NO. 16-3522

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER,

Plaintiff-Appellee,

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-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin
Case No. 2:16-cv-00943-PP
The Honorable Judge Pamela Pepper

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS-APPELLANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiff-Appellee Ashton ("Ash") Whitaker submits this response in opposition to the Motion to Stay Preliminary Injunction Pending Appeal by Defendants-Appellants Kenosha Unified School District Board of Education No. 1 and Superintendent Sue Savaglio-Jarvis, in her official capacity (collectively, "KUSD"). Ash is a 17-year-old high school senior at Tremper High School, a 1,600-student high school in the Kenosha Unified School District. Ash, who is a boy, is also transgender, and has lived in accordance with his male gender identity in all aspects of his life for several years. Ash's classmates, family, medical providers, and others know him as, and recognize him to be, a boy. Recognizing that denying transgender people the ability to live in accordance with their gender identity predictably results in harmful consequences to those individuals—and that Ash's inability to use boys' restrooms did, in fact, expose him to psychological and medical harms—Ash's health care providers recommended to KUSD that Ash be able to use boys' restrooms at school.

KUSD's refusal to permit Ash to use boys' restrooms prior to the injunction—requiring him to use girls' restrooms or segregated, single-user restrooms to which none of Tremper's 1,600 other students had access—resulted in concrete and irreparable harm to Ash, including heightened depression, anxiety, and suicidal ideation. He refused to use girls' restrooms because he is not a girl, and did not use the single-user option because of the unwanted attention and stigma he would experience from using those facilities. Consequently, he tried to stop using restrooms altogether during the school day, and necessarily limited his fluid intake. Ash's resulting dehydration exacerbated symptoms of vasovagal syncope, a medical condition from which he suffers that causes headaches, migraines, dizziness, and fainting.

Recognizing the demonstrable and serious harm Ash already suffered as a result of KUSD's discriminatory restroom policy, the District Court issued a preliminary injunction on September 20, 2016, permitting Ash to use boys' restrooms at school this year without fear of discipline or other sanction by KUSD. Ash had already used boys' restrooms at school for the first seven months of the previous school year, without issue or incident, prior to KUSD's March 2016 decision to discipline Ash if he continued to use those restrooms. The injunction has merely allowed Ash to continue using boys' restrooms without fear of discipline or reprisal by his school. As explained below, Ash's well-being has increased markedly since the injunction was issued and he has been able to focus on his senior coursework, college applications, and extracurricular activities.

KUSD now asks this Court to stay the District Court's preliminary injunction pending its appeal of that same injunction. The injunction has now been in effect for over one month, and KUSD continues to be unable to point to any evidence that the injunction has harmed KUSD or any other party *at all*, let alone to a degree sufficient to warrant this Court staying the injunction and exposing Ash to the well-documented harms he has already suffered. Nor has KUSD litigated this motion, or this appeal, as though it is actually suffering any injury. KUSD has not sought to have this appeal expedited, nor has it even sought to have this motion expedited. Its brief in support of its stay motion previews its arguments on the merits of this appeal but offers no reason why those arguments cannot be heard later.

As explained more fully below, KUSD also is wrong on the merits, but this Court need not decide that question to deny its motion for a stay pending appeal. The sole question currently before this Court is whether Ash may continue to use the boys' restrooms at school while this appeal is pending. A stay pending appeal is unwarranted because the injunction—now in effect

for a full month—has prevented irreparable harm to Ash, has allowed him to take full advantage of the educational opportunities afforded by KUSD to its students, and has resulted in no concomitant harm to KUSD or the public.

BACKGROUND

The District Court issued the preliminary injunction following extensive briefing and oral argument. In granting the injunction, the District Court correctly concluded that Ash (1) established some likelihood of success on the merits of his Title IX and Equal Protection Clause claims; (2) suffered and would continue to suffer irreparable physical, emotional, and educational harms by being barred from boys' restrooms; and (3) had no adequate remedy at law for these harms. Conversely, the District Court found no evidence of harm to KUSD or to the public interest from Ash's past or future use of boys' restrooms. The District Court rejected each of the unsubstantiated and theoretical "harms" proffered by KUSD, in granting the preliminary injunction and in denying both of KUSD's motions for a stay. *See* Decision & Order Granting in Part Motion for Preliminary Injunction, Sept. 22, 2016 [Dist. Ct. Dkt. No. 33] ("Decision") at 13-15; Order Denying Defendants' Motion to Stay Preliminary Injunction Pending Appeal, Oct. 3, 2016 [Dist. Ct. Dkt. No. 46], at 5.

KUSD now asks this Court to stay the preliminary injunction. Though it filed this motion well after the injunction issued, KUSD continues to assert only the same highly speculative harms, without producing any evidence that the injunction is harming anyone. Speculation is unnecessary: because KUSD did not seek an emergency stay from this Court or ask this motion to be expedited, the preliminary injunction has now been in place for a full month, and so there is evidence available as to the injunction's effects. This evidence shows that KUSD implemented

the injunction without issue, that Ash's well-being has improved, and that neither KUSD nor anyone else has experienced any consequences as a result.

During this past month, Ash's use of the boys' restrooms has been wholly uneventful. The effects on Ash have been entirely positive: he is less anxious, less depressed, more engaged with his peers, and has been able to focus on his senior year courses and activities. In its present motion, KUSD has not even attempted to argue that any *actual* harm has resulted from Ash's restroom use, resorting instead to baseless and vague speculation that it would face unspecified "financial consequences," be required to institute unidentified "policy changes," and that Ash's presence in the restroom would somehow violate other students' privacy rights. Although the District Court squarely rejected each of these assertions as unsupported by affidavits or any other evidence, KUSD still has not produced any such evidentiary support for this stay motion.

LEGAL STANDARD

As the Seventh Circuit has explained, "[t]he standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. Stays, like preliminary injunctions, are necessary to mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its merits. The goal is to minimize the costs of error." *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). As in a preliminary injunction analysis, "[t]o determine whether to grant a stay, we consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *Id.* "[A] 'sliding scale' approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *Id.*

ARGUMENT

In seeking to stay the preliminary injunction, KUSD has failed to make a threshold showing that it would suffer irreparable harm if the preliminary injunction remains in place pending the outcome of KUSD's appeal of the preliminary injunction, or that it is likely to prevail on that appeal. Even if KUSD could make that threshold showing, the irreparable harm that Ash would suffer by once again being denied use of boys' restrooms substantially outweighs any negligible harm to KUSD. The "costs of error" if this Court incorrectly stayed the injunction would be borne entirely by Ash. The injunction should, therefore, remain in place until this Court can properly consider KUSD's appeal.

I. KUSD has failed to meet its burden of making the threshold showing justifying a stay.

A. KUSD has not been, and will not be, harmed by the continuation of the injunction pending appeal.

In challenging the motion for preliminary injunction, KUSD failed to offer the District Court any evidence that it would suffer harm if the injunction were to issue. In seeking a stay from the District Court, KUSD similarly failed to present any evidence of irreparable harm. In its present motion, KUSD has once again not attached a single declaration, affidavit, or any other form of evidence that would show even a modicum of harm to KUSD resulting from the continuance of the injunction pending appeal. It is plain that KUSD has suffered no harm since the injunction issued and would suffer no harm if it remains in place pending appeal. Nor has KUSD acted with urgency. It has not sought to expedite this motion or the underlying appeal.

Repeating the same arguments it made to oppose the preliminary injunction initially, KUSD argues to this Court that "[i]f the injunction is not stayed, KUSD, and the students and parents it serves, will suffer irreparable harm as continued compliance with the 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." The District Court found that the available evidence contradicted each of these bald assertions of harm. Rather than attempting to substantiate them now, KUSD simply asks this Court to ignore Judge Pepper's well-reasoned findings. There is no reason that this Court should do so.

First, KUSD's compliance with the injunction pending appeal compels no policy changes. As Judge Pepper wrote, "[t]his relief, however, does not require the defendants to create policies, or review policies. It requires only that the defendants allow Ash to use the boys' restrooms, and not to subject him to discipline for doing so." Decision at 14-15. Indeed, there is clear evidence that the injunction went into effect quickly and without incident the day after the injunction issued, without the need for policy changes or any disruption to the school community. *See* Supp. Decl. of A. Whitaker (attached as Ex. A) (stating he has experienced no problems using the boys' restrooms since the injunction issued on September 20, 2016, has felt increased acceptance by his peers since that time, and has been able to focus on his academics and activities more than he could before); Bill Guida, *Tremper Quiet After Court Decision*, Kenosha News, Sept. 21, 2016 (attached as Ex. 1 to Decl. of J. Wardenski (attached as Ex. B)) (quoting KUSD spokesperson that there were no incidents or protests the day after the injunction was issued, and that KUSD had received no complaints); Email from Tremper High School Principal Steve Knecht to Tremper High School Staff, Sept. 21, 2016 (attached as Ex. 2 to Wardenski Decl.) (advising school staff of the injunction and noting, "This order only affects the plaintiff in this case and the District will continue with all policies and procedures that were in place prior to the case for all other students.") Since even KUSD recognizes that the injunction

applies to only one student—Ash—there can be no genuine dispute that the injunction has not required the District to make systemic policy changes.

Second, the injunction has not imposed and will not "impos[e] financial consequences" on KUSD. Judge Pepper concluded that "[KUSD] did not identify why allowing Ash to use the boys' restrooms would create a financial burden; the court cannot, on the evidence before it, see what cost would be incurred in allowing Ash to use restrooms that already exist." Decision at 14. In seeking an injunction bond from Ash, KUSD conceded that the only costs it would incur related to the injunction would be the attorneys' fees associated with appealing the injunction. Decision at 17. The District Court, rejecting KUSD's request for the bond, reiterated that "the defendants have not demonstrated that it will cost them money to allow Ash to use the boys' restrooms" and that "costs and damages" do not include attorneys' fees under Seventh Circuit precedent. Decision at 16-17.[1] KUSD has failed to come forward with any evidence that the injunction has exposed it to any financial burdens since entry of the injunction and this Court should similarly reject that speculative harm.

Third, there is zero evidence that any other students have been affected in any way by Ash's use of boys' restrooms—either before or since the injunction was issued. Judge Pepper rejected KUSD's argument that allowing Ash to use boys' restrooms would violate other students' privacy rights:

> [KUSD] provided no affidavits or other evidence in support of this argument. The evidence before the court indicates that Ash used the boys' restroom for some seven months without incident or notice; the defendants prohibited him from using them only after a teach[er] observed Ash in a boys' restroom, washing his hands. This

[1] Even if attorneys' fees were a legitimate cost to consider, KUSD has since admitted that it predicts its maximum financial exposure from this litigation to be limited to its insurance deductible of $25,000. *See* Bill Guida, *School district files appeal in transgender case*, Kenosha News, Sept. 23, 2016 (attached as Ex. 3 to Wardenski Decl.).

> evidence contradicts the defendants' assertions that allowing Ash to use the boys' restroom would violate other students' privacy rights.

Decision at 14.

KUSD has offered no evidence to this Court refuting Judge Pepper's findings or showing that any student has been affected in the weeks since the injunction went into effect. Instead, KUSD claims, without support, that "thousands of students [are] negatively impacted by the issuance of the injunction." Defendants-Appellants' Motion to Stay Preliminary Injunction Pending Appeal [App. Dkt. No. 11] ("KUSD Motion") at 19. KUSD does not explain who these "thousands" of students are; Tremper only has 1,600 students, only about half of whom use boys' restrooms and who may, at some point or another, be in the restroom at the same time as Ash. Nor does KUSD present any evidence now that other students or parents have complained about Ash's restroom use since the injunction issued—or at any point since Ash first used the boys' restrooms more than a year ago in September 2015.

In the absence of any harm to KUSD, a stay is unwarranted, and the Court's analysis could and should stop here.

B. KUSD is unlikely to succeed on its appeal of the preliminary injunction.

Even if KUSD could show some irreparable harm resulting from the continuation of the preliminary injunction pending appeal, KUSD has not demonstrated a likelihood of prevailing on its appeal of the preliminary injunction. The District Court applied the correct legal standards to Ash's motion for preliminary injunction and properly weighed the actual harm to Ash against the speculative harms KUSD raised. When this Court reaches the merits of KUSD's appeal in due course, it is likely to find that the District Court did not abuse its discretion in granting the preliminary injunction.

The District Court found that Ash has some likelihood of success on the merits of his Title IX and Equal Protection Clause claims. Decision at 7. In this Circuit, a party seeking a preliminary injunction is only required to show "better than negligible" success on the merits. For the reasons explained by the District Court, Ash met this threshold burden. Decision at 8. Importantly, as the District Court found, Ash has a likelihood of success on both his Title IX and Equal Protection Clause claims under at least one well-established theory of relief available for both claims: sex-stereotyping. As the District Court correctly found in its order vacating certification of its denial of KUSD's motion to dismiss for interlocutory review, Ash can prevail on both his sex discrimination claims by showing that KUSD's actions were motivated by Ash's nonconformity to certain gender stereotypes. Decision at 8-10; Order Granting Motion to Reconsider Certification for Interlocutory Appeal, Sept. 25, 2016 [Dist. Ct. Dkt. No. 36], at 7-9. The Court further determined, and KUSD concedes, that the separate question of whether discrimination based on gender identity is actionable sex discrimination under Title IX is an unsettled question of law in this Circuit. That question need not be resolved now, and the existence of one open question of law does not justify a stay of the preliminary injunction pending appeal absent some showing that KUSD is being harmed by the injunction. While this Court need not consider the merits any further to resolve this motion, it is likely that this Court, if and when it reaches the question of whether Title IX bars discrimination based on gender identity, will affirm the District Court even as to that question. The current weight of the case law falls in Ash's favor, not KUSD's.

The District Court's holding as to this question rested in large part on its finding that the federal government's interpretation of Title IX and its implementing regulations, most recently reflected in a formal guidance letter jointly issued by the U.S. Departments of Education and

Justice on May 13, 2016, is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). In that guidance letter, the agencies advised public school districts that Title IX applies to transgender students and that schools should treat all students consistent with their gender identity, including allowing transgender students to use sex-segregated restrooms that match the students' gender identity. In addition to the District Court here, the Fourth Circuit and several recent and well-reasoned federal district court decisions have also found that *Auer* deference is warranted to the government's interpretation of Title IX. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *mandate recalled and stay granted by* 136 S. Ct. 2442 (2016); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio. Sept. 26, 2016) (attached as Ex. C); *Carcaño v. McCrory*, No. 1:16-CV-236, 2016 WL 4508192, at *14 (M.D.N.C. Aug. 26, 2016) (attached as Ex. D).

Indeed, even since the District Court's injunction was issued in this case, in another case raising similar claims under Title IX and the Equal Protection Clause, a federal district court in Ohio reached a nearly identical conclusion in granting a preliminary injunction ordering the defendant school district to grant a transgender girl access to girls' restrooms. *See Highland Local Sch. Dist.*, 2016 WL 5372349, at *20. In that case, like this one, the court concluded that a transgender student was entitled to a preliminary injunction allowing her to use girls' restrooms at school based on her likelihood of success and the irreparable harms she would suffer without an injunction. *Id.* at *9-15, 19. Conversely, just this week, a federal magistrate judge in the Northern District of Illinois issued a lengthy report and recommendation in a case brought by an advocacy group against a school district that *allowed* transgender students to use restrooms consistent with their gender identity. Report & Recommendation, *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945 (N.D. Ill. Oct. 18, 2015) (attached as Ex. E). In that case,

the magistrate judge recommended that the district court deny the requested preliminary injunction that would have barred transgender students from sex-segregated facilities corresponding to their gender identity, concluding that other students have not been harmed by a transgender girl's use of girls' restrooms for the last three years. *Id.* at 77, 82.

To support its case, KUSD relies on two district court decisions that do not grapple with the relevant questions and now fall into the minority of courts addressing the applicability of Title IX to transgender students. In the first, *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), the court gave no consideration to what, if any, deference should be accorded to the federal government's definition of the term "sex" or the Department of Education's interpretation of its Title IX implementing regulations. As such, it offers no insight to this Court on how to interpret Title IX or its regulations. KUSD also relies on a recent district court decision from Texas that concluded that the meaning of the word "sex" in Title IX is unambiguously restricted to the "biological" differences between men and women. *Texas v. United States*, No. 7:16CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016). As the District Court in this case correctly found, that decision entirely ignores decades of precedent, including from the U.S. Supreme Court, holding that penalizing a person for failure to conform to sex-based stereotypes constitutes sex discrimination under federal civil rights law and the Equal Protection Clause. *See* Decision at 9; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998); *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (noting the "congruence" between discrimination against transgender people and discrimination based on gender stereotypes).

For all these reasons, even if the merits panel finds it necessary to rule on the District Court's finding that discrimination based on gender identity is a form of sex discrimination,[2] this Court is likely to affirm on that question as well. For these reasons, KUSD has little or no likelihood of success of prevailing on appeal. And, even assuming KUSD could win its appeal, it has nevertheless failed to show any harm resulting from the continuation of the injunction until that time.

II. Plaintiff will suffer considerable irreparable harm if the preliminary injunction is stayed.

By contrast, if a stay is issued, the irreparable harm to Ash would be considerable, as has been well-documented. The District Court has already concluded—in findings that KUSD does not challenge—that Ash has suffered irreparable harm based on the District's actions and would continue to suffer such harm without an injunction allowing him to use boys' restrooms at school this year. Decision at 10-13. "Relying primarily on the plaintiff's declaration (which the defendants did not challenge at the hearing), the court has no question that the plaintiff's inability to use the boys' restroom has caused him to suffer psychological harm and serious medical consequences." *Id.* at 11. The District Court found that Ash suffered emotional distress, embarrassment, and stigma resulting from "being singled out and treated differently from all other students." *Id.* at 12. Because he limited his fluid intake to avoid having to use the restroom, Ash experienced exacerbated problems with migraines, fainting, and dizziness. *Id.* He also

[2] KUSD also erroneously points to this Court's now-vacated ruling in *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016), *amended*, 2016 WL 5921763 (7th Cir. Aug. 3, 2016), *vacated pending en banc review* (7th Cir. Oct. 11, 2016), in support of its argument that Title IX's protections do not extend to transgender students. Even if the decision addressed Title IX or discrimination based on gender identity, which it did not, that decision has now been vacated.

experienced sleeplessness, fear of being disciplined, bouts of tearfulness and panic, and difficulty focusing on his classwork. *Id.* These harms were substantiated by Dr. Stephanie Budge, a clinical psychologist and professor at the University of Wisconsin-Madison, who submitted a declaration based on her independent clinical evaluation of Ash, her review of his medical and psychological records, and peer-reviewed research on transgender youth development. *See* Decl. of S. Budge, Aug. 11, 2016 (attached as Ex. 1 to Supp. Decl. of S. Budge (attached as Ex. F)).

As the District Court summarized, "[t]he plaintiff's spending his last school year trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized, being subject to fainting spells or migraines, is not harm that can be rectified by a monetary judgment, or even an award of injunctive relief, after a trial that could take place months or years from now." *Id.* at 13.

Ash will suffer those same harms if a stay is issued and he is barred from the boys' restrooms once again. Defendants have offered no evidence to the contrary, again simply repeating the same arguments this Court has already considered and rejected. KUSD even concedes, as it must, that "not using the bathroom may exacerbate the symptoms associated with Plaintiff's gender dysphoria," but it nonetheless asserts without support that this harm is not "irreparable." KUSD Motion at 18. KUSD ignores the District Court's findings and the expert declarations demonstrating that the educational, psychological, and physical harms Ash already suffered posed a grave risk of lifelong harm to him.

Ash's experience over the last month has shown that the harms he previously suffered have abated significantly since the injunction was issued. As Ash describes in his supplemental declaration, he has experienced decreased symptoms of depression and anxiety, fewer migraines, and more energy in the month since the injunction issued. A. Whitaker Supp. Decl. at ¶¶ 8-14.

Now that he no longer has to fear being monitored, disciplined, or pulled out of class to meet with administrators just for using the restroom, he finally feels able to focus on his classwork, extracurricular activities, after-school job, and college applications and "actually enjoy school and life." *Id.* at ¶¶ 8, 14.

The supplemental declaration of Dr. Stephanie Budge, who conducted follow-up clinical evaluations of Ash on September 30, 2016 and October 19, 2016, confirms the immediate and continuing positive effects of the injunction on Ash's well-being and the irreparable harm he would suffer if he lost the benefits of that injunction. S. Budge Supp. Decl. at ¶ 14. Her clinical testing found that Ash's psychological health had demonstrably improved since the injunction went into effect, with lower scores of depression and anxiety, increased self-confidence and energy, and dramatically lower frequency of suicidal ideation. *Id.* at ¶¶ 4, 7, 9, 11. In particular, Ash's thoughts of suicide have steadily decreased: prior to the injunction, Ash had thoughts of suicide daily. *Id.* at ¶ 7. He had those just "two to three times per week" shortly after the injunction was issued. *Id*. Now, one month into the injunction, Ash has reported having no suicidal thoughts over the past week. *Id.* at ¶¶ 7-8.

Although KUSD has failed to present any evidence that other students have been detrimentally affected by Ash's restroom use, the evidence before the District Court and this Court shows that the injunction has already done what it was intended to do: protect Ash from undue harm. There is no justification for placing him in harm's way again before this appeal can be resolved.

CONCLUSION

KUSD has failed to demonstrate why this Court should stay the District Court's preliminary injunction. Ash Whitaker's use of boys' restrooms, as required by the preliminary injunction, is not harming KUSD or anyone else. To the contrary, the injunction has prevented unnecessary psychological, medical, and educational harms to Ash in the month it has been in place. A stay would impose the same serious and irreparable harms on Ash that justified the preliminary injunction in the first place. KUSD is unlikely to prevail in this case, but will have the opportunity to challenge the preliminary injunction in this appeal even without a stay. For these reasons, Defendants' motion for a stay should be denied.

Dated: October 19, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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EXHIBIT A

Supplemental Declaration of Ashton Whitaker

SUPPLEMENTAL DECLARATION OF ASHTON WHITAKER

1. My name is Ashton Whitaker. I am the Plaintiff in *Whitaker v. Kenosha Unified School District*, Case No. 2:16-cv-00943-PP (E.D. Wis.), Appeal No. 16-3522 (7th Cir.). I have actual knowledge of the matters stated in this declaration. I submit this declaration to supplement my initial declaration, dated August 14, 2016, which was submitted to the U.S. District Court with my motion for preliminary injunction in this case on August 15, 2016. My initial declaration is attached to this declaration as Exhibit 1.

2. I am 17 years old. I started my senior year of high school at Tremper High School in the Kenosha Unified School District on September 1, 2016.

3. As I explained in my initial declaration, during my junior year I felt constantly stressed out, depressed, and anxious as a result of being told I wasn't allowed to use the boys' restroom at school. I was humiliated and embarrassed by my school's directive that I could only use girls' restrooms or single-occupancy restrooms no other students could access. I would try not to drink liquids during the school day so I wouldn't need to use the bathroom at all, which led to physical health problems related to dehydration, stress, and a medical condition I have called vasovagal syncope that results in migraines and dizziness. I ignored my doctor's instruction to drink water and Gatorade throughout the day so I wouldn't have to use the bathroom at school.

4. Over the summer, when I was outside of the discriminatory environment at school, my physical and psychological health improved significantly. I felt relaxed, because I didn't have to worry about people monitoring my restroom use or about getting in trouble just for going to the bathroom. I could drink all the liquids I need without worrying. All summer, I felt accepted by everyone around me for who I am: a boy.

5. Once school started again, though, all that changed. School administrators made it clear from the very beginning of the school year that I was not allowed to use the boys' restrooms. On the third day of school—Tuesday, September 6, 2016—I was pulled out of my Advanced Placement (AP) Calculus class for an unscheduled meeting with my guidance counselor and Vice Principal Holly Graf, during which Ms. Graf reiterated that I was not permitted to use the boys' restrooms. The meeting lasted approximately 50 minutes, and I lost important class time. I left that meeting upset and shaken. I felt scrutinized and punished all over again, just for being me. I felt frustrated that what bathroom I use was apparently more important to the school than whether I could keep up in my AP Calculus class, which I also had missed an important practice quiz for a chapter test the following day because of this meeting.

6. As soon as school started, the stress, anxiety, and depression I experienced in my junior year returned. I started getting migraines from stress again on a daily basis. I went back to restricting the liquids I drink during the day so that I didn't have to risk using the bathroom at school, and that led to a resurgence of the physical health problems that I get from dehydration, including spells of low blood pressure and dizziness.

7. For the first two weeks of the school year, before the court issued the preliminary injunction allowing me to use boys' restrooms, when I absolutely had to go to the bathroom, I used only the boys' restroom. I did not use the girls' restroom, because I am not a girl. I did not use the single-user restrooms that no other students have access to, because I feared that would invite other students at school to harass me or perceive me as somehow so different and weird that I am not allowed to share a bathroom with them. Using those restrooms would also call a lot of attention and scrutiny to me in a way I don't feel comfortable with and that I find embarrassing and humiliating.

8. On September 20, 2016, I learned that the District Court judge had issued a preliminary injunction ordering the school to let me use the boys' restrooms while the rest of the case proceeds. I was so happy and relieved. I could hardly believe it had really happened.

9. As soon as the injunction was in place, I felt this huge weight of anxiety, fear, and stress lessen. It was such a relief knowing that I didn't have to look over my shoulder all the time to see if school staff were monitoring my restroom use, or worry that I'd be pulled out of class all the time, like I was last year.

10. Everyone at school who knows about the case has been extremely friendly and accepting. When the injunction was issued, lots of kids came up to me and said congratulations, both boys and girls. I have not heard any negative comments from other students since the case started and the injunction issued.

11. I now try to drink a normal, healthy amount of liquids while at school, and I have been using the boys' restrooms whenever I need to go. When I've been in the restroom at the same time as other students, no one has ever said anything unfriendly or indicated they were uncomfortable with me being there. In fact, other boys have said "Hey, dude! Congrats on the court thing," or other similar phrases, making me feel accepted as the boy I am.

12. My physical symptoms have dramatically improved. I no longer get daily migraines. I no longer feel faint or dizzy regularly.

13. My mental health has also improved. I feel significantly less anxious and depressed than I did the first few weeks of the school year.

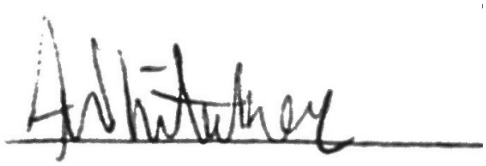
14. I have a huge amount on my plate this year, including classes, extracurricular activities including drama club and the Golden Strings orchestra, working after school at a

medical office, and working on my college applications. Once the injunction was issued, I finally felt like I had the energy to focus on all of my work and actually enjoy school and life.

15. At the same time, it continues to be a bit of an emotional roller-coaster when I hear about the appeals that the school district is making, trying to get the injunction taken away or stayed. When I first learned that they were seeking a stay I felt an immediate wave of stress and panic come rushing back. Once I heard that the District Court judge denied the stay I felt relieved again, but a little more cautiously.

16. I still feel a lot of anxiety and fear when I think about the possibility that the injunction might be stayed or reversed. I really, really hope the injunction can continue so I can finish my senior year of high school like a normal kid.

Pursuant to 8 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Executed on October 19, 2016.

EXHIBIT 1

Original Declaration of Ashton Whitaker, filed August 15, 2016

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

DECLARATION OF ASHTON WHITAKER

1. My name is Ashton ("Ash") Whitaker. I am the plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I was born on August 24, 1999. I live in Kenosha, Wisconsin with my mother, Melissa Whitaker.

3. I am a student at George Nelson Tremper High School ("Tremper"). I will begin my senior year of high school on September 1, 2016. I am ranked in the top five percent of my high school class and hope to attend the University of Wisconsin-Madison and study biomedical engineering after graduation. In school, I am involved in a lot of activities: orchestra, theater, tennis, National Honor Society, and Astronomical Society. Outside of school, I work part-time as an accounting assistant in a medical office.

4. I was designated "female" on my birth certificate, but I realized I am a boy in middle school and began to experience growing discomfort with being viewed as a girl by others.

5. At the end of eighth grade, in spring 2013, I told my parents that I am transgender and a boy. Not long after that, I told my older brothers.

6. During the 2013-2014 school year, my freshman year at Tremper, I began telling my close friends that I am a boy. At that point, I began transitioning more publicly: I cut my hair short, began wearing more masculine clothing, and began to go by a masculine name and pronouns.

7. In fall 2014, the beginning of my sophomore year, I told my classmates and teachers that I am a boy and requested that they refer to me with male pronouns and by my new name. On Christmas Day of 2014, I told my extended family that I am a boy.

8. Around the time of my public transition, I began seeing a therapist, who diagnosed me with Gender Dysphoria. In April 2016, I began seeing an endocrinologist at Children's Hospital of Wisconsin to discuss hormonal therapy. In July 2016 I started hormone replacement therapy (testosterone).

9. On August 2, 2016, I submitted a petition for a legal name change to the Kenosha County Circuit Court to change my name to my traditionally masculine first name, Ashton. I have a court date of September 15, 2016 at which I expect the petition will be granted.

10. My transition has been accepted and respected by most people at Tremper. My friends and classmates have been very supportive and treat me as a boy. To my knowledge most of my teachers also respect my gender identity. For example, at an orchestra performance on January 17, 2015, I wore a tuxedo, just like all the other boys, and was supported by my orchestra teacher, Helen Breitenbach-Cooper. It was accepted without incident and has never been a problem even amongst the audience.

11. In spring 2015, during my sophomore year, my mother and I had several meetings with my guidance counselor, Debra Tronvig. At these meetings, we asked that I be allowed to use the boys' restrooms at school. At a meeting in March 2015, I was told by Ms. Tronvig that school administrators had decided that I could only use the girls' restrooms or a gender-neutral restroom in the school's main office. This meeting was very upsetting to me. I did not want to use the girls' restroom, because I had publicly transitioned in school and using the girls' restroom would communicate to other people that I am "really" a girl—which isn't true—and should be treated like a girl. If I used the office restroom, other students and office staff would ask me questions about why I was using it. The office restroom is also far from my other classes and I would miss class time if I used it.

12. I was also worried that I would be disciplined if I used the boys' restroom, which would hurt my chances of getting into college. Because of this, I did my best to avoid using any restrooms at school for the rest of the school year.

13. In order to avoid using the restrooms, I drank less liquid than I normally would. I have been diagnosed by my pediatrician with vasovagal syncope, which means I am susceptible to fainting and/or having seizures upon certain physical or emotional triggers. If I am dehydrated, my condition is triggered, so my doctor requires that I drink 6-7 bottles of water a day and a bottle of Gatorade. I also get stress-related migraines.

14. When I avoided using the restrooms, I had more symptoms of vasovagal syncope and more migraines. I also felt increasingly depressed and anxious.

15. In July 2015, I went to Europe with my school orchestra group. I asked if I could room with boys, but my orchestra teacher, Ms. Breitenbach-Cooper, told me school administrators had decided I would have to room with girls. We were at times divided by gender

for activities and I would be grouped with girls. I found this demeaning and humiliating. During this trip, feeling a bit freer because of being in another country and knowing I was less scrutinized than at school, I began using men's restrooms. On that trip I also saw a news story about a lawsuit against the Gloucester County School District in Virginia brought by another transgender student who was not allowed to use the boys' restroom. In that story I learned that the U.S. Department of Justice had said that transgender students have the right to use restrooms in accordance with their gender identity under Title IX. I was thrilled to learn that I had this legally protected right.

16. When my junior year started in September 2015, I only used boys' restrooms. No one said anything, and for seven months, I had no issues with other students or staff when I used the restrooms. I did not discuss my decision to use the boys' restrooms with any teachers or administrators because I knew that using the boys' restrooms was my legal right.

17. One day in late February 2016, I was washing my hands in the sink in the boys' restroom when a teacher walked in who had known me my freshman year. He gave me a funny look. A week or two later, just after I finished taking the ACT test, my mom told me that administrators had decided that I would only be permitted to use the girls' or single-user gender-neutral restrooms. Never before had I felt scrutinized and degraded to such an extent in just using the boys' restroom.

18. Hearing that news, I was incredibly upset, uncomfortable, and embarrassed. I am not a girl, and because of that I hadn't used a girls' restroom in months anywhere. If I used the girls' restrooms, that would totally confuse classmates who see me as the boy that I am, and make them think that I'm not a "real" boy and they don't need to respect my identity. I knew they would look at me strangely, ask me intrusive questions, and some would probably laugh at

me and bully me. The idea of using the girls' restroom was humiliating and there was no way I could do it. If I were to use the gender-neutral restrooms, I would also stand out from everyone else with a big label on me that said "transgender." It was humiliating to think of being singled out in that way, which I knew would make other students look at me strangely, ask me intrusive questions, and some would make fun of me and bully me. Having to use a single-user restroom separate from all other students would send the message that I am so different from other students that I need to be separated from everyone else. I was also afraid of getting in trouble if I didn't go with one of the school's options. I had never experienced any disciplinary trouble at school and I was very worried about that possibility.

19. Despite these fears, for the rest of the school year, I kept using the boys' restrooms when I needed to go, because to me, the only other option was to never use any restrooms at school. With my after-school activities, a typical school day for me is about 10 hours. I also know that using the boys' restroom is my legal right. Feeling trapped and having no choice but to break the school's rules or do things I knew were putting my health at risk (trying not to drink liquids during the school day) made me more anxious and depressed. I had trouble completing my schoolwork and sleeping at night. I felt so hopeless, I even had thoughts about suicide.

20. Around March 10, 2016, my mother and I met with my counselor, Ms. Tronvig, and Holly Graf, an assistant principal. During this meeting, Ms. Graf would only call me by my birth name. She told us that I couldn't use the boys' restrooms because my gender is listed as female in the school's official records. She said they wouldn't change that unless they received legal or medical documentation. My mother explained that I was too young for transition-related surgery, but had my pediatrician fax a letter stating that I am a transgender boy and I should be

allowed to use the boys' restrooms. Despite this, I was still not allowed to use the boys' restrooms.

21. Around March 17, 2016, when I went into the boys' restroom, I saw an assistant principal, Mr. Geiger, watch me. When I exited the restroom, I saw Mr. Geiger typing an email. I assumed that he was emailing the other administrators to report me. A short time later Ms. Graf called me in to her office to meet with her, and proceeded to lecture me for half an hour about my restroom use. Ms. Graf told me that I would be subject to disciplinary action if I kept using the boys' restrooms—she said I would have to "go down to 109 or 203" which could lead to in-school suspension. 109 and 203 are discipline offices at school. She asked me why I was not using the girls' or a single-user restroom, and I told her that I wouldn't use the girls' restroom because that would not be appropriate because I'm not a girl. She asked me to compromise and use the single-user restroom in the office. I refused because it was still far from my other classes and it would still make me stand out as different from my classmates. I also told her that the school's policy violated my rights under Title IX.

22. At this meeting and in general, Ms. Graf has almost exclusively referred to me by my female birth name and female pronouns even when I asked that my new name and male pronouns be used instead. When I became upset in our March 17 meeting, she said condescendingly, using my birth name, "S------, calm down." I felt angry and humiliated by this and I left the office.

23. After this meeting, I started crying in the hallway. The rest of the day, I couldn't focus in any of my classes, and just kept having flashbacks about how awful that meeting was and fighting back tears. After school, I skipped work and just lay in bed, exhausted and depressed and not wanting to move, because of the stressful situation I had been forced into.

24. I continued to use the boys' restroom when necessary during the rest of the school year. I met with Ms. Graf alone or with my mother several times because I kept using the boys' restroom. The meetings with Ms. Graf felt invasive and embarrassing. I was mortified that school staff were clearly watching and reporting on my every move. Since these meetings happened during class time, I knew other students and teachers were wondering why I was getting pulled out of class so much, and I felt embarrassed having to explain it to them when they asked. I was also worried that being pulled out of class so much would hurt my performance in school. I was also worried about disciplinary action hurting my ability to get into college.

25. I also learned from my mother that the school security guards had been asked to monitor my restroom use. I felt so embarrassed and stressed by this scrutiny and surveillance.

26. On April 6, 2016, I attended a meeting with my mother, Ms. Graf, Susan Valeri from KUSD, and Richard Aiello, Tremper's principal. At this meeting, I was given the further option of using two single-gender restrooms on the opposite sides of campus. They had installed new locks and I would be the only student who had a key to open them. These restrooms were not near my classes and I would have had to miss class time to use them. I was also embarrassed frustrated at the idea of needing to be assigned personal, separate restrooms, unlike any other students at Tremper. I knew that other students would be curious and annoyed that I was the only person who had access to these locked restrooms. I knew if I used those restrooms some students would not just ask questions but talk about me, make fun of me and bully me.

27. At the April 6 meeting, I asked Ms. Valeri what the school's reason was for not letting me use the boys' restrooms that did not have anything to do with my anatomy. Ms. Valeri essentially said, "Well, we've never had a student who identifies as male but was born female." I told them that Title IX prohibits discrimination based on sex, and that this protects transgender

students and means that schools have to let students use restrooms consistent with students' gender identity. Ms. Valeri said that Title IX did not protect transgender students' access to restrooms consistent with their gender identity. When I asked Valeri to explain what she thought Title IX meant, she refused. When I asked why, she said something like, "I don't think I'm going to give you any reasons."

28. After this meeting, I continued to avoid using the restrooms as much as possible. I have never used the single-user restrooms that I was given special keys for because I did not want to call attention to myself by using them.

29. My depression, anxiety, and gender dysphoria have become worse because of these experiences of negotiating using the bathroom at school, and all the other ways that they school has refused to acknowledge or respect my gender identity and treat me differently just because I am transgender. A lot of times I didn't even want to get out of bed in the morning and go to school, even though I always used to love school. I also have experienced more migraines, fainting, and dizziness because I was attempting to avoid using any school restrooms. I considered withdrawing from Tremper and finishing high school online, but decided not to because I would miss out on my after school activities and because transferring would make me fall even more behind on classwork.

30. In March 2016, I learned that Tremper's junior prom advisor had nominated me to be on the prom court for prom king. At Tremper, nominations for prom court are based on students' community service hours.

31. Around March 22, 2016, my mom was called in to meet with Mr. Aiello and Ms. Graf. They told her that they would allow me to be a candidate for prom court, but only as prom queen, not prom king. When my mom told me about their decision, I was humiliated by the idea

of running for prom queen when my classmates know me as the boy that I am. I felt disrespected by the administration and angry that they did not seem to realize how hurtful they were being.

32. On April 4, 2016, my friends and I showed administrators a MoveOn.org petition demanding that I be allowed to run for prom king and use the boys' restrooms. The petition was signed by thousands of people around the country and many members of the Tremper community. The following day, on April 5, 2016, 70 students had a sit-in at Tremper's main office to show their support for me and for equal rights for transgender students.

33. After the sit-in and the media attention it received, I was told that I would be allowed to run for prom king after all. I was glad to have this opportunity and grateful for the support of my classmates, but I continue to feel upset about the way I was treated by the administration and the fact that they only backed down because of that public attention.

34. Throughout my time at Tremper, most of my teachers have referred to me by my male name, but since KUSD has not changed my name on official records, I have to tell my teachers at the beginning of each term about my preferred name and pronouns. Every time I have a substitute teacher, I have to tell that teacher before class starts that my real name is Ash and that they should call me by that name, not the name on the roster. Even then, some substitute teachers still refer to me by my birth name in class. Sometimes I forget to tell a substitute teacher before class starts about my name, and those teachers will almost always use my birth name in front of other students. Having to correct this in front of everyone reveals to everyone or reminds them of my birth name and is humiliating.

35. At an orchestra rehearsal at school on May 11, 2016, I was approached by the orchestra's volunteer pianist, who put her hands on my shoulders and said something like, "Ash, honey, this isn't about you, this is bigger than you. I'm praying for you." This volunteer also

created a Facebook group called "KUSD Parents for Privacy," which has posts that are critical of transgender students' rights and has mentioned me by name numerous times. My mother and I brought this incident to Mr. Aiello, who requested that the orchestra teacher call the volunteer and tell her not to talk to students like that. It didn't seem like anything changed, though. That woman is still a regular volunteer with the orchestra, and I feel awkward and embarrassed and angry when she's around, because it felt like she got away with deliberately attacking me online, even though Mr. Aiello had explicitly said that was unacceptable.

36. In May 2016, I learned from my mother that school administrators had told guidance counselors to distribute bright green wristbands to transgender students so that their use of the restrooms could be monitored more easily. This made me feel sick and scared. I told my mom there was no way I would agree to wear one, but I was afraid that the school would make me do so. I knew that wearing something like that would single me out for more questions, harassment, or even violence for being transgender.

37. From June 12-16, 2016, I participated in a five-day, school-sponsored summer orchestra camp at the University of Wisconsin-Oshkosh campus. I signed up to stay in a boys' suite with one of my best friends, who is a boy. I was told by Ms. Breitenbach-Cooper that school administrators had decided that I had to either stay in a suite with girls or stay alone. I was definitely uncomfortable staying with girls, so I reluctantly agreed to stay in a double-bedroom suite alone so that I could participate in the program.

38. Staying in a suite alone meant that I could not socialize often with other students in the evenings, since students were not allowed to enter each other's suites. Each evening while everyone else was having fun with their friends, I stayed in my room, either sleeping or practicing my violin. That whole trip I felt lonely and depressed, and disappointed that I wasn't

able to share those fun experiences with my classmates and have happy memories of my last year at camp. I was also hurt and embarrassed. Even though the school did not explain why I could not stay with boys, I understood that they still did not consider me a real boy—and it was degrading and humiliating to think that my teachers and administrators were thinking of me—and no other students—in those terms.

39. I have suffered both physically and emotionally by being separated from and being treated differently than my male classmates. Physically, I have experienced dehydration, dizziness, fainting or nearly fainting, and migraines as a result of limiting my liquid intake to try not to have to use the restroom at school. I have felt increasingly depressed and anxious over the last months due to the discriminatory actions taken by Tremper's administration. These have hurt my ability to focus in class and perform well in school.

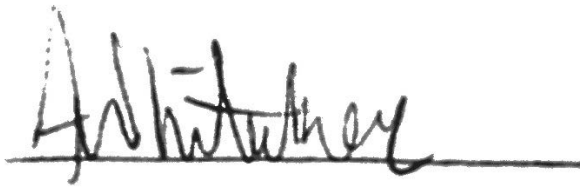
40. The level of attention and scrutiny has made me feel unsafe and scared being outside of my house. I'm constantly afraid that I will be targeted for an assault by someone who knows I am transgender. I try to avoid ever going out alone or even with just one other friend, only going out in groups, so that I'll be protected.

41. If I am not allowed to use the boys' restrooms during my senior year of high school, I know I will experience the same embarrassment, anxiety, and depression as I did last year. I am also worried that my symptoms of vasovagal syncope—fainting and migraines—will continue to get worse. I am continuing to think seriously about transferring to an online school if Tremper and KUSD keep refusing to respect my identity and doing things that single me out and label me as different from all the other boys.

42. I just want to live as who I am—a boy—and go to school without being harassed, discriminated against, demeaned, and humiliated by my school.

Pursuant to 8 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 14, 2016

By: 

Ashton Whitaker

EXHIBIT B

Declaration of Joseph J. Wardenski

DECLARATION OF JOSEPH J. WARDENSKI

1. I am an attorney at Relman, Dane & Colfax, PLLC. I represent Plaintiff-Appellee Ashton Whitaker in *Whitaker v. Kenosha Unified School District*, Case No. 2:16-cv-00943-PP (E.D. Wis.), Appeal No. 16-3522 (7th Cir.). I have actual knowledge of the matters stated in this declaration. I submit this declaration in connection with Plaintiff-Appellee's Response to Defendants-Appellants' Motion to Stay Preliminary Injunction Pending Appeal.

2. Attached hereto as Exhibit 1 is a true and correct copy of the following newspaper article: Bill Guida, *Tremper Quiet After Court Decision*, Kenosha News (Sept. 21, 2016). I accessed and printed this article from the following link on September 29, 2016: http://www.kenoshanews.com/scripts/edoris/edoris.dll?tem=printart&docid=489821990.

3. Attached hereto as Exhibit 2 is a true and correct copy of a September 21, 2016 email sent from Tremper High School Principal Steven Knecht to Tremper High School Staff.

4. Attached hereto as Exhibit 3 is a true and correct copy of the following newspaper article: Bill Guida, *School District Files Appeal in Transgender Case*, Kenosha News (Sept. 23, 2016). I accessed and printed this article from the following link on October 18, 2016: http://www.kenoshanews.com/news/school_district_files_appeal_in_transgender_case_489851642.php.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 19, 2016.

Joseph J. Wardenski
RELMAN, DANE AND COLFAX, PLLC
1225 19th Street, NW, Suite 600
Washington, DC 20036
(202) 728-1888
Attorney for Plaintiff-Appellee

EXHIBIT 1

Kenosha News, "Tremper Quiet After Court Decision," September 21, 2016

KENOSHA NEWS

Tremper quiet after court decision

No protests or celebration regarding injunction in transgender student's lawsuit
BY BILL GUIDA
bguida@kenoshanews.com

It appeared to be school as usual Wednesday at Tremper High School after a federal judge in Milwaukee granted Ash Whitaker, a transgender male, the right to use boys-only restrooms.

According to Tanya Ruder, chief communication officer for the Kenosha Unified School District, there were no incidents reported at Tremper involving students protesting or celebrating. On Wednesday, U.S. District Judge Pamela Pepper granted Whitaker's request for a preliminary injunction to prevent the school and the district from barring his use of boys restrooms.

Nor had Tremper or district officials gotten calls from parents, other individuals or groups voicing concerns about the ruling, Ruder said.

When a Kenosha News reporter visited Tremper unannounced during the school day, the campus and hallways were quiet between classes, with no outward displays of reaction to the court ruling.

Meanwhile, the district plans to abide by the court order.

Whitaker was born female but identifies as male, which his mother, Melissa Whitaker, a Tremper teacher, his pediatrician and psychologist verified in court documents filed previously.

Appeal coming

Ron Stadler, the attorney representing Unified, vowed to appeal Tuesday's ruling to the Seventh U.S. Circuit Court of Appeals in Chicago. However, as of 3 p.m. Wednesday, Unified had not yet filed an appeal. Ruder said work on the appeal is underway.

In July, Whitaker filed a federal civil rights lawsuit against the district claiming district and officials discriminated against him on the basis of his transgender status. The suit remains pending in Milwaukee after Pepper rejected the district's motion for dismissal Monday.

In doing so, Pepper ruled Whitaker "at this stage of the case" had compiled sufficient information to support a plausible violation of Title IX, a law prohibiting sexual discrimination in federally funded education programs.

Pepper also found enough information in Whitaker's lawsuit to proceed to trial regarding possible constitutional claims for violating the 14th Amendment equal protection clause.

Whitaker based his discrimination claims on some teachers and school officials refusing to address him by his chosen name as a boy or to use male pronouns when referring to him.

Instead, according to court documents, Whitaker was addressed in front of other students by his given female name at birth, referred to by feminine pronouns, barred from using male-only facilities and directly monitored by school officials and security personnel tracking his restroom use.

In spring, Whitaker's desire to run for prom king initially was rejected by Tremper administration, including then-principal Richard Aiello, who ultimately reversed his decision in the face of mounting student protests and support for Whitaker, which drew national attention.

EXHIBIT 2

Email from Steven Knecht to Tremper High School Staff, dated September 20, 2016

From: Steven Knecht
Sent: Tuesday, September 20, 2016 9:35 PM
To: Tremper Staff
Subject: Message

Tremper Staff,

Earlier this evening, I received the message below from our school district's legal representation. This message is in reference to the legal matter that we have going on in the district:

The following can be attributed to the district's attorney, Ronald Stadler of Mallery and Zimmerman S.C.:

"The District is disappointed with the court's decision to grant an injunction. Nevertheless, the District is bound by the court's order. The District is reviewing all of its options, including whether to file an immediate, interlocutory appeal to the Court of Appeals. Until an appeal can be made to the 7th Circuit Court the District must follow the order. If the appeal is filed, the District will ask the district court to stay its injunction order until the Court of Appeals resolves these legal issues. This order only affects the plaintiff in this case and the District will continue with all policies and procedures that were in place prior to the case for all other students. The District, like many others in the nation, looks forward to the final decision in this case."

It is important that I shared this message with you so you are aware that the plaintiff may use the boys restroom.

If you have any questions, please come see me.

Sincerely,

Steven J. Knecht
Principal
Tremper High School
sknecht@kusd.edu<mailto:sknecht@kusd.edu> | P: 262.359.2200 | F: 262.359.2353

Kenosha Unified School District | Tremper High School | 8560 26th Avenue | Kenosha, WI 53144
kusd.edu | facebook.com/kenoshaschools | twitter.com/kusd | youtube.com/kenoshaschools | instagram.com/kenoshaschools | KUSD Channel 20

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

EXHIBIT 3

Kenosha News, "School District Files Appeal In Transgender Case," September 23, 2016

School district files appeal in transgender case

Published September 23, 2016

BY BILL GUIDA

bguida@kenoshanews.com

The attorney representing the Kenosha Unified School District in a sexual discrimination case brought by transgender student Ash Whitaker filed an appeal Friday of a court order granting Whitaker injunctive relief.

In addition, attorney Ronald Stadler filed a request for permission to appeal U.S. District Court Judge Pamela Pepper's ruling that there is sufficient evidence for Whitaker's civil suit to proceed against Kenosha Unified.

Stadler filed the documents about 5:30 p.m. with the U.S. Seventh Circuit Court of Appeals in Chicago.

Earlier this week in Milwaukee, Pepper rejected Stadler's motion to dismiss the Tremper High School student's civil rights case, which alleges violation of Title IX, a federal law barring gender discrimination in federally funded education programs. Whitaker's lawsuit, filed in July, also cites constitutional violations of his civil rights under the equal protection clause of the 14th Amendment.

Last month, Whitaker, who was born a girl but identifies as a boy, separately requested a preliminary injunction to prevent school and district officials from discriminating against him based on his transgender status. Pepper's ruling in his favor on the injunction directs Kenosha Unified and Tremper officials and staff to allow Whitaker to use boys restrooms without restrictions.

Federal court procedures permit respondents to appeal injunction rulings directly. However, in civil lawsuits, respondents must first ask the appellate court for permission to appeal, for example, Pepper's rejection of Stadler's motion to dismiss the case.

Because the appeal linked to the injunction and the request for permission to appeal addresses the lawsuit, they must be filed separately, although the court could subsequently join the matters, Stadler said.

Meanwhile, Tanya Ruder, Kenosha Unified's communications chief, said Friday the district's total out-of-pocket expense in the case is $9,430.26, which counts toward the the district's $25,000 deductible in its insurance policy.

"This is being handled through our liability carrier, Community Insurance Corp.," Ruder said. "They do not feel that any potential damages would fall outside of those covered under the CIC policy. As such, the maximum exposure to the district would be $25,000."

Stadler is contracted by CIC to defend Kenosha Unified in the case.

Mary Snyder, the School Board vice-president, said Friday she had "no idea" what the district spent so far or is willing to spend fighting the preliminary injunction and the civil rights case brought by Whitaker.

Snyder said members will discuss the case and the costs during a closed executive session with administration officials immediately prior to the School Board meeting at 7 p.m. Tuesday.

Said School Board President Tamarra Coleman: "Everything is being handled by our insurance carrier. We're all monitoring the financial piece of this — the taxpayer dollars — as well as the legal case. It's our responsibility to do that."

Comments

EXHIBIT C

***Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio. Sept. 26, 2016)**

2016 WL 5372349
Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio, Eastern Division.

Board of Education of the Highland Local School District, Plaintiff,
v.
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,
v.
Board of Education of the Highland Local School District, et al., Third-Party Defendants.

Case No. 2:16-CV-524
|
Signed September 26, 2016

Synopsis

Background: School district brought Administrative Procedure Act (APA) action against Department of Education (DOE), challenging DOE's investigative finding that school district's policy of not permitting student, a transgender girl, to use girls' restroom impermissibly discriminated against student on basis of her sex in violation of Title IX. School district moved for preliminary injunction against enforcement of Title IX's antidiscrimination provisions against school district, and student intervened, by and through her legal guardians, seeking preliminary injunction requiring school district to permit her to use girls' restroom and otherwise treat her as a girl.

Holdings: The District Court, Algenon L. Marbley, J., held that:

[1] Title IX's enforcement scheme precluded district court's jurisdiction over school district's pre-enforcement challenge;

[2] student was substantially likely to succeed on merits of her Title IX sex discrimination claim;

[3] district court would apply heightened scrutiny to student's equal protection claim;

[4] student was substantially likely to succeed on merits of her equal protection claim; and

[5] balance of equities and public interest favored preliminary injunction.

School district's motion denied; student's motion granted.

Attorneys and Law Firms

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OPINION & ORDER

ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE

***1** Jane Doe, an eleven-year-old transgender girl, seeks to use the girls' restroom at Highland Elementary School. Highland will not permit her to do so. After an investigation, the Office of Civil Rights ("OCR") of the Department of Education ("DOE") found that

Highland's policy impermissibly discriminated against Jane on the basis of her sex in violation of Title IX of the Education Amendments of 1972. Highland now asks this Court to enjoin DOE and the Department of Justice ("DOJ") from enforcing the antidiscrimination provisions of Title IX against Highland. Jane Doe, in turn, asks the Court to enjoin Highland's policy and order Highland to permit her to use the girls' restroom and otherwise treat her as a girl. For the reasons that follow, the Court **DENIES** Highland's Motion for Preliminary Injunction and **GRANTS** Jane Doe's Motion for Preliminary Injunction.

I. BACKGROUND

A. Statutory and Regulatory Background

Title IX provides that 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). Title IX also specifies that nothing in the statute "shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *Id.* § 1686. The DOE has promulgated regulations clarifying that a recipient of federal funds "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 for students of the other sex." 34 C.F.R. § 106.33.

Over the past several years, DOE has issued several guidance documents explaining the agency's interpretation of Title IX and its implementing regulations with respect to transgender students. In a 2010 Dear Colleague Letter, a guidance document explaining DOE's interpretation of Title IX, OCR wrote that Title IX "protect[s] all students, including...transgender... students, from sex discrimination." (10/26/10 Dear Colleague Letter, Doc. 33–1 at 8.) In April 2014, OCR issued a "significant guidance document" stating that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." (Questions and Answers on Title IX and Sexual Violence, Doc. 33–2 at B–2.) In December 2014, OCR published further guidance clarifying that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." (Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, Doc. 33–3 at 25.) In April 2015, OCR issued a Title IX Resource Guide, which stated that schools should "help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes." (Resource Guide, Doc. 33–4 at 21–22.) Most recently, on May 13, 2016, DOJ and DOE issued joint guidance that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." (Dear Colleague Letter on Transgender Students, Doc. 33–5 at 3.) The letter also clarified that "[h]arassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly." (*Id.* at 2.)

B. Factual Background

***2** Jane Doe is an eleven-year-old transgender girl who is enrolled in the fifth grade at Highland Elementary School. Jane, who was assigned male at birth, has communicated to her family that she is female since she was four years old. (Declaration of Joyce Doe, Doc. 35–2 at ¶ 2.) After her parents sought out the advice of medical and mental health professionals, Jane was diagnosed with gender dysphoria. (*Id.* at ¶ 4; Declaration of Lourdes Hill, Doc. 36–2 at ¶ 5.) According to Diane Ehrensaft, a developmental and clinical psychologist who specializes in working with children and adolescents with gender dysphoria, gender dysphoria is "the medical diagnosis for the severe and unremitting emotional pain resulting from th[e] incongruity" between one's gender identity and the sex he or she was assigned at birth. (Declaration of Diane Ehrensaft, Ph.D, Doc. 35–4 at ¶¶ 23–24.) Jane's health care providers recommended that she socially transition to treat her gender dysphoria. (Hill Decl., Doc. 36–2 at ¶ 7.) "Social transition" involves "changes that bring the child's outer appearance and lived experience into alignment with the child's core gender," including "changes in clothing, name, pronouns, and hairstyle." (Ehrensaft Decl., Doc. 35–4 at ¶ 27.)

When Jane began kindergarten at Highland Elementary, she used a traditionally male name and was listed as male in school records. (Compl., Doc. 1 at ¶¶ 61–63.) In 2012, however, Jane's parents, Joyce and John Doe, helped her socially transition by obtaining appropriate clothing and a legal name change, treating her as their daughter, and asking others to treat her likewise. (Joyce Doe Decl., Doc. 35–2 at ¶ 5.) According to Joyce, Jane immediately began to feel more joyful, at ease with herself, and less angry. (*Id.* at ¶ 6.) That summer, before she started first grade, Joyce informed Defendant Shawn Winkelfoos, the principal of Highland Elementary, that Jane had socially transitioned and asked that the School District treat her as female, permit her to use the girls' restroom, and ensure that her school records reflected her chosen name and correct gender marker. (*Id.* at ¶¶ 7–8; Compl., Doc. 1 at ¶ 66.) Winkelfoos denied her request to permit Jane to use the girls' restroom and to change the records to reflect her female name, although the School District has stated that it agreed to "address [Jane] as a female." (*Id.* at ¶ 67; Joyce Doe Decl., Doc. 35–2 at ¶¶ 9–10.) Highland has a policy that "students using sex-specific locker rooms and restrooms, or overnight accommodations during school trips or events, must use the facilities that correspond to their biological sex." (Compl., Doc. 1 at ¶ 74.) Jane, therefore, was required to use the office restroom, which was generally used by school personnel and other adults. (Joyce Doe Decl., Doc. 35–2 at ¶ 9.) Joyce and John Doe observed that this arrangement was "taking a toll on Jane's mental health." (*Id.* at ¶ 11.)

Joyce renewed her request the following year, in the summer of 2013, before Jane started second grade. (*Id.* at ¶ 12.) Winkelfoos again denied the request and Jane was required to use the unisex restroom in the teachers' lounge. (*Id.* at ¶ 15.) Jane reported to Joyce that when she would pass through the lounge to access the restroom, "teachers would glare at her and make her feel uncomfortable." (*Id.*) Jane began to suffer from extreme anxiety and depression. (*Id.* at ¶ 16.) In May 2014, she was hospitalized for suicidal ideation and depressed mood. (*Id.*)

In December 2013, Joyce filed a complaint with OCR, which proceeded to investigate the complaint. (*Id.*; Compl., Doc. 1 at ¶ 97.) The complaint alleged that Highland discriminated against Jane on the basis of her sex by requiring her to use a separate individual-user bathroom and denying her access to the same bathrooms used by other female students. (*Id.* at ¶ 98; Complaint-in-Intervention, Doc. 32 at ¶ 72.) On August 29, 2014, OCR amended the complaint to include an additional allegation, namely, that school staff members subjected Jane to harassment, including by referring to her as a boy and failing to use female pronouns when referring to her, and that the School District failed to respond appropriately when staff members were informed of student harassment toward Jane. (*Id.* at ¶ 73; Compl., Doc. 1 at ¶ 100.)

***3** In September 2014, at the beginning of Jane's third-grade year, Joyce also filed a complaint with Superintendent William Dodds against Principal Winkelfoos, alleging that Highland had created a hostile environment for Jane. Dodds investigated the complaint and found it to be without merit. (Joyce Doe Decl., Doc. 35–2 at ¶ 17.) That same month, Joyce put in a request to Superintendent Dodds to ask the Board of Education to permit Jane to use the girls' restroom. (*Id.* ¶ 18.) Dodds later told Joyce that the Board had considered her request and voted not to grant it. (*Id.*)

As the beginning of fourth grade approached, Jane became anxious about returning to school because she would not be permitted to use the girls' restroom and she feared that teachers and other students would harass and bully her, including by using her birth name and male pronouns when referring to her. (*Id.* at ¶ 19.) In August 2015, she attempted suicide. (*Id.*)

After Jane began fourth grade, the School District required her to use a restroom in the staff room. (*Id.* at ¶ 20.) The restroom was kept locked so that for Jane to gain access to it, a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class. (*Id.*) As a result, Jane began to refuse to use the restroom at school and to limit her fluid intake during the day. (*Id.* at ¶ 21.) Joyce characterized her as more agitated and combative when she returned home each day. (*Id.*) Jane herself stated that when she has to use a different restroom from everyone else, she feels alone and not part of the school. (Declaration of Jane Doe, Doc. 35–1 at ¶ 5.) She said that when other students line up to go to the restroom, she "leave[s] the line to go to a different restroom, [and] other kids say, 'Why are you going that way? You're supposed to be over here.' " (*Id.* at ¶ 6.) One friend asked her: "Why are you going to another restroom? You're a girl. Girls go to the girls' restroom." (*Id.* at ¶ 7.) She also stated that other students

sometimes bully her, call her a boy, or tell her to act like a boy, and that some teachers have told her she was a boy and called her by her birth name. (*Id.* at ¶¶ 9, 11.)

Based on her experience working with transgender children, Dr. Ehrensaft believes that "it would be psychologically damaging for a transgender child to be forced to use a separate restroom and repeatedly referred to by her birth name and male pronouns," and that circumstances such as a history of serious health conditions and prior suicide attempts "would amplify risk of harm to the child." (Ehrensaft Decl., Doc. 35–4 at ¶ 42.)

Notwithstanding the prohibition on Jane's use of the girls' restroom, Jane has used the girls' restroom on several occasions, and Joyce asserts that none of these occasions caused any harm to other students. (Joyce Doe Decl., Doc. 35–2 at ¶ 22.) While Jane participated in an after-school running club in April and May 2014, her coach allowed her to use a girls' restroom at the school. (*Id.* at ¶ 23.) In October 2014, Jane attended an after-school program called God's Kids, during which the office and teachers' lounge were locked and Jane was permitted to use the girls' restroom. (*Id.* at ¶ 24.) In April 2015, Jane used the girls' restroom at the local zoo during a school field trip there. (*Id.* at ¶ 25.) Finally, she used a girls' restroom at the elementary school during after-school choir practice and at Highland High School during a summer volleyball camp. (*Id.* at ¶¶ 26–27.)

Defendants Dodds and Winkelfoos have submitted affidavits attesting that they and other School District officials have taken prompt action to revise school records to reflect Jane's current legal name and insisting that Highland staff have made a concerted effort to address her with the name and pronouns of her choice. (Declaration of William Dodds, Doc. 64 at ¶ 9; Declaration of Shawn Winkelfoos, Doc. 65 at ¶ 20.) Dodds and Winkelfoos also stated that they perceive Jane to be consistently happy while at school and that at the beginning of the school year Jane "high-fived" Dodds and told him she was having fun at school. (Dodds Decl., Doc. 64 at ¶¶ 5, 11; Winkelfoos Decl., Doc. 65 at ¶ 3.) They also submitted copies of emails between Joyce Doe and school officials documenting steps Highland took to help Jane deal with her eating disorder and other health issues. (Emails, Docs. 65–1, 65–2.) Finally, they assert that Jane has never attempted self-harm or exhibited anger issues at school. (Winkelfoos Decl., Doc. 65 at ¶¶ 4–5; Dodds Decl., Doc. 64 at ¶ 6.) She has regularly met with the school's social workers and psychologist, with Joyce Doe's consent. (Winkelfoos Decl., Doc. 65 at ¶ 9.) Finally, they point to the school safety plan Highland created for Jane and note that Joyce recently informed them that Jane's suicide risk had been downgraded from high to moderate. (*Id.* at ¶ 22; Doc. 65–9.)

***4** Three parents of other Highland students submitted affidavits in support of the School District's policies. One parent testified that her seventh-grade son who attends Highland Middle School "would be uncomfortable if a girl came into the restroom while he was in there" and that she did not approve of her son sharing a restroom, locker room, or overnight accommodations with girls. (Declaration of Parent H., Doc. 68 at ¶¶ 2, 5.) Another Highland parent, whose two foster daughters have suffered horrific sexual abuse and, as a result, suffer from psychological trauma, submitted an affidavit explaining that for her daughters, "the male anatomy is a weapon by which they were assaulted" and they would feel vulnerable being in the presence of biological males when showering, changing clothes, or using the bathroom. (Declaration of S.B., Doc. 69 at ¶¶ 6, 14–15.) As a result, she contends that "[t]he very presence of a male, regardless of whether he identifies as a female, in my daughters' restroom or locker room...will almost certainly cause severe trauma that will set back their emotional and psychological healing process." (*Id.* at ¶ 16.)

On March 29, 2016, OCR notified Highland that its treatment of Jane Doe violated Title IX. (Complaint-in-Intervention, Doc. 32 at ¶ 75.) The following day, OCR presented a proposed Resolution Agreement to the School District, which provided, in relevant part, that the School District would grant Jane access to sex-specific facilities consistent with her gender identity, treat Jane consistent with her gender identity, and engage a third-party consultant with expertise in child and adolescent gender identity to assist it in implementing the terms of the Agreement. (Compl., Doc. 1 at ¶ 104; Resolution Agreement, Doc. 10–4 at 2–3.) On June 10, 2016, the School District filed this lawsuit, stating in its complaint that Highland had decided not to accept the Resolution Agreement. (Compl., Doc. 1 at ¶ 118.) That same day, OCR sent a letter to the School District's attorney informing him that OCR had learned of the lawsuit. (Letter, Doc. 10–7 at 2.) The letter noted that, due to the lawsuit as well as several unsuccessful attempts to

communicate with the School District, OCR planned to end the 90–day period for negotiations over the Resolution Agreement. (*Id.* at 1–2.) The letter further stated that within 10 days OCR would issue another letter finding the School District in violation of Title IX. (*Id.* at 2.)

On June 28, 2016, OCR issued its letter of findings from its investigation. (Complaint-in-Intervention, Doc. 32 at ¶ 76; Letter, Doc. 10–8.) OCR found that the School District was in violation of Title IX because it: "(1) failed to assess whether a hostile environment existed for [Jane]; and 2) denied [Jane] access to restrooms consistent with [Jane's] gender identity." (*Id.* at 2.) The letter further stated:

> If OCR determines that the matter cannot be resolved voluntarily by informal means OCR then must either initiate proceedings to effectuate the suspension or termination of or refusal to grant or to continue Federal financial assistance or seek compliance through any means otherwise authorized by law. Such other means may include, but are not limited to, referring the matter to the Department of Justice to initiate a lawsuit. 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. §§ 100.7(c)–(d)); 100.8; 100.9(a)).

(*Id.* at 12.) The School District received $1,123,390 in federal funds for the 2015–2016 school year out of a total budget of $15,400,000. (Compl., Doc. 1 at ¶ 128.)

On July 29, 2016, OCR issued a Letter of Impending Enforcement Action to the School District. (Enforcement Letter, Doc. 33–7.) OCR stated that it "will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance to the District or refer the case to the U.S. Department of Justice for judicial proceedings to enforce any rights of the United States under its laws." (*Id.* at 14.) The letter further stated that OCR "can take this action after 15 calendar days of the date of this letter if a resolution of this matter is not reached." (*Id.* at 14–15.)

C. Procedural History

***5** On June 10, 2016, the Board of Education of the Highland Local School District ("Highland" or "School District") commenced this lawsuit, alleging that the actions of the DOJ, DOE, Secretary of Education John King, Attorney General Loretta Lynch, and Principal Deputy Assistant Attorney General Vanita Gupta (collectively, "Defendants" or "federal Defendants") violated: (1) the Administrative Procedure Act ("APA"); (2) the Spending Clause of Article I, Section 8 of the United States Constitution; (3) the federalism guarantees of the United States Constitution; (4) the separation-of-powers guarantees of the United States Constitution; and (5) the Regulatory Flexibility Act. (Compl., Doc. 1 at ¶¶ 132–247.) The School District filed a motion for preliminary injunction on July 15, 2016. (Doc. 10.)

On July 21, 2016, Jane Doe and her parents moved to intervene as third-party plaintiffs in the suit and to proceed pseudonymously. (Docs. 15–16.) The Court granted both motions (Doc. 29), and Jane subsequently filed her own motion for preliminary injunction against Dodds, Winkelfoos (together, the "individual Third-Party Defendants"), the Board of Education of the Highland Local School District, and the Highland Local School District (collectively, "Third-Party Defendants"). (Docs. 35–36.) In her third-party complaint, Jane brings claims against Third-Party Defendants for violations of: (1) her Fourteenth Amendment right to equal protection of the laws; (2) her right to be free from sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*; and (3) her fundamental right to privacy under the United States Constitution. (Doc. 32 at ¶¶ 78–108.)

Both motions for preliminary injunction are now ripe for review. The Court has also granted the State of Ohio's motion for leave to file an *amicus curiae* brief on behalf of the School District. (*See* Doc. 30.)

Highland asks the Court to enjoin the federal Defendants from enforcing what the School District characterizes as the "agency rule" declaring: (1) that the term "sex" in Title IX and its regulations includes "gender identity"; and (2) that Title IX requires schools to allow students to access overnight accommodations, locker rooms, and restrooms consistent with their professed gender identity.

(Doc. 10 at 1.) Highland also asks the Court to enjoin Defendants from: (1) enforcing Title IX in a manner that would require it to allow transgender students "to access overnight accommodations, locker rooms, and restrooms designated for the opposite sex"; and (2) taking any adverse action against the School District, including but not limited to steps to revoke its federal funding, because of its policy "requiring students to use sex-specific overnight accommodations, locker rooms, and restrooms consistent with their sex." (*Id.* at 1–2.) Defendants and Jane Doe oppose Highland's motion for preliminary injunction. (Docs. 33–34.)

Jane Doe asks for a preliminary injunction requiring the School District and other Third-Party Defendants to "treat her as a girl and treat her the same as other girls, including using her female name and female pronouns and permitting Jane to use the same restroom as other girls at Highland Elementary School during the coming school year." (Doc. 36 at 2.) The School District and the individual Third-Party Defendants oppose Jane Doe's motion for preliminary injunction. (Docs. 61, 71.) [1]

1 The States of Texas, Arkansas, Arizona, West Virginia, Alabama, Wisconsin, Georgia, Nebraska, Louisiana, South Carolina, Utah, and Mississippi and the Commonwealth of Kentucky have filed a Motion for Leave to File Brief as *Amici Curiae.* (Doc. 53.) Additionally, a group of school administrators and staff members from California, the District of Columbia, Florida, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin filed a Motion for Leave to Participate as *Amici Curiae* in Support of Jane Doe and, subsequently, a Corrected Motion for Leave to File Amicus Brief. (Docs. 86, 91–1.) Leave to participate as *amicus curiae* is a "privilege within the sound discretion of the courts." *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir.1991) (internal quotation marks and citation omitted). Because school districts and their staff throughout these states are also affected by the agency action at issue here, the Court finds that these parties have "an important interest and a valuable perspective on the issues presented." *United States v. City of Columbus*, No. 2:99–cv–1097, 2000 WL 1745293, at *1 (S.D.Ohio Nov. 20, 2000) (quotation marks and citations omitted). The Court, therefore, **GRANTS** the motions to file amicus briefs. (Docs. 53, 86, 91– 1.)

II. LEGAL STANDARD

***6** **[1]** **[2]** The Sixth Circuit's test to determine whether injunctive relief is appropriate under Federal Rule of Civil Procedure 65 requires the Court to weigh the following factors: (1) whether the movant has a substantial likelihood of success on the merits; (2) whether there is a threat of irreparable injury to the movant 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 granting injunctive relief. *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir.2010). These four factors "guide the discretion of the district court," but "they do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief." *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir.1982). Whether the combination of the factors weighs in favor of issuing injunctive relief in a particular case is left to the discretion of the district court. *See Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir.2000).

[3] **[4]** While the Sixth Circuit has held that "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion," *id.* a party "is not required to prove his case in full at a preliminary injunction hearing and the findings of fact and conclusions of law made by a court granting the preliminary injunction are not binding at trial on the merits," *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir.2007) (citation omitted). A plaintiff has "the burden of establishing a clear case of irreparable injury and of convincing the Court that the balance of injury favor[s] the granting of the injunction." *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (6th Cir.1968) (per curiam).

III. HIGHLAND'S MOTION FOR PRELIMINARY INJUNCTION

[5] At the outset, Defendants contend that the Court lacks subject-matter jurisdiction over the School District's APA claim. Because Congress has established a specific enforcement scheme for Title IX, Defendants argue that

the School District is prohibited from seeking judicial review in this Court before any enforcement action has occurred. (Doc. 33 at 1.)

After an investigation, if OCR finds a school district in violation of Title IX and cannot obtain voluntary compliance from the district, OCR may seek compliance in one of two ways. First, it may initiate administrative proceedings to withhold federal funds from the school district. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(c). A district is entitled to a hearing before an administrative law judge followed by an administrative appeal and discretionary review by the Secretary of Education. *Id.* § 100.10(a), (e). A district may then seek review of an adverse decision in the appropriate court of appeals. 20 U.S.C. § 1683; *see* 20 U.S.C. § 1234g(a)–(b). Alternatively, instead of initiating administrative proceedings, OCR may refer the matter to DOJ to commence a civil action in the appropriate federal district court to enjoin further violations. 34 C.F.R. § 100.8(a); *see also* 20 U.S.C. § 1682.

Relying heavily on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994), Defendants contend that this enforcement scheme precludes district court jurisdiction over parallel pre-enforcement challenges. In *Thunder Basin*, the Supreme Court held that Congress's intent to preclude district court review of pre-enforcement challenges was "fairly discernible in the statutory scheme" of the Federal Mine Safety and Health Amendments Act of 1977 (the "Mine Act"), a statute with an enforcement process quite similar to that of Title IX. *Id.* at 207, 114 S.Ct. 771 (quotation marks and citation omitted).

[6] Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, purpose, legislative history, and the opportunity provided for meaningful review of the claims. *Id.* The Mine Act "establishes a detailed structure for reviewing violations of 'any mandatory health or safety standard, rule, order, or regulation promulgated' under the Act." *Id.* (quoting 30 U.S.C. § 814). A mine operator's challenge to a citation issued under the Mine Act is heard by an administrative law judge with discretionary review by the Federal Mine Safety and Health Review Commission. *Id.* at 207–08, 114 S.Ct. 771. An operator may appeal an adverse decision to the appropriate court of appeals. *Id.* at 208, 114 S.Ct. 771. The Mine Act specifies that the Commission and the courts of appeals have exclusive jurisdiction over challenges to agency enforcement proceedings but is "facially silent with respect to pre-enforcement claims." *Id.* In *Thunder Basin*, a mine operator failed to post identifying information about the miners' union representatives, taking the position that nonemployees should not be permitted to serve as representatives, and the Mine Safety and Health Administration sent the operator a letter instructing it to post the miners' representative designations as required by the Mine Act's regulations. *Id.* at 204, 114 S.Ct. 771. The mine operator filed suit for injunctive relief before it was actually issued a citation. *Id.* at 205, 114 S.Ct. 771.

***7** The Supreme Court held that the structure and legislative history of the Act showed Congress's intent to preclude pre-enforcement challenges in federal district courts. *Id.* at 216, 114 S.Ct. 771. First, the Court noted that the Act's "comprehensive review process does not distinguish between preenforcement and postenforcement challenges, but applies to all violations of the Act and its regulations." *Id.* at 208–09, 114 S.Ct. 771. The Act expressly authorizes district court jurisdiction in only two provisions, neither of which provides a right of action to the mine operators themselves. *Id.* at 209, 114 S.Ct. 771. Second, the legislative history suggested that before enactment Congress was concerned that civil penalties against operators were both too low and non-mandatory and, in particular, that under an earlier statute, mine operators could contest civil-penalty assessments *de novo* in federal district court once the administrative review process was complete. *Id.* at 210, 114 S.Ct. 771.

The enforcement mechanisms of Title IX are indeed similar to that of the Mine Act, notably the administrative hearing and appeal process, judicial review in the court of appeals, and express authorization of district court jurisdiction in suits by the Secretary but not the regulated parties. *See* 20 U.S.C. §§ 1682–83; 34 C.F.R. § 100.8(a)(1). The School District resists this comparison to the Mine Act, pointing to statutory language in Title IX that provides that "[a]ny department or agency action taken pursuant to section 1682...shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." 20 U.S.C. § 1683. Section 1682, in turn, authorizes the agency to effectuate compliance with the anti-discrimination provisions of the statute by initiating termination proceedings against funding recipients. But the judicial review provided "for similar action" in § 1683

references the general provision for judicial review of funding termination decisions in 20 U.S.C. § 1234g(b), which provides that a recipient may seek judicial review in the appropriate court of appeals and that "[t]he Secretary may not take any action on the basis of a final agency action until judicial review is completed." *Id.* § 1234g(a); *see Freeman v. Cavazos*, 923 F.2d 1434, 1440 (11th Cir.1991) (holding that the "applicable judicial review provision" for "similar action" in Title VI of the Civil Rights Act is 20 U.S.C. § 1234g).

The remainder of § 1683, in turn, only applies to funding terminations "not otherwise subject to judicial review." Therefore, when an action *is* "otherwise subject to judicial review," no *additional* judicial review is available under § 1683.

This understanding finds support in other cases involving the potential termination of federal funds. For example, a district court in this circuit held that a provision of Title VI, 42 U.S.C. § 2000d–2, which is virtually identical to § 1683, precluded federal district court jurisdiction over a complaint seeking an injunction against a pending administrative process. *Sch. Dist. of City of Saginaw, Mich. v. U.S. Dep't of Health, Educ., & Welfare*, 431 F.Supp. 147, 152 (E.D.Mich.1977). *See also Taylor v. Cohen*, 405 F.2d 277, 281 (4th Cir.1968) (finding no subject-matter jurisdiction over a complaint for injunctive relief against a federal agency because Title VI dictates that "[j]udicial review must await the outcome of the administrative hearing"). In both cases, the availability of administrative review at the agency level, coupled with judicial review in the court of appeals, divested the district court of only pre- or mid-enforcement jurisdiction. *See id.* at 279–80 ("[I]f specific statutes relating to programs receiving federal assistance afford review of agency action, then review under the Administrative Procedure Act is not available.").

Highland also looks for support from *Cannon v. University of Chicago*, in which the Supreme Court held that there is a private right of action under Title IX for victims of discrimination, for the proposition that the presumption of reviewability should apply to other Title IX claims that are not expressly precluded. 441 U.S. 677, 709, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). A district court in Texas, which recently concluded it had jurisdiction over a challenge from several states to the guidance at issue here, also relied on *Cannon* in adopting this reasoning. *Texas v. United States*, ––F.Supp.3d ––––, ––––, 2016 WL 4426495, at *10 (N.D.Tex. Aug. 21, 2016) ("Neither Title VII nor Title IX presents statutory schemes that would preclude Plaintiffs from bringing these claims in federal district court. Indeed, the Supreme Court has held that Title IX's enforcement provision, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory remedy for violations.") (citing *Cannon*, 441 U.S. at 680, 99 S.Ct. 1946). The *Texas* court's analysis can charitably be described as cursory, as there is undoubtedly a profound difference between a discrimination victim's right to sue in federal district court under Title IX and a school district's right to challenge an agency interpretation in federal district court. This Court cannot assume that the first right implies the second.

***8** Indeed, in *Cannon*, applying the four-part text from *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), to determine whether a private right of action existed, the Court noted that the first factor—whether the statute was enacted for the benefit of a special class of which the plaintiff is a member—favored finding an implied right of action for the plaintiff, who alleged she had been denied admission to a university on the basis of her sex. *Cannon*, 441 U.S. at 694, 99 S.Ct. 1946. Title IX was not, on the other hand, enacted to benefit school districts. Further, in *Cannon*, the Supreme Court found that the statutory structure was "aimed at protecting individual rights without subjecting the Government to suits." *Id.* at 715, 99 S.Ct. 1946. This militates squarely against finding a private right of action in federal district court for school districts against the federal government. And the *Cannon* Court also noted that allowing an action against the agency would be "far more disruptive" of its enforcement efforts "than a private suit against the recipient of federal aid could ever be." *Id.* at 707 n. 41, 99 S.Ct. 1946. The implied right of action the Supreme Court found in *Cannon* does not support, and even weakens, Highland's position. There is "[n]othing in the language and structure of the Act or its legislative history [to] suggest[ ] that Congress intended to allow [regulated parties] to evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings." *Thunder Basin*, 510 U.S. at 216, 114 S.Ct. 771.

Highland also relies on *Sackett v. Environmental Protection Agency*, ––U.S. ––––, 132 S.Ct. 1367, 1374, 182 L.Ed.2d 367 (2012), where the Supreme Court found that a district court had subject-matter jurisdiction to

consider two landowners' APA claim challenging the issuance of an EPA compliance order. The agency argued that because the statute "expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing" but "did not expressly provide for review of compliance orders," the compliance order was unreviewable. *Id.* at 1373. The Court rejected that argument, explaining that "if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Id.* But the enforcement scheme of the Clean Water Act, the statute at issue in *Sackett*, bears little resemblance to that of Title IX or the Mine Act in *Thunder Basin.* In *Sackett*, receipt of a compliance order subjected the plaintiffs to additional penalties for each day they failed to comply and made it more difficult for them to obtain a permit from the Army Corp of Engineers for the discharge of pollutants. *Id.* at 1372. Highland faces no such consequences for its failure to comply with Title IX at this time. Moreover, and more importantly, express judicial review of such orders came only by way of a civil action initiated by the agency; there was no corresponding review in the court of appeals after administrative action as Title IX provides for funding-termination decisions. *Id.* at 1372–73. Here, in contrast, the enforcement scheme imposes no immediate penalties for non-compliance and the School District itself may initiate judicial review in the court of appeals after an adverse funding-termination decision from the agency.

There is also no merit in Highland's argument that now that Jane has intervened in the lawsuit, it will be deprived of any meaningful judicial review if this Court finds that it lacks jurisdiction over Highland's complaint while Highland is nevertheless forced to defend against Jane's third-party complaint. In such a scenario, Highland retains the ability, of course, to raise as a defense to Jane's Title IX claim its arguments that the guidance violates Title IX.

The Court lacks subject-matter jurisdiction over the APA claim and, accordingly, it also lacks jurisdiction over Highland's constitutional claims. *See Elgin v. Dep't of Treasury*, —— U.S. ——, 132 S.Ct. 2126, 2132–33, 183 L.Ed.2d 1 (2012) ("Accordingly, the appropriate inquiry is whether it is "fairly discernible" from the [statute] that Congress intended covered employees appealing covered agency actions to proceed exclusively through the statutory review scheme, even in cases in which the employees raise constitutional challenges to federal statutes."). Dismissal of Highland's constitutional claims "does not foreclose all judicial review of petitioners' constitutional claim" because "meaningful review" of such claims is also available in the court of appeals. *Id.* That Congress "declined to include an exemption from [court of appeals] review for challenges to a statute's constitutionality indicates no such exception." *Id.* at 2134–35. *See also Thunder Basin*, 510 U.S. at 215, 114 S.Ct. 771 ("The [agency] has addressed constitutional questions in previous enforcement proceedings. Even if this were not the case, however, petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals." (footnotes omitted)).

***9** Because the Court lacks jurisdiction over its complaint, Highland's motion for preliminary injunction is **DENIED**. [2]

2 Even if the Court had subject-matter jurisdiction here, Highland's APA claim would fail because it has an "adequate remedy in a court" and thus Highland cannot state a claim under the APA. 5 U.S.C. § 704. The Sixth Circuit recently held that a tour bus company operator, who sued the Federal Motor Carrier Safety Administration for a violation of the APA after the agency issued him an out-of-service order and then later rescinded it, had an adequate remedy in a court when the applicable statute provided for a hearing after an out-of-service order was imposed, followed by review in the appropriate court of appeals. *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 428 (6th Cir.2016).Here too, Highland has an adequate remedy in a court because it may seek review in the Sixth Circuit if OCR commences an enforcement action and issues an adverse decision to Highland. In the same vein, if, instead of commencing administrative proceedings, DOJ filed suit against Highland in federal district court to enjoin its policies, Highland would "almost by definition [ ] have an adequate remedy in a court, that is, the remedy of opposing the Attorney General's motions in the court in which [s]he files h [er] papers." *NAACP v. Meese*, 615 F.Supp. 200, 203 (D.D.C.1985). Highland's argument to the contrary —that its only avenue for review in the court of appeals does not allow it to make a direct challenge to the guidance itself—fails because its remedy remains the same regardless of its type of challenge: keeping

its federal funding while maintaining its policy of denying Jane access to the girls' restroom.

IV. JANE DOE'S MOTION FOR PRELIMINARY INJUNCTION

A. Jane is Likely to Succeed on the Merits of Her Title IX and Equal-Protection Claims

Jane argues that she is likely to succeed on the merits of her Title IX and equal-protection claims and makes no argument regarding her right-to-privacy claim. Accordingly, the Court will focus on the merits of only the first two claims.

1. Jane is Likely to Succeed on Her Title IX Claim

[7] In *Cannon v. University of Chicago*, the Supreme Court held that Title IX affords an implied private right of action to victims of discrimination. 441 U.S. at 709, 99 S.Ct. 1946. To succeed on a Title-IX discrimination claim, Jane must show: (1) that she was excluded from participation in an education program because of her sex; (2) that the educational institution received federal financial assistance at the time of the exclusion; and (3) that the discrimination harmed her. *See id.* at 680 & n. 2, 99 S.Ct. 1946; *Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir.1994) (holding that the *Cannon* Court "implicitly recognized the necessity of causation," the third element of a discrimination claim, when it held plaintiff had stated a cause of action for discrimination under Title IX). The parties do not dispute that the School District receives financial assistance, but they disagree on whether Jane was excluded from participation in an education program because of her sex and whether this discrimination harmed her.

***10** As a preliminary matter, the regulation pertaining to "[e]ducation programs or activities" provides that "in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:...(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;...[or] (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R. § 106.31(b). The Court easily concludes, and Third-Party Defendants do not dispute, that access to a communal school bathroom constitutes an "aid, benefit[ ], or service [ ]" or a "right, privilege, advantage, or opportunity." Access to the bathroom is thus an education program or activity under Title IX.

[8] The crux of Jane's motion turns on whether she was excluded from the girls' bathroom "on the basis of sex." 20 U.S.C. § 1681. Title IX authorizes implementing agencies to "issu[e] rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." *Id.* § 1682. Title IX's implementing regulations permit schools to "provide separate toilet, locker room, and shower facilities on the basis of sex" so long as the "facilities provided for students of one sex" are "comparable to facilities provided for students of the other sex." 34 C.F.R. § 106.33; 28 C.F.R. § 54.410. Title IX does not define "sex" in either the statute or the regulations, and the regulations are silent as to how to determine a transgender student's sex for purposes of access to bathrooms, locker rooms, and shower facilities.

The School District argues that Defendants' guidance is inconsistent with the objectives of Title IX. Under the School District's view, the statute's aim is to prohibit federally funded schools from discriminating only on the basis of biological sex, which it contends is defined as the sex appearing on one's birth certificate.[3] Further, the School District argues that "sex" under Title IX unambiguously means "biological sex" and does not include "gender identity." Jane counters that the federal Defendants' interpretation is consistent with Title IX and its implementing regulations and that the interpretation must be given controlling weight under *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

3 Under Ohio law, a person may not change the sex recorded on his or her birth certificate, and, therefore, a birth certificate reflects the sex a person has been assigned at birth. *See* Ohio Rev. Code §§ 3705.15, 3705.22.

[9] *Auer* requires courts to give controlling weight to an agency's interpretation of its own regulation provided that the regulation is ambiguous and the agency's interpretation is not "plainly erroneous or inconsistent with the regulation." *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). *Auer* deference is not appropriate, however, when "there is reason to suspect

that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question,' " for instance, when the agency's interpretation conflicts with a prior interpretation or appears to be nothing more than a convenient litigation position or *post hoc* rationalization advanced to defend past agency action against attack. *Christopher v. SmithKline Beecham Corp.*, —— U.S. ——, 132 S.Ct. 2156, 2166–67, 183 L.Ed.2d 153 (2012) (quoting *Auer*, 519 U.S. at 462, 117 S.Ct. 905).

[10] In deciding whether *Auer* deference is warranted, the Court must first determine whether the statute and its implementing regulations are ambiguous, that is, "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Whether the language is ambiguous depends on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341, 117 S.Ct. 843 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992)).

***11** Turning first to the language of the statute and regulations, the parties debate the dictionary definition of "sex" at the time of the enactment of Title IX, but the Court sees no need to recite those definitions extensively because they do not settle the question of ambiguity. Suffice it to say that dictionaries from that era defined "sex" in myriad ways and, therefore, Highland has not persuaded the Court that dictionary definitions reflect a uniform and unambiguous meaning of "sex" as biological sex or sex assigned at birth. [4] To the extent that Highland tries to divine Congress's view of "sex" at the time of Title IX's enactment, the Court puts little stock in the wisdom of that endeavor or its possibility of success. [5] As the Supreme Court acknowledged in *Oncale v. Sundowner Offshore Services, Inc.*, a case that held that same-sex sexual harassment was actionable under Title VII even though it was "assuredly not the principal evil Congress was concerned with when it enacted Title VII," a statue's "prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Provided that the discrimination "meets the statutory requirements" that it was "because of...sex," it passes muster under Title VII. *Id.* at 79–80, 118 S.Ct. 998.

4 For instance, in 1973 the American Heritage Dictionary defined sex as "the physiological, functional, and psychological differences that distinguish the male and the female." Am. Heritage Dictionary 548, 1187 (1973). The 1970 Webster's Seventh New Collegiate Dictionary defined sex to include "behavioral peculiarities" that "distinguish males and females." Webster's Seventh New Collegiate Dictionary 347, 795 (1970). These definitions suggest a view of sex that is not solely tied to reproductive function or genitalia. On the other hand, according to the 1980 Random House College Dictionary, sex is "either the male or female division of a species, esp. as differentiated with reference to the reproductive functions." Random House College Dictionary 1206 (rev. ed. 1980). The 1976 American Heritage Dictionary defined sex as "the property or quality by which organisms are classified according to their reproductive functions." Am. Heritage Dictionary 1187 (1976).

5 Nor is the Court persuaded by Highland's attempts to glean the meaning of sex from Congress's *inaction*, specifically its failure to amend Title VII or Title IX to insert the phrase "gender identity" in contrast with its decision to add this phrase to the Violence Against Women Act. *See* 42 U.S.C. § 13925(b)(13)(A); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.") (internal quotation marks omitted); *Atkinson v. Inter–Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C.Cir.1998) ("Congress does not express its intent by a failure to legislate.") (citing *United States v. Estate of Romani*, 523 U.S. 517, 535, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998) (Scalia, J., concurring)).

Looking at both the specific and broader context of the use of the term "sex," neither Title IX nor the implementing regulations define the term "sex" or mandate how to determine who is male and who is female when a school provides sex-segregated facilities. The Fourth Circuit, the only federal appeals court that has examined this question, recently concluded that Title IX and the regulation that permits separate restroom facilities for males and females, 34 C.F.R. § 106.33, were ambiguous

as to how to make this determination for purposes of access to sex-segregated restrooms, because the statute "permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity." *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir.2016), *mandate recalled and stayed*, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, ––U.S. ––––, 136 S.Ct. 2442, –– L.Ed.2d –––– (2016).[6] In support of its finding of ambiguity, the Fourth Circuit noted that to interpret "sex" to mean "biological sex" would still raise a number of questions as to how the bathroom regulation would apply. *Id.* at 720–21. For instance, "which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X–X–Y sex chromosomes? What about an individual who lost external genitalia in an accident?" *Id.* Highland urges the Court to reject the reasoning of *Gloucester* but also tries to distinguish that case because the Fourth Circuit only considered the ambiguity of the regulation permitting sex-segregated bathrooms, 34 C.F.R. § 106.33, not the meaning of "sex" in Title IX itself. This argument is unconvincing, as the Fourth Circuit looked broadly at the meaning of "sex" throughout the statue and its implementing regulations. *See Gloucester*, 822 F.3d at 723 ("We agree that 'sex' should be construed uniformly throughout Title IX and its implementing regulations.").

6 Although the Supreme Court recalled and stayed the Fourth Circuit's mandate pending a decision on a petition for certiorari, a grant of certiorari, much less a stay of a mandate pending a decision on certiorari, "do[es] not [itself] change the law." *Schwab v. Dep't of Corr.*, 507 F.3d 1297, 1298 (11th Cir.2007) (per curiam). Accordingly, "unless the Supreme Court rules otherwise, the Fourth Circuit precedent detailed above binds [district courts in the Fourth Circuit] on questions of law." *Height v. United States*, No. 5:16–cv–00023, 2016 WL 756504, at *4 n. 3 (W.D.N.C. Feb. 25, 2016). A district court within the Fourth Circuit itself has accordingly concluded it was bound by *Gloucester*. *See Carcano v. McCrory*, –– F.Supp.3d ––––, ––––, 2016 WL 4508192, at *13 (M.D.N.C. Aug. 26, 2016). Although this Court is, of course, not so bound, it is entitled to give great weight to a decision of the Fourth Circuit that remains good law. *See Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 278 & n. 3 (6th Cir.2010).

***12** **[11]** Moreover, the Sixth Circuit has expressly held that a plaintiff can prevail on a claim for sex discrimination under Title VII,[7] an analog provision of the Civil Rights Act of 1964, if he or she "has suffered discrimination because of his or her gender non-conformity." *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir.2004); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir.2005) ("A claim for sex discrimination under Title VII, however, can properly lie where the claim is based on 'sexual stereotypes.' "). In *Smith*, the Sixth Circuit held that such a holding was required by the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), *superseded by statute on other grounds as stated in Burrage v. United States*, –– U.S. ––––, 134 S.Ct. 881, 889 n. 4, 187 L.Ed.2d 715 (2014). Gender nonconformity, as defined in *Smith*, is an individual's "fail[ure] to act and/or identify with his or her gender," in that case, an individual who was assigned male at birth but later identified as female. 378 F.3d at 575.

7 Courts look to Title VII of the Civil Rights Act of 1964 "as an analog for the legal standards in both Title IX discrimination and retaliation claims." *Nelson v. Christian Bros. Univ.*, 226 Fed.Appx. 448, 454 (6th Cir.2007); *see also Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 n. 2 (6th Cir.2013).

Third-Party Defendants try to make hay of the fact that the Sixth Circuit issued an amended opinion in *Smith*, which deleted a paragraph stating that "to the extent that Smith also alleges discrimination based solely on his identification as a transsexual, he has alleged a claim of sex stereotyping pursuant to Title VII." *Smith v. City of Salem*, 369 F.3d 912, 922 (6th Cir.2004), *opinion amended and superseded by Smith v. City of Salem*, 378 F.3d 566 (6th Cir.2004). But even after excising that language, the amended opinion in *Smith* expressly rejected a view of sex as a classification based purely on reproductive organs or sex assigned at birth. *See* 378 F.3d at 572 ("[W]e find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because '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.' "); *id.* at 575 ("[A] label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *id.* at 573 (quoting a

Ninth Circuit case, *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir.2000), for the proposition that " 'sex' under Title VII encompasses both the anatomical differences between men and women and gender"). [8] *Smith* thus supports a reading that under Title IX discrimination on the basis of a transgender person's gender non-conformity constitutes discrimination "because of sex."

8 An analogy employed by another district court shows just why discrimination against a transgender employee constitutes discrimination "because of sex" under Title VII:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

Schroer v. Billington, 577 F.Supp.2d 293, 306–07 (D.D.C.2008).

***13** Third-Party Defendants also cite several district court cases that have cut the other way and held that Title IX and its regulations permit schools to provide sex-specific locker-room, shower, and toilet facilities. But, again, these cases do not support a reading of the statute as unambiguous because the Sixth Circuit, as well as several other courts of appeals, have held that sex-discrimination claims based on gender noncomformity are cognizable under Title IX's close cousin, Title VII. *See Smith*, 378 F.3d at 573–75; *Gloucester*, 822 F.3d at 720; *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir.2011) ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir.2000); *Schwenk*, 204 F.3d at 1201 (noting that "[t]he initial judicial approach" of interpreting Title VII to ban discrimination on the basis of an individual's "distinguishing biological or anatomical characteristics" rather than the individual's "sexual identity" or "socially-constructed characteristics" was "overruled by the logic and language of *Price Waterhouse*").

Additionally, although Highland contends that the "weight of authority" is on its side, the School District cites only district court cases, most of which concerned the application of Title IX *before* the agencies' most recent guidance was issued. [9] For the Court to find that the statute was ambiguous, it need not find that the agencies' interpretation is the *only* plausible reading of "sex" in the statute, but, rather, that it is *one* of the plausible readings. Therefore, the district court cases Third-Party Defendants cite are not dispositive of this issue. The Court finds that the term "sex" in Title IX and its implementing regulations regarding sex-segregated bathrooms and living facilities is ambiguous, *see* 20 U.S.C. § 1686; 34 C.F.R. § 106.32; *id.* § 106.33, and thus presumptively entitled to *Auer* deference.

9 For instance, in *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, a district court confronted similar facts but did not consider the agency's interpretation of § 106.33 and thus lacks persuasive effect here. 97 F.Supp.3d 657, 670 (W.D.Pa.2015). The Fourth Circuit rejected *Johnston* on the same grounds. *See Gloucester*, 822 F.3d at 723 n. 9.

[12] Next, the Court concludes that the agencies' interpretation is not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461, 117 S.Ct. 905 (quoting *Methow Valley*, 490 U.S. at 359, 109 S.Ct. 1835). An agency's view "need not be the best or most natural one by grammatical or other standards....Rather, the [agency's] view need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) (internal citation omitted). The agencies easily satisfy this deferential standard. First, the only federal appeals court that has considered this question has already determined that Defendants' interpretation of § 106.33 is reasonable. *See Gloucester*, 822 F.3d at 722 (holding that § 106.33 "sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge" and concluding that the agencies' interpretation was reasonable). Moreover, the Sixth Circuit's construction of sex discrimination under

Title VII in *Smith* and *Barnes* to include discrimination against transgender individuals who do not conform to the stereotypes of the sex assigned to them at birth weighs in favor of finding that the agencies' interpretation of Title IX and its implementing regulations is reasonable. The Court finds that Defendants' interpretation is not clearly erroneous or inconsistent with Title IX implementing regulations. *Auer*, 519 U.S. at 461, 117 S.Ct. 905.

Moreover, although neither Highland nor the individual Third-Party Defendants advance this argument, the Court finds that the agency's interpretation does not conflict with a prior interpretation, as Defendants have not previously issued guidance stating that sex discrimination does *not* include discrimination based on transgender status. Nor does it appear to be merely a convenient litigation position or a *post hoc* rationalization. *See Christopher*, 132 S.Ct. at 2166–67. Rather than taking this position only in this litigation, Defendants have consistently articulated this interpretation of Title IX over the last several years and enforced it accordingly. (*See* Docs. 33–1, 33–2, 33–3, 33–4, 33–5.) Nor is it a *post hoc* rationalization, given that it is in line with regulations and guidance of other agencies. *See Gloucester*, 822 F.3d at 722–23 (citing guidance and regulations from various federal agencies, including the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management, that provide that transgender individuals should be permitted to access the bathroom that corresponds with their gender identity). Defendants' interpretation of Title IX is entitled to *Auer* deference and given controlling weight. *Auer*, 519 U.S. at 461, 117 S.Ct. 905.[10] Under this interpretation of Title IX, Jane has been denied access to the communal girls' restroom "on the basis of [her] sex."

10 The Court also notes that the Fourth Circuit found that the agencies were entitled to *Auer* deference before DOE and DOJ even issued the May 2016 Dear Colleague letter. The agencies' position is, therefore, arguably even stronger here than it was in *Gloucester.*

***14** Finally, the Court turns to the third element of a Title IX discrimination claim: whether the discrimination has harmed Jane. Some issues in this case are difficult, but determining whether Jane has been harmed from the School District's policy is not one of them. Testimony from Joyce Doe and Jane herself indicates that Jane feels stigmatized and isolated[11] when she is forced to use a separate bathroom and otherwise not treated as a girl. Although Winkelfoos and Dodd assert that Jane seems happy at school and Third-Party Defendants all argue that Jane's emotional difficulties stem not from her treatment at school but from other challenges she faces, such as her disabilities and eating disorder, the Court simply cannot discount, and indeed gives great weight to, the statements of Jane and Joyce Doe. Even a moderate risk of suicide—which the School District takes pains to trumpet has been downgraded from a high risk—indicates significant risk of harm to Jane, and both her testimony and Joyce's demonstrate that she feels stigmatized when she is not treated as a girl and that she has been bullied at school. Moreover, according to Joyce, Jane often goes the entire day without using the bathroom because she hates being singled out when she is forced to use a separate bathroom, which would clearly impair her ability to focus on learning. Even without considering the evidence in the record from experts on both sides regarding gender dysphoria and its effects, the Court concludes that Jane is likely to be able to show harm from Highland's discriminatory policy and, therefore, to succeed on the merits of her Title IX claim.

11 Relying on an expert affidavit from Dr. Allan M. Josephson, who has never met Jane, the School District makes the argument that Jane's "alleged sensitivity to social stigma and rejection" are unlikely because she is autistic. (Doc. 61 at 31; *see* Declaration of Allan M. Josephson, M.D., Doc. 63 at ¶ 38 ("Finally, a unique aspect of Jane's case is the diagnosis of autism. There are significant concerns about this diagnosis. Jane appears to be social related to others in a reciprocal which militates against the diagnosis. Indeed, the sensitivity to rejection related to her transgender presentation would be unlikely in an autistic individual.").) The Court flatly rejects this unsupported assertion, which, quite frankly, calls into question much of Third- Party Defendants' other purported medical evidence regarding gender dysphoria.

2. Jane is Likely to Succeed on Her Equal Protection Claim

[13] [14] [15] [16] [17] Under the familiar tiers-of-scrutiny framework in cases arising under the Equal Protection Clause of the Fourteenth Amendment, the

actions of a governmental entity that discriminates on the basis of sex are subject to heightened scrutiny. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). State entities "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.' " *United States v. Virginia*, 518 U.S. 515, 541–42, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)). Therefore, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550, 116 S.Ct. 2264. Accordingly, the Supreme Court has consistently held that a party who seeks to defend discriminatory classifications on the basis of sex must offer an "exceedingly persuasive justification" for that classification. *Id.* at 531, 116 S.Ct. 2264; *Mississippi Univ. for Women*, 458 U.S. at 724, 102 S.Ct. 3331. The government must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724, 102 S.Ct. 3331). The governmental interests enumerated must be "real, as [o]pposed to...merely speculative." *Bernal v. Fainter*, 467 U.S. 216, 227–28, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984). If the governmental action at issue does not concern a suspect or quasi-suspect classification, such as sex, however, a court will uphold it "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

Third-Party Defendants argue that the Supreme Court's jurisprudence applying heightened, or intermediate, scrutiny to sex-discrimination claims has all involved cases where members of one "biological sex" were treated more favorably than members of the other "biological sex." (Doc. 61 at 13.) They argue that because "transgender status" is not a protected class, rational basis review applies to Jane's equal-protection claim, although they insist that Highland's policy also survives intermediate scrutiny. Jane, in turn, argues that the Court should apply intermediate scrutiny to her equal-protection claim but that Third-Party Defendants' asserted interests do not pass muster even under rational basis review.

a. Heightened Scrutiny Applies to Jane's Equal-Protection Claim

***15** The Supreme Court has not decided whether transgender status is a quasi-suspect class under the Equal Protection Clause. The parties dispute whether *Smith v. City of Salem* mandates application of heightened scrutiny in the Sixth Circuit. The question of the level of scrutiny in an equal-protection claim was not squarely before the *Smith* court.[12] Jane argues, however, that *Smith* mandates a finding that discrimination against transgender individuals constitutes discrimination on the basis of sex, because the *Smith* court held that the district court had "erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind.' " 378 F.3d at 572. The Court incorporates its earlier analysis of *Smith* and agrees that *Smith* supports a conclusion that transgender individuals are a quasi-suspect class because discrimination against them is discrimination on the basis of sex. Reading *Smith* differently, and also pointing to Sixth Circuit cases holding that sexual orientation is not a quasi-suspect classification, the individual Third-Party Defendants urge the Court to "conduct its own analysis" of whether heightened scrutiny applies. *See Love v. Beshear*, 989 F.Supp.2d 536, 545 (W.D.Ky.2014). But even if the Court does so, it still concludes that heightened scrutiny is appropriate in this case.

12 In addition to a Title VII claim, the plaintiff in *Smith*, a public employee, also brought an equal-protection claim under § 1983, but the only issue before the Sixth Circuit regarding the equal-protection claim was not which tier of scrutiny to apply, but whether the plaintiff had stated such a claim without referring specifically to the Equal Protection Clause. 378 F.3d at 576–77. The Sixth Circuit did note that the facts the plaintiff "alleged to support his claims of gender discrimination easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution." *Id.* at 577.

In *Love*, the district court ruled on a challenge to Kentucky's statute banning same-sex marriage. *Id.* In the process, the court conducted its own analysis of whether heightened scrutiny should apply to classifications based on sexual orientation after determining that the issue

was unsettled in the Sixth Circuit. *Id.* The court examined *Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir.2012), which held that sexual-orientation classifications should not receive heightened scrutiny, but noted that *Davis* relied on a line of cases beginning with *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which was overruled by *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Accordingly, the *Love* Court concluded that it was required to "conduct its own analysis to determine whether sexual orientation classifications should receive heightened scrutiny." 989 F.Supp.2d at 545. Other district courts in the Sixth Circuit have done the same. *Bassett v. Snyder*, 951 F.Supp.2d 939, 961 (E.D.Mich.2013); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 986 (S.D.Ohio 2013). After applying the four-factor test, two of these courts also concluded that heightened scrutiny should apply to classifications based on sexual orientation. *Love*, 989 F.Supp.2d at 545–46; *Obergefell*, 962 F.Supp.2d at 991. The third concluded it was required to apply *Davis* but observed that the "Sixth Circuit's pronouncements on the question are worthy of reexamination." *Bassett*, 951 F.Supp.2d at 961. And although the Supreme Court did not squarely decide the level-of-scrutiny question when it issued a decision that same-sex marriage bans violate the Equal Protection Clause in *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2608, 192 L.Ed.2d 609 (2015), it is fair to say that *Davis* is no longer good law, particularly in light of *Obergefell's* emphasis on the immutability of sexual orientation and the long history of anti-gay discrimination. *See id.* at 2594, 2596. Like the district courts that examined suspect classification based on sexual orientation, this Court will proceed to conduct its own analysis of the four-factor test to determine whether heightened scrutiny applies to a transgender plaintiff's claim under the Equal Protection Clause.

[18] The Supreme Court employs the following four factors to determine whether a new classification requires heightened scrutiny: (1) whether the class has been historically "subjected to discrimination," *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986); (2) whether the class has a defining characteristic that "frequently bears no relation to ability to perform or contribute to society," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638, 106 S.Ct. 2727; and (4) whether the class is "a minority or politically powerless," *id.*

***16** A district court in the Southern District of New York recently held that heightened scrutiny applied to a transgender plaintiff's equal-protection claim because discrimination on the basis of transgender status is discrimination on the basis of sex. *Adkins v. City of New York*, 143 F.Supp.3d 134, 140 (S.D.N.Y.2015). The court considered the four-factor test to identify a quasi-suspect class and determined that transgender individuals were indeed such a class. *Id.* at 139–40. The Court agrees with the analysis of *Adkins* and largely incorporates it here. [13] *See also Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1119 (N.D.Cal.2015); [14] *Mitchell v. Price*, No. 11–cv–260, 2014 WL 6982280, at *8 (W.D.Wisc. Dec. 10, 2014) ("Although the issue has yet to be settled in this circuit, the parties agree that [the plaintiff's] Fourteenth Amendment equal protection claims based on her transgender status receive heightened scrutiny.").

13 *Adkins* held that transgender people were a quasi-suspect class in light of the Second Circuit's holding that gay people were a quasi-suspect class in *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir.2012), *aff'd by United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). The Supreme Court did not squarely hold whether gay people are a suspect class, *see* 133 S.Ct. at 2706 (Scalia, J., dissenting), and, of course, this Court is not bound by the Second Circuit's reasoning in *Windsor*. Nevertheless, the Court finds the reasoning of *Adkins*, as well as the Second Circuit's *Windsor* decision, persuasive on the four-factor analysis.

14 *Norsworthy* is especially instructive. There, the court did not even reach the question of whether the four factors weighed in favor of finding transgender individuals were a quasi-suspect class because it held that the Ninth Circuit's decision in *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir.2000), compelled a conclusion that they were, noting that *Schwenk* interpreted *Price Waterhouse* to stand for the proposition that by discriminating against a transgender plaintiff for failing to "conform to socially-construed gender expectations," as transgender people do by definition, a defendant had engaged in discrimination because of sex. *Norsworthy*, 87 F.Supp.3d at 1119 (quoting *Schwenk*, 204 F.3d at 1201–02). The Ninth Circuit's

holding and reasoning in *Schwenk*, as noted earlier, are very similar to the Sixth Circuit's in *Smith.*

[19] First, there is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare. *Adkins*, 143 F.Supp.3d at 139. Second, there is obviously no relationship between transgender status and the ability to contribute to society. Third, transgender people have "immutable [and] distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638, 106 S.Ct. 2727, or as the Second Circuit put it in *Windsor*, "the characteristic of the class calls down discrimination when it is manifest," 699 F.3d at 183; *see also Adkins*, 143 F.Supp.3d at 139–40 (noting that transgender people encounter obstacles when there is a mismatch between the sex indicated on a birth certificate and the person's gender identity, and that "transgender people often face backlash in everyday life when their status is discovered"). Finally, as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group. The efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that correspond with their birth sex are but one example of the relative political powerlessness of this group. *See Carcano*, —— F.Supp.3d at —— – ——, 2016 WL 4508192, at *6–7 (describing the enactment of North Carolina's "bathroom bill"); *see also Adkins*, 143 F.Supp.3d at 140 (noting that there are no openly transgender members of the United States Congress or the federal judiciary).

***17** Therefore, even if *Smith* did not require that this Court apply heightened scrutiny to Jane's equal-protection claim, the Court finds that heightened scrutiny is appropriate under the four-factor test to determine suspect and quasi-suspect classifications.

b. Highland's Discriminatory Classification is Not Substantially Related to Its Interests in Its Students' Dignity and Privacy

[20] Highland asserts two justifications for its treatment of Jane: the dignity and privacy rights of other students; and purported safety issues and lewdness concerns. (Compl., Doc. 1 ¶¶ 78–90.) Turning first to the privacy and dignity interests, Jane does not dispute that the protection of the privacy of students, including Jane herself, is an important interest. (Doc. 84 at 11.) First, the Court notes that Highland Elementary students use sex-segregated bathrooms with stall dividers that open on the top and bottom by approximately two feet. (Compl., Doc. 1 at ¶ 83.) There is no evidence that Jane herself, if allowed to use the girls' restroom, would infringe upon the privacy rights of any other students. Therefore, Third-Party Defendants have failed to put forth an "exceedingly persuasive justification," or even a rational one, for preventing Jane from using the girls' restroom. *Mississippi Univ. for Women*, 458 U.S. at 724, 102 S.Ct. 3331. The "fit between the means and the important end" of protecting student privacy is not "exceedingly persuasive." *Nguyen v. I.N.S.*, 533 U.S. 53, 70, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001) (quoting *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264).

Highland also advances an argument that students' "zone of privacy" in the restroom starts at the door of the restroom, not merely at the stall door, and that, therefore, students' privacy interests would be imperiled if Jane even enters the girls' bathroom. *Amici* from school districts in twenty states around the country, however, provide further support for the Court's conclusion that Highland cannot show that allowing a transgender girl to use the girls' restroom would compromise anyone's privacy interests. When they adopted inclusive policies permitting transgender students to use bathrooms and locker rooms that correspond with their gender identity, all of these school districts wrestled with the same privacy concerns that Highland now asserts and, in fact, at least one of the districts was investigated by OCR for non-compliance with Title IX before ultimately reaching a Resolution Agreement with the agency. (Doc. 91–3 at 6.) The school administrators agreed that although some parents opposed the policies at the outset, no disruptions in restrooms had ensued nor were there any complaints about specific violations of privacy. (*Id.* at 10.) Such testimony from other school officials who have experienced these issues lends further support to Jane's argument that Highland's purported justification for its policy is "merely speculative" and lacks any "factual underpinning." *Bernal*, 467 U.S. at 227–28, 104 S.Ct. 2312 (holding that a state's asserted justification for imposing a citizenship requirement for notaries was "utterly" insufficient to pass strict scrutiny because the state put forth no factual showing that the unavailability of non-citizen notaries' testimony presented a problem for the state).

Moreover, none of the cases upon which Third-Party Defendants rely to support their privacy argument is persuasive and relevant to this case. First, Third-Party Defendants rely heavily on *Johnston v. University of Pittsburgh* for the proposition that a university's policy of segregating its bathrooms and locker rooms on the basis of birth sex was substantially related to the government interest in ensuring student privacy. 97 F.Supp.3d at 669. *Johnston* has little persuasive value here because the court relied on outdated, pre-*Price Waterhouse* case law from other circuits. *Id.* at 671 (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir.1984)). In so doing, the *Johnston* court expressly "recognize[d] that other courts have declined to follow the definition articulated in *Ulane*," and cited *Smith v. City of Salem*, but determined that "because neither the Supreme Court nor the Third Circuit has addressed the precise issue, this Court will follow the definition embraced by *Ulane* and its progeny." *Id.* at 671 n. 14. Needless to say, *Smith* is binding precedent on this Court and, therefore, it cannot follow the reasoning of *Johnston*.

***18** Third-Party Defendants also cite several Sixth Circuit cases concerning the right to bodily privacy against invasive strip searches or videotaping, which is not the issue before the Court in this case. For instance, the Sixth Circuit stated in *Brannum v. Overton County School Board* that "there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex." 516 F.3d 489, 495 (6th Cir.2008) (quoting *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir.1987)). But the right at issue in *Brannum* arose under the Fourth Amendment and is more properly characterized as a right to be free from unreasonable searches and seizures of the body. Of course, no such search or seizure of anyone's body is at issue here. The other cases Third-Party Defendants cite are similarly unpersuasive. *See Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir.2005); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 177 (3d Cir.2011) (holding that a deputy sheriff stated a claim for a Fourteenth Amendment violation when a superior officer instructed her to undress and shower while filming her); *Lee v. Downs*, 641 F.2d 1117, 1118–19 (4th Cir.1981) (upholding verdict for a female prisoner who was forcibly restrained by male guards while a female nurse removed her clothing).

Next, Highland argues that the Supreme Court has "telegraphed that the relief that Doe seeks in this case threatens the privacy rights of students by recalling the mandate" in *Gloucester*. (Doc. 61 at 21.) The Supreme Court grants such stays when a court of appeals "tenders a ruling out of harmony with [its] prior decisions, or [presents] questions of transcending public importance[ ] or issues which would likely induce [the Supreme Court] to grant certiorari." *Russo v. Byrne*, 409 U.S. 1219, 1221, 93 S.Ct. 21, 34 L.Ed.2d 30 (1972) (Douglas, J.). It is not for this Court to speculate which, if any, of these justifications motivated the Supreme Court when it took action in *Gloucester*, and even if Highland has somehow been able to divine what the Supreme Court has "telegraphed" by staying the mandate in that case, this Court unfortunately lacks such powers of divination. Moreover, unlike in most cases in which the Supreme Court stays a mandate, one of the five Justices who voted for the stay, Justice Breyer, wrote a brief concurrence that made no mention of irreparable harm, stating only that he voted to grant the application "as a courtesy" and that the order would "preserve the status quo (as of the time the Court of Appeals made its decision)." *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, —— U.S. ——, 136 S.Ct. 2442, —— L.Ed.2d —— (2016) (Breyer, J., concurring). When the Justice whose vote tips the scales issues a statement regarding his position and does not mention irreparable harm, it would be unreasonable for this Court to find that the stay of the mandate in *Gloucester* requires a finding of irreparable harm to Highland and its students. This Court follows statements of law from the Supreme Court, not whispers on the pond.

Finally, the Court also rejects individual Third-Party Defendants' argument that Highland's classification is both rationally and substantially related to its privacy interests because it is expressly permitted under federal law. *See* 34 C.F.R. § 106.33. As the Court has already explained in Section IV(A)(1), *supra*, the DOE and DOJ have interpreted this regulation to require that schools that provide sex-segregated facilities must allow students to use those facilities consistent with their gender identity.

At bottom, Highland cannot show that its refusal to let Jane use the girls' restroom is substantially related to its interest in student privacy.

c. Highland's Discriminatory Classification is Not Substantially Related to its Safety and Lewdness Concerns

Highland's justifications of safety and lewdness concerns suffer from many of the same flaws. Again, *amici* school administrators testified that *no* incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have *ever* occurred. (Doc. 91–3 at 11.) Although parents did raise safety concerns in many instances before the implementation of the policies, the fears turned out to be "wholly unfounded in practice." (*Id.*) Indeed, if anything, these administrators stressed that protection of the transgender students themselves is usually their most pressing concern, because those students, already accustomed to being stigmatized and in some cases harassed, "are not interested in walking around the locker rooms and checking out anatomy. They're just trying to get through [physical education class] safely." (Interview with Diane K. Bruce, Director of Health and Wellness, District of Columbia Public Schools, Doc. 89–1 at 12.) [15]

15 Although the Court understands that some members of the Highland community may have concerns about their children's privacy, ultimately the affidavits submitted by concerned parents do not change the Court's conclusion that these fears and apprehensions are unlikely to lead to disruption or safety incidents in the Highland Elementary School restrooms, which are the subject of this case. (Parent H. Decl., Doc. 68; Parent S.B. Decl., Doc. 69; Parent S. Decl., Doc. 70.)

***19** Additionally, the Fourth Circuit rejected this argument in *Gloucester* when it found that the record was devoid of any actual evidence showing "amorphous safety concerns." 822 F.3d at 723 n.11 ("We also note that the [school board] has been, perhaps deliberately, vague as to the nature of the safety concerns it has."). The Fourth Circuit also pointed out a logical flaw in the argument that allowing transgender students to use the bathroom consistent with their gender identity would lead to danger from "sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." *Id.* Like Highland, the school district in *Gloucester* did not require segregated restrooms for gay boys or girls even though this concern about "sexual responses" would, in theory, apply to a gay male who used a boys' restroom or a gay female who used a girls' restroom. *See id.*

The Court finds that because Third-Party Defendants have failed to show that the School District's discriminatory policy is substantially related to their interests in privacy or safety, Jane is likely to succeed on the merits of her claim under the Equal Protection Clause.

d. Even if Rational Basis Review Applies, Highland's Classification is Not Rationally Related to Its Asserted Interests

Even if the Court were to apply rational basis review to Jane's equal-protection claim, she would likely succeed on the merits. As already stated, Highland most certainly has a legitimate interest in the privacy and safety of its students. But Highland cannot show that its restroom policy is rationally related to those interests. The experience of *amici* school districts belies Highland's speculative assertion that students' privacy or safety interests will be impaired; school districts that have encountered these very issues have been able to integrate transgender students fully into the academic and social community without disruption, and certainly without the doomsday scenarios Highland predicts, such as sexual predators entering an elementary-school restroom. And there is certainly *no* evidence in the record that Jane herself —the only student to whom a preliminary injunction would apply—is likely to violate other students' privacy or put their safety at risk when using the girls' restroom. Highland's policy rests on "mere negative attitudes [and] fear," which are not "permissible bases for" differential treatment, and cannot survive even rational basis review. *City of Cleburne*, 473 U.S. at 448, 105 S.Ct. 3249. Under either standard of scrutiny, Jane has shown that she is likely to succeed on the merits of her equal-protection claim.

B. Jane Will be Irreparably Harmed Absent an Injunction

[21] Irreparable harm is presumed as a matter of law when a moving party shows "that a constitutional right is being threatened or impaired." *Am. Civil Liberties Union of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir.2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) ("[L]oss of First Amendment freedoms, for even minimal periods

of time, unquestionably constitutes irreparable injury."). And there is likewise a presumption of an irreparable injury when a plaintiff has shown a "violat[ion] [of] a civil rights statute." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir.2001). Jane can show irreparable injury simply because both her Title IX claim and constitutional claim are likely to succeed on the merits.

Moreover, for the same reasons detailed in Section IV(A)(1), *supra*, Jane has also shown that she would be irreparably harmed absent an injunction. The stigma and isolation Jane feels when she is singled out and forced to use a separate bathroom contribute to and exacerbate her mental-health challenges. This is a clear case of irreparable harm to an eleven-year-old girl.

C. The Balance of Equities and the Public Interest Favor Injunction

***20** **[22]** As discussed exhaustively above, the Court finds no merit in Third-Party Defendants' argument that other students would be harmed by allowing Jane to use the bathroom consistent with her gender identity, as other students already do. The balance of equities tips especially sharply in Jane's favor because the injunction she seeks is narrowly tailored to permit her to use the girls' restroom and does not even implicate locker rooms or overnight accommodations at the middle- and high-school levels. Moreover, "it 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). Similarly, "the overriding public interest lay[s] in the firm enforcement of Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir.1993).

The Court concludes that the balance of equities and the public interest favor the granting of Jane's preliminary-injunction motion. Accordingly, all four factors of the preliminary-injunction test weigh in Jane's favor and the Court **GRANTS** her motion. [16]

16 Last month, in *Texas v. United States*, a federal district court issued a sweeping nationwide preliminary injunction against the federal Defendants, enjoining them from enforcing the guidance at issue here. In issuing the injunction, the court stated that "an injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of the state law." —— F.Supp.3d at ——, 2016 WL 4426495, at *17. The *Texas* court stated:

> Defendants are enjoined from enforcing the Guidelines *against Plaintiffs and their respective schools*, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight *in any litigation initiated following the date of this Order.*

Id. (emphases added). Because Ohio was not a party to the *Texas* litigation, and because this litigation was initiated before the *Texas* court issued its preliminary injunction, the injunction does not apply here. This is also consistent with the Supreme Court's admonition that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979); *see also Texas v. United States*, 787 F.3d 733, 769 (5th Cir.2015) (upholding issuance of a nationwide injunction of the Obama administration's executive action on immigration because of "a substantial likelihood that a partial injunction would be ineffective" in providing complete relief to the plaintiff states due to migration of individuals across state lines). Moreover, to construe otherwise would prevent other district courts and courts of appeals from weighing in on the important issues presented in this case, which would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984); *see also Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C.Cir.2002) ("Allowing one circuit's statutory interpretation to foreclose...review of the question in another circuit," would "squelch the circuit disagreements that can lead to Supreme Court review.").

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** the School District's Motion for Preliminary Injunction (Doc. 10) and **GRANTS** Jane Doe's Motion for Preliminary Injunction. (Docs. 35–36.) The Court orders School District officials to treat Jane Doe as the girl she is, including referring to her by female pronouns and her female name and allowing her to use the girls' restroom at Highland Elementary School.

***21** Finally, Federal Rule of Civil Procedure 65(c) provides that a court may issue an injunction only if the movant posts bond. Neither Jane nor the Third-Party Defendants have briefed the issue of an appropriate bond. The Court **ORDERS** Jane Doe to post a bond of $100.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2016 WL 5372349

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EXHIBIT D

Carcaño v. McCrory, No. 1:16-CV-236, 2016 WL 4508192, (M.D.N.C. Aug. 26, 2016)

2016 WL 4508192
Only the Westlaw citation is currently available.
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
|
August 26, 2016

Synopsis

Background: Civil liberties organization, transgender students and employee of state university brought action against North Carolina governor, university, and university officials alleging that North Carolina law requiring that multiple occupancy bathrooms and changing facilities must be designated for and only used by persons based on their biological sex, and setting statewide nondiscrimination standards, discriminated against transgender, gay, lesbian, and bisexual individuals on basis of sex, sexual orientation, and transgender status in violation of Title IX, equal protection, and due process. After two North Carolina legislators were allowed to intervene as defendants, 315 F.R.D. 176, organization and university students and employee moved for preliminary injunction enjoining enforcement of so-called "bathroom bill" portion of the law, requiring public agencies to ensure that multiple occupancy bathrooms, showers, and other similar facilities were designated for and only used by persons based on their biological sex, defined as the sex listed on their birth certificate.

Holdings: The District Court, Thomas D. Schroeder, J., held that:

[1] individual plaintiffs' Title IX claims presented a justiciable case or controversy;

[2] Title IX claims were prudentially ripe;

[3] individual plaintiffs were likely to succeed on merits of their claim that the law violated Title IX by discriminating against them on basis of sex;

[4] plaintiffs were not likely to succeed on merits of their claim that the law violated Equal Protection Clause by discriminating on basis of sex;

[5] individual plaintiffs would likely to suffer irreparable harm in the absence of preliminary injunction;

[6] balance of equities favored granting preliminary injunction; and

[7] it was in the public interest to grant preliminary injunction.

Motion granted in part and denied in part.

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MEMORANDUM OPINION, ORDER AND PRELIMINARY INJUNCTION

THOMAS D. SCHROEDER, District Judge

***1** 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

[1] 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, 28 S.Ct. 441, 52 L.Ed. 714 (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** **[2]** **[3]** **[4]** "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, 95 S.Ct. 2197, 45 L.Ed.2d 343 (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, 95 S.Ct. 2197 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (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.

[5] **[6]** 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, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (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, 118 S.Ct. 1665 (quoting Abbott Labs., 387 U.S. at 149, 87 S.Ct. 1507).

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 non-discrimination 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, —— U.S. ——, 136 S.Ct. 2442, —— L.Ed.2d ——.

[7] 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, 118 S.Ct. 1665. 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

[8] [9] [10] 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, 129 S.Ct. 365, 172 L.Ed.2d 249 (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, 130 S.Ct. 2371, 176 L.Ed.2d 764 (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 [11] [12]** 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.

[13] 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, 102 S.Ct. 1912, 72 L.Ed.2d 299 (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.

[14] "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, 125 S.Ct. 1497, 161 L.Ed.2d 361 (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.

[15] 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, 117 S.Ct. 905, 137 L.Ed.2d 79 (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, 117 S.Ct. 905 (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.

[16] 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, —— Fed.Appx. ——, ——, 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, —— U.S. ——, 136 S.Ct. 2442, —— L.Ed.2d —— (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, 93 S.Ct. 21, 34 L.Ed.2d 30 (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, —— F.Supp.3d ——, —— – ——, 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 —— – ——, ——, 2016 WL 4426495 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, 125 S.Ct. 1497 ("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** **[17]** 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, 101 S.Ct. 1531, 67 L.Ed.2d 694 (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, 129 S.Ct. 365, 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** **[18]** **[19]** **[20]** 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, 116 S.Ct. 1620, 134 L.Ed.2d 855 (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, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

[21] **[22]** **[23]** **[24]** 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, 116 S.Ct. 2264, 135 L.Ed.2d 735 (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, 116 S.Ct. 2264 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (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, 116 S.Ct. 2264. 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.

[25] 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, 116 S.Ct. 2264.

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, 109 S.Ct. 1775, 104 L.Ed.2d 268 (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.

[26] 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.1992) (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, 116 S.Ct. 2264; see also id. at 533, 116 S.Ct. 2264 (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, 116 S.Ct. 2264.

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, 121 S.Ct. 2053, 150 L.Ed.2d 115 (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, 121 S.Ct. 2053. 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, 121 S.Ct. 2053. 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, 121 S.Ct. 2053. 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, 121 S.Ct. 2053.

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, 116 S.Ct. 2264; Nguyen, 533 U.S. at 73, 121 S.Ct. 2053; 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, 116 S.Ct. 2264 (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, 116 S.Ct. 1620 ("[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

[27] **[28]** 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, 106 S.Ct. 662, 88 L.Ed.2d 662 (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, 97 S.Ct. 2010, 52 L.Ed.2d 675 (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, 116 S.Ct. 1620.

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

[29] **[30]** 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, 97 S.Ct. 869, 51 L.Ed.2d 64 (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.

[31] 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, 129 S.Ct. 365 (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.

[32] 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** **[33]** 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, 129 S.Ct. 365. Irreparable injury must be both imminent and likely; speculation about potential future injuries is insufficient. See id. at 22, 129 S.Ct. 365.

[34] 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.

[35] 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 WL 1447695, *2–

3, 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, 129 S.Ct. 365. On the current record, both favor entry of an injunction.

[36] 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.").

[37] 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, 116 S.Ct. 2264 (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** **[38]** 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, 98 S.Ct. 359, 54 L.Ed.2d 439 (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

EXHIBIT E

***Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945 (N.D. Ill. Oct. 18, 2015) (Report and Recommendation)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; C.A., a minor, by and through her parent and guardian, N.A.; A.M., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A.T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W.,	)	
Plaintiffs,	)	**No. 16-cv-4945**
v.	)	**Jeffrey T. Gilbert Magistrate Judge**
UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his official capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as United States Attorney General; and SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS,	)	
Defendants,	)	
and	)	
STUDENTS A, B, and C, by and through their parents and guardians, Parents A, B, and C; and the ILLINOIS SAFE SCHOOLS ALLIANCE,	)	
Intervenor-Defendants.	)	

REPORT AND RECOMMENDATION

I. EXECUTIVE SUMMARY

Plaintiffs Students and Parents for Privacy, an unincorporated association, and five current or prospective high school students who live in suburban Cook County, Illinois, by and through their parents and legal guardians, (collectively, "Plaintiffs") have filed a Motion for Preliminary Injunction that, if granted, would require Defendant School Directors of Township High School District 211 ("District 211" or "the District") to segregate restrooms and locker rooms on the basis of students' biological sex (which Plaintiffs consider to be sex assigned at birth). Plaintiffs also seek to enjoin a rule, adopted by Defendant United States Department of Education ("DOE") and enforced in conjunction with Defendant United States Department of Justice ("DOJ") (together with the Secretary of Education and the Attorney General, collectively "the Federal Defendants"), that requires all schools in the United States to allow students to use restrooms and locker rooms consistent with their gender identity. Last, Plaintiffs seek to enjoin the District's policy, implemented in August 2013, allowing transgender students to use restrooms consistent with their gender identity, and an agreement DOE entered into with District 211 in December 2015 in which the District agreed to allow Student A, a transgender girl, to use the girls' locker rooms at William Fremd High School ("Fremd High School"), a public high school in Palatine, Illinois.

District Judge Jorge Alonso referred Plaintiffs' Motion for Preliminary Injunction to this Magistrate Judge for a Report and Recommendation as to whether it should be granted or denied. A preliminary injunction is an extraordinary remedy. Granting a preliminary injunction in this case would change the status quo before a full determination on the merits of the claims and defenses raised in the lawsuit. Preliminary injunctive relief is granted only when the moving parties—here, Plaintiffs—make a clear showing that they have a likelihood of success on the

merits of their claims, they likely will suffer irreparable harm if an injunction is not issued pending a final determination of the matters at issue, and they lack an adequate remedy at law. If the moving parties make these three threshold showings, then they still must show, on balance, that they will suffer more harm if an injunction is not issued than the non-moving parties will suffer if it is issued, and that the public interest would be served by the issuance of an injunction.

The Court finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that DOE violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq*., by promulgating a rule that interprets Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, to require that schools permit transgender students to use restrooms and locker rooms consistent with their gender identity, and by entering into an agreement informed by that rule with District 211 under which the District is required to allow Student A to use the girls' locker rooms at Fremd High School. The law in the Seventh Circuit concerning the meaning of the term "sex" as used in Title IX may be in flux. Just last week, the Seventh Circuit vacated a decision by a panel of that court that adhered to a longstanding interpretation of the word "sex" in the almost identically worded Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, as very narrow, traditional and biological. Plaintiffs relied heavily on the now vacated panel decision. The full court of appeals agreed to rehear that case next month. Recent rulings by courts around the country including a district court in the Seventh Circuit evince a trend toward a more expansive understanding of sex in Title IX as inclusive of gender identity. Therefore, the Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that DOE's interpretation of Title IX is not in accordance with law or entitled to deference.

The Court also finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that District 211 or the Federal Defendants are violating their right to privacy under the United States Constitution or that District 211 is violating Title IX because transgender students are permitted to use restrooms consistent with their gender identity and Student A is allowed to use the girls' locker rooms at Fremd High School. High school students do not have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs. In addition, sharing a restroom or locker room with a transgender student does not create a severe, pervasive, or objectively offensive hostile environment under Title IX given the privacy protections District 211 has put in place in those facilities and the alternative facilities available to students who do not want to share a restroom or locker room with a transgender student. Further, the facilities District 211 provides for its male and female students are comparable as is required by Title IX.

In addition, even if Plaintiffs were able to show they have a likelihood of success on the merits of their claims, they still would not be entitled to the injunctive relief they seek. Plaintiffs have not shown they are likely to suffer irreparable harm if the District's or the Federal Defendants' actions are not enjoined. Plaintiffs also have not shown they lack an adequate remedy at law against either District 211 or the Federal Defendants if they ultimately succeed on their claims. Therefore, Plaintiffs have not made the three required threshold showings at this early stage of the case that the law requires to change the status quo before a final decision on the parties' claims and defenses.

For all of these reasons, there is no legal reason why District 211 cannot continue to permit all students to use restrooms and Student A to use locker rooms consistent with their gender identity while this case proceeds. As discussed more fully below, District 211 balanced

the interests of all its students when it decided to permit transgender students to use restrooms consistent with their gender identity and to allow Student A to use the girls' locker rooms at her high school. Although the District decided to allow Student A to use the girls' locker rooms under threat of an enforcement action by DOE, it nevertheless agreed to resolve that action rather than litigate the issue, and it defends its decision to do so in this case. District 211 now offers all students reasonable accommodations to ensure their privacy is protected in restrooms and locker rooms. In addition, the District has made clear that any cisgender high school student who does not want to use a restroom or a locker room with a transgender student is not required to do so.

Accordingly, this Court respectfully recommends to Judge Alonso that Plaintiffs' Motion for Preliminary Injunction be denied.

II. BACKGROUND

A. Events That Preceded This Lawsuit

In August 2013, District 211 began allowing transgender students to use restrooms consistent with their gender identity ("the Restroom Policy"). Verified Complaint for Injunctive and Declaratory Relief ("Complaint"), [ECF No. 1, at ¶¶ 214-217].[1] But it did not allow transgender students to use locker rooms consistent with their gender identity. In December 2013, Student A, a transgender girl now in her senior year at Fremd High School, filed a

[1] At oral argument, District 211's counsel pointed out that the District allows transgender students to use restrooms consistent with their gender identity as a matter of practice but the District 211 Board never adopted a formal policy on that subject. Transcript of August 15, 2016 Preliminary Injunction Hearing ("Oral Argument Transcript"), [ECF No. 127, at 68]. According to the District's counsel, a "policy" is a term of art the District uses when it takes action in an open session and adopts a formal policy. *Id.* Plaintiffs characterize District 211's practice as "the Restroom Policy" in their Complaint. *See, e.g.*, Complaint, [ECF No. 1, at ¶¶ 211-237]. Although the Court uses the term "Restroom Policy" in this Report and Recommendation to mean District 211's practice of allowing transgender students to use restrooms consistent with their gender identity, it accepts District 211's position that the practice is not a formal policy adopted by the District's Board. It does not matter to the Court's analysis whether the undisputed fact that District 211 allows transgender students to use restrooms consistent with their gender identity is characterized as a practice or a policy.

complaint with DOE's Office of Civil Rights ("OCR"), alleging that District 211 was violating Title IX by denying her access to the girls' locker rooms. *Id.* at ¶¶ 71-75, 80.[2]

Title IX prohibits recipients of "Federal financial assistance" from discriminating on the basis of sex in education programs and activities. 20 U.S.C. § 1681(a). DOE and DOJ share responsibility for enforcing Title IX. *See id.* at § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this grant of authority, OCR investigates complaints, conducts compliance reviews, promulgates regulations, and issues guidance. DOE's regulations implementing Title IX provide, in relevant part, that "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 operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a). The regulations permit recipients to provide sex-segregated "toilet, locker room, and shower facilities," so long as "facilities provided for students of one sex [are] comparable to such facilities for students of the other sex." *Id.* at § 106.33. As a recipient of "Federal financial assistance" from DOE, District 211 is subject to Title IX. *See* 20 U.S.C. § 1681(a).

In a series of guidance documents issued in 2014 and 2015 (collectively, "Guidance Documents" or "Guidance"), DOE explained how schools that receive "Federal financial assistance" should comply with Title IX and its implementing regulations with respect to

[2] Student A, who was assigned the sex of male at birth, has identified as female from a young age. Letter of Findings, [ECF No. 21-10, at 2]. During her middle school years, Student A began living full-time as a female. *Id.* Since then, she has presented a female appearance and taken hormone therapy. *Id.* Student A also has changed her legal name and passport to reflect her gender identity. *Id.* Plaintiffs refer to Student A as a biological male throughout their written filings and consistently use the masculine pronouns "he" and "him" when referring to Student A. The Federal Defendants, District 211, and Intervenor-Defendants use the feminine pronouns "she" and "her" when referring to Student A. In this Report and Recommendation, the Court will identify Student A as a transgender girl and use female pronouns when referring to her, which is consistent with Student A's gender identity and the way she refers to herself.

transgender students. In April 2014, in response to requests for clarification from various funding recipients, DOE, through OCR, issued guidance stating that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity." Questions and Answers on Title IX and Sexual Violence ("Q&A on Sexual Violence"), [ECF No. 21-9, at 5]. In December 2014, DOE also said that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities ("Q&A on Single-Sex Classes and Extracurricular Activities"), [ECF No. 21-8, at 25]. In April 2015, DOE reiterated this interpretation, stating that recipients must "help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes." Title IX Resource Guide, [ECF No. 21-7, at 21-22].[3]

The Guidance Documents were issued after Student A filed her complaint with OCR concerning locker room access but during the time that OCR was reviewing that complaint. After investigating Student A's complaint, OCR notified District 211 by a letter dated November 2, 2015—the "Letter of Findings" for short—that excluding Student A from the girls' locker rooms violated Title IX's implementing regulations. Letter of Findings, [ECF No. 21-10, at 13]. The Letter of Findings further explained that if OCR and District 211 were not able to negotiate

[3] Less than one week after Plaintiffs filed their Complaint in this case, DOE and DOJ issued a joint guidance dated May 13, 2016, in the form of a "Dear Colleague Letter," explaining that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Dear Colleague Letter on Transgender Students ("Dear Colleague Letter"), [ECF No. 21-6, at 3]. Although the statements in and rationale for this Dear Colleague Letter are consistent with the Guidance Documents, the May 13 Dear Colleague Letter is not among the Guidance Documents directly at issue in this case because it was issued after this lawsuit was filed.

an agreement to bring the District into compliance with its obligations, OCR would issue a Letter of Impending Enforcement Action. *Id.*

On December 2, 2015, OCR and District 211 entered into an Agreement to Resolve, which will be referred to as the "Locker Room Agreement." Locker Room Agreement, [ECF No. 21-3]. The Locker Room Agreement provides, among other things:

> Based on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room facilities designated for female students at school and to take steps to protect the privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker rooms to accommodate Student A and any students who wish to be assured of privacy while changing.

Id. at 2. The Locker Room Agreement further provides:

> If any student requests additional privacy in the use of sex-specific facilities designed for female students beyond the private changing stations described [above], the District will provide that student with access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.

Id.

B. Plaintiffs' Complaint In This Case

On May 4, 2016, a little more than five months after the Locker Room Agreement was signed, Plaintiffs filed this lawsuit against the Federal Defendants and District 211, challenging the Restroom Policy, the Locker Room Agreement, and the Guidance Documents. Complaint, [ECF No. 1].[4] In Count I of their Complaint, Plaintiffs allege that DOE violated the APA by

[4] Plaintiffs filed a "Verified Complaint" in this case. There is no requirement in the Federal Rules of Civil Procedure that a complaint must be verified "[u]nless a rule or statute specifically states otherwise." FED. R. CIV. P. 11(a). The Court is unaware of any rule or statute that requires verification of a complaint seeking an injunction. Although a verified complaint may be treated as an affidavit when filed in support of a motion seeking an injunction, *Myers v. Thompson*, 2016 WL 3610431, at *5 (D. Mont. June 28, 2016), "a party's verification of a pleading that need not have been verified does not give the pleading

entering into the Locker Room Agreement with District 211 and by promulgating a rule, embodied in the Guidance Documents, requiring schools to treat students consistent with their gender identity. In Counts II and IV respectively, Plaintiffs allege that the Federal Defendants and District 211 are violating Plaintiffs' constitutional right to privacy, and that the District is violating their rights under Title IX, by allowing transgender students to use restrooms consistent with their gender identity and by allowing Student A, who Plaintiffs consider to be a biological male, to use the girls' locker rooms.

In addition, Plaintiffs assert claims for violations of their parental right to direct the education and upbringing of their children (Count III); the Illinois and Federal Religious Freedom Restoration Acts (Counts V and VI); and the Free Exercise Clause of the First Amendment (Count VII). Counts I and VI are against the Federal Defendants only; Counts IV and V are against District 211 only. The remaining counts are against all Defendants.

Plaintiffs are an unincorporated association and five individually named minor plaintiffs (four females and one male), identified only by their initials. Plaintiffs use the term "Girl Plaintiffs" to refer to "all girl students who attend Fremd, or will attend Fremd in fall 2016, and are part of the Students and Parents for Privacy [including the four female minor named plaintiffs]." *Id.* at ¶ 36. They use the term "Student Plaintiffs" to refer to "all students who are part of Students and Parents for Privacy [including the five individual minor named plaintiffs]." *Id.*[5] The only individual minor plaintiff who is male is identified as B.W. in paragraph 35 of the

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any added weight or importance in the eyes of the district court," 5A Charles Alan Wright et al., *Federal Practice and Procedure* § 1339 (3d ed. 2004) (hereinafter "Wright"). Therefore, the allegations in Plaintiffs' Complaint are not entitled to any greater weight nor are they insulated from being characterized as speculative, vague, general, or overbroad, or from being contradicted by evidence submitted by Defendants. *Id.*

[5] The Court will use the terms "Student Plaintiffs" and "Girl Plaintiffs" as Plaintiffs have defined them. In addition, Plaintiffs refer to male and female students as boys and girls, and to the facilities at issue in

Complaint. Plaintiffs allege B.W. is subject to the Restroom Policy but he is not referenced anywhere else in the Complaint. Student Plaintiffs allege they are affected by the Restroom Policy, but only Girl Plaintiffs allege they are affected by the Locker Room Agreement. The only transgender student who is alleged to have used a restroom or locker room at Fremd High School is Student A.

Plaintiffs allege, among other things, the Restroom Policy and the Locker Room Agreement cause Girl Plaintiffs to experience "embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity" because they use, and anticipate having to use, restrooms and locker rooms with Student A, who they label as a "biological male." *Id.* at ¶¶ 7, 11; *see also id.* at ¶ 226 (adding the word "intimidation" to the list of emotions Girl Plaintiffs allege they are experiencing). Plaintiffs allege Girl Plaintiffs are afraid, worried, and embarrassed about the possibility of seeing or being seen by Student A when either Girl Plaintiffs or Student A are in a state of undress. *Id.* at ¶¶ 8, 9, 114, 126, 127, 186, 187. Plaintiffs assert Girl Plaintiffs' distress is "ever-present" and "constant." *Id.* at ¶¶ 114, 115, 125, 237. Plaintiffs also say Girl Plaintiffs are fearful of having to attend to personal needs in restrooms and locker rooms when Student A is present. *Id.* at ¶¶ 8, 10. All Student Plaintiffs allege they "experience embarrassment, humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity" because of the Restroom Policy. *Id*. at ¶ 226.

Plaintiffs generally allege the Restroom Policy and the Locker Room Agreement have a negative effect on Girl Plaintiffs' access to educational opportunities, benefits, programs, and activities at their schools. *Id*. at ¶¶ 12-13. Plaintiffs allege some Girl Plaintiffs risk tardiness by running to the opposite end of the school, during short passing periods, to find a restroom or

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this case as boys' and girls' restrooms and locker rooms. For the most part, the Court has adopted Plaintiffs' convention of referring to male and female high school students as "boys" and "girls."

locker room that Student A is not likely to be using, and change clothes as quickly as possible while experiencing stress and anxiety and avoiding eye contact and conversation. *Id.* at ¶ 12.

Plaintiffs allege the privacy protections District 211 provides in restrooms and locker rooms do not do enough to ameliorate Student Plaintiffs' concerns about sharing those facilities with a transgender student assigned a different sex than theirs at birth, or the risk that they may see or be seen by a transgender student when either is in an unclothed or partially clothed state. Plaintiffs allege there are "large gaps" above and below the doors on the stalls in both the boys' and girls' restrooms, *id.* ¶ 158, and "gaps along the sides of the door[] that another student could see through even inadvertently," *id.* at ¶ 228. Plaintiffs allege this "mean[s] that the Student Plaintiffs, both boys and girls, must risk exposing themselves to the opposite sex every time they use the restroom." *Id.* at ¶ 229. Plaintiffs allege the privacy stalls provided in the physical education locker room for changing clothes or showering are not adequate to address Girl Plaintiffs' fundamental concern with using the same facility as Student A. *Id.* at ¶¶ 259-260. Plaintiffs also allege Girl Plaintiffs are ridiculed and harassed by their classmates when they use the privacy stalls. *Id.* at ¶¶ 140-146. Plaintiffs allege there are no private stalls in the girls' swim locker room and the girls' gymnastics locker room for changing clothes or showering. *Id.* at ¶¶ 161, 172-174, 196-197. Plaintiffs allege the completely separate, private facilities District 211 provides for students who do not want to use the common facilities "are inadequate and inferior" to the common facilities and "unworkable in terms of the practical locker room needs of Girl Plaintiffs." *Id.* at ¶ 245; *see also id.* at ¶¶ 242-244.

C. Plaintiffs' Motion For Preliminary Injunction

On May 23, 2016, Plaintiffs moved for a preliminary injunction on Counts I, II, and IV of their Complaint. Plaintiffs' Motion for Preliminary Injunction ("Plaintiffs' Motion"), [ECF No.

21]. As noted above, Count I is a claim against the Federal Defendants for violating the APA. Count II is a claim against both the Federal Defendants and District 211 for violating Plaintiffs' constitutional right to privacy. Count IV is a claim against District 211 for violating Title IX. Judge Alonso referred Plaintiffs' Motion for Preliminary Injunction to this Magistrate Judge for a Report and Recommendation. [ECF Nos. 24, 26].

In their Complaint, Plaintiffs ask the Court to "set aside" or enjoin DOE's "new rule that redefines 'sex' in Title IX" and to enjoin the Federal Defendants from taking "any action" based on this interpretation of Title IX and its implementing regulations as requiring schools to treat a student's gender identity as the student's sex. Complaint, [ECF No. 1, Prayer for Relief, at ¶¶ B and C]. During oral argument on their Motion for Preliminary Injunction, however, Plaintiffs' counsel clarified that Plaintiffs are asking the Court only to enter a preliminary injunction restraining the Federal Defendants from "further application of the rule to force District 211 to comply with it in the operation of its facilities." Oral Argument Transcript, [ECF No. 127, at 155]; *see also id.* at 155-58. In other words, Plaintiffs are not now asking the Court broadly to "set aside" a rule or prevent the Federal Defendants from taking "any action" based on DOE's interpretation of Title IX other than with respect to District 211. *Id.* Plaintiffs will seek broader relief if they prevail on the merits of their claims at the conclusion of this case. *Id.* Plaintiffs further seek to enjoin District 211 from enforcing the Restroom Policy and complying with the Locker Room Agreement. Complaint, [ECF No. 1, Prayer for Relief, at ¶ A].[6]

[6] After Plaintiffs filed their Motion, a federal district court in Texas issued a "nationwide" injunction against several federal agencies and various officials, including the Federal Defendants in this case, enjoining them from: (1) "enforcing" certain guidelines against the plaintiffs in that case and "their respective schools, school boards, and other public, educationally-based institutions"; (2) "initiating, continuing, or concluding any investigation based on [their] interpretation that the definition of sex includes gender identity"; and (3) "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of [its] Order." *Texas v. United States*, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016). The court said that its injunction was not intended to interfere with litigation

D. District 211's Request For Early Discovery And The June 9, 2016 Hearing

Shortly after Plaintiffs moved for a preliminary injunction, District 211 requested leave to conduct discovery before responding to Plaintiffs' Motion. Plaintiffs opposed the District's request for early discovery. They wanted a relatively quick (as the litigation timeline goes) decision on their request for injunctive relief and to avoid getting bogged down in fact-intensive, drawn-out discovery that potentially could delay a decision on their Motion. On June 3, 2016, at the Court's direction, District 211 served the interrogatories it wanted Plaintiffs to answer and a short memorandum explaining why the District felt the discovery was necessary for a ruling on Plaintiffs' Motion. [ECF No. 44]. Five days later, on June 8, 2016, Plaintiffs filed a Motion for Protective Order opposing the requested discovery. [ECF No. 48].

On June 9, 2016, the Court held a hearing and granted Plaintiffs' Motion for Protective Order. The Court found that responses to the interrogatories District 211 sought to serve were not necessary at this preliminary stage for the Court to make its recommendation on Plaintiffs' Motion. [ECF No. 52]. The Court's ruling was based on Plaintiffs' representation that the thrust of their case in support of their Motion rests on facial challenges to the Restroom Policy and the Locker Room Agreement which, as Plaintiffs allege, is the result of DOE's interpretation of Title IX in the Guidance Documents. In Plaintiffs' words:

> Plaintiffs' preliminary injunction motion places before this Court two questions of law related to the activities of the District. First, does letting a biological male use the girls' locker rooms and restrooms, and so subjecting the Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate the Girl Plaintiffs' constitutional right to privacy? Second, does letting a biological male use these private female facilities create a hostile environment for the Girl Plaintiffs, in violation of Title IX, and does offering the Girl Plaintiffs incomparable facilities as compared to boy students violate Title IX?

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before other courts involving the same issues. *Id.* For this and other reasons, the Texas injunction does not impact this case. S*ee Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't. of Educ.*, --- F. Supp. 3d --- , 2016 WL 5372349, at *20 (S.D. Ohio Sept. 26, 2016).

Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Protective Order ("Plaintiffs' Protective Order Brief"), [ECF No. 50, at 3].

At the June 9 hearing, Plaintiffs' counsel elaborated on what Plaintiffs were and were not arguing in support of their Motion for Preliminary Injunction:

> What you need to know, Your Honor, is that the policy exists, nobody disputes that, that the policy allows a biological [male] student into a locker room and restroom, and that, of course, results in interactions in the locker room on a daily basis between girls and boys. . . . Inserting the biological male into those facilities is sufficient to show the violation.

Transcript of June 9, 2016 Hearing ("June 9 Hearing Transcript") [ECF No. 128, at 18].

District 211's proposed interrogatories (and depositions of certain Plaintiffs and others that might have followed) were focused on discovering the "who, what, where, when, etc."—in other words, the facts—underlying Plaintiffs' anonymous, general, and relatively conclusory allegations in their Complaint. *See* District 211's Proposed Interrogatories, [ECF No. 44-1]. Plaintiffs argued none of that discovery was necessary at this stage because they are not relying on the specifics of any interactions in either restrooms or locker rooms between any Plaintiff and Student A or anyone else in support of their Motion for Preliminary Injunction. According to Plaintiffs' counsel, "who saw who in the state of undress or naked . . . is not relevant . . . at the preliminary injunction stage. We don't need to prove that. We didn't allege that in the complaint, nor do we rely on it at the preliminary injunction stage." June 9 Hearing Transcript, [ECF No. 128, at 18]. Rather, Plaintiffs argued the simple fact that Student A, in Plaintiffs' words a biological boy, is or can be present in the girls' restrooms and locker rooms is what entitles them to the relief they seek:

> The District's policies allow Student A access to the girls' private facilities. . . . Student A has used the girls' facilities while some Girl Plaintiffs were present. Girl Plaintiffs know that any time they use the restroom or locker room, Student

> A has the right to be present with them. They also know that, even if he is not present, he could walk in at any time. As a result, Girl Plaintiffs are suffering stress, anxiety, embarrassment, and intimidation.

Plaintiffs' Protective Order Brief, [ECF No. 50, at 3].[7]

The Court agreed Plaintiffs are entitled to frame the issues as they want in support of their Motion for Preliminary Injunction. The Court also recognized that, if it allowed District 211 to proceed with the discovery it wanted to take, that materially could delay a decision on Plaintiffs' Motion. In addition, District 211's counsel agreed that if Plaintiffs were resting their case in favor of a preliminary injunction on "the risk of exposure . . . in front of a biological male whose gender identity is female . . . [a] fact that I don't think anybody disputes[,] . . . as opposed to looking at what plaintiffs allege has actually happened in locker rooms and restrooms," then the District's proposed discovery could be deferred. June 9 Hearing Transcript, [ECF No. 128, at 15].

On May 25, 2016, Students A, B, and C, by and through their parents and legal guardians, and the Illinois Safe Schools Alliance (collectively, "Intervenor-Defendants") filed a Motion to Intervene in this case. [ECF No. 30]. As discussed above, Student A is the subject of the Locker Room Agreement entered into by DOE and District 211. Locker Room Agreement, [ECF No. 21-3]. Student C is a transgender boy who recently entered his freshman year at a high school in District 211 and wants to use the boys' restrooms and locker rooms at his school. Declaration of Parent C ("Parent C's Declaration"), [ECF No. 32-3, at ¶¶ 2, 10]. Student B is a transgender boy who soon will attend a high school in District 211 and wants to use the boys' restrooms and locker rooms at his high school. Declaration of Parent B ("Parent B's

[7] Plaintiffs also opposed the District's discovery because they intimated that if certain individual plaintiffs or members of the association plaintiff were forced to disclose their identities, as the District asked them to do in its interrogatories, they might drop out of the lawsuit, which was something Plaintiffs wanted to avoid. Plaintiffs' Protective Order Brief, [ECF No. 50, at 5].

Declaration"), [ECF No. 32-2, at ¶¶ 2, 19]. The Illinois Safe Schools Alliance is an organization that supports lesbian, gay, bisexual, and transgender students in Illinois through advocacy and training, including in District 211. Declaration of Owen Daniel-McCarter, [ECF No. 32-4, at ¶¶ 2-15]. On June 15, 2016, Judge Alonso granted Intervenor-Defendants' Motion to Intervene. [ECF No. 56]. Intervenor-Defendants oppose Plaintiffs' Motion for Preliminary Injunction.

Plaintiffs' Motion for Preliminary Injunction is fully briefed, and this Court held oral argument on August 15, 2016. The record before the Court on Plaintiffs' Motion consists of Plaintiffs' Complaint and the attached exhibits, the parties' respective briefs filed in support of and in opposition to Plaintiffs' Motion, the various declarations and other materials submitted with those briefs, and counsels' oral arguments during the hearing on Plaintiffs' Motion. For all of the reasons set forth below, the Court respectfully recommends that Judge Alonso deny Plaintiffs' Motion for Preliminary Injunction.

III. LEGAL STANDARD

A preliminary injunction "'is an extraordinary and drastic remedy.'" *Goodman v. Ill. Dep't of Fin.*, 430 F.3d 432, 437 (7th Cir. 2005) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). In the Seventh Circuit, the court analyzes a request for such relief in two distinct phases: a threshold phase and a balancing phase. *Girl Scouts of Manitou Council Inc. v. Girl Scouts of USA, Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008). During both phases, movants—here, Plaintiffs—bear the burden of proving "'*by a clear showing*'" that a preliminary injunction should be granted. *Goodman*, 430 F.3d at 437 (quoting *Mazurek*, 520 U.S. at 972) (emphasis in the original).

During the first phase, Plaintiffs must make three threshold showings. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661-62 (7th Cir. 2015). Plaintiffs must show they have a

likelihood of success on the merits. *Id.* at 662. They must show, "absent preliminary injunctive relief, [they] will suffer irreparable harm in the interim prior to a final resolution." *Id.* And Plaintiffs must show there is no adequate remedy at law. *Id.* If Plaintiffs fail to make any of these showings, the court must deny injunctive relief. *Girl Scouts*, 549 F.3d at 1086.

If Plaintiffs carry their burden in the threshold phase, the court then proceeds to the balancing phase. During this stage of the analysis, the court first "weighs the irreparable harm that the moving part[ies] would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving part[ies] would suffer if the court were to grant the requested relief." *Id.* Then the court considers how granting or denying the injunction would affect the interests of non-parties—commonly called the "public interest." *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). During the balancing phase, the court "weighs the balance of potential harms on a 'sliding scale' against the movant[s'] likelihood of success." *Turnell*, 796 F.3d at 662.

IV. ANALYSIS

A. Likelihood Of Success On The Merits

To satisfy the first threshold requirement for a preliminary injunction, Plaintiffs must show they have a likelihood of success on the merits. *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). "This 'likelihood' standard requires more than a 'mere possibility of relief' and more than a 'better than negligible' showing." *Truth Foundation Ministries, NFP v. Village of Romeoville*, --- F. Supp. 3d --- , 2016 WL 757982, at *8 (N.D. Ill. Feb. 26, 2016).

1. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their APA Claim Against The Federal Defendants

a. The Locker Room Agreement And The Federal Defendants' Interpretation Of The Word "Sex" In Title IX Are Subject To Judicial Review

The APA vests "the courts with the power to 'interpret . . . statutory provisions' and overturn agency action inconsistent with those interpretations." *Gutierrez-Brizuela v. Lynch*, --- F.3d --- , 2016 WL 4436309, at *7 (10th Cir. Aug. 23, 2016) (Gorsuch, J., concurring) (quoting 5 U.S.C. § 706). But the APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see also Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016). Therefore, "[w]hether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006).

The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Only two of these types of actions—sanction and rule—are relevant to this case. A sanction is, in pertinent part, "the whole or a part of an agency . . . prohibition, requirement, limitation, or other condition affecting the freedom of a person." *Id.* at § 551(10). And a "rule" is, again in pertinent part, "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* at § 551(4).

This case involves a sanction and a rule. Plaintiffs argue and the Federal Defendants agree the Locker Room Agreement is a sanction because it imposes "concrete consequences" on District 211. *See* Oral Argument Transcript, [ECF No. 127, at 48, 141, 143, 151]. The rule is

the Federal Defendants' "interpretation of Title IX," stated in the Guidance, "as requiring schools to treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." Federal Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Federal Defendants' Response Brief"), [ECF No. 80, at 1]. The Federal Defendants agree with Plaintiffs that this "interpretation," which the Court will refer to as "the Rule," is a rule. *See id.* at 15 ("Here, the Guidance has all the indicia of an interpretive rule.").

Generally, an agency action is final when the action marks the consummation of the agency's decision-making process, and has legal consequences or, phrased another way, directly affects a party. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 800, 806 (D.C. Cir. 2006); *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003). Under this standard, an agency's behavior may indicate that an action is final even when the agency has not observed "'the conventional procedural accoutrements of finality.'" *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001)). In the end, the finality requirement must be interpreted pragmatically. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016).

The Federal Defendants do "not contest[]" that the Locker Room Agreement constitutes final agency action. Oral Argument Transcript, [ECF No. 127, at 48, 139]; *see also id.* at 141, 143. The Locker Room Agreement marked the conclusion of DOE's administrative action against District 211, and DOE did not contemplate any further proceedings. The Locker Room Agreement imposes on District 211 concrete obligations that, according to the Federal

Defendants, are legally enforceable. *See id.* at 48, 141, 143, 151. At least some of these legal obligations exceed what Title IX and its implementing regulations would require the District to do if the Locker Room Agreement did not exist. The Court thus is satisfied that the Locker Room Agreement constitutes final agency action because it represents the culmination of DOE's decision-making process and has concrete legal consequences that bind District 211 and impact Plaintiffs.

The Federal Defendants argue the Rule is not final agency action and, thus, not subject to judicial review. They do not dispute that the Rule is the culmination of DOE's decision-making process with respect to the issue of whether "sex" as used in Title IX includes gender identity. Instead, they assert in a footnote that the Rule "is not final agency action . . . because it does not determine rights or obligations and no 'legal consequences' flow from it." Federal Defendants' Response Brief, [ECF No. 80, at 16 n.9]. The Federal Defendants do not say why the Rule does not determine rights or obligations and has no legal consequences. Instead, the footnote references the corresponding text in the body of the brief, which explains why, in the Federal Defendants' view, the Rule is interpretive, not legislative. In essence, then, the Federal Defendants seem to be arguing the Rule is not a final agency action because it is an interpretive rule.

This argument is contrary to clear precedent holding that interpretive rules and guidance documents may be subject to judicial review. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014); *Oregon v. Ashcroft*, 368 F.3d 1118, 1147 (9th Cir. 2004), *aff'd sub nom.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006). "'An agency may not avoid judicial review merely by choosing the form of'" a guidance document "'to express its definitive position on a general question of statutory interpretation.'" *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637

F.3d 408, 412 (D.C. Cir. 2011) (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986)). "Once [an] agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy*, 801 F.2d at 436; *see also Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) ("'[A]n interpretative rule is subject to review when it is relied upon or applied to support an agency action in a particular case.'") (quoting Edwards, Elliott, & Levy, *Federal Standards of Review* 161 (2d ed. 2013)).[8]

For all practical purposes, the Rule gives schools across the country "marching orders" as to what DOE expects them to do. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). It does not describe what DOE thinks Title IX might mean or propose how schools possibly could interpret Title IX. The Guidance Documents state definitively that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity," Q&A on Sexual Violence, [ECF No. 21-9, at 5], and tell schools what they "must" do to comply with Title IX, *see, e.g.*, Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 25]; Title IX Resource Guide, [ECF No. 21-7, at 21-22]. DOE has not expressed any uncertainty about the binding nature of its interpretation. To the contrary, even since the filing of this lawsuit, DOE has continued to maintain and advance its interpretation as binding on schools in the United States. On May 23, 2016, for example, DOE issued a Dear Colleague Letter saying that "[w]hen a school provides sex-segregated activities and facilities, transgender students must

[8] "If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" *Appalachian Power*, 208 F.3d at 1021.

be allowed to participate in such activities and access such facilities consistent with their gender identity." Dear Colleague Letter, [ECF No. 21-6, at 3]. There is no indication in the record that, within DOE, agency officials consider the Rule to be a suggestion or an interim position. Rather, it guides DOE's review of complaints and pursuit of enforcement actions.

In this particular case, the Rule "informed" DOE's "review" of Student A's complaint against District 211. Federal Defendants' Response Brief, [ECF No. 80, at 1-2]. After its review, DOE sent a Letter of Findings to District 211, saying the agency found the District to be in violation of Title IX, and that, if DOE and the District did not agree to resolve the matter, the agency would issue a Letter of Impending Enforcement Action within 30 days, initiating a process that ultimately could result in District 211 losing its federal funding. Letter of Findings, [ECF No. 21-10, at 13]. District 211 and DOE then entered into the Locker Room Agreement, a resolution that the Federal Defendants concede was "informed" by the Rule. Federal Defendants' Response Brief, [ECF No. 80, at 1-2]. The Federal Defendants concede the Locker Room Agreement has a direct and consequential effect on District 211 and, thus, in turn on Plaintiffs. *See* Oral Argument Transcript, [ECF No. 127, at 48, 141, 143, 151].

DOE says it issued the Rule in response to questions it was receiving from schools around the country confronted with how they should address transgender students' use of facilities denominated as single-sex. *See* Federal Defendants' Response Brief, [ECF No. 80, at 16]; Q&A on Sexual Violence, [ECF No. 21-9, at ii]; Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 1]. As a practical matter, the Rule represents and has been treated by DOE as its definitive statement that "sex" as used in Title IX and its implementing regulations includes gender identity. This has led some schools, such as District 211, to acquiesce to DOE's view. For all of these reasons, the Rule constitutes final agency

action. *See Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1006-07 (D.C. Cir. 2014); *CSI*, 637 F.3d at 411-14; *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d, 215 F.3d 45, 47-50 (D.C. Cir. 2000); *Appalachian Power*, 208 F.3d at 1020-23; *Philip Morris USA Inc. v. United States Food & Drug Admin.*, --- F. Supp. 3d --- , 2016 WL 4378970, at *10-12 (D.D.C. Aug. 16, 2016); *Pharm. Research & Manufacturers of Am. v. United States Dep't of Health & Human Servs.*, 138 F. Supp. 3d 31, 39-47 (D.D.C. 2015).[9]

Moreover, even if the Rule were not a final agency action, it still would be reviewable in this case because it would be at least a preliminary or intermediate agency action that led to the Locker Room Agreement, which is a final agency action. The APA provides that a court may review preliminary and intermediate agency actions "on the review of the final agency action." 5 U.S.C. § 704. That means when a court is reviewing a final agency action, such as the Locker Room Agreement, it also can review any preliminary or intermediate agency actions that led to the final agency action. *See Benzman v. Whitman*, 523 F.3d 119, 132 (2d Cir. 2008); *Oliver v. U.S. Dep't of the Army*, 2015 WL 4561157, at *3 (D.N.J. July 28, 2015); *Souza v. California Dep't of Transp.*, 2014 WL 793644, at *4 (N.D. Cal. Feb. 26, 2014); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 801 F. Supp. 2d 383, 404 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012); *cf. Com. of Mass. v. U.S. Nuclear Regulatory Comm'n*, 924 F.2d 311, 322 (D.C. Cir. 1991) ("Section 704 authorizes us to review only those preliminary, intermediate, or procedural rulings that relate to the final agency action presently before the court.").

For all of these reasons, the Rule is subject to judicial review in this case.

[9] In *Texas v. United States*, the court reviewed a different, but slightly overlapping, set of DOE guidance documents containing the same rule, and also concluded DOE's promulgation of the rule constituted a final agency action. 2016 WL 4426495, at *2 & n.4, 8-9.

b. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their Argument That "Sex" As Used In Title IX Unambiguously Excludes Gender Identity

Plaintiffs argue DOE violated the APA by promulgating the Rule and entering into the Locker Room Agreement which, according to Plaintiffs, conflict with the unambiguous meaning of the term "sex" in Title IX. Plaintiffs contend the statute and its implementing regulations unambiguously mean that one's "sex" is determined by his or her "chromosomes, anatomy, gametes, and reproductive system." Plaintiffs' Reply Memorandum in Support of Their Preliminary Injunction Motion ("Plaintiffs' Reply Brief"), [ECF No. 94, at 1]. Sex does not and cannot, Plaintiffs assert, include gender identity. Plaintiffs look to Seventh Circuit decisions interpreting Congress's intent when it used the word "sex" in the almost identically worded Title VII to support their position under Title IX.

The Federal Defendants argue the word "sex" as used in Title IX is ambiguous as to whether one's sex is determined "'with reference exclusively to genitalia'" or "'with reference to gender identity.'" Federal Defendants' Response Brief, [ECF No. 80, at 19] (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016)). They claim that, because of this ambiguity, courts should defer to DOE's interpretation of the term "sex" under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Chevron U.S.A. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Intervenor-Defendants go a step further and argue that whenever there is not complete alignment among a student's sex-related characteristics, the unambiguous meaning of the term "sex" in Title IX requires that schools determine a student's sex based upon his or her gender identity because gender identity in those circumstances is the only way to determine sex. Intervenor-Defendants' Brief in Response to Plaintiffs' Motion for Preliminary Injunction ("Intervenor-Defendants' Response Brief"), [ECF No. 79, at 2-7].

The Seventh Circuit first addressed, to the extent relevant here, the meaning of "sex" as used in Title VII in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). In that case, which involved a transsexual plaintiff alleging employment discrimination under Title VII, the court of appeals held Congress intended the term "sex" in Title VII to have a "narrow, traditional interpretation." *Id.* at 1086. *Ulane* was decided in 1984, more than 32 years ago, and a number of courts around the country since then have declined to follow its reasoning in light of more recent developments in the law including, among others, the Supreme Court's recognition in 1989 that discrimination claims based upon gender stereotypes and gender non-conformity are cognizable under Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Roberts v. Clark Cty. Sch. Dist.*, 2016 WL 5843046, at *6 (D. Nev. Oct. 4, 2016).[10]

On July 28, 2016, in *Hively v. Ivy Tech Community College, South Bend*, a panel of the Seventh Circuit had an opportunity to overrule *Ulane* but declined to do so. 830 F.3d 698 (7th Cir. 2016). Instead, it concluded *Ulane*'s holding that Congress intended a very narrow and traditional interpretation of the term "sex" in Title VII "so far, appears to be correct." *Id*. at 702. On October 11, 2016, however, the full Seventh Circuit vacated the panel's decision in *Hively* and granted a rehearing en banc in that case, with oral argument scheduled for November 30, 2016. Order Granting Rehearing En Banc and Vacating the Panel Opinion, *Hively v. Ivy Tech*

[10] Although not all of these cases are Title VII cases, they do evidence broad support for the proposition that the term "sex" in the context of statutes similarly designed to attack discrimination on the basis of sex should not be construed narrowly.

Cmty. Coll., S. Bend, No. 15-1720, Dkt. No. 60 (7th Cir. Oct. 11, 2016); Notice of En Banc Oral Argument, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, Dkt. No. 61 (7th Cir. Oct. 11, 2016).

As a result of these recent developments, it appears the law in the Seventh Circuit concerning the interpretation of the term "sex" in Title VII, as relevant to the almost identically worded Title IX, may be in flux. When the Seventh Circuit rules after its en banc review of *Hively*, whether with one voice or otherwise, it very well could shed important new light on the question of whether the term "sex" as used in Title VII, and by implication in Title IX, encompasses gender identity.

To understand the parties' respective arguments as to the meaning of the term "sex" under Title VII and Title IX and the current state of the law in that respect in this Circuit and around the country, it is important to understand the Seventh Circuit's decisions in *Ulane* and its progeny through and including the recent panel decision, now vacated, in *Hively*.

i. *Ulane v. Eastern Airlines, Inc.* and its progeny

The plaintiff in *Ulane*, Karen Frances Ulane, was an Army veteran who earned the Air Medal with eight clusters for her service in Vietnam. *Ulane*, 742 F.2d at 1082. When Ulane returned home, Eastern Airlines, Inc. hired her as a pilot, and she eventually reached the position of First Officer. *Id.* When it discovered that Ulane was transsexual, though, Eastern fired her. *Id.* at 1082-83. Ulane then filed suit, alleging that Eastern discriminated against her because of her sex in violation of Title VII. *Id.* at 1082. The district court, after a bench trial, found that "sex" "comprehend[s] 'sexual identity'" because "'sex is not a cut-and-dried matter of chromosomes,' but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual." *Id.* at 1084 (quoting *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 823-24 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th

Cir. 1984)). The district court ruled in Ulane's favor, holding Title VII prohibits discrimination on the basis of transsexualism. *Id.* The court also ruled Eastern had discriminated against Ulane as a female. *Id.* at 1087.

The Seventh Circuit disagreed with the district court's analysis and held Title VII does not prohibit discrimination on the basis of transsexualism. *Id.* at 1084. In doing so, the court of appeals attempted to discern Congress's intent when it enacted Title VII, and the court identified three adjectives that describe Congress's thinking about the plain meaning of "sex." *See id.* at 1085, 1086 (discussing the "plain" and "common" meaning of Title VII). The first adjective is "traditional." *Id.* at 1085 (recognizing "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex"); *id.* at 1085-86 (saying Congress's failure to amend Title VII "strongly indicates . . . sex should be given a . . . traditional interpretation"); *id.* at 1086 (determining only Congress can decide whether "sex" should encompasses "the untraditional"); *id.* (declining "to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation"). The second is "narrow." *Id.* at 1085-86 (concluding Congress's failure to amend Title VII "strongly indicates . . . sex should be given a narrow . . . interpretation"); *id.* at 1086 (explaining "Congress had a narrow view of sex in mind when it passed the Civil Rights Act"). And the third is "biological." *Id.* at 1087 (agreeing "with the Eighth and Ninth Circuits that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress").[11]

[11] It is hard to reconcile the court of appeals' holding that "sex" under Title VII has a narrow, traditional, and biological meaning, and does not encompass sexual identity, with its statement in dicta that "[i]f Eastern had considered Ulane to be female and had discriminated against her because she was female . . . then the argument might be made that Title VII applied." *Ulane*, 742 F.2d at 1087. The court reversed the district court's finding that Eastern had discriminated against Ulane as a female because that finding was not supported by sufficient factual evidence in the record. *Id.* But the court's apparent willingness to

Based on its understanding of congressional intent, the Seventh Circuit in *Ulane* overruled the district court's conclusion that "sex" "comprehend[s] 'sexual identity.'" *Id.* at 1084. The court of appeals said that "even though some may define 'sex' in such a way as to mean an individual's 'sexual identity,' our responsibility is to . . . determine what Congress intended when it decided to outlaw discrimination based on sex." *Id.* In this context, the Seventh Circuit held discrimination because of "sex" does not encompass discrimination based on "a sexual identity disorder or discontent with the sex into which [one was] born." *Id.* at 1085.[12]

Between 1984 and 2015, the Seventh Circuit referenced *Ulane*'s holding that the word "sex" in Title VII is to be interpreted in a narrow, traditional, and biological sense in three opinions. In *Doe by Doe v. City of Belleville, Illinois*, a 1997 decision, the court of appeals said "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination." 119 F.3d 563, 572 (7th Cir. 1997), *judgment vacated sub nom. City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998), and *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).[13] Then, in a pair of opinions—*Hamner* and *Spearman*—released just two months apart in 2000, the Seventh Circuit, again relying on *Ulane*, reaffirmed that "Congress intended the term 'sex' to mean 'biological male or biological

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consider a claim that Ulane was the victim of discrimination as a woman implies that the court would be considering her gender identity as relevant and potentially dispositive in the context of a Title VII claim.

[12] The court's use of language in *Ulane* and its reference to medical sources is somewhat dated today. For example, the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* recognizes that gender non-conformity is not a mental disorder; this is a change from prior editions of the DSM, including the Third Edition, which was in effect when *Ulane* was decided. American Psychiatric Association, *Gender Dysphoria* 1 (2013), *available* at http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf (discussing changes made in the Fifth Edition of the *DSM*).

[13] *But see Price Waterhouse*, 490 U.S. at 251 ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

female.'" *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084-85 (7th Cir. 2000) (quoting *Ulane*, 742 F.2d at 1087); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (quoting *Ulane*, 742 F.2d at 1087). Between 2001 and 2015, though, *Ulane* almost entirely faded from Seventh Circuit opinions.[14]

ii. *Hively* and the Seventh Circuit's decision to vacate the panel's ruling and rehear that case en banc

As noted above, on July 28, 2016, *Ulane* re-emerged in the Seventh Circuit. In *Hively*, a panel of the court of appeals said *Ulane* remained good law. The plaintiff-appellant in that case, Kimberly Hively, was a former teacher who alleged Ivy Tech Community College denied her full-time employment and promotions on the basis of her sexual orientation. *Hively*, 830 F.3d at 699. On appeal, Hively argued, among other things, that *Ulane* and *Hamner* were wrong and should be reversed. Appellant's Brief at 4-17, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016) (No. 15-1720), Dkt. No. 10. The panel in *Hively* rejected this argument. Instead, the panel said the "understanding in *Ulane* that Congress intended a very narrow reading of the term 'sex' when it passed Title VII of the Civil Rights Act, so far, appears to be correct." *Hively*, 830 F.3d at 702.

Plaintiffs, the Federal Defendants, and Intervenor-Defendants (District 211 did not brief the APA issue) submitted supplemental briefs after the panel's decision in *Hively*. Plaintiffs argued *Ulane* and *Hively* were case dispositive in their favor: "[u]nder the law of *Hively* and *Ulane*, Plaintiffs should prevail on the merits of their APA claim, as well as their Title IX and privacy claims, and so Plaintiffs' Motion for Preliminary Injunction should be granted." Plaintiffs' Supplemental Brief Addressing *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720,

[14] From 2001 through 2015, the Seventh Circuit cited *Ulane* in just one case. *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 819 (7th Cir. 2001) (citing *Ulane* for the proposition that Title VII does not prohibit discrimination on the basis of transsexualism).

2016 WL 4039703 (7th Cir. July 28, 2016) ("Plaintiffs' Supplemental Brief"), [ECF No. 118, at 1]. The Federal Defendants and Intervenor-Defendants argued, on the other hand, that *Hively* should be limited to its facts, and only to Title VII and sexual orientation claims. *See generally* Federal Defendants' Supplemental Brief, [ECF No. 116]; Federal Defendants' Responsive Supplemental Brief, [ECF No. 121]; Intervenor-Defendants' Opening Brief on *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. 2016) ("Intervenor-Defendants' *Hively* Brief"), [ECF No. 117]; Intervenor-Defendants' Response Brief on *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. 2016) ("Intervenor-Defendants' Responsive Supplemental Brief"), [ECF No. 120].

The Federal Defendants also argued *Ulane* and *Hively*, both of which interpreted Title VII, are not relevant to, much less controlling of any resolution of the question presented in this case under Title IX. Title VII and Title IX are different statutes enacted at different times to address different discriminatory conduct. And while the court of appeals in *Ulane* found that Congress included the term "sex" in Title VII at the last minute as the resfult of an effort intended to kill the bill, *Ulane*, 742 F.2d at 1085, the entire purpose behind Title IX was to address discrimination on the basis of sex broadly in educational institutions, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Still, courts routinely rely on Title VII jurisprudence to determine the meaning of similar provisions in Title IX. *Carmichael v. Galbraith*, 574 F. App'x 286, 293 (5th Cir. 2014); *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 695 (4th Cir. 2007); *Doe v. Claiborne Cty., Tenn. By & Through Claiborne Cty. Bd. of Educ.*, 103 F.3d 495, 514 (6th Cir. 1996). Moreover, in this case, all parties rely on Title VII cases in support of their respective legal positions, and they effectively equate the meaning of "sex" in Title VII and Title IX. *See, e.g.*, Plaintiffs' Supplemental Brief, [ECF No. 118, at 3];

Federal Defendants' Responsive Supplemental Brief, [ECF No. 121, at 2]; Intervenor-Defendants' *Hively* Brief, [ECF No. 117, at 9]; Intervenor-Defendants' Responsive Supplemental Brief, [ECF No. 120, at 7].

Therefore, had the Seventh Circuit not vacated *Hively*, the panel's decision certainly would have been relevant to this Court's analysis of the issues raised by Plaintiffs under Title IX. When the Seventh Circuit vacated the panel's decision, however, it called into serious question whether the narrow, traditional, and biological interpretation of the term "sex" announced in *Ulane* remains good law in this Circuit with respect to Title VII and Title IX. Moreover, although the panel in *Hively* relied on *Ulane*'s reading of congressional intent underlying Title VII, courts throughout the country for years have questioned and discounted the continued vitality of *Ulane*, particularly since the Supreme Court's decision in *Price Waterhouse*. *See Smith*, 378 F.3d at 573 ("[T]he approach in . . . *Ulane* . . . has been eviscerated by *Price Waterhouse*."). As the Sixth Circuit noted in *Smith*, "the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Id.*

In addition, two of the three judges on the *Hively* panel said the distinction between discrimination claims based on gender stereotypes or gender non-conformity, which are cognizable under Title VII but only if a person does not conform to the stereotypes associated with his or her gender assigned at birth, and sexual orientation claims, which are not cognizable under Title VII, "seems illogical," and "[p]erhaps the writing is on the wall" that this legal paradox should be corrected. *Hively*, 730 F.3d at 718.[15] In this Circuit, the distinction between

[15] *See also Hively*, 730 F.3d at 715 ("As things stand now . . . our understanding of Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails

these two kinds of claims flows in no small part from the narrow, traditional, and biological interpretation of the term "sex" announced in *Ulane*. The same two judges on the *Hively* panel also recognized that "precedent can be overturned when principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 718 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 33, 854-55 (1992)). [16]

In language that seems to invite the kind of re-examination that will now take place in the form of an en banc rehearing, two of the three judges on the *Hively* panel also said:

> [W]e can see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms. We allow two women or two men to marry, but allow employers to terminate them for doing so. Perchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our precedent.

Id. [17]

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to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing makeup—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman. . . . It seems likely that neither the proponents nor the opponents of protecting employees from sexual orientation discrimination would be satisfied with a body of case law that protects 'flamboyant' gay men and 'butch' lesbians but not the lesbian or gay employees who act and appear straight.").

[16] Ironically, Karen Ulane likely could prevail today on a claim against her employer based on a gender non-conformity theory. In other words, if Karen Ulane alleged today that she was fired not because she was a transsexual or because she was a woman, but because she failed to conform to Eastern's stereotype of how a man should look or act, she might prevail even if the term "sex" in Title VII is defined in a narrow, traditional, and biological way. Under the same law, however, if Ulane alleged that she was fired because she did not conform to Eastern's stereotype of how a woman should look or act, or because she was a woman, Ulane would not have a claim.

[17] As Intervenor-Defendants argue, "[t]ransgender persons *by definition* violate 'gender norms.'" Intervenor-Defendants' *Hively* Brief, [ECF No. 117, at 4] (emphasis in original).

In this Court's view, the Seventh Circuit's en banc review of *Hively* also may delve into the underlying basis for the *Hively* decision, which is whether *Ulane* correctly divined that Congress intended a very narrow, traditional, and biological interpretation of the term "sex" in Title VII. *See Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (per curiam) (explaining that the Seventh Circuit usually only hears cases en banc to address an intra-circuit split, not involved here, or a question of exceptional importance). Whether or not the court of appeals does so, however, its en banc decision could have an important impact on Plaintiffs' argument about the meaning of the term "sex" in Title VII and, by implication, in Title IX. In this respect, that decision could affect materially Plaintiffs' likelihood of success on the merits of their APA claim as this case proceeds.

In light of this uncertainty in the Seventh Circuit, it is useful to look to decisions by other courts concerning the issues raised in this case. To date, only one court of appeals has addressed whether "sex" in Title IX can or must include gender identity. In a case known as *G.G.*, a district court in Virginia found one of Title IX's implementing regulations allowed a local school board "'to limit bathroom access 'on the basis of sex,' including birth or biological sex.'" *G.G.*, 822 F.3d at 719 (quoting *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 745-46 (E.D. Va. Sept. 17, 2015)). The Fourth Circuit disagreed. *See id.* at 727. In its decision reversing the district court, the court of appeals explained that "sex" is ambiguous as it "is susceptible to more than one plausible reading because it permits . . . determining maleness or femaleness with reference exclusively to genitalia . . . [and] determining maleness or femaleness with reference to gender identity." *Id.* at 720. The court of appeals concluded DOE's interpretation of the term "sex" at issue in that case, which is the same interpretation challenged in this case, is not plainly erroneous or inconsistent with Title IX because various dictionaries from the time when the

statute was enacted and its implementing regulations were promulgated "suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive." *Id.* at 721. The Fourth Circuit therefore found DOE's interpretation of "sex" as used in Title IX must be given deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *G.G.*, 822 F.3d at 723; *see also Carcano v. McCrory Berger*, --- F. Supp. 3d --- , 2016 WL 4508192, at *13-17 (M.D.N.C. Aug. 26, 2016) (recognizing *G.G.* cannot be limited to its facts and deferring to DOE's interpretation of "sex").[18]

In *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, a district court in the Seventh Circuit reached the same conclusion under Title IX notwithstanding *Ulane* or *Hively*. Court Minutes from the Oral Argument Hearing on 9/6/2016 ("*Whitaker* Court Minutes"), *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 16-cv-00943-PP, Dkt. No. 26 (Sept. 6, 2016). The court recognized none of the relevant dictionary definitions "are helpful" in determining one's sex "when . . . genes, or chromosomes, or character, or attributes . . . point toward male identity, and others toward female." *Id.* at 3. Then it identified some of the problems with a narrow definition of "sex." *Id.* at 3-4. Finally, the court found *Ulane* did not control the issue because it was a Title VII case decided before *Price Waterhouse*. *Id.* at 4-5. For these reasons, the court held the term "sex" as used in Title IX is ambiguous and it deferred to DOE's interpretation under *Auer*. *Id.* at 6-7.

A district court in Ohio also recently decided "sex" as used in Title IX is ambiguous and, therefore, DOE's interpretation should be given deference under *Auer*. *Highland*, 2016 WL 5372349, at *15. The court recognized dictionaries at the time Title IX was enacted "defined

[18] Although the Supreme Court stayed the mandate of the Fourth Circuit and the preliminary injunction issued by the district court in *G.G.*, pending a petition for a writ of certiorari, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016), *G.G.*, unlike *Hively*, has not been vacated and still remains good law, *Highland*, 2016 WL 5372349, at *11 n.5.

'sex' in a myriad of ways." *Id.* at *11. Relying in part on *G.G.*, the court concluded that "neither Title IX nor the implementing regulations define the term 'sex' or mandate how to determine who is male and who is female when a school provides sex-segregated facilities." *Id.* The court also acknowledged Title IX allows transgender people to bring claims when they are discriminated against because of their gender non-conformity. *Id.* at *12-13. The court concluded Title IX is ambiguous and then found DOE's interpretation is not plainly erroneous or inconsistent with Title IX. *Id.* at *13-14. Based on these determinations, the court gave *Auer* deference to DOE's rule. *Id.* at *14.

These decisions holding "sex" is ambiguous in the context of Title IX and, therefore, that it can encompass gender identity are well-reasoned and persuasive.[19] They provide another basis for questioning whether *Ulane*, a Title VII case, has continued validity and should be applied in the context of Title IX. While the Seventh Circuit's decision to vacate the panel's decision in *Hively* and to rehear that case en banc technically leaves *Ulane* in place as the law in this Circuit, it does so only barely, in this Court's view, particularly with respect to the interpretation of Title IX. Unconstrained by *Hively*'s recent affirmation of *Ulane*, and with the continued vitality of the narrow, traditional, and biological view of the term "sex" articulated in *Ulane* subject to question, this Court believes the better reasoned recent decisions hold that the term "sex" in Title IX can be interpreted to encompass gender identity as DOE has interpreted it.

[19] Only two district courts have held that one's "sex" must be determined biologically under Title IX. *Texas*, 2016 WL 4426495; *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016). In *Johnson*, however, the court did not consider whether DOE's interpretation was entitled to deference and, therefore, that decision is of limited persuasive value in this case. *See Highland*, 2016 WL 5372349, at *13 n.9. In *Texas*, the court decided DOE's interpretation should not be given deference based on a relatively conclusory analysis that this Court finds unpersuasive. *See Texas*, 2016 WL 4426495, at *14-15.

Under the APA, a court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA also says a court must "hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* at § 706(2)(C). Plaintiffs argue that the Rule and the Locker Room Agreement violate the APA because they are based on an interpretation of Title IX that is "not accordance with" Congress's intent regarding the unambiguous meaning of "sex" and because they likely are "in excess of" DOE's jurisdiction and authority because DOE is not empowered to interpret Title IX contrary to congressional intent.

The foundation for each of Plaintiffs' arguments, in the Seventh Circuit, is *Ulane* and *Hively*. Plaintiffs' rely heavily on these two cases for the premise that Congress intended a very narrow and traditional interpretation of the term "sex" in Title VII and, by implication, in Title IX. Given the discussion above, the Court cannot say that Plaintiffs have a likelihood of success on the merits of these arguments. It is far from clear that the narrow interpretation of the term "sex" articulated 32 years ago in *Ulane* will continue to inform the Seventh Circuit's jurisprudence generally after its en banc review of *Hively* or, in particular, with respect to whether that term as used in Title IX includes gender identity.

Accordingly, against this legal backdrop and at this early stage of this case, the Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that the Federal Defendants violated the APA by promulgating the Rule or entering into the Locker Room Agreement based on an interpretation of Title IX that includes gender identity within the term "sex."

c. Plaintiffs Have Not Shown A Likelihood Of Success On The Merits Of Their Other APA Claims

Plaintiffs argue the Rule is legislative in nature and, thus, DOE was required to observe the notice-and-comment process. Plaintiffs' Opening Brief, [ECF No. 23, at 11-12]; Plaintiffs' Reply Brief, [ECF No. 94, at 4-9]. This argument relies in large part on Plaintiffs' contention that "sex" in Title IX means biological sex. Because they have not shown this premise is sound, that flaw significantly undermines the assertion that the Rule is legislative.

Plaintiffs also contend the Rule is legislative because it "contradicts four decades of unbroken authority." Plaintiffs' Opening Brief, [ECF No. 23, at 11]. A rule is not legislative, though, simply because it reflects a new position of the agency. *Twp., Marion Cty., Ind. v. Davila*, 969 F.2d 485, 492 (7th Cir. 1992). Rather, "the APA 'permit[s] agencies to promulgate freely [interpretive] rules—whether or not they are consistent with earlier interpretations' of the agency's regulations." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 719 (D.C. Cir. 2015) (quoting *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015)); *see also Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 681 (6th Cir. 2005).

Plaintiffs also argue the Rule must be legislative because it impacts legal rights and obligations. An interpretive rule, though, may have a substantial impact on the rights of individuals because "'[t]he impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals.'" *Davila*, 969 F.2d at 493 (quoting *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983)). If a rule "cannot be independently legally enforced [because] there must be some external legal basis supporting its implementation," than it is interpretive. *Iowa League of Cities v. EPA*, 711 F.3d 844, 874 (8th Cir. 2013). The "critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's

construction of the statutes and rules which it administers.'" *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

It is undisputed that DOE issued the Guidance that contains the Rule in response to questions from school administrators, teachers, and parents. *See* Federal Defendants' Response Brief, [ECF No. 80, at 16]; Q&A on Sexual Violence, [ECF No. 21-9, at ii]; Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 1]. The Guidance details what DOE thinks Title IX means. It does not provide an independent basis for an enforcement action. Instead, any action would have to be grounded in Title IX itself. Moreover, the specific facts of this case demonstrate DOE does not treat the Guidance as giving rise to the legal obligation to treat transgender students consistent with their gender identity. DOE began its review of Student A's complaint before any of the challenged Guidance Documents were issued. And its Letter of Findings does not reference or cite the Guidance. Therefore, the record shows the Guidance was issued in response to questions received by DOE to inform schools and the public in general as to what schools must do to comply with DOE's understanding of Title IX.

For these reasons, the Rule is interpretive and need not have been promulgated through the notice-and-comment process.[20]

In addition, Plaintiffs contend the Rule conflicts with Title IX and Plaintiffs' constitutional right to privacy. Plaintiffs' Opening Brief, [ECF No. 23, at 10]. As discussed in the subsequent sections of this Report and Recommendation, the Court finds Plaintiffs do not

[20] Plaintiffs note at one point in their briefs that "20 U.S.C. § 1682 provides in part that any 'rule, regulation, or order' issued by a federal agency to effectuate Title IX must be approved by the President in order to become effective." *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 106 (4th Cir. 2011). Although this argument was not developed and supported, the Court notes that, "[a]s with the APA's notice and comment requirements, courts have held that the requirement of presidential approval does not apply to the issuance of interpretive guidelines." *Id.*

have a likelihood of success on either of these claims. This, in turn, undermines that aspect of Plaintiffs' APA claim.[21]

Plaintiffs assert the Rule violates the Spending Clause of the Constitution because it permits the Federal Defendants to pull federal funds for discrimination based on a student's gender identity. Plaintiffs' Opening Brief, [ECF No. 23, at 10-11]; Plaintiffs' Reply Brief, [ECF No. 94, at 17-18]. Plaintiffs do not dispute that Congress has provided adequate notice that federal funds may be withheld from a school that discriminates in violation of Title IX. Instead, Plaintiffs argue Title IX only prohibits discrimination based on biological sex and, therefore, that Title IX does not provide notice that funding may be withheld for discrimination based on gender identity. As with many of Plaintiffs arguments, this one rests on the meaning of "sex" in Title IX. And, as the Court already has explained, Plaintiffs have not carried their burden, at this stage, to establish clearly they have a probability of success on the merits of that claim.

Title IX does not explicitly state that a school may lose its federal funding if it does not take adequate steps to stop discrimination against transgender students. But a spending condition is not unconstitutional simply because its application may be unclear in certain contexts. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 665-66 (1985). Moreover, Congress need not "specifically" identify and prescribe "each condition in the legislation." *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 921 (7th Cir. 2012). Simply put, "it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

[21] Plaintiffs also assert that DOE's actions violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and various additional constitutional rights, including the parental right to direct a child's upbringing and the right to free exercise of religion. Plaintiffs' Opening Brief, [ECF No. 23, at 10]. They never develop or support these arguments. Instead, Plaintiffs raise them in a conclusory sentence or two. That is not enough. *See United States v. Hook*, 471 F.3d 766, 775 (7th Cir. 2006) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).") (quoting *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000)).

Finally, Plaintiffs argue DOE acted arbitrarily and capriciously by promulgating the Rule because the agency did not provide a rational explanation for its action. Plaintiffs' Opening Brief, [ECF No. 23, at 9-10]; Plaintiffs' Reply Brief, [ECF No. 94, at 16-17]. In the Guidance and the Letter of Findings, however, DOE extensively cited the provisions of Title IX, its regulations, and relevant court decisions. In the Letter of Findings, DOE also acknowledged the privacy concerns of the various parties; described in detail the layout of the various restrooms and locker rooms, with a particular emphasis on the resulting privacy risks; and laid out the alternative privacy options. Letter of Findings, [ECF No. 21-10, at 3-13]. In the "Conclusion" section of the Letter of Findings, DOE dedicated a lengthy paragraph solely to explaining how a privacy curtain, coupled with Student A's stated intention to use the curtain, could adequately protect all "potential or actual student privacy interests." *Id.* at 13. Plaintiffs have not done enough to overcome the "highly deferential" standard of review for arbitrary and capricious claims, under which agency actions are presumed valid. *See Am. Trucking Associations, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 245 (D.C. Cir. 2013); *see also Judulang v. Holder*, 132 S. Ct. 476, 483 (2011) (noting that a court must not "'substitute its judgment for that of the agency'") (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

For all of these reasons, Plaintiffs do not have a likelihood of success on the merits of their claim that the Rule and the Locker Room Agreement violate the APA.

2. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their Constitutional Claim Against Either The Federal Defendants Or District 211

Plaintiffs allege a violation of their right to substantive due process. There is a "basic framework" for evaluating substantive due process claims. *Christensen v. Cty. of Boone, Ill.*,

483 F.3d 454, 461 (7th Cir. 2007). The analysis begins with "a 'careful description' of the [right] said to have been violated." *Id.* at 462 (quoting *Doe v. City of Lafayette*, 377 F.3d 757, 768 (7th Cir. 2004)); *see also Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 763 (N.D. Ill. 2015). Then the inquiry turns to whether that right is "fundamental." *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763. If it is, the question becomes whether there is a "direct" and "substantial" interference with a fundamental right. *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763. Even if there is such an interference, the challenged action still must "shock[] the conscience" for there to be a constitutional violation. *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763.

a. There Is No General Constitutional Right To Privacy

Plaintiffs assert a claim against the Federal Defendants and District 211 for violating their "fundamental right to privacy." Complaint, [ECF No. 1, at p.53].[22] In *Griswold v. Connecticut*, the Supreme Court acknowledged for the first time that the "penumbras" of the "specific guarantees in the Bill of Rights" protect certain privacy interests. 381 U.S. 479, 484 (1965). But the Supreme Court never has recognized "a generalized right" to privacy in the substantive due process context. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178 (3d Cir. 2005); *see also*

[22] Plaintiffs describe the "fundamental right to privacy" they seek to vindicate in this case as "grounded in the Fourteenth Amendment's Due Process Clause. Complaint, [ECF No. 1, at ¶ 359]. But the Fourteenth Amendment does not apply to the federal government. The Federal Defendants, therefore, couch their response to Plaintiffs' claim in the context of the Fifth Amendment's Due Process Clause. Federal Defendants' Response Brief, [ECF No. 80, at 26]. The Court will read the Complaint as asserting a claim under both the Fifth and Fourteenth Amendments. Both due process clauses "'guarantee more than fair process'" and "cover a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). They also protect the same fundamental rights and are governed by the same legal standards. *See United States v. Al-Hamdi*, 356 F.3d 564, 575 n.11 (4th Cir. 2004); *Molina-Aviles v. D.C.*, 824 F. Supp. 2d 4, 9 n.8 (D.D.C. 2011).

Katz v. United States, 389 U.S. 347, 350 (1967) (explaining that the Fourth Amendment also does not encompass a "general constitutional 'right to privacy'"). Instead, it has extended substantive due process protection to privacy interests only in limited circumstances. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing that "'individual decisions . . . concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment'") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986)); *Whalen v. Roe*, 429 U.S. 558, 578 (1977) (holding that a New York law, which established a database of names and addresses of persons who received prescriptions for certain drugs sold on the black market, did not pose an unconstitutional invasion of privacy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that the right to privacy "found[] in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision" to terminate a pregnancy); *Griswold*, 381 U.S. at 485-86 (holding that the Fourteenth Amendment confers a right to privacy in one's marital relations and use of contraceptives).

The Supreme Court "always [has] been reluctant to expand the concept of substantive due process because guide posts for responsible decision making in this area are scarce and open-ended." *Glucksberg*, 521 U.S. at 720. "The doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Accordingly, the "Supreme Court of the United States has made clear, and [the Seventh Circuit] similarly cautioned, that the scope of substantive due process is very limited." *Belcher v. Norton*, 497 F.3d 742, 753 (7th Cir. 2007).

b. Plaintiffs Too Broadly Define The Right At Issue In This Case

The first step in the substantive due process analysis is to define carefully the right (or rights) at issue in this case. As the Seventh Circuit has observed, the definition of a substantive due process right is "constrained by the factual record before [the court], which sets the boundaries of the liberty interests *truly* at issue in the case." *Lafayette*, 377 F.3d at 769 (emphasis in original); *see also Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1240 (11th Cir. 2004). The definition must be "specific and concrete," avoiding "sweeping abstractions and generalities." *Lafayette*, 377 F.3d at 769. Crafting a narrow, focused definition ensures that courts "do not stray into broader 'constitutional vistas than are called for by the facts of the case at hand.'" *Doe v. Moore*, 410 F.3d 1337, 1344 (11th Cir. 2005) (quoting *Williams*, 378 F.3d at 1240). This in turn "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Glucksberg*, 521 U.S. at 722.

An example is helpful. In *Washington v. Glucksberg*, the plaintiff asserted as a fundamental right the "liberty to choose how to die," "a right to control of one's final days," and "the liberty to shape death." *Id.* The court of appeals framed the right at issue as "a liberty interest in determining the time and manner of one's death" and "a right to die." *Id.* The Supreme Court, however, rejected all of these formulations as not specific enough. Instead, the Supreme Court asked whether there was a "right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723; *see also Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008) (expressing doubt that the definition of a right "to engage in a private act of consensual sex" is narrow enough).

Plaintiffs assert generally that the Restroom Policy and the Locker Room Agreement violate their constitutional "right to privacy."[23] They identify two broad privacy interests they contend are protected by substantive due process. The first is the "right to privacy in one's fully or partially unclothed body." Complaint, [ECF No. 1, at ¶ 362]; *see also id.* at ¶ 393. The second is "the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex." *Id.* at ¶ 363; *see also id.* at ¶ 393. Plaintiffs' framing of these rights is not tied to the facts of the case and, therefore, is inconsistent with the Seventh Circuit's admonition to avoid "sweeping abstractions and generalities" in the context of substantive due process analysis. *Lafayette*, 377 F.3d at 769.

For this reason, the Federal Defendants argue Plaintiffs' articulation of the fundamental rights at issue in this case "grossly overstates the interest that they actually seek to vindicate, which is an alleged right to change [clothes] in a locker room from which transgender students are excluded." Federal Defendants' Response Brief, [ECF No. 80, at 3]. When opposing District 211's request for discovery, Plaintiffs also framed their constitutional argument more narrowly than they do in their Motion for Preliminary Injunction. In their brief in support of their Motion for Protective Order, Plaintiffs identified the issue to be decided as: "does letting a biological male use the girls' locker room and restrooms, and so subjecting Girl Plaintiffs to the

[23] Count II of Plaintiffs' Complaint, which asserts Plaintiffs' claim that the Federal Defendants and District 211 are violating Plaintiffs' constitutional rights, does not mention DOE's Rule. Complaint, [ECF No. 1, at ¶¶ 358-396]. In Count I of the Complaint against the Federal Defendants, Plaintiffs do allege the Rule violates Plaintiffs' constitutional right to privacy, *id.* at ¶ 332, and Plaintiffs' incorporate by reference all of their prior allegations into Count II. In their Motion for Preliminary Injunction, Plaintiffs seek to enjoin the Restroom Policy and the Locker Room Agreement. They acknowledged at oral argument on that Motion that they are only seeking at this time to enjoin the Federal Defendants "from further application of the rule to force District 211 to comply with it in the operation of its facilities." Oral Argument Transcript, [ECF No. 127, at 155]. The Rule, however, only impacts District 211 in the context of the Locker Room Agreement. District 211 put its Restroom Policy into place years before it heard from OCR in connection with Student A's complaint about locker room access. Plaintiffs' written arguments in support of their constitutional claims focus on the Restroom Policy and the Locker Room Agreement, and do not reference the Rule at all. Therefore, the Court need not address in this Report and Recommendation whether the Rule, standing alone, violates Plaintiffs' constitutional rights.

risk of compelled exposure of their bodies to the opposite biological sex, violate Girl Plaintiffs' constitutional right to privacy?" Plaintiffs' Protective Order Brief, [ECF No. 50, at 3]. This is a better attempt at framing the issue, and it encompasses Plaintiffs' main claim in this case which revolves around Student A's access to restrooms and locker rooms also used by Girl Plaintiffs, but it does not account for Plaintiffs' claim that allowing transgender students to use restrooms consistent with their gender identity violates the privacy rights of both male and female Student Plaintiffs.

Essentially, in the Court's view, Plaintiffs' constitutional claim posits this question: do high school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs? The Court will analyze Plaintiffs' constitutional claims in this context. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1087 (9th Cir. 2015) (refining the definition of the right at issue to account for the fact that the challenged conduct applied "only to persons in specific circumstances," not "generally to the population as a whole").

c. High School Students Do Not Have A Constitutional Right Not To Share Restrooms Or Locker Rooms With Transgender Students Whose Sex Assigned At Birth Is Different Than Theirs

Initially, it is important to note that, for purposes of the constitutional analysis, the Court is not bound by the narrow, traditional, and biological understanding of "sex" that the Seventh Circuit held in *Ulane* that Congress codified in Title VII. Congress's intent in enacting that statute is irrelevant to the analysis of Plaintiffs' asserted constitutional right to privacy. Further, in the Court's view, sex assigned at birth is not the only data point relevant to the question of whether the Constitution precludes a school from choosing to allow transgender students to use restrooms or locker rooms consistent with their gender identity. Rather, as the Federal

Defendants and Intervenor-Defendants point out, a transgender person's gender identity is an important factor to be considered in determining whether his or her needs, as well as those of cisgender people, can be accommodated in the course of allocating or regulating the use of restrooms and locker rooms. So, to frame the constitutional question in the sense of sex assigned at birth while ignoring gender identity frames it too narrowly for the constitutional analysis.

In addition, it also is important to note Plaintiffs are not required—"compelled" in their words, Plaintiffs' Opening Brief, [ECF No. 23, at 15]—by any state actor to use restrooms or locker rooms with Student A or any other transgender student. The District's Restroom Policy allows transgender students to use restrooms consistent with their gender identity. No cisgender student is compelled to use a restroom with a transgender student if he or she does not want to do so. In addition, District 211 does not require any cisgender girl student to use a locker room with Student A if she does not want to do so. As discussed more fully below, District 211 has made clear that any cisgender high school student who does not want to use a restroom or a locker room with a transgender student is not required to do so.

If the privacy stalls and protections the District provides in restrooms and locker rooms are not sufficient for the comfort of any student, whether cisgender, transgender, or otherwise, he or she can use an alternative facility that satisfies his or her privacy needs. *See* Declaration of Mark Kovack ("Kovack's Declaration"), [ECF No. 78-1, at ¶¶ 15-17] (explaining available privacy alternatives include separate, single-use facilities). In addition, District 211 notified all parents that "[s]tudents who seek additional levels of privacy [other than the stalls provided in the communal locker rooms] may request the use of an alternate changing area by contacting their school counselor." *Id.* at ¶ 15(b). The absence of any compulsion distinguishes this case

from others Plaintiffs cite which, as discussed below, involve involuntary invasions of someone's privacy.

Generally speaking, the penumbral rights of privacy the Supreme Court has recognized in other contexts protect certain aspects of a person's private space and decision-making from governmental intrusion. Even in the context of the right to privacy in one's own body, the cases deal with compelled intrusion into or with respect to a person's intimate space or exposed body. No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.

Again, courts are very careful in extending constitutional protection in the area of personal privacy. "Although the Supreme Court has recognized fundamental rights in regard to some special . . . privacy interests, it has not created a broad category where any alleged infringement on privacy . . . will be subject to substantive due process protection." *Moore*, 410 F.3d at 1343-44. In other words, "privacy" is not a magic term that automatically triggers constitutional protection. Instead, the same rules that govern every other substantive due process analysis apply in the privacy context. *See Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 591 (6th Cir. 2008). That means an asserted privacy right is not fundamental unless it is "'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.'" *Khan v. Bland*, 630 F.3d 519, 535 (7th Cir. 2010) (quoting *Glucksberg*, 521 U.S. at 720-21). The list of rights that rise to this level is "a short one." *Sung Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012). This list "'for the most part'" has been limited to "'matters relating to

marriage, family, procreation, and the right to bodily integrity.'" *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 615 (7th Cir. 2014) (quoting *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion)); *see also Kraushaar v. Flanigan*, 45 F.3d 1040, 1047 (7th Cir. 1995).

In assessing the nature and scope of Plaintiffs' constitutional rights, and whether those rights have been infringed, the Court also must consider the need to preserve the discretion of schools to craft individualized approaches to difficult issues that are appropriate for their respective communities. Schools "have the difficult task of teaching 'the shared values of a civilized social order.'" *Doninger v. Niehoff*, 527 F.3d 41, 54 (2d Cir. 2008) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 683 (1986)). Our public education system "has evolved" to rely "necessarily upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *see also Jeffrey v. Bd. of Trustees of Bells ISD*, 261 F. Supp. 2d 719, 728 (E.D. Tex. 2003), *aff'd*, 96 F. App'x 248 (5th Cir. 2004) ("Local school boards have broad discretion in the management of school affairs."). The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Even when confronting segregation, perhaps the most intractable problem ever to afflict our public schools, the Supreme Court emphasized that schools "have the primary responsibility for elucidating, assessing, and solving" problems that arise during desegregation. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299 (1955); *see also Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2214 (2016) ("Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and

educational mission."). Therefore, our Nation's deeply rooted history and tradition of protecting school administrators' discretion require that this Court not "unduly constrain[] [schools] from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him [or her] for later professional training, and in helping him [or her] to adjust normally to his [or her] environment." *Bannon v. Sch. Dist. of Palm Beach Cty.*, 387 F.3d 1208, 1220 (11th Cir. 2004) (Black, J., specially concurring) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 287 (1988)).

It also is important to remember that constitutional privacy rights, whether rooted in the Fourth Amendment or the Fourteenth Amendment, "are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). "[I]t is well established that public school students enjoy a reduced expectation of privacy in comparison to the public at large." *Dominic J. v. Wyoming Valley W. High Sch.*, 362 F. Supp. 2d 560, 570 (M.D. Pa. 2005). Of particular relevance to this case, public school locker rooms in this country traditionally have been and remain "not notable for the privacy they afford." *Vernonia*, 515 U.S. at 657.

Contemporary notions of liberty and justice are inconsistent with the existence of the right to privacy asserted by Plaintiffs and properly framed by this Court. A transgender boy or girl, man or woman, does not live his or her life in conformance with his or her sex assigned at birth. The record in this case provides ample evidence of this point. Intervenor-Defendants Students A, B, and C live, for all intents and purposes, consistent with their gender identity. Student A "live[s] her life full-time as a girl." Declaration of Parent A ("Parent A's Declaration"), [ECF No. 32-1, at ¶ 5]. She dresses in girls' clothes. *Id.* She maintains "a traditionally female hair style . . . and overall appearance." Kovack's Declaration, [ECF No. 78-1, at ¶ 7]. She plays on girls' athletic teams. Parent A's Declaration, [ECF No. 32-1, at ¶ 7].

Her legal name is female, and she uses female pronouns to refer to herself. *Id.* at ¶ 5. Her passport lists her gender as female. *Id.* Likewise, Student B "live[s] his life full-time as a boy." Parent B's Declaration, [ECF No. 32-2, at ¶ 5]. He dresses in boys' clothing and cuts his hair short. *Id.* His legal name is a "traditionally male name," and he uses male pronouns to refer to himself. *Id.* Student C also lives "life as a boy." Parent C's Declaration, [ECF No. 32-3, at ¶ 5]. He uses male restrooms in public. *Id.* at ¶ 10. His legal name is a "traditionally male name," and he uses male pronouns to refer to himself. *Id.* at ¶ 5. His state identification card lists his gender as male, and his Social Security records do the same. *Id.*

Further, people who interact with Students A, B, and C largely treat them consistent with their gender identity. In fact, many people who interact with Students A, B, and C on a daily basis may have no idea, and may not care, what sex they were assigned at birth. Even before OCR got involved, District 211 "honored Student A's request to be treated as female" in every respect other than locker room access. Letter of Findings, [ECF No. 21-10, at 2]. The District allowed her to use the girls' restrooms. Kovack's Declaration, [ECF No. 78-1, at ¶ 9]. All of Student B's friends and most of his family use male pronouns to refer to him. Parent B's Declaration, [ECF No. 32-2, at ¶ 5]. The teachers, administrators, and staff at Student B's school "have made an effort to treat" him "consistent with his gender identity." *Id.* at ¶ 8. The school employees and Student B's friends support his use of the boys' restrooms. *Id.* at ¶ 13. Similarly, the administrators, teachers, and staff at Student C's school "treat him as they would treat any other boy at the school." Parent C's Declaration, [ECF No. 32-3, at ¶ 6]. That includes using his legal, male name and male pronouns to refer to him. *Id.* Other students at Student C's school also "are supportive of" Student C. *Id.* at ¶ 7.

In addition, the military, which historically has served a vital role as a melting pot in our society, allows transgender personnel to serve openly and fully integrated in all military services. Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. Times, July 1, 2016, at A3, *available at* http://www.nytimes.com/2016/07/01/us/transgender-military.html; *see also* Rand Corporation, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* 44 (2016), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/ RAND_RR1530.pdf (citing as precedent the successful integration of transgender service members in the armed forces of Australia, Canada, Israel, and the United Kingdom); Palm Center, *Report of the Planning Commission on Transgender Military Service* (2014), *available at* http://www.palmcenter.org/wpcontent/uploads/2014/08/Report-of-Planning-Commission-on-Transgender-Military-Service_0-2.pdf (finding publically-available data indicates that allowing transgender service members to serve openly does not have a significant effect on unit cohesion, operational effectiveness, or readiness). The National Collegiate Athletic Association includes transgender student-athletes in collegiate sports consistent with their gender identity. Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), *available at* https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

More directly relevant to this case, the General Services Administration ("GSA") has issued a federal management regulation requiring that "[f]ederal agencies occupying space under the jurisdiction, custody, or control of GSA must allow individuals to use restroom facilities and related areas consistent with their gender identity." 81 Fed. Reg. 55148-01, 2016 WL 4377076. Cities across the country have implemented various requirements for gender-neutral bathrooms. *See* Office of the New York City Comptroller, *Restrooms for All: A Plan to Expand Gender*

Neutral Restrooms in NYC 2-3 (2015), *available at* https://comptroller.nyc.gov/wp-content/uploads/documents/Gender_Neutral_Bathrooms.pdf (discussing such laws in Washington, D.C., Philadelphia, and Delaware); The Associated Press, *California Governor Approves Gender-Neutral Restrooms*, N.Y. Times (Sept. 29, 2016), http://www.nytimes.com/aponline/2016/09/29/us/ap-us-xgr-gender-neutral-restrooms-.html?_r=0 (describing a California law requiring all single-stall toilets in California be designated gender-neutral). Likewise, major retailers allow employees and customers to use restrooms that correspond to their gender identity. *See, e.g.*, Abrams Rachel, *Target Steps Out in Front of Bathroom Choice Debate*, N.Y. Times, Apr. 28, 2016, at B1, *available at* http://www.nytimes.com/2016/04/28/business/target-steps-out-in-front-of-bathrchoice-debate.html?_r=0.

Finally, although Plaintiffs raise the specter that all cisgender boys will be able to use the girls' restrooms and locker rooms at-will if District 211 continues to allow transgender students to use restrooms consistent with their gender identity and Student A to use the girls' locker rooms, Plaintiffs' Opening Brief, [ECF No. 23, at 20], District 211 does not permit all boys to enter the girls' restrooms and locker rooms or all girls to enter the boys' restrooms and locker rooms. The Restroom Policy permits all students to use restrooms consistent with their gender identity, and the Locker Room Agreement allows only Student A, who identifies and presents as a female, to use the girls' locker rooms. This is not the same as allowing all cisgender boys to use the girls' facilities or all cisgender girls to use the boys' facilities. District 211 has no such policy, and there is no indication it plans to institute such a policy. Further, speculation that someone will abuse or violate a school policy, and presumably be subject to discipline for doing so, is not a reason to invalidate policies that do not, by their terms, condone such conduct.[24]

[24] In a similar vein is Plaintiffs' allegation in their Complaint that one out of eight high school girls reports being a victim of rape according to the Centers for Disease Control. Complaint, [ECF No. 1, at ¶¶

For all these reasons, high school students do not have a fundamental constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs.

d. Plaintiffs Also Have Not Shown The Broad Constitutional Rights They Allege Exist Have Been Infringed By The Actions Of District 211 Or The Federal Defendants

Even if the Court were to accept that the broad rights to privacy asserted by Plaintiffs—the right to privacy in their fully or partially unclothed bodies and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex—are fundamental, Plaintiffs still have not shown those rights have been "directly" and "substantially" infringed in this case. *See Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763; *Presley v. Bd. of Sch. Directors of Rankin Sch. Dist. No. 98*, 2014 WL 1468087, at *2 (C.D. Ill. Apr. 15, 2014). The cases upon which Plaintiffs rely to establish that the facts in this case rise to the level of a constitutional violation involve starkly different operative facts, law, and analysis. None of the cases stand for the proposition that the risk of bodily exposure to a transgender student in a high school restroom or locker room, particularly given the privacy protections put in place by District 211, infringes upon a fundamental right and thereby violates the Constitution.

For instance, Plaintiffs cite *Doe v. Luzerne County*, 660 F.3d 169 (3d Cir. 2011), for the proposition that Defendants are violating Plaintiffs' right to privacy in their unclothed and partially clothed bodies. Plaintiffs' Opening Brief, [ECF No. 23, at 13]. In that case, the plaintiff, a female deputy sheriff went to a local hospital to use a decontamination shower.

270-271]. There is absolutely no evidence in this record that allowing transgender high school students to use restrooms or locker rooms consistent with their gender identity increases the risk of sexual assault. Further, there are no allegations that during the more than three years transgender students have been using District 211 restrooms consistent with their gender identity, and the portions of two academic years during which Student A has been using the girls' locker room, there have been any actual or threatened sexual assaults as a result of District 211's policies. Again, the entirely speculative risk that someone will commit a criminal act is not a reason to invalidate otherwise valid policies.

Luzerne, 660 F.3d at 172. She took every possible precaution to make sure that no one saw her naked by using a showering room in which no one else was present and closing the door completely before undressing. *Id.* at 172-73. When she got out of the shower, she realized that there were no towels in the room and wrapped herself in some paper that normally was used to cover doctors' examination tables. *Id.* at 173. Then, while wrapped in the paper, she allowed another female deputy to inspect her to see if any fleas survived the decontamination process. *Id.* Unbeknownst to either female deputy, two of their male colleagues opened the closed door and surreptitiously recorded the plaintiff. *Id.* These men later showed the video to other people in their department and saved the images to a public work computer. *Id.* at 173-74.

On appeal, the Third Circuit did not find the plaintiff's constitutional rights were violated. Instead, the court of appeals explained that "[p]rivacy claims under the Fourteenth Amendment necessarily require fact-intensive and context-specific analyses." *Id.* at 176. The Third Circuit explicitly recognized there is no "rule that a nonconsensual exposure of certain anatomical areas constitutes a *per se* violation." *Id.* The court of appeals then said that, even in light of the egregious facts in *Doe*, it still was not clear whether the plaintiff had suffered a constitutional violation. Instead, the Third Circuit determined a material question of fact remained as to whether certain sensitive parts of the plaintiff's body were exposed, which could have affected her claim, and it reversed and remanded for further proceedings consistent with its opinion. *Id.* at 178.

Plaintiffs also rely heavily on *Norwood v. Dale Maintenance System, Incorporated*, 590 F. Supp. 1410 (N.D. Ill. 1984), for the proposition that "compelled cross-sex restroom and locker room use violates" the Constitution. Plaintiffs' Opening Brief, [ECF No. 23, at 15-16.] In *Norwood*, the female plaintiff, who worked as a restroom attendant on the night shift, sought a

job working in a men's restroom during the day shift. *Norwood*, 590 F. Supp. at 1413-14. Based solely on her gender, she was denied that position. *Id.* at 1414-15. In challenging that decision, she argued she was subjected to sex discrimination in violation of Title VII. *Id.* at 1414. *Norwood* did not raise any constitutional issue. Instead, the case turned solely on whether sex was a "bona fide occupational qualification" ("BFOQ") under Title VII for the sought-after restroom attendant job. *Id.* at 1415. While the court's inquiry regarding this issue involved privacy issues in a vernacular sense, the relevant standard required only a "showing that the clients or guests of a particular business would not consent to service by a member of the opposite sex, and that the clients or guests would stop patronizing the business if members of the opposite sex were allowed to perform the service." *Id.* at 1416. The burden on an employer to establish a BFOQ defense based on the level of privacy it wants to afford to its clientele is different, and substantially less demanding, than the burden on Plaintiffs here to establish the existence of a constitutionally protected right. Therefore, *Norwood* simply does not shed any light on Plaintiffs' constitutional rights.

This Court also is not persuaded by Plaintiffs' reliance on *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692 (N.D. Ohio 2005). Plaintiffs' Reply Brief, [ECF No. 94, at 21.] In *Kohler*, the plaintiff, a police dispatcher, was shown a pornographic picture by a colleague who later became the Chief of Police and found another pornographic image anonymously left on her computer. *Kohler*, 381 F. Supp. 2d at 697. The future Chief of Police also told the plaintiff that she could buy used women's underwear online, sent her multiple offensive emails, hid a tape recorder in a toilet stall in the women's restroom, and circulated an old photo of the plaintiff to numerous people. *Id.* After being victimized by this misconduct, the plaintiff filed a lawsuit asserting, in part, that she suffered a violation of her substantive due process right to privacy. *Id.*

at 698. The court, however, never addressed the merits of this claim. Instead, the court discussed various procedural grounds related to Plaintiffs' constitutional privacy claim. *Id.* at 710-13. And, in the end, the court actually granted summary judgment in favor of all the defendants on that claim. *Id.* at 713.

Plaintiffs further cite cases that involve unwarranted aggressive touching of unclothed body parts by members of the opposite sex. Plaintiffs' Opening Brief [ECF No. 23, at 13] (citing *Safford Unified Sch. District No. 1 v. Redding*, 557 U.S. 364 (2009) (search of a student's bra and underpants); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (forceful removal of a student's underwear)). They also rely upon cases holding that governmentally-compelled exposure of one's body to members of the opposite sex, such as school administrators and prison guards, may violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Plaintiffs' Opening Brief, [ECF No. 23, at 13-14] (citing *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (strip search by members of the opposite sex); *Cornfield v. Consolidated High School District 230*, 991 F.3d 1316, 1320 (7th Cir. 1993) (same)).

The Fourth Amendment cases cited by Plaintiffs simply are not relevant to this case. Plaintiffs do not allege, nor can they, that the Restroom Policy or the Locker Room Agreement results in any search or seizure that implicates Fourth Amendment privacy interests. Rather, Plaintiffs' constitutional claim is premised solely on the substantive due process clauses. While the Fourth Amendment generally requires that a government's intrusion on privacy through a search or a seizure must be reasonable, substantive due process does not impose a similar restriction. Instead, substantive due process applies in very limited circumstances when fundamental rights are implicated.

This case, moreover, does not involve the extreme invasions of privacy that the courts confronted in the cases cited by Plaintiffs. Plaintiffs have not alleged any students, whether Student A, any other transgender student, or any Student Plaintiff, ever were in each other's presence in an unclothed state. In fact, Plaintiffs' counsel disclaimed that is central or even relevant to Plaintiffs' case: "who saw who in the state of undress or naked . . . is not relevant . . . at the preliminary injunction stage. We don't need to prove that. We didn't allege that in the complaint, nor do we rely on it at the preliminary injunction stage." June 9 Hearing Transcript, [ECF No. 128, at 18]. Plaintiffs also do not allege that any transgender student, including Student A, and any Student Plaintiff ever saw an intimate part of the other's body. The underlying facts of this case are entirely unlike the surreptitious recordings, strip searches, and aggressive body touchings that courts have found unconstitutional in certain circumstances.[25]

This case also does not involve the type of forced invasion of privacy that animated the cases cited by Plaintiffs. The restrooms and the physical education locker room at Fremd High School have traditional privacy stalls that can be used when toileting, changing clothes, and showering. Kovack's Declaration, [ECF No. 78-1, at ¶¶ 8, 15]. There is no reason why a student who does not want to do so would have to take off clothing or reveal an intimate part of his or her body outside of the private stalls. Inside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another person. Therefore, these protections

[25] The only allegations in Plaintiffs' Complaint that even remotely touch on the risk of actual exposure of any body part are the vague references to Student A lifting up her shirt one time in a common area of the girls' locker rooms and her changing clothes in the gymnastics locker room when one or more girls (not necessarily Girl Plaintiffs, which is not alleged) "were present." Complaint, [ECF No. 1, at ¶¶ 96, 135]. No details are provided about what part of Student A's body, if any, was revealed on either of these occasions. And, when District 211 sought discovery into these incidents, Plaintiffs successful opposed it, arguing that for purposes of their preliminary injunction motion, actual locker room or restroom interactions were irrelevant.

almost entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff.

Further, District 211 has informed parents and students that additional privacy alternatives, beyond the stalls, are available upon request. *Id.* at ¶ 15(b). These include separate, single-use facilities for male and female students who do not want to use the common locker rooms or restrooms. *Id.* at ¶ 17. Any Student Plaintiff who uses the alternative facilities has no meaningful risk of either seeing or being seen by a student in a state of undress or seeing an intimate part of his or her body. In light of these privacy protections and alternatives, any Student Plaintiff who does not want to risk exposure of his or her body to a transgender student has the ability to change clothes and shower in a private space. Put simply, this case does not involve any forced or involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth.

For all of these reasons, the Court finds that Plaintiffs are not suffering a "direct" and "substantial" infringement on any substantive due process right.

e. Defendants' Actions Do Not Shock The Conscience

Even if the Restroom Policy and the Locker Room Agreement did directly and substantially infringe upon a fundamental right, that alone would not render them unconstitutional under the Fifth or Fourteenth Amendments. The Restroom Policy and the Locker Room Agreement would not be unconstitutional unless they require something that "shock[s] the conscience." *Christensen*, 483 F.3d at 462 n.2. "[T]he meaning of this standard varies depending on the factual context." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 400 (3d Cir. 2003). Courts variously have described conscience-shocking conduct as that which "violates the decencies of civilized conduct; . . . is so brutal and

offensive that it does not comport with traditional ideas of fair play and decency; . . . interferes with rights implicit in the concept of ordered liberty; [or] . . . is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 867 (5th Cir. 2012) (quoting *City of Sacramento*, 523 U.S. at 846-47 & n. 8) (internal quotation marks omitted). Under all of these formulations, the conduct must go "beyond merely 'offending some fastidious squeamishness or private sentimentalism.'" *Smith ex rel. Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 173 (2d Cir. 2002) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 n.6 (2d Cir. 1973), *partially abrogated on other grounds by Graham v. Connor*, 490 U.S. 386 (1989)). "Only 'the most egregious official conduct' will satisfy this stringent inquiry." *Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011) (quoting *Cty. of Sacramento*, 523 U.S. at 846); *see also Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005) ("Cases abound in which the government action—though thoroughly disapproved of—was found not to shock the conscience.").

Plaintiffs never address whether the Restroom Policy and the Locker Room Agreement shock the conscience. Instead, Plaintiffs argue those policies cannot pass muster under a strict scrutiny test. As noted above, that standard applies to legislative enactments. *Christensen*, 483 F.3d at 462 n.2. The executive actions at issue in this case must shock the conscience to violate substantive due process. *Id.* And the Fourth Amendment cases cited throughout Plaintiffs' briefs, and upon which they rely, simply are not relevant to this issue because "the Fourth Amendment invokes the less stringent reasonableness standard." *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 171 (3d Cir. 2001).

Neither the Restroom Policy nor the Locker Room Agreement shocks the conscience**.** District 211 is legally responsible for providing an effective learning environment for over 12,000 students. *See* Defendant Board of Education of Township High School District No. 211's Response to Plaintiffs' Motion for Preliminary Injunction ("District 211's Response Brief"), [ECF No. 78, at 1, 10] It determined that allowing all students to use restrooms consistent with their gender identity would improve the educational environment of its students. In reaching this conclusion, District 211 recognized isolating transgender students in separate facilities against their will could, and did, at least in the case of Student A, negatively impact their experience in school. The District decided that remedying this harm by offering appropriate restroom access would not infringe on the privacy of other students because the privacy protections and alternatives sufficiently protected all students' privacy in the restrooms. Kovack's Declaration, [ECF No. 78-1, at ¶ 9].

After District 211 instituted the Restroom Policy, roughly three years elapsed before Plaintiffs challenged it. If Student Plaintiffs did not know they were using restrooms with transgender students during this three-year period, it is hard to say this is a conscience shocking policy. Alternatively, if some Student Plaintiffs were aware transgender students were using restrooms consistent with their gender identity during that time and did not complain about it, then it also is hard to say that state of affairs shocks the conscience.[26]

The Locker Room Agreement represents the same balancing of interests as the Restroom Policy. Before District 211 and DOE entered into the Agreement, DOE conducted a lengthy

[26] Girl Plaintiffs allege they "frequently run into Student A when they use the schools' restrooms." Complaint, [ECF No. 1, at ¶ 231]; *see also id.* at ¶¶ 232-234]. It is not clear from the Complaint whether this occurred before or only after District 211 publicly announced in October 2015 that transgender students had been using restrooms consistent with their gender identity since 2013. In any event, the seven-month delay between the District's announcement that transgender students were being permitted to use restrooms consistent with their gender identity and the filing of this lawsuit in May 2016, also militates against a finding that this state of affairs shocks the conscience.

factual investigation. The resulting Letter of Findings describes in great detail what harm Student A was suffering because of her lack of access to the girls' locker rooms. *See generally* Letter of Findings, [ECF No. 21-10]. The Letter also discusses what facilities are available at Fremd High School, when and how students use those facilities, and what can be done to protect their privacy. *Id.* The Locker Room Agreement requires District 211 to provide significant privacy protections, and District 211 has promised to provide alternative facilities already mentioned upon request. Ultimately, District 211 and DOE, both of which are tasked with advancing and protecting the health, safety and educational environment of all students, at a time when they were potential litigation adversaries, decided that the Locker Room Agreement served the students at Fremd High School well enough to justify entering into it. Therefore, the Court finds that neither the Restroom Policy nor the Locker Room Agreement shocks the conscience because they represent a careful and sensitive balancing of the interests of all the students in District 211.

For all of these reasons, Plaintiffs have not shown they have a likelihood of success on the merits of their claim that the Restroom Policy and the Locker Room Agreement violate their constitutional right to privacy.

3. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their Title IX Claims

Plaintiffs' argument for preliminary injunctive relief under Title IX focuses on two issues: (1) whether the Restroom Policy and the Locker Room Agreement create a hostile environment for Student Plaintiffs in violation of Title IX; and (2) whether District 211's decision to allow Student A to use the girls' locker rooms when boys do not have to share access to the boys' locker rooms with a transgender student, even with the alternative facilities the District offers for girls seeking additional privacy, violates a regulation promulgated to

implement Title IX that provides that sex-segregated facilities must be comparable. *See* Plaintiffs' Opening Brief, [ECF No. 23, at 18]; Plaintiffs' Protective Order Brief, [ECF No. 50, at 3]. As discussed below, Plaintiffs have not shown they are likely to prevail on either of these arguments.

a. Plaintiffs Have Not Shown They Are Suffering Discrimination On The Basis Of Sex

There is a threshold question under Title IX—whether the harassment Plaintiffs allege they are suffering properly can be characterized as *sexual* harassment, or discrimination on the basis of sex. *See Burwell v. Pekin Community High Sch. Dist. 303*, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002); s*ee also C.R.K. v. U.S.D.*, 176 F. Supp. 2d 1145, 1163 (D. Kan. 2001); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 453-56 (S.D.N.Y. 2000). To be actionable under Title IX, the offensive behavior must be "on the basis of sex." *See Frazier v. Fairhaven School Community,* 276 F.3d 52, 66 (1st Cir. 2002); *Benjamin v. Metropolitan Sch. Dist. of Lawrence Township,* 2002 WL 977661, at *3 (S.D. Ind. 2002).

Here, Plaintiffs complain that the Restroom Policy and the Locker Room Agreement create a hostile environment. But Girl Plaintiffs are not being targeted or singled out by District 211 on the basis of their sex, nor are they being treated any different than boys who attend school within District 211. The Restroom Policy applies to all restrooms. That means cisgender boys use the boys' restrooms with transgender boys just like cisgender girls use the girls' restrooms with transgender girls. District 211 also has made clear that it will allow transgender boys to use the boys' locker rooms and will provide the same privacy protections in the boys' locker rooms as exist in the girls' locker rooms, if requested. *See* District 211's Response Brief, [ECF No. 78, at 22 n.9]. Therefore, the alleged discrimination and hostile environment that Girl Plaintiffs claim to experience is not on the basis of their sex, and any discomfort Girl Plaintiffs allege they

feel is not the result of conduct that is directed at them because they are female. All of Plaintiffs' Title IX claims suffer from this threshold problem.

b. Plaintiffs Have Not Shown The Alleged Harassment Is Severe, Pervasive Or Objectively Offensive

In addition, to establish a hostile environment under Title IX, "a plaintiff must establish sexual harassment . . . that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis, Next Friend LaShona D. v. Monroe County Board of Education*, 526 U.S. 629, 651-52 (1999); *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014). Plaintiffs argue that the presence of and risk of exposure to transgender students in restrooms and Student A's presence, and the risk of exposure to or by Student A, in the girls' locker rooms, is severe, pervasive, and objectively offensive conduct that subjects them to a hostile environment in violation of Title IX. The facts of record do not support these propositions, and Plaintiffs do not cite any persuasive authority for this legal conclusion.

Plaintiffs' Complaint is long on conclusory statements but sparse on specific facts. As noted above, Plaintiffs allege generally and repeatedly that District 211's Restroom Policy and the Locker Room Agreement cause Student Plaintiffs "embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity." Complaint, [ECF No. 1, at ¶¶ 11, 124, 129, 136, 191, 205, 208, 210, 226]. Girl Plaintiffs say they are fearful of sharing facilities with and attending to personal needs in the presence of transgender students. *Id.* at ¶¶ 8, 10. Girl Plaintiffs also say they are afraid, worried and embarrassed about the possibility of seeing or being seen by Student A while in a state of undress. *Id.* at ¶¶ 8, 9, 114, 126, 127, 186, 187. They assert that their distress is "ever-present" and constant." *Id.* at ¶¶ 114, 115, 125, 237. Nowhere,

however, do Plaintiffs allege they ever have seen Student A undressed or that Student A has seen any Girl Plaintiff undressed if that Student Plaintiff wanted not to be seen in that state. Moreover, the risk of that occurring is very low given the privacy protections put in place by District 211, the alternative facilities available for any student who does not want to use the common restrooms or locker rooms, and Student A's undertakings in the locker room agreement concerning her use of the girls' locker room.

Generalized statements of fear and humiliation are not enough to establish severe, pervasive or objectively offensive conduct. General allegations have been held to be insufficient to establish a Title IX violation. *See, e.g.*, *Trentadue v. Redmon*, 619 F.3d 648, 654 (7th Cir. 2010) (finding undeveloped allegations of student-on-student harassment cannot establish a Title IX claim); *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 822 (7th Cir. 2003) (finding accusation that a student did "nasty stuff" is insufficient to state a Title IX).

i. The mere presence of transgender students in restrooms or locker rooms is not severe, pervasive, or objectively offensive conduct

It is important to recognize that Title IX does not say schools cannot allow males and females to use the same restrooms or locker rooms under any circumstances. "Title IX is a broadly written general prohibition on [sex] discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson*, 544 U.S. at 175. One of those exceptions says that a school "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. Nowhere does Title IX or its regulations say that schools must provide single-sex facilities. During oral argument on Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' counsel conceded that Title IX is written

permissively with respect to single-sex facilities. Oral Argument Transcript, [ECF No. 127, at 34]. Title IX does not require schools to provide separate facilities; it allows schools to do so as long as they provide comparable facilities for males and females. In other words, Title IX permits schools to decide whether to have sex-segregated restrooms, and gender-neutral restrooms do not *per se* violate Title IX as long as all students' privacy interests are protected. Therefore, the foundation upon which Plaintiffs build much of their Title IX argument—that it is a violation of Title IX for a biological boy to use a restroom also used by a biological girl under any circumstances—does not hold the weight Plaintiffs place on it.

The mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases. *See, e.g., Davis*, 526 U.S. at 653 (holding that over a period of five months, a fifth-grade male student harassed the plaintiff, a fifth-grade female student, by engaging in sexually suggestive behavior, including attempting to touch the plaintiff's breasts and genital area, rubbing against the plaintiff and making vulgar statements); *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 259-60 (6th Cir. 2000) (finding that a female student was repeatedly propositioned, groped and threatened and was also stabbed in the hand; during one incident, two boys held her hands while other male students grabbed her hair and started yanking off her shirt); *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243-44 (10th Cir. 1999) (finding that a disabled female student was sexually assaulted by a male student on multiple occasions); *Seiwert v. Spencer-Owen Community School Corporation*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (holding that the alleged harassment suffered by a male eighth-grade student, which included being called "faggot," being kicked by several boys during a dodge ball game, and receiving death threats, if proven, amounted to severe and pervasive conduct that was objectively

offensive); *Bruning ex rel. v. Carrol County Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (finding repeated acts of touching and sexual groping were objectively offensive); *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001 WL 276975, at *1-3 (D.N.H. 2001) (finding widespread peer harassment, both verbal and physical, which involved referring to the plaintiff as a homosexual, as well as some harassment by coaches); *see also Cruzan v. Special Sch. Dist. No. 1.*, 294 F.3d 981, 983 (8th Cir. 2002) (finding mere presence of transgender female teacher in women's faculty restroom did not create a hostile environment for cisgender female teachers).

Plaintiffs rely on *People v. Grunau*, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009), which Plaintiffs acknowledge is an unpublished opinion that is not to be cited under the California Rules of Courts. In that case, a man with two previous convictions for sexually molesting a 5-year-old girl and a 10-year-old girl was caught staring at a teenager showering in a locker room. *Grunau* has absolutely nothing in common with this case.

In addition, Plaintiffs cite *New Jersey Division of Youth & Family Services v. M.R.*, 2014 WL 1977014 (N.J. Super. Ct. App. Div. Feb. 25, 2014), for the proposition that "allowing [a] teen girl to be unclothed and shower with a biological male risked mental and emotional injury." Plaintiffs' Opening Brief, [ECF No. 23, at 22]. In that case, however, the biological male who showered with the girl was her father, who also was accused of having sexual relations with his under-aged niece. *M.R.*, 2014 WL 1977014, at *1. Again, this case is not remotely similar.

Plaintiffs' Title VII cases similarly are inapposite and improperly equate allowing transgender students to use restrooms consistent with their gender identity and a transgender girl to use the girls' locker rooms with sexual deviancy. Plaintiffs cite *Lewis v. Triborough Bridge and Tunnel Authority*, 31 F. App'x 746 (2nd Cir. 2002), which is another decision that is unpublished and does not have any precedential effect, for the proposition that the defendant

company created a hostile environment when it allowed male cleaners inside the women's locker room while female employees were changing clothes. Plaintiffs, however, omit that the cleaning service employees were leering at the female plaintiff and would crowd the entrance of the locker room, forcing her to "run the gauntlet" and physically brush up against them. *Lewis v. Triborough Bridge and Tunnel Authority*, 77 F. Supp. 2d 376, 377 (S.D.N.Y. 1999). And the supervisor used lewd and objectively offensive words when referring to the employees who complained of the conduct. *Id.* at 378. Nothing of that sort is alleged to have occurred in this case.

ii. Any risk of unwanted exposure is mitigated effectively by the privacy protections and alternatives provided by District 211

Plaintiffs maintain that the presence of a transgender student in a restroom or locker room with cisgender students violates Title IX because it creates a risk that students will see each other in an unclothed or partially clothed state by virtue of their sharing these facilities, and that is a severe, pervasive and objectively offensive hostile environment. The risk of unwanted exposure in this case, however, is substantively mitigated and reduced by the privacy protections that District 211 provides in the restrooms and locker rooms, and by the alternative facilities it provides for students who do not want to use the common facilities.

District 211 agreed in the Locker Room Agreement to install and maintain "sufficient privacy curtains (private changing stations) within the girls' locker rooms to accommodate . . . any students who wish to be assured of privacy while changing." Locker Room Agreement, [ECF No. 21-3, at 3]. The District has installed 13 private stalls, a curtained shower, and privacy curtains on two pre-existing private changing and showering stalls in the girls' physical education locker room at Fremd High School. Kovack's Declaration, [ECF No. 78-1, at ¶

15(a)].[27] The record shows that District 211 also has installed private changing stalls in the boys' locker room at Fremd High School. *Id.* The District agreed to provide "reasonable alternative[s]" to female students who request "additional privacy . . . beyond the private changing stations," including use of a single-use facility. Locker Room Agreement, [ECF No. 21-3, at 3]. Separate from the Locker Room Agreement, District 211 has informed parents that "an alternative changing area" will be made available upon request. Kovack's Declaration, [ECF No. 78-1, at ¶ 15(b)].

Plaintiffs allege there are no privacy stalls for changing clothes or showering in the girls' swim or gymnastics locker rooms. Complaint, [ECF No. 1, at ¶¶ 172, 174]. The District does not appear to dispute this fact. But Student A has completed her swim requirements for graduation, and she informed OCR that she did not intend to take any more physical education classes that include swimming. Letter of Findings, [ECF No. 21-10, at 6]. Therefore, the fact that there are no privacy options available in the swim locker room is not enough for Plaintiffs to satisfy their burden of showing a likelihood of success that the District's failure to provide privacy options in that locker room is severe, pervasive or objectively offensive conduct. There are no allegations, let alone evidence, that Student A is using or intends to use the swim locker room to change her clothes or that other students are forced to change their clothes in the swim locker room when Student A is or will be present. The mere risk that Student A might change clothes or shower in the girls' swim locker room when she has no reason to be there and is not

[27] Plaintiffs allege that there are five privacy stalls in the physical education locker room for students to change their clothes. Complaint, [ECF No. 1, at ¶ 138]. The conflict appears to be that the District's reference is to privacy stalls for changing clothes and showering while Plaintiffs' reference only is to privacy stalls for changing clothes.

enrolled in any required swim class does not create or contribute to a severe, pervasive or objectively offensive hostile environment.[28]

In addition, although Plaintiffs allege there are open pole showers and no privacy curtains for changing clothes in the girls' gymnastics locker room, they do not allege that any girls, or more specifically Girl Plaintiffs, use the showers, or want to use the showers but cannot do so because Student A is present. To the contrary, in the Letter of Findings, OCR said girls on the gymnastics team do not shower in the gymnastics locker room. Letter of Findings, [ECF No. 21-10, at 7]. So, the only issue in the gymnastics locker rooms appears to be that there are no privacy stalls available for students to use when changing into or out of their uniforms. Girl Plaintiffs allege Student A changed clothes in the gymnastics locker room once "while girls were present." Complaint, [ECF No. 1, at ¶ 96]. Plaintiffs, however, do not allege any Girl Plaintiff was present on this occasion nor do they allege any Girl Plaintiff, or any other girl, saw any private part of Student A's body or even that any part of her body was visible on that occasion. This is not evidence of a severe, pervasive, or objectively offensive hostile environment. Moreover, students who do not want to change or shower in the swim or gymnastics locker rooms can use the physical education locker room, which provides privacy protections, or an alternative facility, including a single-use space.

Plaintiffs also allege a number of other girls' athletic team locker rooms in the high school "are open to a male student's use." *Id.* at ¶ 190. But there is nothing specific pled in the Complaint or anywhere in the record to indicate that District 211 would allow cisgender boy students to have access to the girls' team locker rooms or that any transgender girl wants or intends to use any of those locker rooms. A hostile environment and allegations of severe,

[28] There is no allegation, evidence or argument that any other transgender girl student uses or intends to use the swimming locker room.

pervasive and objectively offensive conduct have to be based on something more than speculation and conjecture.

Finally, according to Girl Plaintiffs, they are ridiculed and harassed by their classmates if they choose to change clothes in the privacy stalls provided in the girls' physical education locker room. *Id.* at ¶¶ 140-147. Plaintiffs do not allege that District 211 was aware of this inappropriate conduct before the Complaint was filed (no complaint to the administration, for example, is alleged) nor is it clear that the District's policies are responsible for this alleged conduct by Girl Plaintiffs' classmates. In any event, this isolated or sporadic conduct is not the kind of severe, pervasive, objectively offensive conduct that has been held to violate Title IX.

Plaintiffs' challenge to the Restroom Policy also is short on facts necessary to show a hostile environment. There are private toilet stalls in the restrooms. Even considering the alleged gaps in the stalls above and below the doors, and on the sides of the doors, there is nothing objectively offensive about Girl Plaintiffs having to use the restroom when Student A also is using the restroom, or about any Student Plaintiff using the same restroom as a transgender student whose sex assigned at birth is different than theirs. There is nothing to indicate that the gaps in the stalls make it likely or even possible for someone to observe anything that occurs in the stall if the person inside the stall does not want that to happen. There are no allegations that Student A, or any other transgender student, has harassed anyone in the restroom other than by her mere presence. Moreover, there undoubtedly are remedies within the schools for situations when any student acts in a threatening, harassing, or inappropriate way in a restroom. *See also Cruzan*, 294 F.3d at 984 ("We agree with the district court that Cruzan failed to show the school district's policy allowing [a transgender female teacher] to use the women's

faculty restroom created a working environment that rose to the level of [sexual harassment or a hostile environment].").

In summary, the allegations in Plaintiffs' Complaint are not comparable to the type of conduct that has been found to be severe, pervasive and objectively offensive in violation of Title IX. The Court is not persuaded that there is anything objectively offensive about a transgender student being present in a restroom or Student A being present in a locker room when at no time is his or her unclothed body exposed to any Student Plaintiff, the risk of that happening is substantially mitigated by the various privacy protection put in place by District 211 and Student A's undertakings in the Locker Room Agreement, and any Student Plaintiff who does not want to expose his or her body to a transgender student or anyone else is not compelled to do so. The risk of an unwanted exposure under these circumstances is minimal and not so severe, pervasive, or objectively offensive as to constitute a hostile environment much less a hostile environment that denies any Student Plaintiff access to any educational benefits.

iii. <u>There is no evidence Girl Plaintiffs have been denied access to any educational opportunities or benefits</u>

Finally, Plaintiffs assert in a conclusory and generalized manner that the Locker Room Agreement and the Restroom Policy "have had and continue to have a profoundly negative effect of the girls' access to educational opportunities, benefits, programs, and activities at their schools." Complaint, [ECF No. 1, at ¶ 12]. Plaintiffs give five examples: (1) some girls avoid the locker rooms; (2) one girl wears her gym clothes underneath her regular clothes; (3) other girls change quickly in the locker rooms and avoiding all conversation and eye contact; (4) some girls avoid the restrooms as long as possible; and (5) other girls spend time trying to find an empty restroom and therefore risk being tardy to class. *Id.* There are, however, no specific

allegations that Plaintiffs have been excluded from "participation in" or "denied the benefits of" any education opportunity, class or program as required by Title IX. *See* 20 U.S.C. § 1681(a).

An action under Title IX lies only when the behavior at issue denies a victim equal access to education. *Davis*, 526 U.S. at 652. The harassment must have a "concrete, negative effect" on the victim's education. *Id.* at 654. Examples of a negative impact on access to education may include dropping grades, *id.* at 634, becoming homebound or hospitalized due to harassment, *see Murrell*, 186 F.3d at 1248-49, and suffering physical violence, *see Vance*, 231 F.3d at 259.

Here, there is no evidence Girl Plaintiffs have been denied access to any educational opportunity or benefit. Plaintiffs do not allege, for instance, they have stopped going to gym class, quit an extracurricular activity, started getting lower grades, or struggled to focus during class. Instead, the only effect on their educational opportunities they identify is the risk of running late to class when using more remote restrooms and locker rooms they think will not be used by a transgender student. Complaint, [ECF No. 1, at ¶¶ 12(e), 236]. There is no indication Plaintiffs actually have missed meaningful class time and that this in turn has negatively impacted their education. Therefore, they have not shown they have been denied equal access to any educational activities or programs.

Accordingly, for all of these reasons, the Court is not persuaded Plaintiffs have a likelihood of success in establishing a hostile environment in violation of Title IX based on transgender students use of the same high school restrooms as Student Plaintiffs, or Student A's use of the girls' locker rooms.

c. Plaintiffs Have Not Shown The Facilities Are Not Comparable

By allowing Student A to use the girls' locker rooms at Fremd High School, Plaintiffs argue the locker room facilities for the girls provided by District 211 are inferior to the facilities

provided for the boys in violation of Title IX. Plaintiffs argue that the girls' locker rooms are inferior to the boys' locker rooms for two reasons: (1) the girls have to share a locker room with a biological boy while the boys do not have to share a locker room with a biological girl; and (2) the alternate private single-use facilities for girls to use if they do not want to use the common locker room are inferior to the boys' locker room. Plaintiffs' Opening Brief, [ECF No. 23, at 18-19].

Plaintiffs do not dispute that the physical facilities provided for the boys' and girls' restrooms and locker rooms are comparable. Plaintiffs' argument is based on the fact the Locker Room Agreement allegedly creates inferior facilities for girls because of who is permitted to use the girls' locker rooms, *i.e.*, the girls have to share a locker room with a transgender student and the boys do not. However, even though Plaintiffs allege the boys do not have to share a locker room with a transgender student, District 211 has represented it will provide similar access for a transgender boy wanting to use the boys' locker room with the same privacy accommodations. *See* District 211's Response Brief, [ECF No. 78, at 22 n.9].

When Plaintiffs filed their Motion for Preliminary Injunction, Student A was the only transgender student who had asked District 211 to allow her to use locker rooms consistent with her gender identity. At oral argument on Plaintiffs' Motion, Intervenor-Defendants' counsel stated that Student C, a transgender boy, recently began his freshman year at a District 211 high school. Based on District 211's representation that it would provide similar access to the boys' locker rooms for transgender boys, the Court is not persuaded Plaintiffs have a likelihood of success in establishing that District 211 is violating Title IX by not providing comparable facilities for all students. District 211's Response Brief, [ECF No. 78, at 22 n.9].

The Court also is not persuaded that the alternate single-use facilities District 211 provides for students who do not want to use common restrooms or locker rooms have to be comparable to the common facilities. Plaintiffs do not cite any case to support that proposition. District 211 provides comparable locker room facilities for boys and girls, and the fact that District 211 provides alternate single-use facilities that offer greater privacy options for students who want additional privacy does not change the fact that the District offers comparable common facilities for all students. As far as the Court can tell on this record, the boys' and girls' locker rooms at Fremd High School are comparable in all respects. Student Plaintiffs who choose to use the alternate single-use facilities with additional privacy protections cannot complain that the alternate facilities are not "comparable" to the main facilities offered to boys and girls, which they have chosen not to use. There is no allegation that the alternative facilities made available for boys and girls are not comparable.

Accordingly, for all of these reasons, the Court finds Plaintiffs do not have a likelihood of success on the merits of their claims that District 211 is violating Title IX.

B. Irreparable Harm

To satisfy the second threshold requirement for a preliminary injunction, Plaintiffs must show there is a likelihood—more than a mere possibility—they will suffer irreparable harm. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011). Harm "is 'irreparable' where it 'cannot be prevented or fully rectified by the final judgment after trial.'" *Girl Scouts*, 549 F.3d at 1089 (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). Phrased another way, harm is irreparable when it is "difficult—if not impossible—to reverse." *Michigan*, 667 F.3d at 788.

Plaintiffs devote scant space—just three short paragraphs out of 50-plus pages of briefing in support of their Motion for Preliminary Injunction—to irreparable harm. Plaintiffs raise two undeveloped arguments. They contend that irreparable harm is presumed when a party establishes a likely constitutional violation. Plaintiffs' Reply Brief, [EFC No. 94], at 24. And they assert that Student Plaintiffs are being forced to endure a "per se hostile educational environment." *Id.* Both of these arguments rely on the premise that Plaintiffs' underlying constitutional and Title IX claims have merit. As already explained, however, Plaintiffs have not shown they are likely to prevail on either their constitutional claim or their Title IX claims.

Plaintiffs also assert in a conclusory and generalized manner that Girl Plaintiffs are suffering from an impaired "access to educational opportunities, benefits, programs, and activities." Complaint, [ECF No. 1, at ¶ 13]. "[L]ack of access to classes and related programs, services, and activities can constitute irreparable injury for purposes of a preliminary injunction." *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126, 1148 (C.D. Cal. 2015). Even when access is denied, though, movants may be required to show more to establish irreparable harm. *Sellers v. Univ. of Rio Grande*, 838 F. Supp. 2d 677, 687 (S.D. Ohio 2012) (noting that there is "some authority for the proposition that an interruption in an educational program is not, of itself, an irreparable injury" and also "contrary case law" that finds irreparable harm "especially when the denial of an educational opportunity is coupled with other types of harm").

As discussed above, Plaintiffs do not allege that Girls Plaintiffs have stopped going to physical education class, quit an extracurricular activity, received lower grades, or struggled to focus during class. Instead, the only effect on Girl Plaintiffs' educational opportunities that Plaintiffs identify is the risk of running late to class if they use more remote restrooms and locker rooms in the school to avoid using a restroom or locker room with a transgender student.

Complaint, [ECF No. 1, at ¶¶ 12(e), 236]. There is no indication that anything has negatively impacted Girl Plaintiffs' education. Therefore, Plaintiffs have not shown this speculative harm is irreparable.

Student Plaintiffs' main irreparable harm argument boils down to their contention that they are suffering "embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity," which the Court will refer to as "emotional distress" for short, when they use restrooms in the presence of a transgender student or locker rooms in the presence of Student A who they label a biological boy. *Id.* at ¶ 11 123, 124, 220, 226, 237. Sometimes, emotional harm can be serious enough to rise to the level of irreparable harm. *Moore v. Consol. Edison Co. of New York*, 409 F.3d 506, 511 (2d Cir. 2005); *Kennedy v. Sec'y of Army*, 191 F.3d 460, 460 n.5 (9th Cir. 1999); *Caspar v. Snyder*, 77 F. Supp. 3d 616, 640 (E.D. Mich. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015). But "emotional suffering is commonly compensated by monetary awards" in our legal system. *Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, 2011 WL 221823, at *5 (N.D. Ill. Jan. 24, 2011); *see also The Great Tennessee Pizza Co. Inc. v. Bellsouth Commc'ns*, 2010 WL 3806145, at *2 (E.D. Tenn. Sept. 23, 2010). It is the "extraordinary circumstance[]" when emotional harm, standing alone, is so severe that money damages cannot rectify the harm after a final judgment. *Lore v. City of Syracuse*, 2001 WL 263051, at *5 (N.D.N.Y. Mar. 9, 2001); *see also Colorado Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 220 (D.D.C. 2015) ("Therefore, Plaintiffs' observation or contemplation of the stress and small risk of physical harm that the horses might suffer while being gathered—sincere as it might be—does not rise to the level of a cognizable, irreparable injury.").

In this case, Plaintiffs' allegations of emotional distress do not show Student Plaintiffs are suffering from distress that is so severe it is incapable of being rectified by money damages after a final judgment. Plaintiffs' general and conclusory claims to the contrary are insufficient to carry their burden. *See Lane v. Buckley*, --- Fed. App'x. --- , 2016 WL 1055840, at *3 (10th Cir. Mar. 17, 2016) ("'As a general rule, . . . a district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff.'") (quoting *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990)); *Gatsinaris v. ART Corp. Sols., Inc.*, 2015 WL 3453454, at *8 (C.D. Cal. May 29, 2015); *McDavid Knee Guard, Inc. v. Nike USA, Inc.*, 683 F. Supp. 2d 740, 749 (N.D. Ill. 2010). In addition, Plaintiffs' conclusory allegations of discomfort and distress, unsupported by the "who, what, where, when, why, and how" of what Student Plaintiffs are experiencing, are too speculative to justify injunctive relief. *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1204 (7th Cir. 1996) (recognizing that it is an abuse of discretion to grant an junction "based on nothing but speculation and conjecture"); *see also Moore*, 409 F.3d at 511 ("We affirm the district court's conclusion[] . . . that the claim of psychological harm was too speculative to warrant preliminary relief."); *Holcomb v. California Bd. of Psychology*, 2015 WL 7430625, at *4 (E.D. Cal. Nov. 23, 2015) ("Plaintiff likewise provides no factual support showing she is likely to suffer irreparable reputational or emotional harm."); *Aune v. Ludeman*, 2009 WL 1586739, at *5 (D. Minn. June 3, 2009) ("Plaintiff argues that excessive stress 'may' induce or aggravate physical illness and mental or emotional disturbance, without a showing of any real threat of irreparable harm to himself.").

The fact that District 211 provides significant privacy protections and alternate facilities for students who, like Student Plaintiffs, are uncomfortable at the risk of encountering a transgender student in a state of undress also undermines Plaintiffs' ability to establish

irreparable injury. In the context of a request for preliminary injunctive relief, the movants' failure to investigate potentially mitigating alternatives undermines any claim of irreparable harm. *Orth v. Wisconsin State Employees Union Council 24*, 2007 WL 1029220, at *2 (E.D. Wis. Mar. 29, 2007). Further, harm is not irreparable if the moving parties fail to take advantage of readily available alternatives and thereby effectively inflict the harm on themselves. *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012); *see also Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013) ("'[I]rreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary.'") (quoting *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995)).

Plaintiffs contend Student Plaintiffs are not using the privacy stalls because they are inadequate. Plaintiffs assert the stalls do not guarantee that Student Plaintiffs will not see or be seen by a transgender student in a state of undress. Complaint, [ECF No. 1, at ¶¶ 162-168, 228-230]. Plaintiffs also point out that even if Student Plaintiffs use the stalls, they still will be sharing an intimate environment with a student who they perceive to be of the opposite sex. *Id.* at ¶¶ 155-161, 227, 259-261. None of these assertions is accurate with respect to the single-use alternatives that are available to both female and male students. Moreover, even if Plaintiffs were correct, that would not change the fact that the privacy stalls substantially reduce the risk Student Plaintiffs will see or be seen by a transgender student in a state of undress in the restrooms or locker rooms.

In addition, there is no evidence that the risk of being late to class and extracurricular activities, *id.* at ¶¶ 250-251, 254-257, will have a meaningful negative impact on Student Plaintiffs' education. Moreover, the mere inconvenience of walking to a facility that is farther

away does not constitute irreparable harm. *See Mclean v. Aurora Loan Servicing*, 2011 WL 4635027, at *1 (S.D. Cal. Oct. 5, 2011); *Corbett v. United States*, 2011 WL 1226074, at *5 (S.D. Fla. Mar. 2, 2011) (both stating that mere inconveniences are not irreparable harms).

Plaintiffs further contend all of the privacy protections and alternatives available to them to mitigate the risk of exposure to or by a transgender student are inadequate because of pressure from District 211 and other students. Plaintiffs assert the District has "conveyed to the Student Plaintiffs the message that any objection to the Locker Room Agreement (or the Restroom Policy) will be viewed by the District administration as intolerance and bigotry." Complaint, [ECF No. 1, at ¶ 148]; *see also id.* at ¶¶ 149-154. There also are very general allegations District 211 has conveyed the message that "differing views will not be tolerated." *Id.* at ¶ 153. Plaintiffs say this message has deterred Student Plaintiffs from requesting privacy options. *Id.* Even assuming this is true, the discomfort Plaintiffs (both parents and students) feel at the District's perceived disapproval of their position does not constitute irreparable injury.

As discussed above, Girl Plaintiffs also say students who take advantage of the privacy options in the main physical education locker room are "ridicule[d]" by their classmates. *Id.* at ¶ 140; *see also id.* at ¶¶ 141-146. Plaintiffs allege that, in the locker room and in the hallways, male and female students called one Girl Plaintiff names, yelled derogatory slang words for female body parts at her, and accused her of being transphobic and homophobic. *Id.* at ¶ 145. There is no justification for that kind of conduct by other students. But the pain and pressure these other students have brought upon a Girl Plaintiff is not necessarily the District's fault, and there is no allegation that District 211 was aware of any such conduct and willfully ignored or disregarded it. And, again, Plaintiffs stymied District 211's attempt to discover the specifics underlying these allegations, including whether the District was informed of this misconduct.

Also, importantly, there is no indication in the record that any student was bullied or risks being bullied if she were to use a single-use facility to change clothes or shower.

Finally, the Restroom Policy, in particular, is neither causing nor likely to cause Plaintiffs irreparable harm. District 211 implemented the Restroom Policy during August 2013. *See id.* at ¶¶ 211, 214-217; Federal Defendants' Response Brief, [ECF No. 80, at 13]. Plaintiffs did not file this lawsuit until May 2016, almost three years later. Either Student Plaintiffs did not notice that transgender students were using restrooms consistent with their gender identity, or they knew about the Restroom Policy and tolerated it for years. Further, Plaintiffs acknowledge they were aware of the Restroom Policy at least as of October 2015 when it was announced publicly by District 211, and they waited almost seven months after that before filing this lawsuit.

Under these circumstances, it is likely that the impetus for this lawsuit was the Locker Room Agreement signed in December 2015, not the Restroom Policy standing alone. For all of these reasons, Plaintiffs' delay in challenging the Restroom Policy strongly indicates that the Restroom Policy is not causing them irreparable harm. *See Tap Pharm. Products, Inc. v. Atrix Labs., Inc.*, 2004 WL 2034073, at *1 (N.D. Ill. Aug. 26, 2004) (recognizing that an unjustified delay in seeking relief "can be fatal to claims of irreparable harm"); *see also Traffic Tech, Inc. v. Kreiter*, 2015 WL 9259544, at *22 (N.D. Ill. Dec. 18, 2015); *Ixmation, Inc. v. Switch Bulb Co., Inc.*, 2014 WL 5420273, at *7 (N.D. Ill. Oct. 23, 2014); *Celebration Int'l, Inc. v. Chosun Int'l, Inc.*, 234 F. Supp. 2d 905, 920 (S.D. Ind. 2002).

Accordingly, the Court finds Plaintiffs have not shown they are likely to suffer irreparable harm that cannot be rectified after a final judgment, even if they prevail on the merits of their claims.

C. Adequate Remedy At Law

To satisfy the third and final threshold showing, Plaintiffs must show they do not have an adequate remedy at law. *Girl Scouts*, 549 F.3d at 1095. In other words, Plaintiffs must show money damages would be inadequate compensation for the harm they have suffered if they win this lawsuit. *Id.* Plaintiffs need not show traditional legal remedies would be "wholly ineffectual," but, rather, that they would be "seriously deficient as compared to the harm suffered." *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). "[S]howing irreparable harm is '[p]robably the most common method of demonstrating that there is no adequate legal remedy.'" *Campbell v. Miller*, 373 F.3d 834, 840 (7th Cir. 2004) (Williams, J., dissenting) (quoting 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2944 (2d ed. 1995)); *see also Fleet Wholesale Supply Co. v. Remington Arms Co.*, 846 F.2d 1095, 1098 (7th Cir. 1988); *Wil-Kar, Inc. v. Vill. of Germantown*, 153 F. Supp. 2d 982, 987 (E.D. Wis. 2001).

Plaintiffs do not address or even touch on this threshold requirement for the issuance of a preliminary injunction. As previously stated, "emotional suffering is commonly compensated by monetary awards" in our legal system. *Bhd. of Locomotive Engineers & Trainmen*, 2011 WL 221823, at *5; *see also The Great Tennessee Pizza Co.*, 2010 WL 3806145, at *2. In this case, Plaintiffs seek nominal and compensatory money damages as a remedy. Complaint, [ECF No. 1, Prayer for Relief, at ¶ E]. They have not shown why these damages would be a seriously deficient or inadequate remedy. Therefore, Plaintiffs have not carried their burden to show they lack an adequate remedy at law.

D. The Court Need Not Engage In A Balancing Analysis In Light Of Its Recommendation Concerning The First Three Threshold Showings For Preliminary Injunctive Relief

When the parties seeking a preliminary injunction have not made "any one of" the three threshold showings—likelihood of success on the merits, likelihood of irreparable harm, and inadequate remedy at law—the court "must deny the injunction." *Girl Scouts*, 549 F.3d at 1086. In this case, Plaintiffs have not made any of the required three showings with respect to either the Federal Defendants or District 211. Because of these failures, the Court need not address the balancing phase of the preliminary injunction analysis. *See id.* (explaining that only after the court finds that the movants have "passed this initial threshold" does the court "then proceed[] to the balancing phase"); *see also Ctr. For Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) ("Plaintiff has failed to establish some likelihood of succeeding on the merits. Therefore, it is unnecessary to also consider the balance of harms.").

V. CONCLUSION

For all of the reasons discussed in this Report and Recommendation, the Court respectfully recommends that Judge Alonso deny Plaintiffs' Motion for Preliminary Injunction [ECF No. 21]. Written objections to this Report and Recommendation may be served and filed within 14 days from the date of this Report and Recommendation. FED. R. CIV. P. 72(b). Failure to file objections with the district court within the specified time will result in a waiver of the right to appeal all findings, factual and legal, made in this Report and Recommendation. *Tumminaro v. Astrue*, 671 F.3d 629, 633 (7th Cir. 2011).

Jeffrey T. Gilbert
United States Magistrate Judge

Dated: October 18, 2016

EXHIBIT F

Supplemental Declaration of Stephanie L. Budge, Ph.D.

SUPPLEMENTAL DECLARATION OF STEPHANIE L. BUDGE, Ph.D.

1. I have been retained by counsel for Plaintiff as an expert in connection with *Whitaker v. Kenosha Unified School District*, Case No. 2:16-cv-00943-PP (E.D. Wis.), Appeal No. 16-3522 (7th Cir.). I have actual knowledge of the matters stated in this declaration. I submit this declaration to supplement my initial declaration, dated August 14, 2016 (attached to this declaration as Ex. 1), which was submitted to the U.S. District Court with Plaintiff's motion for preliminary injunction on August 15, 2016.

2. My initial declaration was based on a clinical evaluation of Ashton (Ash) Whitaker I conducted on August 2, 2016, my review of Ash's medical and psychological records, relevant research, and my experience working with transgender youth.

3. Since submitting my initial declaration, I met again with Ash on September 30, 2016 and October 18, 2016, to conduct follow-up clinical assessments of Ash. The purpose of these meetings was to administer additional psychological testing (following our August 2, 2016 meeting) and to assess Ash's affective, behavioral, and cognitive reactions to being allowed to use the boys' restroom at school as a result of the preliminary injunction issued by the District Court on September 20, 2016. Based on these follow-up assessments, I render the following opinions, with a reasonable degree of professional certainty in my field of psychology.

4. I understand that this supplemental declaration will be submitted with Plaintiff's brief in opposition to the Kenosha Unified School District's motion for a stay of the preliminary injunction granting Ash access to the boys' restrooms at school. I am prepared to testify about the information and conclusions contained in this report at a hearing. I may prepare a full expert witness report, as appropriate, during this litigation.

5. I am being compensated at an hourly rate of $150/hour for actual time devoted for my expert services and testimony in this case, as well as expenses and costs. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

6. When I first assessed Ash for any mental health concerns on August 2, 2016, he filled out a battery of measures to indicate any significant diagnostic factors. Based on the initial assessment, he scored a 19 out of 33 on the Kutcher Adolescent Depression Scale. The Kutcher Adolescent Depression Scale-11 (KADS-11) is a self-report scale designed to assess the severity of adolescent depression. Possible scores range from 0-33, with a clinical cutoff score of >9 (Zhou et al., 2016). Ash's score of 19 was within the range of clinical levels of depression and well above the clinical cutoff score of >9. This score is also in line with his initial diagnostic interview related to depression. In the follow-up assessment on September 30, 2016 after being able to use the boys' restroom at school for one week, Ash's score was a 14; while his score is still above the clinical cutoff, the decrease in 5 points is indicative of clinically significant change. On October 18, 2016, Ash's score was 15. Ash reported on October 18, 2016 that he endorsed higher than usual scores on the anxiety symptoms included in the KADS-11 because he was feeling "stressed out" about school tests. Out of all three time points, the KADS-11 administered on October 18, 2016 was the only time he indicated having zero suicidal ideation over the previous week.

7. When I spoke with Ash on September 30, 2016, he noted that many of his depressive symptoms decreased "immediately" upon hearing that he could use the boys' restroom at school. He indicated that he experienced feeling hopeful for the first time since "last year" and that his feelings of worthlessness had decreased. He stated that he noticed a

considerable change in his sleep, such that he has been falling asleep more easily and staying asleep at night. He also indicated that his appetite has increased, but reported that he is not sure if this is due to taking testosterone (hormone therapy to treat his gender dysphoria and to live fully as the boy he is) or because his depressive symptoms were decreasing. He noted that he does continue to experience depressive symptoms, such as feeling sad nearly every day. However, he indicated that he used to feel sad most of the day, every day, and now he has noticed that the frequency of the sadness has decreased. He indicated that prior to the ruling, he was having difficulty getting out of bed, but that he has not experienced any difficulty with this since the ruling. Ash also indicated that prior to the ruling, he was experiencing suicidal ideation (thoughts of suicide without any plan or intent) daily and that his suicidal ideation had now decreased from every day to "two to three days" per week.

8. In my third clinical interview with Ash on October 18, 2016, I assessed Ash for his psychological well-being after nearly one month of his being allowed to use the boys' restroom at school. Behavioral observations and Ash's self report of his mood are notable. Of the three times he was assessed, his mood on October 18, 2016 displayed the most happiness and elevated affect. When asked about his mood over the previous month specifically related to being able to use the restrooms at school, he smiled and said that he felt like his mood had "significantly improved." He reported that the previous time we had engaged in a clinical interview (on September 30, 2016), he had been feeling "extremely angry and upset" at recently learning of the school district's request for a stay of the ruling, which would reinstate the district's policy prohibiting him from using the boys' restrooms, but indicated that he has been feeling less angry and more hopeful over the last three weeks. When asked about what has changed, he stated that he has been feeling "so good" at school that he is choosing to cope by

asking others for support and has been exercising. When assessing current suicidal ideation, Ash reported that he has not had any suicidal thoughts over the last week and indicated that he thinks that this is the "healthiest I've been." As noted above, he continues to endorse depressive symptoms, mostly related to experiencing some anhedonia, feeling tired from the amount of school work he has, and experiencing worry/ anxiety/ restlessness.

9. Along with assessing depression, Ash was also assessed for anxiety and PTSD symptoms. On August 2, 2016, Ash endorsed 8 out of the 8 criteria for PTSD in the DSM-5. Ash continues to meet criteria for a PTSD diagnosis; however, the ruling on the preliminary injunction positively impacted several of his PTSD and anxiety symptoms. Notably, when Ash was asked about his initial response to the ruling, he indicated feeling "relief" and noticing that he does not feel as though he needs to worry about authority figures pulling him out of the restroom or worry about which restroom to use during the day. Particularly, Ash stated that four symptoms initially described prior to the ruling (intense/prolonged psychological distress from exposure to situations that remind him or resemble discrimination in the restroom, avoidance of restrooms, negative beliefs about the world, and hypervigilance) have either diminished or are absent as a result of being allowed to use the boys' restroom at school.

10. On September 30, 2016 Ash was asked about his affective, behavioral, and cognitive reactions to being able to use the boys' restroom at school. Ash reported that being able to use the boys' restroom has allowed him to "de-clutter" his mind—indicating a substantial reduction in his anxiety symptoms. He stated that his mind feels more open to focus on schoolwork and that he feels as though he can prepare more easily and concentrate more on upcoming tests. When initially asked about his reaction, he reported that he "feels better and less stressed." After asking for more specific clarification, he reported that he has noticed less

pressure in his head, feeling more energetic, less "achiness", and overall caring less about what others think about him.

11. On October 18, 2016, when asked about his anxiety symptoms, Ash reported that "all" of his anxiety has been focused on schoolwork. He reported that he has had an increase of anxiety this week that is rooted in submitting college applications, taking tests, and completing homework—which he reports as all being "normal stress." He stated that anxiety related to his gender identity and how others will treat him has been significantly decreased. He noted that his new school principal, Steven Knecht, has been "very supportive" of him at school. He said that he has been treated like "any other boy" regarding restroom use and the use of his name. He indicated that having a school ID with his name, having a new insurance card with his name, and continuously being on testosterone have also contributed to his lessening anxiety at school.

12. On September 30, 2016, Ash was asked about his reaction to the possibility of no longer being allowed to use the boys' restroom at school if KUSD were successful at getting the injunction stayed. Ash reported that he experienced significant distress when considering the possibility of not being able to use the boys' restroom at school. He indicated that he experienced "immense" disappointment, sadness, anxiety, confusion, and anger. He reported that if the stay is allowed, he could not imagine a situation in which he would "feel safe" at school and stated that he would feel the need to not go to school and thus worries about the impact on his academic outcomes. He indicated that, after the initial ruling about the preliminary injunction, he had been feeling hopeful for the first time "since last year" and was feeling optimistic about his suicidal ideation decreasing. He reported that if the stay occurs, he "won't know how to deal" and that he would feel "pathetic and worthless." He stated that he would be fearful of school staff or security pulling him out of the restroom, a situation in which he imagines feeling "embarrassed and

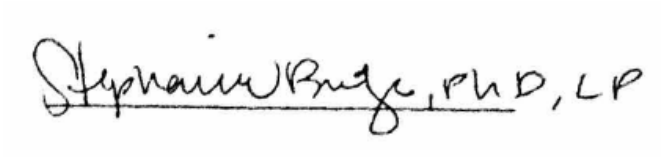
degraded." He reported that he has been working through his feelings and experiences of being invalidated as a boy and coping with the fact that others have called him "sick" because of his transgender identity. He stated that if the stay is issued, it will "un-do" the psychological work he has done to combat internalized transphobia about his identity.

13. On October 18, 2016, Ash indicated that he was experiencing less anger and more hope the longer he is able to use the boys' restroom at school. He stated that having less anger and increased hopefulness has allowed him to finish his college applications and look forward to the future. He indicated that his change in anger has also been influenced by feeling as though he has "done everything I could" and that everything is "out of my hands now." He indicated feeling confidence about who he is and that continuously having less to worry about related to his gender identity has allowed him to have more cognitive space to approach situations that may cause him anxiety.

14. According to Ash, he experienced notably increased psychological well-being related to using the boys' restroom at school immediately after the initial ruling and continues to experience psychological well-being one month after being able to use the boys' restroom at school. Although Ash reported a substantial change in well-being over the last month he has been able to use the restroom at school, I would predict that this well-being is unlikely to continue if he is not allowed to use the boys' restroom at school. Should Ash not be allowed to use the boys' restroom at school, I would anticipate that his feelings would replicate many of his reactions he reported when contemplating that possibility during the September 30, 2016 assessment (for example, anger, frustration, defiance, depression, and suicidal ideation). Although it is difficult to provide a completely accurate prediction of individual future psychological reactions, it is my opinion that Ash's assessment of his anticipated reaction to not

being able to use the boys' restroom seems reasonable, and that such a situation would be detrimental to his mental health.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Executed on October 19, 2016

EXHIBIT 1

Original Declaration of Stephanie L. Budge, Ph.D., filed August 15, 2016

EXHIBIT 2

DECLARATION OF DR. STEPHANIE L. BUDGE, Ph.D.

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

Declaration of Stephanie L. Budge, Ph.D.

PRELIMINARY STATEMENT

1. I have been retained by counsel for Plaintiff as an expert in connection with the above-captioned litigation. I have actual knowledge of the matters stated in this declaration.

2. The information provided regarding my professional background, experiences, publications, and presentations are detailed in my curriculum vitae. This is included as an accurate and true copy and is attached as Exhibit A to this declaration.

3. I received my Ph.D. in Counseling Psychology from the University of Wisconsin-Madison in 2011, with focuses on lesbian, gay, bisexual, and transgender ("LGBT") issues and psychological assessment. I am a tenure-track Assistant Professor of Counseling Psychology at the University of Wisconsin-Madison ("UW-Madison") in the School of Education's Department of Counseling Psychology. I was a visiting assistant professor at UW-Madison from 2014-2016 and received a tenure-track appointment in 2016. I was previously an assistant professor at the

University of Louisville in the Department of Educational and Counseling Psychology, Counseling, and College Student Personnel from 2011 to 2014. I have been a mental health professional since 2006 and I hold a license to practice psychology in the State of Wisconsin. The focus of my academic and clinical work is on the emotional and coping mechanisms of transgender adolescents and adults.

4. I have expertise working with adolescents and adults whose assigned sex at birth is incongruent with their gender identity (hereafter referred to as transgender or trans individuals). Many of these individuals have met the criteria for Gender Dysphoria. I have been a mental health provider to transgender individuals since 2007 and the majority of my caseload over the 10 years since I have been a mental health professional has been trans-identified individuals. The majority of my caseload (around 80%) since 2011 has included transgender youth (ages 13-24). In 2008, I received a year of specialized training in a forensic setting to evaluate adolescents. I also sought and received specialized training as a graduate student in psychological assessment and teach psychological assessment courses to graduate students.

5. I have published 53 peer-reviewed journal articles and book chapters, with the majority of these focusing on transgender individuals. Notably, several of these publications are specifically focused on evaluating transgender individuals to assess their eligibility for transition-related care, including hormone treatment and surgery; how to engage in clinical decision-making related to mental health care for transgender individuals; and effective psychotherapeutic treatment for transgender individuals.

6. I am on the editorial board for three peer-reviewed academic journals: *Psychology of Sexual Orientation and Gender Diversity*; *Archives of Sexual Behavior*; and the *International*

Journal of Transgenderism. Researchers in the United States and internationally have sought my assistance as an expert reviewer for research focused on transgender individuals.

7. I have been involved in over 97 academic presentations (internationally, nationally, and locally). The majority of these presentations have been focused on transgender individuals.

8. I have conducted and analyzed research with over 8,000 transgender individuals. I am currently completing a longitudinal study focused on transgender youth and their families, specifically focusing on their mental health and emotional/coping processes when experiencing discrimination, harassment, and barriers in institutional settings, including schools. The co-principal investigator (Sabra Katz-Wise, PhD) and I have two publications under review that highlight the experiences of these youth and their families. I am also conducting research with the Pediatric and Adolescent Transgender Health clinic in Madison, Wisconsin focusing on transgender youth access to mental and physical health care and the barriers involved in the process of obtaining treatment.

9. I am a member of the World Professional Association of Transgender Health (WPATH). WPATH (formerly known as the Harry Benjamin International Gender Dysphoria Association) is an interdisciplinary professional and educational organization of individuals worldwide who specialize in research and practice on transgender health and with transgender individuals. The organization's mission includes supporting clinical and academic research to develop evidence-based, high quality health care for transgender and gender-nonconforming individuals. WPATH's leadership and many of its members are widely considered experts in this field. As explained further in paragraph 23 below, WPATH publishes the Standards of Care (SOC) for the Health of Transsexual, Transgender, and Gender Nonconforming People, which

are considered the authoritative health care standards for transgender individuals. As a WPATH member, I attend conferences that focus on transgender adults and transgender youth and present my own research to provide trainings to other professionals.

10. I am also a member of the Society for Lesbian, Gay, Bisexual, and Transgender Issues (Division 44) within the American Psychological Association (APA) (of which I am also a member). I am co-chair of the Science Committee for Division 44. The Science Committee is charged with ensuring that the most relevant and up-to-date research regarding LGBT individuals is disseminated through Division 44 and to full membership of the APA. We provide programming at the annual APA convention to disseminate cutting edge research on the best psychological practices and evidence-based treatments with LGBT individuals. At the 2016 APA annual convention, I was charged with disseminating information about evidence-based treatments for transgender individuals, as part of my role as co-chair of this committee.

11. I have received several awards for my expertise in the science and practice of working with transgender individuals, including the 2015 American Psychological Association Early Career Award for work with LGBT populations from the Society for Counseling Psychology and I was the first recipient of the APA Transgender Research Award in 2010. Locally, I am also a member of the Wisconsin Trans Health Coalition, which is an organization focused on decreasing violence and discrimination against transgender individuals within Wisconsin. As such, I am routinely sought out by school districts, service providers, and others as an expert on mental health and transgender issues within Wisconsin.

12. In preparing this declaration, I reviewed A.W.'s medical and therapy records. I also reviewed the seminal and influential psychological and public health research on

transgender individuals published over the past decade, including the most current research published as recently as this year. A bibliography is attached as Exhibit B.

13. I personally met with A.W. and his mother, Melissa Whitaker, on August 2, 2016, to conduct a clinical assessment of A.W. The purpose of this meeting was to administer psychological testing and to review records from his pediatrician and therapists. Based on that assessment, I render the following opinions, with a reasonable degree of professional certainty in my field of psychology.

14. I understand that this declaration will be submitted in support of A.W.'s motion for preliminary injunction in this case. I am prepared to testify about the information and conclusions contained in this report at a hearing. I may prepare a full expert witness report, as appropriate, during this litigation.

15. I am being compensated at an hourly rate of $150/hour for actual time devoted for my expert services and testimony in this case, as well as expenses and costs. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

SEX, GENDER IDENTITY, AND GENDER DYSPHORIA

16. "Gender identity" is a term that has broad psychological and medical consensus to mean a person's internal sense of one's own gender. All human beings have a gender identity. Gender identity is innate and generally considered an immutable characteristic. Gender identity for all human beings usually begins to become clear around the age of three (with some variation around this age), although many transgender individuals may not begin to recognize or express their gender identity until later in life.

17. The majority of individuals born with external female genitalia (i.e., vaginas, clitorises, vulvas), internal female reproductive organs (i.e., ovaries, uteruses), and XX chromosomes, will identify as women and experience themselves as female. Conversely, the majority of individuals born with penises, testes, and XY chromosomes will identify as men and experience themselves as male. However, there are many variations that may differ from that typical course, such as transgender people and those with intersex conditions and sex chromosome conditions (e.g., Turner Syndrome, Klinefelter Syndrome).

18. There is no single anatomical or physiological characteristic that defines a person's sex. When sex-related characteristics such as internal or external genitalia, reproductive capacity, chromosomes, or gender identity are inconsistent—as with many transgender people and people with intersex conditions—it is most appropriate to define sex based on the person's gender identity.

19. A transgender person is someone whose experienced gender identity differs from, or is incongruent with, their sex assigned at birth.

20. Gender Dysphoria is the medical and psychiatric term for that gender incongruence. The psychiatric diagnosis is codified within the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5), and the medical diagnosis is included within the World Health Organization's International Classification of Diseases (ICD-10) (under the now-outdated name Gender Identity Disorder). Individuals who are diagnosed within these classifications present with a variety of symptoms, and typically indicate an intense need to present themselves and be viewed by others in accordance with their gender identity (that differs from their sex assigned at birth). When clients with gender incongruence do not obtain competent and necessary treatment, serious and debilitating

psychological distress (depression, anxiety, self-harm, suicidal ideation/attempts, etc.) often occurs. True and correct copies of the relevant portions of DSM-5 and ICD-10 are attached to this declaration as Exhibits B and C, respectively.

21. Under the DSM-5, the criteria for identifying Gender Dysphoria in adolescents and adults (302.85) are:

a. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:

(1) A marked incongruence between one's experienced/expressed gender and primary and or/secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics);

(2) A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)

(3) A strong desire for the primary and/or secondary sex characteristics of the other gender.

(4) A strong desire to be of the other gender (or some alternative gender different from one's assigned gender)

(5) A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender)

(6) A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender)

22. Gender Dysphoria is associated with clinically significant distress or impairment in social, occupational, educational, or other important areas of functioning.

23. WPATH publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People ("SOC") that are considered the international standards for medical and mental health treatment for transgender individuals. The foremost medical and mental health organizations within the United States, and internationally, recognize the SOC as the authoritative standards for treatment of Gender Dysphoria. Those include the American Psychological Association, the American Psychiatric Association, the American Counseling Association, and the American Medical Association. WPATH has published the SOC since 1979. The Seventh Version of the SOC was published in 2012. A true and correct copy of the SOC, Seventh Version, is attached to this declaration as Exhibit D.

24. The SOC provide evidence-based protocols for mental health and medical providers to follow in determining the specific treatment regimen that will best fit the needs of the transgender individual. It has been well-established from the SOC and experts in the health care of transgender individuals that each transgender person has their own specific transition needs and that not every transition will look the same. Treatment generally consists of social, psychological, and/or medical support, as needed, that allows the individual to live and be integrated into society in accordance with their gender identity, thus relieving the distress that results from gender incongruence. Treatment interventions do not "prove" a person's gender

identity; instead, they help to bring the person's external appearance and gender role in line with who the person really is.

25. For most transgender individuals an important piece of treatment to reduce dysphoria is to engage in a social transition—i.e., non-medical processes taken to ensure that the individual can live in the world in a manner fully consistent with the individual's gender identity. As part of a social transition, an individual will typically tell others of their gender identity, go by a new name, use pronouns congruent with their gender identity, wear clothing typically associated with their gender identity, change their hairstyle, and use restrooms that fit their gender identity, among other things. To be clinically effective at alleviating the distress associated with Gender Dysphoria, a social transition must be respected consistently across all aspects of a trans individual's life—for example, at home, in school, and at work.

26. Psychotherapy to reduce the harmful effects of stigma and improve resiliency, hormone therapy, and/or surgeries can all be very effective ways to treat an individuals' dysphoria; as noted, however, there is no "one size fits all" medical regimen. In addition, individuals may be constrained by practical limitations—for instance, age, medical contraindications, or cost—on the ability to obtain medical treatment such as hormones or surgeries. Surgeries and other treatments related to gender transition are frequently excluded from coverage under health insurance plans.

27. Before transgender identity and Gender Dysphoria were well understood by the medical community, there had been a short history of considering these as disorders to be "cured" through therapy that attempted to reverse the individual's gender identity. This has been referred to as "reparative therapy" in much of the academic and clinical literature. There is a

medical and psychological consensus that reparative therapy is, in fact, unethical (i.e., causes harm) and ineffective.

28. Under the SOC, medical transition is not appropriate for pre-pubertal transgender children. For transgender adolescents, hormone therapy may be prescribed—either puberty-blocking hormones designed to delay the onset of physical changes associated with puberty and/or hormones designed to masculinize or feminize the individual's appearance. Genital surgery is not advised by the SOC until after the adolescent has reached the age of majority.

29. Virtually all transgender adolescents, however, will undergo some type of social transition. Current evidence-based treatment indicates that mental health/medical providers and social supports should affirm an adolescent through a social transition to ensure that their gender identity is part of their lived experience in all aspects of their lives. It is the aim of treatment to assist the adolescent in successfully integrating their internal identity into a life that allows them to function consistently in accordance with that identity and not feel shame for who they are. It is inconsistent with evidenced-based practice to discourage or impede an adolescent from moving forward with any aspect of their transition; if clinically-indicated aspects of transition are impeded, it is likely that critical levels of distress will result. For example, impeding access to a restroom that is in alignment with an adolescent's gender identity will likely result in clinical distress. For transgender adolescents, it is critical that all aspects of social transition are supported by their family, school, work, and community.

IMPACT OF EXCLUSION AND NON-AFFIRMATION

30. In the United States, public restrooms are often separated based on gender (women's and men's restrooms), unlike most other spaces. When restrooms are gendered and a transgender individual is restricted to the restroom based on their assigned sex at birth, they are

being told unmistakably that their understanding of their own gender is invalid. In addition, when "accommodations" are offered to transgender individuals that allow them to either use the restroom of their assigned sex at birth or a restroom that is not usually designated for their group (e.g., sending a high school student to a faculty restroom), that individual is being told not only that their gender is invalid, but that they are something "other" and must be separated from all their peers. Numerous research studies have confirmed the negative psychological impact of being invalidated and "othered" in this way. Specifically, for transgender individuals, such exclusion fundamentally impedes the process of social transition because it prevents the positive integration of their gender identity through affirmation and instead sends a strong message to the individual—that this is a shameful aspect of their identity—that they are likely to internalize.

31. The *gender minority stress and resilience* model provides an explanation for the mental and physical health disparities between transgender and non-transgender populations. This model identifies four common external stressors: gender-based victimization (verbal or physical acts of hostility based on transgender status), gender-based rejection, gender-based discrimination, and identity non-affirmation. These external gender minority stress factors can lead to three types of internal stressors: negative expectations for future events, internalized transphobia, and non-disclosure of one's identity. Negative expectations for future events represent the belief that one may experience prejudice events, discrimination, and social rejection. These beliefs may be based on prior similar personal experiences and/or awareness of general societal stigma against transgender individuals. Internalized transphobia is the adoption and internalization of negative societal attitudes toward transgender individuals. Identity non-disclosure is an effort to conceal one's transgender status.

32. Studies examining external stressors in the transgender community have demonstrated that transgender people face high levels of discrimination and victimization and that exposure to these external stressors is associated with serious psychological harms including anxiety, depression, suicidal ideation, and suicide attempt. For example, one study (Boza & Perry, 2014) found that nearly 70% of transgender and gender non-conforming people had experienced at least one form of victimization or discrimination related to their gender identity, including social discrimination (55%) and harassment (43%). These types of discrimination events are strongly related to suicidality. For example, Goldblum et al. (2012) and Testa et al. (2012) found that individuals who have experienced prejudice events such as these are three to four times more likely to have a history of suicide attempt compared to those who have not had experiences of gender-related victimization and violence. Studies show that rates of ideation for transgender and gender non-conforming individuals with histories of victimization ranged from to 33-47% in the past year (Scanlon et al., 2010) and 82-97% over the lifetime (Testa et al., 2012). These rates are consistently and strikingly higher than the estimated lifetime prevalence of suicidal ideation and suicide attempts in the general population of 13.5% and 4.6%, respectively (Kessler, Borges, & Walters, 1999).

33. One study examined the relationship between suicidal behavior and gender-based hostility and insensitivity experienced in high school (Goldblum, Testa, Pflum, Hendricks, Bradford, & Bongar, 2012). Transgender and gender non-conforming participants were asked if they had experienced hostility or insensitivity from fellow students, teachers, or school administrators in their high school as a result of their gender identity or expression. Those who reported having been the victim of gender-based hostility were approximately four times more likely to have made a suicide attempt than those who did not report being so victimized.

34. It is clear that serious harms can result when transgender individuals are not allowed to use restrooms corresponding to their gender identity. Most transgender individuals begin using restrooms consistent with their identity after completing other aspects of social transition (wearing clothing associated with their gender, changing their hair, etc.). Transgender and gender non-conforming people regularly face harassment and victimization in restrooms when they are perceived not to belong (Herman, 2013). Excluding transgender individuals from restrooms that correspond to their gender identity following a social transition thus subjects those individuals to increased risk of actual victimization as well as the realistic fear of such victimization, with the accordant harms resulting from that stress.

35. Predictably, to avoid the harmful effects of non-affirmation or fear of victimization, transgender individuals will often avoid using the bathroom in any public space. This can lead to significant health consequences. First, transgender individuals will often avoid an intake of fluids to avoid the necessity to urinate; this can have significant health consequences related to dehydration. Even if transgender individuals do not avoid fluid intake, they will often hold urine in their bladders to avoid using the bathroom; this can also cause negative health consequences such as urinary tract or kidney infections. Transgender individuals may also avoid eating certain foods (or restrict food in general) to circumvent defecation, leading to constipation and muscle damage/weakness.

36. Although many transgender individuals report negative consequences when they are restricted from using bathrooms consistent with their identity, this exclusion may be particularly damaging during adolescence. Adolescence is marked by a time of development where individuals' attention and awareness are particularly heightened related to looks, "fitting in," and navigating complex social interactions. Transgender adolescents are typically acutely

self-conscious of the ways they may be perceived as different from their peers of the same gender. An internal consequence of that "not fitting in" is often internalized shame and sometimes diagnosable social anxiety and depression. External consequences can include experiences of bullying, harassment, and discrimination by peers and adults within school institutions.

37. Research shows that the mental health consequences of discrimination and disaffirmation for transgender youth are dire: transgender adolescents experience depression, anxiety, self-harm, and suicidal ideation/attempt(s) at two to three times the rates of cisgender (non-transgender) adolescents (Reisner et al., 2015). Indeed, research released in 2013 indicates that more than 50% of transgender youth report attempting suicide at least once in their lifetime (Mustanski & Liu, 2013).

38. Numerous retrospective and contemporaneous studies have noted the difficulties that transgender adolescents experience while in school. For example, a 2009 report (Greytek et al., 2009) noted that two-thirds of transgender youth feel unsafe at school because of their gender identity and almost all (89%) transgender youth reported being verbally harassed at school. The report indicates that 39% of school staff had commented negatively about someone's gender expression over the past year. Participants also indicated that it was rare for school personnel to intervene when seeing transgender adolescents victimized at school—no intervention occurred 89% of the time. These negative experiences can cause feelings of shame, stigma, and unworthiness, and can lead to psychological distress. This stress can be overwhelming, distracting transgender students from the ability to concentrate on schoolwork, and can even lead students to drop out of school. A study published just prior to the writing of this report indicates that experiences of discrimination and stigmatization related to transgender identity can

frequently cause post-traumatic stress disorder, even when controlling for previous and/or non-trans-related trauma (Reisner et al., 2016).

39. In addition to the links between harassment and discrimination from peers and clinical distress in transgender adolescents, it can be even more harmful when adults in power perpetuate notions that isolate and stigmatize transgender adolescents. Research on *social identity theory* describes the harm that results when people of higher status—usually people in power such as, in the case of students, school administrators—fail to affirm or actively disaffirm lower-status individuals with a marginalized identity. This often leads to external forms of harm such as ostracizing and discrimination against the individual by peers and others, as well as internal harms such as internalized shame and self-hatred. These internal and external factors can be directly related to psychological distress, such as post-traumatic stress disorder, depressive disorders, anxiety disorders, and hypertension, amongst myriad other health concerns.

CLINICAL ASSESSMENT OF A.W.

40. I met with A.W. and his mother, Melissa Whitaker, on August 2, 2016 to conduct a psychological assessment.

41. I used the following Instruments used for the clinical assessment of A.W.: Schedule for Affective Disorders and Schizophrenia for School Age Children (K-SADS-PL), Kutcher Adolescent Depression Scale, Kutcher Generalized Social Anxiety Disorder Scale for Adolescents (K-GSADS-A), Severity of Posttraumatic Stress Symptoms-Child Ages 11-17 (NSESSS), Severity Measure for Social Anxiety Disorder (Social Phobia)-Child Ages 11-17, Severity Measure for Generalized Anxiety Disorder-Child Ages 11-17, Patient Health Questionnaire for Adolescents (PHQ-9), Multidimensional Scale of Perceived Social Support (MSPSS), and Transgender Outness Inventory (TOI).

42. A.W. is a 16 and 11/12ths year old white transgender boy (who also identifies as "female-to-male," or "FTM").

43. A.W. reported a lack of significant psychological history until he reached 6th and 7th grade. He reported that he began experiencing bullying around 7th grade and also began to "feel different." Around that time he stated he began experiencing symptoms congruent with Major Depressive Disorder, specifically feeling down, losing interest in usual activities, difficulty concentrating, feeling a lack of motivation, having difficulty sleeping, and experiencing suicidal ideation. He indicated that as he began to learn more about transgender identity, toward the end of middle school, he felt motivated to come out to his parents. He said he "tested the waters" with his mother in July 2013 by asking about insurance coverage for treatments for transgender individuals. A.W. reported that his distress increased at this time, primarily due to expectations of rejection from peers and loved ones.

44. A.W. stated that once he was able to start transitioning and started experiencing more family support, he began to experience increased psychological well-being. He indicated that he was feeling less anxiety and depression, as well as a complete lack of suicidal ideation during this time. Once he was specifically instructed to not use the boys' bathroom at school, however, his distress increased again, dramatically.

45. Based on the clinical assessment, A.W. meets criteria for several mental health diagnoses.

46. First, he meets all 6 of the criteria under category A in the Gender Dysphoria diagnosis.

- The first symptom under category A includes a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex

characteristics. A.W. reported that he experiences a marked incongruence between his sex assigned at birth (female) and his internal sense of gender identity (male) and gender expression (masculine).

- Symptoms 2 and 3 include the desire to be rid of one's primary/secondary sex characteristics from one's sex assigned at birth and to obtain the primary/secondary sex characteristics typically associated with one's gender identity. A.W. indicated that he experiences discomfort with his chest and with menstruation and strongly desires male secondary sex characteristics (e.g., deep voice, facial hair, redistribution of body fat).
- The fourth symptom in the DSM-5 is a strong desire to be of the other gender. He stated that he has had a strong desire to identify as a boy—and understanding that he is a boy—since 2013, far exceeding the 6-month minimum in the DSM-5 criteria.
- Symptoms 5 and 6 within this diagnosis are a strong desire to be treated as the other gender and a strong conviction that one has the typical feelings and reactions of the other gender. He stated that it is essential for others to see him and treat him as a boy, otherwise he experiences an increase in dysphoria. He said that he clearly feels that he is like any other boy and relates to others as a boy. He recently started hormone therapy (testosterone) and reported that this momentarily assisted with some gender dysphoria, but that his experiences of external rejection often increase his dysphoria.

47. He meets the criteria for category B on three levels: 1) he experiences significant and constant distress related to how he has been treated by school staff and peers related to his

gender identity, 2) he continues to have some internalized stress related to his gender identity, and 3) he experiences distress related to barriers in accessing local trans-competent medical and mental health care.

48. In addition to my assessment that A.W. meets the criteria for Gender Dysphoria, according to his records, he was also diagnosed with Gender Dysphoria by his medical provider (Sheryn Abraham, MD) on 06/30/14 and by his therapist (Tara Rullman, MA, LPC) on 09/06/14.

49. The overarching diagnosis that subsumes several of the diagnoses that will be discussed below is post-traumatic stress disorder (PTSD with panic attacks; 309.81). During the diagnostic interview, A.W. endorsed 8 out of the 8 criteria in the DSM-5 for a diagnosis of PTSD. He reported experiencing several traumatic events, the majority of which include verbal harassment and discrimination at school. These experiences have led to intrusion symptoms, such as recurrent, involuntary, and distressing memories of these events; several flashbacks; and intense distress in situations that remind him of experiences of verbal harassment and discrimination. Primarily he reports persistent avoidance of thoughts and memories as well as avoiding people, places, and situations that remind him of these experiences (or avoiding these situations due to a very real fear that the harassment and discrimination may occur again). Out of the seven criteria focused on negative alterations in mood, where a minimum of two is needed for diagnosis, A.W. endorsed all seven. For the criteria relating to alterations in reactivity, where a minimum of two is needed for diagnosis, he endorsed five out of six criteria. Those included irritability and anger, self-destructive behavior, hypervigilance around using restrooms or going out in public, problems with concentration on schoolwork, and sleep disturbance.

50. Depression and anxiety are often comorbid disorders when an individual meets criteria for PTSD. A.W. meets criteria for Major Depressive Disorder (moderate; 296.33). He

endorsed experiencing 8 out of 9 symptoms. Many of these symptoms overlap with his PTSD symptoms, such as feelings of worthlessness, lack of concentration, difficulty with motivation, psychomotor agitation, and loss of interest in things. He reported that he often has difficulty getting out of bed and feels tired "all of the time." He also indicated that he has lost interest in things he used to find enjoyable and that his level of irritability is much higher than usual. He reported current thoughts of suicide, but does not have any plan or intent. He reported that his suicidal thoughts are passive and that they are usually thoughts that "come up" when he is feeling particularly hopeless. He indicated that he copes with many of these symptoms (but most specifically his suicidal ideation) by talking with a friend about them. He stated that his depressive symptoms for his most recent depressive episode began around four months prior to this assessment. He indicated that his depressive symptoms worsen each time he meets with school officials and is confronted with a similar outcome about his bathroom access, when he is treated "like a girl," or when school staff see how he is being treated and do not step in.

51. A.W. also meets criteria for several anxiety disorders, such as Social Anxiety Disorder (300.23) and Generalized Anxiety Disorder. (300.02) He reported complete avoidance of social gatherings, changing/showering in locker rooms, initiating conversations with strangers, and asking someone out on a date. He also reported in the last week, that he has "all of the time" felt: anxious/worried/nervous, spent a lot of time making decisions/putting off decisions/ preparing for situations due to worry, and sought reassurance from others due to worry. In the last week, he reported having moments of sudden terror, heart racing, sweating, trouble breathing, and feeling faint. He also reported that over the last four years, he has had several incidences of panic, some of which meet criteria for a panic attack; he does not report concern or worry about having panic attacks or changing his behaviors because of the panic attacks.

Because of the comorbid nature of PTSD and these symptoms, it is my clinical opinion that these experiences of anxiety are directly attributable to PTSD and are not derived from other isolated events. According to the DSM-5, individuals with PTSD are 80% more likely than those without PTSD to present with symptoms for depression and anxiety; thus it is often a complex process of determining the course and nature of these disorders. Although it is possible for a transgender person to experience these diagnoses without the cause of the diagnoses being focused on how one is treated as a transgender person, it is my clinical opinion that A.W. meets criteria for these diagnoses based on his hypervigilance around how he will be treated as a transgender person. In order to navigate the world to stay safe, it is actually protective for A.W. to be mindful and somewhat fearful of social situations, due to a high likelihood of experiencing rejection or discrimination. A.W.'s fears have been reinforced by school administrators making clear their view that he does not belong in situations where any other boy would be allowed, thus creating a situation where he constantly has to notice his own level of difference and to read social situations to find out if he will be treated with respect.

52. Because A.W.'s anxiety and depression first started based on his experiences of bullying and continued when he began to experience internalized shame related to his gender identity, this can be conceptualized within the Cultural Formulation of Stress (DSM-5) model: when individuals from marginalized groups experience discrimination based on their marginalized identity, PTSD can result.

53. It is my assessment that the specific ways that A.W. has been treated have significantly and negatively impacted his mental health and overall well-being. A.W. described symptoms of trauma, depression, and anxiety that related to being treated differently because he is a transgender boy. A.W. reported that he lives in fear at school and that this fear has started to

translate to other areas outside of school. He stated that he avoids using the bathroom during the day. He stated that this causes physical discomfort, but also perceives that this is not good for his physical health. After leaving meetings with school staff regarding his treatment, A.W. indicates he has spent tearful nights at home and regularly has difficulty sleeping, especially on evenings when an incident at school has occurred. A.W. reported, "It is a miracle that I have been able to keep my grades up" and said that his only motivation to be successful in school is so he can leave school to attend a university environment that will accept him fully for who he is, as a boy.

54. In addition to the negative psychological effect of not being able to use the boys' bathroom at school, A.W. related that he experienced psychological distress directly related to school staff not using he/him/his pronouns, not using his male name, isolating him to a gender-neutral single room on a school trip, and refusing to let him run as prom king (despite his stellar grades and meeting all required criteria). In contrast to his psychological distress experienced from not being able to use the restrooms, A.W. indicated that he experiences some anxiety, but primarily experiences depression from being misgendered. He stated that it causes him to feel like there is something "wrong with me" and further perpetuates his feelings of shame.

55. Based on the assessment results, it is my strong recommendation that A.W. be allowed to use the boys' restrooms at school and otherwise be allowed to participate like any other boy at gender-segregated events, without being singled out or marked as different from other students. The school's persistent messages to A.W. that he is not a "real" boy in their eyes—excluding him A.W. from the boys' restrooms, requiring him to room with girls or alone on school trips, barring him from running for prom king, and repeatedly calling him by his birth name and female pronouns—are having deeply harmful and stigmatizing effects, causing him to feel consistent isolation, shame, humiliation, anxiety, and depression, as well as fear for his

safety. These actions and policies contribute to his anxiety, depression, and PTSD, and directly undermine the social transition that is medically necessary to treat his Gender Dysphoria. It is my clinical opinion that, while psychotherapy can assist transgender individuals in coping with discrimination and being ostracized, it is difficult (if not impossible) to improve mental health in the wake of concurrent trauma. It is my clinical opinion, based on clinical experiences and scientific findings, that if these exclusionary, isolating, and stigmatizing practices are allowed to continue, there will be immediate and long-term significant consequences for A.W.'s mental health.

56. It is my professional opinion that the Kenosha Unified School District's treatment of A.W. and its policies regarding his bathroom use, separating him from other students during school trips, refusal to require consistent use of his male name and pronouns by school staff, and other actions that single him out as transgender and treat him differently from other boys, are directly causing significant psychological distress and place A.W. at risk for experiencing life-long diminished well-being and life-functioning.

57. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Stephanie Brodz, PhD, LP

Executed on 8/11/2016.

EXHIBIT

A

Stephanie L. Budge, PhD, LP
Curriculum Vitae

Department of Counseling Psychology, School of Education, Room 309, University of Wisconsin-Madison, Madison, WI 53706, 608-262-4807, budge@wisc.edu

PROFESSIONAL EXPERIENCE

8/2016-	**Assistant Professor**, tenure-track, Department of Counseling Psychology, University of Wisconsin-Madison
8/2014-7/2016	**Assistant Professor**, visiting, Department of Counseling Psychology, University of Wisconsin-Madison
8/2011-8/2014	**Assistant Professor**, tenure-track, Department of Educational and Counseling Psychology, Counseling, and College Student Personnel, University of Louisville
9/2011-6/2014	**Postdoctoral Clinical Training,** University of Louisville Counseling Center (9/2011-8/2012) and University of Louisville Transgender Project (7/2013-6/2014)
8/2010-8/2011	**Predoctoral Internship**, University of Minnesota, University Counseling and Consulting Services, APA-Accredited, APPIC listed predoctoral internship

LICENSURE

2/2015-current	Licensed Psychologist in Wisconsin—3244-57
8/2011-6/2014	Licensed Psychologist (under supervision to gain hours for Health Service Provider status) in Kentucky—2012-42

EDUCATION

8/2006-8/2011	**Doctor of Philosophy**. University of Wisconsin-Madison. APA Accredited Counseling Psychology Program. Dissertation Title: *Distress in the transition process for transgender individuals: The role of loss, community, and coping*. Dissertation successfully defended in April, 2010. Minor: Psychological Assessment.
8/2004-5/2006	**Master of Arts.** University of Texas at Austin. Degree in Educational Psychology. Thesis Title: *Sexual pressure in gay, lesbian, and bisexual relationships.*

1/2003-12/2003	**Bachelor of Science.** University of Utah.
9/2000-12/2002	Pace University, New York, New York, credits toward Bachelor of Science degree. Major: Psychology, Minor: Women's and Gender Studies.

RESEARCH GRANTS

06/2016	Wisconsin Partnership Program, Community Opportunity Grant, $50,000—**funded**, *Transgender Health—A New Horizon in Equity in Health Care*. Role: Contributor.
06/2016	UW Institute for Clinical Research (ICTR) Health Equity and Diversity (AHEAD) research pilot award, $10,000--**funded**, *Advancing Wisconsin Survey of Transgender Youth: An Assessment of Resources and Needs*. Role: Collaborator
05/2016	Patient Centered Outcome Research Initiative (PCORI) Engagement Award, $250,000—**submitted**, *Collective for Integrating Psychological Health, Education, and Research for LGBTQ Therapies (CIPHER LGBTQ).* Role: Co-PI.
03/2016	National Institute of Health, NICHD, K23, $666,769—**scored** grant. *The effects of pubertal suppression on affect and emotion regulation for transgender youth.* Role: PI.
10/2012	College of Education and Human Development Faculty Research Development Grant, $2,200—**funded**. PI on research project testing psychotherapy process and outcomes for transgender individuals.
9/2011	College of Education and Human Development Faculty Research Development Grant, $2,260—**funded**. PI on research project regarding positive experiences of transgender identity and intersectionality of identities with genderqueer individuals.
6/2010	Charles J. Gelso Research Grant, $2,000—**funded**. PI on a research project regarding personality disorders and treatment effectiveness.

EDITORIAL RESPONSIBILITIES

Associate Editor: Psychotherapy

Editorial Board: Psychology of Sexual Orientation and Gender Diversity, Archives of Sexual Behavior, International Journal of Transgenderism

Ad Hoc Reviewer: Journal of Consulting and Clinical Psychology, Clinical Psychology Review, Journal of Counseling Psychology, The Counseling Psychologist, Feminism and Psychology, Psychology of Religion and Spirituality, Psychology of Women Quarterly, Journal of GLBT Family Issues, BioMed Central Journal, The Cognitive Behavior Therapist, Psychotherapy Research, Routledge Publishers, Harvard University Press

JOURNAL PUBLICATIONS
*Denotes student

1. **Budge, S.L.,** Orovecz, J.*, Owen, J.J., & Sherry, A.R. (In Press). The Relationship Between Conformity to Gender Norms, Sexual Orientation, and Gender Identity for Sexual Minorities. *Counselling Psychology Quarterly.*
2. **Budge, S.L.** (In press). To err is human: An introduction to the special issue on clinical errors. *Psychotherapy*.
3. **Budge, S.L.** & Pankey, T.L.* (In press). Ethnic differences in gender dysphoria. *Current Psychiatry Reviews.*
4. **Budge, S.L.** & dickey, l.m. (In press). Barriers, challenges, and decision-Making in the letter writing process for gender transition. *Psychiatric Clinics.*
5. Katz-Wise, S.L., Reisner, S.L., White, J.M., & **Budge, S.L.** (In press). Sexual fluidity and social determinants of mental health in gender minority adults in Massachusetts. *Archives of Sexual Behavior.*
6. dickey, l.m., **Budge, S.L.,** Katz-Wise, S.L., & Garza, M.V. (2016). Health disparities in the transgender community: Exploring differences in insurance coverage. *Psychology of Sexual Orientation and Gender Diversity.*
7. Barr, S.M.*, **Budge, S.L.,** & Adelson, J.L. (2016) Transgender community belongingness as a mediator between strength of transgender identity and well-being. *Journal of Counseling Psychology.*
8. Nienhuis, J. B.*, Owen, J., Valentine, J. C., Black, S. W.*, Halford, T. C.*, Parazak, S. E.*, **Budge, S.,** & Hilsenroth, M. J. (2016). Therapeutic alliance, empathy, and genuineness in individual adult psychotherapy: A meta-analytic review. *Psychotherapy Research.*
9. **Budge, S.L.,** Thai, J.L.*, Tebbe, E., & Howard, K.H. (2016) The intersection of socioeconomic status, race, sexual orientation, transgender identity, and mental health outcomes. *The Counseling Psychologist.*
10. Tebbe, E.A. & **Budge, S.L.** (2016) Research with transgender communities: Applying a process-oriented approach to methodological considerations and research recommendations. *The Counseling Psychologist.*
11. Moradi, B., Tebbe, E., Brewster, M., **Budge, S.L.,** Lenzen, A., Enge, E…Painter, J. (2016). A content review of transgender research: 2002-2012. *The Counseling Psychologist.*
12. Tebbe, E.A., Moradi, B., & **Budge, S.L.** (2016). Introduction to the Major Contribution on Research with Transgender Populations. *The Counseling Psychologist.*
13. **Budge, S.L.** (2015*).* Psychotherapists as gatekeepers: An evidence-based case-study highlighting the role and process of letter-writing for transgender clients. *Psychotherapy.*
14. Kopta, M., Owen, J.J., & **Budge, S.L.** (2015). Measuring psychotherapy outcomes with the Behavioral Health Measure-20: Efficient and comprehensive. *Psychotherapy.*
15. Watkins, C.E., **Budge, S.L.,** & Callahan, J.L. (2015). Common and specific factors converging in psychotherapy supervision: A supervisory extrapolation of the Wampold/Budge psychotherapy relationship model. *Journal of Psychotherapy Integration, 25,* 214-235.

16. Owen, J.J., Adelson, J.L., **Budge, S.L.,** Wampold, B.E., Kopta, M., Minami, T., & Miller, S.D., (2015). Trajectories of change in short-term psychotherapy. *Journal of Clinical Psychology, 71,* 817-827.
17. **Budge, S.L.** (2015). The effectiveness of psychotherapeutic treatments for personality disorders: A review and critique of current research practices. *Canadian Psychology, 56,* 191-196.
18. Owen, J.J., Adelson, J.L., **Budge, S.L.,** Reese, R.J., & Kopta, M.M. (2015). Good-Enough Level and Dose-Effect Models: Variation Among Outcomes and Therapists. *Psychotherapy Research.*
19. Katz-Wise, S.L. & **Budge, S.L.** (2015). Cognitive and interpersonal identity processes related to mid-life gender transitioning in transgender women. *Counselling Psychology Quarterly, 28,* 150-174.
20. **Budge, S.L.,** Orovecz, J.*, & Thai, J.L.* (2015). Transgender men's positive emotions: The interaction of gender identity and emotion labels. *The Counseling Psychologist.*
21. **Budge, S. L.,** Keller, B.L.*, & Sherry, A. (2015) A qualitative investigation of lesbian, gay, bisexual, and queer women's experiences of sexual pressure. *Archives of Sexual Behavior.*
22. **Budge, S.L.** (2014). Navigating the balance between positivity and minority stress for LGBTQ clients who are coming out. *Psychology of Sexual Orientation and Gender Diversity, 1,* 350-352.
23. **Budge, S.L.,** Rossman, H.K.*, & Howard, K.H. (2014). Genderqueer individuals' mental health outcomes: The impact of gender socialization, coping, and perceived loss. *Journal of LGBT Issues in Counseling, 8,* 95-117.
24. **Budge, S.L.,** Moore, J.T.*, Del Re, A.C., Wampold, B.E., Baardseth, T.P., & Nienhuis, J.B.* (2013). The effectiveness of evidence-based treatments for personality disorders when comparing treatment-as-usual and bonafide treatments. *Clinical Psychology Review, 33,* 1057-1066.
25. **Budge, S.L.** (2013). Interpersonal psychotherapy with transgender clients. *Psychotherapy*, 50, 356-359.
26. Katz-Wise, S.L., **Budge, S.L.,** & Hyde, J.S. (2013). Objectified body consciousness and the mother adolescent relationship. *Psychology of Women Quarterly,* 37, 366-380.
27. **Budge, S.L.,** Adelson, J.L., & Howard, K.H. (2013). Anxiety and depression in transgender individuals: The roles of transition status, loss, social support, and coping. *Journal of Consulting and Clinical Psychology, 81, 545-557.*
28. **Budge, S.L.**, Owen, J.J., Kopta, S.M., Minami, T., Hanson, M.R., & Hirsch, G (2013). Differences among trainees in client outcomes associated with the Phase Model of Change. *Psychotherapy, 50,* 150-157.
29. **Budge, S. L.,** Katz-Wise, S. L., Tebbe, E., Howard, K.A.S., Schneider, C. L., & Rodriguez, A. (2013). Transgender emotional and coping processes: Use of facilitative and avoidant coping throughout the gender transition. *The Counseling Psychologist, 41,* 601-647.
30. Valdez, C. R. & **Budge, S.L.** (2012). Addressing adolescent depression in schools: Effectiveness and acceptability of an in-service training for school staff in the United States. *International Journal of Educational Psychology, 1,* 228-25.

31. Wampold, B.E., & **Budge, S.L.** (2012). The relationship—and it's relationship to the common and specific factors of psychotherapy. *The Counseling Psychologist, 40, 601-623.*
32. Wampold, B.E., **Budge, S.L.**, Laska, K. M., Del Re, A.C., Baardseth, T.P., Fluckiger, C., Minumi, T., Kivlighan, M., & Gunn, W. (2011). Evidence-based treatments for depression and anxiety versus treatment-as-usual: A meta-analysis of direct comparisons. *Clinical Psychology Review, 31,* 1304-1315.
33. Valdez, C. R., Dvorscek, M., **Budge, S.L.,** & Esmond, S.L. (2011). Provider perspectives of Latino patients: Determinants of care and implications of treatment. *The Counseling Psychologist, 39,* 497-526.
34. Wampold, B.E., Benish, S.G., Imel, Z.E., Miller, S.D., Laska, K., Del Re, A.C., Baardseth, T.P., & **Budge, S.L.** (2010).What works in the treatment of PTSD? A response to Ehlers et al. *Clinical Psychology Review, 30,* 269-276.
35. **Budge, S. L.,** Tebbe, E. N. & Howard, K. A. S. (2010). The work experiences of transgender individuals: Negotiating the transition and coping with barriers. *Journal of Counseling Psychology, 57,* 377-393.
36. Howard, K. A. S., **Budge, S. L.,** Gutierrez, B., Lemke, N. T., & Owen, A. D. (2010) Academic and career goals of high school youth: processes and challenges. *Journal of Career Development, 57,* 377-396.
37. **Budge, S. L.,** Baardseth, T. P., Wampold, B. H., & Fluckiger, C. (2010). Researcher allegiance and supportive therapy: Pernicious affects on results of randomized clinical trials. *European Journal of Counselling and Psychotherapy, 12,* 23-39.
38. Howard, K. A. S., **Budge, S. L.,** & McKay, K. M. (2010). Youth exposed to violence: The role of protective factors. *Journal of Community Psychology, 38,* 63-79.
39. **Budge, S. L.** (2006) Peer mentoring in post-secondary education: Implications for research and practice. *Journal of College Reading and Learning, 37* (1), 71-85.

BOOK CHAPTERS

1. **Budge, S.L.** & Orovecz, J.J.* (In press). Gender Fluidity. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
2. **Budge, S.L.** (In press). Genderqueer. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
3. **Budge, S.L.** & Pankey, T. L.* (In press). Interpersonal therapies and gender. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
4. **Budge, S.L.** & salkas, s.* (In press). Experiences of transgender people within the LGBT community. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
5. **Budge, S.L.** & Thai, J.L.* (In press). Coming out processes for transgender people. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
6. **Budge, S.L.** & Sinnard, M.* (In press). Trans*. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
7. **Budge, S.**L. & Snyder, K.E. (In press). *Sex-related differences research.* Encyclopedia of Gender and Sexuality Studies.

8. **Budge, S. L**., & Wampold, B. E. (2015). The relationship: How it works. In O. C. G. Gelo, A. Pritz, & B. Rieken (Eds.), *Psychotherapy research: Foundations, process, and outcomes* (pp. 213-228). Dordrecht: Springer.
9. Akinniyi, D.* & **Budge, S.L.** (In press). Biological sex and mental health outcomes. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
10. Lam, J.* & **Budge, S.L.** (In press). Help-seeking behaviors and men. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
11. Jones, T.*, Chin, M.Y.*, & **Budge, S.L.** (In press). Sororities. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
12. Sun, S.* & **Budge, S.L.** Women's group therapy. (In press). In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
13. Sun, S.*, Minero-, L.*, & **Budge, S.L.** (In press). Multiracial People and Gender. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.
14. Alexander, D.*, Hunter, C.*, & **Budge, S.L.** (In press). Experiences of women in religious leadership. In K. Nadal (Ed.) *The SAGE Encyclopedia of Psychology and Gender* (pp. xx). Thousand Oaks, CA: SAGE.

PUBLICATIONS IN REVISION AND UNDER REVIEW

*Denotes student

1. **Budge, S.L.,** Chin, M.Y., & Minero, L.P. (In Revision). *Transgender individuals' facilitative coping: An analysis of internal and external processes.*
2. **Budge, S.L.,** Katz-Wise, S. L., & Owen, J.J. (Under Review) *Sexual minorities' sexual communication, internalized homophobia, and conformity to gender norms.*
3. Hambrick, M., Cintron, A., Apegoraro, L., **& Budge, S.L.** *I Am Cait:* An analysis of the top-down and bottom-up framing of Caitlyn Jenner's ESPY Awards speech.
4. Thai, J.L.*, **Budge, S.L.,** & Adelson, J. L. (In Revision) *The impact of family and identity on suicidality and substance abuse in trans* Asian and Pacific Islander individuals*
5. Katz-Wise, S.L., **Budge, S. B.,** Orovecz, J.O., Ngyuen, B., & Thompson, K. (Under Review). *Imagining the Future: Qualitative Findings of Future Orientation from the Transgender Youth Family Study.*
6. Walinsky, D. & **Budge, S.L.** (Under Review) *Gender Binaries, Workplace Discrimination and Satisfaction, and Delayed Gender Transition*

MANUSCRIPTS IN PROGRESS

1. **Budge, S.L.,** Sinnard, M.T.*, & Rossman, H.K.* *Queering emotions: A content analysis of non-binary and genderfluid individuals' experiences of affect*
2. **Budge, S.L.,** Rossman, H.K.*, & Sinnard, M.T*. *A grounded theory analysis of the relationship between emotions and internal identity processes for non-binary and genderfluid individuals*

3. **Budge, S.L.,** Katz-Wise, S.L., Conniff, J.,* Braden, T.*, Belcourt, W.S.*, Parks, R. L. *Coping processes for transgender youth.*
4. Rossman, H.K.*, Sinnard, M.T.*, Salkas, s.*, & **Budge, S.L.** Genderfluid and non-binary individuals' experiences of external identity processes and emotion labels.
5. **Budge, S.L.,** Orovecz, J.O.*, Barr, S.M.*, & Keller, B.L.* *Affirmative emotional processes for transgender women: A qualitative analysis.*
6. **Budge, S.L.,** Stahl, A.*, Alexander, D.*, salkas, s.*, Orovecz, J.*. *The identity formation of genderqueer individuals.*
7. **Budge, S**.L., Akinniyi, D.*, Alexander, D.*, Stahl, A*., Salkas, S*., Orovecz, J*. Analyzing the understanding of multiple identities for genderqueer individuals.
8. **Budge, S.L.** Barr, S.M.*, & Snyder, K. & *A dynamic systems approach to exploring the development of transgender identity.*
9. Rossman, H.K.*, Eleazer, J.*, Gervasi, C.,* **& Budge, S.L.** *A qualitative analysis of transgender individuals' perceptions of privilege.*
10. Hunter, C.* & **Budge, S.L.** *The moderating effect of race related to discrimination for transgender individuals.*
11. Alexander, D.* & **Budge, S.L.** *The impact of partner support on symptoms of anxiety for transgender women, transgender men, and genderqueer individuals.*
12. Eleazer, J.* & **Budge, S.L.** *Transgender military service-members' experiences of identity and vocational integration.*
13. Solberg, V.S., **Budge, S.L.,** Phelps, A., Durham, J., Haakenson, K., & Timmons, J. *The perceived utility and value of Individualized Learning Plans: Parent, educator, and student perspectives.*
14. Solberg, V.S., **Budge, S.L.,** & Halverson, E. *Identifying the nature of career decision-making patterns and their impact on career, academic and social/emotional outcomes: A mixed-methods approach.*

MINOR PUBLICATIONS AND TECHNICAL REPORTS

1. Solberg, V. S., Gresham, S. L., & **Budge, S. L.** (2009, December). *ECDM validation study-II*. Center on Education and Work (CEW), University of Wisconsin – Madison. Submitted to Guidance Branch, Singapore Ministry of Education
2. Solberg, V. S., Gresham, S. G., **Budge, S. L.,** Phelps, A. L., Haakenson, K., & Durham, J. (2009, September). *NCWD/Youth research and demonstration project on Individualized Learning Plans.* Center on Education and Work (CEW), University of Wisconsin-Madison. Submitted to the National Collaborative on Workforce and Disability/Youth.
3. Solberg, V. S., Lindwall, J., **Budge, S. L**., Schneider, C. L., Deloya, J., Halley, K., & Hatfield, P. (2009, August). *Report on the Mental Health Concerns among the Students in the Madison Metropolitan School District*. Center on Education and Work (CEW), University of Wisconsin – Madison. Submitted to the Madison Metropolitan School District.
4. Solberg, V. S., **Budge, S. L**., Phelps, L. A. (2009, August). *Phase II Portal: Focus Group Discussion*. Center on Education and Work (CEW), University of Wisconsin – Madison. Submitted to Guidance Branch, Singapore Ministry of Education

5. Valdez, C. R., & **Budge, S. L.** (2008). *Program evaluation of "It's Time! Adults Addressing Youth and Teen Depression."* InHealth Wisconsin, Milwaukee, WI.
6. Lin, M. & **Budge, S.** (2007). Exploring the impact of race and class on the First Year in Counseling Psychology 115. *Our First Year Experience, 2*, 3-4.

INTERNATIONAL PRESENTATIONS (Peer-reviewed)

1. **Budge, S.L.** & Katz-Wise, S.L. (July, 2016). *Emotional expression of transgender youth and their families: A cross-comparison of familial cultures for gender and emotions.* Paper to be presented at the International Congress of Psychology Conference, Yokohama, Japan.
2. Chin, M.Y.*, Minero, L.*, & **Budge, S.L.** (July, 2016). *"This is me, and I am happy. I love it": Understanding Internal Coping Processes of Trans-identified Individuals using Grounded Theory.* Paper to be presented at the International Congress of Psychology Conference, Yokohama, Japan.
3. **Budge, S.L.,** Katz-Wise, S.L., Conniff, J.*, Belcourt, S.*, & Parks, R*. (June, 2016). *Developmental processes of coping for transgender youth: Results from the Transgender Youth and Family Study (TYFS).* Paper to be presented at the World Professional Association for Transgender Health Biannual Conference, Amsterdam, The Netherlands.
4. Sinnard, M.*, Raines, C.*, & **Budge, S.L.** (June, 2016). *Effects of location and transition status on anxiety and depression in transgender individuals.* Paper to be presented at the World Professional Association for Transgender Health Biannual Conference, Amsterdam, The Netherlands.
5. Salkas, S.* & **Budge, S.L.** (June, 2016). *An Overview of Non-binary gender identities in the National Transgender Discrimination Survey*, Paper to be presented at the World Professional Association for Transgender Health Biannual Conference, Amsterdam, The Netherlands.
6. Orovecz, J.*, Salkas, S.*, & **Budge, S.L.** (June, 2016). *External Identity Processes for Individuals with Non-Binary Identities.* Paper to be presented at the World Professional Association for Transgender Health Biannual Conference, Amsterdam, The Netherlands.
7. Rossman, K.*, Sinnard, M,*, & **Budge, S.L.** (June, 2016). *The Externalization of Affect for Individuals with Non-binary Gender Identities.* Paper to be presented at the World Professional Association for Transgender Health Biannual Conference, Amsterdam, The Netherlands.
8. **Budge, S.L.** (February, 2014). *Developmental processes of positive emotions for trans* individuals: The interplay of interpersonal emotions and transition appraisal.* Paper presented at the World Professional Association for Transgender Health Biannual Conference, Bangkok, Thailand.
9. **Budge, S.L.,** Adelson, J.L., & Howard, K.A.S. (February, 2014). *Transgender and Genderqueer individuals' mental health concerns: A moderated mediation analysis of social support and coping.* Paper presented the World Professional Association for Transgender Health Biannual Conference, Bangkok, Thailand.

NATIONAL PRESENTATIONS (Peer-reviewed)

1. **Budge, S.L.** (August, 2016). *Psychotherapy Interventions, Process, and Outcome with Transgender and Gender Non-Conforming Clients.* Chair of invited symposium for Division 29 at the Annual Meeting for the American Psychological Association, Denver, Colorado.
2. **Budge, S.L.** (August, 2016). *The impact of minority stress interventions on psychotherapy outcomes with a transgender client.* Paper to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
3. Minero, L.M., Chin, M.Y., & **Budge, S.L.** (August, 2016). *Transgender Clients Reports of Characteristics of Effective and Trans- Competent Therapists.* Paper to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
4. **Budge, S.L.** (August, 2016). *The State and Future of Psychotherapy Research with Transgender Clients.* Paper to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
5. Minero, L.M., Chin, M.Y., & **Budge, S.L.** (August, 2016). *Understanding External Coping Processes of Trans-identified Individuals using Grounded Theory.* Poster to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
6. Salkas, S. & **Budge, S.L.** (August, 2016). *An overview of US population-based data on individuals with non-binary gender identities*. Paper to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
7. Alexander, D., Orovecz, J., Salkas, S., Stahl, A., & **Budge, S. L.** (August, 2016). *Internal Identity Processes for Individuals with Non-Binary Identities*. Paper to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
8. Rossman, K., Sinnard, M., & **Budge, S.L.,** (August, 2016). *The "Queering" of Emotions--Using Non-binary Gender Identity to Label Emotional Processes.* Paper to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
9. Barr, S. M. & **Budge, S.L.** (August, 2016). *Experiences of self esteem and well-being for individuals with non-binary gender identities*. Paper to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
10. Chase, A., Lam, J., & **Budge, S.L.** (August, 2016). *Culture and Masculine Ideology: Measuring Masculinity Among Japanese American Men*. Poster to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
11. Akinniyi, D. & **Budge, S.L.** (August, 2016). *The Student-Athlete Experience: Multiple Minority Statuses and Discrimination*. Poster to be presented at the Annual Meeting for the American Psychological Association, Denver, Colorado.
12. **Budge, S.L**. (August, 2016). *Identity Processes, Well-being, and Emotional Processes for Individuals with Non-Binary Identities.* Chair of symposium at the Annual Meeting for the American Psychological Association, Denver, Colorado.
13. Akinniyi, D.A.* and **Budge, S.L.** (August, 2015*). Genderqueer individuals' conceptualizations of multiple identities: A qualitative investigation using identity maps.* Paper presented at the Annual Meeting for the American Psychological Association, Toronto, Canada.
14. Sinnard, M.* and **Budge, S.L.** (August, 2015). *Effects of Location and Transition Status on Anxiety and Depression in Transgender Individuals.* Poster presented at the Annual Meeting for the American Psychological Association, Toronto, Canada.

15. Watkins, C.E., **Budge, S.L.,** & Wampold, B.E. (August, 2015). *Extrapolating the Wampold/Budge Psychotherapy Relationship Model to Psychotherapy Supervision.* Paper presented at the Annual Meeting for the American Psychological Association, Toronto, Canada.
16. **Budge, S.L.** (June, 2015). *The effectiveness of psychotherapeutic treatments for personality disorders: A review and critique of current research practices.* Paper presented at the Annual Meeting for the Society for Psychotherapy Research, Philadelphia, PA.
17. Kring, M.* & **Budge, S.L.** (June, 2015*). Re-evaluating outcomes in psychotherapy: Considerations beyond self-report.* Paper presented at the Annual Meeting for the Society for Psychotherapy Research, Philadelphia, PA.
18. Owen, J. J., Wampold, B.E., Miller, S.D., **Budge, S.L.**, & Minami, T. (June, 2015). *Trajectories of change in short-term psychotherapy: Lessons from growth curve mixture modeling.* Paper presented at the Annual Meeting for the Society for Psychotherapy Research, Philadelphia, PA.
19. Katz-Wise, S.L. & **Budge, S.L.** (April, 2015). *Imaging the future: qualitative findings of future orientation from transgender youth and parents/caregivers in the Transgender Youth Family Study.* Paper presented at the Annual Transgender Health Summit, Oakland, CA.
20. **Budge, S.L.** (August, 2014). *The Other Side of the Story: Trans* Individuals' Experiences of Positivity and Resilience.* Symposium chair for the Annual Meeting for the American Psychological Association, Washington, DC.
21. **Budge, S.L.** (August, 2014). *Lessons learned from NIH-grant submission for LGBTQ research.* Invited panelist for the Annual Meeting for the American Psychological Association, Washington, DC.
22. **Budge, S.L.** & Katz-Wise, S.L. (August, 2014). *Emotional and interpersonal experiences of trans* youth and their caregivers.* Paper presented at the Annual Meeting for the American Psychological Association, Washington, DC.
23. Eleazer, J.L.*, Ngyuen, Y.*, **Budge, S.L.** (August, 2014). *"I'm afraid of my therapist": Military Policy and Access-to-Care for Transgender US Service Members.* Paper presented at the Annual Meeting for the American Psychological Association, Washington, DC.
24. Thai, J.L.* & **Budge, S.L.** (August, 2014). *Mental health outcomes for trans* Asian American, Asian, and Pacific Islander populations.* Paper presented at the Annual Meeting for the American Psychological Association, Washington, DC.
25. Alexander, D.* & **Budge, S.L.** (August, 2014). *The impact of partner support on symptoms of anxiety for transgender women, transgender men, and genderqueer individuals.* Poster presented at the Annual Meeting for the American Psychological Association, Washington, DC.
26. Barr, S.M.* & **Budge, S.L**. (August, 2014). *Transgender identity salience as a predictor for well-being and body control beliefs for trans* individuals.* Poster presented at the Annual Meeting for the American Psychological Association, Washington, DC.
27. Keller, B.L.*, Barr, S.M.*, & **Budge, S.L.** (August, 2014). *Trans* women's emotional resilience: Reactions to the intersection of sexism and transphobia.* Paper presented at the Annual Meeting for the American Psychological Association, Washington, DC.

28. Rossman, H.K.*, Sinnard, M.*, **Budge, S.L.** (August, 2014). *Adapting a three-tiered model of emotions to genderqueer individuals' identity processes.* Paper presented at the Annual Meeting for the American Psychological Association, Washington, DC.
29. Thai, J.L.*, Orovecz, J.*, **Budge, S.L.** (August, 2014). *Trans* men's experiences of positive emotions: An examination of gender identity and emotion labels.* Paper presented at the Annual Meeting for the American Psychological Association, Washington, DC.
30. Tebbe, E.N., Brewster, M., **Budge, S.L.** (August, 2014). *A content analysis of transgender psychological literature.* Poster presented at the Annual Meeting for the American Psychological Association, Washington, DC.
31. Thai, J.L.* & **Budge, S.L.** (March, 2014). *Family relationships and outness for transgender Asian Pacific Islander individuals.* Paper presented at the Society of Counseling Psychology Conference, Atlanta, GA.
32. Hunter, C.* & **Budge, S.L.** (March, 2014). *The moderating effect of race related to discrimination for transgender individuals.* Paper presented at the Society of Counseling Psychology Conference, Atlanta, GA.
33. Alexander, D.* & **Budge, S.L.** (March, 2014). *The impact of partner support on symptoms of anxiety for transgender women, transgender men, and genderqueer individuals.* Paper presented at the Society of Counseling Psychology Conference, Atlanta, GA.
34. Barr, S.M.* & **Budge, S.L.** (March, 2014). *Validation of the Objectified Body Consciousness Scale for transgender individuals.* Paper presented at the Society of Counseling Psychology Conference, Atlanta, GA.
35. **Budge, S.L.** (October, 2013). *Addressing grief and role transitions for transgender clients experiencing gender identity incongruence.* Paper presented at the Biennial North American Society for Psychotherapy Research Conference, Nashville, TN.
36. **Budge, S.L.,** Barr, S.M.*, Katz-Wise, S.L., Keller, B.L.*, & Manthos, M.* (2013, June). *Incorporating positivity into psychotherapy with transgender clients.* Workshop presented at the Annual Philadelphia Transgender Health Conference, Philadelphia, PA.
37. **Budge, S.L.** & Barr, S.M.* (2013, April). *Emotional and identity processes of trans* youth: A developmental approach.* Paper presented at the Biennial Society for Research on Child Development Conference, Seattle, WA.
38. **Budge, S.L.,** Thai, J.*, Rossman, H.K.* *(*2012, August*) Intersecting identities and mental health outcomes for transsexual, cross-dressing, and genderqueer individuals.* Poster presented at the Annual Meeting for the American Psychological Association, Orlando, Florida.
39. **Budge, S.L.** & Keller, B.L.* (2012, August). *"She felt pressured, I felt neglected": LGBQ individuals' experiences of sexual pressure in relationships.* Poster presented at the Annual Meeting for the American Psychological Association, Orlando, Florida.
40. **Budge, S.L.,** Moore, J.*, Neinhuis, J.*, Baardseth, T., & Wampold, B.E. (2012, June). *The relative efficacy of bona-fide psychological treatments for personality disorders: A meta-analysis of direct comparisons.* Paper presented at the Annual Meeting for the Society for Psychotherapy Research, Virginia Beach, Virginia.
41. **Budge, S.L.** & Katz-Wise, S.L. (2012, February). *Trans-Affirmative Therapy: Focusing on Emotional and Coping Processes Throughout Gender Transitioning.* Workshop presented at the Transgender Spectrum Symposium, Annual Meeting of the Gay and Lesbian Affirmative Psychotherapy Association, New York, New York.

42. **Budge, S.L.** & Katz-Wise, S.L. (2011, November). *Transgender emotional and coping processes: Facilitative and avoidant coping throughout the gender transition.* Paper presented at the Annual Meeting for the Society for the Scientific Study of Sexuality, Houston, Texas.

43. **Budge, S.L.** & Howard, K.H. (2011, August). *Gender socialization and gender queer individuals: The impact of assigned sex on coping and mental health concerns.* Paper presented at the Annual Meeting for the American Psychological Association, Washington, D.C.

44. Tebbe, E.L., **Budge, S.L.,** & Fischer, A. (2011, March). *Transforming the research Goliath: Reflections on research with transgender communities.* Roundtable presented at the Bi-Annual Meeting of the Association for Women in Psychology, Philadelphia, Pennsylvania.

45. **Budge, S.L.** & Howard, K.A.S. (2010, August). *Coping, social support, and well-being in the transition process for transgender individuals.* Paper presented at the Annual Meeting for the American Psychological Association, San Diego, California.

46. Baardseth, T.P., **Budge, S.L.,** & Wampold, B.E. (2010, August). *Allegiance and psychotherapy research: The effectiveness of supportive therapy as a control.* Poster presented at the Annual Meeting for the American Psychological Association, San Diego, California.

47. Solberg, V.S., Gresham, S.L., **Budge, S.L**., & Phelps, A.L. (2010, August). *Impact of Learning Experiences on Students With Disabilities Career Development.* Poster presented at the Annual Meeting for the American Psychological Association, San Diego, California.

48. Katz-Wise, S.L., **Budge, S.L.,** & Hyde, J.S. (2010, August). *Individuation or identification? Objectified body consciousness.* Poster presented at the Annual Meeting for the American Psychological Association, San Diego, California.

49. Solberg, V.S., Gresham, S.L., **Budge, S.L**., & Phelps, A.L. (2010, August). *Impact of Exposure to Quality Learning Experiences on Career Development.* Paper presented at the Annual Meeting for the American Psychological Association, San Diego, California.

50. **Budge, S.L.** & Fluckiger, C. (2010, June). *Comparison of Evidence-Based-Treatments versus Treatment as Usual: A meta-analysis.* Paper presented at the Annual Meeting for the Society for Psychotherapy Research, Asilomar, California.

51. **Budge, S.L**. & Howard, K.A.S. (2010, April). *Career decision-making in the transgender population: The role of barriers and discrimination.* Paper presented at the Annual Meeting for the American Educational Research Association, Denver, Colorado.

52. **Budge, S.L.**, Solberg, V.S., Phelps, L.A., Haakenson, K., & Durham, J. (2010, April). *Promising practices for implementing Individualized Learning Plans: Perspectives of teachers, parents, and students.* Paper presented at the Annual Meeting for the American Educational Research Association, Denver, Colorado.

53. Solberg, V.S., Gresham, S.L., Phelps, L.A., & **Budge, S.L.** (2010, April). *Identifying decision-making patterns and its impact on career development and workforce readiness.* Paper presented at the Annual Meeting for the American Educational Research Association, Denver, Colorado.

54. Katz-Wise, S.L., **Budge, S.L.,** & Hyde, J.S. (2010, March). *Objectified body-consciousness and the mother-adolescent relationship.* Poster presented at the Biennial Meeting for the Society for Research on Adolescence, Philadelphia, Pennsylvania.

55. **Budge**, **S. L.**, Tebbe, E. N., Katz-Wise, S. L., Schneider, C. L., & Howard, K. A. S. (2009, August). *Workplace transitions: Work experiences and the impact of transgender identity.* Paper presented at the Annual Meeting of the American Psychological Association, Toronto, Ontario, Canada.
56. Katz-Wise, S. L., **Budge, S. L.**, & Schneider, C. L. (2009, August). *Navigating the gender binary: A qualitative study of transgender identity development.* Paper presented at the Annual Meeting of the American Psychological Association, Toronto, Ontario, Canada.
57. Nelson, M. L., Thompson, M. N., Huffman, K. L., & **Budge, S. L.** (2009, August). *Development and further validation of the social class identity dissonance scale.* Paper presented at the Annual Meeting of the American Psychological Association, Toronto, Ontario, Canada.
58. Dvorscek, M., **Budge, S. L.**, Bluemner, J. L., & Valdez, C. R. (2009, August). *Health care provider perspectives on Latino patients with depression.* Poster presented at the Annual Meeting of the American Psychological Association, Toronto, Ontario, Canada.
59. Neumaier, E. R., **Budge, S. L.**, Bohlig, A. J., Doolin, E. M., & Nelson, M. L. (2009, August). *I feel masculine but they think I'm feminine: Toward measuring experienced gender role.* Poster presented at the Annual Meeting of the American Psychological Association during the Division 17 Social Hour, Toronto, Ontario, Canada.
60. Doolin, E. M., Graham, S. R., Hoyt, W. T., **Budge, S. L.**, & Bohlig, A. J. (2009, January). *Out and about in the South: Defining lesbian communities.* Poster presented at the National Multicultural Conference and Summit, New Orleans, LA.
61. **Budge, S. L.**, Tebbe, E. N. & Howard, K. A. S. (2009, January) *Transgender individuals' work experiences: Perceived barriers, discrimination, and self-efficacy.* Paper presented at the Annual Meeting of the Career Conference, Madison, WI.
62. Howard, K. A. S., **Budge, S. L.**, Jones, J., & Higgins, K. (2009, January). *Future plans of urban youth: A qualitative analysis of influences, barriers, & coping strategies.* Paper presented at the Annual Meeting of the Career Conference, Madison, WI.
63. **Budge, S. L,** Schneider, C., Rodriguez, A., Katz-Wise, S., Tebbe, E., & Valdez, C. (2008, August). *The emotional roller coaster: Transgender experiences of positive and negative emotions.* Poster presented at the Annual Meeting of the American Psychological Association, Boston, MA.
64. Nelson, M. L., Huffman, K. & **Budge, S. L.**, (2008, August). *Initial validation of the Social Class Identity Dissonance Scale.* Poster presented at the Annual Meeting of the American Psychological Association, Boston, MA.
65. **Budge, S. L.,** Schneider, C., Rodriguez, A., & Howard, K. A. S. (2008, January) *What about the "T"?: Career counseling with transgender populations.* Paper presented at the Annual Meeting of the Career Conference, Madison, WI.
66. Howard, K. A .S., McKay, K. M., & **Budge, S. L.** (2007, August) *Adolescents' use of SOC strategies: The interaction with low-income and high violence contexts.* Poster presented at the Annual Meeting of the American Psychological Association, San Francisco, CA.
67. **Budge, S. L.** & Sherry, A. (2007, August) *The influence of gender role on sexual compliance: A preliminary investigation of LGB relationships.* Poster presented at the Annual Meeting of the American Psychological Association, San Francisco, CA.

68. Howard, K. A. S., Solberg, V. S., & **Budge, S. L.** (2007, August). *Designing culturally responsive school counseling career development programming for youth.* Paper presented at the Annual Meeting of the American Psychological Association, San Francisco, CA.
69. Howard, K. A. S., Jones, J. E., **Budge, S.,** Gutierrez, B., Lemke, N., Owen, A., & Higgins, K. (2007, April). *Academic and Career Goals of High School Youth: Processes and Challenges.* Paper presented at the Annual Meeting of the American Educational Research Association, Chicago, IL.

REGIONAL PRESENTATIONS (Peer-reviewed)

1. **Budge, S.L.** (November, 2013). *Incorporating an IPT approach with transgender clients.* Paper presented at the Annual Kentucky Psychological Association Conference, Lexington, KY.
2. **Budge, S.L.** (April, 2013). *Using interpersonal therapy with transgender clients.* Workshop provided at the Annual University of Florida Interdisciplinary Conference on LGBT Issues.
3. Barr, S. M.* & **Budge, S. L.*** (2013, April). The role of identity integration in the emotional well-being of post-transition individuals. Poster presentation at the Kentucky Psychological Association Student Research Conference, Louisville, KY.
4. Orovecz, J.*, Thai, J.L.*, & **Budge, S.L.** (2013, April). I'm stoked about life: The emotional processes of transgender men through a qualitative lens. Poster presented at the Spring Research Conference, Lexington, Kentucky.
5. Rossman, K.* & **Budge, S.L.** (2013, April). Genderqueer individuals' mental health concerns: The relationship between social support and coping. Paper presented at the Spring Research Conference, Lexington, KY.
6. Barr, S. M.* & **Budge, S. L.** (2013, April). The role of identity integration in the emotional well-being of post-transition individuals. Poster presented at the Spring Research Conference, Lexington, KY.
7. Rossman, K.* & **Budge, S.L.** (2013, June). *Just the fact that I commanded that respect - I got the privilege: Qualitative Examination of Privilege in the Trans* Community.* Paper presented at the Spring Research Conference, Lexington, KY.
8. Keller, B. L.*, Barr, S. M.*, & **Budge, S. L**. (2013, April). "For every bad, there's 40 good things that happen: A qualitative approach to understanding the positive emotional experiences of trans* women. Poster presentation at the Spring Research Conference, Lexington, KY
9. Orovecz, J.*, Thai, J.L.*, & **Budge, S.L.** (2013, April). I'm stoked about life: The emotional processes of transgender men through a qualitative lens. Presented at the Spring Research Conference, Lexington, Kentucky.
10. Orovecz, J.*, Thai, J.L.*, & **Budge, S.L.** (2013, March). "I'm me, and I'm proud to be me": A grounded theory analysis of transgender men's emotional processes. Presented at the Kentucky Psychological Association Foundation Spring Academic Conference, Louisville, Kentucky.
11. Eleazer, J. R*. & **Budge, S. L.** (2013, March). "It Would be Better for Them to Have a Dead Hero for a Father than a Freak:" Suicidality and Trans* Military Service. Poster

presented at the Kentucky Psychological Association Spring Academic Conference, Louisville, KY.

12. Sinnard, M.*, Rossman, K.*, & **Budge, S. L.** (2013, March). "Positive emotional experiences of gender non-binary identified individuals. Poster presentation at the Kentucky Psychological Association Student Research Conference, Louisville, KY.
13. Barr, S.M.*, Stahl, A.*, Manthos, M.*, & **Budge, S.L.** (2012, November). *"It means there aren't rules and you don't have to ascribe to a specific binary": A qualitative examination of genderqueer identity.* Paper presented at the **Chicago LGBTQ Health and Wellness Conference, Chicago, IL.**
14. Thai, J.L.*, Orovecz, J.*, & **Budge, S.L.** (2012, November). *Transgender men and positivity: Emotional processes related to identity.* Paper presented at the **Chicago LGBTQ Health and Wellness Conference, Chicago, IL.**
15. **Budge, S.L.,** Barr, S.M.*, Orovecz, J.*, & Rossman, H.K.* (2012, November). *Clinical work with LGBT youth.* Workshop provided at the Annual Kentucky Psychological Association Conference, Louisville, KY.
16. **Budge, S.L.,** Lee, S., & Monahan-Rial, V. (2011, February). *Bridging institutional gaps: Utilizing transgender-affirmative therapy with college students.* Workshop presented at the Annual Meeting for the Big 10 College Counseling Center Conference, Minneapolis, Minnesota.
17. Lee, J., **Budge, S.L.,** Wilson, J.L., & Roper, J.M. (2011, February). *The Korean Conundrum: Managing stigma in the recruitment of group counseling members.* Workshop presented at the Annual Meeting for the Big 10 College Counseling Center Conference, Minneapolis, Minnesota.
18. **Budge, S.L.** & Katz-Wise, S.L. (2010, February). *Transition to adulthood: Developmental steps for transgender individuals.* Workshop presented at the Conference on Transgender and Gender Variant Youth, Madison, Wisconsin.
19. **Budge, S.L.** (2009, October). *Individualized Learning Plans: Parent, student, and educator focus groups.* Paper presented at the Fall Institute for the National Collaborative on Workforce and Disability/Youth, Charleston, South Carolina.

INVITED KEYNOTE PRESENTATIONS

1. **Budge, S.L.** (March, 2016). *Understanding, acknowledging, and responding to LGBTQ microaggressions in health care settings.* Keynote to be provided at the Florida Area Health Education Center, Gainesville, Florida.
2. **Budge, S.L.** (September, 2014). *Positivity in transgender populations: Implications for vocational psychology.* Boston University, Boston Massachusetts.
3. **Budge, S.L.** (April, 2013). *Future Directions for Research and Therapy with Trans* and Gender Diverse Individuals.* Keynote Address provided at the Annual University of Florida Interdisciplinary Conference on LGBT Issues.
4. **Budge, S.L.** *(March, 2013). The Psychology of Sexual Orientation and Gender Identity: Future Directions and Implications.* Keynote provided at the East Texas Psi Chi Student Research Conference, Tyler, Texas.

NATIONAL RESEARCH BRIEFINGS

1. **Budge, S.L.,** & Solberg, V.S., (2010, March) *Career exploration and the use of career narrative data for high school students' career exploration processes: A United States Sample.* Research briefing presented at the Department of Labor, Washington, D.C.
2. **Budge, S.L.,** Solberg, V.S., & Phelps., A.L. (2010, March) *Individualized Learning Plans within a community-oriented approach: The usefulness of focus group data with parents, teachers, and students.* Research briefing presented at the Department of Labor, Washington, D.C.

INTERNATIONAL RESEARCH BRIEFINGS

1. **Budge, S.L.,** & Solberg, V.S., (2010, February) *A three-tiered approach to analyze the career decision making processes using focus group data with Singaporean parents, students, and staff.* Research briefing presented at the Ministry of Education, Singapore.
2. **Budge, S.L.,** & Solberg, V.S., (2010, February) *Use of narrative analysis for high school students' career exploration processes: A Singapore Sample.* Research briefing presented at the Ministry of Education, Singapore.

MEMBERSHIP IN PROFESSIONAL ORGANIZATIONS

American Psychological Association (APA)
- Society of Counseling Psychology (Division 17)
- Division of Psychotherapy (Division 29)
- Society for the Psychology of Women (Division 35)
- Society for the Psychological Study of Lesbian, Gay, Bisexual, and Transgender Issues (Division 44)
- Society of Clinical Child and Adolescent Psychology (Division 53)

World Professional Association for Transgender Health (WPATH)
Society for Psychotherapy Research (SPR)

TEACHING AND INSTRUCTION

University of Wisconsin-Madison Courses:
- CP 805: Microskills of Counselors
- CP 806: Pre-practicum
- CP 900: Foundational Practicum
- CP 903: Advanced Practicum
- CP 990: Independent Research

University of Louisville Courses:
- ECPY 780: Advanced Practicum
- ECPY 648: Intellectual Assessment
- ECPY 663: Multicultural Issues
- ECPY 629: Theories and Techniques of Counseling
- ECPY 621: Differential Diagnosis

ECPY 793: Gender and Queer Issues In Psychology
ECPY 793: Advanced Multicultural Psychotherapy
ECPY 700: Supervised Research

Graduate-Student Teaching:

University of Wisconsin-Madison (2006-2009)
CP 804: Research Methods
CP 994: Personality Assessment
CP 650: Interviewing Skills
CP 115: First Year Experience

University of Texas at Austin (2005-2006)
PSY 301: Introduction to Psychology

DISSERTATION COMMITTEES

Kinton Rossman (University of Louisville; Chair, Proposed)
Kathleen Barnett (University of Louisville; Chair)
Danielle Alexander (University of Louisville; Chair)
Jake Nienhuis (University of Louisville; Defended)
Kelley Quirk (University of Louisville; Defended)
Keldric Thomas (University of Louisville; Defended)
Johanna Strokoff (University of Louisville; Defended)
Elise Romines (University of Louisville; Proposed)
Julia Benjamin (University of Wisconsin-Madison; Proposed)
Craig Hase (University of Wisconsin-Madison; Proposed)
Sarah McArdell Moore (University of Wisconsin-Madison, Proposed)
Noah Yulish (University of Wisconsin-Madison, Proposed)
Nick Frost (University of Wiscosnin-Madison, Proposed)
Lindsey Houghton (University of Wisconsin-Madison, In preparation)
Shufang Sun (University of Wisconsin-Madison, Proposed)
Joe Orovecz (University of Wisconsin-Madison, In preparation)

MASTERS THESES

Dylan Hiner (University of Louisville; Chair)
Dorcas Akinniyi (University of Wisconsin-Madison; Chair)

UNDERGRADUATE THESES

Morgan Sinnard (University of Louisville; Chair, defended)

AWARDS

7/2015	Early Career Award for work with LGBT populations from the Society for Counseling Psychology--Division 17 SLGBTI Group
5/2015	Early Career Award for the Society for the Advancement of Psychotherapy (Division 29, APA)
1/2014	Runner Up for the Most Valuable Paper Award for a 2013 article published in *Psychotherapy*
2/2013	Nominated for the University of Louisville Trustees Award—provided to faculty for excelling in mentoring students.
7/2010	Society for Counseling Psychology--Division 17 LGBT Outstanding Graduate Student Award for community contributions with the LGBT population during my doctoral program.
7/2010	Society for Vocational Psychology/ACT Graduate Student Research Award, $500.00 for career research regarding transgender individuals.
6/2010	Society for the Psychological Study of Lesbian, Gay, Bisexual, and Transgender Issues—Division 44: Transgender Research Award, $500.00 for dissertation research.
2/2010	John W. M. Rothney Memorial Research Award $150.00.
8/2009	Outstanding Student Poster Award, APA Convention 2009.
8/2008-8/2011	APA Student Travel Award, $300.00 (four years in a row).

WORKSHOPS/TRAININGS PROVIDED

3/2016	Invited to provide a community-based training at the University of Florida to teach balance in being an academic and an activist
3/2016	Invited to provide a training to women's and gender studies students at the University of Florida regarding gender and sexuality in psychiatric diagnosis
1/2016	Invited to provide a workshop to veterinary students regarding LGBTQ competent care at the University of Wisconsin-Madison
11/2015	Provided a workshop on genderqueer and non-binary individuals' gender identity development to the Institute of Sexuality Series at the University of Wisconsin-Madison
10/2015	Provided a workshop on transgender adults' facilitative coping mechanisms to the Institute of Sexuality Series at the University of Wisconsin-Madison
8/2015	Provided a Transgender 101 workshop to undergraduate students in a multicultural seminar at the University of Wisconsin-Madison
4/2014	Provided a workshop for 8-10 year old boys at St. Joseph's Children's Home to provide skills for how to talk about gender and comprehend transgender issues.

2/2014	Provided a training to medical students at the University of Louisville for trans-competent medical care.
11/2013	Provided a workshop to school psychologists and guidance counselors for cultural competence training working with LGBTQ youth. Continuing Education credits provided.
7/2013	Provided a workshop to the Campus Health Services at the University of Louisville to address LGBT-friendly health practices and language for medical practitioners.
4/2013	Provided an invited workshop at the University of Florida regarding transgender affirmative therapy and positive emotional processes for gender-diverse clients; located with the Department of Psychology, Gainesville, Florida.
3/2013	Provided an invited workshop at the University of Texas-Tyler related to empowering gender-diverse clients; located with the Department of Psychology, Tyler, Texas.
11/2012	Provided a workshop to the College of Education and Human Development at the University of Louisville regarding support for transgender students on college campuses
10/2012	Provided a workshop regarding specific processes to support transgender clients through the therapeutic process. Workshop provided to the Psychological Sciences Clinic for Continuing Education Credits; located at the University of Louisville
1/2012	Provided a workshop regarding transgender-affirmative therapy to the Psychological Sciences Clinic for Continuing Education Credits; located at the University of Louisville
12/2011	Provided training to pre-doctoral psychology interns regarding therapeutic work with LGBT youth; training was located at the Department of Child and Adolescent Psychiatry, University of Louisville
10/2011	Provided training on stress and anxiety to LGBTQ students for the Center for Health Promotion and Prevention Science at the University of Louisville
8/2010-8/2011	GLBTA office liaison from the University Counseling and Consulting Services at the University of Minnesota-Twin Cities.
4/2011	Facilitated a 3-hour training to counseling psychology students at the University of Minnesota on how to work clinically with LGBTQ populations
1/2011	Provided a 2-hour long training to the psychological staff at the University Counseling and Consulting Services regarding how to conduct trans-positive therapy with transgender clients.
10/2010	Facilitated a 2-hour social justice training based on the film “Diagnosing Difference,” regarding DSM-IV diagnoses of Gender Identity Disorder.
10/2010	Facilitated a 1 ½ hour training for a Career Counseling course at the University of Minnesota-Twin Cities on how to work with transgender individuals in career counseling.

9/2010	Facilitated a 2-hour training on conducting intake interviews for first year PhD practicum students at the University Counseling and Consulting Services at the University of Minnesota-Twin Cities.
3/2010	Facilitator of an inservice training for pre-doctoral interns completing their internship at the Wisconsin Internship Consortium.
11/2008	Co-facilitator for Diversity Dialogues, Madison, Wisconsin.
11/2008	Co-Facilitator for LGBT Brownbag for the department of counseling psychology at the University of Wisconsin-Madison
11/2008	Guest Speaker for LGBT Support Group, Counseling and Consultation Services, University of Wisconsin-Madison,

SERVICE

Department	-Doctoral Training Committee (2015-current) -Master's Training Committee (2014-2015) -Doctoral Admissions (2015-current) -Master's Admissions (2014-2015) -Social Justice Committee (2014-current)
SOE	-Technology Committee (2014-current)
University	-Faculty Senate (alternate) (2016-current) -Microaggressions training for the UW Vet school (2016) -Microaggressions training for the School of Social Work (2016)
Community	-Wisconsin Transgender Health Coalition (2015-current) -Data team -Convening team -Transgender Youth Resource Network (2014-current) -Facilitate Transgender Youth Therapy Group at the CPTC (2015-current) -Coordinate Transgender Youth Conference for the greater Wisconsin community (2015-current)

CONFERENCES ORGANIZED

9/2009-current	Co-Coordinator for the Transgender and Gender Non-Conforming Youth Conference, Madison, Wisconsin, Chair: Jeannette Deloya, LCSW.

Responsibilities: Attend meetings for a planning committee to coordinate annual conferences about the concerns of transgender youth. Helped develop an agenda for the conference, planned speakers, coordinated a budget, and decided on special topics for the conference. Introduced the keynote speaker at the conference and provided project

management during the day of the conference.

8/2010-2/2011	Co-Coordinator for the Big 10 College Counseling Center Conference, Minneapolis, Minnesota. Chair: Glenn Hirsch, Ph.D.

Responsibilities: Attended weekly meetings for a planning committee to coordinate a conference regarding issues related to college counseling centers and counseling college students. Provided ideas for funding and programming. Provided support with logistics of the conference, such as setting up rooms and directing attendees to programming.

EXHIBIT

B

BIBLIOGRAPHY

American Psychiatric Association. Diagnostic and statistical manual of mental disorders (DSM-5). American Psychiatric Pub; 2013 May 22.

Boza C, Nicholson Perry K. Gender-related victimization, perceived social support, and predictors of depression among transgender Australians. International Journal of Transgenderism. 2014 Jan 2;15(1):35-52.

Coleman E, Bockting W, Botzer M, Cohen-Kettenis P, DeCuypere G, Feldman J, Fraser L, Green J, Knudson G, Meyer WJ, Monstrey S. Standards of care for the health of transsexual, transgender, and gender-nonconforming people, version 7. International Journal of Transgenderism. 2012 Aug 1;13(4):165-232.

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CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on October 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Joseph J. Wardenski

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CERTIFICATE OF SERVICE

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

counsel / party:	address:
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

s/_____