to emerge until "shortly before the enactments of both Titles VII and IX." *G. G.*, 822 F.3d at 736. Moreover, "[t]he first users of [the term] 'gender' and 'gender identity' understood these terms to mean something *different* than 'sex.'" *Id.* (Niemeyer, J., dissenting). "Robert Stoller, the UCLA psychoanalyst who introduced the term 'gender identity,' wrote in 1968 that gender had 'psychological or cultural rather than biological connotations.'" *Id.* (Niemeyer, J., dissenting).

"[E]ven today, the term 'sex' continues to be defined based on the physiological distinctions between males and females." *Id.* (Niemeyer, J., dissenting). *See also* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); THE AMERICAN HERITAGE DICTIONARY 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"). "Any new definition of sex that excludes reference to physiological differences," as Plaintiffs now attempt to introduce, "is simply an unsupported reach to rationalize a desired outcome." *G. G.*, 822 F.3d at 737. (Niemeyer, J., dissenting).

Based on the foregoing, Plaintiffs are not likely to succeed on the merits because the ordinary, common meaning of the term "sex" at the time Congress enacted Title IX referred to the physiological differences between females and males and not gender identity.

3. The Department Of Education Intended For The Term "Sex" To Mean The Physiological Differences Between Male And Female Students At The Time Of Birth When It Promulgated 34 C.F.R. § 106.33.

In addition to the fact that legislative intent and "common understanding of the term [sex] when Title IX was enacted" referred to the physiological differences between females and males, this "remained the understanding during the regulatory process that led to the promulgation of § 106.33." *Tex. v. United States*, No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459, *51 (N.D.Tex. Aug. 21, 2016).

Specifically, "[i]t cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth." *Id*. *See also* 34 C.F.R. § 106.33; 45 Fed. Reg. 30955 (May 9, 1980). The federal government has "tacitly agree[d that] this distinction was the intent of the drafter" when it promulgated § 106.33. *Tex.*, 2016 U.S. Dist. LEXIS 113459, *51 ("'[I]t may very well be that Congress did not intend the law to protect transgender individuals'") (quoting hearing transcript). Indeed, "[t]he federal government's approach to this issue has also evolved over time." Memorandum from the Attorney General on Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014) (copy attached as Exhibit 1). As recently as 2006, the "Department stated in litigation that Title VII's prohibition of discrimination based on sex did not cover discrimination based on transgender status or gender identity *per se*." *Id.*

As a result, "it cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students." *Tex.*, 2016 U.S. Dist. LEXIS 113459, at *51.

Based on the foregoing, Plaintiffs are not likely to succeed on the merits as it cannot be disputed that the federal government intended for the term "sex" to refer to the physiological differences between females and males when drafting 34 C.F.R. § 106.33.

4. The Dear Colleague Letter Is Not Entitled To Any Deference.

Seeking to overcome this clear legislative intent, Plaintiffs assert that the Department of Education's Office for Civil Rights ("OCR") "has [recently] interpreted its own regulations to require Title IX recipients to 'allow transgender students access to [sex-separated restroom and locker room facilities] consistent with their gender identity'" and that the "OCR's interpretation of its own regulations as they relate to transgender individuals is entitled to controlling deference pursuant to the Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997)." Motion at 13, quoting U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students* 3 (May 13, 2016).

Highland already addressed whether the *Dear Colleague Letter* is entitled to deference pursuant to *Auer* in pages 11 through 14 of the Reply in Support of Plaintiff's Motion for Preliminary Injunction. *See* Doc. 40, Page ID# 893-896. Superintendent Dodds and Principal Winkelfoos expressly reincorporate those arguments as if fully stated here.

C. PLAINTIFFS DO NOT HAVE A STONG LIKLIHOOD OF SUCCESS ON THE MERITS WITH RESPECT TO THEIR TITLE VII ARGUMENTS.

On pages 15 through 19 of the Motion, Plaintiffs improperly assert that "binding Sixth Circuit precedent has established that discrimination against a transgender individual constitutes discrimination 'on the basis of sex' under federal anti-discrimination statutes." In order to make this erroneous argument, Plaintiffs improperly conflate sex stereotyping claims under Title VII, which are recognized by the Sixth Circuit, with transgender discrimination claims, which are not. Plaintiffs' attempt to contort sex stereotyping jurisprudence to support their claims is improper,

as the Sixth Circuit has **never** held that discrimination against an individual based on that individual's transgender status alone constitutes discrimination "on the basis of sex" under federal anti-discrimination statutes.

Specifically, while both the United States Supreme Court and the Sixth Circuit recognize that "[s]ex stereotyping based on a person's gender non-conforming behavior [with perceived expectations of masculinity and femininity] is impermissible discrimination," no Sixth Circuit court has **ever** recognized that the "based on sex" element of Title VII or Title IX extends to transgender status alone. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) (holding that Title VII's prohibition of discrimination "because of sex" bars gender discrimination based on sex stereotypes). To the contrary, "[t]here is no Sixth Circuit or Supreme Court authority to support the [Plaintiffs'] position that transgender status is a protected class under Title VII" or Title IX. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 598 (E.D. Mich. 2015). *See also Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (holding that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII").

Plaintiffs rely extensively on *Smith* to support their erroneous proposition that discrimination based on an individual's gender identity constitutes discrimination "because of sex" under Title VII. *See* Motion at 16. This reliance is misplaced. Even "though the Sixth Circuit extended protection to transsexuals [in *Smith*] under the *Price-Waterhouse* theory" based on an individual's failure to conform to gender stereotypes, the Sixth Circuit "explained that an individual's status as a transsexual should be irrelevant to the availability of Title VII protection." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. Utah 2007).

In addition to this improper reliance on *Smith*, Doe asserts that "the First, Fourth, Ninth and Eleventh Circuits, as well as several federal district courts around the country, have also applied the reasoning of *Price Waterhouse* to hold that discrimination against transgender individuals constitutes discrimination 'because of sex' under federal anti-discrimination statutes and/or the Equal Protection Clause." Motion at 17. Again, all of the cases cited by Doe involve sex stereotyping claims. None of the cases explicitly recognize that discrimination based on an individual's transgender status alone is discrimination based on sex under Title VII or Title IX. Indeed, "all federal courts that have squarely addressed this issue have held that Title VII does not prohibit discrimination based on an individual's transsexualism." *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509, *8 (N.D. Ohio Nov. 9, 2001). *See also Ulane*, 742 F.2d 1081 (Congress "had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex"); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977).

Plaintiffs also attempt to assert that the "analysis of th[ese] courts is also consistent with the administrative decisions of the Equal Employment Opportunities Commission," which "has expressly interpreted 'on the basis of sex' in Title VII to apply to discrimination against an employee because they are transgender." Motion at 18. While the EEOC may have attempted to unilaterally expand the interpretation of sex under Title VII, this circuit expressly rebuked the EEOC's attempt "to seek a more expansive interpretation of sex under Title VII that would include transgender persons as a protected class." *EEOC*, 100 F. Supp. 3d at 598.

As a result, Doe must rely solely on a *Price-Waterhouse* theory of recovery — i.e., that "the school's reaction to [Doe's] transition" or failure to conform to sex stereotypes motivated

their conduct — if they are to demonstrate a likelihood of success on the merits. In order to demonstrate such likelihood, Plaintiffs would need to show that Defendants discriminated against Doe because Doe did not conform to stereotypes attributable to Doe's biological sex.

However, the Third-Party Complaint does not allege that Defendants denied Doe bathroom access because Doe did not conform to certain stereotypes attributable to male students. In fact, Doe's behavior, mannerisms and appearance did not play **any** role in Defendants' decision with respect to Doe's access to female bathrooms. Stated differently, Defendants are not denying Doe access to the female bathrooms because Doe does not conform to certain stereotypes attributable to male students. Rather, Defendants' decision is based solely on the fact that Doe is physiologically a male and federal law expressly permits Defendants to provide "separate toilet, locker room, and shower facilities" based on the physiological distinction between females and males. 34 C.F.R. § 106.33. Accordingly, it is apparent that Plaintiffs are seeking protection based on Doe's transgender status alone, not stereotypes about biological sex, which is not recognized under federal anti-discrimination statutes.

Based on the foregoing, Plaintiffs are not likely to succeed on the merits of their Title IX claim because Defendants acted solely on the permissible and legitimate biological and anatomical differences between male and female students as currently recognized under federal law.

D. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE DEFENDANTS HAVE NOT VIOLATED THE EQUAL PROTECTION CLAUSE.

On pages 19 through 24 of the Motion, Plaintiffs erroneously assert that "binding Sixth Circuit precedent also establishes that governmental discrimination against a transgender individual constitutes discrimination on the basis of sex in violation of the Equal Protection

Clause of the Fourteenth Amendment." In order to support this erroneous argument, Plaintiffs assert that "discriminat[ion] on the basis of sex is subject to 'heightened scrutiny' under the Equal Protection Clause of the U.S. Constitution." Motion at 19. While it may be true that discrimination on the basis of sex is subject to heightened scrutiny, Sixth Circuit precedent does not consider transgender status to a constitute suspect or quasi-suspect class subject to heightened scrutiny. **In fact, no Circuit Court has recognized that transgender status, in and of itself, as a suspect classification under the Equal Protection Clause.**

Specifically, the Equal Protection Clause forbids states from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In this regard, the Equal Protection Clause promotes the ideal that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). However, states are empowered to "perform many of the vital functions of modern government," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578, 183 L. Ed. 2d 450 (2012), which necessarily involves adopting regulations which distinguish between certain groups within society. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). Indeed, "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). As a result, a balance must be struck between equal protection principles and the practicalities of governance.

In an effort to appropriately weigh and measure this balance, "the United States Supreme Court has fashioned a three-tiered framework for evaluating whether a provision of law offends the Equal Protection Clause." *Deboer v. Snyder*, 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014) (overruled on other grounds). "The most rigorous tier is 'strict' scrutiny, which is reserved for

laws that discriminate against 'suspect classes' such as racial, ethnic or religious minorities." *Id.* "A more relaxed form of inquiry is 'intermediate' or 'heightened' scrutiny, which courts have applied to laws that discriminate against groups on the basis of gender, alienage or illegitimacy, also known as 'quasi-suspect classes.'" *Id.* "The least exacting tier is 'rational basis' review, which assesses the propriety of legislation that does not implicate either suspect or quasi-suspect classes." *Id.*

While Doe claims that government action that distinguishes between classes of individuals on the basis of transgender status is subject to heightened scrutiny under the second tier, "governing Sixth Circuit precedent does not consider gay, lesbian, bisexual or transgender persons to constitute suspect or quasi-suspect classes." *Id. See also Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) ("this court has not recognized sexual orientation as a suspect classification"); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) ("homosexuality is not a suspect class in this circuit").

This precedent is entirely consistent with other jurisdictions as Courts have repeatedly rejected the notion that transgender status, or other classifications of sex, are suspect classification. *See, e.g.*, *Etsitty*, 502 F.3d at 1222 (holding that transsexuals are not a protected class under Title VII**)**; *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Penn. 2015) ("neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause"); *Brown v. Zavaras*, 63 F. 3d 967, 971 (10th Cir. 1995) (but cautioning that recent research suggests reevaluating the rule); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, *8 (E.D. Cal. Sept. 7, 2012) ("it is not apparent that transgender individuals constitute a 'suspect' class"); *Jamison v. Davue*,

No. S-11-cv-2056 WBS, 2012 U.S. Dist. LEXIS 40266, *3 (E.D. Cal. Mar. 23, 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Kaeo-Tomaselli v. Butts*, No. 11-cv-00670 LEK, 2013 U.S. Dist. LEXIS 13280, *5 (D. Haw. Jan. 31, 2013) (holding that plaintiff's status as a transgender female did not qualify her as a member of a protected class and the court could find no "cases in which transgendered individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05-cv-10321-NRB, 2009 U.S. Dist. LEXIS 7645, *13 (S.D.N.Y. Jan. 30, 2009) (holding that plaintiff's claims that she was subjected to discrimination based on her status as transgender are subject to rational basis review).

While the continued efficacy of this classification has been questioned, it, nonetheless, remains the precedent in this circuit. *See, e.g., Love v. Beshear*, 989 F.Supp. 2d 536, 545 (W.D. Kent. 2014) (questioning the same). At the very least, this Honorable Court must "conduct its own analysis to determine whether sexual orientation classifications should receive heightened scrutiny." *Id*.

1. The Classification Is Both Rationally and Substantially Related to Privacy Concerns.

On pages 21 through 26 of the Motion, Plaintiffs assert that "Highland does not, and cannot, offer any non-conjectural explanation for how Highland's discrimination against [Doe] is even rationally, much less substantially, related to advancing [its stated] interests." Motion at 21.

To the contrary, Highland's classification is both rationally and substantially related to its stated interests because it is expressly permitted under federal law. As stated above, and entirely ignored by Plaintiffs in their Equal Protection analysis, the regulations implementing Title IX

specifically allow schools to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33.

Here, Doe was "assigned male at birth" (Compl. ¶ 27, Doc. 32, Page ID# 463) and has not undergone gender reassignment surgery. *See also Johnston*, 97 F. Supp. 3d at 671 (finding this fact to be fatal to the equal protection claim). While Doe socially transitioned to female consistent with Doe's diagnosis of gender dysphoria, Doe remains anatomically a male. As a result, Defendants are permitted to provide separate toilet facilities on the basis of her anatomical sex consistent with federal law. *See* 34. C.F.R. § 106.33

Defendants, therefore, have a substantial interest in providing separate restroom and locker room facilities based on Doe's biological sex. "Regardless of how gender and gender identity are defined, the law recognizes certain distinctions between male and female on the basis of birth sex. Thus, even though Doe is a transgender [female], h[er] sex is [male], a fact alleged in Doe's complaint and a fact that has legal significance [through Title IX] in light of Plaintiff's" Equal Protection claim. *Johnston*, 97 F. Supp. 3d at 671. Plaintiffs cannot reconcile this fact with their position that Defendants do not have a legitimate interest in providing separate toilet, locker room, and shower facilities based on the biological and anatomical differences between students.

Rather than address Defendants' legitimate interests in providing separate toilet, locker room, and shower facilities under Title IX, Plaintiffs argue that "[t]here is no sound basis to conclude that allowing [Doe] to use the girls' restrooms at Highland Elementary will interfere with the dignity or privacy of any other student using those facilities." Motion at 21. However, the soundness of Defendants' position has already been acknowledged by other courts. *See Johnston*, 97 F. Supp. 3d at 657.

In *Johnston*, the plaintiff was assigned female at birth but later identified as a male. After being diagnosed with Gender Identity Disorder, the plaintiff changed his legal name and began living as a male. The plaintiff also began using the men's restrooms and locker rooms on the campus of the university he attended. However, because the plaintiff remained anatomically a female, the university directed the plaintiff to stop using the men's restrooms and locker rooms and, when he refused to comply, expelled him from the university. The plaintiff sued asserting claims under the Equal Protection Clause and Title IX. *Johnston*, 97 F. Supp. 3d at 662–4.

With respect to the university's claims that "students have a constitutional right to privacy, which includes 'the right to disrobe and perform personal bodily functions out of the presence of members of the opposite biological sex,'" the *Johnston* court held that the university had a compelling "interest in providing its students with a safe and comfortable environment for performing [some of life's most compelling] functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex." *Id.*, at 668. Thus, there can be absolutely no question that Defendants have a substantial interest in providing a safe and comfortable environment for minor children to perform these same basic life functions while they are using school restrooms and locker rooms in sex segregated spaces. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646-47 (1999) (recognizing that schools have an obligation to protect students in the school setting). Moreover, *Johnston* further held that segregating "bathroom and locker room facilities on the basis of birth sex is substantially related to a sufficiently important governmental interest." *Johnston*, 97 F. Supp. 3d at 669. As a result, Defendants have both a substantial and rational interest in providing separate restroom and locker room facilities based on biological sex.

This conclusion cannot be doubted in light of other federal cases which recognize the privacy rights of students in the educational setting. This Circuit has consistently recognized that "[s]tudents of course have a significant privacy interest in their unclothed bodies." *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005). *See also Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 498 (6th Cir. 2008) (holding that "given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy," students had constitutionally protected right not to be videotaped while dressing and undressing in locker room). Other circuits have similarly recognized this right to bodily privacy. S*ee, e.g.*, *Doe v. Luzerne Cty.*, 660 F.3d 169, 177 (3d Cir. 2011) (recognizing the right of privacy from involuntary exposure of body particularly while in the presence of members of the opposite sex); *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. 1981) ("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"). Thus, there can be no dispute that "bodily privacy qualifies as an important State interest and that sex-segregated facilities are substantially related to that interest." *Carcaño v. McCrory*, No. 1:16cv236, 2016 U.S. Dist. LEXIS 114605, *62 (M.D.N.C. Aug. 26, 2016). This is particularly true in an environment where children are still developing, both emotionally and physically. *See, e.g.*, *Burns v. Gagnon*, 283 Va. 657, 671, 727 S.E.2d 634, 643 (2012) (school administrators have a responsibility "to supervise and ensure that students

could have an education in an atmosphere conducive to learning, free of disruption, and threat to person.").

This important interest under the Equal Protection Clause in respecting bodily privacy by providing sex-segregated facilities is not negated by Plaintiffs' arguments regarding gender identity. "[R]egardless of the characteristics that distinguish men and women for 'medical' purposes, Supreme Court [. . .] precedent supports Defendants' position that physiological characteristics distinguish men and women for the purposes of bodily privacy" under the Equal Protection Clause. *Carcaño*, 2016 U.S. Dist. LEXIS 114605, at *64. Indeed, "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." *Id*.

Plaintiffs' attempt to discredit Defendants' responsibility to ensure student privacy through the provision of sex-segregated bathrooms, showers, and other similar facilities based on the physiological differences between men and women by arguing that "access to locker rooms in the Middle School and High School and to shower rooms in the High School" are not "before the Court." Motion at 22. With respect, those issues are most certainly before this Honorable Court. As an initial matter, the *Dear Colleague Letter* at issue in this litigation, which the OCR is attempting to enforce, specifically provides that a school district must provide access to "restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes" consistent with a transgender student's "gender identity" to all educational programs — not just elementary school. *Dear Colleague Letter* at 4. *See also* Dodds Decl. ¶¶17-25, Doc. 10-1, Page ID# 154-155 (testifying to the federal funding at stake and costs if Highland is required to implement the policy changes demanded by the Department of Education).

Moreover, Plaintiffs cannot seriously believe that this Honorable Court's ruling will not impact Highland's policies regarding the entire school district. *See* V. Compl. ¶¶ 75-77, Doc. 1, Page ID# 17 (testifying that altering Highland's "policy to address Student A's request will have ramifications throughout all its schools"). *See also Carcaño*, 2016 U.S. Dist. LEXIS 114605, at *47-8 (expanding *G.G.*, which was limited to student bathroom use, to encompass access to showers and other similar facilities). Even if this Honorable Court could craft a ruling that did not impact the Middle School and High School, Doe will eventually graduate to these buildings and, presuming Doe's gender dysphoria does not resolve, seek access to these facilities consistent with Doe's gender identity. *See* V. Compl. ¶¶ 81–3, Doc. 1, Page ID# 18 (verifying that a policy change will impact overnight accomdations, locker rooms where the layout is "very open," and restrooms). *See also* Hruz Decl. ¶ 36, Doc. 36, Page ID# 1074 ("[I]t is well established that 80-95% of children with gender dysphoria will resolve by the end of puberty without direct intervention to affirm transgender identity"). Apparently, Plaintiffs' preference is that they initiate civil litigation to clarify her rights when she transitions to each building.

Finally, Plaintiffs assert that "Highland's conclusion that barring [Doe] from the girls' restrooms is necessary to avoid legal liability to other students has no legal basis." Motion at 22. However, the legal basis for this conclusion is found in other circuit decisions recognizing the potential for such liability. *See, e.g.*, *Etsitty*, 502 F. 3d at 1224 (the use of women's public restrooms by a biological, transgender male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason).

Based on the foregoing, Plaintiffs are not likely to succeed on the merits of their Equal Protection claim because Defendants are permitted, in fact required, to provide separate restroom facilities on the basis of biological sex.

2. Defendants' Classification Is Both Rationally and Substantially Related To Purported Concerns About "Lewdness" And "Safety."

On pages 23 through 24 of the Motion, Plaintiffs assert that "Highland's classifications based on a purported concern about 'lewdness' and 'safety issues' has no rational, let alone substantial, connection to addressing such concerns."

As stated above, the *Johnston* court recognized that Defendants have a compelling interest in "in providing [their] students with a safe and comfortable environment for performing [life's most basic] functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex." *Johnston*, 97 F. Supp. 3d at 668. The substantial and rational connection between this interest and Defendants' actions in providing "separate toilet, locker room, and shower facilities on the basis of sex" is conclusively demonstrated by the fact that it is explicated permitted under federal law. 34 C.F.R. § 106.33.

Moreover, Plaintiffs' argument fails to take into account the emotional and psychological trauma that the exposure to individuals of the opposite sex may have on the victims of sexual abuse. *See* S.B. Decl. (testifying that the "very presence of a male, regardless of whether he identifies as a female, in my daughters' restroom or locker room, even if he has the most innocent of intentions, will almost certainly cause severe trauma that will set back [the] emotional and psychological healing process" of her daughters).

Based on the foregoing, Plaintiffs are not likely to succeed on the merits of their Equal Protection claim because case law recognizes Defendants' interest in protecting the safety of students while performing life's most basic functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex.

3. Defendants' Justifications Are Legitimate And Not Pretext for Discrimination.

On pages 24 through 26 of the Motion, Plaintiffs assert "that Highland's proffered justifications" for complying with federal law "are pretextual." However, Defendants provide ample evidence regarding their fair treatment of Doe and reasons for the restroom policy.

As an initial matter, and as stated above, transgender status is not a protected category under Title VII, Title IX, or the Equal Protection Clause such that Defendants need to proffer a justification for their actions. Even if it were, Defendants did not develop the restroom and locker room policy in an attempt to stigmatize, embarrass, or otherwise reject Doe. Again, and as stated above, Defendants developed the policy solely because it is explicitly permitted under federal law and consistent with the privacy interests of the students their care. *See* V. Compl. ¶ 17, Doc. 1, Page ID# 17 (students have a privacy interest in their "unclothed or partially clothed bodies").

While Plaintiffs state that a policy that segregates students based on their biological sex is "virtually impossible — or at least extraordinarily invasive — to administer," this is certainly not the case. Motion at 25. The biological sex of a student is rarely a subject of debate. In the exceedingly rare instance in which a student's gender may be called into question, Defendants have a record of each student's biological sex through their birth certificates. Dodds Decl. ¶ 3, Doc. 64, Page ID# 1146 (describing Highland's practice of obtaining student birth certificates for school admission). The use of student birth certificates as an accurate proxy of a student's biological sex is substantially related to Defendants' interests in ensuring student privacy because, even if no transgender student ever possessed a birth certificate, "only 0.3% of the national population is transgender." *Carcaño*, 2016 U.S. Dist. LEXIS 114605, at *71. "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 [under the Equal Protection analysis] to a numerical comparison, it seems unlikely that a [policy] that classifies individuals with 99.7% accuracy is insufficient to survive [even] intermediate scrutiny." *Id.*

Moreover, Superintendent Dodds and Principal Winkelfoos do not propose to, nor will they ever, enforce this legal policy by any of the draconian methods suggested in the Motion. *See* Motion at 24-26 (suggesting Defendants would actually enforce their policy by checking student genitalia). Any argument to the contrary has no basis in fact and is, quite simply, absurd.

Finally, Superintendent Dodds and Principal Winkelfoos note that the absence of any discriminatory intent is evidenced by efforts, within the bounds of the law, to fully support Doe's expression of gender. Superintendent Dodds and Principal Winkelfoos have referred to Doe using her new name, changed school records consistent with Doe's legal name change, and used female pronouns when referencing Doe. *See* Winklefoos Decl. ¶ 16, Doc. 65, Page ID# 1178; Dodds Decl. ¶ 8-10, Page ID# 1147. Where Defendants received reports that student or staff members were not using the appropriate gender terms they acted promptly to address those concerns. *Id.*

Based on the foregoing, Plaintiffs are not likely to succeed on the merits of their Equal Protection claim because transgender status is not a protected category under the Equal Protection Clause and, even if it were, there is no evidence Defendants' proffered justifications are pretext.

E. DOE WILL NOT SUFFER IRREPARABLE INJURY WITHOUT THE INJUNCTION.

Plaintiffs will not suffer irreparable injury in the event this Honorable Court denies Plaintiffs' requested preliminary injunction. As an initial matter, Highland, Superintendent

Dodds, and Principal Winkelfoos recognize Doe's female gender identity. They have changed Doe's name in her school records and in the school email system, as requested by Doe. *See* Dodds Decl. ¶¶ 7-8, Page ID# 1146–7; Winkelfoos Decl. ¶ 16, Page ID# 1178. And Highland staff have, and will continue to, refer to Doe by her chosen name consistent with her gender identity. *Id*.

Superintendent Dodds and Principal Winkelfoos stress that they take Doe's welfare extremely seriously. To that end, they have worked with other Highland staff, Doe's family, and medical professionals to develop safety plans in response to reports of Doe's past suicidal ideations in order to ensure her well-being. *See* Winkelfoos Decl. ¶¶ 21-22, Page ID# 1180, Exs. Q,R,T,S. Although Doe was considered a "high" suicide risk during the 2015-2016 school year, no incidents occurred. And, Highland just recently met with Doe's family to review information from Doe's treating professionals and develop her 2016-2017 safety plan. *See* Winkelfoos Decl. ¶ 21, Page ID# 1180; Ex. Q,R, Docs. 65-6, 65-7. During that meeting, Highland learned that Doe's suicide risk level, as of August 16, 2016, has been reduced to "moderate." *See* Winkelfoos Decl. ¶ 22, Exs. S,T, Docs. 65-8, 65-9. This reduction undermines Plaintiffs' claims that Doe will suffer irreparable harm if Doe is not allowed to use the girls' restroom and also demonstrates that Defendants efforts to protect Doe's health and safety are working. Additionally, Doe's guardian has also reported that Doe had had a good summer, that there were no major concerns at home, and that there was no longer any need to accompany Doe to the restroom—part of the safety plan Highland had implemented for Doe to prevent self-harm. *See* Winkelfoos Decl. ¶ 22, Page ID# 1180.

Throughout Doe's enrollment at Highland, Principal Winkelfoos, Superintendent Dodds, and other Highland staff members have perceived Doe to be generally happy while at school. *See*

Winkelfoos Decl. ¶ 3, Page ID # 1146 ("Throughout Doe's enrollment, I have observed Doe to be very happy at school on a consistent basis."); Dodds Decl. ¶ 5, Page ID # 1146 ("Doe has always seemed to be very happy at school. In fact, I cannot recall having ever seen Doe sad"). *See also* Dodds Decl. ¶ 11, Page ID# 1147. In fact, Principal Winkelfoos only recalls seeing Doe unhappy during instances where Highland staff were addressing behavior issues with Doe. *See* Winkelfoos Decl. ¶ 6, Page ID # 1146.

It cannot be overstated that Doe has never attempted self-harm or exhibited anger issues at school. *See* Winkelfoos Decl. ¶¶ 4-5, Page ID # 1175; Dodds Decl. ¶ 6, Page ID# 1146. Even on days when Doe's guardian has reported behavior issues at home and requested Highland staff to monitor Doe closely out of concern for Doe's safety, school personnel have reported that Doe's outlook and behavior while at school were positive. *See* Winkelfoos Decl., Ex. L, Doc. 65-1 (email correspondence from Doe's legal guardian advising Highland staff regarding behavior issues at home and encouraging close monitoring of Doe and reply email responses from Highland staff and Principal Winkelfoos reporting that Doe "appeared to be in good spirits" and "seemed to have a good day today at school . . . laughing and playing with friends and . . . enjoy[ing] what we did in class").

Moreover, it cannot be understated that Highland has allowed, and will continue to allow, Doe to use any of the three individual use staff restrooms at Highland Elementary School, as well as either of the two individual use restrooms in the main office of Highland Elementary School which may be used by all students. *See* Winkelfoos Decl. ¶¶ 15-19, Page ID# 1178. In fact, during Doe's fourth grade year, and now the current fifth grade year, Highland arranged that all of the students in Doe's special education class are given access to, and directed to use, the nearby office restroom. *See* Winkelfoos Decl. ¶¶ 18-19, Page ID# 1178. Implementing the

restroom accommodation for Doe in this manner does not stigmatize or isolate her and does not disaffirm Doe's perceived gender identity. As a result, Superintendent Dodds and Principal Winkelfoos believe that Doe will enjoy a safe and successful 2016-2017 school year.

Finally, Doe's constitutional and statutory civil rights are neither threatened nor impaired, so there is no presumption of irreparable injury. *See ACLU of Ky. v. McCreary Cty. Ky.*, 354 F.3d 438, 446 (6th Cir. 2003) (irreparable injury is presumed only when "it is found that a constitutional right is being threatened or impaired").

Based on the foregoing, Plaintiffs' Motion must be denied because Doe is unlikely to suffer irreparable injury without the preliminary injunction.

F. ISSUANCE OF THE REQUESTED INJUNCTION WILL CAUSE SUBSTANTIAL HARM TO OTHERS.

As set forth above, Highland's restroom policy balances the safety and privacy interests of its entire student body against Doe's interest in using the girls' restroom at Highland Elementary School. Issuance of Plaintiffs' requested injunction stripping local control from Highland and requiring that Doe be allowed to use the girls' restroom will cause substantial harm to both other students attending Highland Elementary School and the Highland community.

As an initial matter, the Supreme Court has ruled that educational institutions must "afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Likewise, as discussed above, federal appellate courts, including the Sixth Circuit, have readily acknowledged the reasonable expectation of an individual's right to bodily privacy. *See Brannum*, 516 F.3d at 494 (explaining that "the constitutional right to privacy [. . .] includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard*, 402 F.3d at 604 ("Students of course have a significant privacy interest in their unclothed bodies"). *See also Doe*, 660 F.3d at 176–77 (recognizing an individual's reasonable expectation

of privacy in their partially clothed body exists "particularly while in the presence of members of the opposite sex"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (holding that a parolee has the right not to be observed producing a urine sample by an officer of the opposite sex). Should the requested injunction issue, the constitutional right to bodily privacy of all the female students attending Highland Elementary School will go unprotected until this issue is resolved on the merits.

Moreover, issuance of Plaintiffs' requested injunction will strip the duly elected members of the Highland Local School District Board of Education of their control over the school district. As the Sixth Circuit has recognized, "issues of public education are generally 'committed to the control of state and local authorities.'" *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) (quoting *Goss v. Lopez*, 419 U.S. 565, 578 (1975)). And, of course, "'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.'" *Maryland v. King*, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The same certainly holds true if a local school board, such as Highland, is enjoined by a court from effectuating the policies it has adopted.

As the Western District of Pennsylvania recently held in *Johnston*, a strikingly similar case involving a transgender student attempting to access the restroom consistent with his gender identity:

> The absence of [sex-segregated spaces] would stifle the ability of the [University] to continue with a respected educational methodology. **It follows too that those students and parents who prefer an education [with sex segregated restrooms and locker rooms] would be denied their freedom of choice**. . . .

> It is not for us to pass upon the wisdom of segregating boys and girls in [their use of restrooms and locker rooms]. We are concerned not with the desirability of the practice but only its constitutionality. Once that threshold has been passed, it is the [University's] responsibility to determine the best methods of accomplishing its mission.

97 F. Supp. 3d 657 (W.D. Pa. 2015) (emphasis added) (brackets in original).

Because substantial harm will befall the students attending Highland Elementary School and the Highland community as whole should the requested injunction issue, Plaintiffs' Motion must be denied.

G. THE PUBLIC INTEREST WILL NOT BE SERVED BY ISSUANCE OF THE REQUESTED INJUNCTION.

The requested injunction is not in the public interest because, as discussed above, Highland's restroom policy violates neither Title IX nor the Equal Protection Clause, and Highland is not discriminating against Doe by maintaining sex-segregated restrooms as explicitly allowed by Title IX.

Moreover, as discussed above, issuance of Doe's requested injunction will violate the constitutional right to bodily privacy currently enjoyed by the students attending Highland Elementary School. And, of course, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Finally, this exact issue is currently being considered by Congress. *See* S.439 114th Cong. (2015). It is in the public interest for the merits of this issue to be debated in Congress rather than decided by the courts.

Because the public interest will not be served by issuance of the requested inunction, Does' motion for a preliminary injunction must be denied.

VI. CONCLUSION

Based on the foregoing, Superintendent Dodds and Principal Winkelfoos respectfully request that this Honorable Court deny the Motion for Preliminary Injunction.

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, a copy of the foregoing was sent via this Court's electronic filing system to all counsel of record.

/s/ Matthew John Markling
Matthew John Markling (0068095)