IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JULIET EVANCHO; *et al.*, *Plaintiffs*, v. PINE-RICHLAND SCHOOL DISTRICT; *et al.*, *Defendants*.	PITTSBURGH DIVISION Civil Action No. 2:16-cv-01537-MRH

PLAINTIFFS' RESPONSES TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to this Court's October 24, 2016 Order (Docket No. 30), Plaintiffs Juliet Evancho, Elissa Ridenour, and A.S., by and through their attorneys, hereby respectfully submit the following Responses to Defendants' Proposed Findings of Fact and Conclusions of Law regarding Plaintiffs' Motion for Preliminary Injunction.

PLAINTIFFS' RESPONSES TO DEFENDANTS' PROPOSED FINDINGS OF FACT

Plaintiffs

1. Plaintiffs, Juliet Evancho ("Ms. Evancho"), Elissa Ridneour ("Ms. Ridenour") and A.S. (collectively, "Plaintiffs") instituted this action by filing a Complaint on October 6, 2016.

   RESPONSE: No objection.

2. Plaintiffs are transgender individuals who seek to use restroom facilities at the Pine-Richland School District (the "District") congruent with their gender identity. In other words, Plaintiffs were assigned a biological sex at birth based on their respective anatomies ("biological sex"), but identify as the opposite gender ("gender identity") and seek to utilize restroom facilities at the District congruent with their gender identity.

RESPONSE: Objection. Plaintiffs are transgender because their gender identity diverges from the sex they were assigned at birth. Juliet Decl. ¶¶ 8, 9; Elissa Decl. ¶¶ 9, 10; A.S. Decl. ¶¶ 7, 12; Ehrensaft Decl. ¶¶ 17, 20. Defendants' use of the term "biological sex" is vague and Plaintiffs object to Defendants' use of the term "biological sex" to the extent it excludes gender identity, which has a biological basis, as a component of a person's sex. Ehrensaft Decl. ¶¶ 18, 19, 21; Ehrensaft Reply Decl. ¶¶ 6, 8, 10.

Plaintiffs' Attendance at the District

3. As part of the District's efforts to ensure that the Plaintiffs are treated respectfully and pursuant to their gender identities, with the exception of requiring Plaintiffs to utilize restrooms corresponding to their biological sex, each Plaintiff is supported by the District based upon their expressed gender identity.

   RESPONSE: Objection. Disputed as to Defendants' use of the term "biological sex." The term "biological sex" is vague and Plaintiffs object to Defendants' use of the term "biological sex" to the extent it excludes gender identity, which has a biological basis, as a component of a person's sex. Ehrensaft Decl. ¶¶ 18, 19, 21; Ehrensaft Reply Decl. ¶¶ 6, 8.

4. By way of example, each Plaintiff is addressed at the District by their preferred name and pronoun.

   RESPONSE: Objection. As a result of Defendants' discriminatory actions, some PRSD students have mocked Plaintiffs by not using their preferred names and pronouns.

5. The District has worked with its faculty members to make them aware that the Plaintiffs are to be treated in accordance with their stated gender identity.

   RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

6. In recognition of the importance of traditional senior year events and District traditions, the Plaintiffs are treated with respect to their stated gender identity.

   RESPONSE: Objection. By passing its resolution and mandating the implementation of the newly adopted discriminatory policy and practice, Defendants have not respected Plaintiffs' gender identities. Juliet Decl. ¶ 62; Elissa Decl. ¶ 40; A.S. Decl. ¶ 40.

7. Ms. Evancho was a candidate for homecoming queen during her senior year

   RESPONSE: No objection.

8. At the time of graduation, each Plaintiff will wear the color of graduation attire in accordance with their gender identity, and their preferred names will be on their diplomas.

   RESPONSE: No objection.

9. The District has made a point of working collaboratively with the Plaintiffs and their families in supporting the Plaintiffs.

   RESPONSE: Objection. As stated in the Complaint, Defendants have refused to allow Plaintiffs to use restrooms consistent with their gender identities despite repeated requests from Plaintiffs and their families.

10. Nancy Bowman ("Principal Bowman") and guidance counselors serve as points of contact for the Plaintiffs at the District to report any instances where they feel threatened, harassed or bullied.

RESPONSE: No objection.

11. In this role, Principal Bowman was made aware of only three such incidents since the approval of Resolution #2 (see below); each incident being directed to one of the Plaintiffs, Ms. Evancho, and all taking place within a few days of the approval of Resolution #2:

RESPONSE: Objection. Some of Plaintiffs have experienced additional instances of harassment in school and by other students. At least three other of these incidents have been reported to the school administration. M. Evancho Reply Decl. ¶¶ 3, 4, 5, 6.

a. On September 15, 2016, Ms. Evancho informed Principal Bowman that she was walking in a stairwell near the cafeteria when she encountered an unknown group of students who called her an inappropriate name and pretended to vomit. Directly following Ms. Evancho's report, Principal Bowman investigated this incident by taking Ms. Evancho's statement and reviewing video footage of the location where the incident occurred. Neither Principal Bowman nor Ms. Evancho were able to identify the students involved. In order to prevent another incident and ensure Ms. Evancho's safety and comfort, two or three District staff members patrol that area of the High School in the morning. The staff members continue to patrol the area on a daily basis. Additionally, either Principal

Bowman or a guidance counselor personally patrol that area of the High School as much as possible.

RESPONSE: No objection.

b. Additionally, on September 15, 2016, Ms. Evancho's sister reported an incident that had occurred between her and another student where the student vocalized a negative opinion about transgender individuals.

RESPONSE: No objection.

c. Also, on September 16, 2016, Principal Bowman became aware of an incident wherein a student shared a picture of Ms. Evancho on the social media application Snapchat. The picture contained the caption, "WTF". Building administration promptly conducted an investigation of this incident, determined that the student violated the District's Code of Conduct and disciplined the student in conformance with that disciplinary policy.

RESPONSE: No objection.

12. In the spring of 2016, A.S. reported that his art project had been vandalized. The District conducted an investigation, but was unable to determine who vandalized the project. Also, A.S.'s art project contained actual currency in the form of paper money, and it is not clear whether the act of vandalism was due to any animosity toward A.S. or was simply a petty theft.

RESPONSE: No objection.

13. The atmosphere of the District High School is a supportive environment for the Plaintiffs.

RESPONSE: Objection. As stated in their declarations, Plaintiffs feel marginalized and stigmatized as a direct result of Defendants' discriminatory actions. Juliet Decl.

¶¶ 54, 58, 62; Elissa Decl. ¶¶ 28, 37, 40; A.S. Decl. ¶¶ 35, 38, 40.

14. Plaintiffs themselves have expressed their appreciation for this supportive environment.

RESPONSE: Objection. While Plaintiffs felt mostly comfortable, safe, and accepted at Pine-Richland High School, Defendants' actions have caused Plaintiffs to feel marginalized, stigmatized, and uncomfortable. Juliet Decl. ¶¶ 34, 39, 46, 62; Elissa Decl. ¶¶ 22, 28, 40; A.S. Decl. ¶¶ 21, 40.

15. Plaintiffs' grades have not suffered, and their attendance has remained largely consistent since prior to the passage of Resolution #2.

RESPONSE: Objection. The passage of Resolution 2 has affected Plaintiffs schoolwork and their concentration in school. *See, e.g.*, Juliet Decl. ¶ 59; A.S. Decl. ¶¶ 30, 37; M. Evancho Reply Decl. ¶ 7. It has also caused some of Plaintiffs to consider whether to remain in school. Juliet Decl. ¶¶ 46, 55; M. Evancho Reply Decl. ¶ 9.

Resolution #2

16. On September 12, 2016, after much reasoned debate and discussion, and in response to requests by District parents to implement a policy, the Pine-Richland School District Board of Education ("School Board") approved Resolution #2.

RESPONSE: Objection. The debate and discussion at the School Board meetings was not reasoned or respectful of Plaintiffs' gender identity. The debate fostered misinformed, derogatory public language and attitudes toward transgender youth, which caused Plaintiffs to feel unwelcome, distressed, uncomfortable, unsafe, and depressed. Juliet Decl. ¶¶ 38, 39, 62; Elissa Decl. ¶¶ 27, 28, 40; A.S. Decl. ¶¶ 24, 40; G. Ridenour ¶ 22; M. Evancho Decl. ¶ 18.

17. Resolution #2 requires all District students to utilize sex-specific facilities that correspond to their biological sex or any unisex facilities. In addition, all students are permitted to use any of ten (10) unisex restrooms that are located throughout Pine-Richland High School.

RESPONSE: Objection as to Defendants' use of the term "biological sex." The term "biological sex" is vague and Plaintiffs object to Defendants' use of the term "biological sex" to the extent it excludes gender identity, which has a biological basis, as a component of a person's sex. Ehrensaft Decl. ¶¶ 18, 19, 21; Ehrensaft Reply Decl. ¶¶ 6, 8, 10.

18. Prior to the passage of Resolution #2, the School Board had taken no action on directing the use of the School District's restrooms inconsistent with the multi-user single-sex designation.

RESPONSE: Objection. Plaintiffs object to this proposed finding of fact based on vagueness.

19. "The elimination of biologically distinct restrooms was not a process by the Board."

RESPONSE: Objection. At no point has the existence of sex-designated facilities been disputed. Plaintiffs object to Defendants' use of the phrase "biologically distinct" as vague. Plaintiffs object to Defendants' use of the phrase "biologically distinct" to the extent it excludes gender identity, which has a biological basis, as a component of a person's sex. Ehrensaft Decl. ¶¶ 18, 19, 21; Ehrensaft Reply Decl. ¶¶ 6, 8, 10.

The District Community's Concerns of Privacy

20. On January 30, 2016, it became known to a parent of a student attending the District's

High School (the "Parent") that transgender girls, i.e. individuals with male genitalia who believe themselves to be girls, were using the girls' restroom facilities in the High School without restriction.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact. Plaintiffs object to the description of transgender girls as "individuals with male genitalia who believe themselves to be girls" as inaccurate. Gender identity is not a personal decision, preference, or belief. Transgender girls are girls. Ehrensaft Reply Decl. ¶ 7.

21. The following day, the Parent was able to confirm through his daughter that she had personally encountered transgender girls in the girls' restroom at the High School.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

22. Dr. Brian Miller, the District's Superintendent ("Dr. Miller), and Dr. Jeffrey Banyas, President of the School Board, met with the Parent to follow-up on his request for information.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

23. At the meeting, the Parent expressed his concerns with respect to his daughter's fundamental right to privacy – the shielding of her unclothed figure from the view of strangers, particularly strangers of the opposite sex – as not being respected by the current restroom situation at the High School. The Parent expressed his belief that restroom usage at the District needed to be done in a manner that protected the dignity of all District students.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact. Plaintiffs object to the extent that the alleged articulated privacy concern of the parent fails to acknowledge that every single-sex, multi-user restroom at Pine-Richland High School has individual single-user stalls with locking doors. Ex. A to Gonzalez-Pagan Reply Decl.; Ex. A to M. Evancho Reply Decl., at 1, 2. Defendants have also repeatedly made clear, all students have the option of using a convenient single-user, unisex restroom if they feel that option better suits their privacy needs than a single-sex multi-user restroom provides. Miller Decl. ¶ 8, Ex. A; Bowman Decl. ¶ 6, 7, 8, 9, 10; Pasquinelli Decl. ¶¶ 4, 5.

24. These same privacy concerns and request for the District to take action respecting the rights of all students was also expressed by a majority of residents in the District community who chose to speak on the issue during the approximately six-month process of deliberation on this issue by the School Board.

RESPONSE: Objection. Plaintiffs object to Defendants' description of what was the "majority view" expressed at school board meetings. Plaintiffs further object to the relevance of the proposed fact.

25. Due to the delay in the School Board taking action regarding the use of restrooms in protection of the privacy interests of all students, the Parent withdrew his daughter from the District, and she is now attending parochial school.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

26. Ultimately, the Parent withdrew his daughter from the District and enrolled her at parochial school to ensure that her constitutionally protected right to privacy would be

protected while she was in high school.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

The School Board's Deliberative Process

27. From the outset of its deliberative process, the School Board set forth its goals to maintain civil discourse and to encourage diverse points of view.

RESPONSE: Objection. The School Board allowed and encouraged people to make false and demeaning statements, including incorrectly stating that boys were being provided access to girls' facilities; repeatedly referring to transgender girls as boys; and comparing transgender people to a person thinking "I'm seven feet tall and this qualifies me for the basketball team" and "if I wear a sombrero and a poncho, does it make me a Mexican?" G. Ridenour Decl. ¶ 22.

28. The School Board acknowledged that the District, as well as other school districts around the country, were continuing to struggle with the issue of use of restrooms by gender identity rather than restricted to biological sex.

RESPONSE: Objection. Disputed as to Defendants' use of the term "biological sex." The term "biological sex" is vague and Plaintiffs object to Defendants' use of the term "biological sex" to the extent it excludes gender identity, which has a biological basis, as a component of a person's sex. Ehrensaft Decl. ¶¶ 18, 19, 21; Ehrensaft Reply Decl. ¶¶ 6, 8, 10.

29. The School Board further recognized that the legal environment on the issue was unsettled and offered that it now found itself at the consensus-building phase.

RESPONSE: Objection. There is no evidence that the School Board was attempting to build consensus. Defendants knew that barring Plaintiffs from the restrooms consistent with their gender identity exposed them to liability under federal law. Dkt. 23-4 at 5-10; Dkt. 23-6 at 13; Dkt. 23-22 at 2-5; Banyas Decl. ¶ 20, 22, 23.

30. In an effort to promote awareness and informed discussion, the School Board held a public Student Services Committee information session on transgender youth. (Ex. "B", PR Notice of Meeting). Physicians from Children's Hospital of Pittsburgh of UPMC were invited by the School Board to provide the public with background knowledge from medical, social and psychological perspectives.

RESPONSE: No objection.

31. Prior to the September 12, 2016 vote on Resolution #2, the School Board was informed of the stay issued by the United States Supreme Court in August 2016 in *G.G. v. Gloucester County School Board* which meant that the transgender student at that school district was required to use the restroom consistent with his biological sex during the time period taken by that Court to make a final decision.

RESPONSE: Objection. Disputed as to Defendants' use of the term "biological sex." The term "biological sex" is vague and Plaintiffs object to Defendants' use of the term "biological sex" to the extent it excludes gender identity, which has a biological basis, as a component of a person's sex. Ehrensaft Decl. ¶¶ 18, 19, 21; Ehrensaft Reply Decl. ¶¶ 6, 8, 10. Plaintiffs also object to Defendants' interpretation of the stay in *G.G.* The stay was issued to preserve the status quo in that case which is markedly different from the status quo in the case at bar.

32. Some School Board members believed that the Supreme Court's action in issuing a stay in *G.G.* mirrored the proposed effects of Resolution #2 – to issue a stay that restrooms in the School District were to be used according to biological sex.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact. Plaintiffs also object to Defendants' interpretation of the stay in *G.G.*, which was issued to preserve the status quo in that case and is markedly different from the status quo in this case. G.G.'s use of the restroom consistent with his gender identity was always contested. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715-16 (4th Cir. 2016), *cert. granted in part*, No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016). As such, G.G. was only able to use the restroom consistent with his gender identity for seven weeks only. *Id.* By contrast, Plaintiffs have used the restrooms consistent with their gender identity for years or months, prior to Resolution 2. *See, e.g.*, Juliet Decl. ¶¶ 31, 41; Elissa Decl. ¶¶ 21, 29; A.S. Decl. ¶¶ 22, 24, 28; Miller Decl. ¶ 5. Indeed, prior to Resolution 2, PRSD's years-long longstanding practice was to allow students to use the restrooms consistent with their gender identity. *See* Dkt. 23-3 at 5; Dkt. 23-23 at 2; Dkt. 23-3 at 5; Ex. A to M. Evancho Reply Decl., at 1, 2.

33. The majority of the School Board concluded that Resolution #2 represents a reasonable balance between the rights of transgender individuals and the privacy interests of students attending the Pine-Richland School District.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

The Presence of Unisex Restrooms at the District

34. Prior to March 2016, at least six (6) of the ten (10) unisex restrooms located throughout the District High School were available for use at any time by any student. The remaining unisex restrooms were reserved for District staff use only.

    RESPONSE: No objection.

35. As of March 2016, all ten (10) unisex restrooms were made available for student use throughout the District High School, and consistent signage outside each unisex restroom informed students of the restrooms unisex usage.

    RESPONSE: No objection.

36. The unisex restrooms are spread throughout the High School, and are not clustered in a single location. Most are located near the communal, sex-segregated restrooms.

    RESPONSE: No objection.

37. District students use the unisex restrooms due to their proximity to the students' scheduled classrooms on a regular basis.

    RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

38. The level of student usage of the unisex restrooms has remained constant before and after the passage of Resolution #2.

    RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

39. Based on the Plaintiffs' current class schedules, they would not have to travel any greater distance to use a unisex restroom than they would to use a communal restroom. Based

upon their class schedules, the Plaintiffs are never more than a forty-five (45) second walk to any unisex restroom.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

Federal Funding of the District

40. During the 2014 – 2015 school year, the District received approximately 1.4 million dollars in federal funding.

RESPONSE: No objection.

41. The total budget for the District was approximately $75 million.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

42. For the 2015 – 2016 school year, the District received federal funding in the amount of approximately $1 million with a total budget of approximately $76.7 million.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this proposed fact.

43. The District receives the federal funding for special education programs, Title I programs and food services. Such services are an integral part of the District's overall mission to provide the best possible education to its students.

RESPONSE: No objection.

44. The District receives the aforementioned federal funds on the condition that it complies with Title IX.

RESPONSE: No objection.

PLAINTIFFS' RESPONSES TO
DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

1. Plaintiffs have not shown a likelihood of success on the merits of their Title IX claims.

RESPONSE: Objection. For the reasons set forth in their briefs filed in support of their motion for a preliminary injunction, Plaintiffs have a strong likelihood of success on the merits of their Title IX claim.

a. The *Dear Colleague Letter on Transgender Students* ("2016 DCL") issued by the Department of Education ("DOE") in May 2016 is currently the subject of a nationwide injunction from enforcement of the DOE's interpretation of "sex" under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX") as including gender identity.

RESPONSE: Objection. The existence of an injunction issued by a single district court judge in a different circuit does not affect Plaintiffs' likelihood of success on the merits. Plaintiffs' claims are based on a reasonable interpretation of Title IX that is consistent with the position of the U.S. Department of Education ("ED"). Plaintiffs' claims are not solely based on ED's Dear Colleague Letter. Furthermore, even though the ED may be enjoined from asserting that its guidance is entitled to deference, Plaintiffs are not so enjoined.

b. The DOE's interpretation of "sex" as including gender identity is currently before the United States Supreme Court on Certiorari.

RESPONSE: Objection. It is not at all clear that the Supreme Court's ultimate decision in the *G.G.* case would resolve any of the issues in this case.

Therefore, the grant of *certioriari* does not affect Plaintiffs' likelihood of success on the merits.

c. Separation of the sexes based upon biology is expressly authorized by Title IX's implementing regulations at 34 C.F.R. §106.33 which expressly permits a recipient to "provide toilet, locker room and shower facilities on the basis of sex [as long as] such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

RESPONSE: Objection. For the reasons set forth in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Title IX's implementing regulations regarding sex-segregated facilities do not permit schools to prevent transgender students from using the restrooms consistent with their gender identity.

d. The United States District Court for the Western District of Pennsylvania has held that facts as alleged by Plaintiffs do not support a claim for a violation of Title IX because "on a plain reading of the statute, the term 'on the basis of sex' … means nothing more than male and female, under traditional binary conception of sex consistent with one's birth or biological sex."

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the majority of courts that have considered the issue have concluded that Title IX prohibits the type of discrimination at issue in this case. Therefore, the *Johnston* case is an outlier and does not affect Plaintiffs' likelihood of success on the merits.

2. Plaintiffs have not shown a likelihood of success on the merits of their Equal Protection claims.

RESPONSE: Objection. For the reasons set forth in their briefs filed in support of their motion for a preliminary injunction, Plaintiffs have a strong likelihood of success on the merits of their equal protection claim.

a. United States Supreme Court precedent and persuasive authority in this District Court support Defendants' position that physiological characteristics distinguish men and women for purposes of bodily privacy.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the majority of courts that have considered the issue have concluded that the equal protection clause prohibits the type of discrimination at issue in this case.

b. The law permits distinctions between male and females on the basis of birth sex where not based upon irrational or uncritical analysis.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the majority of courts that have considered the issue have concluded that Title IX prohibits the type of discrimination at issue in this case.

c. Failing to treat transgender females and males in the use to restrooms in the same manner as cisgender females and males is not based on an impermissible classification or stereotype.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the majority of courts that have

considered the issue have concluded that Title IX prohibits the type of discrimination at issue in this case. Accordingly, *Johnston* "is of limited persuasive value in this case." *Students v. United States Dep't of Education*, No. 16-cv-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016); *see also G.G.*, 822 F.3d at 723 n.9 ("we find the Title IX analysis in *Johnston* to be unpersuasive").

d. Separating students by sex based on biological considerations – which involves the physical differences between men and women – for restroom use does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the majority of courts that have considered the issue have concluded that the Equal Protection Clause prohibits the type of discrimination at issue in this case. *See United States v. Virginia,* 518 U.S. 515, 550 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994).

e. Resolution #2 is rationally related to the District's purpose in protecting the privacy of all its student in the use of private facilities.

RESPONSE: Objection. Defendants misstate the legal standard for the evaluation of Plaintiffs' claims. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Plaintiffs' equal protection claims must be examined under the rigorous analysis required by heightened scrutiny. Nevertheless, for the reasons stated in Plaintiffs' briefs filed in

support of their motion for a preliminary injunction, Resolution 2 is not rationally related to the protection of the any student's privacy. In addition, the proposed conclusion is contradicted by the evidence because Defendants have already admitted that the use by transgender students of restrooms consistent with their gender identity does not implicate questions of bodily privacy because all the multi-user restrooms have stalls with locking doors. *See* Ex. A to Gonzalez-Pagan Reply Decl.; Ex. A to M. Evancho Reply Decl., at 1, 2; Dkt. 23-4 at 38; *see also* Juliet Decl. ¶ 33; Elissa Decl. ¶ 21; A.S. Decl. ¶ 22.

f. The District's approval of Resolution #2 arises from a recognition of the physiological differences between males and females, not from an improper, discriminatory classification.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Defendants passed and implemented Resolution 2 with knowledge that it violated Title IX and the Equal Protection Clause because it unlawfully discriminated based on sex, sex stereotypes, and transgender status.

3. Plaintiffs have not shown that they will suffer immediate, irreparable harm.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Plaintiffs have made the requisite showing that they are suffering and will continue to suffer irreparable harm absent the enjoinment of Resolution 2 and PRSD's new policy and practice.

a. Plaintiffs fail to meet their burden because they only offer possible, speculative and remote injuries that may occur in the indefinite future.

RESPONSE: Objection. Plaintiffs "can show irreparable injury simply because both [their] Title IX claim and constitutional claim are likely to succeed on the merits." *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *19 (S.D. Ohio Sept. 26, 2016). But more importantly, Plaintiffs have provided ample evidence of how Defendants' actions have, *inter alia*, isolated them, caused them distress, anxiety, and depression, exposed them to harassment, and negatively impacted their ability to concentrate on their school work and college applications. Plaintiffs' declarations establish that they have suffered and will continue to suffer emotional distress as a result of not being allowed to use the restrooms consistent with their gender identity.

b. Plaintiffs' allegations of "significant educational, psychological and physical harms" are harms that monetary damages compensate and do not meet the requisite standard of irreparable harm. Plaintiffs have not shown injuries that cannot be compensated by monetary damages and thus fail to meet the requisite irreparable harm for injunctive relief.

RESPONSE: Objection. Plaintiffs spending their senior year trying to avoid using the restroom, living in fear of being disciplined, feeling singled out, marginalized, and stigmatized, and suffering distress and depression is not harm that can be compensated by money damages, or even an award of injunctive relief, after a trial that could take place months or years from

now. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *6 (E.D. Wis. Sept. 22, 2016).

c. Plaintiffs' alleged harm caused by their rejection of using the School District's unisex restrooms located throughout the High School is a harm caused by their refusal and rejection of a permissible alternative. An injunction will not issue "to restrain one from doing what he [or she] is not attempting and does not intend to do."

RESPONSE: Objection. These harms are not self-inflicted but rather the direct result from Defendants' actions. It is well-understood that transgender youth "experience significant psychological distress when . . . school staff repeatedly fail to acknowledge [their] gender identity." Ehrensaft Reply Decl. ¶ 19. "Because gender is a core aspect of a person's identity, transgender children who are treated in this way experience that mistreatment as a profound rejection of their core self, which has serious negative consequences for their development and their long-term health and well-being," including "low self-esteem, anxiety, depression, substance use issues, self-harming behaviors, and suicidal ideation, conditions that . . . [can] show up immediately in the face of rejecting circumstances, as when they are told that the bathroom they must use will in no way match the gender they know themselves to be." *Id.*

d. Plaintiffs' claims of being "marginalized and separated from the student body" in being forced to use the unisex restrooms are discredited by the fact that all District students are welcome to use, and do in fact use, the unisex restrooms.

RESPONSE: Objection. Plaintiffs' declarations establish that have suffered and will continue to suffer emotional distress as a result of not being allowed to use the restrooms consistent with their gender identity. In addition, Plaintiffs are the only students *forced* to use the single-stall unisex restrooms or restrooms not consistent with their gender identity.

e. There exists no "stigma" or "marginalization" associated with the use of the unisex restrooms at the District High School.

RESPONSE: Objection. Plaintiffs' declarations establish that they have suffered and will continue to suffer emotional distress as a result of not being allowed to use the restrooms consistent with their gender identity. In addition, Plaintiffs are the only students *forced* to use the single-stall unisex restrooms or restrooms not consistent with their gender identity. Plaintiffs further object because Defendants mischaracterize the cause of stigma and marginalization at Pine-Richland High School. Plaintiffs are marginalized and stigmatized by the Defendants' refusal to treat them consistent with their gender identity solely because they are transgender.

f. Plaintiffs' education is not disrupted or impeded in the use of the District's unisex restrooms. Ten unisex restrooms are readily available to all Plaintiffs and in sections of the High School that are in close proximity to where they attend classes. "Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary."

RESPONSE: Objection. Plaintiffs are the only students *forced* to use the single-stall unisex restrooms or restrooms not consistent with their gender

identity. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, it is Defendants' disparate treatment of Plaintiffs solely because of their gender identity which has caused Plaintiffs to have suffered and continue to suffer irreparable harm.

g. Plaintiffs' do not meet the threshold for presuming irreparable harm because there are no First Amendment freedoms at issue and there are not any injuries to Plaintiffs that are actually occurring.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the violation of constitutional rights and statutory civil rights, even if temporary, constitutes *per se* irreparable harm.

4. Plaintiffs have not shown that the injuries they allegedly face outweigh those which would be sustained by Defendants as a result of the injunctive relief.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the balance of the equities strongly favors Plaintiffs. Defendants have been unable to identify any harms they would suffer should the enforcement of Resolution 2 be enjoined.

a. Where a plaintiff fails, as in this instant matter, to reach their threshold showings of likelihood of success on the merits and irreparable harm, the injunction is denied and the court is not required to address the balance of harm.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Plaintiffs have demonstrated that they have a likelihood of success on the merits of their Title IX and Equal Protection claims.

b. Plaintiffs' allegations of harm do not meet the standards for injunctive relief.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Plaintiffs have suffered and continue to suffer irreparable harm as a result of Defendants' refusal to permit them to use the sex-segregated multi-user restrooms solely because they are transgender

c. The District will be harmed if the long-standing use of restrooms based upon biological sex will be overturned.

RESPONSE: Objection. Defendants have been unable to identify any harms they would suffer should the enforcement of Resolution 2 be enjoined.

d. An unnecessary tension in the High School will exist between the important interest in the protection of the bodily privacy rights of all of District students and Plaintiffs' asserted rights.

RESPONSE: Objection. Defendants have been unable to identify any harms they would suffer should the enforcement of Resolution 2 be enjoined. Any tension at PRSD and Pine-Richland High School is directly attributable to Defendants' actions and their decision to disrupt Plaintiffs' education and succumb to a few anti-transgender voices. Defendants have admitted that Plaintiffs' use of the restrooms consistent with their gender identity does not cause disruption at Pine-Richland High School. *See* Ex. A to M. Evancho Reply Decl., at 2 ("That is also true with this topic of transgender students. We have not had a substantial disruption in any sense."); Dkt. 23-23 at 2.

e. The rigorous debate would continue and distract from the educational programs until an ultimate determination on this issue is made.

RESPONSE: Objection. Defendants have been unable to identify any harms they would suffer should the enforcement of Resolution 2 be enjoined. Any debate at PRSD and Pine-Richland High School is directly attributable to Defendants' actions and their decision to disrupt Plaintiffs' education and succumb to a few anti-transgender voices.

f. Disrupting the status quo will distract from the District's primary mandate of providing the best education for its students.

RESPONSE: Objection. Plaintiffs object to Defendants use of the term status quo. The status quo is "defined as the last, peaceable, noncontested status of the parties." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). In the present case, there can be no doubt that the last, peaceable, noncontested status is PRSD's years-long longstanding inclusive practice of allowing students to use the restrooms and other sex-designated facilities consistent with their gender identity. Dkt. 23-23 at 2; Dkt. 23-3 at 5; Miller Decl. ¶ 5; Ex. A to M. Evancho Reply Decl., at 1. Defendants have also been unable to identify any harms they would suffer should the enforcement of Resolution 2 be enjoined. Any distraction from Defendants' educational mission is directly attributable to Defendants' actions and their decision to disrupt Plaintiffs' education and succumb to a few anti-transgender voices.

g. Plaintiffs are seeking a preliminary order for the District to take action that goes well beyond simply maintaining the status quo and is disfavored as granting Plaintiffs the ultimate relief they seek.

RESPONSE: Objection. Plaintiffs object to Defendants use of the term status quo. The status quo is "defined as the last, peaceable, noncontested status of the parties." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). In the present case, there can be no doubt that the last, peaceable, noncontested status is PRSD's years-long longstanding inclusive practice of allowing students to use the restrooms and other sex-designated facilities consistent with their gender identity. Dkt. 23-23 at 2; Dkt. 23-3 at 5; Miller Decl. ¶ 5; Ex. A to M. Evancho Reply Decl., at ¶ 1. Plaintiffs only seek to preserve and return to the status quo.

h. Plaintiffs' claims present questions concerning the protections offered under Title IX and Equal Protection that are not developed fully in the law, and should be developed fully at trial and not at the preliminary injunctive stage.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, the majority of courts that have considered the issue have concluded that Title IX and the Equal Protection Clause prohibit the type of discrimination at issue in this case. Plaintiffs have satisfied the elements of injunctive relief and are entitled to the requested injunction. The existence of litigation involving similar issues does not negate Plaintiff's entitlement to relief.

5. Plaintiffs have not shown that injunctive relief would not adversely affect public interests.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Plaintiffs have demonstrated that issuing the requested injunction would be in the public interest. The eradication of discrimination, protection of constitutional rights, and enforcement of civil rights laws are in the public interest. Furthermore, as a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *Am. Tel. and Tel. Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994).

a. Entering a preliminary injunction against a school district implicates the public's interests.

RESPONSE: No objection.

b. It is only when a school board has transcended the limits of its legal discretion that it is amenable to the injunctive process.

RESPONSE: Objection. By knowingly and unlawfully discriminating against Plaintiffs in violation of Title IX and equal protection clause, Defendants have transcended the limits of their legal discretion. Objection to the extent that this conclusion suggests that the issuance of an injunction here is governed by a legal standard different than that set forth in the briefs Plaintiffs filed in support of their motion for preliminary injunction. As

stated in Plaintiffs' briefs, Plaintiffs have satisfied the elements of injunctive relief and are entitled to the requested injunction.

c. Courts are restrained, when dealing with matters of school policy, by the long-established salutary rule that the courts should not function as super school boards.

RESPONSE: Objection. Schools may not set policy that is in violation of federal law. Objection to the extent that this conclusion suggests that the issuance of an injunction here is governed by a legal standard different than that set forth in the briefs Plaintiffs filed in support of their motion for preliminary injunction. As stated in Plaintiffs' briefs, Plaintiffs have satisfied the elements of injunctive relief and are entitled to the requested injunction.

d. The courts do not interfere with matters of school policy unless the action was based on a misconception of the law, ignorance through lack of inquiry, or the result of arbitrary will or caprice.

RESPONSE: Objection. Schools may not set policy that is in violation of federal law. Objection to the extent that this conclusion suggests that the issuance of an injunction here is governed by a legal standard different than that set forth in the briefs Plaintiffs filed in support of their motion for preliminary injunction. As stated in Plaintiffs' briefs, Plaintiffs have satisfied the elements of injunctive relief and are entitled to the requested injunction.

e. The District, after much reasoned debate, information gathering and discussion approved Resolution #2.

RESPONSE: Objection. The debate and discussion at the School Board meetings was not reasoned or respectful of Plaintiffs' gender identity. The debate fostered misinformed, derogatory public language and attitudes toward transgender youth, which caused Plaintiffs to feel unwelcome, distressed, uncomfortable, unsafe, and depressed. Juliet Decl. ¶¶ 38, 39, 62; Elissa Decl. ¶¶ 27, 28, 40; A.S. Decl. ¶¶ 24, 40; G. Ridenour ¶ 22; M. Evancho Decl. ¶ 18.

f. Resolution #2 requires all District students to utilize sex-specific facilities that correspond to their biological sex or any unisex facilities. In addition, all students are permitted to use any of ten (10) unisex restrooms that are located throughout the High School.

RESPONSE: Objection. Plaintiffs object to Defendants' use of the term "biological sex." The term "biological sex" is vague and Plaintiffs object to Defendants' use of the term "biological sex" to the extent it excludes gender identity, which has a biological basis, as a component of a person's sex. Ehrensaft Decl. ¶¶ 18, 19, 21; Ehrensaft Reply Decl. ¶¶ 6, 8. In addition, while all students are permitted to use the single-stall unisex restrooms, Plaintiffs are the only students *forced* to use the single-stall unisex restrooms or restrooms not consistent with their gender identity.

g. A District parent expressed his concerns with respect to his daughter's fundamental right to privacy – the shielding of her unclothed figure from the view of strangers, particularly strangers of the opposite sex – as not being respected by the current restroom situation at the High School. The parent expressed his belief

that restroom usage needed to be done in a manner that protected the dignity of all District students.

RESPONSE: Objection. Plaintiffs have insufficient information to determine the truth of this fact. Plaintiffs object to the relevance of this fact and because the proposed conclusion does not involve a question of law. Plaintiffs object to the extent that the alleged articulated privacy concern of the parent fails to acknowledge that every single-sex, multi-user restroom at Pine-Richland High School has individual single-user stalls with locking doors. Ex. A to Gonzalez-Pagan Reply Decl.; Ex. A to M. Evancho Reply Decl., at 1, 2. Defendants have also repeatedly made clear, all students have the option of using a convenient single-user, unisex restroom if they feel that option better suits their privacy needs than a single-sex multi-user restroom provides. Miller Decl. ¶ 8, Ex. A; Bowman Decl. ¶ 6, 7, 8, 9, 10.

h. These same privacy concerns were expressed by a majority of members of the District community who chose to speak on the issue during the approximately six-month process of deliberation on this issue.

RESPONSE: Objection. Plaintiffs object to Defendants' description of what was the majority view expressed at school board meetings. Plaintiffs further object to the relevance of this fact and because the proposed conclusion does not involve a question of law.

i. The public interest does not favor forcing the District to change a long-standing societal practice of single-sex designated facilities; a practice recognized as legally compliant under Title IX regulations since 1980.

RESPONSE: Objection. As stated in Plaintiffs' briefs filed in support of their motion for a preliminary injunction, Plaintiffs have demonstrated that issuing the requested injunction would be in the public interest. Plaintiffs object of the description of the "long-standing practice." In the present case, there can be no doubt that PRSD's years-long longstanding practice was to allow students to use the restrooms and other sex-designated facilities consistent with their gender identity. Dkt. 23-23 at 2; Dkt. 23-3 at 5; Miller Decl. ¶ 5; Ex. A to M. Evancho Reply Decl., at 1.

j. The District clearly has an important interest in protecting the privacy interests of all students in these intimate facilities.

RESPONSE: Objection to the extent Defendants imply that Resolution 2 protects the privacy of students.

k. Resolution #2 serves this important and legitimate interest of the District.

RESPONSE: Objection. Resolution 2 is not rationally related to the protection of students' privacy.

Dated this 21st of November, 2016.

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, I electronically filed the foregoing with the Clerk of the Court for the for the U.S. District Court for the Western District of Pennsylvania using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan