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

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, v. 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.	No. 1:16 CV 4945 The Hon. Jorge L. Alonso, *District Court Judge*

INTERVENOR-DEFENDANTS' BRIEF IN OPPOSITION
TO PLAINTIFFS' RESPONSE TO
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

Page

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION 1

I. Plaintiffs Are Unlikely To Succeed on the Merits of Their Claims Because They Depend on an Incorrect Definition of the Term "Sex." 4

II. Refusing To Allow Transgender Students To Use Gender-Appropriate Restrooms and Locker Rooms Would Be Sex Stereotyping in Violation of Price Waterhouse 9

III. Plaintiffs Have Failed To Show They Will Succeed on the Merits of Their Constitutional Privacy Claim 17

IV. Plaintiffs Cannot Satisfy the Other Requirements for a Preliminary Injunction 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Mead Johnson & Co.,
971 F.2d 6 (7th Cir. 1992) 23

Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.,
2:16-cv-00524-ALM-KAJ, Dkt. 95 (S.D. Ohio Sept. 26, 2016) 12

Cameo Convalescent Ctr., Inc. v. Percy,
800 F.2d 108 (7th Cir. 1986) 17

Canedy v. Boardman,
16 F.3d 183 (7th Cir. 1994) 18

Christiansen v. Omnicom Grp., Inc.,
No. 15 Civ. 3440, 2016 WL 951581 (S.D.N.Y. Mar. 9, 2016) 15

City of L.A., Dep't of Water & Power v. Manhart,
435 U.S. 702 (1978).....10

Creed v. Family Exp. Corp.,
No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009).....10, 14

De'Lonta v. Johnson,
708 F.3d 520 (4th Cir. 2013) 6, 7

Doe v. Brimfield Grade Sch.,
552 F. Supp. 2d 816 (C.D. Ill. 2008) 11

Doe v. Wood Cty. Bd. of Educ.,
888 F. Supp. 2d 771 (S.D.W. Va. 2012).....20, 22

Etsitty v. Utah Trans. Auth.,
502 F.3d 1215 (10th Cir. 2007) 10

Fabian v. Hosp. of Cent. Connecticut,
172 F. Supp. 3d 509 (D. Conn. 2016).....14

Fields v. Smith,
712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011).....7

Finkle v. Howard Cty.,
12 F. Supp. 3d 780 (D. Md. 2014).....10, 11, 14

Glenn v. Brumby,
663 F.3d 1312 (11th Cir. 2011) 10, 12, 13

Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm,
136 S. Ct. 2442 (2016) (Breyer, J., concurring) 19

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,
822 F.3d 709 (4th Cir. 2016) 19, 20

Hively v. Ivy Tech Community College,
830 F.3d 698 (7th Cir. 2016) 13, 15, 17

Hughes v. William Beaumont Hosp.,
No. 13-cv-13806, 2014 WL 5511507 (E.D. Mich. Oct. 31, 2014).....10

Johnston v. Univ. of Pittsburgh,
97 F. Supp. 3d 657 (W.D. Pa. 2015).....14

Kohler v. City of Wapakoneta,
381 F. Supp. 2d 692 (N.D. Ohio 2005).....19

Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.,
542 F. Supp. 2d. 653 (S.D. Tex. 2008) 10

McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck,
370 F.3d 275 (2d Cir. 2004).....20

Norwood v. Dale Maintenance System, Inc.,
590 F. Supp. 1410 (N.D. Ill. 1984) 18, 19

Oncale v. Sundowner Offshore Services, Inc.,
523 U.S. 75 (1998).....15, 16, 17

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990).....16

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989)..... *passim*

Radtke v. Misc. Drivers & Helpers Union,
867 F. Supp. 2d 1023 (D. Minn. 2012).....14

Roberts v. Colorado State Bd. of Agric.,
998 F.2d 824 (10th Cir. 1993) 20

Rosa v. Park W. Bank & Trust Co.,
214 F.3d 213 (1st Cir. 2000).....10

Schroer v. Billington,
424 F. Supp. 2d 203 (D.D.C. 2006) 10, 14, 16

Schwenk v. Hartford,
204 F.3d 1187 (9th Cir. 2000) 10, 14

Smith v. City of Salem,
378 F.3d 566 (6th Cir. 2004) 10, 13

Soneeya v. Spencer,
851 F. Supp. 2d 228 (D. Mass. 2012) 7

Strautins v. Trustwave Holdings, Inc.,
27 F. Supp. 3d 871 (N.D. Ill. 2014) 17

Stuller, Inc. v. Steak N Shake Enterprises, Inc.,
695 F.3d 676 (7th Cir. 2012) 20, 21, 22

Tronetti v. TLC HealthNet Lakeshore Hosp.,
No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) 10, 14

Ulane v. Eastern Airlines, Inc.,
742 F.2d 1081 (7th Cir. 1984) ..... *passim*

Vega v. Chi. Park Dist.,
958 F. Supp. 2d 943 (N.D. Ill. 2013) 11

Villasenor v. Indus. Wire & Cable, Inc.,
929 F. Supp. 310 (N.D. Ill. 1996) 17, 18

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,
Dkt. No. 28 (E.D. Wis. Sept. 19, 2016) 11, 12, 14

Rules

Rule 12(b)(6).....12

Other Authorities

Am. Med. Ass'n, House of Delegates, Resolution 122 (A-08), *Removing Financial Barriers to Care for Transgender Patients* 1 (2008) ("The World Professional Association for Transgender Health, Inc. ("WPATH") 7, 8, 9

Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) 5, 6

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (2014), *available at* http://www.apa.org/topics/lgbt/transgender.pdf.....5

Am. Psychological Ass'n, Task Force on Gen. Identity & Gen. Variance, *Report of the APA Task Force on Gender Identity and Gender Variance* 32 (2008), *available at* https://www.apa.o 7

APA Answers to Your Questions, *supra* note 1 8

Br. *Amici Curiae* of 128 Members of Congress, *Christiansen v. Omnicom Grp., Inc.*, No. 16-748-cv, 2016 WL 3551468, at *7 (2d Cir. June 28, 2016) 16

Caitlin Ryan, Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual, & Transgender Children 17 (2009), available at http://familyproject.sfsu 8

Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol. 65 (2013) 22

Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 Law & Ineq. 163 (1991) 15

Laura Edwards-Leeper & Norman Spack, *Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary "Gender Management Service" (GeMS) in a Major Pediatric Center*, 59 J. of Homosexuality 321, 321-22, 327 (2012) 7

Norman P. Spack, *An Endocrine Perspective on the Care of Transgender Adolescents*, 13 J. of Gay & Lesbian Mental Health 309, 312-13 (2009) 5, 6

Oral Decision Minutes, *Whitaker*, 16-cv-00943-PP, Dkt. 28 at 5–6. 14

P.T. Cohen-Kettenis & L.J.G. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment* 5

Preliminary Injunction Order, *Highland*, 2:16-cv-00524-ALM-KAJ, Dkt. 95 23

Preliminary Injunction Order, *Whitaker*, 16-cv-00943-PP, Dkt. 33 23

Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137, 138, 143–44 (1997) 15

Substance Abuse & Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 1 (2015), *available at* http://store. samhsa.gov/shin/content//SMA15-4928/SMA15-4928.pdf 6, 7

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

Intervenor-Defendant Student A, a transgender girl, uses the girls' locker rooms at William Fremd High School, where she is a senior, under the terms of a December 2015 Agreement ("the Agreement") between District 211 ("the District") and the Department of Education's Office of Civil Rights (OCR). Student A and other transgender students use the restrooms consistent with their gender identity. The school year is now well under way. The record remains devoid of evidence that any student has been harmed by Student A's and other transgender students' use of gender-appropriate locker rooms and restrooms but is replete with evidence documenting the harm that Student A and other students would suffer if they were forced back into using facilities that do not match their gender identity or segregated into separate spaces from their fellow students to dress or use the restroom. Yet Plaintiffs persist in trying to overturn the status quo by preliminarily enjoining compliance with the Agreement and the District's practice regarding restroom usage. This Court should reject that effort to disrupt Student A's senior year at school and inflict injury on transgender students in the District and confirm Magistrate Judge Gilbert's carefully reasoned 82-page Report and Recommendation ("R&R") that Plaintiffs' Motion for a Preliminary Injunction be denied. As Magistrate Judge Gilbert concluded, following extensive briefing and oral argument, Plaintiffs have failed to satisfy their heavy burden to prove that each of the requirements—indeed, *any* of those requirements—for this extraordinary relief. Plaintiffs' objections to the R&R come no closer to meeting their burden to prove that they are likely to prevail on the merits, that they are likely to suffer irreparable harm without an injunction, and that they lack an adequate remedy at law. Nor have they established that the balance of harms favors an injunction.

Plaintiffs' arguments rest on errors regarding the meaning of sex and what it means to be transgender, as well as the law prohibiting sex discrimination. The former error is that Plaintiffs

believe sex is solely determined by "biological differences" between the sexes centered on "anatomy, physiology" and, above all else (they newly argue to this Court), "reproductive functions." If a person's gender identity does not match their "reproductive functions," Plaintiffs wrongly attribute that identity to the transgender person's "subjective" "perceptions," which they suggest a person may "optionally adopt" and "optionally" un-adopt (Dkt. 146 at 4-5) and which they contend "mee[t] the criteria for maintaining a delusion" and are a "psychological construct" that most people grow out of. Dkt. 94-1 ¶¶ 15, 17, 29. To the contrary, we show in Part I that the medical research and clinical standards firmly establish that gender identity is neither a transitory whim nor a delusion but a core part of a person's physical and mental makeup. Clinical standards established by U.S. and world professional medical organizations recognize that gender identity is innate or fixed and is a fundamental part of being human and that, in order to thrive, transgender people, like cisgender people, must live their lives in a way that is consistent with their gender identity. In short, transgender girls are girls, and transgender boys are boys.

Plaintiffs also err in characterizing the law. As Magistrate Judge Gilbert recognized, in continuing to cling to the 32-year-old decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), Plaintiffs ignore not just substantial changes in the medical understanding of gender identity since then, but also a host of more recent judicial rulings around the country that interpret "sex" in Title VII and Title IX to protect transgender persons and that have expressly declined to follow *Ulane*'s outdated reasoning. Dkt. 134 at 3, 25. In order to conclude that Plaintiffs had not met their burden on a preliminary injunction motion to show that they are likely to prevail on the merits, Magistrate Judge Gilbert needed to go no further than observe that the case law is in flux and that it is far from clear that the Seventh Circuit will continue to apply

Ulane's narrow view of "sex" to find that the term does not include gender identity. *Id.* at 36. Controlling precedent, however, allows one to go further, as we show in Part II. The Supreme Court's interpretation of statutory prohibitions on "sex" discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to encompass decisions based on gender stereotypes squarely prohibits treating transgender students differently from cisgender students. Requiring transgender individuals to use gendered facilities in conformity with the gender assigned to them at birth, regardless of their gender identity, is prohibited sex stereotyping as clearly as is the discrimination against a cisgender woman because she fails to look or act according to the stereotypes associated with being a woman.

In Part III, we address Plaintiffs' additional contention that Student A's and other transgender students' use of gender-appropriate restrooms and locker rooms violates their right to privacy. That argument relies on a series of decisions involving far-removed circumstances from the facts in this case, which Magistrate Judge Gilbert carefully distinguished in his 20-page analysis of privacy rights. The Agreement itself contains ample provisions allowing girls to maintain their privacy in the locker room when Student A is present and also gives them the option to use alternative facilities where Student A will not be present. The Constitution does not afford students a privacy right to exclude transgender students from school locker rooms and restrooms as Plaintiffs claim (*see* Dkt. 134 at 49-53), but even the most broadly conceived right to bodily privacy would not be violated by the presence of a transgender girl in the girls' locker room, given all the means the Agreement provides for avoiding unwanted exposure. Those practical measures, as well as the privacy available in school restrooms, preclude any plausible contention that Plaintiffs have been harmed, let alone irreparably harmed.

Finally, even if the Magistrate Judge erred on all of these issues, the fact remains that no preliminary injunction may be issued unless Plaintiffs show that the balance of harms requires an injunction. Magistrate Judge Gilbert had no need to reach this balancing stage of the preliminary injunction test, because Plaintiffs failed to satisfy any of the three threshold showings. But it is illuminating to compare, as we do in Part IV, how transgender and cisgender students would be affected by the prohibition on locker room and restroom use that Plaintiffs seek. The record here, and a wealth of medical studies, leave no doubt that the balance tips decidedly against an injunction.

I. Plaintiffs Are Unlikely To Succeed on the Merits of Their Claims Because They Depend on an Incorrect Definition of the Term "Sex."

Plaintiffs now assert that sex is "objectively verifiable" and "wholly grounded in the reality that humans reproduce sexually." Dkt. 146 at 3. But Plaintiffs' current definition of sex, which relies on "the relevance of [a person's] reproductive nature" and "reproductive design" (*id.* at 10, 12), is a notable departure from what they previously argued to this Court. In their Complaint and Motion for Preliminary Injunction briefs, Plaintiffs claimed Student A has an "objective biological status as a male" (Dkt. 23 at 1 n.1) based solely on the fact that Student A was assigned the sex male at birth. *See* Dkt. 1 ¶ 56 (claiming that the term "sex" as used in Title IX "means male and female, under the traditional binary conception of sex consistent with one's birth or biological sex"). Plaintiffs next argued that sex should be determined by "chromosomes" or "genetic sex" such that transgender persons remain "chromosomally, physiologically, and reproductively" the sex they were assigned at birth (Dkt. 94 at 1-2). Currently, however, Plaintiffs assert that all sex-based characteristics "*subserve* our binary, genetically-determined bi-parental nature as humans" that "reproduce sexually." Dkt. 146 at 3, 10 (emphasis in original). Plaintiffs' shifting tests for sex illustrate the complexity of sex and impracticability of defining it

narrowly to exclude consideration of gender identity—a problem that is underlined by the lack of any necessary match between gender and ability to reproduce. Plainly, "biology," as narrowly defined by Plaintiffs, does not "brin[g] dispositive clarity" to identifying a person's sex. Dkt. 146 at 12.

To the contrary, gender identity is the only medically appropriate way to determine a transgender individual's sex. As Dr. Garofolo explained, the term "gender identity" refers to one's sense of self as male or female or something else. Dkt. 79-3 ¶ 12. Gender identity is not unique to transgender individuals—everyone has a gender identity; it is a fundamental part of being human. *Id.*[1] Evidence strongly suggests that many children develop a strong sense of gender identity at a young age and that gender identity has a strong biological basis. *Id.* ¶¶ 12, 14.

For the majority of the population, a person's gender identity conforms with their assigned birth sex. But it is a mistake to assume that sex assigned at birth and gender identity are always the same. They are not.[2] A transgender individual is a person whose gender identity differs from the sex they were assigned at birth. *Id.* ¶ 10. Evidence has shown that this divergence is likely innate. *Id.* ¶ 12. Indeed, analyses of the brains of transgender individuals show that transgender individuals have structural and connectivity differences in their brains as compared to other persons of their birth-assigned sex. *Id.* ¶ 14.

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[1] *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013); Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (2014), *available at* http://www.apa.org/topics/lgbt/transgender.pdf.

[2] P.T. Cohen-Kettenis & L.J.G. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 J. of Psychosomatic Res. 315, 318 (1999); Norman P. Spack, *An Endocrine Perspective on the Care of Transgender Adolescents*, 13 J. of Gay & Lesbian Mental Health 309, 312-13 (2009).

By the end of the twentieth century, researchers had established that external genitalia alone—a criterion for assigning sex at birth—is not determinative of one's sex.[3] Instead, research has come to show that the medically appropriate criteria for assigning an individual's sex, when such assignment is necessary, is gender identity. *Id.* ¶ 22. Using chromosomes, hormones, internal reproductive organs, external genitalia, or secondary sex characteristics to override gender identity for purposes of classifying someone as male or female is not supported by current medical literature or clinical standards. *Id.* ¶ 21.[4]

The medical diagnosis for the incongruence and accompanying distress when an individual's gender identity differs from their birth-assigned sex is "gender dysphoria." *Id.* ¶ 15.[5] Untreated gender dysphoria can result in significant clinical distress, debilitating depression, and, often, suicidality. *Id.* ¶ 16. Treatment for gender dysphoria has been recognized as a "serious medical need" for purposes of the Eighth Amendment. *De'Lonta v. Johnson*, 708 F.3d 520, 522, 525 (4th Cir. 2013).

The distress caused by gender dysphoria can be alleviated through appropriate medical treatment. In the past, mental health and medical practitioners treated gender dysphoria by attempting to change the individual's gender identity. Dkt. 79-3 ¶ 17. Those practices were unsuccessful and incredibly harmful to the patient. *Id.*[6] Today, the established medical

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[3] Cohen-Kettenis & Gooren, *supra* note 2, at 318.

[4] *See* Norman P. Spack, *An Endocrine Perspective on the Care of Transgender Adolescents*, 13 J. of Gay & Lesbian Mental Health 309, 312-13 (2009) ("In other words, how can [a transgender girl] be a male to female if you really always were a female in your brain?").

[5] *See also* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 20130). Contrary to popular misconception, the fact of being transgender is not itself a mental disorder. It is only when the lack of alignment between one's gender identity and sex assigned at birth causes manifest distress that gender dysphoria occurs. *Id.* at 451-53.

[6] *See also* Substance Abuse & Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 1 (2015), *available at* http://store.samhsa.gov/shin/content//SMA15-4928/SMA15-4928.pdf ("[C]onversion therapy—efforts to change an

consensus discourages attempts to change a child's gender identity but to instead treat gender dysphoria by alleviating a person's distress through supporting outward expressions of the person's gender identity and bringing their body, gender expression, and gender presentation into alignment with that gender identity to the extent deemed medically appropriate based on assessments of individual patients by their medical and mental health providers. *Id.* ¶ 18.

There is nothing speculative about these medical facts. The protocol for gender transition is well-established and highly effective.[7] It is codified in the *Standards of Care* developed by the World Professional Association for Transgender Health (WPATH), which are broadly recognized—including by the American Medical Association and American Psychological Association—as the acceptable and appropriate treatment for gender dysphoria.[8] *See Fields v. Smith*, 712 F. Supp. 2d 830, 838 n.2 (E.D. Wis. 2010) (accepting WPATH's *Standards of Care*

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individual's . . . gender identity or gender expression—is a practice that is not supported by credible evidence and has been disavowed by behavioral health experts and associations.").

[7] Substance Abuse & Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 48-49 (2015), *available at* http://store.samhsa.gov/shin/content//SMA15-4928/SMA15-4928.pdf; Cohen-Kettenis *et al.*, *supra* note 2, at 1893; Laura Edwards-Leeper & Norman Spack, *Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary "Gender Management Service" (GeMS) in a Major Pediatric Center*, 59 J. of Homosexuality 321, 321-22, 327 (2012).

[8] Am. Med. Ass'n, House of Delegates, Resolution 122 (A-08), *Removing Financial Barriers to Care for Transgender Patients* 1 (2008) ("The World Professional Association for Transgender Health, Inc. ("WPATH") is the leading international, interdisciplinary professional organization devoted to the understanding and treatment of gender identity disorders, and has established internationally accepted Standards of Care for providing medical treatment for people with GID [gender dysphoria] [that] are recognized within the medical community to be the standard of care for treating people with GID."); Am. Psychological Ass'n, Task Force on Gen. Identity & Gen. Variance, *Report of the APA Task Force on Gender Identity and Gender Variance* 32 (2008), *available at* https://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf ("The *Standards of Care* reflects the consensus in expert opinion among professionals in this field on the basis of their collective clinical experience as well as a large body of outcome research . . . ."); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012) ("The course of treatment for Gender Identity Disorder generally followed in the community is governed by the 'Standards of Care' promulgated by [WPATH]."); *De'Lonta*, 708 F.3d at 522-23 (same).

as "the worldwide acceptable protocol for treating GID [gender dysphoria]"), *aff'd*, 653 F.3d 550 (7th Cir. 2011).

The *Standards of Care* for gender dysphoria calls for an individualized protocol that can include psychotherapy support and counseling, support for social role transition, hormone therapy (including hormone blockers), and a range of confirming surgeries, as determined to be appropriate for each individual. WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 Int'l J. Transgenderism 165 (2012).[9] When transgender individuals are supported and affirmed in their gender identity in the manner contemplated by the *Standards of Care*, they thrive psychologically and socially.[10]

Thus, it is critical that transgender children be able to access this medically necessary care, including living their lives as the boys and girls they know themselves to be. Consistent with the *Standards of Care*, this must include all aspects of their lives, including their use of restrooms, locker rooms, and other spaces and activities typically separated by sex. Dkt. 79-3 ¶ 24. Being excluded from such facilities and forced to use either a separate facility or a facility consistent with their assigned sex at birth would be disruptive to that medically necessary care and cause serious, lasting harms. *Id.*

The support that Students A, B, and C have received to date, as prescribed by their medical providers, is consistent with the *Standards of Care* and allows them to lead healthy lives. *See* Dkt. 32-1; Dkt. 32-2; Dkt. 32-3. Student A is a girl who lives her life consistently as a girl. Dkt. 32-1 ¶ 4. Student A dresses as female, uses a female name and pronouns, participates on the girls' athletic teams at Fremd High School, and uses female restrooms and any other facilities

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[9] *See also APA Answers to Your Questions*, *supra* note 1, at 55.

[10] Caitlin Ryan, Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual, & Transgender Children 17 (2009), available at http://familyproject.sfsu.

that are divided by sex. *Id.* ¶¶ 4, 7. Student A completed a legal name change in May 2013 and obtained a passport listing her gender as female in July 2013. *Id.* Students B and C are boys who live their lives consistently as boys. Student B adopted a traditionally male name, uses male pronouns, dresses as male, and uses the boys' restroom at school. Dkt. 32-2 ¶¶ 5, 13. Student C has legally changed his name to a traditionally male name, completed a gender change in his social security records, changed the gender on his state ID to male, refers to himself using male pronouns, and uses male restrooms in public. Dkt. 32-3 ¶¶ 5, 10. Student A, B, and C all have taken steps to or plan to transition medically. Dkt. 32-1 ¶ 4; Dkt. 32-2 ¶ 7; Dkt. 32-3 ¶ 8. Medically, psychologically, and socially, Student A is a girl, and Students B and C are boys. They simply want to be recognized as the gender that they are and to be treated by the District like any other student. Plaintiffs disagree that Students A, B, and C should be allowed to live their lives in accordance with their gender, contending that "the subjective fluid continuum of gender identity is not 'reasonably comparable' to male and female." Dkt. 146 at 16 n.17. But Plaintiffs' speculative assertions about a "gender continuum" are utterly irrelevant here, where Students A, B, and C identify clearly and consistently as male or female.

II. Refusing To Allow Transgender Students To Use Gender-Appropriate Restrooms and Locker Rooms Would Be Sex Stereotyping in Violation of *Price Waterhouse*.

The Supreme Court's recognition in *Price Waterhouse* that employers may not discriminate based on sex stereotypes confirms that any definition of "sex" is not limited to a person's sex assigned at birth, chromosomal make-up, or reproductive nature, but also includes other aspects of a person's sex, such as gender identity and an individual's conformity (or lack of conformity) with societal expectations regarding gender roles. In *Price Waterhouse*, the Supreme Court recognized that employers discriminate "because of sex" when they make adverse employment decisions based on sex-specific stereotypes, such as the notion that "a

woman cannot be aggressive, or that she must not be." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). In holding that protection from discrimination "because of . . . sex" includes sex stereotyping, *Price Waterhouse* makes clear that the definition of "sex" extends beyond any "biological" differences among people. Rather, the "simple test" for discrimination because of "sex" is "treatment of a person in a manner which but for that person's sex would be different." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

Every federal appellate court that has considered sex discrimination claims brought by transgender people post-*Price Waterhouse* has reaffirmed that laws prohibiting sex discrimination include transgender people within their protections. *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1199–1203 (9th Cir. 2000); *see also Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (assuming without deciding that transgender employees may bring sex stereotyping claims under Title VII). Numerous other courts have allowed sex discrimination claims brought by transgender plaintiffs to proceed after *Price Waterhouse*.[11] As these courts have recognized, because "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," discrimination based on transgender status is a form of impermissible sex stereotyping. *Glenn*, 663 F.3d at 1316–18 (collecting cases). Plaintiffs fail to account for this foundational aspect of federal discrimination law, which invalidates the

[11] *See, e.g.*, *Hughes v. William Beaumont Hosp.*, No. 13-cv-13806, 2014 WL 5511507 (E.D. Mich. Oct. 31, 2014); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Schroer*, 577 F. Supp. 2d 293; *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d. 653 (S.D. Tex. 2008); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *see also Creed v. Family Exp. Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at *8 (N.D. Ind. Jan. 5, 2009) (holding that transgender employees may bring sex stereotyping claims under Title VII but granting summary judgment to employer on the basis of insufficient evidence).

narrow conception of "sex" at the heart of their claims. *See Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse*").

Sex discrimination includes discrimination based on gender nonconformity, as well as physical sex-related characteristics. *See, e.g., Vega v. Chi. Park Dist.*, 958 F. Supp. 2d 943, 958 (N.D. Ill. 2013) (declining to dismiss Title VII claim where plaintiff was told that she "looks like a guy"); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (allegation that a student's harassment was allowed to continue because of a stereotypical perception that he "'was not man enough'" was sufficient to state a Title IX claim). Plaintiffs' arguments why Student A should not be considered a girl are founded in similar gender stereotypes. Plaintiffs contend that a person's sex is dictated by their sex assignment at birth, "genetic sex," or "reproductive nature" and that transgender students must be required to use sex-segregated facilities based on these characteristics rather than their gender identity. Plaintiffs seek to deny transgender students alone the ability to use gendered facilities that match their gender identity because (unlike cisgender students) they fail to conform to the stereotype that a person's gender identity aligns with their sex assignment at birth. *See* Court Minutes from the September 19, 2016, Oral Decision on Motion to Dismiss ("Oral Decision Minutes"), *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 16-cv-00943-PP, Dkt. No. 28, at 8 (E.D. Wis. Sept. 19, 2016) ("[T]he defendants clearly treated the plaintiff differently because he did not conform to the gender stereotypes associated with being a biological female. The school suggested that he use

bathrooms that other students were not required to use [and] endure surveillance to police his bathroom use . . . .").[12]

Transgender persons *by definition* violate "gender norms" because they violate the stereotypical expectation that a person's gender identity matches his or her birth-assigned sex. As a result, discrimination against transgender people falls easily within the category of sex discrimination claims recognized in these and other cases. *See Glenn*, 663 F.3d at 1316; *see also* Decision and Order Granting in Part Motion for Preliminary Injunction ("Preliminary Injunction Order"), *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 16-cv-00943-PP, Dkt. 33 at 9 (E.D. Wis. Sept. 22, 2016) (granting preliminary injunction and ordering school system to provide access to gender identity-appropriate facilities because transgender plaintiff was likely to succeed on merits of sex discrimination claim); Order Granting Motion for Preliminary Injunction ("Preliminary Injunction Order"), *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 2:16-cv-00524-ALM-KAJ, Dkt. 95 at 29 (S.D. Ohio Sept. 26, 2016) (same).[13]

The primary case to which Plaintiffs repeatedly turn for their cramped understanding of "sex" is *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984),which predates *Price Waterhouse*. The *Ulane* plaintiff was a transgender pilot who sued her employer under Title VII for discriminatory termination. *Id.* at 1082. The court concluded "that Title VII does not protect transsexuals" despite that statute's protection against discrimination "because of . . . sex," based

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[12] On September 21, 2016, the *Whitaker* court issued a written order denying the defendants' motion to dismiss "[f]or the reasons stated on the record during [the] oral ruling." Order Denying Defendants' Rule 12(b)(6) Motion to Dismiss the Amended Complaint, *Whitaker*, 16-cv-00943-PP, Dkt. 29, at 1 (Sept. 21, 2016). The Order specifically references the "court minutes memorializing [the] oral ruling." *Id.* Plaintiffs' objection to the Magistrate's reliance on "informal court minutes" is therefore unfounded. *See* Dkt. 146 at 12. Moreover, Plaintiffs' assertion that the language quoted by the Magistrate does not appear on the *Whitaker* docket is incorrect—it appears in the Oral Decision Minutes (*Whitaker*, 16-cv-00943-PP, Dkt. 28 at 3). *Whitaker* Dkt. 28 is attached as Exhibit 1, and *Whitaker* Dkt. 29 is attached as Exhibit 2.

[13] *Whitaker* Dkt. 33 is attached as Exhibit 3, and *Highland* Dkt. 95 is attached as Exhibit 4.

on its understanding that Congress did not intend for the statute to "apply to anything other than the traditional concept of sex." *Id.* at 1085.

But as Magistrate Judge Gilbert recognized, a host of more recent judicial rulings around the country interpreting "sex" in Title VII and Title IX in the wake of *Price Waterhouse* shows that the case law on this issue is, to say the very least, in flux. Dkt. 134 at 3, 25. This uncertainty is confirmed by the Seventh Circuit's decision to vacate the panel ruling in *Hively v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016)—which reluctantly followed *Ulane* in the sexual-orientation context—and to rehear the case *en banc*. *See* Order Granting Rehearing En Banc and Vacating the Panel Opinion, *id.*, No. 15-1720, Dkt. 60 (7th Cir. Oct. 11, 2016). Magistrate Judge Gilbert needed to go no further than to observe that the case law is in flux to conclude that Plaintiffs have failed to show a likelihood of success on the merits.

In fact, controlling precedent *does* go further, conclusively establishing that *Ulane* is no longer good law. More recent medical understanding and case law, including judicial recognition of gender stereotyping claims under Titles VII and IX, mean that the Seventh Circuit should abandon *Ulane*'s narrow view of "sex" and hold that the term does include gender identity. First, *Ulane* incorrectly limits the definition of "sex" to the "traditional" concept of being male or female. As already described, *Price Waterhouse* did away with such a limited notion of what "sex" means. "[S]ince the decision in *Price Waterhouse*, federal courts have recognized *with near-total uniformity*" that *Ulane*'s approach is no longer good law. *Glenn*, 663 F.3d at 1318 n.5 (emphasis added). *Ulane* "has been eviscerated by *Price Waterhouse*," under which the federal antidiscrimination statutes' "reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith*, 378 F.3d at

573; *see also Schwenk*, 204 F.3d at 1201–02 (the "narrow[ ]" construction and "judicial approach" in *Ulane* "ha[ve] been overruled by the logic and language of *Price Waterhouse*"); *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) ("*Price Waterhouse* abrogates" *Ulane*); *Radtke v. Misc. Drivers & Helpers Union*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (rejecting "reliance on decades-old Title VII cases," including *Ulane*); *Finkle*, 12 F. Supp. 3d at 788; *Schroer*, 577 F. Supp. 2d at 307; *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 & n.15 (W.D.N.Y. Sept. 26, 2003). Most recently, *Whitaker* held that *Ulane* did not preclude a transgender plaintiff from alleging sex discrimination under Title IX because *Ulane* "did not interpret the word 'sex' under Title IX, it provided no basis for its definition of the word 'sex,' and it does not take into account cases such as *Price Waterhouse*." Oral Decision Minutes, *Whitaker*, 16-cv-00943-PP, Dkt. 28 at 5–6.

The sole post-*Price Waterhouse* cases on which Plaintiffs rely for the assertion that *Ulane* is still good law are *Creed*, 2009 WL 35237, and *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). These decisions are inconsistent with both the logic and the result in *Price Waterhouse*. *Creed* recognizes that transgender employees may bring sex discrimination claims under Title VII when they can present specific evidence of sex stereotyping, undercutting Plaintiffs' theory that "sex" means only the fact of being physically male or female. But *Creed* relies on the now-discredited narrow definition of "biological sex" to find that the enforcement of a "biological sex"-specific dress code is insufficient by itself to prove discriminatory intent. 2009 WL 35237, at *11. *Johnston* involved an equal protection case, did not involve privacy claims by cisgender students, and relied on the discredited reasoning of *Ulane*. *Johnston*, 97 F. Supp. 3d, at 675-78. Neither case supports Plaintiffs' argument that "the biology of human reproduction is dispositive." Dkt. 146 at 24.

Plaintiffs make no real attempt to reconcile *Ulane* with *Price Waterhouse* or other legal developments in the more than 30 years since *Ulane* was decided.[14] But in that period, undeniably, "[t]he broader legal landscape has undergone significant changes" in the area of sex and gender discrimination, as well as other areas of human behavior that have long been subject to stereotyping and discrimination. *E.g.*, *Christiansen v. Omnicom Grp., Inc.*, No. 15 Civ. 3440, 2016 WL 951581, at *13 (S.D.N.Y. Mar. 9, 2016). These developments show that age-old errors of legal analysis need not tie the hands of modern courts with better evidence, better understanding, and decades more case law as guidance.

Ulane's second critical legal error was to rely on Title VII's murky legislative history to support its holding that transgender individuals are not entitled to Title VII's protections. The *Ulane* court inconsistently concluded both that there is a "total lack of legislative history supporting the sex amendment" to Title VII and that "Congress had a narrow view of sex in mind when it passed the Civil Rights Act." 742 F.2d at 1085–86. Regardless of the truth or weight of these conflicting statements,[15] any reliance on congressional intent behind Title VII to determine its reach was squarely rejected in *Oncale v. Sundowner Offshore Services, Inc.*,

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[14] Plaintiffs' observation that some courts have found that Title VII does not include sexual orientation is beside the point. *See* Dkt. 146 at 22. Discrimination on the basis of sexual orientation and against transgender persons have been treated differently under federal law by the courts. *See* Dkt. 117 at 5-6. In addition, sex stereotyping claims are treated differently than those based on sexual orientation. *See, e.g.*, *Hively*, 2016 WL 4039703, at *4–11 (discussing the differential treatment of sexual orientation and sex stereotype claims in the Title VII context), *en banc review granted*.

[15] *Ulane* stated that the Title VII "sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act." 742 F.2d at 1085. That account of the origins of the amendment has been discredited by more recent scholarship. *See, e.g.*, Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137, 138, 143–44 (1997) (the amendment was instead the "result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women"); Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 Law & Ineq. 163 (1991).

523 U.S. 75, 79–80 (1998). In recognizing that Title VII protects against male-on-male sexual harassment, the Court observed that such behavior was "assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79; *see also Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) (*Ulane*'s arguments "have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non* of legislative history").

In addition, the Supreme Court has rejected *Ulane*'s reliance on subsequent Congress' rejection of amendments to Title VII that would have explicitly prohibited discrimination based on sexual orientation (but *not* transgender status) to support its claim that Congress took a narrow view of the concept of "sex." *Ulane*, 742 F.2d at 1085–86. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("subsequent legislative history is . . . a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law"). Congressional inaction as to sexual orientation is irrelevant to what "sex" means in the statute; it has nothing to do with gender identity. And congressional failure to act could just as easily establish the opposite conclusion from that of the *Ulane* court (*i.e.*, Congress may have concluded that Title VII already covered sexual orientation and gender identity discrimination through its "because of . . . sex" language). *See* Br. *Amici Curiae* of 128 Members of Congress, *Christiansen v. Omnicom Grp., Inc.*, No. 16-748-cv, 2016 WL 3551468, at *7 (2d Cir. June 28, 2016).

Ulane thus rests on legal errors that have subsequently been exposed, as well as on the attitudes and medical knowledge of the very different era in which it was decided three decades

ago. Although the Seventh Circuit has not yet explicitly overruled *Ulane*, the *en banc* rehearing in *Hively* suggests that overruling *Ulane* is a strong possibility.[16] In any event, district courts in this circuit are not bound by Seventh Circuit precedent that has been overtaken by an "intervening change in the controlling authority." *Cameo Convalescent Ctr., Inc. v. Percy*, 800 F.2d 108, 110 (7th Cir. 1986); *see also Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 879 (N.D. Ill. 2014) ("If existing circuit precedent cannot be reconciled with a subsequent ruling from the Supreme Court, then the latter governs."); *Villasenor v. Indus. Wire & Cable, Inc.*, 929 F. Supp. 310, 313 (N.D. Ill. 1996) ("[W]e are bound by Seventh Circuit precedent unless and until a subsequent decision by that court or the Supreme Court undermines its holding."). This Court therefore is not bound by *Ulane*'s outmoded view of the definition of "sex," which cannot be reconciled with *Price Waterhouse* or *Oncale*.

III. Plaintiffs Have Failed To Show They Will Succeed on the Merits of Their Constitutional Privacy Claim.

Even apart from the factual and legal shortcomings of their arguments about "sex," Plaintiffs cannot show they will prevail on their privacy claim. That claim ignores provisions of the Agreement between the District and OCR that Plaintiffs are attacking, which establish a private changing area for "*any students* who wish to be assured of privacy while changing." Dkt. 21-3 at 2 (emphasis added), as well as the District's decision to make available private shower facilities for students who wish to use them. Dkt. 21-8 at 9. Specifically, the District agreed "to take steps to protect the privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker rooms." *Id.* Student A said she

[16] As we explained in detail in a prior filing (Dkt. 120), Plaintiffs' request for an injunction would fail even if the Seventh Circuit were to affirm the panel decision in *Hively*. *Hively* involved only a sexual orientation claim under Title VII and was careful to distinguish between discrimination claims based on gender stereotypes or gender nonconformity, which it recognized are cognizable under Title VII, and sexual orientation claims, which it reluctantly held are not. *See Hively*, 830 F.3d at *4–11.

would change within such private changing stations. *Id.* And any other girl student may do so as well. Plaintiffs fail to explain why, in these circumstances, the presence of a transgender girl in the restroom would implicate constitutional privacy interests at all.

Plaintiffs argue that Defendants should force transgender students to use separate, individual facilities. Dkt. 146 at 31. But the Agreement makes private accommodations available for *all* female students equally in the form of privacy curtains or the ability to choose to change in separate, private facilities. Accordingly, it does *not* mandate "forced observations or inspections of the naked body" by anyone, let alone by "a member of the opposite sex." *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994). Plaintiffs' contention that the Agreement "*[f]orc[es]* minors to risk exposing their bodies to the opposite sex" and otherwise "*obligat[es]* adolescent children to share intimate facilities with a member of the opposite sex" is simply untrue. Dkt. 146 at 26 (emphasis added). Plaintiffs' historical ruminations about privacy—which egregiously conflate the mere presence of a transgender student in the locker room with "peeping toms" and "sexting" (*id.* at 27)—is premised upon the claim that students cannot avoid unclothed interaction with Student A. Under the Agreement, they can. Regardless, the premise of Plaintiffs' claim is wrong; as already discussed, Student A's presence in the girls' restrooms or locker rooms is not that of an "opposite-sex student." *Id.* at 15. She is a girl.

The cases Plaintiffs rely on in their Response are no more useful than the series of inapposite decisions the Magistrate Judge distinguished. Plaintiffs again cite *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984), for the proposition that, "in the context of locker rooms and restrooms, bodily privacy rights begin at the door to the facility." Dkt. 146 at 28. But *Norwood* held no such thing. Both the plaintiff and the defendant in *Norwood* conceded that entry of a non-transgender female janitor into a men's restroom would

violate the privacy rights of any man who happened to be inside. Thus, the only question before the court was whether the bona fide occupational qualification exception to Title VII applied and whether the defendant provided reasonable alternatives for the plaintiff. *Norwood*, 590 F. Supp. 2d at 1417–23. And there is no indication that the facilities in *Norwood* offered privacy areas similar to those available at Fremd High School.[17]

Nor does the stay of the mandate in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), establish that Plaintiffs can maintain a valid privacy claim. In *G.G.*, the plaintiff, a transgender boy, sued for access to the boys' facilities in his school. The Fourth Circuit held for the plaintiff, and, on remand, the district court issued an injunction permitting the plaintiff to use the boys' facilities. The Supreme Court recalled the mandate and stayed the injunction. Justice Breyer, who provided the critical fifth vote to stay the injunction, specifically noted that he was staying the injunction "as a courtesy" in order to "preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari." *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (Breyer, J., concurring). Thus, *G.G.* is unhelpful to Plaintiffs for two separate reasons. First, the stay in *G.G.* was granted "as a courtesy" and does not create a privacy right. Second, to the extent the stay in *G.G.* stands for anything at all, it stands in favor of preserving the status quo. The status quo in this case is the Agreement between OCR and the District, as well as the District's practice regarding restroom usage, which permit transgender students to use the facilities that align with their gender identities.[18]

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[17] The Magistrate also correctly disregarded *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692 (N.D. Ohio 2005), on the basis that the plaintiff's substantive due process claim was decided on immunity grounds and did not decide the privacy question. *See id.* at 711–13.

[18] The subsequent grant of certiorari in *G.G.* is equally irrelevant. The Supreme Court's decision to review a case indicates nothing at all about the ultimate outcome. Nor did the Fourth

IV. Plaintiffs Cannot Satisfy the Other Requirements for a Preliminary Injunction.

As the Magistrate Judge recognized, Plaintiffs' failure to demonstrate a likelihood of success on the merits of their claims ends the Court's consideration of their motion. Without such a showing, the Court "must deny the injunction." *Girl Scouts of Manitou Council*, 549 F.3d at 1086.

Even if this Court were to disagree with the Magistrate's view of the merits, Plaintiffs would still fail to satisfy the irreparable harm, balance-of-hardships, and public interest elements necessary to obtain a preliminary injunction. Plaintiffs assert that they are suffering irreparable harm because they are being "denied access to truly private girls' locker rooms and bathrooms." Dkt. 146 at 36. But, as the Magistrate Judge correctly found, Plaintiffs are not being denied access to private facilities; rather, they have access to the privacy stalls and alternative facilities made available under the District's Agreement with OCR. That Plaintiffs have chosen not to use these facilities cuts against their assertions of irreparable harm. *See Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012).[19] In any event, Plaintiffs' allegations of emotional distress are general, conclusory, and speculative. As Magistrate Judge Gilbert observed, "Plaintiffs do not allege that Girl[] Plaintiffs have stopped going to physical education class, quit an extracurricular activity, received lower grades, or struggled to focus during class."

Circuit in *G.G.* consider an agreement like that involved here or the applicability of *Price Waterhouse*.

[19] None of the cases Plaintiffs cite provides support for the proposition that Plaintiffs are irreparably harmed by the choice between sharing the locker room with a transgender student and using an alternative facility. *See Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771, 779 (S.D.W. Va. 2012) (involuntary placement of female students in a single-sex classroom violates Department of Education regulation requiring single-sex classrooms to be "completely voluntary"); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 294 (2d Cir. 2004) (girls' soccer team must be permitted to attend championship playoff when boys' team is permitted to attend); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993) (discontinuation of women's softball team violated Title IX by creating 10% disparity in athletic participation between male and female students).

Dk. 134 at 75. Plaintiffs make no attempt in their Response to provide the "who, what, where, when, why, and how" of their alleged injuries, and could not do so because they successfully opposed discovery on those issues and failed to submit affidavits or other evidence establishing those alleged facts. *See* Dkt. 146 at 35–36.

Plaintiffs' conclusory allegations stand in stark contrast to the immediate and irreparable injury Intervenor-Defendants would suffer if a preliminary injunction were granted. Prior to being allowed to use the girls' locker rooms, Student A expressed anxiety and frustration at being treating differently by the school, she talked about feeling alone and isolated when she had to use a separate space for changing, and she talked about feeling singled out as being different from other girls. Dkt. 32-1 ¶ 12. Being singled out was embarrassing for Student A and invited questions and speculation about her transgender status from other students. Student A would often not change for gym class, miss gym class, or even miss school related to her feelings of being isolated, upset, and embarrassed related to this issue. *Id.* Similarly, before Student B came out as transgender, he suffered from serious depression and anxiety, was often withdrawn and uncommunicative, had difficulty sleeping, and had exhibited self-harming behaviors. Dkt. 32-2 ¶ 9. But since transitioning, Student B has been visibly happier, more confident, and more comfortable in his everyday life. *Id.* ¶ 10. Student C's transition to living his life as a boy has resulted in his becoming more outgoing and confident, more social, less apt to hide in his room, and a lot happier and carefree. Dkt. 32-3 ¶ 9.

As more fully set forth in Part I, *supra*, the medically accepted treatment for gender dysphoria must include alleviating distress through supporting outward expressions of the person's gender identity. Dkt. 79-3 ¶ 18. The need for support encompasses all aspects of life, including the use of restrooms and other spaces typically separated by sex. *Id.* ¶ 24. The ability

to use facilities designated for one's gender as part of one's daily activities is an essential part of a transgender person's medically indicated social role transition. Dkt. 79-3 ¶ 26.[20] Being excluded from such facilities and forced to use either a separate facility or a facility consistent with their assigned sex at birth is disruptive to that medically necessary care and can cause serious, lasting harms. *Id.* When transgender students are not permitted to use restrooms or locker rooms that match their gender identity, they experience anxiety and have trouble concentrating in school. *Id.* ¶ 27. They are at risk for depression, post-traumatic stress disorder, hypertension, and self-harm. Dkt. 32-1 ¶ 9. And they are labeled as an undifferentiated "other"—someone who is not a "real" boy or girl. Dkt. 79-3 ¶ 26. To avoid the anxiety of using the restroom, transgender students often avoid drinking fluids during the day and hold their urine for the entire school day, making them prone to developing urinary tract infections, dehydration, and constipation. Dkt. 79-3 ¶¶ 26-27. Excluding a transgender student from restrooms and locker rooms singles out the student for potential stigmatization, victimization, and bullying, and it undermines the medically appropriate social transition process. Dkt. 79-3 ¶¶ 26, 28.

Intervenor-Defendants have provided specific examples of the harm they will suffer if an injunction is granted. Student A would face immediate harm if an injunction were to suspend the very Agreement that she has fought for over the course of two years, during which she experienced substantial stress and anxiety. Dkt. 32-1 ¶¶ 6–17. Losing gender-appropriate restroom and locker room access would be traumatizing and embarrassing. *Id.* ¶ 20. Student A has already lost years of her high school experience—years she will experience "only once during [her] life"—and, if a preliminary injunction were to issue, she will irrevocably lose her senior year as well. *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771, 778 (S.D. W. Va.

[20] *See also* Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol. 65 (2013).

2012). Similarly, Students B and C will suffer significant discomfort, embarrassment, and psychological harm if they are unable to use gender-appropriate restrooms when they enter District schools. Dkt. 32-2, ¶¶ 19–21; Dkt. 32-3, ¶¶ 10–12. Forcing Student C to use a single-use restroom or to dress apart from the other boys would separate him from the other students and send him the message that he is different and should be ashamed of who he is. Dkt. 32-3 ¶ 10. And the Safe Schools Alliance's work in assisting Student A will be undone and its advocacy efforts on behalf of transgender students damaged. Dkt. 32-4, ¶¶ 14–19. In short, any inconvenience to Plaintiffs pales in comparison to the medical and emotional injuries Intervenor-Defendants will suffer if an injunction is granted.[21] *See* Preliminary Injunction Order, *Whitaker*, 16-cv-00943-PP, Dkt. 33 at 10–12 (Sept. 22, 2016) ("[N]o recovery could give back to [plaintiff] the loss suffered if he spent his senior year focusing on avoiding using the restroom, rather than on his studies, his extra-curricular activities and his college application process."); Preliminary Injunction Order, *Highland*, 2:16-cv-00524-ALM-KAJ, Dkt. 95 at 41 ("The stigma and isolation [plaintiff] feels when she is singled out and forced to use a separate bathroom contribute to and exacerbate her mental-health challenges.").

Further, a preliminary injunction would damage the public interest—that is, the interest of non-parties. *See Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992). Plaintiffs have made no showing at all that the public interest is better served by an injunction than by preserving the status quo during the litigation. The protection of privacy is amply served by the Agreement, as we have explained in Part III. And the public has an interest in providing

[21] Plaintiffs contend that the Plaintiffs are the only parties with an interest in protecting their privacy. *See* Dkt. 146 at 31 ("Student A is not seeking to use the girls' locker rooms because of the privacy afforded, but because [she] believes it affirms [her] perceived identity."). To the contrary, Student A cares deeply about protecting her privacy, which is why she sought to use the girls' facilities rather than changing and showering in a separate space from her fellow students which served to both stigmatize her and reveal her transgender status to other students.

equal educational opportunities to all students. If a preliminary injunction were to issue, all transgender students in the District would face uncertainty about their ability to use the gender-appropriate restroom, which could result in anxiety, learning difficulties, stigmatization, depression, and even suicidality. An injunction would also create serious confusion and uncertainty for *all* families with students in the District over the status of the District's Agreement with OCR—an Agreement finally reached this past December after years of investigation, negotiation, public hearings, and debate.

CONCLUSION

For the reasons stated above, the Intervenor-Defendants urge the Court to adopt the Report and Recommendation.

Dated: November 18, 2016

Respectfully submitted,

/s/ Britt M. Miller

John Knight
ROGER BALDWIN FOUNDATION OF ACLU, INC.
180 North Michigan Avenue
Suite 2300
Chicago, IL 60601
Telephone: (312) 201-9740 ext. 335
Facsimile: (312) 288-5225
jknight@aclu-il.org

- and -

Ria Tabacco Mar*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

125 Broad St., 18th Floor
New York, NY 10004
Telephone: (212) 549-2627
Facsimile: (212) 549-2650
rmar@aclu.org

* *Admitted pro hac vice*

Britt M. Miller
Timothy S. Bishop
Laura R. Hammargren
Linda X. Shi
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
bmiller@mayerbrown.com
tbishop@mayerbrown.com
lhammargren@mayerbrown.com
lshi@mayerbrown.com

- and –

Catherine A. Bernard
Madeleine L. Hogue*†
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

cbernard@mayerbrown.com
mhogue@mayerbrown.com

** Admitted pro hac vice*
† Member of the North Carolina Bar; not admitted in the District of Columbia. Practicing under the supervision of firm principals.

Counsel for Students A, B, and C, and the Illinois Safe Schools Alliance

Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Court Minutes

DATE:	September 19, 2016
JUDGE:	Pamela Pepper
CASE NO:	2016-cv-943
CASE NAME:	Ashton Whitaker v. Kenosha Unified School District No. 1 Board of Education, *et al.*
NATURE OF HEARING:	Oral decision on motion to dismiss
APPEARANCES:	Joseph J. Wardenski – Attorney for the plaintiff Ilona Turner – Attorney for the plaintiff Alison Pennington – Attorney for the plaintiff Michael Allen – Attorney for the plaintiff Robert Pledl - Attorney for the plaintiff Ronald S. Stadler – Attorney for the defendants Jonathan E. Sacks - Attorney for defendants
COURTROOM DEPUTY:	Kristine Wrobel
TIME:	3:34 p.m. – 4:38 p.m.

The court began by reviewing the standard for determining whether to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6). A motion to dismiss challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). When evaluating a motion to dismiss under Rule 12(b)(6), the court accepts as true all well-pleaded facts in the complaint and draws all reasonable inferences from those facts in the plaintiff's favor. AnchorBank, FSB v. Hofer, 649 F.3d 610, 614 (7th Cir. 2011). To survive a Rule 12(b)(6) motion, the complaint must provide the defendant with fair notice of the basis for the claim and also must be facially plausible. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

The court then moved on to analyze the plaintiff's claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. This statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. §1681.

The court noted that Count One alleged that defendant Kenosha Unified School District ("KUSD") is a federal funding recipient, and thus is covered by Title IX. Dkt. No. 1 at 30. Count One of the complaint alleged that KUSD discriminated against the plaintiff by treating him differently from other students "based on his gender identity, the fact that he is transgender, and his non-conformity to male stereotypes." Id.

The court noted that during oral argument on the motion to dismiss, the parties had each discussed what the word "sex" meant in the context of Title IX. No court in this circuit has decided that question. The court recalled that KUSD had argued that "sex" referred to the gender on one's birth certification, while the plaintiff had argued that "sex" was more than biological, birth gender. The court told the parties that it had looked in three different dictionary definitions of the word "sex." The *Merriam-Webster Dictionary* defined "sex" as "the state of being male or female." It defined the word "male" as being "a man or a boy: a male person." *Webster's New World College Dictionary ("Your Dictionary")* defined "sex" as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions." It provided a secondary definition: "the character of being male or female; all the attributes by which males and females are distinguished." That dictionary defined the word "male" as being "someone of the sex that produces sperm, or is something that relates to this sex . . . ." The secondary definition added, "as opposed to a female who produces an egg." The on-line dictionary *Dictionary.com* defined "sex" as "either the male or female division of a species, especially as differentiated with reference to the reproductive functions." It defined the word "male" as "a person bearing an X and Y chromosome pair in the cell nuclei and normally having a penis, scrotum, and testicles, and developing hair on the face at adolescence; a boy or man."

In noting the variations among these definitions, the court looked at the Fourth Circuit's decision in G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. April 19, 2016). The court stated that it was not relying on the G.G. decision; the Supreme Court has stayed the issuance of the preliminary injunction the district court issued as a result of that decision. But the court pointed out that that court, like this one, had found varying definitions of 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* 281 (1971).

Id. at 721.

Given this array of differing definitions of the word sex, the court agreed with the G.G. court's reasoning that

> the definitions . . . suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive. The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness."

Id. None of these definitions are helpful when some of those various factors—genes, or chromosomes, or character, or attributes—point toward male identity, and others toward female. And, the court noted, none of those definitions describe "sex" as the gender on a person's birth certificate.

The court opined that some of the Seventh Circuit's decisions have acknowledged the difficulties of trying to cram the analysis of the word "sex" in the Title VII context into the binary construct. For example, in Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), Judges Ripple, Manion and Rover (Rovner writing) struggled with the question of why, in a case where a plaintiff claimed to have been harassed under circumstances involving sexual overtones (as in the act of sex), it should matter whether the victim was harassed because of his or her sex. (That decision was vacated and remanded; the final disposition is sealed. City of Belleville v. Doe, 523 U.S. 1001 (1998).) In Hively v. Ivy Tech Community College, South Bend, Case No. 15-1720, 2016 WL 4039703 at *15 (7th Cir., July 28, 2016), the court stated in the context of discrimination under Title VII based on sexual orientation that it "does not condone" "a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry."

Some cases have discussed the absurd results of trying to cabin people into categories based on gender at birth. In Schroer v. Billington, 577 F.Supp.2d 293, 306-307 (D. D.C. 2008), the court reasoned that a "plain-language" reading of the word "sex" in the Title VII context would, under certain circumstances, mandate a strange result:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take

> seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

The court turned to the Seventh Circuit's decision in Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), upon which the defendants had relied in their moving papers and at oral argument. In finding that Title VII did not provide protection to people who had "sex identity disorder," the court stated:

> It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 . . . (1979). 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.

Id.at 1085.

The court agreed with the defendants that neither the Supreme Court nor the Seventh Circuit had overruled Ulane. But in the context of the struggles the court had outlined above with defining "sex" in evolving contexts, the court noted several things. First, the Ulane conceded that there was little legislative history regarding the decision to include protections against discrimination based on "sex." The Ulane court explained that the statute originally was "primarily concerned" with race discrimination, and that "sex" was "added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." Id., quoting Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662 (9th Cir. 1977). The court stated that "[t]his sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added

to the statute's prohibition against race discrimination." Id. (citing Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 434-35 & n.1 (W.D. Pa. 1973)).

This court observed that Title IX does not share the same legislative history (or lack thereof), and that there may be reasons why a court may interpret the word "sex" more broadly in a Title IX context than in Title VII. The court also stated that the defendants' argument that, because Congress not shed light on the definition of the word "sex" in Title VII in the years since its passage was not necessarily determinative, noting the plaintiffs' reference, in argument and in their supplemental authority, to recent efforts by members of Congress to, among other things, pass the Student Non-Discrimination Act. (Dkt. No. 23).

Second, the court pointed out, as the plaintiffs had discussed at oral argument, that the decision in Ulane predated the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) by five years, as well as other decisions the parties had discussed at oral argument. As the Seventh Circuit acknowledged in Hively, the Supreme Court stated in Price Waterhouse that "Congress intended to strike at the *entire* spectrum of disparate treatment of men and women resulting from sex stereotypes." Hively, 2016 WL 4039703 at *13 (emphasis the Seventh Circuit's) (quoting Price Waterhouse, 490 U.S. at at 251).

Third, the court stated, Ulane held that Title *VII* does not protect trans-gender persons; it did not interpret Title IX. As the court noted above, at the motion to dismiss stage, the court cannot conclude that there may not be reasons to interpret the word "sex" in the Title IX context differently.

Finally, the court pointed out that the Ulane court had stated that even if it had accepted the district court's finding that the plaintiff was female, the district court had not made factual findings relating to whether the defendant had discriminated against her on that basis. Ulane, 742 F.2d at 1087. The court emphasized that at the motion-to-dismiss stage, it had made no finding as to whether the plaintiff (Ash Whitaker) was male or female, a determination that would need to be made after further litigation before addressing the question of discrimination.

Thus, the court summarized, (1) there was no case providing definition of word "sex" as it appear in Title IX, and the statute does not define the word; (2) no court in the Seventh Circuit has specifically addressed whether Title IX's prohibition of discrimination on the basis of sex encompasses transgender students; (3) the case law considering whether "sex" in the Title VII context includes transgender persons is contradictory; (4) there clearly are factual and legal disputes between the parties, and support for each parties claims in the case law; (5) Ulane does not gut the Title IX cause of action, because it did not interpret the word "sex" under Title IX, it provided no basis for its definition of

the word "sex," and it does not take into account cases such as Price Waterhouse and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

The court acknowledged that the plaintiffs had argued that Texas v. USA, 2016 WL 4426495 (N.D. Tex. August 21, 2016) may cast doubt on the reasoning the Fourth Circuit employed in G.G. (although the court opined that that case was unusual in its broad scope of the defendant's request for national injunctive relief, and noted the fact that it was a district court decision, while G.G. is an appellate decision). The court again emphasized, however, that at the motion-to-dismiss stage, the court need only determine whether the plaintiff's claims are plausible, not whether the plaintiffs eventually will succeed.

The court also reminded the parties that at oral argument, it had asked the plaintiff about how a student's inability to use a restroom constituted a denial of educational opportunities. The court stated that, since argument, it had determined that there is support in the case law for the conclusion that a student's inability to use the restroom of his/her choice impacts his/her educational opportunities. The court reiterated that the facts around that claim would be fleshed out in further litigation, but concluded that there was a sufficient basis for the plaintiffs to make that claim under the law.

The court touched on the defendants' argument that it owed no deference to the Department of Education's "Dear Colleague" letter (Dkt. No. 10-6). The court agreed with the defendants that the letter was not a statute (and therefore was not binding law), and that it wasn't entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), because it did not constitute an agency regulation. The court agrees with the G.G. court's reasoning, however, that the letter should be accorded deference under Auer v. Robbins, 519 U.S. 452 (1997). G.G., 822 F.3d at 720.

The defendants first argued that the regulation providing schools with the discretion to segregate bathrooms based on sex was unambiguous. (While the defendants did not specifically identify that regulation, the court expects that they referred to 34 C.F.R. §106.33, which states that "[a] recipient [of federal funding] 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.") A court does not grant Auer deference to an agency which interprets an unambiguous regulation. G.G., 822 F.3d at 719-720.

The court disagreed, finding that, for the reasons discussed above, the word "sex" in the regulation was ambiguous. It does not address how schools must consider or treat transgender students within the discretionary scheme it provides. Once the court determined that the regulation was ambiguous, the

court then turned to whether the Department of Education's interpretation of that regulation in the "Dear Colleague" letter was plainly erroneous or inconsistent with the regulation or with Title IX. Id. at 721 (citing Auer, 519 U.S. at 461). The "Dear Colleague" letter stated that, "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identities," and that schools "may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so." Dkt. No. 10-6 at 5. The court stated that it could not conclude that the Department's interpretation requiring schools to allow transgender persons to use the restroom comporting with their gender identities would prevent schools from exercising their discretion to provide separate bathrooms. Rather, the court indicated, it allowed students identifying as boys to use the bathroom segregated for boys, and those identifying as girls to use the bathroom segregated for girls.

The defendants also argued that the only way the Department's letter would not be at odds with the regulation would be to change Title IX's definition of the word "sex," and that that task was reserved to Congress. The court disagreed, noting—as it had throughout its ruling-that neither the statute nor the regulation define the word "sex."

The defendants argued that to defer to the Department's interpretation would leave schools in the position of trying to "assume gender identity based on appearances, social expectations or explicit declarations of identity," citing the dissent in G.G. The court stated that whether or not that turned out to be the case was not relevant to whether the Department's letter was inconsistent with the regulation, and the court determined that it was not. For those reasons, the court found, it was appropriate to accord the letter Auer deference.

The court also stated that regardless of whether Title IX provides protection for transgender persons, the plaintiffs have alleged sufficient facts to sustain a gender stereotyping claim. See Price Waterhouse, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'") (citations omitted). See also, Kastl v. Maricopa Count, 325 F. Appx. 492, 493 (9th Cir. 1009) (finding that after Price Waterhouse and Schwenk v. Harford, 204 F.3d 1187, 1201-02 (9th Cir. 2000), "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women.")

In regard to sex stereotyping, the court stated, the defendants clearly treated the plaintiff differently because he did not conform to the gender stereotypes associated with being a biological female. The school suggested that he use bathrooms that other students were not required to use, endure surveillance to police his bathroom use, and initially refused to allow him to stand for prom king (although it later changed that decision).

For all of the above reasons, the court concluded that the plaintiffs had submitted sufficient factual evidence to survive a motion to dismiss, and sufficient legal authority to overcome the defendants' argument that they had no possibility of prevailing as a matter of law. Thus, the court denied the motion to dismiss as to Count One.

The court then turned to the claim in Count Two—that the defendants had violated 42 U.S.C. §1983 by violating the plaintiffs' Fourteenth Amendment right to equal protection. The court began to stating that to state a claim for relief under §1983, a plaintiff must allege that (1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was visited on him by a person or persons acting under color of state law. Buchanan-Moore v. Cnty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009) (citing Kramer v. Village of North Fond du Lac, 384 F.3d 856, 861 (7th Cir. 2004)). The court found that the plaintiff had satisfied these elements—he had alleged that his equal protection rights under the Fourteenth Amendment had been violated by the defendants, who are state actors.

With regard to the Fourteenth Amendment claim, the court stated that "[i]n order to make out an equal protection claim . . . [the plaintiff] had to present evidence that the defendants treated [him] differently from others who were similarly situated. [He] also had to present evidence that the defendants intentionally treated [him] differently because of [his] membership in the class to which [he] belonged." Hedrich v. Bd. of Regents of Univ. of Wisconsin Sys., 274 F.3d 1174, 1183 (7th Cir. 2001) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Nabozny v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996). The plaintiff alleged in the complaint that the defendants treated him differently from the "other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes . . . ." Dkt. No. 1 at 32-33. The court stated that, if one assumed for the purposes of the argument that Ash is male, he had alleged sufficient facts to indicate that he was discriminated against relative to other males, because he had alleged that he was not allowed to use the facilities that the defendants allow other males to use. In the alternative, the court stated, the plaintiff is transgender, and if the court concludes at a later stage in the proceedings that transgender persons constitute a suspect class, then the plaintiff has alleged sufficient facts to show discrimination on that basis. Finally, the court again concluded that the plaintiff had alleged sufficient facts to show discrimination based on gender stereotypes.

The court pointed out that it did not have to decide, at the motion to dismiss stage, whether transgender persons constituted a suspect class. Durso v. Rowe, 579 F.2d 1365, 1372 (7th Cir. 1978) ("A state prisoner need not allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the Equal Protection Clause. The lack of a fundamental constitutional right or the absence of a suspect class merely affects the court's standard of review; it does not destroy the cause of action.") The court noted that the defendants argued that the court should employ a rational basis standard of review, while the plaintiffs had argued for heightened scrutiny, but the court reiterated that it did not need to make a decision on that issue in order to conclude that the complaint contained sufficient allegations to survive the motion to dismiss.

For all of these reasons, the court also denied the motion to dismiss Count Two.

In light of its decision to deny the motion to dismiss, the court turned to the motion for a preliminary injunction. Counsel for the plaintiff told the court that the plaintiff's application for a legal name change had been granted, and that the relief the plaintiffs were seeking in the injunction consisted of enjoining the defendants from prohibiting the plaintiff from using the boys' restrooms, enjoining the defendants from calling the plaintiff by female names and female pronouns, and enjoining the defendants from identifying the plaintiff as transgender (in ways such as requiring him to wear a colored arm band). Counsel for the defendants acknowledged that the defendants were aware of the official name change and were in the process of changing school records, but indicated that he'd need time to talk with his clients before acceding to any request never to refer to the plaintiff by a female pronoun. He also told the court that there was no wristband policy, that there never had been, and that the plaintiffs' request for relief on that ground was speculative.

Counsel for the plaintiff asked if the court would hear argument right away on the request for injunctive relief as to the restrooms, and reserve for a later time the request regarding pronoun reference. The court, after conferring with counsel for the defense, agreed. The court also stated that it would not entertain a request for injunctive relief regarding the armband at this time, given that no such policy appeared to be in force.

The court scheduled a hearing on the motion for preliminary injunction for September 20, 2016 at 1:00 p.m. in Room 225. Parties wishing to appear by phone may do so by calling the court's conference line at 888-557-8511 and using the access code 4893665#. The hearing will address only the plaintiffs' request for injunctive relief as to the prohibition against his using the boys' restrooms.

Exhibit 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

KENOSHA UNIFIED SCHOOL DISTRICT
NO. 1 BOARD OF EDUCATION and
SUE SAVAGLIO-JARVIS,
in her official capacity as
Superintendent of the Kenosha
Unified School District No. 1,

Defendants.

Case No. 16-cv-00943-pp

ORDER DENYING DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS THE AMENDED COMPLAINT (DKT. NO. 14)

On September 6, 2016, the court heard argument on the defendants' Rule 12(b)(6) motion to dismiss the amended complaint (Dkt. No. 14). See Dkt. No. 26 (court minutes from oral argument). On September 19, 2016, after having reviewed the pleadings and attachments and considered the parties' oral arguments, the court delivered its oral ruling, denying the defendants' motion to dismiss the amended complaint. Dkt. No. 28 (court minutes memorializing oral ruling).

For the reasons stated on the record during that oral ruling, the court **ORDERS** that the defendants' Rule 12(b)(6) motion to dismiss the amended complaint is **DENIED**. Dkt. No. 14.

The court concludes that the reasoning supporting this decision, and the decision itself, involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Dated in Milwaukee, Wisconsin this 21st day of September, 2016.

BY THE COURT:

HON. PAMELA PEPPER
United States District Judge

Exhibit 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

Case No. 16-CV-943-PP

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and SUE SAVAGLIO-JARVIS, in her official capacity As Superintendent of the Kenosha Unified School District No. 1,

Defendants.

DECISION AND ORDER GRANTING IN PART MOTION FOR PRELIMINARY INJUNCTION (DKT. NO. 10)

I. INTRODUCTION

On July 19, 2016, the plaintiff, Ashton Whitaker, filed this action against the defendants, Kenosha Unified School District and Sue Savaglio-Jarvis, in her official capacity as the Superintendent of the Kenosha Unified School District. Dkt. No. 1. In his complaint (amended on August 15th), the plaintiff alleges that the treatment he received at Tremper High School after he started his female-to-male transition violated Title IX, 20 U.S.C. §1681, et seq., and the Equal Protection clause of the Fourteenth Amendment. Dkt. Nos. 1, 12. On August 15, 2016, the plaintiff also filed a motion for a preliminary injunction. Dkt. No. 10. The defendants filed a motion to dismiss the next day. Dkt. No.

14. Both motions were fully briefed by August 31, 2016. Dkt. Nos. 11, 15, 17, 19, 21, 22. Following oral arguments on the motions on September 6, 19 and 20, the court issued an oral ruling denying the defendants' motion to dismiss. Dkt. No. 28. See also, Dkt. No. 29 (order denying motion to dismiss). For the reasons stated at the September 20, 2016 hearing, and supplemented here, the court grants in part the plaintiff's motion for preliminary injunction. Dkt. No. 10.

II. BACKGROUND

The plaintiff, Ash Whitaker, is a student at Tremper High School, a public high school in the Kenosha Unified School District (KUSD). Dkt. No. 12 at ¶6. The plaintiff's mother, Melissa Whitaker, brought this action as his next friend. Id. at ¶7. She is also a high school teacher at Tremper. Id.

The plaintiff's birth certificate identifies him as female, and he lived as a female until middle school. Id. at ¶21. Around seventh grade, in late 2013, the plaintiff asked his mother about treatment for transgender individuals. Id. at ¶¶21-23; Dkt. 10-2 at 17. He later was diagnosed by his pediatrician with Gender Dysphoria. Dkt. No. 12 at ¶¶15, 25. "Gender Dysphoria is the medical and psychiatric term for gender incongruence." Dkt. No. 10-2 at 6. Individuals with gender dysphoria suffer extreme stress when not presenting themselves and living in accordance with their gender identity. Id. Treatment for gender dysphoria consists of transitioning to living and being accepted by others as the sex corresponding to the person's gender identity. Dkt. No. 12 at ¶17. To pursue medical interventions, a person with gender dysphoria must live in

accordance with their gender identity for at least one year. Id. at ¶18. If left untreated, gender dysphoria may result in "serious and debilitating" psychological distress including anxiety, depression, and even self-harm or suicidal ideation. Dkt. No. 10-2 at 6-7; Dkt. No. 12 at ¶15. The plaintiff currently is under the care of a clinical psychologist, and began receiving testosterone treatment in July 2016. Id. at ¶25.

During the 2013-2014 school year, the plaintiff began telling close friends that he was a boy, and transitioning more publicly to live in accordance with his male identity. Id. at ¶23. At the beginning of his sophomore year (Fall 2014), the plaintiff told all of his teachers and peers about his transition, and asked that they refer to him using male pronouns and by his male name. Id. at ¶24. In the spring of 2015, the plaintiff asked to be allowed to use the boys' restrooms at school. Id. at ¶27. The school administrators denied the request, stating that the plaintiff was allowed to use only the girls' restroom or the single-user, gender-neutral restroom in the school office. Id. The plaintiff did not want to use the office restroom because it was far from his classes and only used by office staff and visitors. Id. at ¶28. Consequently, the plaintiff avoided drinking liquids, and using the bathroom at school for fear of being stigmatized as different. Id. at ¶29. During his sophomore year, the plaintiff experienced vasovagal syncope[1], stress-related migraines, depression, anxiety and suicidal thoughts. Id. at ¶31.

[1] "Vasovagal syncope . . . occurs when you faint because your body overreacts to certain triggers, such as the sight of blood or extreme emotional distress. It may also be called neurocardiogenic syncope."

Upon learning, over the summer of 2015, that the US Department of Justice had concluded that transgender students have the right to use restrooms in accordance with their gender identity, the plaintiff began using the male-designated bathrooms at school starting his junior year, September 2015. Id. at ¶35. He used the male bathroom without incident until late February 2016. Id. at ¶36-37. Despite the lack of any written policy on the issue, the school informed the plaintiff, in early March, that he could not use the boys' restroom. Id. at 38. Nevertheless, to avoid the psychological distress associated with using the girls' restroom or the single-user restroom in the office, the plaintiff continued to use the boys' restrooms when necessary. Id. at ¶42.

The plaintiff and his mother met with an assistant principal and his guidance counselor on or about March 10, 2016 to discuss the school's decision. Id. at 44. The assistant principal told him that he could use only the restrooms consistent with his gender as listed in the school's official records, and that he could only change his gender in the records only if the school received legal or medical documentation confirming his transition to male. Id. Although the plaintiff's mother argued that the plaintiff was too young for transition-related surgery, the assistant principal responded that the school needed medical documentation, but declined to indicate what type of medical documentation would be sufficient. Id. at 45. The plaintiff's pediatrician sent two letters to the school, recommending that the plaintiff be allowed access to

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http://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/home/ovc-20184773 (last visited September 21, 2016).

the boys' restroom. Id. at 46. Despite lacking a written policy on the issue, id. at ¶60, the school again denied the plaintiff's request, because he had not completed a medical transition, but failing to explain why a medical transition was necessary. Id. at 47.

The plaintiff generally tried to avoid using the restroom at school, but when necessary, he used the boys' restroom. Id. at 48. Consequently, the school directed security guards to notify administrators if they spotted students going into the "wrong" restroom. Id. at ¶56. The school re-purposed two single-user restrooms, which previously had been open to all students, as private bathrooms for the plaintiff. Id. at ¶61. The plaintiff refused to use these bathrooms, because they were far from his classes and because using them would draw questions from other students. Id. Despite several more confrontations with the school administration, id. at ¶¶49, 51, 54, the plaintiff continued to use the boys' restroom through the last day of the 2015-16 school year. Id. at ¶54.[2]

The plaintiff started his senior year of high school on September 1, 2016. As of the date of oral argument on this motion (September 20, 2016), the school still refused to allow him to use the boys' restroom, and the plaintiff

[2] The plaintiff alleges other instances of discrimination: that the defendants refused to allow him to room with male classmates during two summer orchestra camps, resulting in his having to room alone, id. at ¶¶33-34, 86; that the defendants directed guidance counselors to give transgender students a bright green bracelet to wear (the defendants dispute this, and as of this writing, the school has not implemented such a policy), id. at ¶¶80; and the school initially refusing to allow the plaintiff to run for prom king, id. at ¶¶71-72. For the reasons the court discussed on the record at the September 19, 2016 hearing, th decision decides only the request to enjoin the defendants from prohibiting the plaintiff from using the boys' restrooms.

continued to avoid the restrooms generally, using the boys' restroom when needed.

The plaintiff seeks the following relief: an order (1) enjoining the defendants from enforcing any policy that denies the plaintiff's access to the boys' restroom at school and school-sponsored events; (2) enjoining the defendants from taking any formal or informal disciplinary action against the plaintiff for using the boys' restroom; (3) enjoining the defendants from using, causing or permitting school employees to refer to the plaintiff by his female name and female pronouns; (4) enjoining the defendants from taking any other action that would reveal the plaintiff's transgender status to others at school, including the use of any visible markers or identifiers (e.g. wristbands, stickers) issued by the district personnel to the plaintiff and other transgender students. Dkt. No. 10 at 2.

As discussed in the oral arguments before the court, this decision only addresses the first two requests; the court denied the orally denied the fourth request without prejudice at the September 19, 2016 hearing, and the court defers ruling on the third request to allow counsel for the defendants to discuss with his client recent developments, such as the plaintiff's legal name change and this court's denial of the defendants' motion to dismiss.

III. DISCUSSION

A. Preliminary Injunction Standard

"A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need." Turnell v. CentiMark Corp.,

796 F.3d 656, 661 (7th Cir. 2015) (citing Goodman v. Ill. Dep't of Fin. and Prof'l Regulation, 430 F.3d 432, 437 (7th Cir. 2005)). "[A] district court engages in a two-step analysis to decide whether such relief is warranted." Id. (citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc., 549 F.3d 1079, 1085–86 (7th Cir.2008)). The first phase requires the "party seeking a preliminary injunction [to] make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." Id. at 661-62.

If the movant satisfies the first three criteria, the court then considers "(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the 'public interest')." Id. at 662. When balancing the potential harms, the court uses a 'sliding scale': "the more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." Id.

B. The Plaintiff Has Shown a Likelihood That His Claims Will Succeed on the Merits.

"The most significant difference between the preliminary injunction phase and the merits phase is that a plaintiff in the former position needs only to show 'a likelihood of success on the merits rather than actual success.'" Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 782 (7th Cir. 2011)

(quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)). In the Seventh Circuit, the court "only needs to determine that the plaintiff has some likelihood of success on the merits." Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 896 (7th Cir. 2001). As the plaintiffs argued, this is a relatively low standard.

The arguments the parties made on September 20, 2016 regarding the motion for preliminary injunction mirror the arguments they made on September 19, 2016 regarding the motion to dismiss. Essentially, the defendants argue that gender identity is not encompassed by the word "sex" in Title IX, and the plaintiff disagrees. The defendants also argue that under a rational basis standard of review, the plaintiffs cannot sustain an equal protection claim; the plaintiffs respond that they can, and further, that the court should apply a heightened scrutiny standard.

The court denied the motion to dismiss because it found that there were several avenues by which the plaintiff might obtain relief. Dkt. No. 28. The court found that, because no case defines "sex" for the purposes of Title IX, the plaintiff might succeed on his claim that that word includes transgender persons. The court found that, while the defendants raised a number of arguments in support of their claim that the word "sex" does not encompass transgender persons, much of that case law came from cases interpreting Title VII, a different statute with a different legislative history and purpose. The court also found that there was case law supporting the plaintiff's position, as

well as the Department of Education's "Dear Colleague" letter, which, the court found, should be accorded Auer deference.

The court also noted that the plaintiff had alleged sufficient facts to support a claim of gender stereotyping, alleging that the defendants had discriminated against him because he did not fit standard stereotypes of girls (the sex the school insists is his).

The court also found that the plaintiff had alleged sufficient facts to support his claims that the defendants had violated his equal protection rights. While the court did not, at the motion to dismiss stage, and does not now have to decide whether a rational basis or a heightened scrutiny standard of review applies to the plaintiff's equal protection claim, at this point, the defendants have articulated little in the way of a rational basis for the alleged discrimination. The defendants argue that students have a right to privacy; the court is not clear how allowing the plaintiff to use the boys' restroom violates other students' right to privacy. The defendants argue that they have a right to set school policy, as long as it does not violate the law. The court agrees, but notes that the heart of this case is the question of whether the current (unwritten) policy violates the law. The defendants argue that allowing the plaintiff to use the boys' restroom will gut the Department of Education regulation giving schools the discretion to segregate bathrooms by sex. The court noted at both the September 19 and September 20 hearings that it did not agree.

Because of the low threshold showing a plaintiff must make regarding likelihood of success on the merits, see Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir.1999), and because the plaintiff has articulated several bases upon which the court could rule in his favor, the court finds that the defendant has satisfied this element of the preliminary injunction test.

C. The Plaintiff Has Shown that He Has No Adequate Remedy at Law.

The court observed at the September 20 hearing that neither party focused much attention, either in the moving papers or at oral argument, on the question of whether the plaintiffs had an adequate remedy at law. The plaintiffs argued that plaintiff Ash Whitaker has only one senior year. They argued that even if, at the end of this lawsuit, the plaintiffs were to prevail, no recovery could give back to Ash the loss suffered if he spent his senior year focusing on avoiding using the restroom, rather than on his studies, his extra-curricular activities and his college application process. The defendants made no argument that the plaintiffs have an adequate remedy at law. The court finds, therefore, that the plaintiffs have shown that they have no adequate remedy at law.

D. The Plaintiff Has Shown That He Will Suffer Irreparable Injury If The Court Does Not Enjoin The School's Actions.

The parties focused most of their arguments on the element of irreparable harm. While alleged irreparable harm does not need to occur before a court may grant injunctive relief, there must be more than a mere possibility. United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed.

1303 (1953); Bath Indus., Inc. v. Blot, 427 F.2d 97, 111 (7th Cir. 1970). Put another way, the irreparable harm must be *likely* to occur if no injunction issues. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 21–23 (2008).

During the oral arguments, the plaintiff argued that the defendants' denial of access to the boys' restroom has caused and will continue to cause medical and psychological issues that his present and future health. In support of this argument, the plaintiff pointed to the declarations from Dr. Stephanie Budge and Dr. R. Nicholas Gorton, M.D., which explain gender dysphoria and discuss, both in terms specific to the plaintiff (Dr. Budge) and terms general to persons suffering from gender dysphoria (Dr. Gorton) the effects on persons with gender dysphoria of not being allowed to live in accordance with their gender identity. See Dkt. Nos. 10-2, 10-3. The defendants responded that the court should grant little weight or credibility to these affidavits, because Dr. Budge barely knew Ash Whitaker, Dr. Gorton did not know him at all, and neither affidavit quantified the harms they described.[3]

Relying primarily on the plaintiff's declaration (which the defendants did not challenge at the hearing), dkt. no. 10-1, the court has no question that the plaintiff's inability to use the boys' restroom has caused him to suffer harm. The plaintiff's declaration establishes that he has suffered emotional distress

[3] While "[a]ffidavits are ordinarily inadmissible at trial . . . they are fully admissible in summary proceedings, including preliminary-injunction proceedings." Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997)(citing Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995).

as a result of not being allowed to use the boys' restrooms. While the school allows him to use the girls' restrooms, his gender identity prevents him from doing so. He has refused to use the single-user bathrooms, due to distance from his classes and, more to the point, the embarrassment and stigma of being singled out and treated differently from all other students. Because the defendants do not allow him to use the boys' restrooms, he has begun a practice of limiting his fluid intake, in an attempt to avoid having to use the restroom during the school day. Lack of hydration, however, exacerbates his problems with migraines, fainting and dizziness. He describes sleeplessness, fear of being disciplined (and having that impact his school record ahead of his efforts to get into college), and bouts of tearfulness and panic.

The plaintiff also attested to the fact that the emotional impact of his inability to use the restrooms like everyone else, and his being pulled out of class for discipline in connection with his restroom used, impacted on his ability to fully focus on his studies. The Seventh Circuit has recognized that discrimination that impacts one's ability to focus and learn constitutes harm. See e.g., Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 853 (7th Cir. 1999).

To reiterate, the court finds that Ash has suffered harm. The defendants intimated in their arguments, however, that such harm was not irreparable, because the plaintiffs had not provided any evidence that the harm would be long-lasting, or permanent. It was in this context that the defendants challenged the professional declarations the plaintiffs had provided from

experts in the field of gender dysphoria and gender transition. As the court stated at the September 20, 2016 hearing, however, the plaintiffs are not required to prove that Ash will be forever irreversibly damaged in order to prove irreparable harm. The Seventh Circuit has noted that irreparable harm is harm that "would [not] be rectifiable following trial." Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc., 549 F.3d 1079, 1088 (7th Cir. 2008). It has held that irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial." Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386 (7th Cir. 1984).

The plaintiff's spending his last school year trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized, being subject to fainting spells or migraines, is not harm that can be rectified by a monetary judgment, or even an award of injunctive relief, after a trial that could take place months or years from now. The court finds that the plaintiffs have satisfied the irreparable harm factor.

E. The Plaintiff's Irreparable Harm Outweighs Any Harm The Defendants Might Experience and the Effects Granting the Injunction Will Have on Nonparties.

The balancing of the harms weighs in the plaintiffs' favor. The court has found that Ash Whitaker has suffered irreparable harm, and will continue to do so if he is not allowed to use the boys' restrooms. The court must balance against that harm the possible harm to the defendants.

In their moving papers, the defendants argued that requiring them to allow Ash to use the boys' restrooms would subject them to financial burdens

and facility changes. They did not identify why allowing Ash to use the boys' restrooms would create a financial burden; the court cannot, on the evidence before it, see what cost would be incurred in allowing Ash to use restrooms that already exist. The defendants provided no evidence regarding any facilities that they would have to build or provide.

The defendants also argued that a requirement that they allow Ash to use the boys' restrooms would violate the privacy rights of other students. They provided no affidavits or other evidence in support of this argument. The evidence before the court indicates that Ash used the boys' restroom for some seven months without incident or notice; the defendants prohibited him from using them only after a teach observed Ash in a boys' restroom, washing his hands. This evidence contradicts the defendants' assertions that allowing Ash to use the boys' restroom would violate other students' privacy rights.

The defendants argued that granting the injunctive relief would deny them the ability to exercise their discretion to segregate bathrooms by sex, as allowed by the regulations promulgated by the Department of Education. This argument is a red herring; the issuance of the injunction will not disturb the school's ability to have boys' restrooms and girls' restrooms. It will require only that Ash, who identifies as a boy, be allowed to use the existing boys' restrooms.

The defendants argued that the injunctive relief would require the defendants, in the first month of the new school year, to scramble to figure out policies and procedures to enable it to comply with the order of relief. This

relief, however, does not require the defendants to create policies, or review policies. It requires only that the defendants allow Ash to use the boys' restrooms, and not to subject him to discipline for doing so.

The court finds that the balance of harms weighs in favor of the plaintiff.

F. Issuance of the Injunction Will Not Negatively Impact the Public Interest.

Finally, the court finds that issuance of the injunction will not harm the public interest. The defendants argue that granting the injunction will force schools all over the state of Wisconsin, and perhaps farther afield, to allow students who self-identify with a gender other than the one reflected anatomically at birth to use whatever restroom they wish. The defendants accord this court's order breadth and power it does not possess. This order mandates only that the defendants allow one student—Ash Whitaker—to use the boys' restrooms for the pendency of this litigation. The Kenosha Unified School District is the only institutional defendant in this case; the court's order binds only that defendant. The defendants have provided no proof of any harm to third parties or to the public should the injunction issue.

G. The Defendants' Request for a Bond

At the conclusion of the September 20, 2016 hearing, the defendants asked that if the court were inclined to grant injunctive relief, it require the plaintiffs to post a bond in the amount of $150,000. The defendants first cited Rule 65, and then cited the Wisconsin Supreme Court's decision in Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931). The defendants argued that, in the event that events revealed that this court had improvidently

granted the injunction, the Muscoda case provided that the court should impose a bond sufficient to reimburse the defendants' costs and attorneys' fees, and counsel estimated that those fees could reach $150,000. The plaintiffs objected to the court requiring a bond, citing the plaintiffs' limited means.

Rule 65(c) states that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The rule leaves to the court's discretion the question of the proper amount of such a bond, and tethers that consideration to the amount of costs and damages sustained by the wrongfully enjoined party.

Counsel for the defendants argued that under Wisconsin law, "costs and damages" includes the legal fees the defendants would incur in, presumably, seeking to overturn the injunction, and argued that those fees could amount to as much as $150,000. In support of this argument, he cited Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931), which held that "[i]t is the established law of this state that damages, sustained by reason of an injunction improvidently issued, properly include attorney fees for services rendered in procuring the dissolution of the injunction, and also for services upon the reference to ascertain damages." Id. at 651. The problem with this argument is that Seventh Circuit law says otherwise.

> [T]he Seventh Circuit has determined that, for purposes of Fed. R. Civ. P. 65(c), "costs and damages" damages do not include attorneys' fees. Rather, in the absence of a statute authorizing

> such fees . . . an award of attorneys' fees is only proper where the losing party is guilty of bad faith."

Minnesota Power & Light Co. v. Hockett, 14 Fed. App'x 703, 706 (7th Cir. 2001), quoting Coyne-Delany Co. v. Capital Dev. Bd. Of State of Ill., 717 F.2d 385, 390 (7th Cir. 1983)). See also, Int'l Broth. Of Teamsters Airline Div. v. Frontier Airlines, Inc., No. 10-C-0203, 2010 WL 2679959, at *5 (E.D. Wis. July 1, 2010). When there is a "direct collision" between a federal rule and a state law, the Seventh Circuit has mandated that federal law applies. Id. at 707.

The defendants did not identify any statute authorizing an award of attorneys' fees should they succeed in overturning the injunction. Thus, in order to determine the amount of a security bond under Rule 65(c), the court must consider the costs and damages the defendants are likely to face as a result of being improvidently enjoined, but not the legal costs they might incur in seeking to overturn the injunction. It is unclear what damages or costs the defendants will incur if they are wrongfully enjoined. As discussed above, the defendants have not demonstrated that it will cost them money to allow Ash to use the boys' restrooms. Because it is within this court's discretion to determine the amount of a security bond, and because the defendants have not demonstrated that they will suffer any financial damage as a result of being required to allow Ash to use the boys' restrooms, the court will not require the plaintiffs to post security.

IV. CONCLUSION

For the reasons explained above, the court **GRANTS IN PART** the plaintiff's motion for a preliminary injunction. Dkt. No. 10. The court **ORDERS** that defendants Kenosha Unified School District and Sue Savaglio-Jarvis (in her capacity as superintendent of that district) are **ENJOINED** from

(1) denying Ash Whitaker access to the boys' restrooms;

(2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;

(3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and

(4) monitoring or surveilling in any way Ash Whitaker's restroom use.

The court **DENIES** the defendants' request that the court require the plaintiffs to post a bond under Rule 65(c).

Dated in Milwaukee, Wisconsin this 22nd day of September, 2016.

BY THE COURT:

HON. PAMELA PEPPER
United States District Judge

Exhibit 4

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

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT,	:	
Plaintiff,	:	**Case No. 2:16-CV-524**
v.	:	**JUDGE ALGENON L. MARBLEY**
UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,	:	**Magistrate Judge Jolson**
Defendants.	:	
JANE DOE, a minor, by and through her legal guardians JOYCE and JOHN DOE	:	
Intervenor Third-Party Plaintiff,	:	
v.	:	
BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, *et al.*,	:	
Third-Party Defendants.	:	

OPINION & ORDER

Jane Doe, an eleven-year-old transgender girl, seeks to use the girls' restroom at Highland Elementary School. Highland will not permit her to do so. After an investigation, the Office of Civil Rights ("OCR") of the Department of Education ("DOE") found that Highland's policy impermissibly discriminated against Jane on the basis of her sex in violation of Title IX of the Education Amendments of 1972. Highland now asks this Court to enjoin DOE and the Department of Justice ("DOJ") from enforcing the antidiscrimination provisions of Title IX

against Highland. Jane Doe, in turn, asks the Court to enjoin Highland's policy and order Highland to permit her to use the girls' restroom and otherwise treat her as a girl. For the reasons that follow, the Court **DENIES** Highland's Motion for Preliminary Injunction and **GRANTS** Jane Doe's Motion for Preliminary Injunction.

I. BACKGROUND

A. Statutory and Regulatory Background

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX also specifies that nothing in the statute "shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *Id.* § 1686. The DOE has promulgated regulations clarifying that a recipient of federal funds "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33.

Over the past several years, DOE has issued several guidance documents explaining the agency's interpretation of Title IX and its implementing regulations with respect to transgender students. In a 2010 Dear Colleague Letter, a guidance document explaining DOE's interpretation of Title IX, OCR wrote that Title IX "protect[s] all students, including . . . transgender . . . students, from sex discrimination." (10/26/10 Dear Colleague Letter, Doc. 33-1 at 8.) In April 2014, OCR issued a "significant guidance document" stating that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." (Questions and Answers on

Title IX and Sexual Violence, Doc. 33-2 at B-2.) In December 2014, OCR published further guidance clarifying that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." (Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, Doc. 33-3 at 25.) In April 2015, OCR issued a Title IX Resource Guide, which stated that schools should "help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes." (Resource Guide, Doc. 33-4 at 21-22.) Most recently, on May 13, 2016, DOJ and DOE issued joint guidance that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." (Dear Colleague Letter on Transgender Students, Doc. 33-5 at 3.) The letter also clarified that "[h]arassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly." (*Id.* at 2.)

B. Factual Background

Jane Doe is an eleven-year-old transgender girl who is enrolled in the fifth grade at Highland Elementary School. Jane, who was assigned male at birth, has communicated to her family that she is female since she was four years old. (Declaration of Joyce Doe, Doc. 35-2 at ¶ 2.) After her parents sought out the advice of medical and mental health professionals, Jane was diagnosed with gender dysphoria. (*Id.* at ¶ 4; Declaration of Lourdes Hill, Doc. 36-2 at ¶ 5.) According to Diane Ehrensaft, a developmental and clinical psychologist who specializes in working with children and adolescents with gender dysphoria, gender dysphoria is "the medical diagnosis for the severe and unremitting emotional pain resulting from th[e] incongruity"

between one's gender identity and the sex he or she was assigned at birth. (Declaration of Diane Ehrensaft, Ph.D, Doc. 35-4 at ¶¶ 23-24.) Jane's health care providers recommended that she socially transition to treat her gender dysphoria. (Hill Decl., Doc. 36-2 at ¶ 7.) "Social transition" involves "changes that bring the child's outer appearance and lived experience into alignment with the child's core gender," including "changes in clothing, name, pronouns, and hairstyle." (Ehrensaft Decl., Doc. 35-4 at ¶ 27.)

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

used by school personnel and other adults. (Joyce Doe Decl., Doc. 35-2 at ¶ 9.) Joyce and John Doe observed that this arrangement was "taking a toll on Jane's mental health." (*Id.* at ¶ 11.)

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

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

In September 2014, at the beginning of Jane's third-grade year, Joyce also filed a complaint with Superintendent William Dodds against Principal Winkelfoos, alleging that Highland had created a hostile environment for Jane. Dodds investigated the complaint and found it to be without merit. (Joyce Doe Decl., Doc. 35-2 at ¶ 17.) That same month, Joyce put in a request to Superintendent Dodds to ask the Board of Education to permit Jane to use the

girls' restroom. (*Id.* ¶ 18.) Dodds later told Joyce that the Board had considered her request and voted not to grant it. (*Id.*)

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

After Jane began fourth grade, the School District required her to use a restroom in the staff room. (*Id.* at ¶ 20.) The restroom was kept locked so that for Jane to gain access to it, a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class. (*Id.*) As a result, Jane began to refuse to use the restroom at school and to limit her fluid intake during the day. (*Id.* at ¶ 21.) Joyce characterized her as more agitated and combative when she returned home each day. (*Id.*) Jane herself stated that when she has to use a different restroom from everyone else, she feels alone and not part of the school. (Declaration of Jane Doe, Doc. 35-1 at ¶ 5.) She said that when other students line up to go to the restroom, she "leave[s] the line to go to a different restroom, [and] other kids say, 'Why are you going that way? You're supposed to be over here.'" (*Id.* at ¶ 6.) One friend asked her: "Why are you going to another restroom? You're a girl. Girls go to the girls' restroom." (*Id.* at ¶ 7.) She also stated that other students sometimes bully her, call her a boy, or tell her to act like a boy, and that some teachers have told her she was a boy and called her by her birth name. (*Id.* at ¶¶ 9, 11.)

Based on her experience working with transgender children, Dr. Ehrensaft believes that "it would be psychologically damaging for a transgender child to be forced to use a separate restroom and repeatedly referred to by her birth name and male pronouns," and that

circumstances such as a history of serious health conditions and prior suicide attempts "would amplify risk of harm to the child." (Ehrensaft Decl., Doc. 35-4 at ¶ 42.)

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

Defendants Dodds and Winkelfoos have submitted affidavits attesting that they and other School District officials have taken prompt action to revise school records to reflect Jane's current legal name and insisting that Highland staff have made a concerted effort to address her with the name and pronouns of her choice. (Declaration of William Dodds, Doc. 64 at ¶ 9; Declaration of Shawn Winkelfoos, Doc. 65 at ¶ 20.) Dodds and Winkelfoos also stated that they perceive Jane to be consistently happy while at school and that at the beginning of the school year Jane "high-fived" Dodds and told him she was having fun at school. (Dodds Decl., Doc. 64 at ¶¶ 5, 11; Winkelfoos Decl., Doc. 65 at ¶ 3.) They also submitted copies of emails between Joyce Doe and school officials documenting steps Highland took to help Jane deal with her eating disorder and other health issues. (Emails, Docs. 65-1, 65-2.) Finally, they assert that Jane has never attempted self-harm or exhibited anger issues at school. (Winkelfoos Decl., Doc. 65 at

¶¶ 4-5; Dodds Decl., Doc. 64 at ¶ 6.) She has regularly met with the school's social workers and psychologist, with Joyce Doe's consent. (Winkelfoos Decl., Doc. 65 at ¶ 9.) Finally, they point to the school safety plan Highland created for Jane and note that Joyce recently informed them that Jane's suicide risk had been downgraded from high to moderate. (*Id.* at ¶ 22; Doc. 65-9.)

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

On March 29, 2016, OCR notified Highland that its treatment of Jane Doe violated Title IX. (Complaint-in-Intervention, Doc. 32 at ¶ 75.) The following day, OCR presented a proposed Resolution Agreement to the School District, which provided, in relevant part, that the School District would grant Jane access to sex-specific facilities consistent with her gender identity, treat Jane consistent with her gender identity, and engage a third-party consultant with expertise in child and adolescent gender identity to assist it in implementing the terms of the Agreement.

(Compl., Doc. 1 at ¶ 104; Resolution Agreement, Doc. 10-4 at 2-3.) On June 10, 2016, the School District filed this lawsuit, stating in its complaint that Highland had decided not to accept the Resolution Agreement. (Compl., Doc. 1 at ¶ 118.) That same day, OCR sent a letter to the School District's attorney informing him that OCR had learned of the lawsuit. (Letter, Doc. 10-7 at 2.) The letter noted that, due to the lawsuit as well as several unsuccessful attempts to communicate with the School District, OCR planned to end the 90-day period for negotiations over the Resolution Agreement. (*Id.* at 1-2.) The letter further stated that within 10 days OCR would issue another letter finding the School District in violation of Title IX. (*Id.* at 2.)

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

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

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

On July 29, 2016, OCR issued a Letter of Impending Enforcement Action to the School District. (Enforcement Letter, Doc. 33-7.) OCR stated that it "will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance to the District or refer the case to the U.S. Department of Justice for judicial proceedings to enforce any

rights of the United States under its laws." (*Id.* at 14.) The letter further stated that OCR "can take this action after 15 calendar days of the date of this letter if a resolution of this matter is not reached." (*Id.* at 14-15.)

C. Procedural History

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

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

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

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

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

[1] The States of Texas, Arkansas, Arizona, West Virginia, Alabama, Wisconsin, Georgia, Nebraska, Louisiana, South Carolina, Utah, and Mississippi and the Commonwealth of Kentucky have filed a Motion for Leave to File Brief as *Amici Curiae*. (Doc. 53.) Additionally, a group of school administrators and staff members from California, the District of Columbia, Florida, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont, Washington, and

II. LEGAL STANDARD

The Sixth Circuit's test to determine whether injunctive relief is appropriate under Federal Rule of Civil Procedure 65 requires the Court to weigh the following factors: (1) whether the movant has a substantial likelihood of success on the merits; (2) whether there is a threat of irreparable injury to the movant without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief. *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir. 2010). These four factors "guide the discretion of the district court," but "they do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief." *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982). Whether the combination of the factors weighs in favor of issuing injunctive relief in a particular case is left to the discretion of the district court. *See Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

While the Sixth Circuit has held that "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion," *id.*, a party "is not required to prove his case in full at a preliminary injunction hearing and the findings of fact and conclusions of law made by a court granting the preliminary injunction are not binding at trial on the merits," *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (citation omitted). A plaintiff

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Wisconsin filed a Motion for Leave to Participate as *Amici Curiae* in Support of Jane Doe and, subsequently, a Corrected Motion for Leave to File Amicus Brief. (Docs. 86, 91-1.) Leave to participate as *amicus curiae* is a "privilege within the sound discretion of the courts." *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (internal quotation marks and citation omitted). Because school districts and their staff throughout these states are also affected by the agency action at issue here, the Court finds that these parties have "an important interest and a valuable perspective on the issues presented." *United States v. City of Columbus*, No. 2:99-cv-1097, 2000 WL 1745293, at *1 (S.D. Ohio Nov. 20, 2000) (quotation marks and citations omitted). The Court, therefore, **GRANTS** the motions to file amicus briefs. (Docs. 53, 86, 91-1.)

has “the burden of establishing a clear case of irreparable injury and of convincing the Court that the balance of injury favor[s] the granting of the injunction.” *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (6th Cir. 1968) (per curiam).

III. HIGHLAND’S MOTION FOR PRELIMINARY INJUNCTION

At the outset, Defendants contend that the Court lacks subject-matter jurisdiction over the School District’s APA claim. Because Congress has established a specific enforcement scheme for Title IX, Defendants argue that the School District is prohibited from seeking judicial review in this Court before any enforcement action has occurred. (Doc. 33 at 1.)

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

Relying heavily on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994), Defendants contend that this enforcement scheme precludes district court jurisdiction over parallel pre-enforcement challenges. In *Thunder Basin*, the Supreme Court held that Congress’s intent to preclude district court review of pre-enforcement challenges was “fairly discernible in the statutory scheme” of the Federal Mine Safety and Health Amendments Act of 1977 (the

"Mine Act"), a statute with an enforcement process quite similar to that of Title IX. *Id.* at 207 (quotation marks and citation omitted).

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

The Supreme Court held that the structure and legislative history of the Act showed Congress's intent to preclude pre-enforcement challenges in federal district courts. *Id.* at 216. First, the Court noted that the Act's "comprehensive review process does not distinguish between preenforcement and postenforcement challenges, but applies to all violations of the Act and its regulations." *Id.* at 208-09. The Act expressly authorizes district court jurisdiction in only two

provisions, neither of which provides a right of action to the mine operators themselves. *Id.* at 209. Second, the legislative history suggested that before enactment Congress was concerned that civil penalties against operators were both too low and non-mandatory and, in particular, that under an earlier statute, mine operators could contest civil-penalty assessments *de novo* in federal district court once the administrative review process was complete. *Id.* at 210.

The enforcement mechanisms of Title IX are indeed similar to that of the Mine Act, notably the administrative hearing and appeal process, judicial review in the court of appeals, and express authorization of district court jurisdiction in suits by the Secretary but not the regulated parties. *See* 20 U.S.C. §§ 1682-83; 34 C.F.R. § 100.8(a)(1). The School District resists this comparison to the Mine Act, pointing to statutory language in Title IX that provides that "[a]ny department or agency action taken pursuant to section 1682 . . . shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." 20 U.S.C. § 1683. Section 1682, in turn, authorizes the agency to effectuate compliance with the anti-discrimination provisions of the statute by initiating termination proceedings against funding recipients. But the judicial review provided "for similar action" in § 1683 references the general provision for judicial review of funding termination decisions in 20 U.S.C. § 1234g(b), which provides that a recipient may seek judicial review in the appropriate court of appeals and that "[t]he Secretary may not take any action on the basis of a final agency action until judicial review is completed." *Id.* § 1234g(a); *see Freeman v. Cavazos*, 923 F.2d 1434, 1440 (11th Cir. 1991) (holding that the "applicable judicial review provision" for "similar action" in Title VI of the Civil Rights Act is 20 U.S.C. § 1234g).

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

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

Highland also looks for support from *Cannon v. University of Chicago*, in which the Supreme Court held that there is a private right of action under Title IX for victims of discrimination, for the proposition that the presumption of reviewability should apply to other Title IX claims that are not expressly precluded. 441 U.S. 677, 709 (1979). A district court in Texas, which recently concluded it had jurisdiction over a challenge from several states to the guidance at issue here, also relied on *Cannon* in adopting this reasoning. *Texas v. United States*, --- F. Supp. 3d ----, 2016 WL 4426495, at *10 (N.D. Tex. Aug. 21, 2016) ("Neither Title VII nor

Title IX presents statutory schemes that would preclude Plaintiffs from bringing these claims in federal district court. Indeed, the Supreme Court has held that Title IX's enforcement provision, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory remedy for violations.") (citing *Cannon*, 441 U.S. at 680). The *Texas* court's analysis can charitably be described as cursory, as there is undoubtedly a profound difference between a discrimination victim's right to sue in federal district court under Title IX and a school district's right to challenge an agency interpretation in federal district court. This Court cannot assume that the first right implies the second.

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

evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings." *Thunder Basin*, 510 U.S. at 216.

Highland also relies on *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1374 (2012), where the Supreme Court found that a district court had subject-matter jurisdiction to consider two landowners' APA claim challenging the issuance of an EPA compliance order. The agency argued that because the statute "expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing" but "did not expressly provide for review of compliance orders," the compliance order was unreviewable. *Id.* at 1373. The Court rejected that argument, explaining that "if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Id.* But the enforcement scheme of the Clean Water Act, the statute at issue in *Sackett*, bears little resemblance to that of Title IX or the Mine Act in *Thunder Basin*. In *Sackett*, receipt of a compliance order subjected the plaintiffs to additional penalties for each day they failed to comply and made it more difficult for them to obtain a permit from the Army Corp of Engineers for the discharge of pollutants. *Id.* at 1372. Highland faces no such consequences for its failure to comply with Title IX at this time. Moreover, and more importantly, express judicial review of such orders came only by way of a civil action initiated by the agency; there was no corresponding review in the court of appeals after administrative action as Title IX provides for funding-termination decisions. *Id.* at 1372-73. Here, in contrast, the enforcement scheme imposes no immediate penalties for non-compliance and the School District itself may initiate judicial review in the court of appeals after an adverse funding-termination decision from the agency.

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

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

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

[2] Even if the Court had subject-matter jurisdiction here, Highland's APA claim would fail because it has an "adequate remedy in a court" and thus Highland cannot state a claim under the APA. 5 U.S.C. § 704. The Sixth Circuit recently held that a tour bus company operator, who sued the Federal Motor Carrier Safety Administration for a violation of the APA after the agency

IV. JANE DOE'S MOTION FOR PRELIMINARY INJUNCTION

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

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

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

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

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issued him an out-of-service order and then later rescinded it, had an adequate remedy in a court when the applicable statute provided for a hearing after an out-of-service order was imposed, followed by review in the appropriate court of appeals. *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 428 (6th Cir. 2016).[2] Here too, Highland has an adequate remedy in a court because it may seek review in the Sixth Circuit if OCR commences an enforcement action and issues an adverse decision to Highland. In the same vein, if, instead of commencing administrative proceedings, DOJ filed suit against Highland in federal district court to enjoin its policies, Highland would "almost by definition [] have an adequate remedy in a court, that is, the remedy of opposing the Attorney General's motions in the court in which [s]he files h[er] papers." *NAACP v. Meese*, 615 F. Supp. 200, 203 (D.D.C. 1985). Highland's argument to the contrary—that its only avenue for review in the court of appeals does not allow it to make a direct challenge to the guidance itself—fails because its remedy remains the same regardless of its type of challenge: keeping its federal funding while maintaining its policy of denying Jane access to the girls' restroom.

receives financial assistance, but they disagree on whether Jane was excluded from participation in an education program because of her sex and whether this discrimination harmed her.

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

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

The School District argues that Defendants' guidance is inconsistent with the objectives of Title IX. Under the School District's view, the statute's aim is to prohibit federally funded schools from discriminating only on the basis of biological sex, which it contends is defined as

the sex appearing on one's birth certificate.[3] Further, the School District argues that "sex" under Title IX unambiguously means "biological sex" and does not include "gender identity." Jane counters that the federal Defendants' interpretation is consistent with Title IX and its implementing regulations and that the interpretation must be given controlling weight under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Auer requires courts to give controlling weight to an agency's interpretation of its own regulation provided that the regulation is ambiguous and the agency's interpretation is not "plainly erroneous or inconsistent with the regulation." *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). *Auer* deference is not appropriate, however, when "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question,'" for instance, when the agency's interpretation conflicts with a prior interpretation or appears to be nothing more than a convenient litigation position or *post hoc* rationalization advanced to defend past agency action against attack. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012) (quoting *Auer*, 519 U.S. at 462).

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

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

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

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

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

governed." 523 U.S. 75, 79 (1998). Provided that the discrimination "meets the statutory requirements" that it was "because of . . . sex," it passes muster under Title VII. *Id.* at 79-80.

Looking at both the specific and broader context of the use of the term "sex," neither Title IX nor the implementing regulations define the term "sex" or mandate how to determine who is male and who is female when a school provides sex-segregated facilities. The Fourth Circuit, the only federal appeals court that has examined this question, recently concluded that Title IX and the regulation that permits separate restroom facilities for males and females, 34 C.F.R. § 106.33, were ambiguous as to how to make this determination for purposes of access to sex-segregated restrooms, because the statute "permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity." *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016), *mandate recalled and stayed, Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016).[6] In support of its finding of ambiguity, the Fourth Circuit noted that to interpret "sex" to mean "biological sex" would still raise a number of questions as to how the bathroom regulation would apply. *Id.* at 720-21. For instance, "which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X–X–Y sex chromosomes? What about an individual who lost external genitalia in an

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

accident?" *Id.* Highland urges the Court to reject the reasoning of *Gloucester* but also tries to distinguish that case because the Fourth Circuit only considered the ambiguity of the regulation permitting sex-segregated bathrooms, 34 C.F.R. § 106.33, not the meaning of "sex" in Title IX itself. This argument is unconvincing, as the Fourth Circuit looked broadly at the meaning of "sex" throughout the statue and its implementing regulations. *See Gloucester*, 822 F.3d at 723 ("We agree that 'sex' should be construed uniformly throughout Title IX and its implementing regulations.").

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

Third-Party Defendants try to make hay of the fact that the Sixth Circuit issued an amended opinion in *Smith*, which deleted a paragraph stating that "to the extent that Smith also alleges discrimination based solely on his identification as a transsexual, he has alleged a claim

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

of sex stereotyping pursuant to Title VII." *Smith v. City of Salem*, 369 F.3d 912, 922 (6th Cir. 2004), *opinion amended and superseded by Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). But even after excising that language, the amended opinion in *Smith* expressly rejected a view of sex as a classification based purely on reproductive organs or sex assigned at birth. *See* 378 F.3d at 572 ("[W]e find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'"); *id.* at 575 ("[A] label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *id.* at 573 (quoting a Ninth Circuit case, *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000), for the proposition that "'sex' under Title VII encompasses both the anatomical differences between men and women and gender").[8] *Smith* thus supports a reading that under Title IX discrimination on the basis of a transgender person's gender non-conformity constitutes discrimination "because of sex."

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

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

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

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

Additionally, although Highland contends that the "weight of authority" is on its side, the School District cites only district court cases, most of which concerned the application of Title IX *before* the agencies' most recent guidance was issued.[9] For the Court to find that the statute was ambiguous, it need not find that the agencies' interpretation is the *only* plausible reading of "sex" in the statute, but, rather, that it is *one* of the plausible readings. Therefore, the district court cases Third-Party Defendants cite are not dispositive of this issue. The Court finds that the term "sex" in Title IX and its implementing regulations regarding sex-segregated bathrooms and

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

living facilities is ambiguous, *see* 20 U.S.C. § 1686; 34 C.F.R. § 106.32; *id.* § 106.33, and thus presumptively entitled to *Auer* deference.

Next, the Court concludes that the agencies' interpretation is not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quoting *Methow Valley*, 490 U.S. at 359). An agency's view "need not be the best or most natural one by grammatical or other standards. . . . Rather, the [agency's] view need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (internal citation omitted). The agencies easily satisfy this deferential standard. First, the only federal appeals court that has considered this question has already determined that Defendants' interpretation of § 106.33 is reasonable. *See Gloucester*, 822 F.3d at 722 (holding that § 106.33 "sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge" and concluding that the agencies' interpretation was reasonable). Moreover, the Sixth Circuit's construction of sex discrimination under Title VII in *Smith* and *Barnes* to include discrimination against transgender individuals who do not conform to the stereotypes of the sex assigned to them at birth weighs in favor of finding that the agencies' interpretation of Title IX and its implementing regulations is reasonable. The Court finds that Defendants' interpretation is not clearly erroneous or inconsistent with Title IX implementing regulations. *Auer*, 519 U.S. at 461.

Moreover, although neither Highland nor the individual Third-Party Defendants advance this argument, the Court finds that the agency's interpretation does not conflict with a prior interpretation, as Defendants have not previously issued guidance stating that sex discrimination does *not* include discrimination based on transgender status. Nor does it appear to be merely a convenient litigation position or a *post hoc* rationalization. *See Christopher*, 132 S. Ct. at 2166-

67. Rather than taking this position only in this litigation, Defendants have consistently articulated this interpretation of Title IX over the last several years and enforced it accordingly. (*See* Docs. 33-1, 33-2, 33-3, 33-4, 33-5.) Nor is it a *post hoc* rationalization, given that it is in line with regulations and guidance of other agencies. *See Gloucester*, 822 F.3d at 722-23 (citing guidance and regulations from various federal agencies, including the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management, that provide that transgender individuals should be permitted to access the bathroom that corresponds with their gender identity). Defendants' interpretation of Title IX is entitled to *Auer* deference and given controlling weight. *Auer*, 519 U.S. at 461.[10] Under this interpretation of Title IX, Jane has been denied access to the communal girls' restroom "on the basis of [her] sex."

Finally, the Court turns to the third element of a Title IX discrimination claim: whether the discrimination has harmed Jane. Some issues in this case are difficult, but determining whether Jane has been harmed from the School District's policy is not one of them. Testimony from Joyce Doe and Jane herself indicates that Jane feels stigmatized and isolated[11] when she is forced to use a separate bathroom and otherwise not treated as a girl. Although Winkelfoos and Dodd assert that Jane seems happy at school and Third-Party Defendants all argue that Jane's

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

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

emotional difficulties stem not from her treatment at school but from other challenges she faces, such as her disabilities and eating disorder, the Court simply cannot discount, and indeed gives great weight to, the statements of Jane and Joyce Doe. Even a moderate risk of suicide—which the School District takes pains to trumpet has been downgraded from a high risk—indicates significant risk of harm to Jane, and both her testimony and Joyce's demonstrate that she feels stigmatized when she is not treated as a girl and that she has been bullied at school. Moreover, according to Joyce, Jane often goes the entire day without using the bathroom because she hates being singled out when she is forced to use a separate bathroom, which would clearly impair her ability to focus on learning. Even without considering the evidence in the record from experts on both sides regarding gender dysphoria and its effects, the Court concludes that Jane is likely to be able to show harm from Highland's discriminatory policy and, therefore, to succeed on the merits of her Title IX claim.

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

Under the familiar tiers-of-scrutiny framework in cases arising under the Equal Protection Clause of the Fourteenth Amendment, the actions of a governmental entity that discriminates on the basis of sex are subject to heightened scrutiny. *Craig v. Boren*, 429 U.S. 190, 197 (1976). State entities "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" *United States v. Virginia*, 518 U.S. 515, 541-42 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Therefore, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550. Accordingly, the Supreme Court has consistently held that a party who seeks to defend discriminatory classifications on the basis of sex must offer

an "exceedingly persuasive justification" for that classification. *Id.* at 531; *Mississippi Univ. for Women*, 458 U.S. at 724. The government must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 533 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). The governmental interests enumerated must be "real, as [o]pposed to . . . merely speculative." *Bernal v. Fainter*, 467 U.S. 216, 227-28 (1984). If the governmental action at issue does not concern a suspect or quasi-suspect classification, such as sex, however, a court will uphold it "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

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

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

The Supreme Court has not decided whether transgender status is a quasi-suspect class under the Equal Protection Clause. The parties dispute whether *Smith v. City of Salem* mandates application of heightened scrutiny in the Sixth Circuit. The question of the level of scrutiny in an equal-protection claim was not squarely before the *Smith* court.[12] Jane argues, however, that

[12] In addition to a Title VII claim, the plaintiff in *Smith*, a public employee, also brought an equal-protection claim under § 1983, but the only issue before the Sixth Circuit regarding the

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

In *Love*, the district court ruled on a challenge to Kentucky's statute banning same-sex marriage. *Id.* In the process, the court conducted its own analysis of whether heightened scrutiny should apply to classifications based on sexual orientation after determining that the issue was unsettled in the Sixth Circuit. *Id.* The court examined *Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012), which held that sexual-orientation classifications should not receive heightened scrutiny, but noted that *Davis* relied on a line of cases beginning with *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Accordingly, the *Love* Court concluded that it was required to "conduct its own analysis to determine whether sexual orientation classifications should receive

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equal-protection claim was not which tier of scrutiny to apply, but whether the plaintiff had stated such a claim without referring specifically to the Equal Protection Clause. 378 F.3d at 576-77. The Sixth Circuit did note that the facts the plaintiff "alleged to support his claims of gender discrimination easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution." *Id.* at 577.

heightened scrutiny." 989 F. Supp. 2d at 545. Other district courts in the Sixth Circuit have done the same. *Bassett v. Snyder*, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 986 (S.D. Ohio 2013). After applying the four-factor test, two of these courts also concluded that heightened scrutiny should apply to classifications based on sexual orientation. *Love*, 989 F. Supp. 2d at 545-46; *Obergefell*, 962 F. Supp. 2d at 991. The third concluded it was required to apply *Davis* but observed that the "Sixth Circuit's pronouncements on the question are worthy of reexamination." *Bassett*, 951 F. Supp. 2d at 961. And although the Supreme Court did not squarely decide the level-of-scrutiny question when it issued a decision that same-sex marriage bans violate the Equal Protection Clause in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), it is fair to say that *Davis* is no longer good law, particularly in light of *Obergefell*'s emphasis on the immutability of sexual orientation and the long history of anti-gay discrimination. *See id.* at 2594, 2596. Like the district courts that examined suspect classification based on sexual orientation, this Court will proceed to conduct its own analysis of the four-factor test to determine whether heightened scrutiny applies to a transgender plaintiff's claim under the Equal Protection Clause.

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

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

First, there is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare. *Adkins*, 143 F. Supp. 3d at 139. Second, there is obviously no relationship between transgender status and the ability to contribute to society. Third, transgender people have "immutable [and] distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638, or as

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

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

the Second Circuit put it in *Windsor*, "the characteristic of the class calls down discrimination when it is manifest," 699 F.3d at 183; *see also Adkins*, 143 F. Supp. 3d at 139-40 (noting that transgender people encounter obstacles when there is a mismatch between the sex indicated on a birth certificate and the person's gender identity, and that "transgender people often face backlash in everyday life when their status is discovered"). Finally, as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group. The efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that correspond with their birth sex are but one example of the relative political powerlessness of this group. *See Carcano*, 2016 WL 4508192, at *6-7 (describing the enactment of North Carolina's "bathroom bill"); *see also Adkins*, 143 F. Supp. 3d at 140 (noting that there are no openly transgender members of the United States Congress or the federal judiciary).

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

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

Highland asserts two justifications for its treatment of Jane: the dignity and privacy rights of other students; and purported safety issues and lewdness concerns. (Compl., Doc. 1 ¶¶ 78-90.) Turning first to the privacy and dignity interests, Jane does not dispute that the protection of the privacy of students, including Jane herself, is an important interest. (Doc. 84 at 11.) First, the Court notes that Highland Elementary students use sex-segregated bathrooms with stall dividers that open on the top and bottom by approximately two feet. (Compl., Doc. 1 at ¶ 83.) There is no evidence that Jane herself, if allowed to use the girls' restroom, would infringe upon

the privacy rights of any other students. Therefore, Third-Party Defendants have failed to put forth an "exceedingly persuasive justification," or even a rational one, for preventing Jane from using the girls' restroom. *Mississippi Univ. for Women*, 458 U.S. at 724. The "fit between the means and the important end" of protecting student privacy is not "exceedingly persuasive." *Nguyen v. I.N.S.*, 533 U.S. 53, 70 (2001) (quoting *Virginia*, 518 U.S. at 533).

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

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

Third-Party Defendants also cite several Sixth Circuit cases concerning the right to bodily privacy against invasive strip searches or videotaping, which is not the issue before the Court in this case. For instance, the Sixth Circuit stated in *Brannum v. Overton County School Board* that "there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex." 516 F.3d 489, 495 (6th Cir. 2008) (quoting *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987)). But the right at issue in *Brannum* arose under the Fourth Amendment and is more properly characterized as a right to be free from unreasonable searches and seizures of the body. Of course, no such search or seizure of anyone's body is at issue here. The other cases Third-Party Defendants cite are similarly unpersuasive. *See Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 177 (3d

Cir. 2011) (holding that a deputy sheriff stated a claim for a Fourteenth Amendment violation when a superior officer instructed her to undress and shower while filming her); *Lee v. Downs*, 641 F.2d 1117, 1118-19 (4th Cir. 1981) (upholding verdict for a female prisoner who was forcibly restrained by male guards while a female nurse removed her clothing).

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

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

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

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

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

[15] Although the Court understands that some members of the Highland community may have concerns about their children's privacy, ultimately the affidavits submitted by concerned parents do not change the Court's conclusion that these fears and apprehensions are unlikely to lead to disruption or safety incidents in the Highland Elementary School restrooms, which are the

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

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

d. <u>Even if Rational Basis Review Applies, Highland’s Classification is Not Rationally Related to Its Asserted Interests</u>

Even if the Court were to apply rational basis review to Jane’s equal-protection claim, she would likely succeed on the merits. As already stated, Highland most certainly has a legitimate interest in the privacy and safety of its students. But Highland cannot show that its restroom policy is rationally related to those interests. The experience of *amici* school districts belies Highland’s speculative assertion that students’ privacy or safety interests will be impaired; school districts that have encountered these very issues have been able to integrate transgender students fully into the academic and social community without disruption, and certainly without the doomsday scenarios Highland predicts, such as sexual predators entering an elementary-

subject of this case. (Parent H. Decl., Doc. 68; Parent S.B. Decl., Doc. 69; Parent S. Decl., Doc. 70.)

school restroom. And there is certainly *no* evidence in the record that Jane herself—the only student to whom a preliminary injunction would apply—is likely to violate other students' privacy or put their safety at risk when using the girls' restroom. Highland's policy rests on "mere negative attitudes [and] fear," which are not "permissible bases for" differential treatment, and cannot survive even rational basis review. *City of Cleburne*, 473 U.S. at 448. Under either standard of scrutiny, Jane has shown that she is likely to succeed on the merits of her equal-protection claim.

B. Jane Will be Irreparably Harmed Absent an Injunction

Irreparable harm is presumed as a matter of law when a moving party shows "that a constitutional right is being threatened or impaired." *Am. Civil Liberties Union of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). And there is likewise a presumption of an irreparable injury when a plaintiff has shown a "violat[ion] [of] a civil rights statute." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001). Jane can show irreparable injury simply because both her Title IX claim and constitutional claim are likely to succeed on the merits.

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

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

As discussed exhaustively above, the Court finds no merit in Third-Party Defendants' argument that other students would be harmed by allowing Jane to use the bathroom consistent with her gender identity, as other students already do. The balance of equities tips especially sharply in Jane's favor because the injunction she seeks is narrowly tailored to permit her to use the girls' restroom and does not even implicate locker rooms or overnight accommodations at the middle- and high-school levels. Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Similarly, "the overriding public interest lay[s] in the firm enforcement of Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993).

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

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

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

Id. (emphases added). Because Ohio was not a party to the *Texas* litigation, and because this litigation was initiated before the *Texas* court issued its preliminary injunction, the injunction does not apply here. This is also consistent with the Supreme Court's admonition that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also*

V. CONCLUSION

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

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

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: September 26, 2016

Texas v. United States, 787 F.3d 733, 769 (5th Cir. 2015) (upholding issuance of a nationwide injunction of the Obama administration's executive action on immigration because of "a substantial likelihood that a partial injunction would be ineffective" in providing complete relief to the plaintiff states due to migration of individuals across state lines). Moreover, to construe otherwise would prevent other district courts and courts of appeals from weighing in on the important issues presented in this case, which would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see also Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002) ("Allowing one circuit's statutory interpretation to foreclose . . . review of the question in another circuit," would "squelch the circuit disagreements that can lead to Supreme Court review.").