UNITED STATES DISTRICT COURT
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,

vs.

UNITED STATES DEPARTMENT OF EDUCATION; **JOHN B. KING, JR.**, in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE**; **LORETTA E. LYNCH**, in her official capacity as United States Attorney General; and **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 legal guardians **Parents A**, **B**, and **C**, and the **ILLINOIS SAFE SCHOOLS ALLIANCE**,

Intervenor-Defendants.

Case No. 1:16-cv-04945

The Honorable Jorge L. Alonso

Plaintiffs' Response to Magistrate's Report and Recommendation

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I. Introduction

School locker rooms, restrooms, and similar intimate facilities serve an essential, utilitarian purpose: to provide a secluded place for boys or girls to change, shower, and perform personal hygiene without the intrusion of the opposite sex. Such facilities accommodate undeniable biological differences between males and females—differences related to anatomy, physiology, and reproductive functions.

The Magistrate rejects that accommodation, holding instead that a student's self-perception of his sexuality trumps biological differences. Thus, he wrongly spurns the privacy function of girls' locker rooms and restrooms, finding it more important that locker rooms be used to affirm Student A's personal perception of himself, regardless of the impact it has on other students' privacy interests.

But Congress wrote Title IX to forcefully affirm that women shall have equal access to all educational programs—not to affirm an individual self-perception of "gender." And while Congress recognized that sex differences seldom matter in the classroom, they matter very much when it comes to intimate spaces like dorm rooms, locker rooms, showers, and even certain sports. In those circumstances, the profound privacy and safety concerns grounded in the innate, and real differences between boys and girls permits sex-specific intimate spaces where needed. That is confirmed in the genesis and text of Title IX, which affirms biological realities and the binary nature of the sexes.

Student A is not seeking privacy by demanding access to the girls' communal facilities; that was previously provided via wholly private individual facilities. Instead, his sole interest in demanding access is affirming his self-perception of his gender. The District Defendants had already accommodated Student A by: allowing him to use his preferred name and pronouns; to dress as he wished; altering his school records to reflect his perception, and providing a team of professionals to support him. Initially, the District Defendants drew the same line Congress did when privacy rights grounded in real physical distinctions between males and females were implicated. But once they exercised their local authority and discretion to provide privacy for all students, the Federal Defendants imposed their national "marching orders" on them and the District Defendants

capitulated, authorizing Student A's unhindered access to all of the girls' intimate facilities.

The Magistrate erred by affirming the Defendants' redefinition of sex that rewrites sex to "include" and in fact be *defined* by "gender identity"—a view that has no grounding in Title IX or its subsequent jurisprudence. This error is compounded by deferring to agency "Guidance,"[1] enforcement of which has been stayed by the U.S. Supreme Court in the *Gloucester County School Board v. G.G.* case and enjoined nationwide by a federal court.[2] The error deprives Plaintiffs of their constitutional right to privacy, violates Title IX, and ignores violations of the Administrative Procedures Act. Therefore, the Magistrate's Report and Recommendation should be rejected and preliminary injunctive relief awarded to Plaintiffs forthwith.

II. Standard of Review for Plaintiffs' Objections

Pursuant to Federal Rules of Civil Procedure Rule 72(b)(2), Plaintiffs timely submit their objections to Magistrate Jeffrey T. Gilbert's Report and Recommendation. And under Rule 72(b)(3), the "district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." As set forth

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[1] For clarity, we continue the conventions used in Plaintiffs' Complaint: "**Locker Room Agreement**" refers to the "Agreement To Resolve," OCR Case # 05-14-1055, Dec. 2, 2015, [ECF No. 21-3]; "**Restroom Policy**" refers to the District Defendants' practice authorizing students to use restrooms according to their perceived gender identity. Superintendent's Newsletter Update, *High School District 211 protects student privacy over Office of Civil Rights Mandate*, [ECF No. 21-5 at 1] (jointly, the "**Policies**"). The Policies result from the Federal Defendants' novel legislative rule ("**Federal Rule**" or "**Rule**") dictating that "sex" in Title IX "includes" perceived gender identity as memorialized in various guidance documents ("**Guidance**"), including: U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, May 13, 2016 ("DCL"), [ECF No. 21-6]; U.S. Dep't of Educ., Office for Civil Rights, *Title IX Resource Guide*, Apr. 2015, [ECF No. 21-7]; U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, Dec. 1, 2014, [ECF No. 21-8]; and U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, Apr. 29, 2014, [ECF No. 21-9].

[2] Federal Defendants were enjoined nationwide from, *inter alia*, enforcing their Guidance against the plaintiffs in the case and from "initiating, continuing, or concluding any investigation based on [their] interpretation that the definition of sex includes gender identity"; and from using the Guidance or other guidelines in any litigation initiated after the date of the injunction. *Texas v. United States*, Civil Action No. 7:16-cv-00054-O, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016) (Copy attached as Exhibit 1). As this case arose prior to that injunction issuing, it is not directly affected by the Texas case.

below, de novo review should find that the Federal Rule is *ultra vires* and further, that "sex" in Title IX and 34 C.F.R. §106.33 unambiguously means "male" and "female" as dispositively grounded in our reproductive nature, eliminating any deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Since deference is not warranted, the Defendants' Rule and Policies which replace the objective term "sex" in Title IX and 34 C.F.R. §106.33 with a subjective concept of "gender identity" are clearly unlawful. Furthermore, the Court should find sufficient prospective injury to Girl Plaintiffs' privacy to merit granting their requested injunction.

III. Executive Summary

When drafting Title IX, Congress used the term "sex" to mean male and female. Sex is determined at conception and ascertained at birth (or earlier with sonograms). It is binary, objectively verifiable, and wholly grounded in the reality that humans reproduce sexually. This creates a narrow gate for invidious discrimination claims under Title IX. The claim must refer to one's male or female sex, and sex does not admit gender identity as a basis for a claim. So Congress said, and so courts should hold. Had Congress meant "gender identity," it would have said so—as it recently did in the Violence Against Women Act. 42 U.S.C. § 13925.

Defendants reject that history, arguing that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) unhinged the narrow gate so much so that gender identity supplants sex. If so, then Title IX and its regulations would ostensibly forbid virtually any (not just invidious) distinction which falls short of affirming a student's subjectively perceived gender identity, which is a fluid continuum ranging from male or female to something else, such as genderqueer or trigender.

Defendants' postion eviscerates the textual and historical protection Title IX offers for women by authorizing female-specific facilities. And it leaves our adolescent Girl Plaintiffs having their privacy and modesty violated when Defendants command that they entertain male use within their formerly female-only facilities.

Reading gender identity into "sex" unhinges sex from its objective, reproductive context. A

person's sex is determined at conception[3] and may be ascertained at or before birth, being evidenced by objective indicators such as gonads, chromosomes, and genitalia. *See* Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM-5") (sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia."). As a sexually reproducing[4] species, we are equipped with gonads and genitalia which facilitate the reproductive act—our "privates"—and all the human sensitivities around sex (as a verb) and our privates give rise to our privacy needs and correlated rights. When sex is understood as Congress intended—a description of our male and female differences that raise important concerns about privacy and safety—the pretense of "ambiguity" evaporates and this case becomes a very simple exercise in statutory application.

Standing in stark contrast to sex is gender identity, a subjectively-determined "internal sense of gender" comprising a fluid continuum ranging from "male or female" to "something else." Expert Decl. of R. Garofalo, M.D., M.P.H. ("Garofalo Decl."), [ECF No. 79-3 at 6 ¶ 19; 4 ¶ 12]. Whether one is male, female, or something else is determined solely by the perceptions of the person claiming the identity. *Id.* at 6-7, ¶¶ 19-23. A person professing to be transgender has a "gender identity [] different from the sex they were assigned at birth."[5] DCL, [ECF No. 21-6 at 1]. A student (or student's parent) invokes the Federal Rule's enforcement by notifying the school of his gender identity; "there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity." *Id.* at 2.

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[3]Developmental Biology, 6th Ed., (Sinauer Associates 2000), https://www.ncbi.nlm.nih.gov/books/NBK9967/ (last visited October 26, 2016).

[4] Defined as "[a] form of reproduction that involves the fusion of two reproductive cells (gametes) in the process of fertilization. Normally, especially in animals, it requires two parents, one male and the other female." *Oxford Dictionary of Biology* (7th ed. 2015). It is essential to human survival, as "[s]exual reproduction, unlike asexual reproduction, therefore generates variability within a species." *Id.*

[5] Plaintiffs reject Defendants' position expressed by saying that "sex is assigned" at birth so that unambiguous genitalia serve merely as *proxy* for determining sex. Garofalo Decl. [ECF 79-3 at 6 ¶19]. Plaintiffs' position is that genitalia are inextricably related to the reproductive role of males and females as determined by their genetic makeup of XX or XY.

Under the Defendants' and Magistrate's approach, sex is determined by gender identity, so that "sex" is grounded in self-perception, not our reproductive nature. While the person expressing a gender identity may optionally adopt an outward appearance that conforms more or less to stereotypes associated with one sex or the other (such as hair length, attire choices, or use of makeup) it is not essential to asserting any particular gender identity. At bottom, the Defendants argue that internal self-perception transmutes a person from one sex to another.

The consequence of Defendants' position is that Student A, a male,[6] is officially authorized to join Girl Plaintiffs in their female-only intimate facilities. Consider a hypothetical to demonstrate the conundrum—and injury—that Defendants inflict upon Girl Plaintiffs. One of our Girl Plaintiffs is disrobing in the girls' locker room when identical male twins, Kyle and Kurt, walk in and begin changing clothes nearby. Distressed by the opposite sex invading her privacy, she quickly but politely asks "both of you boys" to leave the room, and they do.

As our girl later exits the room, she is confronted by a school official who lectures her about "transphobia" and threatens discipline if there is further "discrimination"[7] against Kurt who, it turns out, asserts a female identity despite being no less male than his identical twin brother Kyle. This—the Defendants' desired end state—rewrites a law intended to guarantee women's equal access to educational programs (and which expressly provides protection for privacy from the other sex via 34 C.F.R. § 106.33) into a law which exposes adolescent girls to anatomical males inside formerly female-only facilities. The Magistrate errs in many ways by accepting gender identity theory as a substitute for Congress's use of "sex" in Title IX.

IV. Argument

A. NO SAFE HAVEN: STUDENT A's ACCESS TO FEMALE FACILITIES

[6] See Pls.' Reply Mem. in Supp. of Prelim. Inj., [ECF 94 at 22].

[7] One of the many voids in Defendants' legal position is their forcing school staff (who in turn often coerce students to follow suit) to use pronouns and "gender markers" that are consistent with gender identity rather than sex. Yet Title IX does not authorize content-based speech regulation, Q&A on Title IX and Sexual Violence, [ECF No. 21-9 at 44], and the First Amendment forbids compelled speech. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471 (1997).

The Magistrate aptly summarized the events leading to filing this case, although Plaintiffs do note that the Locker Room Agreement grants Student A access to the girls' facilities contingent upon "Student A's representation that she will change in private changing stations…." Agreement, [ECF No. 21-3 at 2], and that District 211 agreed to provide a "separate locker room"[8] or a "different time to use the locker room" for those students "requesting additional privacy." Dist. 211 Resp. to Pls.' Mot. for Prelim. Inj., [ECF No. 78 at 2]. But the Girl Plaintiffs' uncontroverted facts demonstrate that Student A is not obligated to use the "private changing station" and even if he does so, he must traverse the common areas of the locker room where up to 65 girls will be changing clothes. Thus, Student A's "representation" does not eliminate the injury to Girl Plaintiffs' privacy. Compl., [ECF No. 1 at 25-31]. Student A also has unhindered access to girls' bathrooms. *Id*. at 32.

Because the Agreement inserts a male into the girls' locker room, it improperly burdens the girls by forcing them to either seek privacy somewhere other[9] than the facilities that are specifically designated for them under 34 C.F.R. §106.33 or suffer the violation of their privacy inside the room—despite the Magistrate's absurd position that Defendants are still providing sex-separated facilities pursuant to 34 C.F.R. §106.33. Report, [ECF No. 134 at 52].

B. GIRL PLAINTIFFS' SWORN FACTS SHOULD BE GIVEN DUE WEIGHT

The Magistrate notes that Plaintiffs verifying their Complaint adds no weight to its statement, nor insulates them from being characterized as "speculative, vague, general, or overbroad, or from being contradicted by evidence submitted by Defendants." Report, [ECF No. 134 at 8-9, n.4] (citation omitted). Nonetheless, where facts are fairly stated they should be accepted by this Court as valid in its de novo review unless they are "substantially controverted by counter-affidavits." *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088–89 (9th Cir. 1972). The importance of this becomes evident below, as the Plaintiff girls have spoken with authority regarding the impact of having a male

[8] Apparently these are single user facilities. There is no girls' locker room that Student A may not enter.

[9] Of course, this means that the Girl Plaintiffs miss out on their bonding, social connection, and other "important high school experiences" so that Student A can be "bonded" and "connected." See Decl. of Parent A, [ECF No. 32-1 at 6 ¶ 19].

using their locker rooms and Defendants fail to controvert the vast majority of Girl Plaintiffs' sworn statements. The statements in the Verified Complaint speak for themselves with the same effect as a sworn affidavit.

The Magistrate characterizes the Locker Room Agreement as providing "legal obligations exceed[ing] what Title IX and its implementing regulations would require the District to do if the Locker Room Agreement did not exist," (Report, [ECF No. 134 at 20]). That is true only if by "exceeding," he means "violating" Title IX. The Agreement violates the Girl Plaintiffs' privacy by authorizing a male to enter the girls' locker room. It deprives local school officials of the authority to craft local solutions that protect everyone's privacy—as the District Defendants had attempted to do before the Federal Defendants enforced what the Magistrate called nation-wide "marching orders": treat a professed transgender girl indistinguishably from all girls, or lose your federal funding. Report, [ECF No. 134 at 21].

C. DEFENDANTS SUPPLANT UNAMBIGUOUS, OBJECTIVE "SEX" WITH SUBJECTIVE "GENDER IDENTITY"

Also flatly wrong is characterizing the Federal Defendants' position as a "definitive statement that 'sex' as used in Title IX and its implementing regulations includes gender identity," Report, [ECF No. 134 at 22]. "Includes" suggests that gender identity somehow now coexists with sex as another protected category under Title IX. But the actual effect of the Federal Defendants' "interpretation" of "sex" is to *supplant* sex with gender identity, which severs the meaning of sex from its definitional reproductive nature, as we see in Section C, *infra*.

In respect to Title IX, the sole role of the Court is to enforce it according to its terms, unless that leads to an absurd result. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). The Magistrate errs by reading a false ambiguity into the term "sex" in Title IX, and improperly sidesteps the binding authority of *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

As the Magistrate noted, the Federal Defendants argue that sex is "ambiguous as to whether one's sex is determined 'with reference exclusively to genitalia' or 'with reference to gender

identity.'" Fed. Defs.' Resp. Br., [ECF No. 80, at 19] (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016)). The Intervenor-Defendants put it a little differently, saying that when "there is not complete alignment among a student's sex-related characteristics, the unambiguous[10] 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." Report, [ECF No. 134 at 24] (citing Intervenor-Defs.' Br. in Resp. to Pls.' Mot. for Prelim. Inj., [ECF No. 79, at 2-7]). But at bottom, gender identity principles decree that in all cases, reproductive organs are merely a "proxy" for "assigning" sex, and that gender identity trumps such "proxies," leaving gender identity as the primary factor to determine "sex". Garofalo Decl., [ECF No. 79-3 at 6 ¶ 19].

1. *Ulane* is binding and defines sex unambiguously

The Magistrate then assesses at length *Ulane* and *Hively v. Ivy Tech Community College, South Bend*, 830 F.3d 698 (7th Cir. 2016), *vacated and reh'g granted*, Order Granting Rehearing En Banc and Vacating the Panel Opinion, *Hively v. Ivy Tech Cmty. Coll. S. Bend*, No. 15-1720, ECF. No. 60 (7th Cir. Oct. 11, 2016). Although both are Title VII cases, courts have traditionally looked to Title VII jurisprudence to inform Title IX sex discrimination claims. *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011); *accord*, *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997).

Ultimately, the Magistrate concedes that vacating *Hively* still "technically leaves *Ulane* in place as the law of this Circuit." But even if *Ulane* were as moribund as the Magistrate thinks, it is "still slightly alive"[11] and thus *Ulane* is binding authority in this Court. *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006). And that binding authority flatly rejects Defendants' position:

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[10] "Unambiguous" here may refer to the Intervenor-Defendants' statement that "as a purely textual matter, the term 'sex' plainly encompasses transgender status, because transgender people by definition are individuals who identify with a sex different from the sex assigned to them at birth." Intervenor-Defendants' Response Brief, [ECF No. 79 at 5]. But Intervenor-Defendants cannot have their ambiguity both ways—saying that "sex" is *ambiguous* so as to merit *Auer* deference, and then say that gender identity arises from the "plain text" (which is simply another way of saying "unambiguous") of Title IX.

[11] Miracle Max, *The Princess Bride* (Act III Productions, 1987).

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

Ulane, 742 F.3d at 1085. Although the Magistrate evaluated *Ulane* with a three-part analysis centering on tradition, narrowness, and biology, the question is actually only twofold: whether either tradition or biology admit any ambiguity in the narrow reading of sex in Title VII which excludes gender identity as a protected characteristic. We turn first to biology, as our human biology and physiology provides the timeless, dispositive definition for sex as Congress intended in Title IX and Title VII.

First, contra the Magistrate's concern, it is of no moment that *Ulane* was decided 32 years ago, Report, [ECF No. 134 at 25]: the human species remains binary with male and female being the two, opposite, irreducible and essential elements of sex. This is something that even the majority in *G.G.* had to admit when it evaluated 34 C.F.R. §106.33: "the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female." *G.G.*, 822 F.3d at 720.

And this is where the Magistrate errs, as he follows the *G.G.* court in misreading drafting-era dictionary definitions so as to inject unfounded ambiguity into the word "sex":

> Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished...." *American College Dictionary* 1109 (1970). The second defines "sex" as:
>
> > the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous

> occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness ....
>
> *Webster's Third New International Dictionary* 2081 (1971).
>
> Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive

G.G., 822 F.3d at 721. The Magistrate then adopts the panel's reading:

> 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….

Report, [ECF No. 134 at 33-34]. But the only way to find an ambiguity in those definitions is to do something very implausible: eliminate the relevance of our reproductive nature. This was well demonstrated during briefing, when the Federal Defendants artfully redacted *G.G.'s Webster* definition, quoting it as only the "sum of the morphological, physiological, and behavioral peculiarities … that is typically manifested as maleness or femaleness." Fed. Defs.' Suppl. Br., [ECF No. 116 at 4] (quoting *G.G.*, 822 F.3d at 721). What the Federal Defendants excised, however, was the very reason humans' "morphological, physiological, and behavioral peculiarities" exist: to *subserve* our binary, genetically-determined bi-parental nature as humans. *See* Pls.' Reply Mem. in Supp. of Prelim. Inj. Mot., [ECF No. 94 at 16-18] (expanding argument).

It is only by implausibly excising the very purpose of being male and female—to sexually

reproduce—that the *G.G.* panel and the Magistrate discover the "ambiguity" which then obligates federal judges to accept a bureaucrat's version of the law under *Auer*. By yielding to the agency's reading, Title IX now protects a novel continuum of gender identity which ranges from male to female to "something else" and is verifiable only by an individual's self-report, Garofalo Decl., [ECF No. 79-3 at 7 ¶12], rather than the objectively defined sexes of male and female. Nor is gender identity's addition of an amorphous "something else" mere theory: Student C, born female, then later "identified as gender queer but has presented himself in a masculine manner since at least spring 2015." Decl. of Parent C, [ECF No. 44 at ex. 3 p.2].[12]

The Magistrate (and the *G.G.* majority) equate primary sex characteristics—being male or female—with stereotypes and secondary sex characteristics[13] such as long hair, a low-pitched voice, or wearing makeup. This muddles the analysis beyond redemption—how can anything be stereotypical of "sex" if male and female are themselves mere stereotypes? And how is "sex discrimination" discerned if everything is a stereotype and no objective factor actually defines what sex is? These are not rhetorical questions: in the *Highland* case, the court questioned counsel for the intervening transgender student about his client still having "male genitalia," to which counsel responded, "I think it would be inappropriate to label any part of her body as male." *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, S.D. Ohio, Transcript of

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[12] The Magistrate confirms that there are other "genders" yet to be considered (referring to students seeking access to facilities as "cisgender, transgender, or otherwise," Report, [ECF No. 134 at 46]) and that scarcely scratches the surface. *See* Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 2 (3rd ed. 2014), http://bit.ly/1mZQCsH (explaining that some "[g]enderqueer" people "identify their gender as falling outside the binary constructs of 'male' and 'female,'" and indicating that other gender identities include "androgynous, multigendered, gender nonconforming, third gender, and two-spirit"). Plaintiffs object to the use of the "cisgender" construct by the Magistrate in the Report as it is heavily criticized, not widely accepted in peer-reviewed journals, and evidently was intended to eliminate the notion that sex is normatively male and female. It is a term formulated for advocacy, not accuracy as to the nature of male and female. S*ee* Wikipedia, https://en.wikipedia.org/wiki/Cisgender#Etymology_and_terminology (last visited Oct. 21, 2016).

[13] "External features of a sexually mature animal that, although not directly involved in copulation, are significant in reproductive behavior. The development of such features is controlled by sex hormones (androgens or oestrogens); they may be seasonable (e.g., the antlers of a male deer...) or permanent (e.g. breasts in women or facial hair in men). In humans they develop during adolescence." *Oxford Dictionary of Biology* (7th ed. 2015)

Oral Argument Proceedings, Sept. 20, 2016, ECF No. 94 at 61 (Transcript extract attached as Exhibit 2).

The Magistrate reprises the fundamental error of disregarding reproductive design by citing to informal court minutes in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 16-cv-00943-PP, Dkt. No. 26 (Sept. 6, 2016), saying that 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.[14] Obviously, those minutes are not even persuasive authority and the quote again suffers the fundamental defect of ignoring why sex exists: to enable human reproduction.

In sum, biology brings dispositive clarity: there is no ambiguity as to what "sex" means—it means male or female as grounded in our reproductive nature. Gender identity cannot be "included" with sex under Title IX because as a subjective, fluid, continuum it leads to exactly the situation we have: adolescent females being told that adolescent males may disrobe along with them in the girls' locker rooms, and if the girls don't like it, they can leave. That utterly defeats the purpose of Title IX and its implementing 34 C.F.R. §106.33 regulation.

Judge Niemeyer—the dissenting judge in *G.G.*—demonstrated that "includes" really means "replaces" when he assessed the impact of the Federal Rule on separating the two sexes within facilities protected under 34 C.F.R. § 106.33. *G.G.*, 822 F.3d 709, 737 (Niemeyer, J., dissenting), *mandate recalled and stayed*, *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S.Ct. 2442 (2016), *cert. granted*, *Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 2016 WL 4565643, (Oct. 28, 2016).

He reasoned that access to sex-specific facilities could not be governed by a rule which relied upon either sex *or* gender identity, as that would allow the defendant school to do just what provoked the wrath of the Department of Education ("DOE"), which was to protect the privacy of the professed female-to-male transgender student via access to individual facilities while maintaining boys-only communal facilities. *Id*. Nor could it be "*both*" sex and gender identity: a student with

[14] Counsel for Plaintiffs was unable to locate the quoted language in the referenced court minutes, nor in any other order on the *Whitaker* docket. A copy of *Whitaker* Dkt. No. 26 is attached as Exhibit 3.

conflicting sex and gender identity would not satisfy the conjunctive criteria for a boys' or a girls' facility. *Id.* Putting that in Defendants' language, if it was "both," then only students whose sex and gender identity align could access sex-specific facilities. This left only one option: sex must mean *only* gender identity, which was confirmed by an OCR letter to the defendant school stating that when "a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally must treat transgender students consistent with *their gender identity*." *Id.*[15]

This substitution of gender identity for sex eliminates the protection of 34 C.F.R. §106.33 for the Plaintiffs, who now confront a male in their private facilities, and it shows that the Defendants are not merely interpreting a statutory term, but replacing it wholesale with a concept utterly foreign to reproductively-defined sex.

Turning to "tradition," the term serves as an entry point into the legislative history of Title VII, *Ulane*, 742 F.3d at 1085-86, which Plaintiffs thoroughly briefed in their Memo in Support of Plaintiffs' Motion for Preliminary Injunction, [ECF No. 23 at 5-8] and Plaintiffs' Reply Memo in Support of their Motion for Preliminary Injunction, [ECF No. 94 at 10-12]. The legislative history buttresses the dispositive definition "sex" and its unambiguous reference to male and female.

Because "sex" is not ambiguous, Title IX speaks with clarity to the issue of who uses the girls' locker room, and "in all but the most extraordinary circumstances," the judicial inquiry is finished. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). And absent the faux ambiguity created when the categories of male and female are conflated with the characteristics of masculinity and femininity, this Court owes no deference whatsoever to the Federal Defendants' substitution of gender identity for sex.

This also defeats the Magistrate's position that *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657, 670 (W.D. Pa. 2015) is irrelevant

[15] This language presages that of the May 13, 2016 Dear Colleague Letter, which postdated the enforcement action in our case, Report, [ECF No. 134 at 7 n.3], and confirms that the Federal Defendants had finalized the Rule prior to enforcing it against the district in our case.

because it did not offer up *Auer* deference. Report, [ECF No. 134 at 35 n.10]. Absent deference, *Johnston* persuasively supports Plaintiffs. In *Johnston*, a female who identified as male challenged the university policy barring her from men's locker rooms and restrooms. *Johnston*, 97 F. Supp. 3d at 661. The court noted that while the question of whether students may use opposite-sex facilities is new, "the applicable legal principles are well-settled." *Id.* at 668. The school had an interest "in providing its students with a safe and comfortable environment for [using the restroom and locker room] . . . consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex[,]" *id*. at 668, as well as in ensuring "the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex." *Id*. at 669. "[S]eparating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use" does not violate Equal Protection, *id*. at 670, or Title IX, *id*. at 673.[16]

2. *Ulane* is durable authority and scarcely "eviscerated"

The Magistrate asserts that *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) swept away traditional notions of sex and established "transgenderism" (labeled as "gender nonconformity") as a class protected against invidious discrimination under Title VII, quoting *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) to say that *Price Waterhouse* "eviscerated" *Ulane*. Report, [ECF No. 134 at 30]. But neither *Price Waterhouse* nor *Smith* relied on such "gender nonconformity" as a legal basis, but rather used sex stereotyping as evidence of discrimination based on the complainant's sex. Indeed, a subsequent Sixth Circuit case heeded Justice Kennedy's warning that *Price Waterhouse* does not provide an independent sex stereotyping claim, *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting), advising plaintiffs not to "bootstrap protection" for other classifications into Title VII. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006)(citation omitted).

If Title VII had been so altered, then a statute that was meant to protect persons from

[16] *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) (finding that Title IX and its regulations allow biological sex-separate toilet, shower and locker room facilities); *Doe v. Clark Cty. Sch. Dist.*, 2008 WL 4372872, at *4 (D. Nev. Sept. 17, 2008) (same); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. Ct. App. 2015) (same).

invidious discrimination based on their sex—male or female—would become a law protecting sexual affections and self-perceptions of sexuality—while the binary, reproductively based male and female categories disappear. Plaintiffs respectfully submit that if nondiscrimination law is to be so muddled, Congress should act and not leave it to a court to do (and then improperly) by fiat.

There are more reasons why *Ulane* should abide as binding authority. First, it is scarcely persuasive for the Magistrate to say 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." Report, [ECF No. 134 at 27 n.11] (quoting *Ulane*, 742 F.2d at 1087). That dicta says no more than it says: that an argument may be made, which is scarcely the same as the court accepting such a claim.

Second, *Ulane's* holding that "sex" in Title VII does not include sexual orientation discrimination is scarcely an outlier, as the Magistrate suggests, given that the 1st, 2d, 3d, 4th, 5th, 6th, 8th, 10th, and the D.C. Circuits all align with the 7th Circuit in *Ulane* on that point. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996); *U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

Third, the Magistrate's argument that *Ulane* has gone quiet from 2001 to 2015 is simply an argument from silence that likely arose from the type of cases that were brought in that time frame. Searching Westlaw for district court decisions mentioning transgender or transsexual within the 7th Circuit during those years located 46 cases, 35 of which the plaintiff was a prisoner and many were pro se. Unsurprisingly, those cases did not lead to appellate decisions—and in many other cases, the mention of "transgender" or "transsexual" had no material bearing on the case.

And the one case (with two decisions) that dealt with a transgender issue in private

employment, *Creed v. Family Exp. Corp.*, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009) squarely supports our Plaintiffs. Creed was a male who identified as female, suffered what is now termed gender dysphoria, and slowly feminized his appearance before and during his employment at Family Express. *Id*. at 1-2. He was eventually terminated when his increasingly feminine appearance—particularly the length of hair and use of nail polish and makeup—violated the company's mandatory sex-specific dress code. *Id.* at *4. Creed sued, including two claims for discrimination based on transgender status, relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) as having "eviscerated *Ulane*," thus creating a new status-based cause of action for transgenders. *Creed v. Fam. Exp. Corp.*, 2007 WL 2265630 at *3. The court rejected that argument, saying that *Price Waterhouse* "focused on the situation in which initiative, effort, and aggressiveness were rewarded with partnership for men, but the company then punished women who exhibited these "macho" traits." *Id*. It was thus "the disparate treatment of men and women by sex stereotype that violated Title VII." *Id.* This is precisely the point that Plaintiffs have made: that sex stereotyping is simply evidence of classic sex discrimination and not protection for an entirely new category of persons who believe themselves to be changing their sex. And the court relied on *Ulane* and *Spearman v. Ford Motor Co*., 231 F.3d 1080 (7th Cir. 2000). *Id.*at 8-9.

The *Creed* court nonetheless allowed two other claims to advance in which Creed said Family Express discriminated against him because it perceived him "to be a man who did not conform with gender stereotypes associated with men in our society, or because it perceived Plaintiff to be a woman who did not conform with gender stereotypes associated with women in our society." *Id.*[17] Family Express prevailed on those claims at summary judgment because Creed "must be considered male for the purposes of Title VII," and the court properly concluded that he was

[17] These claims are consonant with same-sex sex discrimination held actionable under *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Defendants have made much of the statement therein that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," *id.*, but the subjective fluid continuum of gender identity is not "reasonably comparable" to male and female.

discharged because he violated the otherwise valid male dress code, and not because he "wasn't 'male' enough." *Creed*, 2009 WL 35237 at *8-*9. *Creed* thus lays out the right analysis: sex stereotypes may be evidence of sex discrimination, but the protected category is still an objectively verifiable characteristic: sex.

To summarize, the biology of human reproduction is dispositive: it shows that Congress meant sex in the male-female sense, recognizing that male and female together *subserve* a reproductive purpose and thus define "sex." No ambiguity lurks in such "sex," and that ends the judicial inquiry.

D. THE FEDERAL RULE IS LEGISLATIVE AND VIOLATES THE APA

The Magistrate also deems the Rule to be merely "interpretive" (and thus obligating Court deference to Defendants' gender identity theory) with only superficial analysis of whether the Federal Rule is interpretive or legislative. The Rule would be "legislative" (and thus obligated to go through notice-and-comment rulemaking) if it can be independently enforced or if it relies on some "external legal basis" to support its implementation. Report, [ECF No. 134 at 37]. Despite the Federal Defendants touting the Rule as merely interpreting Title IX, Federal Defs.' Mem. of Law Opp. Pls.' Mot. for Prelim. Inj. [ECF No. 80 at 14-25], as demonstrated in Section C, *supra*, what the Federal Defendants actually enforce is not Title IX's statutory term of sex, but an independent agency-created "gender identity" that replaces "sex" in Title IX and 34 C.F.R. §106.33 with a fluid, subjective continuum of many "genders." Thus, the Federal Defendants may enforce their Rule only by dint of raw agency power, for "sex" under Title IX and 34 C.F.R. §106.33 provides no textual basis to enforce a concept so radically different from male or female.

By summarily decreeing the rule to be interpretive, the Magistrate erroneously invoked deference, Report, [ECF No. 134 at 37] and thus failed to analyze Plaintiffs' arguments that the Federal Defendants' legislative Rule exceeds the DOE's statutory authority; is arbitrary, capricious, and an abuse of discretion; is contrary to Plaintiffs' constitutional rights. And even if this Court were to nonetheless deem the Rule to be interpretive, the Rule would still violate federal law and is

inconsistent with 34 C.F.R. §106.33. *See* Pls.' Mem. in Supp. of Prelim. Inj., [ECF No. 23 at 5-13] [18]; Pls.' Reply Mem. in Supp. of Prelim. Inj., [ECF No. 94 at 3-18]. [19]

E. THERE IS A CONSTITUTIONAL RIGHT TO PRIVACY

There is a constitutional right to privacy, which is protected by the Fifth Amendment's Due Process Clause against federal action and by the Fourteenth Amendment in respect to state action, using the same legal standards. Report, [ECF No. 134 at 41 and n.22]. Carefully defining how privacy is implicated in this case is critical. Thus the Magistrate erred in characterizing Plaintiffs' privacy right as whether "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?" *Id.* at 45. That formulation ignores the privacy implications of co-mingling the sexes in intimate settings and tacitly accepts that transgender students have a different sex than that which was determined upon their conception, which is scarcely proven at this point.[20]

The proper statement of the right at issue in this case is "whether adolescent students' constitutional right to privacy ensures that they may use sex-specific intimate facilities free of government-mandated use by a member of the opposite sex?"

The answer is "yes." The physical differences between boys and girls are enduring and the two sexes are not fungible. *United States. v. Virginia*, 518 U.S. 515, 533 (1996). And a number of cases make clear the import of those enduring physical differences: "Most people . . . 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." *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981). That feeling is magnified for teens, who are "extremely self-conscious about their

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[18] There is a typographical error in Plaintiffs' opening brief, [ECF 23 at 8]; "Title IX's regulations were enacted in 1975, only three years after Title IX" should read "...only three years after Title VII."

[19] As the case has developed, Plaintiffs do agree with the Magistrate that there is not a comparability of facilities issue between the boys' and girls' facilities and therefore waive the claim raised in the Complaint, [ECF No. 1] at page 67, ¶¶ 466-467. *See* Report, [ECF No. 134 at 72-73].

[20] The Magistrate did not delve into the expert testimony in the record. Doing so would have shown that there is no published research whatsoever which demonstrates a causal link between biological development and gender identity.

bodies[.]" *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993). Their "adolescent vulnerability intensifies the . . . intrusiveness of the exposure." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009). Forcing minors to risk exposing their bodies to the opposite sex is an "embarrassing, frightening, and humiliating" experience. *Id*. at 366.

These realities are why Congress was careful to say that Title IX would not require co-ed dormitories or locker rooms. 117 Cong. Rec. 30407 (1971) (Statement of Sen. Bayh). And Congress intended that the sexes would be respected regarding such sex-specific situations as "classes for pregnant girls …, in sport facilities or *other instances where personal privacy must be preserved*." 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added) Thus, Title IX expressly authorizes "separate living facilities for the different sexes," 28 U.S.C. § 1686, and its implementing regulations permit separate toilets, locker rooms, and shower facilities for males and females. 34 C.F.R. §106.33.[21]

We must pause here to point one thing out: obligating adolescent children—a captive audience under the *in loco parentis* authority of District Defendants—to share intimate facilities with a member of the opposite sex is simply unprecedented. Even if, as Defendants' claim, a person's self-professed gender identity is the sole determinate of sex, the fact is that male anatomy remains, as does the Plaintiffs' personal awareness that Student A has been, and continues to be, a male. The only court of appeals precedent on this issue is the wrongly-decided *G.G.* case, in which there was no party directly representing privacy interests as our Girl Plaintiffs do. Thus, Plaintiffs properly rely on other areas of law such as the Fourth Amendment, privacy torts, and liberty interests for precedents which illuminate the nature of the privacy right—a right that is protected, but not created, by the Constitution.

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[21] The Magistrate's footnote argument, Report, [ECF No. 134 at 44 n.23], that the Federal Rule is relevant only to the Locker Room Policy and not the use of girls' restrooms by Student A is wrong: The Rule, now memorialized in the May 13, 2016 Dear Colleague Letter, conflates restrooms and locker rooms and demands that schools "must allow transgender students access to such facilities consistent with their gender identity." [ECF No. 134 at 3] If the District refuses Student A access to girls' restrooms, it directly violates the Federal Rule.

The right to bodily privacy is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty[.]" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Magistrate gave no regard to the long history of protecting bodily privacy ranging from dealing with "peeping toms" in colonial times to teenagers "sexting" nude photos today. Pls.' Mem. in Supp. of Prelim. Inj., [ECF No. 23 at 14].

Certainly, females "using a women's restroom expect[] a certain degree of privacy from . . . members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. Ct. App. 2014). Children also expect such privacy. Teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988). "[P]rivacy matters" to children and is "central to their development and integrity."[22] Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy interests are why a girls' locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009).[23] Title IX regulations clarify that restrooms and locker rooms may continue to be separated by biological sex. 34 C.F.R. § 106.33. And they have been: as the Kentucky Supreme Court observed, "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993), *McLain v. Bd. of Ed. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty.*, 384 N.E.2d 540,

[22] Samuel T. Summers, Jr., *Keeping Vermont's Public Libraries Safe*, 34 Vt. L. Rev. ef5, 674 (2010) (*quoting* Ferdinand Schoeman, *Adolescent Confidentiality and Family Privacy*, in PERSON TO PERSON 213, 219 (George Graham & Hugh Lafollette eds., 1989)).

[23] The Magistrate says that the unpublished *Grunau* opinion "is not to be cited under the California Rules of Courts" but that only pertains to California per Cal. R. of Ct. R. 8.1115. *Grunau*, 2009 WL 5149857 at *1. And the case is relevant: the victimized girls complained to school officials prior to an assault simply because an unknown man was nearby their locker room, and the officials investigated, *id.*, which supports Plaintiffs' point that privacy begins at the locker room door, not inside and based upon some untoward act. And per Fed. R. App. P. 32.1, after 2007 unpublished opinions may be cited in federal court.

542 (Ill. App. Ct. 1978) (refusing to place male teacher as overseer of school girls' locker room).

Despite this, both Defendants and the Magistrate take the position that the zone of privacy is not the locker room or restroom itself, but rather at some stall door or curtain within the locker room and attack Plaintiffs' reliance on *Kohler v. City of Wapakoneta,* 381 F. Supp. 2d 692 (N.D. Ohio 2005) and *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984) as inapposite to Plaintiffs' constitutional claims. But these cases show that in the context of locker rooms and restrooms, bodily privacy rights begin at the door to the facility, not somewhere inside where there may be curtains or stalls which—if available for use—may offer additional privacy. Thus, when the *Kohler* court finds that recording a woman using an individual stall within a communal ladies' room where "she reasonably expected her activities to be secluded from men" establishes "an intrusion into a private area," 381 F. Supp. 2d at 704, it informs the Court that using a stall within a communal ladies' room does not eliminate the bodily privacy concern—a concern almost identical to that expressed by Girl Plaintiffs in ¶ 227 of their Complaint, [ECF No. 1 at 33]. The Magistrate further dismisses the case because it was decided largely on immunity grounds, Report, [ECF No. 134 at 56], but that does not undercut the fact that a privacy violation was established.

Norwood helps Plaintiffs in the same way—showing that privacy in a men's room within a major professional building began at the doorway. The Magistrate dismisses this, suggesting that "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." Report, [ECF No. 134 at 55]. But this Court should be mindful that the "bfoq exception in Title VII 'was meant to be an extremely narrow exception to the general prohibition of discrimination on sex.'" *Norwood*, 590 F. Supp. at 1415 (citation omitted). Since only exceptionally strong interests permit an exception from sex discrimination laws, it is clear that the right to privacy is a sufficiently strong interest to justify the exception. Indeed, the privacy interest is elevated in the school context, because the District Defendants owe a higher duty to the students over which they act *in loco parentis* than employers owe to employees. *Mary M. v. N. Lawrence Cmty.*

Sch. Corp., 131 F.3d 1220, 1226–27 (7th Cir. 1997).

Similarly, the Magistrate's summary rejection of the Fourth Amendment cases, Report, [ECF No. 134 at 56] is misguided. Those cases stand for the proposition that unconsented viewing of a student's body by a government actor violates her privacy, and that illuminates the nature of the bodily privacy right which is protected by the Fourth, Fifth, and Fourteenth Amendments, but not created by them. Given the novelty of the situation in this case—a school-mandated mingling of adolescent girls disrobing with a male inside their locker room, it is helpful to explore the contours of the privacy right as other government actions have impacted it.

Ultimately, the Magistrate shrugs off the Girl Plaintiffs' privacy concerns, asserting that "[t]here 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." Report, [ECF No. 134 at 60]. That disregards the zone of privacy, which begins at the facility door. And it ignores the Girl Plaintiffs' uncontroverted testimony that:

- The PE locker room, which is a long, open rectangular room with several banks of lockers, was designed with minimal privacy safeguards because the expectation was that only females would be allowed to access the room. Compl. ¶ 117 [ECF No. 1 at 20-21].

- Girls are required to change into clothing appropriate for PE class, resulting in at least 65 girls doing so at the same time in the few minutes before class begin *Id.* ¶¶ 119-20.

- Girls do not merely change their outer garments in the communal changing area; many, including some of the Girl Plaintiffs, change into sports bras and other undergarments, resulting in even greater bodily exposure while in the locker room. *Id.* ¶ 121.

- Some of the Girl Plaintiffs have physical education during the same class period as Student A, and so must use the PE locker room with him. *Id.* ¶ 122.

- The changing stalls offered by District Defendants do not fully shield the Girl Plaintiffs from being seen in a state of undress because there are large gaps above and below the stall doors, and gaps along the sides of the door that another student could see through even inadvertently. Nor do the stalls guarantee that Girl Plaintiffs will not see Student A in a state of undress if he chooses not to use the stalls for undressing and changing. *Id.* ¶ 158-59.

- In fact, nothing in the Agreement requires Student A to use the changing stalls, allowing him to change in the communal areas of the locker room with the female students. *Id.* ¶ 160.

- Even if Student A uses the privacy stalls, he will still see Girl Plaintiffs in a state of undress because he would still have to pass through the communal changing area where Girl Plaintiffs change in order to reach the stalls, and he is free to enter the locker room at any time, including when the Girl Plaintiffs are changing. *Id.* ¶ 162-67.[24]

- While changing stalls may be available for the PE Class, there are no changing stalls in the gymnastics and swimming locker rooms, which Student A has permission to use. *Id.* ¶ 161.

These uncontroverted facts demonstrate that Girl Plaintiffs will continue to encounter Student A within the locker room, unless they forgo the access to their sex-specific locker rooms—which District Defendants still insist that they are providing under 34 C.F.R. §106.33—and go in search of a single-user facility to change their clothes or deal with personal hygiene.

This illustrates the prospective, ongoing injury to Girl Plaintiffs which merits immediate injunctive relief. Here, the *G.G.* case is most instructive. In *G.G.*, a girl claiming a male gender identity sought access to boys' restroom facilities. *G.G.*, 822 F.3d at 714-716. Like our District Defendants initially did, the *G.G.* school defendants provided individualized, entirely private facilities for the professed transgender student, but that was not enough: relying on the same Federal Rule at issue in our case, the student demanded access to communal boys' restrooms. *Id*. The school resisted, winning at district court but losing at the Fourth Circuit. *Id*. at 717. The Fourth Circuit timely issued its mandate, and the lower court promptly enjoined the school to admit the girl to the boys' restroom.[25]

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[24] District Defendants assert that there are 13 "privacy" stalls in the girls' locker room which means that they included existing, cramped toilet stalls with the 5 designated changing stalls constructed by the District Defendants. Dist. Defs.' Resp. to Pls.' Mot. for Prelim. Inj., [ECF No. 78 at 20]. This is addressed in Plaintiffs' Combined Response Opposing Intervenor-Defendants Motion for a Sur-Reply and District Defendants Motion to Strike, [ECF 112 at 13]. But even including toilets as dressing stalls, there are five girls for every putative "privacy" area. Worse, when girls have dared to use the stalls, they have been ridiculed and harassed by others. Compl. [ECF No. 1 at 24 ¶¶ 142-146].

[25] Petitioners' Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari at 33-36, *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636 (August 3, 2016), a true and correct copy of which is attached as Exhibit 4.

On seeking the mandate recall, the *G.G.* Defendants specifically argued that the mandate and related injunction threatened the constitutional and Title IX rights of the other students to access facilities reserved to their biological sex as well as violating parents' rights to control when their children might be exposed to the opposite sex. *Id*. at 33-36. Such arguments are very much like those of our Girl Plaintiffs.

On August 3, 2016, the Supreme Court recalled the mandate and stayed the district court's injunction, *G.G.*, 2016 WL 4131636 at *1, which restored the school's practice of providing individual privacy-protecting facilities to G.G. (the girl professing to be a boy) while reserving communal facilities to the designated sex during the pendency of Supreme Court review, which has now been granted. Girl Plaintiffs ask for no more relief from this Court than what the Supreme Court afforded the students in *G.G.*

Finally, the Magistrate wrongly lays the burden of curing privacy violations on the Girl Plaintiffs rather than the school officials who act *in loco parentis*.[26] Report, [ECF No. 134 at 46]. But there is no safe harbor to protect Girl Plaintiffs' privacy. Stalls and curtains within the communal facilities do not resolve the privacy issue as discussed above, and the alternative of leaving the facility to seek a single-occupant alternative deprives Girl Plaintiffs of their protection under 34 C.F.R. §106.33, and forces them to use a separate-but-unequal facility to protect their privacy. Now, this may seem like a two-edged sword—if Student A prevails, Girl Plaintiffs must resort to the individual facilities and if Girl Plaintiffs prevail, the same alternative falls on Student A. But Student A is not seeking to use the girls' locker rooms because of the privacy afforded, but because he believes it affirms his perceived identity. Decl. Parent A [ECF No. 32-1 at 7 ¶ 22] . Girl Plaintiffs, on the other hand, seek to use the facility designated to protect their privacy under 34 C.F.R. §106.33, so their interests are quite different—and the school's duty to protect students' privacy should outweigh such interest as there may be in affirming one student's self-perception. That is especially true when

[26] The Magistrate notes that Plaintiffs did not develop arguments grounded in the Parent Plaintiffs' fundamental right to raise their children or the religious freedom claim. Report, [ECF No. 134 at 39 n.21]. These were not relied upon at this early stage but are not waived as they will be developed in later stages as discovery is appropriately conducted.

affirming the student results in violating others' privacy, and the student may be helped in other ways, such as the professional support team already deployed to help Student A. *See* Agreement, [ECF No. 21-3 at 3]; Kovack Decl. [ECF No. 78-1 at 2].

So the District Defendants' original plan—a product of what the Magistrate describes as "broad discretion in the management of school affairs," and "comprehensive authority ... to prescribe and control conduct in the schools," Report, [ECF No. 134 at 48] (citations omitted) should have solved the issue and prevented this lawsuit by providing individual facilities to protect Student A's privacy while preserving true sex separation in the communal facilities. But then the Federal Defendants came to town with their mandatory "marching orders" (as they have done to schools all across the nation)[27] and crushed the local authority.

F. DELIBERATE AND INTENTIONAL PRIVACY VIOLATIONS

The Magistrate wrongly diminishes Girl Plaintiffs' privacy interest, citing *Davis, Next Friend LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), saying that the "mere presence" of Student A in a restroom or locker room is neither objectively offensive nor hostile. There are two things wrong with that: a person enters a girls' locker room or restroom for a particular, private purpose: to disrobe or to conduct personal hygiene, not to be "merely present." And the necessary zone of privacy precludes male presence, be it "mere" or more.

Second, the Magistrate errs by missing the material difference between those cases where school officials are "deliberately indifferent" to student-on-student conduct, and our case where school officials are *deliberately intentional* in ordering the student activity to occur. Properly read, the *Davis* standard supports the Plaintiffs:

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

> [T]he provision that the discrimination occur "under any education program or activity" suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.

Davis, 526 U.S. at 652–53. This shows that the standard for a Title IX violation is "a systematic effect on educational programs or activities" that "den[ies] the victim equal access to an educational program or activity." And that is exactly what the Agreement and Federal Rule do: systematically deny Girl Plaintiffs access to the private facilities which are reserved to their use under Title IX and 34 C.F.R. §106.33. Girl Plaintiffs' uncontroverted facts show that there is more than "mere presence" in the locker room, and it is undisputed that a male using the female-only facilities results from intentional government direction. Under *Davis*, that violates Title IX.

Finally, even if this Court were to find that there is no fundamental privacy right violated when school officials purport to provide intimate facilities for one sex, then turn around and authorize use of the same facility by the opposite sex, there remains "a residual substantive limit on government action which prohibits arbitrary deprivations of liberty by government. Where a non-fundamental liberty—sometimes described as a "harmless liberty," is at stake, the government must demonstrate that the intrusion upon that liberty is rationally related to a legitimate government interest. *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). Rational basis review applies to such non-fundamental liberty interests, a standard which Plaintiffs easily meet: for Defendants to supplant the Congressionally-specified term of "sex," which is binary, objectively verifiable, and rooted in our nature as a species with the agency-created, fluid, non-binary, subjectively defined theory of gender identity which is rooted in individual psychology, may

have been well-intentioned, but it is not rational.[28] Plaintiffs should prevail under *Hayden.*

G. DISCRIMINATING AGAINST THE GIRL PLAINTIFFS' SEX

The Magistrate asserts that Plaintiffs fail at the threshold of Title IX—that the Locker Room Agreement, which authorizes a male to access a girls' locker room to affirm the male's professed identity as a girl, is somehow not based on the girls' sex. Report, [ECF No. 134 at 62]. If that is so, then Student A may retire to the boys' facilities and Plaintiffs will be pleased to dismiss the lawsuit on their own motion. But that won't happen, because the Agreement was reached specifically to introduce a male into the girls' facilities to serve but one interest: affirming the male students' subjective perception of his sexuality. Decl. Parent A [ECF No. 32-1 at 7 ¶ 22]. That the District Defendants are now willing to similarly discriminate against their male students does not mitigate the discrimination, any more than an employer who invidiously discriminates against male as well as female employees would be thereby absolved of discrimination. Put another way, 34 C.F.R. §106.33[29] permissibly differentiates on the basis of sex, but the Agreement violates that by targeting girls for compelled association with student A because mingling with girls purportedly "affirms" him.

Throughout the Report and especially toward the end, the Magistrate exculpates Defendants by putting the burden on Plaintiffs to self-cure privacy violations by abandoning their girls' facilities (which 34 C.F.R. §106.33 uniquely provides for them) in search of privacy in some toilet stall, behind a curtain, or in an individual "unisex" facility. [ECF No. 134, *passim*]. This boils down to blaming the victim, and it certainly is not the Girl Plaintiffs' obligation to cure the District Defendants' intentional violation of 34 C.F.R. §106.33.

The Magistrate is also astray with comments suggesting that Plaintiffs were dilatory in challenging the Locker Room Agreement. Report, [ECF No. 134 at 60 n.26; 80]. For example, the

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[28] Judge Niemeyer's dissent is again useful as he outlines the absurd results that come from this irrational rewrite of Title IX. *See G.G.*, 822 F.3d at 738.

[29]It is irrelevant that 34 C.F.R. §106.33 is permissive, Report, [ECF No. 134 at 65]; District Defendants have not decreed that all facilities are now unisex, but continue to putatively differentiate facilities by sex.

plaintiff in *Davis*, 526 U.S. 629 (1999) (the seminal case establishing "student-on-student" sexual harassment as a cause of action under Title IX) was filed on almost the exact same time-line as this case. The harassment began in December, 1992, and the plaintiff filed her lawsuit in May, 1993—a gap of five months. *Id.* at 633-35. The plaintiff in *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63, (1992), which established that damages are available under Title IX, waited *two years* after she was first sexually harassed to file her complaint. *Id.*

In comparison, the District first publicly announced in October 2015 that the privacy provided by sex-specific locker rooms was in danger. *District 211 Newsletter Update* (October 2015), [ECF No. 21-5]. At that time, the District vowed to resist the Federal Defendants' "marching orders" to authorize a male to use the girls' locker rooms. *Id*. The Plaintiffs reasonably relied on the District's initial resistance.[30] The District, however, capitulated in December, 2015. *Verified Compl.*, ECF No. 1, ¶ 105. The Plaintiffs, who had been pursuing a political solution, began considering options for a lawsuit. Organizing, finding the right attorneys, and preparing a lawsuit of this magnitude takes time. The Locker Room Agreement took effect in January, 2016. The Plaintiffs filed their lawsuit on May 4, 2016, a mere four months later, and filed their motion for preliminary injunction two weeks after that. Moreover, regardless of how much time elapsed, the injury to Girl Plaintiffs is ongoing and merits prospective relief.

H. IRREPARABLE HARM

The Magistrate errs by asserting Girl Plaintiffs will suffer no irreparable harm from the ongoing use of female-only facilities by a male, relying again on manufacturing ambiguity so as to set aside Plaintiffs' constitutional and statutory claims. Report, [ECF No. 134 at 74-75].

Of course, if Plaintiffs prove the likelihood of a constitutional violation, irreparable harm is presumed. *Am. Civil Liberties Union of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir.

[30] As to the District Defendants' older practice of permitting transgender students to use restrooms based on their professed gender identity, that practice was not publicly announced prior to the dispute over the girls' locker room. To the extent that the duration of that policy is an issue, it is not material to the prospective relief needed now and the facts can be developed in subsequent phases of the case.

2003). In respect to Title IX, the irreparable harm question is simply what "injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

And in this context, that a remedy at law is inadequate may be demonstrated by showing that "'the particular circumstances of the instant case bear substantial parallels to previous cases' in which irreparable harm has been found." *Hoop Culture, Inc. v. GAP Inc.*, 648 F. App'x 981, 985 (11th Cir. 2016) (quoting *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir. 2008). Determining whether a case is substantially parallel requires only that the Court "[d]raw[] fair inferences from facts [already] in the record" and consider the nature of the Title IX claims. *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC,* 774 F3d 192, 205 (3d Cir. 2014).

Girl Plaintiffs have been denied access to truly private girls' locker rooms and bathrooms, which substantially parallels a number of reasonably comparable cases in which irreparable harm has been found. *See, e.g. Doe v. Wood Cty. Bd. of Educ.,* 888 F. Supp. 2d 771(S.D.W. Va. 2012) (student's involuntary participation in a "completely voluntary" single-sex class was irreparable harm under Title IX); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 301–02 n. 25 (2d Cir.2004) (depriving players access to championship playoff was irreparable harm); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir.1993) (denial of access to play softball was irreparable harm).

V. Conclusion

Ironically, both the Magistrate and the *G.G.* majority reveal that importing gender identity into sex results in wholesale rewriting federal law, even to the point of adding marital status as a new protected category under Title VII, as demonstrated by their urging this example of why courts should rewrite "sex" to mean gender identity:

> "[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

> [under Title VII] 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."

Report, [ECF No. 134 at 32] (citing *Hively*, 830 F.3d at 718). But take heed: Title VII does not protect marital status for anyone whether they marry the opposite sex or not. What this example actually shows is that unelected executive branch officials can inject new and independent causes of action into the law, contra clear text and Congressional intent, if courts allow sham ambiguity to drive their analysis.

Indeed, civil rights law intended to eliminate invidious sex-based discrimination should not be repurposed to compel not just accommodation, but active affirmation of a student's self-perceived gender identity. This is not to say that the law has no role when such issues arise. One might argue that it would be better to eschew radically trying to repurpose law via judicial fiat in favor of amending the Americans with Disabilities Act to permit access to intimate facilities while relying on some reasonable indicia of whether a person purports to be male or female, such as a driver's license or affidavit of surgery completion.[31]

Unfortunately, Defendants would rather litigate than lobby, but the role of writing new law to serve new ends belongs to Congress, not the federal courts. As the Supreme Court will soon rule in *G.G.*, the parties may seek to stay this case pending that decision. But it should not be stayed while Girl Plaintiffs suffer daily, ongoing privacy violations. Therefore this Court should reject the Magistrate's Recommendation and forthwith grant a preliminary injunction protecting Girl Plaintiffs which would mirror the protection provided by the Supreme Court to students in the Gloucester School District. The privacy of Girl Plaintiffs merits no less.

[31] This was the approach the state of North Carolina took, and of course got sued for its effort to accommodate. See footnote 27, *supra*.

Respectfully submitted this the 1st day of November, 2016.

By: /s/ Gary S. McCaleb

THOMAS L. BREJCHA, IL 0288446
PETER BREEN, IL 6271981
JOCELYN FLOYD, IL 6303312
THOMAS MORE SOCIETY
19 S. La Salle Street, Suite 603
Chicago, IL 60603
(312) 782-1680
(312) 782 -1887 Fax
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org
jfloyd@thomasmoresociety.org

GARY S. MCCALEB, AZ 018848*
DOUGLAS WARDLOW, AZ 032028*
JEANA HALLOCK, AZ 032678*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
gmccaleb@adflegal.org
dwardlow@adflegal.org
jhallock@adflegal.org

J. MATTHEW SHARP, GA 607842*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
(770) 339-6744 Fax
msharp@adflegal.org

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record who are registered users of the ECF system:

Patrick M. DePoy
Erin D. Fowler
Sally J. Scott
Jennifer A. Smith
Michael A. Warner, Jr.
FRANCZEK RADELET P.C.
300 S. Wacker Drive, Suite 3400
Chicago, IL 60606

Attorneys for Defendant Board of Education of Township High School District No. 211

Megan Anne Crowley
Sheila Lieber
UNITED STATES DEPARTMENT OF JUSTICE,
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 Massachusetts Ave., N.W.
Washington, DC 20001

Benjamin L. Berwick
UNITED STATES DEPARTMENT OF JUSTICE,
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
1 Courthouse Way, Suite 9200
Boston, MA 02210

Attorneys for Defendants United States Department of Education, John B. King, Jr., United States Department of Justice, and Loretta E. Lynch

Britt M. Miller
Laura R. Hammargren
Linda X. Shi
Timothy S. Bishop
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606

Catherine A. Bernard
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006

John A. Knight
ROGER BALDWIN FOUNDATION OF ACLU, INC.
180 N. Michigan, Suite 2300
Chicago, IL 60601

Ria Tabacco Mar
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004-2400

Attorneys for Intervenor Defendants Students A, B,and C, and the Illinois Safe Schools Alliance

By: /s/ Gary S. McCaleb

GARY S. MCCALEB
Attorney for Plaintiffs

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00054-O**
	§	
UNITED STATES OF AMERICA et al.,	§	
	§	
Defendants.	§	
	§	

PRELIMINARY INJUNCTION ORDER

Before the Court are Plaintiffs' Application for Preliminary Injunction (ECF No. 11), filed July 6, 2016; Defendants' Opposition to Plaintiffs Application for Preliminary Injunction (ECF No. 40), filed July 27, 2016; and Plaintiffs' Reply (ECF No. 52), filed August 3, 2016. The Court held a preliminary injunction hearing on August 12, 2016, and counsel for the parties presented their arguments. *See* ECF No. 56.[1]

This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school. The sensitivity to this matter is heightened because Defendants' actions apply to the youngest child attending school and continues for every year throughout each child's educational career. The resolution of this difficult policy issue is not, however, the subject of this Order. Instead, the

[1] The Court also considers various amicus briefs filed by interested parties. *See* ECF Nos. 16, 28, 34, 36-1, 38-1.

Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

That being the case, the issues Plaintiffs present require this Court to first decide whether there is authority to hear this matter. If so, then the Court must determine whether Defendants failed to follow the proper legal procedures before issuing the Guidelines in dispute and, if they failed to do so, whether the Guidelines must be suspended until Congress acts or Defendants follow the proper legal procedure. For the following reasons, the Court concludes that jurisdiction is proper here and that Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing the Administrative Procedures Act's notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts. Accordingly, Plaintiffs' Motion should be and is hereby **GRANTED.**

I. BACKGROUND

The following factual recitation is taken from Plaintiffs' Application for Preliminary Injunction (ECF No. 11) unless stated otherwise. Plaintiffs are composed of 13 states and agencies represented by various state leaders, as well as Harrold Independent School District of Texas and Heber-Overgaard Unified School District of Arizona.[2] They have sued the U.S. Departments of Education ("DOE"), Justice ("DOJ"), Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials (collectively "Defendants"), challenging Defendants' assertions that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate

[2] Plaintiffs include: (1) the State of Texas; (2) Harrold Independent School District (TX); (3) the State of Alabama; (4) the State of Wisconsin; (5) the State of West Virginia; (6) the State of Tennessee; (7) Arizona Department of Education; (8) Heber-Overgaard Unified School District (Arizona); (9) Paul LePage, Governor of the State of Maine; (10) the State of Oklahoma; (11) the State of Louisiana; (12) the State of Utah; (13) the state of Georgia; (14) the State of Mississippi, by and through Governor Phil Bryant; (15) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.

facilities which match their gender identity rather than their biological sex.[3] Plaintiffs claim that on May 13, 2016, Defendants wrote to schools across the country in a Dear Colleague Letter on Transgender Students (the "DOJ/DOE Letter") and told them that they must "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk losing Title IX-linked funding." Mot. Injunction 1, ECF No. 11. Plaintiffs also allege Defendants have asserted that employers who "refuse to permit employees to utilize the intimate areas of their choice face legal liability under Title VII." *Id.* Plaintiffs complain that Defendants' interpretation of the definition of "sex" in the various written directives (collectively "the Guidelines")[4] as applied to Title IX of the Education Amendments of 1972 ("Title IX") and Title VII of the Civil Rights Act of 1964 ("Title VII") is unlawful and has placed them in legal jeopardy.

Plaintiffs contend that when Title IX was signed into law, neither Congress nor agency regulators and third parties "believed that the law opened all bathrooms and other intimate facilities to members of both sexes." Mot. Injunction. 1, ECF No. 11. Instead, they argue one of Title IX's initial implementing regulations, 34 C.F.R. § 106.33 ("§ 106.33" or "Section 106.33"),

[3] Plaintiffs refer to a person's "biological sex" when discussing the differences between males and females, while Defendants refer to a person's sex based on the sex assigned to them at birth and reflected on their birth certificate *or* based on "gender identity" which is "an individual's internal sense of gender." *See* Am. Compl. 12, ECF No. 6; Mot. Injunction 1, ECF No. 11; Am. Compl. Ex. C (Holder Transgender Title VII Memo) ("Holder Memo 2014") App. 1 n.1, ECF No. 6-3 ("'[G]ender identity' [is defined] as an individual's internal senses of being male or female."); *Id.* at Ex. J. (DOJ/DOE Letter) 2, ECF No. 6-10. When referring to a transgendered person, Defendants' Guidelines state "transgender individuals are people with a gender identity that is different from the sex assigned to them at birth . . . ." Am. Compl., Ex. C (Holder Memo 2014), App. 1 n.1, ECF No. 6-3. "For example, a transgender man may have been assigned female at birth and raised as a girl, but identify as a man." *Id.* at Ex. D (OSHA Best Practices Guide to Restroom Access for Transgender Employees) ("OSHA Best Practice Guide"), App. 1, ECF No. 6-4. The Court attempts to use the parties' descriptions throughout this Order for the sake of clarity.

[4] The Guidelines refer to the documents attached to Plaintiffs' Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) ("DOE Q&A Memo), ECF No. 6-2; (3) Ex. C ("Holder Memo 2014"), ECF No. 6-3, (4) Ex. D (OSHA Best Practice Guide), ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet), ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.

expressly authorized separate restrooms on the basis of sex. Section 106.33 provides: "A recipient 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. Plaintiffs assert the term sex in the pertinent statutes and regulations means the biological differences between a male and female. Mot. Injunction 2, ECF No. 11. Plaintiffs state that Defendants' swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines, coupled with Defendants' actions to enforce these new agency policies through investigations and compliance reviews, causes Plaintiffs to suffer irreparable harm for which a preliminary injunction is needed. *Id.* at 3–8; Pls.' Reply 3–7, ECF No. 54.

Defendants contend that the Guidelines and recent enforcement actions are designed to prohibit sex discrimination on the basis of gender identity and are "[c]onsistent with the nondiscrimination mandate of [Title IX]," and that "these guidance documents . . . are merely expressions of the agencies' views as to what the law requires." Defs.' Resp. 2–4, ECF No. 40. Defendants also contend that the Guidelines "are not legally binding, and they expose [P]laintiffs to no new liability or legal requirements" because DOE "has issued documents of this nature for decades, across multiple administrations, in order to notify schools and other recipients of federal funds about how the agency interprets the law and how it views new and emerging issues." *Id.* at 4–5.[5] Defendants also state that the "[g]uidance documents issued by [DOE] 'do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations'" and these documents expressly state that they do

[5] Defendants cited to U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance, http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html (last visited August 5, 2016) (discussing the purpose of guidance documents and providing links to guidance documents).

not carry the force of law. *Id.* at 5 (citing Holder Memo 2, ECF No. 6-10, to clarify that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status," but the memo "is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case").

A. TITLE IX

Title IX, enacted in 1972, is the landmark legislation which prohibits discrimination among federal fund recipients by providing that no person "shall, on the basis of sex, . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 USC § 1681. The legislative history shows Congress hailed Title IX as an indelible step forward for women's rights. Mot. Injunction at 2–4. After its passage, the DOE and its predecessor implemented a number of regulations which sought to enforce Title IX, chief among them, and at issue here, § 106.33. *See G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016) (stating that the Department of Health, Education, and Welfare ("HEW") adopted its Title IX regulations in 1975 pursuant to 40 Fed. Reg. 24,128 (June 4, 1975), and DOE implemented its regulations in 1980 pursuant to 45 Fed. Reg. 30802, 30955 (May 9, 1980)). Section 106.33, as well as several other related regulations, permit educational institutions to separate students on the basis of sex, provided the separate accommodations are comparable.

II. LEGAL STANDARDS

A. The Administrative Procedure Act (the "APA")

"The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'"

Norton v. S. Utah Wilderness All., 542 U.S. 55, 61 (2004) (quoting 5 U.S.C. § 702). "Where no other statute provides a private right of action, the 'agency action' complained of must be *final* agency action.'" *Id.* at 61–62 (quoting 5 U.S.C. § 704).[6] In the Fifth Circuit, "final agency action" is a jurisdictional threshold, not a merits inquiry. *Texas v. Equal Employment Opportunity Comm'n*, No. 14-10949, 2016 WL 3524242 at *5 (5th Cir. June 27, 2016) ("*EEOC*"); s*ee also Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir. 2004) ("If there is no 'final agency action,' a federal court lacks subject matter jurisdiction." (citing *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999))).

An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). "In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *EEOC*, 2016 WL 3524242, at *5; *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting

[6] Agency action is defined in 5 U.S.C. § 551(13) 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." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (quoting 5 U.S.C. § 551(13)). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: 'an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy' (rule); 'a final disposition . . . in a matter other than rule making' (order); a 'permit . . . or other form of permission' (license); a 'prohibition . . . or . . . taking [of] other compulsory or restrictive action' (sanction); or a 'grant of money, assistance, license, authority,' etc., or 'recognition of a claim, right, immunity,' etc., or 'taking of other action on the application or petition of, and beneficial to, a person' (relief)." *Id.* (quoting § 551(4), (6), (8), (10), (11)).

Abbott Labs. v. Gardner, 387 U.S. 136, 149–50 (1967)). When final agency actions are presented for judicial review, the APA provides that reviewing courts should hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150–151 (1991).

B. Preliminary Injunction

The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.*; *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001). A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621

(5th Cir. 1985) (citing *Canal*, 489 F.2d at 572). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). Even when a movant satisfies each of the four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light Co.*, 760 F.2d at 621. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.*

III. ANALYSIS

Plaintiffs argue that: (1) Defendants skirted the notice and comment process—a necessity for legislative rules; (2) the new mandates are incompatible with Title VII and Title IX and the agencies are not entitled to deference; (3) the mandates violate the clear notice and anti-coercion requirements which the federal government may attach to spending programs; and (4) nationwide relief is necessary to prevent the irreparable harm Defendants will cause Plaintiffs. Mot. Injunction 2–3, ECF No. 11.

Defendants assert that Plaintiffs are not entitled to a preliminary injunction because: (1) Plaintiffs do not have standing to bring their claims; (2) this matter is not ripe for review; (3) Defendants' Guidelines do not violate the APA; (4) Plaintiffs cannot demonstrate irreparable harm and they have an alternative remedy; (5) Defendants did not violate the Spending Clause; (6) and an injunction would harm Defendants and third parties. Defs.' Resp. 1–3, ECF No. 40. Defendants allege that should an injunction be granted, it should be implemented only to

Plaintiffs in the Fifth Circuit. *Id*. The Court addresses these issues, beginning with Defendants' jurisdictional arguments.[7]

A. Jurisdiction

1. Standing

Defendants allege that "[P]laintiffs' suit fails the jurisdictional requirements of standing and ripeness . . . because they have not alleged a cognizable concrete or imminent injury." Defs.' Resp. 12, ECF No. 40 (citing *Lopez v. City of Hous.*, 617 F.3d 336, 342 (5th Cir. 2015)). Defendants allege "a plaintiff must demonstrate that it has 'suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Defendants contend that "[t]he agencies have merely set forth their views as to what the law requires" regarding whether gender identity is included in the definition of sex, and "[a]t this stage, [P]laintiffs have alleged no more than an abstract disagreement with the agencies' interpretation of the law," since "[n]o concrete situation has emerged that would permit the Court to evaluate [P]laintiffs' claims in terms of specific facts rather than abstract principles." *Id.* at 13–14.

Defendants also allege that Plaintiffs "have [not] identified any enforcement action to which they are or are about to be subject in which a defendant agency is seeking to enforce its

[7] The parties have requested that the Court provide expedited consideration of the preliminary injunction. The briefing on this request was completed on August 3, 2016, and the matter was not ripe until after the hearing was completed on August 12, 2016. Because further legal issues concerning the basis for Plaintiffs' Spending Clause claim were raised at the hearing and require further briefing, the Court will not await that briefing at this time. *See* Hr'g Tr. 35, 44, 52–53 (discussing new program requirements and whether a new program is the same as annual grants). Therefore, the Spending Clause issue is not addressed in this Order. *See* ECF Nos. 11–12. Finally, where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX because the two statutes are commonly linked. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 546 (1982).

view of the law. As such, any injury alleged by plaintiffs is entirely speculative, as it depended on the initiation of some kind of enforcement action . . . which may never occur." Defs.' Resp. 14, ECF No. 40.

Plaintiffs state that Defendants are affirmatively using the Guidelines to force compliance as evidenced by various resolution agreements reached in enforcement cases across the country and from the litigation against the state of North Carolina, all of which is designed to force Plaintiffs to amend their policies to comply or place their federal funding in jeopardy. Hr'g Tr. at 78. Plaintiffs argue they are clearly the object of the Defendants' Guidelines, and those directives run afoul of various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities.[8] Hr'g Tr. at 77. Plaintiffs contend all

[8] Plaintiffs' motion provides the following citations to their state laws which give them legal control over the management of the safety and security policies of educational buildings in their states and which the Guidelines will compel them to disregard. Texas cites to Tex. Const. art 7 § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); Tex. Educ. Code §§ 4.001(b) (stating the objectives of public education, including Objective 8: "School campuses will maintain a safe and disciplined environment conducive to student learning."); 11.051 ("An independent school district is governed by a board of trustees who, as a corporate body, shall: (1) oversee the management of the district; and (2) ensure the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations."); 11.201 (listing the duties of the superintendent including "assuming administrative responsibility and leadership for planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district . . . ."); and 46.008 ("The commissioner shall establish standards for adequacy of school facilities. The standards must include requirements related to space, educational adequacy, and construction quality."); Pls.' Reply Ex. (Belew Decl.) 4, ECF No. 52-1 (stating the Texas Education Agency ("TEA") is responsible for "[t]he regulation and administration of physical buildings and facilities within Texas public schools" among other duties). Plaintiffs also provided an exhaustive list of similar state constitution citations, statutes, codes, and regulations that grant each Plaintiff the power to control the regulations that govern the administration of public education and public education facilities. *See* Mot. Injunction 9–11 n. 9-22, ECF No. 11 (quoting Ala. Code §§ 16-3-11, 16-3-12, 16-8-8–16-8-12 ("Alabama law authorizes state, county, and city boards of education to control school buildings and property."); Wis. stat. chs. 115, 118 ("In Wisconsin, local school boards and officials govern public school operations and facilities . . . with the Legislature providing additional supervisory powers to a Department of Public Instruction."); Wis. Stat. § 120.12(1) ("School boards and local officials are vested with the 'possession, care, control and management of the property and affairs of the school district, and must regulate the use of school property and facilities."); Wis. Stat. § 120.13(17) ("Wisconsin law also requires school boards to '[p]rovide and maintain enough suitable and separate toilets and other sanitary

of this confers standing according to the Fifth Circuit's opinion in *Texas v. Equal Employment Opportunity Commission*, No. 14-10940, 2016 WL 3524242 (5th Cir. June 27, 2016). Hr'g Tr. 78.

Defendants counter that *EEOC* was wrongly decided and, regardless, the facts here are distinguishable from that case.[9] *Id.* Defendants primarily distinguish *EEOC* from this case based on the *EEOC* majority's view that the "guidance [at issue] contained a 'safe harbor' [provision]" and "the [guidance at issue had] the immediate effect of altering the rights and obligations of the 'regulated community' . . . by offering them [] detailed and conclusive means

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facilities for both sexes.'"); W. Va. Const. art. XII, § 2; W. Va. code § 18-5-1, 18-5-9(4) ("West Virginia law establishes state and local boards of education . . . and charges the latter to ensure the good order of the school grounds, buildings, and equipment."); Tenn. Code Ann. §§ 49-12, 1-302, 49-1-201 ("In Tennessee, the state board of education sets statewide academic policies, . . . and the department of education is responsible for implementing those polices[, while] [e]ach local board of education has the duty to "[m]anage and control all public schools established or that may be established under its jurisdiction."); Tenn. Code Ann. §§ 49-1-201(a)-(c)(5), 49-2-203(a)(2) ("The State Board is also responsible for "implementation of law" established by the General Assembly, . . . and ensuring that the 'regulations of the state board of education are faithfully executed.'"); Ariz. Rev. Stat. §§ 15-203(A)(1), 15-341(A)(1), 15-341(A)(3) ("Arizona law establishes state and local boards of education, . . . and empowers local school districts to '[m]anage and control the school property within its district.'"); Me. Rev. Stat. tit. 20-A, §§ 201–406, 1001(2), 6501 ("Maine provides for state and local control over public education. While state education authorities supervise the public education system, control over management of all school property, including care of school buildings[,] . . . [a]nd Maine law provides requirements related to school restrooms."); Okla. Const. art. XIII, §§ 5, 5-117 ("Oklahoma law establishes a state board of education to supervise public schools. Local school boards are authorized by the board to operate and maintain school facilities and buildings."); La. Const. art VIII, § 3, LSA-R. Stat. § 17:100.6 ("In Louisiana, a state board of education oversees public schools, . . .while local school boards are charged with the management, administration, and control of buildings and facilities within their jurisdiction."); Utah Code §§ 53A-1-101, 53A-3-402(3) ("Utah law provides for state and local board of educations, . . . and authorizes the local boards to exercise control over school buildings and facilities."); Ga. Code § 20-2-59, 520 ("Georgia places public schools under the control of a board of education, . . . and delegates control over local schools, including the management of school property, to county school boards govern local schools."); Miss. Code Ann. § 37-7-301 ("In Mississippi, the state board of education oversees local school boards, which exercise control over local school property."); Ky. Rev. Stat. §§ 156.070, 160.290 ("In Kentucky, the state board of education governs the state's public school system, . . . while local boards of education control "*all* public school property" within their jurisdictions, . . and can make and adopt rules applicable to such property.").

[9] *Id*. at 14 ("[T]he government respectfully disagrees with that decision for many of the reasons stated in Judge Higginbotham's dissenting opinion, and . . . EEOC is distinguishable from this case in important respects."); Hr'g Tr. 53 ("Let me say at the outset . . . the Government disagrees with that decision.").

to avoid an adverse EEOC finding." Defs.' Resp. 15, ECF No. 40. Defendants claim that the same kind of facts are not present here. Defendants contend further that "the [transgender] guidance documents do not provide 'an exhaustive procedural framework,' [or] . . . a safe harbor, but merely express[] the agencies' opinion about the proper interpretation of Title VII and Title IX." *Id.* Thus, they argue, the Court lacks jurisdiction and should decline to enter a preliminary injunction. *Id.*[10]

The Court finds that Plaintiffs have standing. "The doctrine of standing asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560–61. The injury in fact must be "concrete and particularized" and "actual or imminent," as opposed to "conjectural" or "hypothetical." *Id.* at 560. When "a plaintiff can establish that it is an 'object' of the agency regulation at issue, 'there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.'" *EEOC*, 2016 WL 3524242 at *2; *Lujan*, 504 U.S. at 561–62. The Fifth Circuit provided, "[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *Id.* at *6 (quoting *Contender Farms LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015)).

In *EEOC*, Texas sued the EEOC over employment guidance the EEOC issued to employers concerning their Title VII obligations. In response, the EEOC argued Texas lacked standing because the guidance was advisory only and imposed no affirmative obligation. The

[10] The Court addresses Defendants' claim that Plaintiffs have an adequate alternate remedy in Section III.A.4.

Fifth Circuit held that Texas had standing to seek relief because it was an object of the EEOC's guidance as the guidance applied to Texas as an employer. *Id*. at *4.

This case is analogous. Defendants' Guidelines are clearly designed to target Plaintiffs' conduct. At the hearing, Defendants conceded that using the definition in the Guidelines means Plaintiffs are not in compliance with their Title VII and Title IX obligations. Hr'g Tr. 74. Defendants argue that that this does not confer standing because the Guidelines are advisory only. Defs.' Resp. 14, ECF No. 40. But this conflates standing with final agency action and the Fifth Circuit instructed district courts to address the two concepts separately. *See EEOC*, 2016 WL 3524242 at *3. Defendants' Guidelines direct Plaintiffs to alter their policies concerning students' access to single sex toilet, locker room, and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations.[11] Plaintiffs' counsel argued the Guidelines will force Plaintiffs to consider ways to build or reconstruct restrooms, and how to accommodate students who may seek to use private single person facilities, as other school districts and employers who have been subjected to Defendants' enforcement actions have had to do. Hr'g Tr. 80–81. That the Guidelines spur this added regulatory compliance analysis satisfies the injury in fact requirement. *EEOC*, 2016 WL 3524242 at *4 ("[T]he guidance does, at the very least, force Texas to undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations . . . overrides the State's interest . . . . [T]hese injuries are sufficient to confer constitutional standing, especially when considering Texas's unique position as a sovereign state . . . ."). That Plaintiffs have standing is strengthened by the fact that Texas and

[11] For example, Plaintiffs list Wisconsin's state statutes regarding this matter, which state that school boards are required to "[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes." Mot. Injunction 10 n.9, ECF No. 11 (citing Wis. Stat. s. 120.12(12)). Plaintiffs interpret this to mean that Wisconsin has the authority to maintain separate intimate facilities that correspond to a person's biological sex. *Id.*

other Plaintiffs have a "stake in protecting [their] quasi-sovereign interests . . . [as] special solicitude[s]." *Mass. v. E.P.A.*, 549 U.S. 497, 520 (2007) ("Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.").

Accordingly, Plaintiffs have standing to pursue this lawsuit.

2. Ripeness

Defendants also argue that this case is not ripe for review. According to Defendants, this Court should avoid premature adjudication to avoid entangling itself in abstract disagreements over administrative policies. Defs.' Resp. 13, ECF No. 40 (citing *Nat'l Park Hosp. Ass'n v. Dep.'t Interior*, 538 U.S. 803, 807 (2003)). Defendants argue that more time should be given to allow the administrative process to run its course and develop more facts before the Court can address this case. *Id.* at 13 (citing *Abbott Labs*, 387 U.S. 136, 149 (1967)); Hr'g Tr. 62. Plaintiffs counter that, taking into account recent events where Defendants have investigated other entities that do not comply with the Guidelines, this case is ripe. Pls.' Reply 4–7, ECF No. 52; Hr'g Tr. 79.

"A challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.'" *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir. 2007) (citing *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812).

The Court finds that Plaintiffs' case is ripe for review. Here, the parties agree that the questions at issue are purely legal. Hr'g Tr. 61. Defendants asserted at the hearing that Plaintiffs are not in compliance with their obligations under Title IX given their refusal to change their policies. Hr'g Tr. 74. Furthermore, for the reasons set out below, the Court finds that Defendants' actions amount to final agency action under the APA.[12] *EEOC*, 2016 WL 3524242 at *11 n.9 ("Having determined that the Guidance is 'final agency action' under the APA, it follows naturally that Texas's APA claim is ripe for review. Texas's challenge to the EEOC Guidance is a purely legal one, and as such it is unnecessary to wait for further factual development before rendering a decision.") (Internal citations omitted).

Finally, the facts of this case have sufficiently developed to address the legal impact Defendants' Guidelines have on Plaintiffs' legal questions in this case. *Texas*, 497 F.3d at 498–99. The only other factual development that may occur, given Defendants' conclusion Plaintiffs are not in legal compliance, is whether Defendants actually seek to take action against Plaintiffs. But it is not clear how waiting for Defendants to actually take action would "significantly advance [the court's] ability to deal with the legal issues presented." *Texas*, 497 F.3d at 498–99. As previously stated, Defendants' Guidelines clash with Plaintiffs' state laws and policies in relation to public school facilities and Plaintiffs have called into question the legality of those Guidelines. Mot. Injunction 9–12, ECF No. 11. Therefore, "further factual development would not 'significantly advance the courts ability to deal with the legal issues presented.'" *Texas*, 497 F.3d at 498−99. Accordingly, the Court finds that this case is ripe for review.

3. Final Agency Action under the APA

[12] The Court further addresses this issue in section III.A.3.

The Court now evaluates whether the Guidelines are final agency action meeting the jurisdictional threshold under the APA. *EEOC*, 2016 WL 3524242 at *5. Defendants argue that there has been no final agency action as the documents in question are merely "paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." Defs.' Resp. 18, ECF No. 40. Defendants also allege that the Guidelines are "[v]alid interpretations of the statutory and regulatory authorities on which they are premised" because although Title IX and § 106.33 provide that federal recipients may provide for separate, comparable facilities, the regulation and statute "do not address how they apply when a transgender student seeks to use those facilities . . . ." *Id.* at 20−21.

Plaintiffs allege that the agencies' Guidelines are binding nationwide and the Defendants' enforcement patterns in various states clearly demonstrate that legal actions against those that do not comply will follow. Mot. Injunction 9–12, ECF No. 11; Reply 2–8, ECF No. 52. Plaintiffs identify a number of similar cases where Defendants have investigated schools that refused to comply with the new Guidelines and where they sued North Carolina over its state law which, in part, made it legal to require a person to use the public restroom according to their biological sex. Reply 6, ECF No. 52.

An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177–78. "In evaluating whether a challenged agency action meets these two conditions, the court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *EEOC*, 2016 WL 3524242 at *5 (quoting *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011)).

The Court finds that the Guidelines are final agency action under the APA. Defendants do not dispute that the Guidelines are a "consummation" of the agencies' decision-making process. Hr'g Tr. 61; *Nat'l Pork Producers Council v. E.P.A.*, 635 F.3d 738, 755–56 (5th Cir. 2011) (citing *Her Majesty the Queen in Right of Ontario v. Envtl. Prot. Agency*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (deciding that EPA guidance letters constitute final agency actions as they "serve[d] to confirm a definitive position that has a direct and immediate impact on the parties . . . .")).

The second consideration is also satisfied in this case because legal consequences flow from the Defendants' actions. Defendants argue no legal consequences flow to Plaintiffs because there has been no enforcement action, or threat of enforcement action. Hr'g Tr. 71. The Fifth Circuit held in *EEOC* however that "an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties." 2016 WL 3524242 at *8. According to the Fifth Circuit, "'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability." *Id.* (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814–15 (May 31, 2016) (holding that using the pragmatic approach, an agency action asserting that plaintiff's land was subject to the Clean Water Act's permitting process was a final agency action which carried legal consequences). The Fifth Circuit concluded that "[i]t is also sufficient that the Enforcement Guidance [at issue in *EEOC*] has the immediate effect of altering the rights and obligations of the 'regulated community' (i.e. virtually all state and private employers) by offering them a detailed and conclusive means to avoid an adverse EEOC finding . . . ." 2016 WL 3524242 at * 6.

In this case, although the Guidelines provide no safe harbor provision, the DOJ/DOE Letter provides not only must Plaintiffs permit individuals to use the restrooms, locker rooms, showers, and housing consistent with their gender identity, but that they find *no* safe harbor in providing transgender students individual-user facilities as an alternative accommodation. Indeed, the Guidelines provide that schools may, consistent with Title IX, make individual-user facilitates available for *other* students who "voluntarily seek additional privacy." *See* DOJ/DOE Letter 3, ECF No. 6-10. Using a pragmatic and common sense approach, Defendants' Guidelines and actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants' Guidelines.[13] *EEOC*, 2016 WL 3524242 at *8 ("Instead, 'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability."); *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1056–57 (5th Cir. 1993) (stating that "[w]ere HUD to formally define the phrase [at issue] . . . [the plaintiffs] would undoubtedly have the right to review HUD's final agency action under § 702 [of the APA]"); *Frozen Foods Express v. United States*, 351 U.S. 40, 44–45 (1956) (holding an order specifying which commodities the Interstate Commerce Commission believed were exempt was final agency action, even though the order simply gave notice of how it would interpret the statute and would apply only when an action was brought): *compare with AT&T Co. v. E.E.O.C*, 27 F.3d 973, 975–76 (D.C. Cir. 2001) (holding that the EEOC's compliance manual was not a final agency action because the policy guidance did not intend to bind EEOC staff in their official conduct, the

[13] The Holder Memorandum concludes, "For these reasons, the [DOJ] will no longer assert that Title VII's prohibition of discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination)." Holder Memo 2, ECF No. 6-3. Other guidance from Defendants take similar actions. *See also* DOJ/DOE Letter 4–5, ECF No. 6-10.

manual simply expressed the agency's view with respect to employers' actions and compliance with Title VII).

Accordingly, the Court finds that Defendants' Guidelines are final agency action such that the jurisdictional threshold is met. *EEOC*, 2016 WL 3524242 at *5.

4. Alternative Legal Remedy

Defendants also contend that district court review is precluded and Plaintiffs should not be allowed to avoid the administrative process by utilizing the APA at this time. Defs.' Resp. 16, ECF No. 40. Defendants allege that "review by a court of appeals is an 'adequate remedy' within the meaning of the APA," and "[s]ection 704 of the APA thus prevents plaintiffs from circumventing the administrative and judicial process Congress provided them." *Id.* Defendants argue "Congress has precluded district court jurisdiction over pre-enforcement actions like this." *Id.* at 17. Defendants cite several cases, including the Supreme Court's opinions in *Thunder Basin v. Reich*, 510 U.S. 200 (1994) and *Elgin v. Department of Treasury*, 132 S.Ct. 2126 (2012), in support of this argument.[14]

Defendants' assertion that there is no jurisdiction to review Plaintiffs' APA claims fails and their reliance on *Thunder Basin*, *Elgin*, and the other cited cases is misplaced. In *Thunder Basin*, the Supreme Court held that the Mine Act's statutory review scheme precluded the district

[14] Defendants also assert *NAACP v. Meese* supports this argument but the Court disagrees. In that case, the plaintiffs sought to enjoin the Attorney General from reopening or agreeing to reopen any consent decree in any civil rights action pending in any other court. The district court denied this request, holding such actions would violate principles of separation of powers and comity. 615 F. Supp. 200, 201–02 (D.D.C. 1985) ("Plaintiffs' action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States."). The *Meese* court also concluded there was no final agency action to enjoin and, by definition, there would be an alternative legal remedy related to those cases where a consent decree existed because those decrees were already subject to a presiding judge. *Id.* at 203 n.9. Additionally, Defendants reliance on *Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953 (5th Cir. 1991) does not apply because there was no final agency action in that case.

court from exercising subject-matter jurisdiction over a pre-enforcement challenge. To determine whether pre-enforcement challenges are prohibited courts look to whether this "intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin*, 510 U.S. at 207 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984)). The Supreme Court held that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history . . . and whether the claims can be afforded meaningful review." *Id.* (internal citation omitted).

Although the Mine Act was silent about pre-enforcement claims, the Supreme Court held that "its comprehensive enforcement structure demonstrate[d] that Congress intended to preclude challenges," and the Mine Act "expressly authorize[d] district court jurisdiction in only two provisions . . . [which allowed] the Secretary [of Labor] to enjoin [] violations of health and safety standards and to coerce payment of civil penalties." *Id.* at 209. Thus, plaintiffs had to "complain to the Commission and then to the court of appeals." *Id.* (italics omitted).

Elgin reached a similar conclusion, holding that the Civil Service Reform Act ("CSRA") was the exclusive avenue to judicial review for petitioners' claims against the Treasury Department. 132 S. Ct. 2126, 2128 ("Just as the CSRA's 'elaborate' framework [citation omitted] demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review.").

No similar elaborate statutory framework exists covering Plaintiffs' claims. 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 provisions, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory

remedy for violations. *See Cannon v. Univ. of* Chicago, 441 U.S. 677 (1979) (holding that Title IX did not preclude a private right of action for damages). Given Defendants lack of authority to the contrary, the presumption of reviewability for all agency actions applies. *EEOC*, 2016 WL 3524242 at *11 (citing *Abbott Labs.*, 387 U.S. at 140) ("To wholly deny judicial review, however, would be to ignore the presumption of reviewability, and to disregard the Supreme Court's instruction that courts should adopt a pragmatic approach for the purposes of determining reviewability under the APA.").

Having concluded that Plaintiffs claims are properly subject to judicial review, the Court next evaluates whether a preliminary injunction is appropriate.

B. Preliminary Injunction

1. Likelihood of Success on the Merits

The first consideration is whether Plaintiffs have shown a likelihood of success on the merits for their claims. Plaintiffs aver that they have shown a substantial likelihood that they will prevail on the merits because Defendants have violated the APA by (1) circumventing the notice and comment process and (2) by issuing final agency action that is contrary to law. Mot. Injunction 12–16, ECF No. 11. Furthermore, Plaintiffs contend that Defendants' new policies are not valid agency interpretations that should be granted deference because "[a]gencies do not receive deference where a new interpretation conflicts with a prior interpretation." Pls.' Reply 11, ECF No. 52 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

Defendants contend that their actions do not violate the APA because the Guidelines are interpretive rules and are therefore exempt from the notice and comment requirements. Defs.' Resp. 12–18, ECF No. 40. Defendants argue the Guidelines are exempt because they do not carry the force of law, even though "the agencies' interpretations of the law are entitled to some

deference." Further, they argue because their interpretation is reasonable, this interpretation is entitled to deference.[15] Defendants also assert they did not act contrary to law because the Guidelines are valid interpretations of Title IX as the statute and regulations "do not address how [the laws] apply when a transgender student seeks to use those facilities" or "how a school should determine a transgender student's sex when providing access to sex-segregated facilities." *Id.* at 20–21. Thus, according to Defendants, this situation presents an ambiguity in the regulatory scheme and Defendants are allowed to provide guidelines to federal fund recipients on this matter. *Id.* at 21.[16]

In their Reply, Plaintiffs counter that DOE's implementing regulation, § 106.33, is not "ambiguous[,] [a]s a physiologically-grounded regulation, it covers every human being and therefor all those within the reach of Title IX." Reply 8, ECF No. 52. They contend further, "[t]o create legal room to undo what Congress (and preceding regulators) had done, Defendants

[15] Defendants argue the Court should be guided in this decision by the Fourth Circuit's decision in *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) ("*G.G.*"). Defendants contend the Fourth Circuit's majority opinion in *G.G.* should be followed as it provides the proper analysis. The Supreme Court recalled the Fourth Circuit's mandate and stayed the preliminary injunction entered by the district court in that case. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-A-52, 2016 WL 4131636 at *1 (Aug. 3, 2016) (Breyer, J. concurring) ("In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy."). The Supreme Court takes such actions only on the rarest of occasions. *Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) ("On such an application, since the Court of Appeals refused the stay '* * * this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari."); *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) ("If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted."). Because it is impossible to know the precise issue (s) that prompted the Supreme Court to grant the stay, it is difficult to conclude that *G.G.* would control the outcome here. *See New Motor Vehicle Bd. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (declaring it is very difficult to predict anticipated Supreme Court decision). Nevertheless, the Court has reviewed the opinion and considers the well-expressed views of each member of the panel in reaching the decision in this case.

[16] Defendants characterize their Guidelines as, "supply[ing] 'crisper and more detailed lines' than the statutes and regulations that they interpret," without "alter[ing] the legal obligations of regulated entities." *Id.* at 20 (citing *Am. Mining Cong. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

manufacture an ambiguity, claiming that 'these regulations do not address how they apply when a transgender student seeks to use those facilities . . . .'" *Id.* (citing Defs.' Response 20–21, ECF No. 40). Plaintiffs continue, "[i]n enacting Title IX, Congress was concerned that women receive the same opportunities as men, [t]hus, Congress utilized 'sex' in an exclusively biological context[,] [and] "[t]he two sexes are not fungible." *Id.* at 8–9 (quoting *Ballard v. United States,* 329 U.S. 187, 193 (1946). It is the biological differences between men and women, Plaintiffs allege, that led Congress in 1972 to "permit differential treatment by sex only[,]" provide a basis for DOE "to approve 'separate toilet, locker rooms, and shower facilities on the basis of sex" in § 106.33, and led the Supreme Court "to conclude that educational institutions must 'afford members of each sex privacy from the other sex.'" *Id.* at 9 (quoting 118 Cong. Rec. 5807 (1972)); *United States v. Virginia,* 518 U.S., 550 n.19 (1996)).

The Court finds that Plaintiffs have shown a likelihood of success on the merits because: (1) Defendants bypassed the notice and comment process required by the APA; (2) Title IX and § 106.33's text is not ambiguous; and (3) Defendants are not entitled to agency deference under *Auer v. Robbins,* 519 U.S. 452 (1997).[17]

i. Notice and Comment under the APA

Defendants state that "[t]he APA does not require agencies to follow notice and comment procedures in all situations [, and the APA] specifically excludes interpretive rules and statements of agency policy from these procedures." Defs.' Resp. 17–18, ECF No. 40. Defendants allege "[t]he guidance documents are . . . paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." *Id.* at 18. According to Defendants,

[17] Defendants' counsel stated at the hearing that Defendants would not be entitled to *Chevron* deference for the Guidelines. *See* Hr'g Tr. 72. Thus, the Court addresses only Defendants' claim that they are entitled to *Auer* deference when interpreting § 106.33.

"the interpretations themselves do not carry the force of law . . . ." *Id.* at 19. Defendants rely on *G.G.*, 822 F.3d 709, 720 (4th Cir. 2016) to support their claim that DOE's "interpretation of the single-sex facility regulation implementing Title IX is reasonable, and does not conflict with those regulations in any way." *Id.*

Plaintiffs contend that Defendants' rules are legislative because: "(1) they grant rights while also imposing significant obligations; (2) they amend prior legislative rules or longstanding agency practice; and (3) bind the agencies and regulated entities," requiring them to go through the notice and comment process. Mot. Injunction 12, ECF No. 11.

The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them. 5 U.S.C. §§ 553(b) −(c). This is referred to as the notice and comment requirement. The purpose is to permit the agency to understand and perhaps adjust its rules based on the comments of affected individuals. *Prof'ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir.1995). However, not every action an agency takes is required to go through the notice and comment process. "The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). "Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not." *Id.* (citing 5 U.S.C. § 553). "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03, (1979).

The APA does not define a legislative or "substantive" rule, but in *Morton v. Ruiz*, 415 U.S. 199, 234 (1974), the Supreme Court held that a substantive rule or "a legislative-type rule," is one that "affect[s] individual rights and obligations." *Id.* at 232. The Supreme Court also

held, "the promulgation of these regulations must conform with any procedural requirements imposed by Congress." *Chrysler Corp.*, 441 U.S. at 303. Thus, agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *Id*. (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)). If a rule is substantive, notice and comment requirements must be adhered to scrupulously. *Prof'ls and Patients for Customized Care*, 56 F.3d at 595.

"[L]egislative rules (and sometimes interpretive rules) may be subject to pre-enforcement review" because they subject a party to a binding obligation which can be the subject of an enforcement action. *McCarthy*, 758 F.3d at 251. ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule . . . ."). The APA treats interpretive rules and general statements of policy differently. *Id.* ("As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.").[18]

Courts have focused on several factors to evaluate whether rules are interpretative or legislative. Courts analyze the agency's characterization of the guidance and post-guidance events to determine whether the agency has applied the guidance as if it were binding on regulated parties. *McCarthy*, 758 F.3d at 252−53. However, "the most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated

[18] *Catawba Cty*. provides: "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.")

entities." *McCarthy*, 758 F.3d at 252 (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34; *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002)). "A touchstone of a substantive rule is that it establishes a binding norm." *Prof'ls and Patients for Customized Care*, 56 F.3d at 596; *see also Texas v. United States*, 809 F.3d 134, 202 (5th Cir. 2015) (King, J., dissenting) (declaring that an agency action establishing binding norms which permit no discretion is a substantive rule requiring notice and comment). If agency action "draws a 'line in the sand' that, once crossed, removes all discretion from the agency" the rule is substantive. *Id.* at 601.

Here, the Court finds that Defendants rules are legislative and substantive. Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are "compulsory in nature." *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000);[19] *see also Prof'ls and Patients for Customized Care*, 56 F.3d at 596 (the label an agency places on its exercise of administrative power is not conclusive, rather it is what the agency does with that policy that determines the type of action). Defendants confirmed at the hearing that schools not acting in conformity with Defendants' Guidelines are not in compliance with Title IX. Hr'g Tr. 71. Further, post-Guidelines events, where Defendants have moved to enforce the Guidelines as binding, buttress this conclusion. *Id.* at 7; Mot. Injunction 15–16, ECF No. 11; Reply 4–8, ECF No. 52. The information before the Court demonstrates Defendants have "drawn a line in the sand" in that they have concluded Plaintiffs must abide by the Guidelines, without exception, or they are in breach of their Title IX obligations. Thus, it would follow that the "actual legal effect" of the Guidelines is to force

[19] In *Appalachian Power*, the D.C. Circuit held that an EPA guidance was a legislative rule despite the guidance document's statement that it was advisory. The Court analyzed the document as a whole and found that "the entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates." 208 F.3d at 1022-23. Similarly, the DOJ/DOE Letter uses the words "must," and various forms of the word "require" numerous times throughout the document. Am. Compl. Ex. J (DOJ/DOE Letter), ECF No. 6-10.

Plaintiffs to risk the consequences of noncompliance. *McCarthy*, 758 F.3d at 252; *Catawba Cty.*, 571 F.3d at 33–34; *Gen. Elec. Co.*, 290 F.3d at 382; *see also Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). Plaintiffs, therefore, are legally affected in a way they were not before Defendants issued the Guidelines. The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. *Panhandle Producers and Royalty Owners Ass'n v. Econ. Regulatory Admin*, 847 F.2d 1168, 1174 (5th Cir. 1988) (stating that a substantive rule is one that establishes standards of conduct that carry the force of law). As such, Defendants should have complied with the APA's notice and comment requirement. 5 U.S.C. § 553; *Nat'l Min. Ass'n*, 758 F.3d at 251; *Chrysler Corp.*, 441 U.S. at 301–03. Permitting the definition of sex to be defined in this way would allow Defendants to "create de facto new regulation" by agency action without complying with the proper procedures. *Christensen v. Harris Cty.*, 529 U.S. 576, 586−88 (2000). This is not permitted.

Accordingly the Court finds that Plaintiffs would likely succeed on the merits that Defendants violated the notice and comment requirements of the APA.

ii. Agency Action Contrary to Contrary to Law (5 U.S.C. § 553)

Plaintiffs contend that Defendants' Guidelines are contrary to the statutory and regulatory text, Congressional intent, and the plain meaning of the term. Mot. Injunction 14, ECF No. 11. When an agency acts contrary to law, its action must be set aside. 5 U.S.C. § 706(2)(A). Plaintiffs argue that Defendants' interpretation of the meaning of the term "sex" as set out in the Guidelines contradicts its meaning in Title VII, Title IX, and § 106.33. They assert "the meaning of the terms 'sex,' on the one hand, and 'gender identity,' on the other, both now and at the time

Titles VII and IX were enacted, forecloses alternate constructions." Mot. Injunction 16, ECF No. 11 (citing *Thomas Jefferson Univ.*, 512 U.S. at 512. They also allege that the ordinary meaning of the term controls. *Id.* at 17 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

Defendants contend that Plaintiffs' arguments for legislative history and intent at the time of passage are irrelevant. Hr'g Tr. 33 ("But it may very well be that Congress did not intend the law to protect transgender individuals. [But,] . . . as the Supreme Court has made it absolutely clear in *Oncale*, the fact that Congress may have understood the term sex to mean anatomical sex at birth is largely irrelevant.") Defendants also allege that "Title IX and Title VII should be construed broadly" to protect any person, including transgendered persons, from discrimination. Hr'g Tr. 33–34.

The starting point to analyze this dispute begins with the actual text of the statute or regulation, where the words should be given their ordinary meaning. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). When the words are unambiguous, the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). The pertinent statutory text at issue in this case provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681. Title IX expressly permits educational institutions to maintain separate living facilities for the different sexes. *Id.* at § 1686. The other language at issue comes from one of the DOE regulations promulgated to implement Title IX, which states: "A recipient 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.

Defendants assert the Guidelines simply provide clarity to an ambiguity in this regulation, and that ambiguity is how to define the term sex when dealing with transgendered students. Defs.' Resp. 20, ECF No. 40. Because they contend the regulation is ambiguous, Defendants argue "[f]oundational principles of administrative law instruct [the Court] to give controlling weight to [their] interpretations of their own ambiguous regulations unless [they are] plainly erroneous." *Id.*

Plaintiffs contend the text of both Title VII and Title IX is not ambiguous. Mot. Injunction 16–19, ECF No. 11. They argue when Congress passed both statutes it clearly intended sex to be defined based on the biological and anatomical differences between males and females. *See id.* at 17–18 (citing legislative history and common understanding of its meaning at the time of passage). Plaintiffs likewise assert § 106.33 is unambiguous, for the same reason, as it was designed to separate students based on their biological differences because they have a privacy right to avoid exhibiting their "nude or partially nude body, genitalia, and other private parts" before members of the opposite sex. Pls.' Reply 8–9, ECF No. 52. Based on this, they argue Defendants have manufactured an ambiguity so they can then unilaterally change the law to suit their policy preferences. *Id.* at 8.

iii. Auer Deference

Because Defendants assert their regulation is ambiguous, the Court must determine whether their interpretation is entitled to deference. Defendants contend an agency may interpret its own regulation by issuing an opinion letter or other guidance which should be given controlling weight if: (1) the regulation is ambiguous; and (2) the interpretation is not plainly

erroneous or inconsistent with the regulation. Defs.' Resp. 21, ECF No. 40; *Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("[An agency's] interpretation of [its regulation] is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)).

This deference is only warranted however when the language of the regulation is ambiguous. *Moore v. Hannon Food Services, Inc.*, 317 F.3d 489, 495 (5th Cir. 2003). Legislation is ambiguous if it is susceptible to more than one accepted meaning. *Calix v. Lynch*, 784 F.3d 1000, 1005 (5th Cir. 2015). "Multiple accepted meanings do not exist merely because a statute's 'authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.'" *Id.* (citing *Moore*, 317 F.3d at 497 *and* applying this rule of construction to regulations).

If a regulation is not ambiguous, the agency's interpretation may be considered but only according to its persuasive power. *Moore*, 317 F.3d at 495. "Thus, a court must determine whether 'all but one of the meanings is ordinarily eliminated by context.'" *Calix*, 784 F.3d at 1005 (quoting *Deal v. United States*, 508 U.S. 129, 132–33 (1993)). When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent. *D.C. Bd. of Elections & Ethics v. D.C.*, 866 A.2d 788, 798 n.18 (D.C. 2005) ("In finding the ordinary meaning, 'the use of dictionary definitions is appropriate in interpreting undefined statutory terms.'"); *1618 Twenty–First St. Tenants Ass'n, Inc. v. Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003) (same). Furthermore, "an agency is not entitled to deference when it offers up an interpretation of [a regulation] that [courts] have already said to be

unambiguously foreclosed by the regulatory text." *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014) (citing *Christensen*, 529 U.S. at 588).

Based on the foregoing authority, the Court concludes § 106.33 is not ambiguous. It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth. *See* 34 C.F.R. § 106.33; 45 Fed. Reg. 30955 (May 9, 1980); *Thomas Jefferson Univ.*, 512 U.S. at 512 (holding that intent determined at the time the regulations are promulgated). It appears Defendants at least tacitly agree this distinction was the intent of the drafter. *See* Holder Memo 1, ECF No. 6-3 ("The federal government's approach to this issue has also evolved over time."); *see also* Hr'g Tr. 33 ("[I]t may very well be that Congress did not intend the law to protect transgender individuals.").

Additionally, it cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students. Pls.' Mot. Injunction 17–18, ECF No. 11 (citing legislative history and common understanding of its meaning at the time of passage). As the support identified by Plaintiffs shows, this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33. *See* Pls.' Am. Compl. ¶¶ 8–13, ECF No. 6; *see also G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (providing comprehensive list of various definitions from the 1970s which demonstrated "during that time period, virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions."). This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their "nude or

partially nude body, genitalia, and other private parts," and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy. *See G.G.*, 822 F.3d at 723.

This conclusion is also supported by the text and structure of the regulations. Section 106.33 specifically permits educational institutions to provide separate toilets, locker rooms, and showers based on sex, *provided* that the separate facilities are comparable. The sections immediately preceding and following § 106.33 likewise permit educational institutions to separate students on the basis of sex. For instance, § 106.32 permits educational institutions to provide separate housing for students on the basis of sex, again so long as the separate housing is comparable, and § 106.33 permits separate educational sessions for boys and girls when dealing with instruction concerning human sexuality. 34 C.F.R. §§ 106.32, 106.34. Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality, was to protect students' personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex. *G.G.*, 822 F.3d at 723. Accordingly, this interpretation of § 106.33 is consistent with the structure and purpose of the regulations.

Based on the foregoing, the Court concludes § 106.33 is not ambiguous. Given this regulation is not ambiguous, Defendants' definition is not entitled to *Auer* deference, meaning it does not receive controlling weight. *Auer*, 519 U.S. at 461. Instead, Defendants' interpretation is entitled to respect, but only to the extent it has the power to persuade. *Christensen*, 529 U.S. at 587. In his dissent in *G.G.*, Judge Niemeyer characterized Defendants' definition as "illogical and unworkable." *G.G.*, 822 F.3d at 737. He outlined a number of scenarios, which need not be repeated here, where the Defendants' interpretation only causes more confusion for educational

institutions. *Id.* A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased. *See Morton*, 415 U.S. at 237; *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (holding that an agency announcement of an interpretation preceded by a very lengthy period with no interpretation indicates agency considered prior practice lawful). Accordingly, the Court concludes Defendants' interpretation is insufficient to overcome the regulation's plain language and for the reasons stated above is contrary to law.

2. Threat of Irreparable Harm

The Court next addresses irreparable harm. Defendants allege that Plaintiffs have not identified any pending or imminent enforcement action, and the Guidelines "expose [P]laintiffs to no new liability or legal requirements." Defs.' Resp. 7, ECF No. 40 (citing *Google v. Hood*, 822 F.3d 212, 227 (5th Cir. 2016). Defendants argue that, "[a]lthough [P]laintiffs *do* identify a small number of specific 'policies and practices' that they claim are in conflict with [D]efendants' interpretation of Title IX, they have identified no enforcement action being taken against them—now or in the future—as a result of these polices." Defs.' Resp. 8–9, ECF No. 40. They assert that even if DOE were "to decide to bring an administrative enforcement action against plaintiffs for noncompliance . . . at some point in the future, [P]laintiffs *still* would be unable to make a showing of irreparable harm because they would have an opportunity to challenge the interpretation in an administrative process prior to any loss of federal funds." *Id.* at 9 (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975)).

Plaintiffs counter that "Defendants' actions cause irreparable harm by forcing policy changes, imposing drastic financial consequences, and usurping [Plaintiffs'] legitimate authority." Mot. Injunction 21, ECF No. 11. According to Plaintiffs, Defendants' actions

present "a Hobson's choice between violating federal rules (labeled as regulations, guidance, and interpretations) on the one hand, and transgressing longstanding policies and practices, on the other." *Id.* Thus, Plaintiffs characterize Defendants' administrative letters and notices as "mandates" which effectively carry the force of law. *Id.* Plaintiffs also allege that Defendants' rules are "irreconcilable with countless polices regarding restrooms, showers, and intimate facilities," while threatening to override the practices of "countless schools," which had previously been allowed to differentiate intimate facilities on the basis of biological sex consistent with Title IX, federal regulations, and laws protecting privacy and dignity. *Id.* (citing Mot. Injunction, Ex. P. (Thweatt Dec.) 5–7, ECF No. 11-2).

Defendants' appear to concede the Guidelines conflict with Plaintiffs' policies and practices, *see* Defs.' Resp. 8–9; ECF No. 40 ("[P]laintiffs do identify a small number of specific 'policies and practices' . . . ."); however, they argue that additional threats of enforcement are required before irreparable harm exists. Case law does not support this contention. Instead the authorities hold, "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." *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (stating, whenever an enactment of a state's people is enjoined, the state suffers irreparable injury); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., *in chambers*) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

As Defendants have conceded the conflict between the Guidelines and Plaintiffs' policies, and Plaintiffs have identified a number of statutes that conflict, the Court concludes Plaintiffs have sufficiently demonstrated a threat of irreparable harm.[20]

3. Balance of Hardships and Public Interest[21]

The Court next considers whether the threatened injury to the Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants and its impact on the public interest. *Nichols*, 532 F.3d at 372. Plaintiffs risk either running afoul of Defendants' Guidelines or complying and violating various state statutes and, in some cases, their state constitutions. Mot. Injunction 21, ECF No. 11. Plaintiffs also state that they likely risk legal action from parents, students, and other members of their respective communities should they actually comply with Defendants' Guidelines. Defendants argue these harms do not outweigh the damage that granting the injunction will cause because it will impede their ability to eliminate discrimination in the workplace and educational settings, prevent them from definitively explaining to the public the rights and obligations under these statutes, and it would have a deleterious effect on the transgendered.

The Court concludes Plaintiffs have established that the failure to grant an injunction will place them in the position of either maintaining their current policies in the face of the federal government's view that they are violating the law, or changing them to comply with the Guidelines and cede their authority over this issue. *See* DOJ/DOE Letter, ECF No. 6-10 ("This letter summarizes a school's Title IX obligations regarding transgender students and explains

[20] Defendants also contend the injunction should be denied because Plaintiffs delayed in seeking this relief. The DOJ/DOE Letter is dated May 13, 2016. This case was filed very soon after on May 25, 2016, and the parties reached an agreement on a briefing schedule to consider this request. The Court concludes Plaintiffs did not fail to act timely.

[21] The Parties address the third and fourth Canal factors together, therefore they are treated together in this Order as well.

how [DOE and DOJ] evaluate a school's compliance with these obligations."). Plaintiffs' harms in this regard outweigh those identified by Defendants, particularly since the Supreme Court stayed the Fourth Circuit's decision supporting Defendants' position, and a decision from the Supreme Court in the near future may obviate the issues in this lawsuit. As a result, Plaintiffs interests outweigh those identified by Defendants. Further, Defendants have not offered evidence that Plaintiffs are not accommodating students who request an alternative arrangement. Indeed, the school district at issue in *G.G.* provided its student an accommodation.

Accordingly, the Court finds that Plaintiffs have met their burden and these factors weigh in favor of granting the preliminary injunction.

C. Scope of the Injunction

Finally, the Court must determine the scope of the injunction. Plaintiffs seek to apply the injunction nationwide. Mot. Injunction 3, ECF No. 11; Pls.' Reply 13, ECF No. 52. Defendants counter that the injunction should be narrowly tailored to Plaintiffs in the Fifth Circuit. Defs.' Resp. 28, ECF No. 40.

"Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.* at 702 (permitting a nationwide injunction because the class action was proper and finding that a nationwide injunction was not more burdensome than necessary to redress plaintiffs' complaints).

The Court concludes this injunction should apply nationwide. As the separate facilities provision in § 106.33 is permissive, states that authorize schools to define sex to include gender

identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by it. Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation. However, an injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of the state law. As such, the parties should file a pleading describing those cases so the Court can appropriately narrow the scope if appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' application for a preliminary injunction (ECF No. 11) should be and is hereby **GRANTED**. *See* Fed. R. Civ. P. 65. It is **FURTHER ORDERED** that bond is set in the amount of one hundred dollars.[22] *See* Fed. R. Civ. P. 65(c). 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. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals. This preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other

[22] Neither party addressed the appropriate bond amount should an injunction be entered.

persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).

SO ORDERED on this **21st day** of **August, 2016.**

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT,	)	
PLAINTIFF,	)	CASE NO. 2:16-CV-524
vs.	)	SEPTEMBER 20, 2016
U.S. DEPARTMENT OF EDUCATION, et al.,	)	2:00 P.M.
DEFENDANTS.	)	

TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFF:

Alliance Defending Freedom
By: DOUGLAS G. WARDLOW, ESQ.
GARY S. MCCALEB, ESQ.
JEANNA HALLOCK, ESQ.
STEVEN O'BAN, ESQ.
15100 North 90th Street
Scottsdale, Arizona 85260

Langdon Law LLC
By: DAVID R. LANGDON, ESQ.
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069

- - -

Proceedings recorded by mechanical stenography, transcript produced by computer.

be a girl in order to access those facilities, one has not materialized, but that those administrators have been able to implement those policies in a way that ensures the dignity and privacy of all students in school.

THE COURT: Well, there have been affidavits submitted by parents. And the parents theoretically, at least, are reflecting some of the concerns of their students. In this calculus, where do I place the concerns of other girls who don't want to be viewed or share a bathroom with someone who, under Mr. Wardlow's definition, is biologically a boy, a person who has male genitalia? What deference should the Court give to those interests of those students?

MR. ORR: First, Your Honor, I would not say that Jane has male genitalia. But secondly, school districts have shown that --

THE COURT: Jane doesn't have male genitalia?

MR. ORR: No. As I indicated, gender and sex are much more complex than that. I think it would be inappropriate to label any part of her body as male.

THE COURT: How do you label, then, the means through which she excretes liquid waste?

MR. ORR: Your Honor, having not ever seen her body, I don't know. But I think it's important --

THE COURT: Has she had sex reassignment surgery?

MR. ORR: No. That would be inconsistent with

standard --

THE COURT: So unless she's an intersex individual - and I don't think that the record reflects that she is - she would likely have a penis. Wouldn't you agree?

MR. ORR: Likely, Your Honor.

THE COURT: That's typically associated with male genitalia. You would agree with that?

MR. ORR: Our society has defined that as male genitalia, yes.

THE COURT: And it's generally accepted that that's one physical indicia of being male, correct?

MR. ORR: Yes, but I think it can be an inaccurate one.

THE COURT: Well, this case is proof positive that it can be an inaccurate one. But if the individual with the penis doesn't suffer from gender dysphoria, typically that individual is considered male.

MR. ORR: That is typically a good proxy for their gender identity.

THE COURT: All right.

MR. ORR: With regards to --

THE COURT: Going back now that we have -- let's assume, then, for the purpose of my argument that Jane Doe has a penis. What about those students who are possessed of what we would consider female genitalia, what about those students

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Court Minutes

DATE:	September 6, 2016
JUDGE:	Pamela Pepper
CASE NO:	2016-cv-943
CASE NAME:	Ashton Whitaker v. Kenosha United School District No. 1 Board of Education, *et al.*
NATURE OF HEARING:	Oral arguments on the motion to dismiss and motion for preliminary injunction
APPEARANCES:	Joseph J. Wardenski, Ilona Turner, Robert Theine Pledl - Attorneys for the plaintiff Ronald S. Stadler, Jonathan E. Sacks - Attorneys for defendants
COURTROOM DEPUTY:	Becky Ray
TIME:	3:33:50 – 5:20:41
ADJOURNED DATE:	Oral decision on motion to dismiss—September 19, 2016 at 3:30 p.m. by telephone

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The court told the parties that it thought it best to start with the arguments on the motion to dismiss (Dkt. No. 14), given that the resolution of that motion might determine the need for further proceedings on the motion for preliminary injunction. The court then allowed the parties to argue the motion to dismiss, starting with the defendants.

Counsel for the defendant told the court that the plaintiffs' argument revolved around the claim that one has a right to declare one's own gender, and then to demand Title IX protection based on that declaration. He argued that there was no precedent to support this claim, and said it was clear that transgender individuals are not protected under Title IX. Counsel began with the language of Title IX, which stated that educational institutions could not discriminate based on "sex," and that it made no mention of gender identity. While acknowledging the Fourth Circuit's Title VII decision to the contrary in *G.G. v. Gloucester City School Board*, counsel argued that the Northern District of Texas had cast doubt whether *G.G.* would be able to stand. He also argued that *Carcaño v. McCrory*, which the plaintiffs cieted in their moving papers, did not have persuasive authority.

Counsel argued that Title VII and IX both prohibit discrimination based on sex, and that "sex" equals the biological gender reflected on one's birth certificate. and states you cannot treat men differently than women because sex equals gender. Counsel discussed in detail cases such as *Hively v. Ivy Tech Community College*, in which courts (in that case, the Seventh Circuit) had found that sexual orientation was not encompassed by the word "sex," or protected under Title VII. Counsel argued that if the meaning of the word "sex" was to be expanded to include gender identity, then it was up to Congress to

make that expansion. Counsel also argued that Title IX and its regulations allow schools to segregate bathrooms, locker rooms, and living facilities by gender; a ruling including under its protection transgender persons would be contrary to that authority.

Counsel also addressed the Department of Education's "dear colleague" letter. He argued that it was just that—a letter—and constituted neither a regulation or a law. As such, he argued that it was entitled to neither *Chevron* deference nor *Auer* deference. He told the court that there was no ambiguity in the statute, and so no need for administrative deference, and reiterated that the "dear colleague" letter contradicted statutory and regulatory authority to segregate based on sex.

Counsel conceded that individuals who identify as transgender have had success arguing sex stereotyping in the context of Title VII, but told the court that the plaintiffs had not alleged sex stereotyping. The sole issue under Title IX, he argued, was whether its protection against discrimination based on "sex" included a prohibition on discrimination against transgender individuals.

With regard to the equal protection claim, counsel told the court that the Supreme Court has never held that transgender is entitled to higher scrutiny. He argued that the standard of review applicable under the circumstances of this case was rational basis, and that *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education* outlined the rational reasons behind policies and rules segregating men and women when it comes to bathrooms, locker rooms and living facilities.

Counsel for the plaintiffs began by sharing some personal information about plaintiff Ash Whitaker. Counsel explained that while Ash's assigned sex at birth was female, and while he was, for a time, raised as a female, he is a boy. According to his pediatrician, counsel said, Ash is a transgender boy who should be treated as such in all aspects of his life.

Counsel argued that under Title IX, 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 by a federal funding recipient. He told the court that the defendant was a federal funding recipient.

While the defendants had argued that Title IX's reference to "sex" refers to males versus females, counsel argued that case law had broadened the definition to encompass gender identity. The plaintiffs referred the court to several gender stereotyping cases, and to Justice Scalia's opinion in *Oncale v. Sundowner Offshore Services, Inc.* Justice Scalia, counsel argued, had noted that Congressional intent must be disregarded in favor of the broad sweep of the statutory text to include all forms of sex and gender based discrimination.

Counsel told the court that the plaintiffs were not asking the court to create a third sex (transgender); they were asking the court to find that Ash should be treated as what he is--a boy.

Counsel went into detail about how Ash had been treated by the defendants—he had been denied access to the boys' restroom at school, and told either to use a single occupancy restrooms to which only he has a key or to use the girls' restroom. Counsel stated that some staff members refuse to identify Ash by that name, and call him by his birth name. Counsel stated that the burden has been placed on Ash to inform substitute teachers to call him by Ash instead of his birth name. He also argued that the defendant had refused to follow Ash's pediatrician's recommendation that, because Ash is a boy who suffers from gender dysphoria, proper treatment would be to allow him to use the boys' restroom.

Counsel told the court that five circuit courts have held that transgender people are protected by the nation's sex discrimination laws, including Title VII and Title IX. Counsel stated that these courts have held that a transgender person is protected if he or she is discriminated against due to gender identity or a perceived failure to fit sex stereotypes. Turning to the Seventh Circuit's decision in *Ulane v. Eastern Airlines, Inc.*, upon which the defendants rely, counsel asserted that the defendants were relying on a thirty-two-year-old case that did not define transgender in the same manner we do today, and did not reflect the current knowledge regarding transgender individuals. He argued that gender dysphoria does not mean that being transgender is a disorder, but that being transgender can result in issues such as anxiety, depression, etc. Counsel argued that at that time (the1980s), the Seventh Circuit had a fundamental misunderstanding of what a transgender person was, in comparison to the contemporary understanding of who transgender people are. Counsel argued that such views had changed in the last thirty-five years or so, asserting that the Fair Housing Act, the Affordable Care Act, and other statutes, as well as agencies of the federal government, have started to consider gender identity discrimination as a form of sex discrimination based on the premise that gender identity is a fundamental part of one's sex.

Counsel stated that the text of Title IX revolves around whether a student has been treated differently based on sex and has suffered educational and/or other consequences. He argued that the answer to both of those questions in Ash's case was yes. There are ample examples in the complaint to survive a motion to dismiss.

With regard to the equal protection claim, counsel argued that the appropriate standard of review was heightened scrutiny. He told the court that the Eighth Circuit had found that a transgender woman's presence in a

women's restroom did not violate another woman's privacy interests; the second woman's privacy interests did not trump a transgender individual's rights. Counsel argued that, rather than protecting the privacy rights of others, requiring a transgender man to use a women's restroom could raise privacy concerns for the women using that bathroom. Counsel argued that the defendants had yet to explain how excluding a transgender boy from the boys' restroom effected any other students' privacy interests, and told the court that Ash's presence in a boys' restroom was not a *de facto* privacy violation.

Counsel concluded with the fact that the Seventh Circuit never has revisited the question of whether gender identity discrimination or discrimination against a transgender person is actionable under any sex discrimination statute.

Counsel for the defendants reminded the court that this case involves a Title IX claim, not a claim under Title VII. He argued that in a school with 700+ students, having someone who was a biological girl use the boys' restrooms raised a host of privacy issues. With regard to the plaintiffs' criticisms of the *Ulane v. Eastern Airlines, Inc.* decision, counsel argued that the age of case didn't change the fact that it was still good law, and had not been overturned.

The court asked several questions. It noted that the defendants had argued that sex or biological gender was what was reflected on the birth certificate, while the plaintiffs had argued that gender consisted of more than chromosomes/genitalia. The court asked the defendants whether they could point to any case that defined "sex" as the gender reflected on one's birth certificate. Counsel for the defendants responded that he had not found such a case. He did point out one case in which an individual who had undergone a sex change operation had officially changed the person's birth certificate. The court also asked whether counsel believed that *Ulane* would be decided the same way today. Counsel for the defendants stated that it would be, because the language of the statute which *Ulane* interpreted has not changed.

The court enquired, in the context of deference, whether the word "sex" was ambiguous if Congress did not define it in the statute, given some of the recent case law the parties had been discussing. Counsel for the defendants responded that when Congress passed Title IX, the word "sex" was not ambiguous—it was understood to mean the biological gender one possessed at birth. The court followed up by asking how counsel squared that legislative intent argument with Justice Scalia's opinion in *Oncale v. Sundowner Offshore Services, Inc.* that legislative intent should be disregarded if the entire text of the statute warranted a broader reading. Counsel for the defendants argued that *Oncale* involved a claim of a male sexually harassing another male—a

claim that was based on "sex" as he had defined it today, and as he believed Congress had understood it at the time it passed Title VII.

The court asked counsel for the plaintiffs whether he could cite to any cases in which the word "sex" had been defined more broadly than one's biological gender at birth—in other words, that defined "sex" as something other than chromosomes or the genitalia with which a person is born. Counsel stated that he believed that the Seventh Circuit's 1997 case, *Doe v. City of Belleville* did so, but asked to be allowed to confirm that.

In response to the court's question regarding congressional intent, counsel for the plaintiffs argued that Congress' failure to change its law is not necessarily indicative of its intent. He told the court that members of Congress had filed *amicus* briefs in several of the cases he'd cited, and that there was legislation pending which pointed to a general congressional intent to broaden the definition of sex.

The court noted that Title IX and its regulations gave schools discretion to create segregated restrooms, and asked whether the relief the plaintiffs requests would not gut that discretion. Counsel for the plaintiffs responded that such relief would not prohibit schools from having segregated bathrooms; it simply allow all boys to use the boys' bathroom, and all girls to use the girls' bathrooms. The court asked, referring to *Joe v. Clark County*, how the inability to use the restroom of one's choice thwarted a student's educational opportunities. Counsel responded that in this case, it reduced Ash's class time, partly because the individual restroom is further than boys' and girls' restrooms, and partly because the defendants take him out of class to discuss his bathroom usage with him. He also argued that the attention and stigma to which Ash is subject as a result of the defendants' actions impact his school work and focus. He also stated that the *Joe* case was distinguishable, because in that case, the student had yet to enroll in the school.

Counsel for the plaintiffs commented that the issue of locker rooms was not involved in this case. Counsel for the defendants responded that it was relevant, because Ash planned to play tennis in the 2016-17 school year. Counsel for the plaintiffs told the court that Ash does not want to use the boys' lockers rooms and does not intend to use them. Counsel for the defendants responded that the plaintiffs could not pick and choose; a ruling regarding bathroom use would necessarily have implications for locker room use, shared housing on trips away from school, and other issues.

Given the lateness of the hour, the court proposed that it find a time at a later date to give the parties an oral decision on the motion to dismiss, so the parties would know whether they needed to prepare to argue the motion for a preliminary injunction. The court scheduled its oral decision on the motion to

dismiss for **September 19, 2016 at 3:30 PM**. Any party wishing to appear by phone may do so by calling the court's conference line at 888-557-8511 and use access code 4893665#.

Counsel for the plaintiffs asked whether the court would consider hearing argument on a request for a temporary restraining order until the September 19 date. Counsel for the defendants opposed that request. The court indicated that, while it in no way meant to trivialize the stress Ash was experiencing, given the fact that the oral decision on the motion to dismiss was forthcoming shortly, it would wait until September 19th to discuss issues regarding the injunction. The court denied the plaintiffs' request to hear argument on a motion for a temporary injunction.

EXHIBIT 4

No. A16-_____

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G., by his next friend and mother, Deirdre Grimm,
Respondent

PETITIONER'S APPLICATION FOR RECALL AND STAY OF THE U.S. FOURTH CIRCUIT'S MANDATE PENDING PETITION FOR CERTIORARI

Directed to the Honorable John G. Roberts, Jr.
Chief Justice of the Supreme Court of the United States and
Circuit Justice for the United States Court of Appeals for the Fourth Circuit

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER, JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
Tel: (804) 747-5200
dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner Gloucester County School Board

July 13, 2016

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Applicant Gloucester County School Board ("Board") respectfully requests a recall and stay of the Fourth Circuit's mandate, pending this Court's disposition of the Board's forthcoming certiorari petition. Additionally—because it is necessary in aid of this Court's jurisdiction and to prevent irreparable harm to the Board and its students—the Board respectfully requests a stay of the district court's injunction, which was immediately entered following issuance of the Fourth Circuit's mandate.

INTRODUCTION

This case presents one of the most extreme examples of judicial deference to an administrative agency this Court will ever see, thereby providing the perfect vehicle for revisiting the deference doctrine articulated in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and subsequently criticized by several Justices of this Court.

Enacted over forty years ago, Title IX and its implementing regulations have always allowed schools to provide "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. No one ever thought this was discriminatory or illegal. And for decades our Nation's schools have structured their facilities and programs around the sensible idea that in certain intimate settings men and women may be separated "to afford members of each sex privacy from the other sex." *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996).

The Fourth Circuit's decision in this case turns that longstanding expectation upside down. The court reasoned that the term "sex" in the applicable Title IX regulation does not simply mean biological males and females, which is what Congress and the Department of Education (and everyone else) thought the term

meant when the regulation was promulgated. To the contrary, the Fourth Circuit now tells us that "sex" is ambiguous as applied to persons whose "gender identity" diverges from their biological sex. App. A-21 to A-24. According to the Fourth Circuit, this means that a biologically female student who self-identifies as a male—as does the plaintiff here—must be allowed under Title IX to use the boys' restroom.

The Fourth Circuit reached this conclusion, not by interpreting the text of Title IX or its implementing regulation (neither of which refers to "gender identity"), but instead by deferring to an agency opinion letter written last year by James Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights. App. J-1. The letter is unpublished; it disclaims any definite opinion on how Title IX applies to transgender persons in any specific situation; its advice has never been subject to notice-and-comment; and it was generated in response to an inquiry about the School Board's restroom policy *in this very case*. Nonetheless, the Fourth Circuit concluded—over Judge Niemeyer's vehement dissent—that the opinion letter was due "controlling" deference under *Auer*. App. A-26. The Fourth Circuit denied the School Board's motions for *en banc* rehearing and to stay the mandate; on remand, the district court immediately entered a preliminary injunction allowing the plaintiff to use the boys' restroom during the upcoming school year that starts on September 6.

The School Board intends to file its certiorari petition by the current due date of August 29, 2016. In the interim, however, it urgently needs a stay of the

underlying action—including the preliminary injunction—in order to avoid irreparable harm to the Board, to the school system, and to the legitimate privacy expectations of the district's schoolchildren and parents alike. Moreover, as Judge Niemeyer pointed out in his dissent from the denial of the Board's stay request, App. G-6, the Fourth Circuit's application of *Auer* to the Title IX regulation at issue has assumed "nationwide" importance—given that the Department of Justice and the Department of Education have now promulgated a "guidance" document, expressly relying upon the Fourth Circuit's decision, that seeks to impose the Departments' Title IX interpretation on every school district in the Nation and, indeed, to extend that interpretation beyond restrooms to locker rooms, showers, single-sex classes, housing, and overnight accommodations.

Consequently, this application asks for two things: *first*, a recall and stay of the Fourth Circuit's *G.G.* mandate; and *second*, a stay of the preliminary injunction subsequently issued by the district court, which was based entirely on *G.G.* This will restore the *status quo ante* pending filing and disposition of the Board's certiorari petition, due on August 29. Alternatively, the Court could simply recall and stay the Fourth Circuit's *G.G.* mandate without also staying the preliminary injunction. In that event, the Board would immediately ask the district court to stay or vacate its preliminary injunction, a request the district court would presumably grant given that the injunction turned on *G.G.* App. E-1. However, the Board believes the better course is for this Court to stay the injunction at the same time it recalls and stays the *G.G.* mandate, something it has authority to do under

the All Writs Act, 28 U.S.C. § 1651(a). That would allow the Court to accord complete relief to the Board pending disposition of its certiorari petition.

QUESTIONS PRESENTED

1. Should the doctrine of judicial deference to agency interpretations of their own regulations—as expressed in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)—be overruled or modified?

2. Assuming that *Auer / Seminole Rock* deference is retained, can it properly be applied where, among other things, the agency interpretation (a) does not carry the force of law, (b) was developed in the context of the very litigation in which deference is sought, and (c) diverges from the understanding of the regulation when it was promulgated?

3. With or without deference to the agency, can the prohibition on "sex" discrimination in Title IX and its implementing regulations properly be extended to discrimination on the basis of a person's subjective "gender identity"?

BACKGROUND

A. Facts

1. G.G. is a 17 year old student at Gloucester High School in Gloucester County, Virginia. G.G. is biologically female, but from an early age G.G. "did not feel like a girl." App. A-2; App. H-1. In G.G.'s words, "[a]t approximately age twelve, I acknowledged my male gender identity to myself." App. H-2.

During G.G.'s 2013-14 freshman year at Gloucester High School, G.G. began therapy and was diagnosed with gender dysphoria, a condition described by the American Psychiatric Association as the "distress that may accompany the incongruence between one's experienced and expressed gender and one's assigned gender." App. A-3 & n.4 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013)); H-2. The

therapist recommended that G.G. "immediately begin living as a boy in all respects," including "using a male name and pronouns and using boys' restrooms." App. A-3; App. H-2. The therapist also recommended that G.G. "see an endocrinologist and begin hormone treatment." App. H-2. In July 2014, G.G. legally changed her female name to a male name and now refers to herself using male pronouns. App. A-3; App. H-2.

2. In August 2014, before the beginning of the 2014-15 sophomore year, G.G. and his mother met with the Gloucester High School principal and guidance counselor to discuss G.G.'s "need … to socially transition at school as part of [G.G.'s] medical treatment." App. H-3. The school officials accommodated all of G.G.'s requests and "expressed support for [G.G.] and a willingness to ensure a welcoming environment for [G.G.] at school." *Id.* School records were changed to reflect G.G.'s new male name, and the guidance counselor helped G.G. send an email to teachers explaining that G.G. was to be addressed by the male name and pronouns. G.G. was also permitted to continue with a home-bound physical education program "while returning to school for the rest of [G.G.'s] classes," because G.G. did not wish to use the school's locker room. *Id.*

G.G. initially agreed to use a separate restroom in the nurse's office because G.G. was "unsure how other students would react to [G.G.'s] transition." *Id.* However, after the school year began G.G. "quickly determined that it was not necessary … to continue to use the nurse's restroom" and also "found it stigmatizing

to use a separate restroom." App. H-4. Consequently, the school principal allowed G.G. to use the boys' restroom beginning on October 20, 2014. *Id.*

3. The next day, however, the Gloucester County School Board began receiving numerous complaints from parents and students about G.G.'s use of the boys' restroom. App. L-1. The Board considered the problem and, after two public meetings, see App. A-4 to A-5, adopted the following restroom and locker room policy on December 9, 2014:

> Whereas the GCPS [*i.e.*, Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

App. A-4; App. L-2. The School Board immediately had three single-stall unisex bathrooms installed at Gloucester High School, which were operational by December 16, 2014. App A-5 to A-6. These bathrooms are for all students, regardless of their biological sex or gender identity. App. L-2.

4. In December 2014, a request for an opinion on the Gloucester School Board policy was sent to the U.S. Department of Education, which referred the matter to its Office for Civil Rights ("OCR"). App. A-13; App. B-15; App. B-51; App. I-1. Shortly thereafter, on January 7, 2015, the OCR responded in relevant part:

> 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. OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

App. J-2 ("OCR Letter").

B. District Court proceedings

1. G.G. sued the School Board in federal district court in June 2015, alleging that its restroom and locker room policy violates the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. G.G. sought declaratory relief, injunctive relief, and damages. The Board moved to dismiss G.G.'s claims for failure to state a claim. App. A-6 to A-7.

2. Following a hearing, the district court dismissed G.G.'s Title IX claim for failure to state a claim and denied a preliminary injunction. (The court did not rule on G.G.'s equal protection claim but took the claim under advisement.) App. A-7. The court concluded that the Title IX claim was "precluded by Department of Education regulations"—specifically, by the 1975 regulation allowing "separate toilet, locker room, and shower facilities on the basis of sex," provided that "such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." App. A-11 (citing 34 C.F.R. § 106.33). The court reasoned that the regulation "specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable," and

thus concluded that "the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex." App. A-12.

The court also rejected the United States' argument—made in a "Statement of Interest"—that the Department of Education's OCR Letter should receive deference under *Auer* v. *Robbins*. *See* App. A-14 (an agency's interpretation of its own regulation is given controlling weight under *Auer* "if (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation") (citing *Christensen* v. *Harris Cnty*., 529 U.S. 576, 588 (2000)). First, the court found that the regulation at issue "is not ambiguous" because "it clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." App. A-14. Second, the court found that the agency interpretation was "plainly erroneous and inconsistent with the regulation" because it would supplant the concept of "sex" with "gender," a result supported by neither the regulation's text or history and one contradicted by the United States' own briefing. App. A-14 to A-15.

Furthermore, the district court noted that the OCR Letter was supported only by a December 2014 "guidance document" concerning claims of gender identity discrimination—not in restrooms or locker rooms—but in "single-sex classes." App. A-13 to A-14.[1] The court also observed that, "[d]espite the fact that Section 106.33

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[1] See Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 25 (Dec. 1, 2014).

[2] See*, e.g., Mullins Coal Co. of Va.* v. *Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (warning *Seminole Rock* deference is not "a license for an agency effectively to rewrite a regulation through interpretation"); John F.

has been in effect since 1975, the Department does not cite any documents published before 2014 to support the interpretation it now adopts." *Id.* at A-14. The court thus reasoned that, to defer to the Department's "newfound interpretation … would be nothing less than to allow the Department … to 'create a *de facto* new regulation' through the use of a mere letter and guidance document." *Id.* at A-15 (quoting *Christensen*, 529 U.S. at 588). The Department, the court held, could accomplish such an amendment to its regulations only "through notice and comment rulemaking, as required by the Administrative Procedure Act." App. A-15 (citing 5 U.S.C. § 553).

C. Fourth Circuit proceedings

G.G. appealed to the Fourth Circuit, which reversed the district court and concluded in a 2-1 decision that the OCR Letter merits *Auer* deference.

1. First, the panel majority considered whether the Title IX regulation at issue "contains an ambiguity." App. B-18. With respect to the regulation's text, the panel had "little difficulty concluding that the language itself—'of one sex' and 'of the other sex'—refers to male and female students." App. B-19 (quoting 34 C.F.R. § 106.33). With respect to the regulation's "specific context," the panel likewise found that its "plain meaning" was that "the mere act of providing separate restroom facilities for male and females does not violate Title IX." *Id.* (internal quotations omitted). And with respect to the regulation's "broader context," the panel also concluded that "the only reasonable reading" of the language was "that it references male and female." App. B-19 & n.6. The panel thus concluded that,

"plainly," the regulation at issue "permits schools to provide separate toilet, locker room, and shower facilities for its male and female students," and also "permits schools to exclude males from the female facilities and vice-versa." App. B-19.

Despite this "straightforward conclusion," the majority nonetheless found that the regulation was ambiguous because "it is silent as to how a school should determine whether a transgender individual is a male or a female for the purpose of access to sex-segregated restrooms." App. B-20. The panel believed the regulation was "susceptible to more than one plausible reading"—namely, the School Board's reading that "determin[es] maleness or femaleness with reference exclusively to genitalia," and the Department's contrary reading that "determin[es] maleness or femaleness with reference to gender identity." *Id.* The panel therefore concluded that the Department's interpretation "resolves ambiguity" in the regulation by providing that a transgender student's "sex as male or female is to be determined by reference to the student's gender identity." *Id.*

2. Second, the panel considered whether the Department's interpretation was "plainly erroneous or inconsistent with the regulation or statute." App. B-21 (citing *Auer*, 519 U.S. at 461). Observing that the regulation was promulgated in 1975 and adopted unchanged by the Department in 1980, the panel consulted "[t]wo dictionaries from the drafting era [to] inform [its] understanding of how the term 'sex' was understood at that time." App. B-22. The panel cited the American College Dictionary's 1970 definition of "sex" as "the sum of those anatomical and physiological differences with reference to which male and female are

distinguished." *Id.* (quoting AMERICAN COLLEGE DICTIONARY 1109 (1970)). It also cited Webster's Third New International Dictionary, which in 1971 defined "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change," and which "in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness." App. B-22 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1181 (1971)).

The panel conceded that these definitions suggested that, "at the time the regulation was adopted," the word "sex" was understood "to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed 'biological sex,' namely reproductive organs." App. B-22. Nonetheless, the panel thought that the definitions' use of qualifiers (like "sum of" and "typical") suggested that "a hard-and-fast binary division on the basis of reproductive organs … was not universally descriptive." App. B-22 to B-23. In any event, the panel concluded that the regulation at issue "assumes a student population composed of individuals of what has traditionally been understood as the usual 'dichotomous occurrence' of male and female where the various indicators all point in the same direction." App. B-23. As promulgated, then, the regulation "sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge." *Id.* The panel therefore found that the

Department's interpretation of how the regulation should apply to transgender individuals—"although perhaps not the intuitive one"—is not "plainly erroneous or inconsistent with the text of the regulation." *Id.*

3. Third, the panel considered whether the Department's interpretation was a result of its "fair and considered judgment"—specifically, whether it was "no more than a convenient litigating position, or … a *post hoc* rationalization." App. B-24 (citing *Christopher* v. *Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)).

The panel concluded that the Department's interpretation was not a "convenient litigating position" because the Department has "consistently enforced this position since 2014" in two enforcement actions regarding transgender students' access to restrooms. App. B-25. The panel also concluded that the Department's interpretation was not a "*post hoc* rationalization" because "it is in line with the existing guidances and regulations of a number of federal agencies." App. B-25 to B-26.

The panel did concede that the Department's interpretation was "novel," given that "there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015." App. B-24. It nonetheless thought this was no reason to deny the Department's interpretation *Auer* deference, since the issue of transgender students' access to restrooms consistent with their gender identity "did not arise until recently." *Id.* (internal quotations omitted).

4. The panel also reversed the district court's denial of G.G.'s motion for preliminary injunction and remanded the case to the district court for further consideration of the evidence. App. B-33.

5. Judge Niemeyer vigorously dissented from the majority's decision to grant *Auer* deference to the interpretation of the Title IX regulation at issue. Calling the decision "unprecedented," Judge Niemeyer criticized the majority for "misconstru[ing] the clear language of Title IX and its regulations" and "reach[ing] an unworkable and illogical result." App. B-47 to B-48.

First, Judge Niemeyer emphasized that the majority's holding with respect to the definition of "sex" in Title IX and its implementing regulations "relies entirely on a 2015 letter sent by the Department of Education's Office of Civil Rights *to G.G.*" App. B-46 (emphasis added). As Judge Niemeyer pointed out, not only is the letter "*not* law," but the letter actually approves the Board's policy by encouraging schools "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." App. B-48.

Second, contrary to the majority's reasoning, Judge Niemeyer explained that "Title IX and its implementing regulations are not ambiguous" in providing for separate restrooms, locker rooms, and showers on the basis of "sex." App. B-48. To the contrary, those provisions "employ[ ] the term 'sex' as was generally understood at the time of enactment," as referring to "the physiological distinctions between males and females, particular with respect to their reproductive functions." App. B-61 to B-63 (quoting five dictionary definitions of "sex" from 1970 to 1980).

Consequently, Judge Niemeyer would have found that the major premise for applying *Auer* deference—*i.e.*, that the regulation is ambiguous—was absent.

Third, Judge Niemeyer explained that the Department's conflation of "sex" in Title IX with "gender identity" would produce "unworkable and illogical result[s]," and would undermine the very concerns with bodily privacy and safety that motivated the regulation's express allowance of sex-separated restrooms and locker rooms in the first place. App. B-48, B-57 to B-60. By making "gender identity" determinative of "sex," the Department's interpretation "would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex," and, even if a school attempted to do so, "enforcement of any separation would be virtually impossible." App. B-65, B-66.

Furthermore, Judge Niemeyer recognized that underlying Title IX's allowance of sex-separated restrooms, locker rooms, and showers are "commonplace and universally accepted … privacy and safety concerns arising from the biological differences between males and females." App. B-57. Interpreting the word "sex" to encompass "gender identity," however, would severely undermine Title IX's goal of protecting privacy and safety in intimate settings. For instance, "a biological male identifying as female could hardly live in a girls' dorm or shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower." App. B-60. Indeed, these concerns with privacy and safety are no mere policy preferences but are instead interests of constitutional magnitude. As Judge Niemeyer explained, "courts have consistently

recognized that the need for such privacy is inherent in the nature and dignity of humankind." App. B-57 to B-58 (and collecting cases).

6. Following the decision, the School Board timely moved for *en banc* rehearing, which the panel denied on May 31, 2016. App. C-2. Dissenting, Judge Niemeyer explained that he had declined to call for an *en banc* poll of his colleagues only because "the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application." App. C-4.

7. The School Board then timely moved for a stay of the Fourth Circuit's mandate pending filing of a certiorari petition to this Court. The panel—again over Judge Niemeyer's dissent—denied the School Board's request on June 9, 2016. App. D-3. The Fourth Circuit's mandate subsequently issued on June 17, 2016.

8. Immediately thereafter, on June 23, 2016, the district court entered a preliminary injunction requiring the Board to allow G.G. to use the boys' restroom. App. E-2. The district court did so without giving the Board any notice, nor allowing the Board to submit additional evidence or briefing in opposition to G.G.'s preliminary injunction request. On June 27, the School Board appealed the preliminary injunction to the Fourth Circuit, and on June 28 asked the district court to stay the injunction pending appeal or pending resolution of this application. The district court denied those requests on July 6. App. F-2.

9. That same day, the Board filed an emergency motion asking the Fourth Circuit to stay the injunction pending appeal or pending resolution of this

application. The Fourth Circuit denied those requests on July 13. App. G. Again dissenting, Judge Niemeyer would have granted the stay because:

- the *G.G.* decision underlying the injunction was "groundbreaking" and "unprecedented"; violated the "clear, unambiguous language of Title IX"; and was a "questionable" application of *Auer* to "a letter from the U.S. Department of Education, imposing an entirely new interpretation of 'sex' in Title IX without the support of any law" (App. G-5);

- the injunction will deprive Gloucester High School students of "bodily privacy when using the facilities" which is "likely to cause disruption in the school and among the parents" (*id.*);

- staying the injunction would not substantially harm G.G. because "the School Board has constructed three unisex bathrooms to accommodate any person" (*id.*); and

- the public interest supports a stay because "the changes that this injunction would require—and that the Department of Justice and Department of Education now seek to impose nationwide on the basis of our earlier decision—mark a dramatic departure from the responsibilities of local school boards have heretofore understood and the authorizations that Congress has long provided."

App. G-5 to G-6.

10. Absent a recall and stay of the Fourth Circuit's mandate—including a stay of the subsequently issued preliminary injunction—the School Board will have to decide how to respond to the Fourth Circuit's decision and the district court's injunction in preparation for the coming school year, which begins on September 6.

JURISDICTION

The final judgment of the Fourth Circuit on appeal is subject to review by this Court under 28 U.S.C. § 1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a recall and stay of the mandate pending filing of a petition for certiorari under 28 U.S.C. § 2101(f). Additionally, this Court has

jurisdiction to entertain and grant a stay of the subsequently-issued preliminary injunction pursuant to its authority to issue stays in aid of its jurisdiction under 28 U.S.C. § 1651(a).

REASONS FOR GRANTING A RECALL AND STAY OF THE MANDATE

The standards for granting a stay pending review are "well settled." *Deaver* v. *United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers); *see also, e.g., Teva Pharms. USA, Inc.* v. *Sandoz, Inc.*, 134 S. Ct. 1621, 1621 (2014) (Roberts, C.J., in chambers) (applying same standards to application for recall and stay of mandate). Preliminarily, the applicant must show that "the relief is not available from any other court or judge," Sup. Ct. R. 23.3—a conclusion established here by the fact that the Fourth Circuit denied the School Board's timely motion to stay issuance of its mandate, and to stay the subsequently issued injunction, pending filing of the board's certiorari petition. App. D-3. A stay is then appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 189 (2010) (per curiam). Moreover, in close cases the Circuit Justice or the Court will "balance the equities" to explore the relative harms to applicant and respondent, as well as the interests of the public at large. *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Each of these considerations points decisively toward issuing a recall and stay of the Fourth Circuit's mandate—as well as a stay of the

subsequently issued preliminary injunction—pending the Court's disposition of the School Board's forthcoming certiorari petition.

I. There is a strong likelihood that the Court will grant certiorari to review the Fourth Circuit's decision.

A. This case presents an ideal vehicle to reconsider the doctrine of Auer *deference.*

The Court is likely to review in the decision below because it cleanly presents an issue on which several members of the Court have expressed increasing interest over the past five years—namely, whether *Auer* should be reconsidered.

The origins of *Auer* deference lie in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945), which expressed in *dicta* the unsupported principle that a court must give "controlling" deference to an agency's interpretation of its own ambiguous regulation. The doctrine has long been subject to judicial and scholarly criticism.[2] Nonetheless, "[f]rom … [*Seminole Rock's*] unsupported rule developed a doctrine of deference that has taken on a life of its own" and "has been broadly applied to regulations issued by agencies across a broad spectrum of subjects." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1214 (2015) (Thomas, J., concurring in the judgment).

In the last five years, however, several members of this Court have called for reconsideration of the doctrine. In 2011, Justice Scalia—the author of *Auer*—wrote

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[2] See*, e.g., Mullins Coal Co. of Va.* v. *Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (warning *Seminole Rock* deference is not "a license for an agency effectively to rewrite a regulation through interpretation"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 638-39, 654, 696 (1996) (criticizing *Seminole Rock* deference).

that, "while I have in the past uncritically accepted that rule [of *Seminole Rock / Auer* deference], I have become increasingly doubtful of its validity." *Talk Am., Inc.* v. *Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The following term in *Decker* v. *Northwest Environmental Defense Center*, Justice Scalia advocated rejecting *Auer* based on his view that it has "no principled basis [and] contravenes one of the great rules of separation of power [that he] who writes a law must not adjudge its violation." 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part). In the same case, the Chief Justice, joined by Justice Alito, observed that it "may be appropriate to reconsider that principle [of *Auer* deference] in an appropriate case" where "the issue is properly raised and argued." *Id.* at 1338-39 (Roberts, C.J., concurring).

More recently, in *Perez* v. *Mortgage Bankers Association*, three Justices expanded the case for reconsidering *Auer*. Reiterating his view that he was "unaware of any … history justifying deference to agency interpretations of its own regulations," Justice Scalia advocated "abandoning *Auer*" and instead "applying the [Administrative Procedure] Act as written," under which a court would independently decide whether an agency's interpretation of its own regulations were correct. *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment). Justice Thomas's concurrence comprehensively attacked *Auer* deference. See *id.* at 1213-1225 (Thomas, J, concurring in the judgment). He demonstrated that the doctrine violates the Constitution in two related ways—as "transfer of judicial authority to the Executive branch," and "an erosion of the judicial obligation to

serve as a 'check' on the political branches." *Id.* at 1217 (Thomas, J., concurring in the judgment). "This accumulation of governmental powers," Justice Thomas wrote, "allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties." *Id.* at 1221 (Thomas, J., concurring in the judgment). He therefore urged reconsideration of "the entire line of precedent beginning with *Seminole Rock* … in an appropriate case." *Id.* at 1225 (Thomas, J., concurring in the judgment). Finally, Justice Alito observed that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect" and that consequently he "await[s] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment).

The Fourth Circuit's decision in this case presents an ideal vehicle for reconsidering *Auer* deference. The decision turns entirely on whether the *Auer* doctrine requires a court to give controlling deference to the Department of Education's interpretation—contained in the OCR Letter—of the Title IX regulation allowing provision of sex-separated restrooms and other facilities. Moreover, the decision poses the *Auer* issue in as clean a factual setting as possible: the case arrived on appeal at the Fourth Circuit on a motion to dismiss and therefore does not involve any contested factual matters. See App. C-4 (Niemeyer, J., dissenting from denial of rehearing) (noting that "the facts of this case are especially 'clean,' such as to enable the [Supreme] Court to address the [*Auer*] issue without the distraction of subservient issues").

B. This case directly implicates a disagreement among multiple Circuits over the proper application of Auer.

The Court is also likely to review the Fourth Circuit's decision because it implicates at least three circuit splits over the application of *Auer* deference, an issue that "arise[s] as a matter of course on a regular basis," *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring). Indeed, as one scholar has observed, "panels of several circuits have interpreted the [*Auer*] doctrine in a way that squarely conflicts with both Supreme Court precedent and other circuit courts' decisions." Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference by the U.S. Courts of Appeal*, 66 Admin. L. Rev. 787, 801 (2014).

1. First, multiple circuits are split over whether an agency's interpretation of its regulation, if it is to receive *Auer* deference, must appear in a format that carries the force of law. See generally Leske, *supra*, at 823-28, 824 (describing "a conflict" on this issue "between some circuits and the Supreme Court, as well as splits among the circuits"). Several circuits continue to hold that *Auer* deference protects an agency's interpretation regardless of whether it has followed formal procedures (such as notice-and-comment) that would clothe its interpretation with binding legal force. For example, the Second, Fourth, Ninth, and Federal Circuits have held that informal agency interpretations that "lack the force of law"—such as interpretations announced in agency opinion letters like the one at issue here—are nonetheless entitled to *Auer* deference.[3]

[3] See*, e.g., Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 207-08 (2nd Cir. 2009) (holding that "agency interpretations that lack the force of law," while not warranting deference when interpreting ambiguous statutes, "do normally warrant deference when

By contrast, the First and Seventh Circuits have taken the contrary view that informal agency determinations, such as those expressed in opinion letters which have not undergone public notice-and-comment, do not merit *Auer* deference. See generally Leske*, supra,* at 826-28. For instance, in *Sun Capital Partners III, LP* v. *New England Teamsters & Trucking Industry Pension Fund*, the First Circuit held that *Auer* deference did not apply to an unpublished agency letter because "[t]he letter was not the result of public notice and comment" and "merely involved an informal adjudication" resolving a dispute between the parties. 724 F.3d 129, 139-40 & n.13 (1st Cir. 2013). Based on this Court's decision in *Christensen*, the panel reasoned that "interpretations contained in formats such as opinion letters are 'entitled to respect' … only to the extent that those interpretations have the power to persuade." *Id.* at 140 (quoting *Christensen*, 529 U.S. at 587; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Years before the First Circuit's opinion in *Sun Capital Partners*, Judge Posner had anticipated this view by reasoning that, in light of *Christensen*, *Auer* likely did not apply to agency determinations that "'lack the force of law.'" *Keys* v. *Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (Posner, J.) (quoting *Christensen*, 529 U.S. at 587). Subsequently, in *Exelon* v. *Generation*

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they interpret ambiguous *regulations*"); *Encarnacion ex. rel George* v. *Astrue*, 568 F.3d 72, 78 (2nd Cir. 2009) (holding agency's interpretation is entitled to *Auer* deference "regardless of the formality of the procedures used to formulate it"); *Humanoids Group* v. *Rogan*, 375 F.3d 301, 306 (4th Cir. 2004) (concluding that "agency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) … receive deference under *Auer* when interpreting ambiguous *regulations*"); *Bassiri* v. *Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (granting *Auer* deference to agency interpretation "even if through an informal process" that "is not reached through the normal notice-and-comment procedure" and that "does not have the force of law"); *Smith* v. *Nicholson*, 451 F.3d 1344, 1350 (Fed. Cir. 2006) (affording *Seminole Rock* deference "even when [the agency's interpretation] is offered in informal rulings such as in a litigating document").

Company, LLC v. *Local 15 IBEW*, the Seventh Circuit held that *Auer* deference does not apply to guidance documents the agency itself has "disclaimed … as authoritative or binding interpretations of [the agency's] own rules." 676 F.3d 576, 577 (7th Cir. 2012).[4]

The Fourth Circuit's decision in this case squarely implicates this split of authority. The OCR Letter, to which the Fourth Circuit granted *Auer* deference, is an informal, unpublished opinion letter that has not undergone notice-and-comment proceedings and therefore lacks the force of law. See App. J-1 (addressee redacted); App. J-2 (letter "refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws"). Furthermore, the only prior agency opinion referred to in the OCR Letter is a 2014 "guidance" document that, by definition, lacks binding legal force.[5] Finally, in an attempt to buttress the OCR Letter, the Fourth Circuit referred to two DOJ enforcement actions against school districts alleging gender-identity discrimination under Title IX. App. B-25. But the resolution letters accompanying those actions state that they are "not a formal

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[4] The Sixth Circuit appears to agree with the Seventh on this point. See *Air Brake Sys., Inc.* v. *Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) (declining to apply *Auer* deference where Department of Justice "emphatically denies" opinion letters issued by agency general counsel "are authoritative views entitled to *any* deference"). Furthermore, the Sixth Circuit's opinion in *Air Brake Systems* points to a related split concerning whether *Auer* deference applies to opinion letters issued by agency general counsels. *See id.* (suggesting split on this issue with Federal and Fifth Circuits); see also *Am. Express Co.* v. *United States*, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001) (affording *Auer* deference to IRS general counsel memorandum); *Gavey Prop./762* v. *First Fin. Savings & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (affording deference to published general counsel opinion letter).

[5] See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007) (setting forth standards for guidance documents and providing that "[n]othing in this Bulletin is intended to indicate that a guidance document can impose a legally binding requirement").

statement of OCR policy and should not be relied upon, cited, or construed as such."[6] Consequently, the Fourth Circuit's decision to grant the non-binding OCR Letter *Auer* deference is consistent with the views of the Second, Ninth, and Federal Circuits (and with the Fourth Circuit's own previous opinion in *Humanoids*), but inconsistent with the views of the First and Seventh Circuits.

2. Second, multiple circuits are split over whether an agency interpretation of a regulation merits *Auer* deference if the interpretation is developed in the context of the particular litigation at issue. The Fourth, Sixth, Seventh, Tenth and Eleventh Circuits follow the rule that an agency's interpretation of a regulation developed in the specific context of the current litigation nonetheless merits *Auer* deference.[7] By contrast, the Ninth and the Federal Circuits have ruled that an agency determination developed solely in the context of the current litigation may not, for that reason, obtain *Auer* deference. See *Mass. Mut. Life* v. *United States*, 782 F.3d 1354, 1369-70 (Fed. Cir. 2015) (refusing *Auer* deference to IRS interpretation "advanced for the first time in this litigation" and therefore not "'reflect[ing] the agency's fair and considered judgment on the matter in question'")

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[6] See App. J-2 nn. 5, 6 (referencing OCR Case No. 09-12-1020 (July 24, 2013), htt D://www.iustice.gov/crt/about/edu/documents/arcadialener.Ddf (resolution letter), at 7); OCR Case No. 09-12-1095 (October 14, 2014), htt D://www2.ed.gov/documents/Dress-releases/downev-sChnnldistnct-letter.pdf (resolution letter), at 5).

[7] See, *e.g., Intracomm, Inc.* v. *Bajaj,* 492 F.3d 285, 293 & n.6 (4th Cir. 2007) (deferring to Secretary's interpretation advanced in case under review); *Woudenberg* v. *U.S. Dep't of Agriculture*, 794 F.3d 595, 599, 601 (6th Cir. 2015) (deferring to agency ruling in the case under review); *Bible ex rel. Proposed Class* v. *United Student Aid Funds, Inc.,* 799 F.3d 633, 639, 651 (7th Cir. 2015) (deferring to agency's interpretation advanced in amicus briefs), *cert. denied,* 136 S. Ct. 1607 (2016); *Biodiversity Conservation Alliance* v. *Jiron*, 762 F.3d 1036, 1062-68 (10th Cir. 2014) (deferring to agency interpretation advanced during administrative appeal); *Polycarpe* v. *E&S Landscaping Serv. Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010) (deferring to agency interpretation advanced in amicus brief).

(quoting *Auer*, 519 U.S. at 462); *Vietnam Veterans* v. *CIA*, 811 F.3d 1068, 1078 (9th Cir. 2015) (declining *Auer* deference to agency interpretation where agency "developed [its] interpretation only in the context of this litigation").

The Fourth Circuit's decision in this case also implicates this split of authority. As the United States' briefing in this case demonstrates, the OCR Letter advancing the agency's regulatory interpretation was issued in response to an inquiry regarding the Gloucester County School Board policy itself.[8] The OCR Letter would therefore *not* receive *Auer* deference if this case arose in the Ninth or Federal Circuits.

3. Third, the Fourth Circuit's decision in this case conflicts with the decisions of several circuits that have placed strong weight on whether the agency's present interpretation diverges from the understanding of the regulation at the time it was promulgated. These circuit decisions "look[ ] at whether the agency expressed an intent at the time it promulgated the regulation in question, especially if that inquiry impact[s] whether acceptance of the new agency interpretation would result in 'unfair surprise.'" Leske, *supra*, at 806 & n.116 (and collecting decisions from the First, Third, Fourth, Fifth, Sixth, Tenth, and Federal Circuits). For instance, in deciding whether to defer to the SEC's current regulatory interpretation in *Morrison* v. *Madison Dearborn Capital Partners III L.P.*, the Third Circuit placed "[p]articular weight" on "the agency's interpretations made at the time the

[8] See U.S. Stmt. of Int., at 9 & n.11, Ex. A & B [Dist. Ct. ECF No. 28] (referencing letter and response regarding "a school district's restroom policy"); see also App. B-51 (Niemeyer, J., dissenting) (explaining that, "[i]n December 2014, G.G. sought an opinion letter from [OCR], and on January 15, 2015, the Office responded" with the OCR Letter).

regulations are promulgated." 463 F.3d 312, 315 (3rd Cir. 2006) (citing *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988)). Similarly, in *Gose* v. *U.S. Postal Service*, the Federal Circuit explained that a factor counting against *Auer* deference is "evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation." 451 F.3d 831, 838 (Fed. Cir. 2006).

The reasoning in *G.G.* contradicts those circuits' application of *Auer*. As the Fourth Circuit conceded in *G.G.*, the original 1975-era understanding of the Title IX regulation at issue here was based on the longstanding "dichotomous" understanding of male and female. See App. B-23 (observing that "Section 106.33 assumes a student population composed of … the usual 'dichotomous occurrence' of male and female"). Without giving any weight to that original understanding, however, the Fourth Circuit deferred to the agency's current interpretation of the regulation in the context where a person's gender identity "diverge[s]" from biological sex. *Id.* Yet the court candidly admitted that this interpretation of the regulation was "novel," was "perhaps not intuitive," and was supported by "no interpretation of how [the regulation] applied to transgender individuals before January 2015." App. B-24, B-23. This application of *Auer* sharply diverges from the other circuits that place "particular weight" on the regulation's understanding at the time it was promulgated, see *Morrison*, 463 F.3d at 315, and that refuse deference to novel interpretations that would result in "unfair surprise" to regulated entities. See, *e.g.*, *Southwest Pharmacy Solutions, Inc.* v. *Centers for Medicare & Medicaid Serv's.*, 718 F.3d 436, 442 (5th Cir. 2013) (no *Auer* deference where new

interpretation would result in "unfair surprise"); *Sun Capital Partners*, 724 F.3d at 140 (no *Auer* deference where "significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue") (citing *Christopher*, 132 S. Ct. at 2167).

C. The Fourth Circuit's application of Auer *implicates issues of nationwide importance concerning the meaning of Title IX and its implementing regulations.*

This Court's review is also likely because the Fourth Circuit's application of *Auer* implicates issues that have recently assumed nationwide importance.

After the decision below, on May 13, 2016, DOE and DOJ issued a joint "Dear Colleague Letter" that amplifies the Title IX interpretation in the OCR Letter at issue in this case. App K. Citing *G.G.* as authority, see App. K-2 n.5, the Dear Colleague Letter instructs that, in order to "[c]ompl[y] with Title IX," and "[a]s a condition to receiving Federal funds," a school "must not treat a transgender student differently from the way it treats other students of the same gender identity." App. K-2; see also App. K-1 (noting the letter "summarizes a school's Title IX obligations regarding transgender students and explains how [DOE and DOJ] evaluate a school's compliance with these obligations"). The Dear Colleague Letter offers specific Title IX guidance across an array of topics—not only restrooms, but also showers, locker rooms, housing and overnight accommodations, athletic teams, and other "sex-specific activities." App. K-2 to K-5. In addition, the Letter claims that:

- Schools must treat a student in accordance with his gender identity when "a student or the student's parent or guardian … notifies the school

administration that the student will assert a gender identity that differs from previous representations or records." App. K-2

- "Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity." *Id.*

- Schools "must allow transgender students access to [restroom and locker room] facilities consistent with their gender identity" and "may not require transgender students … to use individual-user facilities when other students are not required to do so." App. K-3

- While Title IX allows "sex-segregated athletic teams," a school "may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students." *Id.*

- While Title IX allows "separate housing on the basis of sex," a school nonetheless "must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students." App. K-4

And to re-emphasize: DOE and DOJ explicitly offer this guidance to instruct schools on their "compliance" with Title IX, which, the agencies baldly claim, "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status." App. K-1.

The Dear Colleague Letter has now been challenged by twenty-three States in two federal lawsuits. See *State of Texas, et al.* v. *United States of America, et al.*, No. 7:16-cv-00054 (N.D. Tex. May 25, 2016); *State of Nebraska, et al.* v. *United States of America, et al.*, No. 4:16-cv-03117 (D. Neb. July 8, 2016). The deference issue presented in this case—while it probably would not settle all of the legal issues in the States' cases—would nonetheless clarify the principles of administrative deference applicable to guidance documents like the Dear Colleague

Letter and, having done so, allow those cases to focus on more pertinent issues of state sovereignty. The nationwide Dear Colleague Letter thus amplifies the nationwide impact of the Fourth Circuit's decision and thereby increases the likelihood that this Court will review it.[9]

II. There is a strong likelihood that the Court will overturn the Fourth Circuit's decision.

For numerous reasons, the Court is also likely to overturn the Fourth Circuit's decision to grant *Auer* deference to the agency opinion letter at issue in this case. Most obviously, given that "the … doctrine is on its last gasp," *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari), a majority of the Court is likely to abandon *Auer* altogether, thus removing the only doctrinal basis for the Fourth Circuit's decision to defer to the OCR Letter.

But even if the Court is unwilling at present to abandon *Auer* wholesale, it is nonetheless likely to overturn the Fourth Circuit's application of *Auer* in this case

[9] Furthermore, less than a month after the Fourth Circuit rendered its decision, DOJ brought an enforcement action against the State of North Carolina, its public officials, and its university system, alleging that a North Carolina law (commonly known as "HB2") violates Title IX and other federal laws by designating public multiple-occupancy restrooms, locker rooms and shower facilities for use only by persons of the "biological sex" reflected on their birth certificates. See *United States* v. *State of North Carolina, et al.*, No. 1:16-cv-00425 (M.D.N.C. May 9, 2016). Relying on the Dear Colleague Letter and on the *G.G.* decision, the DOJ lawsuit argues that Title IX's bar on "sex" discrimination extends to "gender identity" discrimination and, hence, claims that a law like HB2 violates Title IX. *See* Mem. ISO Prelim. Inj, at 12-16, in *United States* v. *North Carolina*, *supra*. Indeed, DOJ asserts that the *G.G.* decision "dictates" that result. *Id.* at 15. The ACLU has taken the same position in related litigation. See Mem. ISO Prelim. Inj. at 12 in *Carcaño, et al.* v. *McCrory, et al.*, No. 1:16-cv-00236 (M.D.N.C. May 16, 2016) (arguing that "[t]he Fourth Circuit's binding decision in *G.G.* compels the conclusion that Plaintiffs are likely to succeed on the merits of their Title IX claim").

for several reasons—in addition to those discussed above in explaining the various circuit conflicts exacerbated by the decision below.

First, the fundamental premise for applying *Auer* in this case is lacking because the agency opinion letter at issue—while purporting to interpret a Title IX *regulation*—is in reality a disguised interpretation of Title IX's *statutory* prohibition on "sex" discrimination. The letter tells schools that to comply with Title IX they "generally must treat transgender students consistent with their gender identity," but this guidance is explicitly premised on the letter's view that Title IX's proscription of "sex" discrimination "includ[es] gender identity." App. J-2, J-1. Plainly that is not an interpretation of a Title IX regulation, but an interpretation of Title IX itself. See, *e.g.*, App. C-3 (Niemeyer, J., dissenting from denial of rehearing) (noting that "the statutory text of Title IX provides no basis" for the government's "acceptance of gender identification as the meaning of 'sex'"); *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (declining *Auer* deference where agency interpretation "cannot be considered an interpretation of the regulation"). *Auer* does not apply to an agency's interpretation of a statute, which is a subject addressed by *Chevron* and not *Auer*. See, *e.g.*, *id.*, at 255 (*Auer* involves deference to interpretation of "the issuing agency's own ambiguous regulation," whereas *Chevron* involves deference to an agency's "interpretation of an ambiguous statute").

Second, even assuming the agency letter interprets a Title IX regulation and not Title IX itself, another basic premise for applying *Auer* is lacking because the regulation at issue is not ambiguous. See, *e.g.*, *Christensen.*, 529 U.S. at 588

(explaining "*Auer* deference is warranted only when the language of the regulation is ambiguous"). The plain text of 34 C.F.R. § 106.33 allows public restrooms to be separated by "sex," which the *G.G.* panel conceded was "understood at the time the regulation was adopted to connote male and female." App. B-22. As Justice Niemeyer's dissent explained, with respect to allowing separate male and female facilities such as living quarters, restrooms, locker rooms, and showers, "Title IX and its implementing regulations are not ambiguous." App. B-48.

Third, *Auer* deference should not apply to what the *G.G.* panel conceded was a "novel" agency interpretation unsupported by the plain language or the original understanding of the regulation.[10] To accord controlling deference to that novel interpretation would be to allow the agency to "create *de facto* a new regulation" through a mere letter and guidance document. *Christensen*, 529 U.S. at 588; see also*, e.g., Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (*Auer* deference warranted unless alternative reading is "compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"). Moreover, it "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or prescribes.'" *Christopher*, 132 S. Ct. at 2167 (quoting *Gates & Fox Co.* v. *Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)).

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[10] App. B-24 (stating "the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015"); App. B-22 (stating "the word 'sex' was understood at the time the regulation was adopted to connote male and female … determined primarily by reference to … reproductive organs").

Finally, the agency interpretation reflected in the OCR Letter is both plainly erroneous and inconsistent with the regulation itself, and does not merit *Auer* deference for that reason alone. See *Christopher*, 132 S. Ct. at 2166 (*Auer* deference is "undoubtedly inappropriate" when agency's interpretation is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer*, 519 U.S. at 461). For example, by conflating the term "sex" with the concept of "gender identity" (which appears nowhere in Title IX or its regulations) the agency's new interpretation ignores the reality that Title IX, by regulation and by statute, expressly authorizes the provision of facilities and programs separated by "sex"—including, of course, restrooms, locker rooms, and shower facilities. 34 C.F.R. § 106.33.[11] Furthermore, numerous instances in the U.S. Code and other federal provisions show that the concept of "gender identity" is distinct from the concept of "sex" or "gender."[12] Consequently, it is clear Title IX's prohibition on "sex" discrimination does not cover "gender identity" discrimination, and that the OCR letter's interpretation of the Title IX regulation at issue is flatly wrong.

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[11] See also, *e.g.,* 20 U.S.C. § 1686 (allowing educational institutions to "maintain[ ] separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing funding recipients to "provide separate housing on the basis of sex," provide those facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact").

[12] See, *e.g.,* 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination in programs funded through Violence Against Women Act "on the basis of actual or perceived race, color, religion, national origin, *sex*, *gender identity* …, sexual orientation, or disability"; 18 U.S.C. § 249(a)(2) (providing criminal penalties for "[o]ffenses involving actual or perceived religion, national origin, *gender*, sexual orientation, *gender identity*, or disability").

III. Without a stay, the School Board, its officials, and parents and children in the school district will suffer irreparable harm.

It is equally clear that, absent a recall and stay of the Fourth Circuit's mandate in *G.G.*, the School Board—including parents and children in the Gloucester County school district—will suffer irreparable harm.

First, expressly relying on the *G.G.* decision, the district court on remand in this case has already issued a preliminary injunction requiring the School Board to disavow its policy and allow G.G. to use the boys' restrooms at school. App. E. The district court entered the injunction on June 23—less than a week after the *G.G.* mandate issued on June 17—and, moreover, without notice to the parties and without allowing introduction of any further evidence or additional briefing.[13] As this action makes plain, the *G.G.* decision has now essentially stripped the School Board of its most basic authority to enact policies that accommodate the need for privacy and safety of *all* students.[14] This is a particularly devastating blow to the School Board's authority, given that the school has made every effort to accommodate G.G.'s requests from the moment that G.G. approached school

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[13] As explained above, the School Board immediately appealed the preliminary injunction to the Fourth Circuit and moved for a stay pending appeal in the district court and the Fourth Circuit. Both motions were denied, see Apps. F & G, leaving this Court as the only avenue for relieving the Board from the threat of irreparable harm. As noted previously, however, it is likely that the district court would vacate or stay its preliminary injunction if this Court stayed the Fourth Circuit's mandate. But requiring the Board to go back to the district court with such a request would seem to impose an unnecessary burden on that court as well as the parties.

[14] See, *e.g.*, *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 829 (2002) (noting public schools' "'custodial and tutelary responsibility for children'") (quoting *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 655 (1995)); *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 684 (1986) (recognizing "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children").

officials, including providing access to a separate restroom in the nurse's office and subsequently installing three single-occupancy unisex restrooms for the use of *any* student, including G.G., who may not feel comfortable using multiple-occupancy restrooms corresponding to their biological sex.

Notwithstanding all this, the School Board now faces an order from a federal court—based entirely on the *G.G.* decision—enjoining enforcement of its policy before the upcoming school year begins in September, giving the Board scant time to make any further changes to school district facilities or to develop new policies to safeguard the privacy and safety rights of its students, kindergarten through twelfth grade. Putting the School Board in this untenable position *alone* constitutes irreparable harm justifying a recall and stay of the Fourth Circuit's mandate and a stay of the preliminary injunction.[15]

Second, compliance with the preliminary injunction will likely cause severe disruption to the school as the upcoming school year approaches in September. When the school previously attempted to allow G.G. to use the boys' restroom, outcry from parents and students was immediate and forceful, leading to two rounds of public hearings and ultimately to the issuance of the policy at issue. See App. A-4; see also App. L-1 (immediately after G.G. was allowed to use boys'

[15] *Cf., e.g.*, *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (observing 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'") (quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Houchins* v. *KQED, Inc.*, 429 U.S. 1341, 1346 (1977) (Rehnquist, J., in chambers) (granting stay pending certiorari in First Amendment access case because "preservation of th[e] status quo … is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time") (citing *Edelman* v. *Jordan*, 414 U.S. 1301, 1303 (1973) (Rehnquist, J., in chambers)).

restroom, "the School Board began receiving numerous complaints from parents and students"). There is every reason to expect the same reaction if the School Board is now enjoined from enforcing its policy. This also constitutes irreparable harm. See, *e.g.*, *N.J.* v. *T.L.O.*, 469 U.S. 325, 341 (1985) (noting "the substantial need of teachers and administrators for freedom to maintain order in the schools").

Third, compliance with the preliminary injunction will also put parents' constitutional rights in jeopardy. Depriving parents of any say over whether their children should be exposed to members of the opposite biological sex, possibly in a state of full or complete undress, in intimate settings deprives parents of their right to direct the education and upbringing of their children.[16] Indeed, it is natural to assume that parents may decide to remove their children from the school system after reaching the understandable conclusion that the school has been stripped by the *G.G.* decision of its authority to protect their children's constitutionally guaranteed rights of bodily privacy. See, *e.g.*, *Doe* v. *Luzerne Cnty.*, 660 F.3d 169, 176, 177 (3rd Cir. 2011) (concluding that a person has a constitutionally protected privacy interest in "his or her partially clothed body" and "particularly while in the

[16] See generally *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000) (observing that, "[i]n light of … extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children") (and collecting cases); see also, *e.g.*, *Meyer* v. *Nebraska*, 262 U.S. 390, 401 (1923) (recognizing that the liberty interest protected by due process includes the right of parents "to control the education of their own").

presence of members of the opposite sex"). The resulting dilemma—to the school district, to students, and to parents—constitutes irreparable harm.[17]

All of this threatened harm would be prevented in the interim if the Court recalls and stays the Fourth Circuit's *G.G.* mandate and the subsequently issued preliminary injunction, while it considers whether to review the Fourth Circuit's erroneous application of *Auer* deference in this case.

IV. The balance of equities and the broader public interest support a stay.

The balance of equities also weighs in favor of recalling and staying the mandate in *G.G.* and in favor of staying the subsequently issued preliminary injunction.

Absent a stay, the Board will be stripped of its authority to enact a restroom, locker room, and shower policy which—in the Board's judgment and in the judgment of the vast majority of its parents and schoolchildren expressed at public hearings—is necessary to protect the basic expectations of bodily privacy of Gloucester County students. Those expectations are of constitutional magnitude and it is the Board's responsibility to safeguard them for all students. If the Board's policy is enjoined and it must therefore allow G.G. to use the boys' restrooms, recent

[17] See, *e.g.*, *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (noting the constitutionally protected "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Frederick* v. *Morse*, 551 U.S. 393, 409 (2007) ("School principals have a difficult job, and a vitally important one."); see also, *e.g.*, *Schleifer* v. *City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) (observing that government has a "significant interest" in "strengthening parental responsibility" and that "[s]tate authority complements parental supervision").

and painful experience has shown that this will cause serious disruption among parents and children at the school. See App. A-4 to A-5; App. L-1.

When the new school year begins in September, G.G., like all students at Gloucester High School, will have access to three single-user restrooms, or, if G.G. prefers, to the restroom in the nurse's office. The latter option is significant because G.G. had previously *agreed* to use the separate restroom in the nurse's office after having explained his gender identity issues to school officials. See App. A-3 to A-4 (noting that, "[b]eing unsure how students would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office"). Only later did G.G. decide that this arrangement was "stigmatizing" and refuse to use the facility. App. A-4. It is not plausible that G.G. would suffer substantial harm—justifying maintenance of a preliminary injunction—based on a subjective change in preference about whether to use the nurse's restroom.

Moreover, now G.G. need not even suffer the subjective discomfort of the nurse's restroom, because the school has now made generic single-user facilities available to *all* students. App. A-5. Nor can G.G. credibly claim that having to use those facilities rises to the level of constitutional harm. After all, DOE expressly *encourages* such accommodations for gender dysphoric students. See App. J-2 (OCR Letter stating that "to accommodate transgender students, schools are encouraged to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities").

In weighing the equities, the Court should also consider the broader public interest in putting the *G.G.* mandate on hold while considering the School Board's forthcoming certiorari petition. See, *e.g.*, *Edelman*, 414 U.S. at 1303 (Rehnquist, J., in chambers) (noting that balance of equities includes consideration of "the interests of the public at large"). Simply put, the current harm being caused by the Fourth Circuit's *G.G.* decision goes far beyond the harm to the Board and extends to every school district in the Fourth Circuit and, indeed, the entire Nation.

As explained above, *supra* I.C, DOE and DOJ have already seized momentum from the *G.G.* ruling by issuing on May 13 a nationally applicable Dear Colleague Letter that amplifies the policy in the OCR Letter at issue in this case. App. K. The Dear Colleague Letter, which prominently cites *G.G.*, instructs schools throughout the Nation on their "Title IX obligations regarding transgender students," informs them that Title IX's prohibition on "sex" discrimination "encompasses discrimination based on a student's gender identity," and pointedly notes that "compliance with Title IX" is "a condition of receiving Federal funds." App. K-1 to K-2 & n. 5. And *G.G.* provides a ready-made argument that the Dear Colleague Letter now merits *Auer* deference at least in the Fourth Circuit.[18]

To give a specific example of the severe disruption now being caused by *G.G.*, consider the situation confronting parents and students in the public schools of Fairfax County, Virginia. The Fairfax County School Board has recently been

[18] As already discussed, *supra* I.C, pending lawsuits against North Carolina by the ACLU and DOJ have taken the position that the *G.G.* decision "compels" the conclusion that North Carolina's HB2 law violates Title IX.

convulsed by proposals to alter the anti-discrimination policies in its Student Rights and Responsibilities Booklet.[19] On June 9, 2016, a sharply divided board voted to add sexual orientation and gender identity to the booklet, over parents' vociferous objections. See App. M (school board agenda noting amendment of Chapter I, Part J to add "sexual orientation" and "gender identity" to discrimination norms in booklet).[20] The board has expressly relied on the *G.G.* decision as justification for moving forward with this new policy for the upcoming school year.[21]

Like the Fairfax County School Board, school boards throughout the Fourth Circuit—and indeed, the entire Nation—must now contemplate whether they must change their policies and alter their facilities, or else be found out of compliance with Title IX and therefore at risk of losing all federal funds, all before the new school year begins in September or late August. As noted, moreover, because of the Dear Colleague Letter the question is no longer only about restrooms: it is also

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[19] See, *e.g.*, Moriah Balingit, *Move to protect transgender students' rights leads to school board uproar*, Washington Post, June 10, 2016 ("The Fairfax County School Board set off a furious debate when it decided to amend its student handbook to ban discrimination against transgender students, a move that angered some board members who saw the move as an 11th-hour change without proper vetting."), available at: https://www.washingtonpost.com/local/education/move-to-protect-transgender-students-rights-leads-to-school-board-uproar/2016/06/10/5fa11674-2f30-11e6-9de3-6e6e7a14000c_story.html.

[20] The agenda and Student Rights and Responsibilities Booklet are publicly available at http://www.boarddocs.com/vsba/fairfax/Board.nsf/Public. A video of the June 9 board meeting is available at https://www.youtube.com/watch?v=jMS21yVGqdY&feature=youtu.be ("June 9 Meeting Video") (the relevant discussion begins at 1:30.11 and continues to 4:29.12). The vote approving the amended policy occurs around 4:29.00.

[21] See June 9 Meeting Video, at 3:05.10—3:07.50 (dissenting board member reading email into record indicating that school board is "waiting on the decisions from the court cases before we submit proposed regulations," and that "Fairfax County Public Schools anticipates [*sic*] that the court of appeal in the Fourth Circuit will provide Virginia schools with binding legal interpretation of the requirements").

about locker rooms, showers, dormitories, athletic teams, and all "sex-specific activities," as well as record keeping, disciplinary policies, and other administrative measures. App. K.

A recall and stay of the Fourth Circuit's *G.G.* mandate would bring an immediate halt to these repercussions, which are now being caused by the decision below and which will only increase in severity and urgency as the next school year approaches in September and August. If, instead, the *G.G.* mandate is left operative, the effect may well be to convert non-binding regulatory "guidance" from DOE and DOJ into the law of the land, with irreversible consequences to school district policies, to the authority of those districts to protect the legitimate expectations of their students to bodily privacy and safety, and to their relationships of trust with students and parents.

To prevent this irreparable harm to the Board and to school districts, officials, parents, and children throughout the Fourth Circuit and the entire Nation, the Board respectfully asks for a recall and stay of the *G.G.* mandate and a stay of the preliminary injunction that was subsequently issued based on *G.G.*

CONCLUSION

The Fourth Circuit's *G.G.* mandate should be recalled and stayed, and the subsequently issued preliminary injunction should also be stayed.

Respectfully submitted,

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER, JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
Tel: (804) 747-5200
Email: dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 714-9492
Email: KDuncan@Schaerr-Duncan.com

Counsel for Petitioner Gloucester County School Board

July 13, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2016 I sent a copy by United States mail as well as an electronic copy of the foregoing to the following counsel of record:

JOSHUA A. BLOCK
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(202) 549-2500
jblock@aclu.org

_____
S. Kyle Duncan
Counsel for Petitioner