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

STUDENTS AND PARENTS FOR PRIVACY, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants.

No. 1:16-CV-4945

Hon. Jorge L. Alonso, District Judge
Hon. Jeffrey T. Gilbert, Magistrate Judge

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO THE REPORT AND RECOMMENDATION

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INTRODUCTION

Plaintiffs brought this action against the U.S. Departments of Education ("ED") and Justice ("DOJ"), as well as the Secretary of Education and the Attorney General in their official capacities (collectively, the "Federal Defendants"), seeking to enjoin them from enforcing their interpretation that, under the antidiscrimination provisions of Title IX and its implementing regulations, *see* 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. pt. 106, schools must allow a transgender student to access the restrooms and other sex-segregated facilities that match the student's gender identity. In a thorough and well-reasoned opinion, Magistrate Judge Gilbert recommended that this Court deny Plaintiffs' request for preliminary injunctive relief to prevent the continued implementation of an Agreement to Resolve between ED and Defendant School Directors of Township High School District 211 (the "Agreement" and the "District"), which was signed in December 2015. *See* Report & Recommendation ("R&R"), ECF No. 134. The Agreement challenged by Plaintiffs was designed to protect the right of Student A, a transgender girl, to be free from unlawful discrimination. The Agreement allows Student A to use the girls' restroom and locker room, and in so doing promotes a safe and nondiscriminatory environment for all students in District 211. The Agreement applies to Student A and the public high school that she attends.

Plaintiffs have objected to the Magistrate Judge's ruling. *See* Pls.' Resp. to Magistrate Judge's R&R ("Pls.' Resp."), ECF No. 146. These objections are unavailing. For the reasons explained herein and in the Federal Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, ECF No. 80, and as the Magistrate Judge correctly found, Plaintiffs have failed to establish their entitlement to the extraordinary remedy of a preliminary injunction. They have neither made a clear showing that they are likely to succeed on the merits of their claims, nor shown that they would be irreparably harmed absent a preliminary injunction. This Court should therefore accept the Magistrate Judge's recommendation and deny Plaintiffs' motion for a preliminary injunction.

BACKGROUND

I. Statutory and Regulatory Background

Title IX prohibits recipients of federal financial assistance from discriminating on the basis of sex in education programs and activities. 20 U.S.C. § 1681 *et seq*. DOJ and ED share primary responsibility for enforcing Title IX and its implementing regulations. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this authority, ED's Office for Civil Rights ("OCR") investigates complaints and conducts compliance reviews, promulgates regulations, and issues guidance to clarify its interpretation of applicable statutory and regulatory obligations. *See* 20 U.S.C. § 1682. Consistent with the statute's anti-discrimination mandate, ED and DOJ regulations prohibit recipients from providing "different aid, benefits, or services," or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex in education programs and activities. 34 C.F.R. § 106.31(b); 28 C.F.R. § 54.400(b). The regulations further explain that recipients may "provide separate toilet, locker room, and shower facilities on the basis of sex" without violating Title IX, so long as the "facilities provided for students of one sex" are "comparable to [the] facilities provided for students of the other sex." 34 C.F.R. § 106.33; 28 C.F.R. § 54.410.

In response to requests for clarification from schools, ED and DOJ have issued guidance interpreting Title IX and its implementing regulations with respect to transgender individuals. Plaintiffs have identified four such guidance documents. In April 2014, OCR issued guidance entitled "Questions and Answers on Title IX and Sexual Violence," in which it explained 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." Pls.' Mot. for Prelim. Inj. ("Pls.' PI Mot."), Ex. 7 at 5 (hereinafter "April 2014 Guidance"). In December 2014, OCR further explained 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." Pls.' PI Mot., Ex. 6 at 25. In April 2015, OCR reiterated this interpretation in a Title IX Resource Guide. Pls.' PI Mot., Ex. 5 at 25. Finally, on

May 13, 2016, ED and DOJ issued joint guidance in the form of a Dear Colleague Letter (DCL),[1] explaining that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Pls.' PI Mot., Ex. 4 at 3 (hereinafter "2016 DCL").[2] The Dear Colleague Letter was issued five months after the District entered into the Agreement.

II. Factual and Procedural Background

Student A is a transgender girl in the middle of her senior year at William Fremd High School, a public school in Palatine, Illinois.[3] Since August 2013, the District has allowed her to use the girls' restroom (but not, initially, the girls' locker room) in accordance with her gender identity (the "Restroom Policy"). In December 2013, Student A filed a complaint with OCR concerning access to the girls' locker room. After investigating the complaint for over a year, OCR informed the District that excluding Student A from the girls' locker room violates Title IX. *See* R&R at 7. OCR further explained that if the District did not comply with its Title IX obligations, OCR would issue a Letter of Impending Enforcement Action. *Id.*

OCR and the District entered into an agreement to resolve the complaint on December 2, 2015. *See* Fed. Defs.' Opp. to Pls.' PI Mot., Ex. A, ECF No. 80-1. The Agreement states that:

> [B]ased on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room facilities designated for female students at school and to take steps to protect the privacy

[1] A Dear Colleague Letter is a guidance document issued by an agency to explain its interpretation of statutes and regulations. *See* Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

[2] Plaintiffs do not challenge the Dear Colleague Letter in their Complaint, and cannot challenge it in the context of this motion. *See, e.g.*, *Turner-El v. Ill. Bd. of Ed.*, 1996 WL 480341, at *2 (N.D. Ill. Aug. 21, 1996) ("As a general rule, a party cannot insert new claims into a case through motions for a preliminary injunction." (citing *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994)). As the Magistrate Judge correctly observed, "the May 13 Dear Colleague Letter is not among the Guidance Documents directly at issue in this case because it was issued after this lawsuit was filed." R&R at 7 n.3. In any event, Plaintiffs lack standing to challenge the Dear Colleague Letter, which was issued well after the District entered into the Agreement which they claim harms them.

[3] Student A was assigned the sex of male at birth, but from a young age has identified as female. During her middle school years, she transitioned to living full-time as a female. Since then, she has presented a female appearance, completed a legal name change, obtained a passport indicating that she is female, received a diagnosis of and treatment for gender dysphoria, and has taken an ongoing course of hormone therapy. *See* R&R at 6 n.2.

> of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker rooms to accommodate Student A and any students who wish to be assured of privacy while changing.

Id. at 2. The Agreement also provides that:

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

Id. The Agreement was effective immediately.

A semester later, Plaintiffs filed this lawsuit, challenging the Agreement, the Restroom Policy, and the Federal Defendants' interpretation of Title IX and its implementing regulations. The organization was joined by a number of anonymous students and parents of students enrolled in the District. Compl., ECF No. 1. Plaintiffs claim violations of the APA (Count I); the right to privacy (Count II); parents' right to direct the education and upbringing of their children (Count III); Title IX (Count IV); the Illinois and federal Religious Freedom Restoration Acts (Counts V and VI); and the Free Exercise Clause of the First Amendment (Count VII). Counts I and VI are brought against the Federal Defendants only, and Counts IV and V against the District only. The remaining counts are brought against all defendants.

Plaintiffs moved for a preliminary injunction on Counts I, II, and IV of their Complaint. As to the Federal Defendants, Plaintiffs sought an injunction against further application of the challenged interpretation of Title IX and its implementing regulations "to force District 211 to comply with [that interpretation] in the operation of its facilities." R&R at 12 (quoting Oral Argument Transcript, ECF No. 127 at 155). Plaintiffs also sought an injunction prohibiting District 211 from enforcing the Restroom Policy or complying with the Agreement. *Id.*

Magistrate Judge Jeffrey T. Gilbert issued a report and recommendation, finding that this Court should deny Plaintiffs' motion because they have not shown a likelihood of success on the merits of their claims or irreparable harm that would justify preliminary injunctive relief. Plaintiffs have filed objections.

LEGAL STANDARD

Federal Rule of Civil Procedure 72(b)(3) provides that this Court "must determine de novo any part of the magistrate judge's disposition" of Plaintiffs' motion for a preliminary injunction "that has been properly objected to." In doing so, this Court "may accept, reject, or modify the recommended disposition." *Id.*

A party seeking a preliminary injunction must establish that (1) it will suffer irreparable harm without the injunction; (2) there is no adequate remedy at law; and (3) it has a reasonable likelihood of success on the merits. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661-62 (7th Cir. 2015). If it cannot clearly establish each of these threshold requirements, the injunction must be denied. *Id.* at 662. If the moving party makes this threshold showing, the court then must determine whether the harm to the moving party in the absence of relief outweighs any harm that may be suffered by the non-moving party if the injunction is granted. *Id.* The court should also consider the effects, if any, that the injunction would have on nonparties. "The court weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he 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.* "If a plaintiff fails to meet just one of the prerequisites for a preliminary injunction, the injunction must be denied." *See Cox v. City of Chi.*, 868 F.2d 217, 223 (7th Cir. 1989).

ARGUMENT

I. The Magistrate Judge Correctly Found That Plaintiffs Had Made No Showing of Irreparable Harm

A party seeking a preliminary injunction must establish that it is likely to suffer irreparable injury in the absence of the requested relief. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The threat of irreparable injury must be "real," "substantial," and "immediate," not speculative or conjectural. *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). The irreparable harm requirement is "the single most important prerequisite for the issuance of a preliminary injunction." *Craig v. Pepperidge Farm, Inc.*, 2008 WL 4280154, at *2 (S.D. Ind. Sept. 15, 2008); *see also Reinders Brothers, Inc.*

v. Rain Bird E. Sales Corp., 627 F.2d 44, 52-53 (7th Cir. 1980). Because Plaintiffs have not made any showing that they will suffer irreparable harm in the absence of injunctive relief, the Magistrate Judge correctly concluded that their motion should be denied.

Plaintiffs assert in a single factually-unsupported paragraph of their motion that they face irreparable harm because students are "suffering humiliation, dignity loss, stress, apprehension, fear, and anxiety" because of the Restroom Policy and Agreement, which are "interfering with their ability to receive an education." Pls.' Mem. in Supp. of Prelim. Inj., ECF No. 23 at 24. This conclusory assertion is entirely insufficient to establish the irreparable injury necessary to justify preliminary injunctive relief. As the Magistrate Judge found, "Plaintiffs' conclusory allegations of discomfort and distress, unsupported by the 'who, what, when, why, and how' of what Student Plaintiffs are experiencing, are too speculative to justify injunctive relief." R&R at 77.[4]

Plaintiffs assert that the Agreement and Restroom Policy are causing the students dignitary and emotional harms and interfering with their ability to receive an education, but (even crediting the allegations in their verified complaint) they have not put forth any evidence to substantiate this assertion, despite the fact that the Agreement was in effect, and Plaintiffs were allegedly suffering irreparable harms, for a full semester before Plaintiffs filed their motion. Plaintiffs' generalized assertions of injury fall far short of the showing necessary to warrant preliminary injunctive relief. *See McDavid Knee Guard, Inc. v. Nike USA, Inc.*, 683 F. Supp. 2d 740, 749 (N.D. Ill. 2010) ("[A] district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff.") (internal citation omitted); *Ditton v. Rusch*, 2014 WL 4435928, at *3 (N.D. Ill. Sept. 9, 2014) (same). As the Magistrate Judge found, "Plaintiffs' general and conclusory claims . . . are insufficient to carry their burden." R&R at 77.

[4] The allegations in the Complaint underscore the lack of irreparable harm. For example, Plaintiffs allege that "[o]ne Girl Plaintiff has experienced Student A walking into a restroom while she was washing her hands and staring at her in a way that made her feel very awkward and uncomfortable." Compl. ¶ 234. Although being stared at by anyone may make someone feel uncomfortable, that alleged discomfort does not derive from the transgender status of any individual and, in any event, does not constitute the sort of irreparable harm necessary to obtain the emergency measure of preliminary injunctive relief. *See also id.* ¶ 233 ("Other Girl Plaintiffs have experienced Student A staring at them in the restroom, which makes them uncomfortable.").

Furthermore, courts have rejected claims by plaintiffs who object to sharing facilities with transgender individuals, belying any argument that some countervailing privacy right trumps the right of Student A to receive an education in an environment free from discrimination. *See, e.g.*, *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (rejecting argument that being required to share restroom facilities with a transgender coworker constituted an "adverse employment action" under Title VII); *Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting claim that placing a transgender prisoner in a cell with a prisoner who was not transgender violated the latter's clearly established right to privacy).

Although Plaintiffs ask this Court to presume that they will suffer irreparable harm because their constitutional rights have been infringed, "injury to constitutional rights does not *a priori* entitle a party to a finding of irreparable harm." *Ditton*, 2014 WL 4435928, at *5 (collecting cases). Nor is the Court required to presume that Plaintiffs' constitutional rights have been violated, as this inquiry involves a question of law and, as the Magistrate Judge correctly found (and as discussed below), Plaintiffs have not established that their constitutional rights have been violated. *See* R&R at 75 (noting that Plaintiffs' arguments for irreparable harm "rely on the premise that Plaintiffs' underlying constitutional and Title IX claims have merit," despite the fact that "Plaintiffs have not shown that they are likely to prevail on either their constitutional claim or their Title IX claims").

Plaintiffs have not established that a preliminary injunction is necessary to avoid irreparable harm to their privacy interests because, under the Agreement, the District must "install[] and maintain[] sufficient privacy curtains (private changing stations) within the girls' locker rooms" and provide "a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use," to students who seek additional privacy. Agreement at 2. These alternative facilities eliminate the privacy concerns about which Plaintiffs complain. *See* R&R at 77-78 ("The fact that District 211 provides significant privacy protections and alternate facilities for students

who . . . are uncomfortable at the risk of encountering a transgender student in a state of undress also undermines Plaintiffs' ability to establish irreparable injury."). Plaintiffs do not allege that they asked to use these facilities—much less that any such request was denied—and their failure to do so vitiates their claim of irreparable harm.[5] And even if Plaintiffs had established that these alternative facilities are less convenient than the girls' locker room, their motion would still fail because any inconvenience from choosing to use alternative facilities does not constitute the type of irreparable harm necessary to justify preliminary injunctive relief. *See Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 813 (2d Cir. 1996) (holding that movants did not show risk of irreparable injury when they had alternatives, even when alternatives were less convenient); *Corbett v. United States*, 2011 WL 1226074, at *5 (S.D. Fla. Mar. 2, 2011) (same).[6] *See* R&R at 77-78.

II. The Magistrate Judge Correctly Found that Plaintiffs Are Unlikely to Succeed on the Merits of Their Claims

Plaintiffs' motion should also be denied for failure to establish a likelihood of success on the merits. A "likelihood" is a "better than negligible" chance and "more than a mere possibility of relief." *Truth Found. Min. v. Vill. of Romeoville*, 2016 WL 757982, at *8 (N.D. Ill. Feb. 26, 2016) (quoting *Nken v. Holder*, 556 U.S. 418 (2009)). Plaintiffs assert that they are entitled to injunctive relief because the Agreement and the challenged interpretation violate the APA and students' fundamental rights to privacy. As the Magistrate Judge correctly concluded, these claims are unlikely to succeed.

[5] *See Orth v. Wis. State Emps. Union Council*, 2007 WL 1029220, at *2 (E.D. Wis. Mar. 29, 2007) ("[Plaintiffs] have apparently not explored any alternatives to insurance . . . a fact which undermines their claim that the absence of preliminary relief here would cause them irreparable harm.").

[6] Moreover, any inconvenience that Plaintiffs allegedly suffer from *choosing* to use these alternative facilities cannot be compared to the inconveniences *imposed* on Student A when she was prohibited from using the girls' locker room prior to the implementation of the Agreement.

A. Plaintiffs' are not likely to succeed on the merits of their APA claims

1. Federal Defendants' interpretation of Title IX and its implementing regulations is reasonable

Title IX's implementing regulations allow schools to "provide separate toilet, locker room, and shower facilities on the basis of sex," as long as "facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Neither this regulation nor Title IX itself defines "sex" or makes clear which single-sex facility may be used by a transgender student when the various indicators of that student's sex diverge. Federal Defendants' interpretation resolves that question, consistent with Title IX's mandate of equal access to educational opportunities, *see* 20 U.S.C. § 1681(a), by recognizing that in order to provide transgender students equal access to multi-occupancy sex-segregated facilities—and to avoid subjecting them to stigma and isolation—they must be allowed to use the facilities that match their gender identity. The Supreme Court has held that courts must defer to agencies' reasonable interpretations of their own ambiguous regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011). The only court of appeals to consider ED's interpretation of 34 C.F.R. § 106.33 found it reasonable. *See G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016), *mandate recalled and stayed*, *Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016), *cert. granted*, No. 16-273 (Oct. 28, 2016).[7] A growing chorus of district courts has largely agreed. *See Highland Bd. of Ed. v. U.S. Dep't of Ed.*, 2016 WL 5372349, at *11 (S.D. Ohio Sept. 26, 2016); Decision and Order Granting in Part Motion for Preliminary Injunction, *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-cv-943, Dkt. No. 10 (E.D. Wis. Sept. 22, 2016); *Carcaño v. McCrory*, 2016 WL 4508192, at *11-16 (M.D.N.C. Aug. 26, 2016).[8] As the Magistrate Judge observed, "[t]hese decisions holding 'sex' is ambiguous in

[7] The Fourth Circuit's decision in *Gloucester* remains good law despite the Supreme Court's stay and grant of certiorari. *See Carcaño*, 2016 WL 4508192, at *13 ("[D]espite the stay and recall of the mandate, the Supreme Court did not vacate or reverse the Fourth Circuit's decision. Thus, . . . at present [*Gloucester*] remains the law in this circuit."); *Highland*, 2016 WL 5372349, at *18 (explaining reliance on *Gloucester* despite the Supreme Court's stay).

[8] One district court has held otherwise. *See Texas v. United States*, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016). As the Magistrate Judge recognized, that decision is unpersuasive.

the context of Title IX and, therefore, that it can encompass gender identity are well-reasoned and persuasive." R&R at 35. Indeed, they show that the Federal Defendants' interpretation is not just reasonable; it is the best construction of the relevant statutory and regulatory authority.

a. The Magistrate Judge correctly found that Title IX and its implementing regulations are silent as to which restrooms and locker rooms transgender students should be allowed to use

Section 106.33—the regulation at issue here—does not specify which sex-segregated facilities transgender students may use. *See* 34 C.F.R. § 106.33. Neither does the statute, which prohibits sex discrimination with limited exceptions, *see* 20 U.S.C. §§ 1681(a), 1686, but does not define "sex" or establish the criteria by which a school should determine which multiple-occupancy single-sex facility a transgender student is authorized to use. Plaintiffs dwell on the regulation's reference to "students of one sex" and "students of the other sex," arguing that the regulation therefore refers to males and females. Pls.' Resp. at 9. But that "straightforward conclusion" does not answer the question in this case, because the regulation remains "silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." *Gloucester*, 822 F.3d at 720.

Nor is it the case that "sex," as used in Title IX and its implementing regulations, unambiguously refers to any particular component of a person's sex. As the Fourth Circuit explained, dictionary definitions of "sex" contemporaneous with Title IX demonstrate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive" even at that time. *Gloucester*, 822 F.3d at 721; *see also Highland Local School District*, 2016 WL 5372349 at *11 (noting that "dictionaries from [the time when Title IX was enacted] defined 'sex' in myriad ways" and rejecting the argument that those dictionary definitions "reflect a uniform and unambiguous meaning of 'sex' as biological sex or sex assigned at birth").[9] Modern dictionaries similarly define sex in ways that encompass multiple

[9] *See, e.g.*, Am. Heritage Dictionary 548, 1187 (1973) (defining sex as "the physiological, functional, and psychological differences that distinguish the male and the female"); Webster's Third New Int'l Dictionary 2081 (1971) (defining sex as "the sum of the morphological, physiological, and behavioral peculiarities"); Webster's

components, including social, psychological, and behavioral factors. *See Gloucester*, 822 F.3d at 721 n.7 (citing modern dictionaries).

Those factors sometimes diverge. As multiple courts have now recognized, neither Title IX nor section 106.33 purports to favor any particular component of sex over any others; the text "sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge." *Highland*, 2016 WL 5372349, at *13 (quoting *Gloucester*, 822 F.3d at 722); *see also Radtke*, 867 F. Supp. 2d at 1032 (rejecting the argument that "'sex' is narrowly defined as an immutable biological determination at birth").[10] For instance, a person who has undergone sex reassignment surgery may have genitalia that indicate a different sex from that person's chromosomes. A transgender person's gender identity does not match their birth-assigned sex. *See Radtke v. Misc. Drivers & Helpers Union Local No. 683 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) ("An individual's sex includes many components, . . . some of which could be ambiguous or in conflict.").

Plaintiffs maintain that Title IX's legislative history demonstrates that Congress intended "sex" to mean "sex assigned at birth," *see* Pls.' Resp. at 13, but nothing they cite has anything to do with the definition of sex. The regulation permitting schools to maintain certain types of sex-segregated facilities similarly omits any definition of sex or any determination of which sex-specific facilities transgender students may use. *See Gloucester*, 822 F.3d at 720. And Plaintiffs' arguments based on the subjective intent of legislators in 1972 are foreclosed by the Supreme

Seventh New Collegiate Dictionary 347, 795 (1970) (defining sex to include the "behavioral peculiarities" that "distinguish males and females").

[10] Plaintiffs attempt to draw a hard distinction between biological and non-biological factors (though they concede that the biological determinants of sex are numerous, and therefore potentially divergent). Pls.' Resp. at 4. But there are increasing indications that gender identity itself has biological roots. "[N]umerous medical studies conducted in the past six years . . . 'point in the direction of hormonal and genetic causes for the in utero development'" of gender identity that is inconsistent with an individual's genitalia. Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, *in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE, ch.16, at 16-72 to 16-74 & n.282 (Christine Michelle Duffy ed. Bloomberg BNA 2014))); *see also* E.S. Smith et al., *The Transexual Brain—A Review of Findings on the Neural Basis of Transsexualism*, 59 NEUROSCIENCE AND BIOBEHAVIORAL REVIEWS 251-66 (Dec. 2015) (citing numerous studies and concluding that "[t]he available data from structural and functional neuroimaging-studies promote the view of transsexualism as a condition that has biological underpinnings").

Court's decision in *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 79 (1998). There, the Court explained that "statutory prohibitions often go beyond the principal evil" in the minds of the enacting legislators "to cover reasonably comparable evils" fairly encompassed by the statutory text. *Id.* The Court therefore held that Title VII prohibited "male-on-male sexual harassment," even though that "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.*[11]

In sum, Plaintiffs have not carried their heavy burden to establish that Title IX or its implementing regulations *unambiguously* preclude schools from considering gender identity when determining which bathroom or locker room facilities a transgender student is authorized to use. *Cf. Stanley v. Cottrell, Inc.*, 784 F.3d 454, 465-66 (8th Cir. 2015) (explaining that a provision is only "unambiguous" when it is not "susceptible to more than one interpretation"). This Court should therefore apply *Auer* to the Federal Defendants' interpretation.[12]

[11] Courts look to case law interpreting Title VII for guidance in evaluating a claim brought under Title IX, and vice-versa. *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

[12] One district court has preliminarily concluded that section 106.33 is not ambiguous and requires facilities to be segregated according to birth-assigned sex. *See Texas*, 2016 WL 4426495, at *14-15. But there are multiple problems with that court's analysis, which the Magistrate Judge found to be "relatively conclusory." R&R at 35 n.19; *accord Highland*, 2016 WL 5372349, at *7 ("The *Texas* court's analysis can charitably be described as cursory . . . ."). First, the *Texas* court relied heavily on what it assumed was "the intent of the drafter" of Title IX, *id.* at *14, despite the Supreme Court's clear instruction not to limit sex discrimination laws to "the principal concerns of our legislators." *Oncale*, 523 U.S. at 79-80. The court did not even discuss *Oncale*. Second, while acknowledging that "the use of dictionary definitions is appropriate in interpreting undefined statutory terms," *Texas*, 2016 WL 4426495, at *14, the court did not acknowledge the numerous dictionaries that have defined sex to include behavioral and social factors like gender identity. *See, e.g.*, *Gloucester*, 822 F.3d at 721 & n.7; *Highland*, 2016 WL 5372349, at *11 & n.4. Third, the court did not address the many ambiguities created by defining sex based on genitalia alone, or the evidence that gender identity has biological roots. *See Gloucester*, 822 F.3d at 720-21.

b. Federal Defendants reasonably interpreted Title IX's implementing regulations consistent with the statute's mandate of equal educational opportunity

An agency's interpretation of its own ambiguous regulation is controlling as long as it is not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Two courts have considered whether ED's resolution of ambiguity in Title IX or its implementing regulation allowing single-sex facilities was reasonable and, like Magistrate Judge Gilbert, R&R at 35, both courts concluded that it was. *See Gloucester*, 822 F.3d at 721-23; *Highland*, 2016 WL 5372349, at *13 ("The agencies easily satisfy this deferential standard."). This Court should as well. Defendants' interpretation of Title IX is consistent with those of numerous other federal agencies, and ED has never taken a definitive position to the contrary. While its present interpretation is fairly new, "novelty alone is no reason to refuse deference." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 64 (2011). As in *Talk America*, "the issue in th[is] case[] did not arise until recently," as school districts began to seek ED's guidance on how to assign transgender students to sex-specific facilities under the Title IX regulations. *Id.* Plaintiffs have not argued—nor could they—that ED's interpretation represents "a convenient litigation position or a *post hoc* rationalization." *Highland*, 2016 WL 5372349, at *13 (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012)). Because section 106.33 does not provide an unambiguous answer as to which facilities transgender students should be allowed to use, this Court should defer to the agencies' interpretation.

ED's interpretation of section 106.33 is rooted in Title IX's overriding concern for equal access to educational opportunities. Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.'" *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629 (1999) (quoting 20 U.S.C. § 1681(a)); *see also* 34 C.F.R. § 106.31(b). Consistent with this prohibition, schools can separate facilities such as restrooms or locker rooms, *see, e.g.*, 34 C.F.R. § 106.33, but they may only do so within the narrow confines of the regulation. *See Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 175 (2005) ("Title

IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition."). Interpreting that exception consistent with Title IX "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81.

After studying this issue for years in consultation with school administrators, transgender students, parents, and experts in the field, ED concluded that providing transgender students with access to facilities that match their gender identity is consistent with the purposes of Title IX and its implementing regulations.[13] Using the facilities that *conflict* with their gender identity is not a meaningful option for most transgender people. A transgender female student who lives as a girl, dresses and presents as a girl, and who is perceived by others to be a girl, cannot reasonably be expected to use the boy's restroom. ED's interpretation thus ensures that transgender students who use multi-occupancy boys' or girls' facilities are not subject to the daily stigma of a school negating their "very identity." *See Lusardi v. Dep't of the Army*, 2015 WL 1607756, at *10 (E.E.O.C. Apr. 1, 2015) (explaining why denying a transgender woman access to the women's restroom denied her "equal status, respect, and dignity"); *see also* U.S. Dep't of Ed., *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 2016) ("*Emerging Practices*"), http://www.ed.gov/oese/oshs/emergingpractices.pdf (last visited Oct. 6, 2016).

Magistrate Judge Gilbert also concluded that the Seventh Circuit's decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), does not control the outcome here. R&R at 26-36. After reviewing that decision, which held that purposeful discrimination on the basis of transgender status was not prohibited by Title VII, *id.* at 1085-86, and the Seventh Circuit's vacatur of the panel opinion in *Hively v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), which held that *Ulane* was still operative, the Magistrate Judge concluded that "the term 'sex' in Title IX

[13] *See, e.g.*, Resolution Agreement, *In re Dorchester Cnty. Sch. Dist. 2, SC*, OCR Case No. 11-15-1348 (Jun. 16, 2016) (one-year investigation); Resolution Agreement, *Township High School Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 3, 2015) (two-year investigation); Resolution Agreement, *Central Piedmont Cmty. College, NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015) (one-year investigation); Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095 (Oct. 8, 2014) (three-year investigation); Resolution Agreement, *Student v. Arcadia Unified Sch. Dist., CA*, OCR Case No. 09-12-1020/DOJ Case Number 169-12C-70 (Jul. 24, 2013) (two-year investigation).

can be interpreted to encompass gender identity as [ED] has interpreted it." R&R at 35.

As the Magistrate Judge recognized, R&R at 31, courts have long understood that federal protections against sex discrimination extend beyond discrimination motivated simply by the victim's genitalia or chromosomes. Since the Supreme Court's decision in *Price Waterhouse v. Hopkins*, it has been clear that discrimination "because of . . . sex" extends to the behavioral and social aspects of sex: "sex-based considerations," in the Supreme Court's words. 490 U.S. 228, 240, 242 (1989) (quoting 42 U.S.C. § 2000e-2(a)(1)). In *Price Waterhouse*, the Court held that an employer engaged in sex discrimination when it failed to promote an employee because of "her failure to conform to certain gender stereotypes." *Id.* at 272.

Applying *Price Waterhouse* in the context of transgender employees, numerous courts of appeals have held that "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/*or identify* with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*." *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (emphasis added). As the Eleventh Circuit has explained, "[t]he very acts that define transgender people are those that contradict stereotypes of gender-appropriate appearance and behavior." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (quotation marks omitted). "There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Id.* at 1316; *see also Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (rejecting pre-*Price Waterhouse* cases that failed to apply Title VII to discrimination based on a person's "sexual identity"). These cases support ED's interpretation of its regulations because they are rooted in the understanding that, after *Price Waterhouse*, "'sex' under Title VII encompasses *both* the anatomical differences between men and women *and* gender." *Schwenk*, 204 F.3d at 1202 (emphasis added). In other words, "sex" in the civil rights laws includes "sex as viewed as social rather than biological classes." *Smith*, 378 F.3d at 572 (quotations omitted). *See Schwenk*, 204 F.3d at 1201 (rejecting pre-*Price Waterhouse* cases for "construing 'sex' in Title VII narrowly to mean only anatomical sex rather than gender"). For this reason, "courts throughout the country for years have questioned

and discounted the continued vitality of *Ulane*, particularly since the Supreme Court's decision in *Price Waterhouse*." R&R at 31.

But even if *Ulane* remains good law, it does not answer the question of whether a transgender female should be treated as a girl for purposes of access to sex-segregated facilities in educational institutions under the single-sex facility regulation. Instead, the *Ulane* court explicitly allowed for the possibility "that society, as the trial judge found, considers Ulane [a transgender female] to be female," and went on to analyze whether she had established that she was discriminated against because she was a woman. 742 F.2d at 1087; *see also Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (noting that "even medical experts disagree as to whether [the transgender plaintiff] is properly classified as male or female"). In short, while the *Ulane* Court concluded that discrimination on the basis of "transsexuality" is not actionable under Title VII, it did not purport to determine whether a transgender female should be treated as a female (the crucial question here), let alone consider whether Title IX's regulations permit a transgender individual to access sex-segregated facilities consistent with her gender identity.

Finally, *Ulane*'s logic does not foreclose the possibility that a transgender woman who is denied access to women's facilities is subject to unlawful discrimination because she is treated differently based on the fact that her gender identity differs from her sex assigned at birth. *See United States v. Se. Okla. State Univ.*, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015) ("Here, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male."). As explained above, ED has considered this issue in the context of schools and Title IX, and has concluded that transgender students are subject to discrimination when they are denied access to sex-segregated facilities consistent with their gender identity. That conclusion is based on "careful consideration of the social context in which particular behavior occurs and is experienced by its target," *Oncale*, 523 U.S. at 81, and is not undermined by *Ulane*, which was decided in a very different context.

For all of these reasons, the Magistrate Judge was correct to find that Plaintiffs had no likelihood of success on the merits of their substantive APA claims. *See* R&R at 35-36.[14]

2. Federal Defendants' interpretation is exempt from the APA's notice and comment requirements

The Magistrate Judge correctly concluded that Federal Defendants' interpretation of Title IX and its implementing regulations "need not have been promulgated through the notice-and-comment process." R&R at 38. The APA specifically excludes interpretive rules from its notice-and-comment requirement. 5 U.S.C. § 553(b)(3)(A). The Supreme Court has explained that the "critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204, 1204 (2015). Interpretive rules encourage predictability in the administrative process because they "clarif[y] or explain[] existing law or regulations." *McKenzie v. Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986). An agency that enforces "less than crystalline"

[14] The Magistrate Judge was, however, wrong to conclude that Federal Defendants' interpretation of Title IX and its implementing regulations was final agency action under the APA. R&R at 18-23; *see* 5 U.S.C. § 704. To be final, an agency action must (1) "mark the 'consummation' of the agency's decisionmaking process," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Plaintiffs' APA challenge to the interpretation contained within the guidance documents fails the second *Bennett* requirement. The guidance documents are *explicit* that they merely announce ED's and DOJ's views as to the proper interpretation of Title IX and its implementing regulations. For instance, the 2016 DCL explains that it "does not add requirements to applicable law, but [rather] provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations." 2016 DCL at 1. The same is true of the April 2014 Guidance. *See* April 2014 Guidance at 1 n.1. Final agency action is not found "when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *AT&T Co. v. E.E.O.C.*, 270 F.3d 973, 975 (D.C. Cir. 2001).

None of the guidance documents imposes any legal obligations or consequences. Plaintiffs' allegations that school districts have had to modify their behavior and prepare for a potential loss of federal funds do not suffice. "The flaw in [Plaintiffs'] argument is that the 'consequences' to which they allude are practical, not legal." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 811 (D.C. Cir. 2006). Although guidance by an agency may be "voluntarily followed by [regulated parties,] . . . de facto compliance is not enough to establish that [agency guidance] [has] legal consequences." *Id*. Indeed, "while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall about what will be needed," no final agency action exists "where there has been no order compelling the regulated entity to do anything." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (quotation marks omitted).

As the Magistrate Judge noted, R&R at 19, the Federal Defendants have not contested Plaintiffs' argument that the Locker Room Agreement constitutes final agency action. By choosing not to contest that argument here, however, Federal Defendants do not concede that resolution agreements are reviewable final agency action as a general matter.

statutes and regulations must interpret them, "and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement, which the [APA] assimilates to an interpretive rule." *Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996). Courts should not "discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities." *Id.* Here, by announcing their interpretations of Title IX and its implementing regulations, the Federal Defendants have "advise[d] the public of the agency's construction of the statutes and rules which it administers"—and no more. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). The guidance documents announce paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA. *Id.*

Plaintiffs argue that the Federal Defendants' interpretation is actually legislative, because the interpretation is (they argue) unauthorized by statute. Pls.' Resp. at 17-18. Both the premise and the conclusion are incorrect. As explained above, the guidance documents and the interpretations contained therein merely explain what ED thinks Title IX and its implementing regulations already require. *See* R&R at 38 (concluding that ED "does not treat the Guidance as giving rise to the legal obligation to treat transgender students consistent with their gender identity"). The guidance documents impose no liability. And while ED's interpretations of the law—irrespective of any guidance documents—are entitled to some deference, the Supreme Court recently confirmed that receiving *Auer* deference does not transform a mere interpretation into a legislative rule. *See Perez*, 135 S. Ct. at 1208 n.4. Nor would the fact that an interpretation was invalid (as Plaintiffs wrongly suggest) make it a legislative rule.

The guidance documents impose no new obligations on school districts, contrary to Plaintiffs' argument. Pls.' Resp. at 17-18. To the contrary, they simply provide an interpretation of the applicable statutes and regulations in a particular context. The guidance documents "detail[]

what [ED] thinks Title IX means," but they "do[] not provide an independent basis for an enforcement action." R&R at 38.[15]

In sum, the guidance documents and the interpretations contained therein merely supply "crisper and more detailed lines than the authority being interpreted," *Iowa League of Cities v. EPA*, 711 F.3d 844, 875 (8th Cir. 2013); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993, and are not subject to the notice-and-comment requirements of the APA. R&R at 38.

B. Plaintiffs' are not likely to succeed on the merits of their constitutional claim

The Magistrate Judge also correctly concluded, after a lengthy analysis, that "Plaintiffs have not shown a likelihood of success on the merits of their claim that the Restroom Policy and the Locker Room Agreement violate their constitutional right to privacy." R&R at 61.

Plaintiffs' factual allegations do not implicate any fundamental right protected by the Due Process Clause. Such a fundamental constitutional right is one that is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has mandated caution in elevating individual liberty interests to the status of fundamental constitutional rights because recognizing such rights, "to a great extent, places the matter outside the arena of public debate and legislative action" and risks transforming the Due Process Clause "into the policy preferences of the Members of the Court." *Id.* In determining whether a claimed right is fundamental, courts first require a "careful description" of the asserted interest. *Christensen v. Cnty. of Boone*, 483 F.3d 454, 462 (7th Cir. 2007). "[V]ague generalities . . . will not suffice." *Chavez v. Martinez*, 538 U.S. 760, 776 (2003). Next, a reviewing court must determine whether that asserted interest is "fundamental"—that is, whether "it is so deeply rooted and sacrosanct that no amount of process

[15] As the Fourth Circuit explained, for most of their existence, the Title IX regulations at 34 C.F.R. § 106.33 were understood simply to mean that a school may provide sex-segregated facilities, without much further specificity. *See Gloucester*, 822 F.3d at 722. In recent years, as schools have confronted the reality that some students' gender identities do not align with their birth-assigned sex, schools have begun to look to ED for guidance on the question of how its regulations apply to transgender students. *Id.* at 720. The challenged interpretation thus simply applies a preexisting statute and regulations to new circumstances.

would justify its deprivation." *Christensen*, 483 F.3d at 462.

Here, Plaintiffs assert that the Federal Defendants have violated students' fundamental right to privacy "in their unclothed bodies" and their right "to be free from government-compelled risk of intimate exposure to the opposite sex." Compl. ¶ 393. Plaintiffs' description of the "right to privacy in their unclothed bodies" fails to narrowly and accurately define the interest that they actually seek to vindicate. Instead, "Plaintiffs' constitutional claim posits this question: do high school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different from theirs?" R&R at 45. Magistrate Judge Gilbert recognized that there is no such fundamental right. "No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort." *Id.* at 47. And even if the Agreement and challenged interpretation somehow implicated Plaintiffs' fundamental privacy rights, their substantive due process claim would still fail because the Federal Defendants have not interfered "directly" and "substantially" with those rights. *See Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978). The Seventh Circuit has made clear that incidental effects on fundamental rights are not cognizable pursuant to the Due Process Clause. *Christensen*, 483 F.3d at 463 ("The Constitution prevents fundamental rights from being aimed at; it does not, however, prevent side effects that may occur if the government is aiming at some other objective.").[16]

Here, the government's purpose is to protect transgender students from unlawful discrimination. Plaintiffs fail to plausibly allege how the Federal Defendants' enforcement of Title IX and its implementing regulations "directly and substantially" infringed on their rights to

[16] For example, in *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir. 1985), the court concluded that regulations designed to keep undocumented immigrants out of the country that had the indirect effect of separating parents from children "do not bring the constitutional rights of family association into play" because these effects are mere "collateral consequences of regulations not directed at the family." The court explained that "regulations are not unconstitutional deprivations of the right of family association unless they regulate the family directly." *Id.*; *see also Johnson v. City of Kankakee*, 260 F. App'x 922, 925 (7th Cir. 2008) (applying directness test to privacy).

privacy. *See* R&R at 58 ("[T]he Court finds that Plaintiffs are not suffering a 'direct' and 'substantial' infringement on any substantive due process right."). Instead, Plaintiffs can complain only of the Agreement's indirect effects, such as requiring students who want additional privacy to use alternative restroom and changing facilities at their option. These indirect effects most assuredly do not reach the level of a constitutional deprivation. To hold otherwise would mean that every inconvenience related to restroom and locker room usage would "carry the seed of a constitutional claim, and thus would improperly open '[b]reathtaking vistas of liability.'" *Walls v. Lombard Police Officers*, 2002 WL 548675, at *5 (N.D. Ill. Apr. 4, 2002) (quoting *Hameetman*, 776 F.2d at 643).

In short, Plaintiffs have entirely failed to plausibly allege, much less demonstrate, that any fundamental rights to privacy have been substantially impaired. Accordingly, the rational basis test governs this Court's review of the Agreement and Challenged interpretation. *See Glucksberg*, 521 U.S. at 728. Under this test, the Court must simply ask if the challenged government action bears "a reasonable relation to a legitimate state interest." *Id.* at 722. It does. The government's action promotes its important interest in protecting the right of all students to receive an education in an environment free from unlawful discrimination. The Agreement furthers these interests by providing Student A with access to the girls' locker room, while protecting the privacy of all students by requiring the District to provide "reasonable" alternative changing facilities. ECF No. 80-1 at 2. And in no sense does either the Agreement or the challenged interpretation "shock the conscience." *See Beary Landscaping, Inc. v. Ludwig*, 479 F. Supp. 2d 857, 874 (N.D. Ill. 2007) ("The Seventh Circuit has repeatedly emphasized that [t]he scope of substantive due process is very limited and protects Plaintiffs only against arbitrary government action that shocks the conscience." (collecting cases)).[17]

Finally, as Magistrate Judge Gilbert recognized, this case arises in the context of a school,

[17] It cannot be said that by offering a considered interpretation of their own regulations, the Federal Defendants' actions rise to the level of conscience-shocking behavior. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense."); *Tessler v. Paterson*, 451 F. App'x 30, 33 (2d Cir. 2011) (affirming dismissal of substantive due process claim where defendant "was acting pursuant to a reasonable interpretation of the applicable regulations").

where students' privacy expectations are necessarily diminished. *See* R&R at 49. As the Supreme Court has observed, "Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995). The Court noted that minors do not have the same rights as adults, explaining that they "lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will." *Id.*; *see also id.* at 657 ("Public school locker rooms . . . are not notable for the privacy they afford.").

The Magistrate Judge correctly found that "neither the Restroom Policy nor the Locker Room Agreement shocks the conscience because they represent a careful and sensitive balancing of the interests of all the students in District 211." R&R at 61. This Court should do the same.

III. Although the Magistrate Judge Did Not Address Harm to Third Parties or the Public Interest, Both Weigh Against Injunctive Relief

Because Plaintiffs have not made the threshold showings of irreparable harm and a likelihood of success on the merits there is no need for the Court to proceed to the balancing of hardships. R&R at 82; *see Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 972 (7th Cir. 2012). But if the Court were to consider the balance of equities and public interest, there is even further reason to deny Plaintiffs' motion because these factors tip sharply in favor of the Defendants.

As explained above, Plaintiffs' alleged harms are entirely conclusory and can be cured by using the alternative facilities provided. Against this alleged harm weighs the substantial public interest in achieving Title IX's goals of eliminating discrimination in federally-funded educational settings. As a general matter, "there is inherent harm to an agency" in preventing it from enforcing statutes and regulations that "Congress found it in the public interest to direct that [it] develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) ("[T]he granting of an injunction against the enforcement of a likely constitutional statute would harm the government."). That harm is all the

greater here, where the agency action being challenged protects the rights of unrepresented minors. As Judge Davis stated in *Gloucester*, "[e]nforcing [a transgender student's] right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." 2016 WL 1567467, at *14 (Davis, J., concurring); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[Courts] should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

Enjoining the Agreement to Resolve with District 211 would prevent the Federal Defendants from implementing the antidiscrimination provisions of Title IX, which ED and DOJ are charged with enforcing, *see* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54, and would inflict a very real harm on the public, on Student A, and, by extension, on other transgender students who have been forced to either conceal their gender identity or have it ignored when they arrive at school. *See* Fed. Defs.' Opp. to Pls.' PI Mot., Ex. B (detailing some of the harms suffered by Student A when she was excluded from the girls' locker room); *see also Nken*, 556 U.S. at 420 (consideration of harm to the opposing party and the public interest "merge when the Government is the opposing party"). Accordingly, the requested injunction should be denied.

CONCLUSION

For the reasons set forth above, the recommendation of the Magistrate Judge should be accepted, and Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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Dated: November 18, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2016, I electronically filed the Federal Defendants' Response to Plaintiffs' Objections to the Report and Recommendation in the above-captioned action through the Court's CM/ECF system, which sent notice of such filing to all counsel of record.

Respectfully submitted,

/s/ *Benjamin L. Berwick*
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