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

JULIET EVANCHO; ELISSA RIDENOUR; and A.S., a minor, by and through his parent and next friend,	:	Civil Action No. 2:16-cv-01537
	:	Judge Mark R. Hornak
Plaintiffs,	:	
vs.	:	*Electronically Filed*
PINE-RICHLAND SCHOOL DISTRICT; DR. BRIAN R. MILLER, in his official capacity as Superintendent of the Pine-Richland School District; and NANCY BOWMAN, in her official capacity as Principal of Pine-Richland High School,	:	JURY TRIAL DEMANDED
Defendants.	:	

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

Defendants Pine-Richland School District, Dr. Brian R. Miller and Nancy Bowman (collectively "Defendants"), by and through their attorneys, the law firm of Maiello, Brungo & Maiello, LLP, file this Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law Regarding Plaintiffs' Motion for Preliminary Injunction.

RESPONSE TO PLAINTIFFS' FINDINGS OF FACT

GENERAL OBJECTIONS

The majority of Plaintiffs' Proposed Findings of Fact and Conclusions of Law address the merits of Plaintiffs' claims. The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that

is less complete than in a trial on the merits. A party thus is not required to prove his or her case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390 *, 101 S. Ct. 1830, 68 L. Ed. 2d 175, 1981 U.S. LEXIS 91, 49 U.S.L.W. 4468, (U.S. 1981).

The constitutional claims in this case raise novel and difficult questions in a context not clearly developed in the law. Plaintiffs' task of presenting the kind of "clear showing" necessary to justify preliminary relief is even more difficult because they raise novel issues. See *Capital Associated Indus. v. Cooper*, 129 F. Supp. 3d 281, 288– 89 (M.D.N.C. 2015) ("Where, as in this case, 'substantial issues of constitutional dimensions' are before the court, those issues 'should be fully developed at trial in order to [e]nsure a proper and just resolution.'" (quoting *Wetzel v. Edwards*, 635 F.2d 283, 291 (4th Cir. 1980))); see also *Gantt v. Clemson Agr. Coll. of S.C.*, 208 F. Supp. 416, 418 (W.D.S.C. 1962) ("On an application for preliminary injunction, the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact."). With these legal principles in mind, Defendants will note "NOT RELEVANT AT THIS STAGE OF PROCCEEDINGS" to Plaintiffs' Proposed Findings of Fact and Conclusions of Law which address the merits of Plaintiffs' claims.

Sex, Gender Identity, and Gender Dysphoria

1. A person's sex is determined by multiple factors, including hormones, external and internal morphological features, external and internal reproductive organs, chromosomes, and gender identity. Decl. of Diane Ehrensaft, Ph.D. ("Ehrensaft Decl.") ¶¶ 18, 20. These factors may not always be in alignment. *Id.* at ¶ 18.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. See, *Special Report: Sexuality and Gender*, The New Atlantis, A Journal of Technology & Society, Paul R. McHugh, Ph.D. and Lawrence S. Mayer, Ph.D., Fall 2016, p. 901. ("Nothing in biology suggests that Plaintiffs are anything other than their birth sex. In science, an organism is male or female if it is structured to perform one of the respective roles in reproduction.")

2. Gender identity—a person's internal sense of their own gender—is the primary factor in determining a person's sex. Ehrensaft Decl. at ¶¶ 18, 19.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. This hypothesis is not supported by scientific evidence. The underlying basis of maleness and femaleness is the distinction between the reproductive roles of the sexes. In biology, an organism is male or female if it is structured to perform one of the respective roles in reproduction. *Special Report: Sexuality and Gender*, The New Atlantis, A Journal of Technology & Society, Paul R. McHugh, Ph.D. and Lawrence S. Mayer, Ph.D., Fall 2016, p.90

3. Gender identity is a deeply felt and core component of human identity. Ehrensaft Decl. at ¶ 19. Every person has a gender identity. *Id.* at ¶ 20.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. Gender identity is a social and psychological concept that it not

well defined, and there is little scientific evidence that it is an innate, fixed biological property. The New Atlantis, Journal of Technology & Society, *Special Report: Sexuality and Gender*, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 11. Gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. Id. at 87.

4. Children become aware of their gender identity between the ages of two and four. Ehrensaft Decl. ¶ 23. Gender identity is innate and efforts to change a person's gender identity are unethical and harmful to a person's health and well-being. *Id.* at ¶¶ 21-22, 31.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. The available evidence from brain imaging and genetics does not demonstrate that the development of gender identity, as different from biological sex, is innate. Defendants do not contest that efforts to force a change of a person's expressed gender identity may be harmful. The New Atlantis, Journal of Technology & Society, *Special Report: Sexuality and Gender*, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 105.

5. The phrase "sex assigned at birth" refers to the sex recorded on a person's birth certificate at the time of birth. Ehrensaft Decl. at ¶¶ 17, 37. Typically, individuals are assigned a sex on their birth certificate solely on the basis of the appearance of external genitalia at the time of birth. ¶ 17.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. Biological sex is not a concept that can be reduced to, or artificially assigned on the basis of, the type of external genitalia alone. Artificial constructs do

not change the biological sex of the recipients of sex re-assignment surgery. Sex for almost all human beings is clear, binary and stable, reflecting an underlying biological reality that is not contradicted by exceptions to sex-typical behavior and cannot be altered by surgery or social conditioning. The New Atlantis, Journal of Technology & Society, *Sexuality and Gender*, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 93. At time of birth, sex is determined based on biological characteristics, such as internal and external genitalia. (Pagan Decl. Ex. G. p. 7).

6. A transgender person is someone whose gender identity diverges from the person's sex assigned at birth. Ehrensaft Decl. at ¶¶ 17, 20. A cisgender person is someone whose gender identity aligns with the sex they were assigned at birth. *Id.* at ¶ 20.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. Defendants accept the definitions are accurate as stated. The available evidence from brain imaging and genetics does not demonstrate that the development of gender identity as different from biological sex is innate. The New Atlantis, Journal of Technology & Society, *Special Report: Sexuality and Gender*, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 105.

7. Gender dysphoria is a serious medical condition that refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth. Ehrensaft Decl. at ¶ 24.

OBJECTION: The Diagnostic and Statistical Manual of Mental Disorders (DSM-5), provides that gender dysphoria is marked by "incongruence between one's experienced/expressed gender and assigned gender," as well as "clinically significant distress or impairment in social, occupational,

or other important areas of functioning." It is the nature of the struggle that defines the disorder not the fact that the expressed gender differs from the biological sex. Gender nonconformity refers to the extent to which a person's gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex (Institute of Medicine, 2011). Gender dysphoria refers to discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics) (Fisk, 1974; Knudson, De Cuypere, & Bockting, 2010b). Only some gender nonconforming people experience gender dysphoria at some point in their lives. World Professional Association for Transgender Health (WPATH) The Standards of Care, Version 7, p.5[1].

8. Treatment for gender dysphoria typically includes a "social transition" during which transgender individuals live in accordance with their gender identity in all aspects of life, including the use of sex-designated facilities that correspond to that gender. Ehrensaft Decl. ¶ 27.

OBJECTION: The treatment for gender dysphoria involves some combination of "triadic therapy": hormone therapy, gender-affirming surgery and/or Real Life Experience (living for a period of time in accordance with your gender identity). Each patient must be evaluated on a case-by-case basis, with expert medical judgment required for both reaching a diagnosis and determining treatment. There is no set formula for gender transition. These treatment protocols are outlined in the Standards of Care published by the World Professional Association for Transgender Health (WPATH), which keeps the public up to date on the "professional consensus

1 The World Professional Association for Transgender Health (WPATH) is an international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health.

about the psychiatric, psychological, medical, and surgical management of gender dysphoria." http://www.lambdalegal.org/know-your-rights/article/trans-related-care-faq.

Treatment is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications. Medical treatment options include, for example, feminization or masculinization of the body through hormone therapy and/or surgery, which are effective in alleviating gender dysphoria and are medically necessary for many people. WPATH Standards of Care, 7th Version, p.5.

9. Social transition can often be the most important and only aspect of transition for a transgender person. Ehrensaft Decl. at ¶ 30.

OBJECTION: In this instant matter, the most important aspect of transition needs as alleged by Plaintiffs is being able to use the restroom of their choice. According to the WPATH Standards of Care 7th Version (p. 9 – 10), treatment options include the following:

- Changes in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity);
- Hormone therapy to feminize or masculinize the body;
- Surgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring); and
- Psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience.

10. Social transitioning requires that a transgender girl be recognized as a girl and treated the same as all other girls by parents, teachers, classmates and others in the community. Ehrensaft Decl. at ¶¶ 27, 32. Social transitioning also requires that a transgender boy be recognized as a boy and treated the same as all other boys by parents, teachers, classmates and others in the community.

OBJECTION: For individuals seeking care for gender dysphoria, a variety of therapeutic options can be considered. The number and type of interventions applied and the order in which these take place may differ from person to person (e.g., Bockting, Knudson, & Goldberg, 2006; Bolin, 1994; Rachlin, 1999; Rachlin, Green, & Lombardi, 2008; Rachlin, Hansbury, & Pardo, 2010). Treatments options include the following: Changes in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity). WPATH Standards of Care 7th Version, p. 9. To the extent that the Court finds this to be true, the evidence clearly establishes that the District does recognize transgender girls as girls, and transgender boys as boys, in all aspects of school life except as related to the biological process of urinating and defecating.

11. To be effective, social transitioning must include being permitted to use restrooms and other sex-designated facilities on the same footing as other students of the same gender. Ehrensaft Decl. at ¶¶ 32, 33, 38.

OBJECTION: In this instant matter, the most important aspect of transition needs as alleged by Plaintiffs is being able to use the restroom of their choice. WPATH and the Standards of Care 7th Version are silent on the use of restroom and other sex-specific facilities. "All gender facilities is the preferred option as it lessens the stress of gender policing by peers and teachers." Pagan Decl.

Ex. J, Human Rights Watch, Shut Out-Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools, September 2016, p. 27.

Plaintiffs

12. Plaintiffs Juliet Evancho, Elissa Ridenour, and A.S. are senior students at Pine-Richland High School in Gibsonia, Pennsylvania. Decl. of Juliet Evancho ¶ 4 ("Juliet Decl."); Decl. of Elissa Ridenour ¶ 5 ("Elissa Decl."); Decl. of A.S. ¶¶ 4, 9 ("A.S. Decl."); Decl. of Glenn Ridenour ¶¶ 3, 11 ("G. Ridenour Decl."); Decl. of Michael J. Evancho ¶¶ 7, 10 ("M. Evancho Decl.").

NO OBJECTION

13. Plaintiffs Juliet Evancho and Elissa Ridenour are girls. Like cisgender girls at Pine-Richland High School, Juliet and Elissa have a female gender identity. Juliet Decl. ¶ 2; Elissa Decl. ¶ 2. They are widely known and accepted as girls by the Pine-Richland school community. Juliet Decl. ¶¶ 33, 56; Elissa Decl. ¶¶ 20, 39.

OBJECTION IN PART: Although the District recognizes that Plaintiffs Juliet Evancho and Elissa Ridenour identify as girls, said Plaintiffs are not "girls" biologically. Sex for almost all human beings is clear, binary and stable, reflecting an underlying biological reality that is not contradicted by exceptions to sex-typical behavior and cannot be altered by surgery or social conditioning. The New Atlantis, Journal of Technology & Society, *Special Report: Sexuality and Gender*, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 93.

14. Plaintiff A.S. is a boy. A.S., like cisgender boys at Pine-Richland High School, has a male gender identity. A.S. Decl. ¶ 2. He is widely known and accepted as a boy by the Pine-Richland school community. A.S. Decl. ¶ 25.

OBJECTION IN PART: Although the District recognizes that Plaintiff A.S. identifies as a boy, said Plaintiff is not a "boy" biologically. Sex for almost all human beings is clear, binary and stable, reflecting an underlying biological reality that is not contradicted by exceptions to sex-typical behavior and cannot be altered by surgery or social conditioning. The New Atlantis, Journal of Technology & Society, *Special Report: Sexuality and Gender*, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 93.

15. Plaintiffs Juliet Evancho, Elissa Ridenour, and A.S. are transgender. Juliet Decl. ¶ 8; Elissa Decl. ¶ 9; A.S. Decl. ¶ 9; G. Ridenour Decl. ¶ 3; M. Evancho Decl. ¶ 7. Plaintiff Juliet Evancho has also been diagnosed with gender dysphoria. Juliet Decl. ¶ 27; M. Evancho Decl. ¶ 8.

NO OBJECTION

16. Plaintiffs socially transitioned at school at different points in their lives. Juliet Decl. ¶¶ 29-31; Elissa Decl. ¶ 18; A.S. Decl. ¶¶ 9-10, 15; G. Ridenour's Decl. ¶¶ 12-13; M. Evancho's Decl. ¶¶ 11-12.

NO OBJECTION

17. Plaintiff Elissa Ridenour has been widely known and accepted as a girl by the Pine-Richland School District ("PRSD") community since eighth grade. Elissa Decl. ¶¶ 18, 20, 23, 39; G. Ridenour Decl. ¶ 12. She has been referred to by her female pronouns and, until Defendants' adoption and implementation of Resolution 2 and PRSD's new policy and practice, used the girls' restroom her entire tenure at Pine-Richland High School. Elissa Decl. ¶¶ 21, 23, 39.

OBJECTION IN PART: Plaintiff Elissa Ridenour used the girls' restroom at the Pine-Richland High School on the basis of her own initiative. Prior to the approval of Resolution #2, the School Board had taken no action on directing students' use of the District's restrooms inconsistent with the students' biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of

biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

18. Plaintiff Juliet Evancho socially transitioned during the summer before her junior year. Juliet's Decl. ¶¶ 30-31; M. Evancho Decl. ¶¶ 11-12. Since the beginning of her junior year, Juliet has been widely known and accepted as a girl by the Pine-Richland school community. Juliet Decl. ¶ 33; M. Evancho Decl. ¶ 12. Until Defendants' adoption and implementation of Resolution 2 and PRSD's new policy and practice, Juliet used the girls' restrooms. Juliet's Decl. ¶ 33.

OBJECTION IN PART: Plaintiff Juliet Evancho used the girls' restroom at the Pine-Richland High School on the basis of her own initiative. Prior to the approval of Resolution #2, the School Board had taken no action on directing students' use of the District's restrooms inconsistent with the students' biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

19. Plaintiff A.S. began to socially transition at school during his sophomore year. A.S. Decl. ¶¶ 9-10. Since his junior year, A.S. has been widely known and accepted as a boy by the Pine-Richland school community. *Id.* at ¶ 25. Until Defendants' adoption and implementation of Resolution 2 and PRSD's new policy and practice, A.S. used the boys' restrooms. *Id.* at ¶ 22.

OBJECTION IN PART: Plaintiff A.S. used the boys' restroom at the Pine-Richland High School on the basis of his own initiative. Prior to the approval of Resolution #2, the School Board had taken no action on directing students' use of the District's restrooms inconsistent with the students' biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

Defendants

20. Defendant PRSD is a public school district serving over 4,600 students in kindergarten through 12th grade who reside in the Pine and Richland townships of Pennsylvania. It is organized under the laws and constitution of the Commonwealth of Pennsylvania. PRSD operates four elementary schools, Pine-Richland Middle School, and Pine-Richland High School.

NO OBJECTION

21. PRSD is governed by the Board of School Directors of Pine-Richland School District (the "School Board"), a nine-member elected body that sets policy for PRSD and delegates responsibility for the administration of PRSD to its Superintendent of Schools, who oversees a number of district-level administrators.

NO OBJECTION

22. PRSD is a recipient of federal financial assistance. DE 23-3 at 5; DE 23-4 at 3, 5.[2]

NO OBJECTION

23. Defendant Superintendent Brian R. Miller is the current Superintendent of PRSD. At all times relevant to the events at issue in the case at bar, Superintendent Miller acted within the scope of his employment as an employee, agent, and representative of the School Board. In such capacity, he implemented Resolution 2 and PRSD's new policy and practice described herein at the direction of, and with the consent, encouragement, knowledge, and ratification of the School Board; under the School Board's authority, control, and supervision; and with the actual or apparent authority of the School Board.

[2] Except where otherwise specified, "DE 23-__" refers to the docket entry number for an exhibit to the Declaration of Omar Gonzalez-Pagan in Support of Plaintiffs' Motion for Preliminary Injunction (Docket No. 23).

OBJECTION IN PART: Resolution #2 is not a formal adopted policy of the Pine-Richland Board of School Directors. Furthermore, prior to the approval of Resolution #2, the School Board had taken no action on directing students' use of the District's restrooms inconsistent with the students' biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

24. Superintendent Miller has final policymaking authority for PRSD in circumstances not otherwise provided for in the School District Bylaws and Policies.

OBJECTION: To have policymaking authority, an official must have final, unreviewable discretion to make a decision or take action. Pennsylvania law is clear in determining the policymakers for a School District. Sections 21-2103, 24 P.S. § 21-2103 (2005), and, 24 P.S. § 5-511 (2005), of the Public School Code establish that the policymaker of a School District is the Board of School Directors. *Cooper v. Sch. Dist*., 2006 Phila. Ct. Com. Pl. LEXIS 347 * (Pa. C.P. 2006).

25. Defendant Principal Nancy Bowman is the current Principal of Pine-Richland High School. At all relevant times relevant to the events at issue in the case at bar, Principal Bowman acted within the scope of her employment as an employee, agent, and representative of the School Board. In such capacity, she implemented at Pine-Richland High School Resolution 2 and PRSD's new policy and practice described at the direction of, and with the consent, encouragement, knowledge, and ratification of the School Board; under the School Board's authority, control, and supervision; and with the actual or apparent authority of the School Board.

OBJECTION IN PART: Resolution #2 not a formal adopted policy of the Pine-Richland Board of School Directors. Furthermore, prior to the approval of Resolution #2, the School Board had taken no action on directing students' use of the District's restrooms inconsistent with the students'

biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

26. Principal Bowman has final policymaking authority for Pine-Richland High School with respect to the day-to-day enforcement of PRSD's policies, including disciplinary policies and the newly adopted discriminatory policy and practice described herein at Pine-Richland High School.

OBJECTION: To have policymaking authority, an official must have final, unreviewable discretion to make a decision or take action. Pennsylvania law is clear in determining the policymakers for a School District. Sections 21-2103, 24 P.S. § 21-2103 (2005), and, 24 P.S. § 5-511 (2005), of the Public School Code establish that the policymaker of a School District is the Board of School Directors. *Cooper v. Sch. Dist*., 2006 Phila. Ct. Com. Pl. LEXIS 347 * (Pa. C.P. 2006).

PRSD's Policies and Practices Pertaining to the Use of Restrooms and Other Sex-Designated Facilities.

27. For several years, PRSD's longstanding practice was to provide transgender students access to the restrooms consistent with their gender identity. Juliet Decl. ¶¶ 31, 41; Elissa Decl. ¶¶ 21, 29; A.S. Decl. ¶¶ 22, 24, 28; M. Evancho Decl. ¶¶ 16, 19; G. Ridenour Decl. ¶¶ 15, 17-20, 34; DE 23-23 at 2; DE 23-3 at 5; DE 23-5 at 35 ("The factual status quo here is that you've had at least two transgender female [students] . . . using girls' restrooms. That is the factual status quo.") (School Solicitor Patrick Clair, at August 8, 2016 Pine-Richland School Board meeting).

OBJECTION: The characterization of "longstanding" is misleading. The longstanding practice in Pennsylvania school districts is the use of restrooms consistent with biological sex. See, 24 P.S.

7-740. The individual Plaintiffs, on their own initiative, separately and at different points in time, began using the multi-user sex-designated restrooms consistent with their gender identity without any express approval or authority of the Defendants. 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 student's biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

28. On March 11, 2016, Superintendent Miller emailed parents and guardians of PRSD students noting that there were transgender students at Pine-Richland and that PRSD had not previously communicated about the topic based on the strong desire to maintain the confidentiality of individual students and that the U.S. Department of Education ("ED") Office of Civil Rights had "taken a consistent stance that gender identity and expression are included in the terms [sex or gender] under Title IX that prohibits sex discrimination in schools." DE 23-23 at 1.

NO OBJECTION

29. In his email, Superintendent Miller described PRSD's longstanding inclusive practice with respect to restrooms as follows:

> In our high school, transgender students have been able to use a private bathroom, such as the nurse's office, a single room unisex bathroom, or the bathroom of their gender identity. This has occurred for several years. To date, we are not aware of any inappropriate actions on the part of any student. The option also exists for any student to use a single stall bathroom.

DE 23-23 at 2; *see also* DE 23-3 at 3.

OBJECTION: The characterization of "longstanding" is misleading. The longstanding practice in Pennsylvania school districts is the use of restrooms consistent with biological sex. See, 24 P.S. 7-740. The individual Plaintiffs, on their own initiative, separately and at different points in time,

began using the multi-user sex-designated restrooms consistent with their gender identity without any express approval or authority of the Defendants. Prior to the approval of Resolution #2, the School Board had taken no action on directing students' use of the District's restrooms inconsistent with the students' biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

30. On September 12, 2016, following months of debate regarding the use of restrooms by transgender students, the School Board adopted Resolution 2, which reversed PRSD's longstanding inclusive practice. DE 23-6 at 41.

OBJECTION: The characterization of "longstanding" practice is misleading. The longstanding practice in Pennsylvania school districts is the use of restrooms consistent with biological sex. See, 24 P.S. 7-740. Resolution #2 was issued to provide clear direction of the District's longstanding practice and culturally accepted designation of sex-specific restrooms based upon biology. Such designation is required by the Pennsylvania School Code 24 P.S. §7-740. Prior to the approval of Resolution #2, the School Board had taken no action on directing students' use of the District's restrooms inconsistent with the students' biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

31. Resolution 2 read, in whole:

> This resolution agreed to by a majority of the Board of Directors of the Pine-Richland School District indicates our support to return to the long-standing practice of providing sex specific facility usage. All students will have the choice of using either the facilities that correspond to their biological sex or unisex facilities. This practice will remain in place until such time that a policy may be developed and approved.

DE 23-1.

NO OBJECTION

32. By using the term "biological sex"—which by Defendants' definition is meant to refer to the sex assigned to an individual at birth or "anatomical sex"—Resolution 2 excludes transgender individuals like Plaintiffs from multi-user restrooms and other facilities consistent with their gender identity because their birth-assigned sex does not match their gender identity. DE 23-4 at 4 ("[M]y intent of this resolution is that biological, anatomical sex is what this stands for. Essentially for lack of a better term, your sex assigned at birth is what I'm referring to in this resolution.") (Greg DiTullio, at July 11, 2016 Pine-Richland School Board meeting).

NO OBJECTION

33. On September 13, 2016, Defendants implemented Resolution 2 by barring transgender students from using the restrooms and other sex-designated spaces consistent with their gender identity and by mandating that transgender students utilize the restrooms that are not consistent with their gender identity or use single-stall unisex restrooms ("PRSD's new policy and practice"). Juliet Decl. ¶¶ 44-45; Elissa Decl. ¶¶ 32-33; A.S. Decl. ¶¶ 29-32; M. Evancho Decl. ¶¶ 20-21, 23; Ex. 1 to M. Evancho Decl. ¶ 27; G. Ridenour Decl. ¶¶ 35, 37.

OBJECTION: Resolution #2 was communicated to each of the individual Plaintiffs by School District administrators. Plaintiffs were offered educational alternatives to their scheduling to ensure there would be no disruption to their educational program. Plaintiffs, as well as the entire student body, have access to ten (10) unisex restrooms located throughout the High School. The only change made was that Plaintiffs could not maintain their self-initiated agenda in seeking to use the multi-user sex-specific restrooms in direct contradiction to their biological sex. See, Decl. Pasquinelli, ¶¶ 15 – 16. (The day following the passage of Resolution Number 2, I met with Ms.

Evancho and her family, as well as Ms. Ridenour and her family to discuss the effect that Resolution Number 2 would have on each Plaintiff. On September 19, 2016, I met with A.S. and his family to discuss the effect that Resolution Number 2 would have on him. Additionally, the Evancho family initiated a discussion of the availability of alternative instructional opportunities by the District following the passage of Resolution Number 2. The District provided options included a program wherein Ms. Evancho would spend part of the day at school and complete the balance of her work as part of an online curriculum. This discussion was due to Ms. Evancho's sporadic attendance and the District's commitment to determine alternative options to continue her educational program. Ms. Evancho ceased exploring this option when she was informed that she was nominated for homecoming court.")

34. On September 14, 2016, Defendants informed Plaintiffs that they would not delay implementation of Resolution 2 through PRSD's new policy and practice, and that Plaintiffs would be disciplined should they use the restrooms that are consistent with their gender identity. DE 23-16; *see also* M. Evancho Decl. ¶ 30.

OBJECTION: Resolution #2 not a formal adopted policy of the Pine-Richland Board of School Directors. Additionally, the Plaintiffs were not threatened with discipline by District Administration. The reference herein is to communication between the School District's Solicitor, Patrick Clair Esq. and Plaintiffs' counsel. Complaint, ¶ 148.

35. As a result of Defendants' implementation of Resolution 2 through PRSD's new policy and practice, Plaintiffs, unlike cisgender students, are not permitted to use restrooms consistent with their gender identity. Juliet Decl. ¶¶ 44-45; Elissa Decl. ¶¶ 32-33; A.S. Decl. ¶ 32; M. Evancho Decl. ¶ 23; G. Ridenour Decl. ¶¶ 34-35, 37; DE 23-16.

OBJECTION: Plaintiffs, who identify as girls and boys but are not biologically girls and boys, are not alike in all respects to their chosen comparators and are not permitted to use sex-specific multi-user restrooms in contravention of their biological sex. However, there are ten unisex restrooms available for all students use throughout the High School. Also, in all other respects, Plaintiffs have been and continue to be treated in accordance with their gender identity by the District. (Banyas Decl. ¶ 19; Goebel Decl. ¶ 16; Miller Decl. ¶ 4; Bowman Decl. ¶ 4).

The Effects of Resolution 2 and PRSD's New Policy and Practice on Plaintiffs.

36. By adopting Resolution 2, enforced through PRSD's new policy and practice, Defendants have caused and continue to cause irreparable harm to Plaintiffs.

OBJECTION: There is no evidentiary basis for this proposed finding of fact. Plaintiffs, in a conclusory and generalized manner, offer that they are suffering from "significant educational, psychological, and physical harms" and that they will suffer and continue to suffer if Resolution #2 is not enjoined. (Plaintiffs' Motion, ¶¶ 3, 7). This claim is conclusory and directly contradicted by the actions of Plaintiffs such as their recent press conferences and the showcasing of their advocacy efforts on behalf of Lambda Legal in a video montage (The video is available at http://www.lambdalegal.org.) With the exception of the use of restrooms consistent with their expressed gender identity, each Plaintiff is supported by the District (as well as their family and peers) based on their expressed gender identity. (Miller Decl. ¶ 25). By way of example, each Plaintiff is addressed at the District by their preferred name and pronoun. (Miller Decl. ¶ 26). 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. *Id.* In recognition of the importance of traditional senior year events and District traditions, the Plaintiffs are treated with respect to their

stated gender identity. *Id.* Ms. Evancho was a candidate for homecoming queen during her senior year. *Id.* (See also Bowman Decl. ¶ 23). 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. (Miller Decl. ¶¶ 24, 25).

37. Defendants' actions have caused and continue to cause Plaintiffs to suffer from distress, anxiety, discomfort, depression, and humiliation. Juliet's Decl. ¶¶ 46-52, 55, 62; Elissa Decl. ¶¶ 28, 31, 34, 40; A.S. Decl. ¶¶ 24, 33-35, 40; G. Ridenour Decl. ¶¶ 39, 44; M. Evancho Decl. ¶¶ 18, 32, 35; *see also* Ehrensaft Decl. ¶¶ 32-35, 37, 38; DE 23-10 at 10-12.

OBJECTION: Plaintiffs offer conclusory and generalized statements of harm without any evidentiary support.[3] Plaintiffs have also alleged psychological harm as a result of their feelings of discomfort and isolation in being barred from utilizing restrooms congruent with their gender identity. Any harm that Plaintiffs allege due to their alleged inability to use the District's restrooms is self-inflicted as the District has provided ten (10) unisex restrooms throughout the High School for all students to use. (See Miller Decl. ¶ 4; Bowman Decl. ¶¶ 4 – 6; Pasquinelli Decl. ¶¶ 3 – 5). Injunctions will not be issued merely to allay the fears and apprehensions, or to soothe the anxieties, of the parties. Nor will an injunction be issued "to restrain one from doing what he [or she] is not attempting and does not intend to do." *Continental Group, Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) (citation omitted). The District has made a good-faith effort to accommodate Plaintiffs and assist them in their transition, balancing its concern for their well-

[3] Defendants also generally object to the declarations made by Dr. Ehrensaft (Doc. 22-5) in that they are not specific to the instant matter. That is to say that the declarations made by Dr. Ehrensaft concerning the Plaintiffs' alleged irreparable harm in this matter are the same exact declarations as those made by Dr. Ehrensaft in other matters involving transgender students. See, Declaration of Diane Ehrensaft, Ph.D (Doc. 35-4) in *Board of Educ. v. U.S. Dep't of Educ.*, No. 2:16-cv-524, 2016 U.S. Dist. LEXIS 131474 (S.D. Ohio, Sept. 26, 2016). In fact, Dr. Ehrensaft herself admits that she has never met or spoke to Plaintiffs or their parents or guardians for the purposes of her declaration. Ehrensaft Decl, at ¶ 16.

being with its responsibilities to all students. (Complaint, ¶¶ 38, 42, 53, 54, 56, 64, 65, 68 – 71, 73, see also Pasquinelli Decl. ¶¶ 12 – 16; Bowman Decl. ¶¶ 21 – 23, 25 – 26).

38. The emotional distress and symptoms of gender dysphoria, including depression, anxiety, and suicidal ideation, surge significantly in transgender students when they are instructed not to use the restrooms consistent with their gender identity and after each instance in which school personnel fail to respect their gender identity. Ehrensaft Decl. ¶¶ 33-36; *see also* DE 23-10 at 10-12.

OBJECTION: Dr. Ehrensaft proffers a conclusion without any proof of causation. Additionally, this generalized statement is in conflict with WPATH's Standards of Care, Version 7, which direct that treatment is individualized and cannot be generalized into a global argument of restroom usage. What helps one person alleviate gender dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications. Medical treatment options include, for example, feminization or masculinization of the body through hormone therapy and/or surgery, which are effective in alleviating gender dysphoria and are medically necessary for many people. WPATH Standards of Care, Version 7, p.5. Moreover, only one of the Plaintiffs, Juliet Evancho, has actually been diagnosed with gender dysphoria.

39. As a result of Defendants' adoption of Resolution 2, enforced through PRSD's new policy and practice, Plaintiffs feel increasingly isolated, marginalized, and stigmatized. Juliet Decl. ¶¶ 46, 49, 62; Elissa Decl. ¶¶ 36-37, 40; A.S. Decl. ¶ 35.

OBJECTION: The District has made a good-faith effort to accommodate Plaintiffs and assist them in their transition, balancing its concern for their well-being with its responsibilities to all students. (Complaint, ¶¶ 38, 42, 53, 54, 56, 64, 65, 68 – 71, 73, see also Pasquinelli Decl. ¶¶ 12 – 16;

Bowman Decl. ¶¶ 21 – 23, 25 – 26). The Plaintiffs are not marginalized or stigmatized as the School District has ten (10) unisex restrooms throughout the High School which are available for Plaintiffs' use and the use of any student. Many District students have used and continue to use the District's multiple unisex restrooms prior to and following the approval of Resolution #2. (See Bowman Decl. ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8). Thus, there is no "stigma" or "marginalization" associated with the use of the unisex restrooms at the High School. (See Bowman Decl. ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8).

40. Plaintiffs live in constant fear of being stigmatized for using a restroom that is not consistent with their gender identity and being referred to by their birth names and pronouns—which could lead to involuntary and consistent disclosure of their transgender status to others, harassment, or even violence. Juliet Decl. ¶ 58; Elissa Decl. ¶ 35; A.S. Decl. ¶ 35.

OBJECTION: This statement is in direct conflict with the Defendants actions in ensuring that in all other respects the Plaintiffs are treated consistent with their gender identity. The District has made a good-faith effort to accommodate Plaintiffs and assist them in their transition, balancing its concern for their well-being with its responsibilities to all students. (Complaint, ¶¶ 38, 42, 53, 54, 56, 64, 65, 68 – 71, 73, see also Pasquinelli Decl. ¶¶ 12 – 16; Bowman Decl. ¶¶ 21 – 23, 25 – 26). With the exception of the use of restrooms consistent with their expressed gender identity, each Plaintiff is supported by the District (as well as their family and peers) based on their expressed gender identity. (Miller Decl. ¶ 25). By way of example, each Plaintiff is addressed at the District by their preferred name and pronoun. (Miller Decl. ¶ 26). 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. *Id.* In recognition of the importance of traditional senior year events and District traditions, the Plaintiffs are treated with respect to their stated gender identity.

Id. Ms. Evancho was a candidate for homecoming queen during her senior year. *Id.* (See also Bowman Decl. ¶ 23). 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. (Miller Decl. ¶¶ 24, 25). Additionally, this conclusory statement is contradicted by Plaintiffs' own self-declaration of their status in press conferences, advocacy efforts and press releases with pictures. Significantly, Plaintiffs have not sough anonymity. See Plaintiffs' video available at http://www.lambdalegal.org.

41. PRSD's requirement that Plaintiffs use sex-designated restrooms that are not consistent with their gender identity causes them discomfort, anxiety, and distress. Juliet Decl. ¶¶ 46-48; Elissa Decl. ¶ 35; A.S. Decl. ¶ 34; *see also* Ehrensaft Decl. ¶¶ 33, 37, 38. It also exposes them to actual and/or future violence and harassment. Juliet Decl. ¶¶ 48, 51-52, 58; Elissa Decl. ¶ 35; A.S. Decl. ¶ 34, 38-39.

OBJECTION: Plaintiffs are not required by the District to use sex-specific restrooms in accord with their biological sex. To the contrary, the Pine-Richland High School has provided the use of ten (10) unisex restrooms. These restrooms are not designated for transgender use only but in fact are used by the entire student body. Prior to March 2016, at least six (6) of the ten (10) unisex restrooms located throughout the High School were available for use at any time by any student. The remaining unisex restrooms were reserved for staff use only. (Bowman Decl. ¶ 5). As of March 2016, all ten (10) unisex restrooms were made available for student use throughout the High School, and consistent signage outside each unisex restroom informs students of the restrooms' unisex usage. (Miller Decl. ¶ 8, Ex. A; Bowman Decl.¶ 6). 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. (Bowman Decl. ¶ 7). District students use the unisex

restrooms due to their proximity to the students' scheduled classrooms on a regular basis. (Bowman Decl. ¶ 10). The level of student usage of the unisex restrooms has remained constant before and after the passage of Resolution #2. (Bowman Decl. ¶12). The educational environment is not impacted by students' use of the unisex restrooms. (Bowman Decl. ¶¶ 10 – 12). "Transgender people should not be singled out as the only people using any particular restroom. But providing individual and/or unisex restrooms is not a bad idea, because they do provide more options for TGNC people, as well as for people with young children and people with disabilities who need help from someone of a different gender." http://www.lambdalegal.org/know-your-rights/article/trans-restroom-faq

42. By compelling Plaintiffs to use single-stall unisex restrooms while not requiring it of cisgender students, PRSD marginalizes Plaintiffs and stigmatizes Plaintiffs. Juliet Decl. ¶ 49; Elissa Decl. ¶¶ 36-37; A.S. Decl. ¶ 35; M. Evancho Decl. ¶ 25; G. Ridenour Decl. ¶ 44. PRSD's actions not only cause Plaintiffs to feel isolated, but also continuously threaten to disclose their gender identity and out them as transgender. Juliet Decl. ¶ 49; Elissa Decl. ¶¶ 36-37; A.S. Decl. ¶ 35; M. Evancho Decl. ¶ 25; G. Ridenour Decl.¶¶ 40, 42.

OBJECTION: 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 restroom were reserved for staff use only. (Bowman Decl. ¶ 5). As of March 2016, all ten (10) unisex restrooms were made available for student use throughout the High School and consistent signage outside each unisex restroom informed students of the restrooms unisex usage. (Miller Decl. ¶ 8, Ex. A; Bowman Decl.¶ 6). District students, including cisgender students, use the unisex restrooms due to their proximity to the students' scheduled classrooms on a regular basis. (Bowman Decl. ¶ 10). The level of student usage of the unisex restrooms has

remained constant before and after the passage of Resolution #2. (Bowman Decl. ¶12). Disclosure of what is already revealed (i.e. that Plaintiffs are transgender) cannot establish immediate irreparable harm. Each Plaintiff has "outed" or disclosed their gender identity in their advocacy efforts, press conferences and actions taken in the School District. A.S. declared himself and his advocacy on behalf of transgender students in his artwork. Complaint, ¶178; (Miller Decl. ¶ 27d). Plaintiffs' repetitive, conclusory and generalized statements of "marginalization" and "stigmatization" have also been answered in above in response to Paragraphs 37, 39, 40 and 41.

43. Because of the anxiety and distress caused by Resolution 2 and PRSD's new policy and practice, Plaintiffs avoid using the restroom at all while at school except when absolutely necessary. This causes them great physical discomfort. Juliet Decl. ¶ 50; Elissa Decl. ¶ 38; A.S. Decl. ¶ 36.

OBJECTION: 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 restroom were reserved for staff use only. (Bowman Decl. ¶ 5). As of March 2016, all ten (10) unisex restrooms were made available for student use throughout the High School and consistent signage outside each unisex restroom informed students of the restrooms unisex usage. (Miller Decl. ¶ 8, Ex. A; Bowman Decl.¶ 6). 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. (Bowman Decl. ¶ 7). District students, including cisgender students, use the unisex restrooms due to their proximity to the students' scheduled classrooms on a regular basis. (Bowman Decl. ¶ 10). Thus, if Plaintiffs are in fact avoiding the use of restrooms which causes them to experience physical comfort, it is a self-inflicted harm. "Irreparable harm will not

be found where alternatives already available to the plaintiff make an injunction unnecessary." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995).

44. Avoiding regular restroom use can have adverse health consequences. Ehrensaft Decl. ¶ 38; DE 23-10 at 10-12.

OBJECTION: This is a conclusory statement and has no relevance to the individual plaintiffs. Dr. Ehrensaft has not met the Plaintiffs, nor has she provided any treatment to Plaintiffs. Ehresnaft Decl., ¶ 16. If Plaintiffs are in fact avoiding use of restrooms resulting in any adverse health consequences, it is a self-inflicted harm. "Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995).

45. By adopting Resolution 2, as enforced by PRSD's new policy and practice, Defendants have caused a noticeable deterioration in the school climate, which was once accepting of transgender students, but which now permits prejudice and discrimination. This shift has caused Plaintiffs to fear for their safety and well-being. Juliet Decl. ¶¶ 40, 52-53, 58; A.S. Decl. ¶¶ 38-39; M. Evancho Decl. ¶¶ 24, 28-29; *see also* Ehrensaft Decl. ¶¶ 37-38; DE 23-10 at 9-10.

OBJECTION: The atmosphere of the District High School is a supportive environment for the Plaintiffs. (Bowman Decl. ¶ 22). By way of example, Plaintiff Juliet Evancho was nominated by her peers to be a candidate for homecoming queen and was a member of the school's homecoming court during the District's homecoming celebrations. During the school assembly where the homecoming court was announced, Ms. Evancho and her escort were applauded and cheered by the student body. In fact, Ms. Evancho received a standing ovation from several individuals. Plaintiffs themselves have expressed their appreciation for this supportive environment. (Bowman Decl. ¶¶ 23, 27).

46. Defendants' actions have negatively affected Plaintiffs' schoolwork, just as they are in the process of deciding whether and where to go to college. Juliet Decl. ¶ 59; A.S. Decl. ¶¶ 30, 37.

OBJECTION: Plaintiffs' grades have not suffered, and their attendance has remained largely consistent since prior to the passage of Resolution #2. (Miller, Decl. ¶ 28, 29; Bowman Decl.¶ 24, Ex. B).

Defendants' Acted Fully Knowing Their Actions Violated the Law and Would Harm Plaintiffs.

47. Defendants adopted Resolution 2 and implemented PRSD's new policy and practice with full knowledge that they were in violation of Title IX. DE 23-4 at 5-10; DE 23-6 at 13 ("Certainly an individual plaintiff could file suit on the basis that sex in Title IX does include identity."); DE 23-22 at 2-5.

OBJECTION: 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. *(See, Ex. A, to Defendants' Memorandum in Opposition).* 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. *Id.* (See also Pagan Decl. Ex. F – partial transcript of September 12 2016 meeting, p. 24, lines 17 – 20) ("School Districts everywhere are in limbo because of the disagreement or incoherence between OCR's significant guidance and the courts, and the different perspectives"); see also, (Miller Decl. ¶¶ 20 – 21) ("…shift from the commonly understood and long-standing practice of segregating restrooms based upon biological sex. Segregation of restrooms by biological sex had been the

status quo of public schools and other facilities for decades even before the implementation of Title IX."). Furthermore, 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.

48. Defendants acted knowing that their actions could be in violation of the United States Constitution's guarantee of equal protection. DE 23-4 at 8.

OBJECTION: 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. Resolution #2 is rationally related to the District's purpose in protecting the privacy of all its student in the use of private facilities. *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

49. The School Board voted for Resolution 2 even when it ran counter to the professional opinion of PRSD administrators, like Superintendent Miller. DE 23-3 at 5; DE 23-6 at 25. Counsel for Plaintiffs alerted Defendants of the risks posed by the institution of discriminatory practices and the importance of social transitioning for transgender students. *See* DE 23-22 at 8.

OBJECTION: The School Board recognized that the legal environment on the issues before it was unsettled and offered that it now found itself at the consensus-building phase. *(See Ex. A to Defendants' Memorandum in Opposition).* (See also Pagan Decl. Ex. F – partial transcript of September 12 2016 meeting, p. 24, lines 17 – 20) ("School Districts everywhere are in limbo because of the disagreement or incoherence between OCR's significant guidance and the courts, and the different perspectives"); see also, (Miller Decl. ¶¶ 20 – 21) ("…shift from the commonly understood and long-standing practice of segregating restrooms based upon biological sex. Segregation of restrooms by biological sex had been the status quo of public schools and other facilities for decades even before the implementation of Title IX.")

50. Defendants adopted Resolution 2 and implemented PRSD's new policy and practice with full knowledge that the adoption of such a policy would harm Plaintiffs and other transgender students by endangering their health, safety, and well-being. On April 21, 2016, Defendants also heard from a panel of experts from Children's Hospital of Pittsburgh of UPMC, who provided background knowledge about transgender youth from medical, social, and psychological perspectives. DE 23-2 at 1-2; DE 23-15. The Pittsburgh Children's Hospital experts also noted that some of the major health challenges faced by transgender youth are, *inter alia*, a lack of acceptance of their gender identity by family, peers, and schools; not being allowed to express their true gender identity; and bullying and victimization from peers, caregivers, and others. DE 23-7 at 21.

OBJECTION: Plaintiffs have provided no evidence of harm absent conclusory and generalized statements. The self-inflicted choice of refusing to use the unisex restrooms available to all students is not evidence of irreparable harm. The Children's Hospital presentation did not take a position on the use of restrooms. Social transition milestones are listed as: changing one's name

and pronouns; wearing clothes that align more closely with one's identity; telling family, friends and school personnel about one's identity; and requesting that everybody use their chosen name/pronouns. Pagan Decl. Ex. G. p. 19. All of these milestones have been supported by the District. The District has made a good-faith effort to accommodate Plaintiffs and assist them in their transition, balancing its concern for their well-being with its responsibilities to all students. (Complaint, ¶¶ 38, 42, 53, 54, 56, 64, 65, 68 – 71, 73, see also Pasquinelli Decl. ¶¶ 12 – 16; Bowman Decl. ¶¶ 21 – 23, 25 – 26). With the exception of the use of restrooms consistent with their expressed gender identity, each Plaintiff is supported by the District based on their expressed gender identity. (Miller Decl. ¶ 25). By way of example, each Plaintiff is addressed at the District by their preferred name and pronoun. (Miller Decl. ¶ 26). 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. *Id.* In recognition of the importance of traditional senior year events and District traditions, the Plaintiffs are treated with respect to their stated gender identity. *Id.* Ms. Evancho was a candidate for homecoming queen during her senior year. *Id.* (See also Bowman Decl. ¶ 23). 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. (Miller Decl. ¶¶ 24, 25).

51. Defendants were fully aware that their actions contravened the policies and practices for supporting transgender students recommended by ED's Office of Safe and Healthy Students. DE 23-9.

OBJECTION: The only DOE recommendation not followed by the District is that regarding the use of restrooms according to expressed gender identity which recommendation is in direct conflict with Pennsylvania School Code 24 P.S. 7-708 and Title IX's regulation at 34 C.F.R. §106.33. Furthermore, the DOE's interpretation of "sex' is in violation of the Administrative Procedures Act

("APA"), 5 U.S.C. §706. The APA's straight-forward instruction to this Court is to "decide all relevant questions of law" and "determine the meaning of Agency action", not to defer to an agency's viewpoint on a political, social and legal issue. In this instance, the DOE and the DOJ, with the providence of the Executive Branch, are in clear violation of the APA. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies . . . must always 'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007).

RESPONSE TO PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

Plaintiffs are likely to succeed on their statutory and constitutional claims.

Title IX

1. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

NO OBJECTION. By way of further response, "on the basis of sex", as referenced in discrimination statutes, is sex-fixed, binary and genetically-determined sex, rooted in the nature of human reproduction and the irrefutable fact that we are a species of male and female. *Bibby v. Phila. Coca Cola Bottling Co*., 260 F. 3d 257, 261 (3d Cir. 2001). "Sex" is generally understood to mean "whether a person is anatomically male or female." Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*. 101 Colum. L. Reve. 392, 394 (2001).

2. Title IX's prohibition on sex discrimination extends to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient of federal funding." 34 C.F.R. § 106.31.

NO OBJECTION. By way of further response, "on the basis of sex", as referenced in discrimination statutes, is sex-fixed, binary and genetically-determined sex, rooted in the nature of human reproduction and the irrefutable fact that we are a species of male and female. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F. 3d 257, 261 (3d Cir. 2001). "Sex" is generally understood to mean "whether a person is anatomically male or female." Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*. 101 Colum. L. Reve. 392, 394 (2001).

3. Defendant PRSD is an education program receiving federal financial assistance and is therefore subject to Title IX's prohibition of sex discrimination against any student.

NO OBJECTION

4. Under Title IX, discrimination "on the basis of sex" encompasses discrimination based on an individual's gender identity, transgender status, and gender expression, including nonconformity to sex-or gender-based stereotypes.

OBJECTION: 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. See *Texas v. United States*, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016). ("Title IX") as including gender identity. Also, the DOE's interpretation of "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL

4565643. Additionally, 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." Furthermore, 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." *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

5. By adopting Resolution 2, as implemented by PRSD's new policy and practice, Defendants have discriminated on the basis of sex.

OBJECTION: 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."

6. The "weight of circuit authority" has recognized that "discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016) (Davis, J., concurring), *cert. granted sub nom. Gloucester Cty. Sch. Bd. v. G.G.*, --- S. Ct. ----, 2016 WL 4565643 (Oct. 28, 2016).

OBJECTION: There is no "weight of circuit authority" as only one Circuit Court of Appeals has addressed the issue. In fact, the Fourth Circuit's decision to provide the Department of Education's DCL *Auer* deference, as well as the DOE's interpretation of "on the basis of sex" to include

"gender identity", is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643.

7. Discrimination against transgender individuals is inherently rooted in sex stereotypes and accordingly triggers heightened scrutiny on that basis.

OBJECTION: First, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause and is subject to review under the rational basis standard. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015). Also, Plaintiffs have not raised claims of sex stereotyping. To state a cognizable claim for discrimination under a sex stereotyping claim, a plaintiff must allege that he did not conform to his harasser's vision of how a man should look, speak, and act. *Prowel v. Wise Business Forms, Inc.*, 579 F. 3d 285, 292, (3d Cir. 2009). Sex stereotyping claims are based on behaviors, mannerisms and appearances. See, e.g., *Glenn v. Brumby*, 663 F. 3d 1312, 1318 – 19 (11th Cir. 2011) (reviewing cases and finding gender stereotypes to include "wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in child-rearing"); *Smith v. City of Salem, Ohio*, 378 F. 3d 566, 572 (6th Cir. 2004) (explaining that plaintiff's "complaint sets forth the conduct and mannerisms . . . [that] did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave," including plaintiff's mannerisms, appearance, conduct and behaviors); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-cv-243, 2006 U.S. Dist. LEXIS 6521, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (finding that plaintiff had alleged facts showing that his failure to conform to sex stereotypes of how a man should look and behave—in other words, his non-conforming behavior and appearance—were the catalyst behind defendant's discriminatory actions). In *Johnston v. Univ. of*

Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 681, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015), plaintiff had not alleged that defendants discriminated against him because of the way he looked, acted, or spoke. Instead, plaintiff alleged only that the University refused to permit him to use the restrooms and locker rooms consistent with his gender identity rather than his birth sex. Such an allegation was found to be insufficient to state a claim for discrimination under a sex stereotyping theory. See, e.g., *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, No. 5:12-cv-1119-DAE, 2014 U.S. Dist. LEXIS 163151, 2014 WL 6611997, at *6 (W.D. Tex. Nov. 19, 2014) ("courts have been reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (*Price Waterhouse* does not require "employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) aff'd, 98 F. App'x 461 (6th Cir. 2004) (finding no discrimination where employer did not require plaintiff to conform her appearance to a particular gender stereotype, but instead only required plaintiff to conform to the accepted principles established for gender-distinct public restrooms.) As in *Johnston*, the Plaintiffs have been permitted to live in conformance with their expressed gender identity in all material respects, with the one exception of single-sex multi-user restrooms.

8. By definition, a transgender person's gender identity does not conform to societal gender stereotypes associated with a person's sex assigned at birth. *See Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

OBJECTION: See, *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 671, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015) ("while Plaintiff might identify his gender as male, his birth sex is female. It is this fact—that Plaintiff was born a biological female, as alleged in the complaint—that is fatal to Plaintiff's sex discrimination claim. Regardless of how gender and gender identity are defined, the law recognizes certain distinctions between male and female on the basis of birth sex. Thus, even though Plaintiff is a transgender male, his sex is female, a fact alleged in Plaintiff's complaint and a fact that has legal significance in light of Plaintiff's discrimination claim.")

9. Resolution 2, and the policy and practice enforcing it, codify sex stereotypes by banishing those whose gender identities do not match their birth-assigned sex from the facilities that others are permitted to use. That exclusion is based on sex stereotypes. *See Lusardi v. McHugh*, EEOC No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015) (employer's policy banning a transgender woman from the women's facilities was discrimination because of sex).

OBJECTION: Resolution #2, offered in a school setting and not an employment setting, re-establishes the consistent, long-held and legally permissible distinctions between males and females on the basis of biology found in United States Supreme Court precedence, Title IX and its regulations, and the Pennsylvania Public School Code of 1949. 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015); 34 C.F.R. §106.33; 24 P.S. 7-708.

10. A policy that discriminates against people because their birth-assigned sex and gender identity do not match necessarily is discriminating based on sex.

OBJECTION: Courts have defined the term "sex" in the context of the Equal Protection Clause, as well as anti-discrimination statutes such as Title VII, as the biological sex assigned to a person at birth. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) ("sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth"). The Seventh Circuit Court of Appeals has provided the following definition for "discrimination based on sex" under Title VII, which the Court found instructive in defining sex discrimination under the Equal Protection Clause:

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

Ulane v. E. Airlines, Inc., 742 F. 2d 1081, 1085 (7th Cir. 1984).

11. It is beyond dispute that sex has been taken into account in passing Resolution 2. In analyzing whether sex has been taken into account, the proper inquiry is whether the discrimination at issue is in any way related to sex. *See Schwenk*, 204 F.3d at 1202; *Smith v. Virginia Commonw. Univ.*, 84 F.3d 672, 676 (4th Cir. 1996). *Accord Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526-27 (D. Conn. 2016).

OBJECTION: Resolution #2, offered in a school setting and not an employment setting, re-establishes the consistent, long-held and legally permissible distinctions between males and

females on the basis of biology found in United States Supreme Court precedence, Title IX and its implementing regulations, and the Pennsylvania Public School Code of 1949. 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015); 34 C.F.R. §106.33; 24 P.S. 7-708.

12. Gender identity is a critical determinant of sex itself. *See, e.g., G.G.*, 822 F.3d at 730 (recognizing that the "the term 'sex' means a person's gender identity") (Niemeyer, J., dissenting); *Schwenk*, 204 F.3d at 1201-02 (holding that conduct motivated by an individual's "gender or sexual identity" is because of "gender," which is interchangeable with "sex"); *Roberts v. Clark Cty Sch. Dist.*, 2016 WL 5843046, *6 (D. Nev. Oct. 4, 2016); *Fabian*, 172 F. Supp. 3d at 526-27; *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Rumble v. Fairview Health Services*, 2015 WL 1197415 at *2 (D. Minn. Mar. 16, 2015); *see also* Ehrensaft Decl. ¶ 18. Discrimination based on gender identity is thus literally sex discrimination.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. Gender identity is a social and psychological concept that it not well defined, and there is little scientific evidence that it is an innate, fixed biological property. The New Atlantis, Journal of Technology & Society, *Sexuality and Gender*, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 11. Gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. *Id.* at 87. The use of the term "gender" in case law is not a

term separate and distinct from the biological term sex. See, Article LA Times Ginsburg Explains the Origins of Sex, Gender: Justice: Supreme Court's newest member speaks at her old law school and brings down the house with her history lesson about fighting bias, November 21, 1993; "I owe it all to my secretary at Columbia Law School, who said, 'I'm typing all these briefs and articles for you and the word sex, sex, sex is on every page. Don't you know that those nine men (on the Supreme Court)—they hear that word, and their first association is not the way you want them to be thinking? Why don't you use the word gender? It is a grammatical term and it will ward off distracting associations."

13. Because Resolution 2 and PRSD's new policy and practice distinguishes between transgender individuals and cisgender individuals, they unlawfully discriminate on the basis of sex because they allow people to be treated consistent with their gender identity only if that identity is consistent with their sex assigned at birth.

OBJECTION: Resolution #2, offered in a school setting and not an employment setting, re-establishes the consistent, long-held and legally permissible distinctions between males and females on the basis of biology found in United States Supreme Court precedence, Title IX and its implementing regulations, and the Pennsylvania Public School Code of 1949. 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015); 34 C.F.R. §106.33; 24 P.S. 7-708.

14. In addition, discrimination based on gender transition is necessarily based on sex, just as discrimination based on religious conversion is necessarily based on religion. For example,

firing an employee because she converts from Christianity to Judaism constitutes unlawful discrimination "because of religion." *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *accord Fabian*, 172 F. Supp. 3d at 526-27; *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, *11 (EEOC Apr. 20, 2012).

OBJECTION: Plaintiffs have not been discriminated against on the basis of their transition. 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. (Miller Decl. ¶ 25). By way of example, each Plaintiff is addressed at the District by their preferred name and pronoun. (Miller Decl. ¶ 26). 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. (Miller Decl. ¶ 26). In recognition of the importance of traditional senior year events and District traditions, the Plaintiffs are treated with respect to their stated gender identity. (Miller Decl. ¶ 26). Ms. Evancho was a candidate for homecoming queen during her senior year. (Miller Decl. ¶ 26; see also Bowman Decl. ¶ 23). 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. (Miller Decl. ¶¶ 24 – 26). The District has made a point of working collaboratively with the Plaintiffs and their families in supporting the Plaintiffs. (Bowman Decl. ¶ 25).

15. A policy or practice that treats men and women equally as a general matter but nonetheless discriminates against those who undertake gender transition or who do not "complete" gender transition constitutes discrimination on the because of DE 23-6or example, if a student is a girl, lives openly as a girl, and has taken medical steps (including hormone therapy) to affirm her

female identity, a school's policy, such as Resolution 2 here, would reflect a determination that the student's gender transition is not yet finished and so she is not "really" a girl until she obtains surgical treatment and updates her birth certificate.

OBJECTION: This is a statement of opinion without any record support or legal citation, and is an improper as a conclusion of law.

16. By defining the proper terms of gender transition and therefore writing into law what it means to be a "real" man or "real" woman, policies like Resolution 2 discriminate based on sex.

OBJECTION: This is a statement of opinion without any record support or legal citation, and is an improper as a conclusion of law.

17. Title IX requires schools to provide transgender students access to restrooms that are consistent with their gender identity because access to the bathroom is an education program or activity under Title IX. *Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.*, --- F. Supp. 3d ---, 2016 WL 5372349, *10 (S.D. Ohio Sept. 26, 2016).

OBJECTION: The *Highland* case cited by Plaintiffs has no precedential value to this Court. Furthermore, the *Highland* court relied upon the interpretative guidance issued by the DOE interpreting "sex" as including gender identity which guidance is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643.

18. For purposes of Title IX, ED and U.S. Department of Justice ("DOJ") have made clear that schools must treat a student's gender identity as the student's sex. DE 23-8 at 2.

OBJECTION: The interpretative guidance issued by the DOE interpreting "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester*

County Schools v. G.G., 2016 U.S. LEXIS 6408, 2016 WL 4565643. Furthermore, the DOE's interpretation of "sex' is in violation of the Administrative Procedures Act ("APA"), 5 U.S.C. §706. The APA's straight-forward instruction to this Court is to "decide all relevant questions of law" and "determine the meaning of Agency action", not to defer to an agency's viewpoint on a political, social and legal issue. In this instance, the DOE and the DOJ, with the providence of the Executive Branch, are in clear violation of the APA. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies . . . must always 'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007).

19. Over the past several years, ED has issued several guidance documents explaining the agency's interpretation of Title IX and its implementing regulations with respect to transgender students. DE 23-18 at 8; DE 23-19 at 5; DE 23-20 at 25; DE 23-21 at 2.

OBJECTION: The interpretative guidance issued by the DOE interpreting "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643. Furthermore, the DOE's interpretation of "sex' is in violation of the Administrative Procedures Act ("APA"), 5 U.S.C. §706. The APA's straight-forward instruction to this Court is to "decide all relevant questions of law" and "determine the meaning of Agency action", not to defer to an agency's viewpoint on a political, social and legal issue. The interpretative guidance issued by the DOE interpreting "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643. The DOE refers to the DCL 2016 as "significant guidance." The DOE defines "significant guidance documents" as "raising novel legal or policy issues arising out of legal mandates, the President's priorities, or

the principles set forth in Executive Order 12866, as further amended." See, Department of Education, Types of Guidance Documents, http://www2.ed.gov/print/policy/gen/guid/types-of-guidance-documents.html. In this instance, the DOE and the DOJ, with the providence of the Executive Branch, are in clear violation of the APA. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies . . . must always 'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007).

20. Thus, schools cannot treat transgender students differently from the way they treat other students of the same gender identity. DE 23-8 at 2. When schools provide sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity. *Id.* at 3.

OBJECTION: The DOE's interpretation of "sex' is in violation of the Administrative Procedures Act ("APA"), 5 U.S.C. §706. The APA's straight-forward instruction to this Court is to "decide all relevant questions of law" and "determine the meaning of Agency action", not to defer to an agency's viewpoint on a political, social and legal issue. The interpretative guidance issued by the DOE interpreting "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643. The DOE refers to the DCL 2016 as "significant guidance." The DOE defines "significant guidance documents" as "raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended." See, Department of Education, Types of Guidance Documents, http://www2.ed.gov/print/policy/gen/guid/types-of-guidance-documents.html. In this instance, the DOE and the DOJ, with the providence of the Executive Branch, are in clear violation of the

APA. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies . . . must always 'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007).

21. By barring Plaintiffs from the restrooms consistent with their gender identity, Defendants have discriminated against Plaintiffs on the basis of sex. *See G.G.*, 822 F.3d at 718.

OBJECTION: The 2016 DCL issued by the DOE in May 2016 is currently the subject of a nationwide injunction from enforcement of the DOE's interpretation of "sex" under Title IX as including gender identity. See *Texas v. United States of America*, No. 7:16-cv-00054 (N.D. Tex. August 21, 2106) (Judge Reed O'Connor Order granting nationwide injunction) (Judge Reed O'Connor October 18, 2016, Order denying Defendants' request to limit grant of preliminary injunction to just plaintiffs and further clarifying reach of nationwide injunction). Also, the DOE's interpretation of "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643. Additionally, 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." Furthermore, 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." *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

22. Although regulations concerning Title IX include an exception to the statute's general prohibition on discrimination based on sex in that they permit schools to have separate toilet, locker rooms, and shower facilities on the basis of sex, such exception does not permit the exclusion of transgender students from the restrooms congruent with their gender identity, particularly in light of ED's interpretation of 34 C.F.R. § 106.33. *See G.G.*, 822 F.3d at 715, 718.

OBJECTION: The 2016 DCL issued by the DOE in May 2016 is currently the subject of a nationwide injunction from enforcement of the DOE's interpretation of "sex" under Title IX as including gender identity. See *Texas v. United States of America*, No. 7:16-cv-00054 (N.D. Tex. August 21, 2106) (Judge Reed O'Connor Order granting nationwide injunction) (Judge Reed O'Connor October 18, 2016, Order denying Defendants' request to limit grant of preliminary injunction to just plaintiffs and further clarifying reach of nationwide injunction). Also, the DOE's interpretation of "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643. Additionally, 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." Furthermore, 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." *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

23. ED's unequivocal interpretation of its own regulation as not permitting

discrimination against transgender individuals through such exclusions is reasonable, reflects the agency's fair and considered judgment, and is entitled to controlling weight under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See G.G.*, 822 F.3d at 720; *Highland Loc. Sch. Dist.*, 2016 WL 5372349 at *10-13.

OBJECTION: In *Auer v. Robbins*, the Supreme Court extended deference to an agency's interpretation of its own regulation. But such deference is due "only when the language of the regulation is unambiguous." *Christensen v. Harris City*, 529 U.S. 576, 586-587 (2000). "Permitting the definition of sex to be defined in this way would allow Defendants to 'create [a] de facto new regulation' by agency action without complying with the proper [legislative] procedures." *Texas v. United States*, 2016 U.S. Dist. LEXIS 113459, *46-47 (citing *Christensen*.) The 2016 DCL issued by the DOE in May 2016 is currently the subject of a nationwide injunction from enforcement of the DOE's interpretation of "sex" under Title IX as including gender identity. See *Texas v. United States of America*, No. 7:16-cv-00054 (N.D. Tex. August 21, 2106) (Judge Reed O'Connor Order granting nationwide injunction) (Judge Reed O'Connor October 18, 2016, Order denying Defendants' request to limit grant of preliminary injunction to just plaintiffs and further clarifying reach of nationwide injunction). Also, the DOE's interpretation of "sex" as including gender identity is currently before the United States Supreme Court on Certiorari. *Gloucester County Schools v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643. Additionally, 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." Furthermore, 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." *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

24. By adopting and enforcing a policy or practice prohibiting Juliet, a transgender girl, from accessing and using female-designated restrooms at school, and requiring that she use male-designated restrooms or single-occupancy restrooms, Defendant PRSD discriminated against and continues to discriminate against Juliet in her enjoyment of PRSD's educational programs and activities by treating her differently from other female students based on her gender identity, the fact that she is transgender, and her nonconformity with sex stereotypes.

OBJECTION: 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." 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." *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed

of both.'" *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . ."). *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

25. Defendant PRSD has discriminated against Juliet on the basis of sex in violation of Title IX and has thereby denied Juliet the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by PRSD and Pine-Richland High School.

OBJECTION: 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." 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." *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: "The heightened review standard our precedent establishes does not make sex a proscribed classification

. . . Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . ."). *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

26. By adopting and enforcing a policy or practice prohibiting Elissa, a transgender girl, from accessing and using female-designated restrooms at school, and requiring that she use male-designated restrooms or single-occupancy restrooms, Defendant PRSD discriminated against and continues to discriminate against Elissa in her enjoyment of PRSD's educational programs and activities by treating her differently from other female students based on her gender identity, the fact that she is transgender, and her nonconformity with sex stereotypes.

OBJECTION: 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." 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." *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . .) *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

27. Defendant PRSD has discriminated against Elissa on the basis of sex in violation of Title IX and has thereby denied Juliet the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by PRSD and Pine-Richland High School.

OBJECTION: 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."

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." *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . ."). *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

28. By adopting and enforcing a policy or practice prohibiting A.S., a transgender boy, from accessing and using male-designated restrooms at school, and requiring that he use female-designated restrooms or single-occupancy restrooms, Defendant PRSD has discriminated against and continues to discriminate against A.S. in his enjoyment of PRSD's educational programs and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity with sex stereotypes.

OBJECTION: 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." 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." *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . ."). *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

29. Defendant PRSD has discriminated against A.S. on the basis of sex in violation of Title IX and thereby has denied A.S. the full and equal participation in, right to be free from

discrimination in, and benefits of educational opportunities offered by PRSD and Pine-Richland High School.

OBJECTION: 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." 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." *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . ."). *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

30. PRSD has intentionally violated Title IX.

OBJECTION: 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. (Banyas Decl. ¶ 19; Goebel Decl. ¶ 16; Miller Decl. ¶ 4; Bowman Decl. ¶ 4). 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." 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." *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[T]he

statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . .). *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

31. Resolution 2 and PRSD's new policy and practice impose a host of irreparable harms upon Plaintiffs, including distress, stigma, anxiety, depression, decreased academic performance, and possible disciplinary actions—all during their irreplaceable senior year of high school.

OBJECTION: Plaintiffs, in a conclusory and generalized manner, offer that they are suffering from "significant educational, psychological, and physical harms" and that they will suffer and continue to suffer if Resolution #2 is not enjoined. (Plaintiffs' Motion, ¶¶ 3, 7). They also list a "host of irreparable harms" such as "distress, stigma, anxiety, depression, decreased academic performance and possible disciplinary actions." (Plaintiffs' Memorandum, p. 12.). Plaintiffs reject the use of the District's unisex restrooms because, allegedly, anything short of achieving their end result causes "discomfort, anxiety, and distress." (Evancho Decl. ¶ 48; Ridenour Decl. ¶ 35; A.S. Decl. ¶ 34). Plaintiffs ignore the evidentiary record. 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. (Miller Decl. ¶ 25).

By way of example, each Plaintiff is addressed at the District by their preferred name and pronoun. (Miller Decl. ¶ 26). 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. (Miller Decl. ¶ 26).

In recognition of the importance of traditional senior year events and District traditions, the Plaintiffs are treated with respect to their stated gender identity. (Miller Decl. ¶ 26). Ms. Evancho was a candidate for homecoming queen during her senior year. (Miller Decl. ¶ 26; see also Bowman Decl. ¶ 23). 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. (Miller Decl. ¶¶ 24, 25); (Miller Decl. ¶ 26). The District has made a point of working collaboratively with the Plaintiffs and their families in supporting the Plaintiffs. (Bowman Decl. ¶ 25). 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. (Bowman Decl. ¶ 20). The atmosphere of the District High School is a supportive environment for the Plaintiffs. (Bowman Decl. ¶ 22). Plaintiffs themselves have expressed their appreciation for this supportive environment. (Bowman Decl. ¶ 27). Plaintiffs' grades have not suffered, and their attendance has remained largely consistent since prior to the passage of Resolution #2. (Miller, Decl. ¶ 28, 29; Bowman Decl.¶ 24, Ex. B).

Equal Protection

32. Resolution 2 and PRSD's new policy and practice facially discriminate against transgender students in violation of the equal protection guarantee of the Fourteenth Amendment. *See Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *19.

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). The law permits distinctions

between male and females on the basis of birth sex where not based upon irrational or uncritical analysis. *Tuan Anh Nguyen*, 533 U.S. at 64, 68. 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. *Virginia*, 518 U.S. at 540 – 46, 550 n. 19; *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53 (2001). 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.

33. In the first instance, Resolution 2 and PRSD's new policy and practice discriminate on the basis sex. Discrimination on the basis of sex necessarily encompasses discrimination based on an individual's gender identity, transgender status, and gender expression, including nonconformity to sex-or gender-based stereotypes.

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

34. Excluding transgender individuals from restrooms congruent with their gender identity constitutes government action on the basis of sex. *See G.G.*, 822 F.3d at 727; *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *13 ("Jane has been denied access to the communal girls' restroom 'on the basis of [her] sex.'").

OBJECTION: 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. 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).The law permits distinctions between male and females on the basis of birth sex where not based upon irrational or uncritical analysis. *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53, 64, 68 (2001). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53 (2001).

35. Because Resolution 2 excludes transgender students from facilities congruent with their gender identity, and because it relies on "biological sex," it is a sex-based classification.

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). The law permits distinctions between male and females on the basis of birth sex where not based upon irrational or uncritical analysis. *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 64, 68 (2001). 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. *United*

States v. Virginia, 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001).

36. Gender-based classifications warrant heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks omitted).

OBJECTION. Gender identity has never been recognized as a quasi-suspect classification and rational basis review applies. However, even if this Court were to apply intermediate scrutiny the end result is the same. Segregation of restrooms on the basis of biological sex is an important governmental interest. As held by the Court in *Johnston*:

> First, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiff's discrimination claim is reviewed under the rational basis standard. This finding is consistent with numerous other courts that have considered allegations of discrimination by transgender individuals.
>
> Nevertheless, even if a heightened standard of review were to apply, the result would be the same as under rational basis here. Here, [the University's] policy of segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest.' Specifically, [the University] explained that is policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts. 97 F. Supp. 3d at 669 – 670.

Thus, whether this Court applies rational basis review or the heightened standard of review urged by Plaintiffs, Plaintiffs have still failed to plead an Equal Protection Claim upon which relief can be granted.

37. Resolution 2 and PRSD's new policy and practice separately also trigger heightened scrutiny because they discriminate on the basis of transgender status. *See Adkins v. City*

of New York, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *15-17; *Norsworthy*, 87 F. Supp. 3d at 1119.

OBJECTION: See, *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ*., 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015). Neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard. This is consistent with numerous other courts that have considered allegations of discrimination by transgender individuals. See, e.g., *Etsitty v. Utah Transit Auth*., 502 F. 3d 1215, 1228 (10th Cir. 2007); *Brown v. Zavaras*, 63 F. 3d 967, 971 (10th [*669] Cir. 1995) (but cautioning that recent research concluding that sexual identity may be biological suggests reevaluating the rule); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012) [**23] ("it is not apparent that transgender individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S-11-cv-2056 WBS, 2012 U.S. Dist. LEXIS 40266, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Kaeo-Tomaselli v. Butts*, No. 11-cv-00670 LEK, 2013 U.S. Dist. LEXIS 13280, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013) (noting the plaintiff's status as a transgender female did not qualify her as a member of a protected class and explaining the court could find no "cases in which transgendered individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05-cv-10321-NRB, 2009 U.S. Dist. LEXIS 7645, 2009 WL 229956, *13 (S.D. N.Y. Jan. 30, 2009) (explaining that because transgender individuals are not a protected class for the purpose of

Fourteenth Amendment analysis, claims that a plaintiff was subjected to discrimination based on her status as transgender are subject to rational basis review).

38. In identifying whether a classification triggers heightened scrutiny, courts consider whether: (a) the class has historically been subjected to discrimination, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (b) the class's defining characteristic bears a relation to the ability to perform or contribute to society, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); (c) the class exhibits an obvious, immutable, or sufficiently discernible characteristic to define them as a discrete group, *Bowen*, 483 U.S. at 602; *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012); and (d) the class is a minority or politically powerless, *Bowen*, 483 U.S. at 602.

NO OBJECTION. By way of further response, see *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015). Neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard.

39. While not all four factors must be met to warrant heightened scrutiny, *see Windsor*, 699 F.3d at 181; *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012), all four point in favor of heightened scrutiny with respect to laws that classify on the basis of transgender status. *Adkins*, 143 F. Supp. 3d at 139-40.

OBJECTION: Neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard. However, even if this Court were to apply intermediate scrutiny, the end result is the same. Segregation of restrooms on the basis of biological sex is an important governmental interest. See

Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

40. Transgender people have experienced a long history of discrimination, including pervasive discrimination in employment, housing, and access to places of public accommodation or government services. *See Adkins*, 143 F. Supp. 3d at 139; *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *16; *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) ("[t]he hostility and discrimination that transgender individuals face in our society today is well-documented"); *see also* DE 23-12 at 7 ("It is part of social and legal convention in the United States to discriminate against, ridicule, and abuse transgender and gender non-conforming people within foundational institutions such as the family, schools, the workplace and health care settings, every day.").

OBJECTION: Neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard. However, even if this Court were to apply intermediate scrutiny, the end result is the same. Segregation of restrooms on the basis of biological sex is an important governmental interest. See *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

41. There is also no relationship between transgender status and the ability to contribute to society. *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *16.

NO OBJECTION. By way of further response, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard. However, even if this Court were to apply intermediate scrutiny, the end

result is the same. Segregation of restrooms on the basis of biological sex is an important governmental interest. See *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

42. Transgender individuals are a discrete minority—it is estimated that only 0.6% of the adults in the United States identify as transgender, DE 23-13 at 2—and there can be little dispute that they are relatively powerless politically.

OBJECTION. Neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard. However, even if this Court were to apply intermediate scrutiny, the end result is the same. Segregation of restrooms on the basis of biological sex is an important governmental interest. See *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

43. Further, a person's gender identity is a sufficiently discernible characteristic that is innate and effectively immutable in that it cannot be altered or be expected to change. *See* Ehrensaft Decl. ¶¶ 20-22, 31; *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *16; *see also Hernandez-Montiel, v. Immigr. & Naturalization Serv.*, 225 F.3d 1084, 1093 (9th Cir. 2000).

NOT RELEVANT AT THIS STAGE OF PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex and gender identity as separate and innate. Neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard. However, even if this Court were to apply

intermediate scrutiny, the end result is the same. Segregation of restrooms on the basis of biological sex is an important governmental interest. See *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

44. Resolution 2's class-based targeting of Plaintiffs demands meaningful review, as discrimination based on both sex and transgender status.

OBJECTION: Neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiffs' discrimination claim is reviewed under the rational basis standard. However, even if this Court were to apply intermediate scrutiny, the end result is the same. Segregation of restrooms on the basis of biological sex is an important governmental interest. See *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668-669; 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015).

45. All sex classifications must be evaluated under heightened scrutiny even when they are based on alleged biological differences between men and women. *See Tuan Anh Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53, 73 (2001).

NO OBJECTION. By way of further response, 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); Johnson v. University of Pittsburgh, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

46. Under heightened scrutiny, the State must show that the challenged classification serves important governmental objectives and that the discriminatory means employed are

substantially related to the achievement of those objectives—a burden of justification that is demanding and rests entirely on the State. *See Virginia*, 518 U.S. at 533. The State's justifications must be genuine, not hypothesized or invented *post hoc* in response to litigation, and must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. *Id*. As such, the constitutionality of the challenged classification must be judged based on the actual purpose of the classification, not on rationalizations for actions in fact differently grounded. *Id.* at 535-36.

NO OBJECTION. By way of further response, as held by the Court in *Johnston*:

> First, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiff's discrimination claim is reviewed under the rational basis standard. This finding is consistent with numerous other courts that have considered allegations of discrimination by transgender individuals.
>
> Nevertheless, even if a heightened standard of review were to apply, the result would be the same as under rational basis here. Here, [the University's] policy of segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest.' Specifically, [the University] explained that is policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts.

97 F. Supp. 3d at 669 – 670.

Thus, whether this Court applies rational basis review or the heightened standard of review urged by Plaintiffs, Plaintiffs have still failed to plead an Equal Protection Claim upon which relief can be granted.

47. And indeed, courts must insist on knowing the relation between a classification and its purported justification even in the most ordinary equal protection cases calling for the most

deferential of standards. *See Romer v. Evans*, 517 U.S. 620, 632 (1996). The justifications offered must be grounded in the realities of the subject addressed by the legislation. *See Heller v. Doe*, 509 U.S. 312, 321 (1993). Close scrutiny requires Defendants to demonstrate that the challenged actions constitute meaningful steps towards solving a real, not fanciful problem. *See Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1998); *see also Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("The state must specifically identify an 'actual problem' in need of solving.").

NO OBJECTION: See response to Proposed Conclusion of Law No. 46 above. The District's justification in approval of Resolution #2 arises from a recognition of the physiological differences between males and females, not from an improper, discriminatory classification. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

48. Resolution 2 and PRSD's new policy and practice cannot meet these tests.

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). The law permits distinctions between male and females on the basis of birth sex where not based upon irrational or uncritical analysis. *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53, 64, 68 (2001). 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. *United*

States v. Virginia, 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001). 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. Resolution #2 is rationally related to the District's purpose in protecting the privacy of all its student in the use of private facilities. *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

49. Defendants have no legitimate reason to treat Plaintiffs differently from their cisgender peers.

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). The law permits distinctions between male and females on the basis of birth sex where not based upon irrational or uncritical analysis. *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 64, 68 (2001). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and*

Naturalization Serv., 533 U.S. 53 (2001). 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. Resolution #2 is rationally related to the District's purpose in protecting the privacy of all its student in the use of private facilities. *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

50. Plaintiffs' unremarkable and uneventful use of the restrooms consistent with their gender identity for months, even years, without any incident is the best evidence that Defendants' decision to bar them from those same restrooms later was purely arbitrary and based on discriminatory motives.

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

51. Defendants appear to have primarily based Resolution 2 on a purported interest to protect "bodily privacy," DE 23-2 at 4, meaning the interest of all students in not having their unclothed bodies observed by another person. Although the protection of students' privacy is a legitimate interest, in the circumstances presented here, Defendants cannot show that the fit

between the means and the important end is "'exceedingly persuasive.'" *Nguyen*, 533 U.S. at 70 (quoting *Virginia*, 518 U.S. at 533).

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

52. Plaintiffs have the same interest in privacy as other cisgender students, and there is no basis for Defendants to conclude that allowing Plaintiffs to access the restrooms consistent with their gender identity would violate any student's privacy.

OBJECTION: Plaintiffs gender identity is different than their biological sex. There is no question that the protection of bodily privacy is an important governmental interest and that the District may promote this interest by excluding members of the opposite [biological] sex from places in which individuals are likely to engage in intimate bodily functions. See, *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("The point is illustrated by society's undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between genders [sex] demand a facility for each gender [sex]; *Lee v. Downs*, 641 F. 2d 1117, 1119 (4th Cir. 1989) ("Most people, however have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.") See also; *Doe v. Luzerne Cty*., 660 F. 3d 169, 176-177 (3d Cir. 2011) (observing that several circuits have recognized a "constitutionally protected privacy interest in [one's] partially clothed body"). This protection is more important for adolescents who are "extremely self-conscious about their bodies." *Cornfield v. Consol High*

Sch. Dist. No. 230, 991 F. 2d 1316, 1323 (7th Cir. 1993). "Adolescent vulnerability intensifies the …intrusiveness of the exposure." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009).

53. To the extent that Defendants argue that they are protecting students' privacy interest in not being observed or exposed to another student of a different sex, such argument is wholly without merit. *See Highland Loc.l Sch. Dist.*, 2016 WL 5372349, at *17; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, Slip Copy, 2016 WL 5239829, *4 (E.D. Wis. Sept. 22, 2016) ("The defendants argue that students have a right to privacy; the court is not clear how allowing the plaintiff to use the boys' restroom violates other students' right to privacy.").

OBJECTION: There is no question that the protection of bodily privacy is an important governmental interest and that the District may promote this interest by excluding members of the opposite [biological] sex from places in which individuals are likely to engage in intimate bodily functions. See, *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("The point is illustrated by society's undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between genders [sex] demand a facility for each gender [sex]; *Lee v. Downs*, 641 F. 2d 1117, 1119 (4th Cir. 1989) ("Most people, however have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.") See also; *Doe v. Luzerne Cty*., 660 F. 3d 169, 176-177 (3d Cir. 2011) (observing that several circuits have recognized a "constitutionally protected privacy interest in [one's] partially clothed body"). This protection is more important for adolescents who are "extremely self-conscious about their bodies." *Cornfield v. Consol High Sch. Dist. No. 230*, 991 F. 2d 1316, 1323 (7th Cir. 1993).

"Adolescent vulnerability intensifies the …intrusiveness of the exposure." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009).

54. A contention about the physical differences between Plaintiffs and cisgender students of the same gender identity do not justify Defendants' actions in barring Plaintiffs from shared restrooms and singling them out from their peers. Although physiological differences between the sexes in some cases may permit differential treatment in the achievement of an important objective, such differences cannot be used to mask discrimination that is unlawful or is otherwise based on gender stereotypes. *See Nguyen*, 533 U.S. at 64, 68.

OBJECTION: Resolution #2 is rationally related to the District's purpose in protecting the privacy of all of its student in the use of private facilities. *Johnson v. University of Pittsburgh,* 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015).

55. The notion that the presence of Plaintiffs, who are transgender, in areas of restrooms consistent with their gender identity and where all students are fully clothed would somehow invade the bodily privacy of other students in a way that the presence of cisgender students of the *same* gender identity in those very same areas would not is incorrect. Such notion is not only based on groundless speculation, it is also one of the "overbroad generalizations" and gender-based assumptions about individuals that the Supreme Court has held cannot justify sex discrimination. *Virginia*, 518 U.S. at 533.

OBJECTION: 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001); *Johnson v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). The law permits distinctions between male and females on the basis of birth sex where not based upon irrational or uncritical analysis. *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 64, 68 (2001). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550 n. 19 (1996*); Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001).

56. From a medical and scientific perspective, the most important determinants of a person's sex are neurological sex and gender identity, not external physical characteristics. *See* Ehrensaft Decl. ¶ 18. Unlike cisgender students with their same gender identity, however, Elissa, Juliet, and A.S. are not permitted to use restrooms consistent with their gender identity. Juliet Decl. ¶¶ 44-45; Elissa Decl. ¶¶ 32-33; A.S. Decl. ¶ 32; M. Evancho Decl. ¶ 23; G. Ridenour Decl. ¶¶ 34-35, 37; DE 23-16.

NOT RELEVANT AT THIS STAGE OF THE PROCEEDINGS

Should this Court require a response, it should be noted that there exists a conflict on the determination of a person's sex. This hypothesis is not supported by scientific evidence. The underlying basis of maleness and femaleness is the distinction between the reproductive roles of the sexes. In biology, an organism is male or female if it is structured to perform one of the

respective roles in reproduction. *Special Report: Sexuality and Gender*, The New Atlantis, A Journal of Technology & Society, Paul R. McHugh, Ph.D. and Lawrence S. Mayer, Ph.D., Fall 2016, p. 90. Sex for almost all human beings is clear, binary and stable, reflecting an underlying biological reality that is not contradicted by exceptions to sex-typical behavior and cannot be altered by surgery or social conditioning. *Special Report: Sexuality and Gender*, The New Atlantis, Journal of Technology & Society, Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D. Fall 2016, p. 93. At time of birth, sex is determined based on biological characteristics, such as internal and external genitalia. (Pagan Decl. Ex. G. p. 7). See Am Psychological Ass'n Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) (DSM-V) (sex-"refers to the biological indicators of male and female (understood in the context of reproductive capacity) such as in sex chromosomes, gonads, sex hormones, and nonambigous internal and external genitalia.").

57. In addition, privacy can be preserved without resorting to discrimination against transgender individuals. As a threshold issue, a purported concern for bodily exposure has no footing in the restroom context, given the divided and enclosed nature of restroom stalls, and the existence and availability of privacy dividers for urinals.

OBJECTION: Plaintiffs do not determine where privacy interests begin and end. The zone of privacy as recognized by United States Supreme Court precedent and Title IX extends to the sex-specific facilities. See *Kohler v. City of Wapokoneta*, 381 F. Supp. 2d 692,704 (N.D. Ohio 2005) (finding that recording a woman using an individual stall within a communal ladies' room where "she reasonably expected her activities to be secluded from men" establishes "an intrusion into a private area"). Having stall doors and privacy dividers does not eliminate the bodily privacy concern. The right to bodily privacy is "deeply rooted in this Nation's history and tradition" and

"implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa., Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973). Privacy does not end at the door to the restroom. 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."

58. Resolution 2 also fails to promote privacy, even on its own terms. Resolution 2 and PRSD's new policy and practice continually invade transgender students' own interest in bodily privacy, stigmatizing them and exposing them to their peers as different. *See* DE 23-10 at 12 ("Such discrimination can also undermine transgender students' right to privacy, by effectively outing them as transgender to peers and school staff."). The physiological differences upon which Defendants rely to justify their exclusionary and discriminatory actions do not advance any interest in protecting students' bodily privacy. To the contrary, Resolution 2 and Defendants' actions actually undermine any interest in protecting students' privacy by making Plaintiffs' physiological features the subject of unwanted attention.

OBJECTION: Plaintiffs' allegations of harm are conclusory and do not suffice. Plaintiffs have exposed their transgender status. See video of Plaintiffs available at http://www.lambdalegal.org. Allegations of self-inflicted harm do not meet the standards of irreparable harm. 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. (Bowman Decl. ¶ 5). 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. (Miller Decl. ¶ 8, Ex. A; Bowman Decl.¶ 6). 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. (Bowman Decl. ¶ 7). District students, including cisgender students, use the unisex restrooms due to their proximity to the students' scheduled classrooms on a regular basis. (Bowman Decl. ¶ 10). The level of student usage of the unisex restrooms has remained constant before and after the passage of Resolution #2. 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. (Bowman Decl. ¶ 8). Based upon their class schedules, the Plaintiffs are never more than a forty-five (45) second walk to any unisex restroom. (Bowman, Decl. ¶ 9).

59. The fact that transgender students at PRSD, including Plaintiffs have been able to use the restrooms consistent with their gender identity "for several years," DE 23-23 at 2, before the discriminatory actions at issue here completely undermines any assertion that Plaintiffs' use of the restrooms consistent with their gender identity would violate other students' privacy. *See Whitaker*, 2016 WL 5239829, at *6 ("The evidence before the court indicates that Ash used the boys' restroom for some seven months without incident or notice . . . This evidence contradicts the defendants' assertions that allowing Ash to use the boys' restroom would violate other students' privacy rights.").

OBJECTION: The characterization of "for several years" is misleading. The longstanding practice in Pennsylvania school districts is the use of restrooms consistent with biological sex. See, 24 P.S. 7-740. The individual Plaintiffs, on their own initiative, separately and at different points in time,

began using the multi-user sex-designated restrooms consistent with their gender identity without any express approval or authority of the Defendants. 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 student's biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15). In *Gloucester County Sch. v. G.G.*, the United States Supreme Court issued a stay despite the factual contention that G.G. had been using restrooms consistent with his gender identity for a period of time. The stay requires *G.G.* to use the restrooms consistent with his biological sex. 2016 U.S. LEXIS 6408, 2016 WL 4565643.

60. Generalized concerns about safety cannot justify Resolution 2 or PRSD's new policy and practice.

OBJECTION: Resolution #2 is rationally related to the District's purpose in protecting the privacy of all of its students in the use of private facilities. *Johnston v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001). The privacy interests of all of its students was of paramount concern. The right to bodily privacy is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

61. There is no evidence that excluding Plaintiffs from the restrooms consistent with their gender identity implicates any safety concerns.

OBJECTION: Resolution #2 is rationally related to the District's purpose in protecting the privacy of all of its student in the use of private facilities. *Johnston v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001). The privacy interests of all of its students was of paramount concern. The right to bodily privacy is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). 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."

62. Defendants have admitted that transgender students have been able to use the restrooms consistent with their gender identity "for several years" and that they "are not aware of any inappropriate actions on the part of any student." DE 23-23 at 2. *See Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *18 (noting that school district's "justifications of safety and lewdness concerns" were insufficient because "no incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have ever occurred").

OBJECTION: Plaintiffs used the sex-specific restrooms at Pine-Richland High School on the basis of their own initiative. 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 student's biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically

distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15). Resolution #2 is rationally related to the District's purpose in protecting the privacy of all of its students in the use of private facilities. *Johnston v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001). The privacy interests of all of its students was of paramount concern. The right to bodily privacy is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). 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."

63. Without a basis for Defendants' safety concerns, it is evident that Defendants simply acted based on "nightmare speculation." *Exodus Refugee Immigr., Inc. v. Pence*, 2016 WL 5682711, at *1 (7th Cir. Oct. 3, 2016). Accordingly, this Court rejects the resort to such baseless fears. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016); *Exodus Refugee Immigr. Inc.*, 2016 WL 5682711, at *1.

OBJECTION: Resolution #2 is rationally related to the District's purpose in protecting the privacy of all of its student in the use of private facilities. *Johnston v. University of Pittsburgh*, 97 F. Supp, 3d 657 (W.D. Pa. 2015). 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550, n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53 (2001). The privacy interests of all of its students was of paramount concern. The right to bodily privacy is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). 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."

64. When it comes to safety risks, transgender people themselves are the group most vulnerable to harassment and violence in sex-separated spaces such as restrooms. *See* DE 23-10 at 9; DE 23-14. Thus, when a school requires a transgender girl to use the boys' restroom or force a transgender boy to use the girls' restroom, they put them at risk of physical, verbal, or sexual assault from other students or adults. Ex J. at 9.

OBJECTION: In the actual facts presented to the Court, there is no evidence of forced compulsion to use certain communal restrooms or associated harm. Plaintiffs conveniently attempt to ignore the reasoned alternative offered by the District to Plaintiffs and all students in the ten (10) unisex restrooms located throughout the High School. This repeated failure projects the disingenuous nature of Plaintiffs' allegations of harm.

65. Lastly, protecting cisgender students' comfort is an illegitimate interest that cannot justify Resolution 2 or PRSD's new policy and practice.

OBJECTION: Separation of the sexes based upon biology is expressly authorized by Title IX's implementing regulations at 34 C.F.R. §106.33 which specifically 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." 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001).

66. A transgender person's mere presence in a restroom does not violate the rights of cisgender individuals in those spaces. *See Dep't of Fair Emp't & Hous. v. Am. Pac. Corp.*, No. 34-2013-00151153, Order at 4 (Cal. Super. Ct. Mar. 13, 2014) (DE 23-11); *Lusardi*, 2015 WL 1607756, at *9. *Cf. G.G.*, 822 F.3d at 724 n.11; *Glenn*, 663 F.3d at 1321; *Cruzan v. Special Sch. Dist.*, No. 1, 294 F.3d 981, 984 (8th Cir. 2002). And what is more, for every student at Pine-Richland High School that may feel uncomfortable using a shared restroom, "[t]he option also exists for any student to use a single stall bathroom." DE 23-23 at 2.

OBJECTION: Separation of the sexes based upon biology is expressly authorized by Title IX's implementing regulations at 34 C.F.R. §106.33 which specifically 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." 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001).

67. To the extent Resolution 2 seeks to validate an objection to seeing transgender people—which is to say, to their mere presence—that is not a legitimate government interest that

this Court will dignify. Similar claims of "discomfort" about simply sharing spaces with those perceived as different have been made throughout history, but never has the correct answer been to indulge that discomfort.

OBJECTION: Separation of the sexes based upon biology is expressly authorized by Title IX's implementing regulations at 34 C.F.R. §106.33 which specifically 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." 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. *United States v. Virginia,* 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001).

68. Discomfort with transgender people, even when wrapped in the cloak of privacy or safety, is simply not a legitimate basis for imposing unequal or stigmatizing treatment.

OBJECTION: "Discomfort with transgender people" is not the basis of the District's approval of Resolution #2. Also, plaintiffs' stated preference and desire for "comfort" in their expression of an identity in contradiction of their birth sex is not a right which negates the valid and fundamental privacy interests of all District students. Separation of the sexes based upon biology is expressly authorized by Title IX's implementing regulations at 34 C.F.R. §106.33 which specifically 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." 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. *United States v. Virginia*, 518 U.S. 515, 540 – 46, 550 n. 19 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001).

Plaintiffs are suffering and will continue to suffer irreparable harm absent the enjoinment of Resolution 2 and PRSD's new policy and practice.

69. By adopting new and discriminatory rules governing the use of restrooms by transgender students, Defendants have caused and continue to cause irreparable harm to Plaintiffs.

OBJECTION: Plaintiffs fail to meet their burden because they only offer possible, speculative and remote injuries that may occur in the indefinite future. *Dice v. Clinicorp Inc.*, 887 F. Supp. 803, 809 (W.D. Pa. 1995). Furthermore, 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 simply not alleged any injuries that cannot be compensated by monetary damages and thus fail to meet the requisite irreparable harm for injunctive relief. *Adams v. Freedom Forge Corp.*, 204 F. 3d 475, 485 (3d Cir. 2000). Also, Plaintiffs' alleged harm caused by their rejection of using the District's unisex restrooms located throughout the High School is a harm caused by their own refusal and rejection of a permissible alternative. (Evancho Decl. ¶ 48; Ridenour Decl. ¶ 35; A.S. Decl. ¶ 34). An injunction will not issue "to restrain one from doing what he [or she] is not attempting and does not intend to do." *Continental Group, Inc. v. Amoco Chems. Corp.*, 624 F. 2d 351 (3d Cir. 1980).

70. As a result of the School Board's debate surrounding the use of restrooms by transgender students, the adoption of Resolution 2, and the implementation of PRSD's new policy and practice, Plaintiffs are suffering irreparable harm each passing day.

OBJECTION: Plaintiffs fail to meet their burden because they only offer possible, speculative and remote injuries that may occur in the indefinite future. *Dice v. Clinicorp Inc.*, 887 F. Supp.

803, 809 (W.D. Pa. 1995). Furthermore, 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 simply not alleged any injuries that cannot be compensated by monetary damages and thus fail to meet the requisite irreparable harm for injunctive relief. *Adams v. Freedom Forge Corp.*, 204 F. 3d 475, 485 (3d Cir. 2000). Also, Plaintiffs' alleged harm caused by their rejection of using the District's unisex restrooms located throughout the High School is a harm caused by their own refusal and rejection of a permissible alternative. (Evancho Decl. ¶ 48; Ridenour Decl. ¶ 35; A.S. Decl. ¶ 34). An injunction will not issue "to restrain one from doing what he [or she] is not attempting and does not intend to do." *Continental Group, Inc. v. Amoco Chems. Corp.*, 624 F. 2d 351 (3d Cir. 1980). Additionally, Plaintiffs' claims of being "marginalized and separated from the student body" by being forced to use the District's unisex restrooms are discredited by the fact that all District students are welcome to use, and do in fact use, the unisex restrooms. (Evancho Decl. ¶ 49; Ridenour Decl. ¶ 36 – 37; A.S. Decl. ¶ 25; Bowman Decl ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8) There exists no "stigma" or "marginalization" associated with the use of the unisex restrooms at the High School. (Bowman Decl. ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8). Plaintiffs' education is also not disrupted or impeded by 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. (Bowman Decl. ¶¶ 9 – 12; Pasquinelli Decl.¶¶ 7 – 8). "Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995).

71. Defendants' actions have caused and continue to cause Plaintiffs to suffer from distress, anxiety, discomfort, depression, and humiliation. Juliet Decl. ¶¶ 46-52, 54-55, 62; Elissa

Decl. ¶¶ 28, 31, 34, 40; A.S. Decl. ¶¶ 24, 33-35, 40; G. Ridenour Decl. ¶¶ 39, 44; M. Evancho Decl. ¶¶ 18, 32, 35; *see also* Ehrensaft Decl. ¶¶ 37-38; DE 23-10 at 10-12.

OBJECTION: Plaintiffs fail to meet their burden because they only offer possible, speculative and remote injuries that may occur in the indefinite future. *Dice v. Clinicorp Inc.*, 887 F. Supp. 803, 809 (W.D. Pa. 1995). Furthermore, 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 simply not alleged any injuries that cannot be compensated by monetary damages and thus fail to meet the requisite irreparable harm for injunctive relief. *Adams v. Freedom Forge Corp.*, 204 F. 3d 475, 485 (3d Cir. 2000). Also, Plaintiffs' alleged harm caused by their rejection of using the District's unisex restrooms located throughout the High School is a harm caused by their own refusal and rejection of a permissible alternative. (Evancho Decl. ¶ 48; Ridenour Decl. ¶ 35; A.S. Decl. ¶ 34). An injunction will not issue "to restrain one from doing what he [or she] is not attempting and does not intend to do." *Continental Group, Inc. v. Amoco Chems. Corp.*, 624 F. 2d 351 (3d Cir. 1980). Additionally, Plaintiffs' claims of being "marginalized and separated from the student body" by being forced to use the District's unisex restrooms are discredited by the fact that all District students are welcome to use, and do in fact use, the unisex restrooms. (Evancho Decl. ¶ 49; Ridenour Decl. ¶ 36 – 37; A.S. Decl. ¶ 25; Bowman Decl ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8) There exists no "stigma" or "marginalization" associated with the use of the unisex restrooms at the High School. (Bowman Decl. ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8). Plaintiffs' education is also not disrupted or impeded by 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. (Bowman Decl. ¶¶ 9 – 12; Pasquinelli Decl.¶¶ 7 – 8). "Irreparable harm will not be found

where alternatives already available to the plaintiff make an injunction unnecessary." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995).

72. Plaintiffs also increasingly feel isolated, marginalized, and stigmatized by Defendants' actions. Juliet Decl. ¶¶ 38-39, 46, 48-49, 62; Elissa Decl. ¶¶ 36-37, 40; A.S. Decl. ¶ 35. They live in constant fear of being stigmatized for using a restroom that is not consistent with their gender identity and being referred to by his female birth name and pronouns—which could lead to involuntary and consistent disclosure of their transgender status to others, harassment, or even violence. Juliet Decl. ¶ 58; Elissa Decl. ¶ 35; A.S. Decl. ¶ 35.

OBJECTION: Plaintiffs fail to meet their burden because they only offer possible, speculative and remote injuries that may occur in the indefinite future. *Dice v. Clinicorp Inc.*, 887 F. Supp. 803, 809 (W.D. Pa. 1995). Furthermore, 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 simply not alleged any injuries that cannot be compensated by monetary damages and thus fail to meet the requisite irreparable harm for injunctive relief. *Adams v. Freedom Forge Corp.*, 204 F. 3d 475, 485 (3d Cir. 2000). Also, Plaintiffs' alleged harm caused by their rejection of using the District's unisex restrooms located throughout the High School is a harm caused by their own refusal and rejection of a permissible alternative. (Evancho Decl. ¶ 48; Ridenour Decl. ¶ 35; A.S. Decl. ¶ 34). An injunction will not issue "to restrain one from doing what he [or she] is not attempting and does not intend to do." *Continental Group, Inc. v. Amoco Chems. Corp.*, 624 F. 2d 351 (3d Cir. 1980). Additionally, Plaintiffs' claims of being "marginalized and separated from the student body" by being forced to use the District's unisex restrooms are discredited by the fact that all District students are welcome to use, and do in fact use, the unisex restrooms. (Evancho Decl. ¶ 49; Ridenour Decl. ¶ 36 – 37;

A.S. Decl. ¶ 25; Bowman Decl ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8) There exists no "stigma" or "marginalization" associated with the use of the unisex restrooms at the High School. (Bowman Decl. ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8). Plaintiffs' education is also not disrupted or impeded by 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. (Bowman Decl. ¶¶ 9 – 12; Pasquinelli Decl.¶¶ 7 – 8). "Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995).

73. Because of Defendants' actions, Plaintiffs have been compelled to not use the restroom at all while at school except when absolutely necessary, which causes them great discomfort and can lead to adverse health consequences. Juliet Decl. ¶ 50; Elissa Decl. ¶ 38; A.S. Decl. ¶ 36; *see also* Ehrensaft Decl. ¶¶ 37-38; DE 23-10 at 10-12.

OBJECTION: Plaintiffs' alleged harm caused by their rejection of using the District's unisex restrooms located throughout the High School is a harm caused by their refusal and rejection of a permissible alternative. (Evancho Decl. ¶ 48; Ridenour Decl. ¶ 35; A.S. Decl. ¶ 34). An injunction will not issue "to restrain one from doing what he [or she] is not attempting and does not intend to do." *Continental Group, Inc. v. Amoco Chems. Corp.*, 624 F. 2d 351 (3d Cir. 1980).

74. Defendants' actions have also caused Plaintiffs to fear for their safety and well-being. Juliet Decl. ¶¶ 40, 52, 54-55, 58; A.S. Decl. ¶¶ 38-39; M. Evancho Decl. ¶¶ 24, 28-29; *see also* Ehrensaft Decl. ¶¶ 37-38; DE 23-10 at 9-10.

OBJECTION: 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. *Adams v. Freedom Forge Corp*., 204 F. 3d 475, 485 (3d Cir. 2000).

75. Defendants' actions have negatively affected Plaintiffs' schoolwork, just as they are in the process of deciding whether and where to go to college. Juliet Decl. ¶ 59; A.S. Decl. ¶¶ 30, 37; *see also* Ehrensaft Decl. ¶ 35. In the school context, even "diminished academic motivation" is sufficient to constitute irreparable harm. *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 853 (7th Cir. 1999).

OBJECTION: Plaintiffs' grades have not suffered, and their attendance has remained largely consistent since prior to the passage of Resolution #2. (Miller, Decl. ¶ 28, 29; Bowman Decl.¶ 24, Ex. B). Furthermore, 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. (Bowman Decl. ¶¶ 9 – 12; Pasquinelli Decl.¶¶ 7 – 8). "Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995).

76. In addition, there is a presumption of irreparable harm when a plaintiff's constitutional rights or civil rights have been violated. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001); *Rogers v. Windmill Pointe Village Club Ass'n*, 967 F.2d 525, 528 (11th Cir. 1992).

OBJECTION: 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. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed. 547 (1976) (finding loss of First Amendment freedoms constitutes irreparable injury because threatened and occurring).

77. When preliminary injunctive relief is requested to prevent the violation of constitutional rights, no further showing of irreparable injury is required. *See Murray v. Silberstein*, 882 F.2d 61, 64 (3d Cir. 1989) (quoting *Elrod v. Burns*, 427 U.S. 347, 373–75 (1976)). The violation of constitutional rights constitutes irreparable injury. *See Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007).

OBJECTION: 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. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed. 547 (1976) (finding loss of First Amendment freedoms constitutes irreparable injury because threatened and occurring).

78. Finally, Plaintiffs have no adequate remedy at law for the aforementioned harms. Irreparable harm is found where a final judgment would be insufficient to compensate for the harm caused by Defendants' actions. *See Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.,* 735 F.3d 735, 740 (7th Cir. 2013); *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992).

OBJECTION: Plaintiffs have an adequate remedy which is a trial on the merits of their claims. Plaintiffs may be compensated with monetary damages just the same as any other plaintiff who alleges mental anguish resulting from some injury. Such damages may be ascertained through the presentation of bills for psychiatric care, the testimony of expert witnesses, etc.

79. Here, Defendants' have upended the status quo during Plaintiffs' last year of high school. *See Amalgamated Food Emp. Union, Loc. No. 590 v. Natl. Tea Co.*, 346 F. Supp. 875, 883 (W.D. Pa. 1972). Thus, even if, at the conclusion of this case, Plaintiffs were to prevail, there is no recovery that possibly could give back to Plaintiffs the loss suffered if they are forced to spend their senior year focusing on avoiding using the restroom, rather than on their studies,

extracurricular activities, and college application process. *See Whitaker*, 2016 WL 5239829, at *4. No amount of damages can compensate Plaintiffs' for such harm.

OBJECTION: Such relief requested by Plaintiffs equates to a mandatory injunction and would overturn the status quo. The status quo, as recognized by the United States Supreme Court via the issuance of its stay in the *G.G.* matter (see above), is consistent with the use of restrooms according to biology. In this instance, the District's High School offers Plaintiffs the alternative of ten (10) unisex restrooms which do not stigmatize or marginalize their identities as such restrooms are routinely used by the entire student body. That is to say that the unisex restrooms are open to all students, and are used by both cisgender and transgender students.

80. Plaintiffs will undoubtedly suffer serious and irremediable harm if the injunction is not granted. Final judgment at trial in their favor can never rectify the significant psychological, academic, and physical harm that Defendants' continued discriminatory actions would cause.

OBJECTION: Plaintiffs fail to establish irreparable harm, and any injury alleged by Plaintiffs may be compensated with monetary damages just the same as any other plaintiff who alleges mental anguish resulting from some injury. Such damages may be ascertained through the presentation of bills for psychiatric care, the testimony of expert witnesses, etc.

The Balance of the Equities and the Public Interest Strongly Favor the Issuance of a Preliminary Injunction.

81. The balance of the equities favors granting a preliminary injunction. The more likely Plaintiffs are to win, the less heavily the balance of the equities must weigh in their favor. *See Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 729 (3d Cir. 2004). Here, Plaintiffs have demonstrated a strong likelihood that they will ultimately prevail in their claims. Moreover,

Plaintiffs have demonstrated that, absent preliminary relief, they will continue to suffer irreparable harms, including distress, stigma, anxiety, depression, decreased academic performance, and possible disciplinary actions—all during their irreplaceable senior year of high school.

OBJECTION: As Plaintiffs have not made their threshold showings of likelihood of success on the merits and irreparable harm (see above), this Court must deny the requested injunction. *Girl Scouts*, 549 F.3d at 1086. Also, because of these failures, this Court is not required to address the balancing phase of the analysis. Even so, the District will be harmed if the long-standing use of restrooms based upon biology is overturned. Rather than permitting the District to focus on the educational needs of its students, granting Plaintiffs' injunctive relief will force the District to focus on the use of its restroom facilities as an official practice that has not been done before. Based upon the rigorous debate during the School Board's deliberation process, the Defendants contend that public debate would now continue and distract from the educational programs until such time as an ultimate determination on this issue is made by this Court or otherwise. The resulting controversy would be detrimental to the District's students' education. Disrupting the status quo would distract from the District's primary mandate of providing the best education for its students. (Miller Decl. ¶ 23).

82. Defendants cannot point to any possible harms should the preliminary injunction be granted. Indeed, Defendants have admitted that transgender students have been able to use the restrooms consistent with their gender identity "for several years" and that they "are not aware of any inappropriate actions on the part of any student." DE 23-23 at 2.

OBJECTION: The District will be harmed if the long-standing use of restrooms based upon biology will be overturned. First, the District "not [being] aware of any inappropriate actions on the part of any student" means just that. It certainly does not mean that there are not any District

students who have felt that their privacy rights have been implicated by the District allowing students to use restrooms based upon gender identity instead of biology. In fact, in one known instance, a student addressed this issue with her parent who ultimately enrolled the student at a private school. See Wiethorn Decl. ¶¶15, 16. Another parent made the decision to not have his child return to the District based upon this issue. See DiNucci Decl. ¶¶ 9, 10. Should the District now be enjoined from enforcing Resolution #2 by this Court, it is unknown how many other parents will make similar decisions regarding their children to the detriment of the District. Furthermore, rather than permitting the District to focus on the educational needs of its students, granting Plaintiffs' injunctive relief will force the District to focus on the use of its restroom facilities as an official practice that has not been done before. Based upon the rigorous debate during the School Board's deliberation process, the Defendants contend that public debate would now continue and distract from the educational programs until such time as an ultimate determination on this issue is made by this Court or otherwise. The resulting controversy would be detrimental to the District's students' education. Disrupting the status quo would distract from the District's primary mandate of providing the best education for its students. (Miller Decl. ¶ 23).

83. A factor that weighs in the balance of the equities is the goal of maintaining the status quo, which is defined as the last peaceable, uncontested status of the parties. *See Kos Pharm.*, Inc., 369 F.3d at 729. Plaintiffs' request is to return to the status quo, where for several years Defendants allowed transgender students to use the restrooms consistent with their gender identity. *See* DE 23-3 at 5; DE 23-5 at 35. This factor clearly weighs in Plaintiffs' favor.

OBJECTION: The status quo, as recognized by the United States Supreme Court via the issuance of its stay in the *G.G.* matter (see above), is consistent with the use of restrooms according to biology. In this instance, the District's High School offers Plaintiffs the alternative of ten (10)

unisex restrooms which do not stigmatize or marginalize their identities as such restrooms are routinely used by the entire student body. That is to say that the unisex restrooms are open to all students, and are used by both cisgender and transgender students.

84. The public interest also strongly favors granting the requested injunction. Indeed, the public interest demands respect for both constitutional rights and effective education. *See Sypniewski v. Warren Hills Reg'l. Bd. of Educ.*, 307 F.3d 243, 258 (3d Cir. 2002); *see also Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883–84 (3d Cir. 1997). The public interest also commands the firm enforcement of Title IX. *See Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993); *see also Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *20.

OBJECTION: Courts are restrained, when dealing with matters of school policy, by the long-established and salutary rule that the courts should not function as super school boards. The court will not interfere with the discretionary exercise of a school board's power unless the action was based on a misconception of law, ignorance through lack of inquiry into the facts necessary to form an intelligent judgment, or the result of arbitrary will or caprice. It is only when the board transcends the limits of its legal discretion that it is amenable to the injunctive processes of a court of equity. *Zebra v. School Dist of the City of Pittsburgh*., 449 Pa. 432, 437, 296 A.2d 748, 1972 Pa. LEXIS 394 (Pa. 1972) citing, *Landerman v. Churchill Area School District*, 414 Pa. 530, 534, 200 A. 2d 867, 869 (1964); *Deteweiler v. Hatfield Borough School District*, 376 Pa. 555, 566, 104 A. 2d 100, 116-117 (1954). The burden of showing such an abuse is a heavy one and rests with the party seeking the injunction. *Zebra*, 449 Pa. 432, 437 citing, *Hibbs v. Arensberg*, 276 Pa. 24, 26, 119 A. 727, 728 (1923). The Pennsylvania courts have set a high standard for reversal of a school board's discretionary decision:

> [T]he exercise of discretion by the school authorities will be interfered with only when there is a clear abuse of it, and the burden of showing such an abuse is a heavy one. In those few instances where the court has interfered with the administrative power of school boards, the interference was based on the school boards' manifestly illegal action in violating the express words of statutes defining their powers, or on facts clearly indicating bad faith and violation of their public duty.

Telly v. Pennridge Sch. Dist. Bd. of Sch. Dirs., 617 Pa. 473, 491, 53 A.3d 705, 2012 Pa. LEXIS 1860 (Pa. 2012) citing, *Wilson v. Sch. Dist. of Philadelphia*, 328 Pa. 225, 239, 195 A. 90, 98 (1937)

Plaintiffs Shall Not Be Required to Post a Bond

85. A court may waive the requirement to post a bond under Federal Rule of Civil Procedure 65(c) where no risk of monetary loss to the Defendants is shown. *See Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988). And even in instances where there is some risk of monetary loss, the amount of the bond is left to the discretion of the court. *Id.*

NO OBJECTION.

86. This is not a suit involving a commercial or business dispute. Rather, an injunction against the governmental Defendants here restores the status quo that governed restroom access for transgender students for years without incident. Restoring restroom access for these Plaintiffs during the pendency of this litigation poses no financial burden or cost, nor any risk of monetary loss, on the Defendants. (Indeed, the injunction actually may protect the School from separate action by the Department of Education to withhold federal funding for violation of Title IX—a benefit to the Defendants as well as the Plaintiffs while this litigation progresses).

DEFENDANTS LEAVE THE DECISION CONCERNING THE AMOUNT OF ANY BOND WITH THE COURT.

87. Accordingly, the balance of the equities weighs overwhelmingly in favor of the plaintiff students seeking the injunction against their school and the Court specifically finds that the facts warrant invoking the rare and narrow exception to the bond requirement of Rule 65(c). *See Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412, 425-26 (3d Cir. 2010).

DEFENDANTS LEAVE THE DECISION CONCERNING THE AMOUNT OF ANY BOND WITH THE COURT.

88. For these reasons, the Court finds that Plaintiffs need not post a bond.

DEFENDANTS LEAVE THE DECISION CONCERNING THE AMOUNT OF ANY BOND WITH THE COURT.

SUBMISSION OF MATTER TO THE COURT

On October 24, 2016, this Court Ordered that, as part of their filings, the parties delineate the witnesses that they intend to call at the hearing on Plaintiffs' Motion for Preliminary Injunction and include a paragraph stating the tenor of each witness' testimony (see Doc. #30). In this regard, and based upon various joint discussions between counsel concerning the same, Defendants desire to advise this Court that Plaintiffs have mutually agreed that Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter may be considered by this Court based upon the documents submitted to the Court regarding said Motion (i.e. briefs, affidavits, exhibits, etc.) and oral argument by counsel. Also, Defendants mutually understand that, ultimately, this "Court will, in its discretion, and after review of the pleadings and affidavit(s), determine whether or not to

conduct a hearing and, if so, the scope of the testimony necessary to resolve the matter" (see "Practices and Procedures of Judge Mark R. Hornak" addressing "Injunctions and Temporary Restraining Orders").

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 21st day of November, 2016, I have filed the foregoing **Defendants' Responses to Plaintiffs' Proposed Findings of Fact and Conclusions of Law regarding Plaintiffs' Motion for Preliminary Injunction** with the Clerk of Courts via the District Court Electronic Case Filing System which will send notification of such filings to the following counsel of record:

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