UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRIVACY MATTERS, a voluntary unincorporated association; and **PARENT A**, president of Privacy Matters, Plaintiffs, vs. **UNITED STATES DEPARTMENT OF EDUCATION**; **JOHN B. KING, JR.,** in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE**; **LORETTA E. LYNCH**, in her official capacity as United States Attorney General, and **INDEPENDENT SCHOOL DISTRICT NUMBER 706, STATE OF MINNESOTA.** Defendants.	**Case No. 0:16-cv-03015-WMW-LIB** Judge Wilhelmina M. Wright Magistrate Judge Leo I. Brisbois

DECLARATION OF JORDAN LORENCE

I, Jordan Lorence, declare:

1. I submit this Declaration in support of Plaintiffs' Motion for Preliminary Injunction. I am legal counsel for Plaintiffs in this matter. I have personal knowledge of all matters asserted herein.

2. Exhibit A is a true and accurate copy of Petitioner's Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari in *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52.

3. Exhibit B is a true and accurate copy of the Appendix to Petitioner's Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari in *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52.

4. Exhibit C is a true and accurate copy of Response to Application to Stay Preliminary Injunction and Recall and Stay Mandate Pending a Petition for Certiorari in *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52.

5. Exhibit D is a true and accurate copy of Reply in Support of Petitioner's Application for Recall and Stay of the Fourth Circuit's Mandate Pending Petition for Certiorari in *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52.

I declare under penalty of perjury of the laws of the United States that to the best of my knowledge, information, and belief, the foregoing is true and correct.

Executed in Washington, D.C. on November 2, 2016.

By: /s/ Jordan Lorence

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2016, I electronically filed the foregoing Declaration of Jordan Lorence with the Clerk of Court using the ECF system, which will effectuate service on all parties..

/s/ Jordan Lorence
Jordan Lorence

Exhibit A

No. A16-_____

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

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

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

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

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July 13, 2016

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

QUESTIONS PRESENTED

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

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

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

BACKGROUND

A. Facts

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

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

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

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

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

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

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

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

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

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

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

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

B. District Court proceedings

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

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

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

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

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

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

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

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

C. Fourth Circuit proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

App. G-5 to G-6.

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

JURISDICTION

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

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

REASONS FOR GRANTING A RECALL AND STAY OF THE MANDATE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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July 13, 2016

CERTIFICATE OF SERVICE

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

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_____
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Exhibit B

No. A16-_____

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

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

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

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

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July 13, 2016

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiffs,

v.

CIVIL NO. 4:15cv54

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on Plaintiff G.G.'s challenge to a recent resolution (the "Resolution") passed by the Gloucester County School Board (the "School Board") on December 9, 2014. This Resolution addresses the restroom and locker room policy for all students in Gloucester County Public Schools. Specifically, G.G. brings claims under both the Equal Protection Clause of the Fourteenth Amendment (the "Equal Protection Clause") and Title IX of the Education Amendments of 1972 ("Title IX"), seeking to contest the School Board's restroom policy under the Resolution.

On June 11, 2015, G.G. filed a Motion for Preliminary Injunction, ECF No. 11, and on July 7, 2015, the School Board filed a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court **GRANTED** the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court **DENIED** the Motion for Preliminary Injunction. ECF No. 53. This opinion memorializes the reasons for these orders.

I. FACTUAL AND PROCEDURAL HISTORY

The following summary is taken from the factual allegations contained in Plaintiff's Complaint, which, for purposes of ruling on the Motion to Dismiss as to Count II, the Court accepts as true. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009).

This case arises from a student's challenge to a recent restroom policy passed by the School Board. Plaintiff G.G. was born in Gloucester County on , 1999 and designated female.[1] Compl. ¶¶ 12, 14. However, at a very young age, G.G. did not feel like a girl. Id. ¶ 16. Before age six, Plaintiff "refused to wear girl clothes." Id. ¶ 17. Starting at approximately age twelve, "G.G acknowledged his male gender identity to himself."[2] Id. ¶ 18. In 2013–14, during G.G.'s freshman year of high school, most of his friends were aware that he identified as male. Id. ¶¶ 18–19. Furthermore, away from home and school, G.G. presented himself as a male. Id. ¶ 19.

During G.G.'s freshman year of high school, which began in September 2013, he experienced severe depression and anxiety related to the stress of concealing his gender identity from his family. Id. ¶ 20. This is the reason he alleges that he did not attend school during the spring semester of his freshman year, from January 2014 to June 2014, and instead took classes through a home-bound program. Id. In April 2014, G.G. first informed his parents that he is

[1] For the sake of brevity occasionally in this opinion the term "birth sex" may be used to describe the sex assigned to individuals at their birth. "Natal female" will be used to describe the gender assigned to G.G. at birth.

[2] The American Psychiatric Association ("APA") defines "gender identity" as "an individual's identification as male, female, or, occasionally, some category other than male or female." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) ("DSM"). The DSM is "a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders." Id. at xli. Although the DSM was included in G.G.'s briefs, it was not alleged in the Complaint and will consequently not be considered for the purpose of the Motion to Dismiss. However, the Court finds it instructive for definitional purposes.

transgender, that is, he believed that he was a man.[3] Id. ¶ 21. Sometime after informing his parents that he is transgender in April 2014, G.G., at his own request, began to see a psychologist, who subsequently diagnosed him with Gender Dysphoria.[4] Id. ¶ 21. As part of G.G.'s treatment, his psychologist recommended that G.G. begin living in accordance with his male gender identity in all respects. Id. ¶ 23. The psychologist provided G.G. with a "Treatment Documentation Letter" that confirmed that "he was receiving treatment for Gender Dysphoria and that, as part of that treatment, he should be treated as a boy in all respects, including with respect to his use of the restroom." Id. The psychologist also recommended that G.G. "see an endocrinologist and begin hormone treatment." Id. ¶ 26.

Subsequently, G.G. sought to implement his psychologist's recommendation. Id. ¶ 25. In July 2014, G.G. petitioned the Circuit Court of Gloucester County to change his legal name to his present masculine name and, the court granted his petition. Id. At his own request, G.G.'s new name is used for all purposes, and his friends and family refer to him using male pronouns. Id. Additionally, when out in public, G.G. uses the boys' restroom. Id.

G.G. also sought to implement his lifestyle transition at school. In August 2014, G.G. and his mother notified officials at Gloucester High School that G.G. is transgender and that he had changed his name. Id. ¶ 27. Consequently, officials changed school records to reflect G.G.'s new masculine name. Id. Furthermore, before the beginning of the 2014–15 school year, G.G. and his mother met with the school principal and guidance counselor to discuss his social transition. Id. ¶ 28. The school representatives allowed G.G. to email teachers and inform them that he preferred to be addressed using his new name and male pronouns. Id. Being unsure how students

[3] The APA defines "transgender" as "the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender." Id.

[4] The APA defines "gender dysphoria" as "the distress that may accompany the incongruence between one's experienced and expressed gender and one's assigned gender." Id.

would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office. Id. ¶ 30. G.G. was also permitted to continue his physical education requirement through his home school program. Id. ¶ 29. Consequently, G.G. "has not and does not intend to use a locker room at school." Id.

However, after 2014–15 school year began, G.G. found it stigmatizing to use a separate restroom. Id. ¶ 31. G.G. requested to use the male restroom. Id. On or around October 20, 2014, the school principal agreed to G.G.'s request. Id. ¶ 32. For the next seven weeks, G.G. used the boys' restroom. Id.

Some members of the community disapproved of G.G.'s use of the men's bathroom when they learned of it. Id. ¶ 33. Some of these individuals contacted members of the School Board and asked that G.G. be prohibited from using the men's restroom. Id. Shortly before the School Board's meeting on November 11, 2014, one of its members added an item to the agenda, titled "Discussion of Use of Restrooms/Locker Room Facilities," along with a proposed resolution. Id. ¶ 34. This proposed resolution stated as follows:

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

Id. ¶ 34. At the meeting, a majority of the twenty-seven people who spoke were in favor of the proposal. Id. ¶ 37. Some proponents argued that transgender students' use of the restrooms would violate the privacy of other students and might "lead to sexual assault in the bathrooms." Id. It was suggested that a non-transgender boy could come to the school in a dress and demand to use the girls' restroom. Id. G.G. addressed the group and spoke against the proposed resolution and thus identified himself to the entire community. Id. ¶ 38. At the end of the meeting, the School Board voted 4-3 to defer a vote on the policy until its meeting on December 9, 2014. Id. ¶ 39.

On December 3, 2014, the School Board issued a news release stating that regardless of the outcome, it intended to take measures to increase privacy for all students using school restrooms, including "expanding partitions between urinals in male restrooms"; "adding privacy strips to the doors of stalls in all restrooms"; and "designat[ing] single-stall, unisex restrooms, similar to what's in many other public spaces." Id. ¶ 41. On December 9, 2014, the School Board held a meeting to vote on the proposed resolution. Id. Before the vote was conducted, a Citizens' Comments Period was held to allow a discussion on the proposed resolution. Id. Again, a majority of the speakers supported the resolution. Id. ¶ 42. Speakers again raised concerns about the privacy of other students. Id. After thirty-seven people spoke during the Citizens' Comment Period, the School Board voted 6-1 to pass the Resolution. Id. ¶ 43.

On December 10, 2015, the day after the School Board passed the Resolution, the school principal informed G.G. that he could no longer use the boys' restroom and would be disciplined if he did. Id. ¶ 45.

Since the adoption of the restroom policy, certain physical improvements have been made to the school restrooms at Gloucester High School. The school has installed three unisex

single-stall restrooms. Id. ¶ 47. The school has also raised the doors and walls around the bathroom stalls so that students cannot see into an adjoining stall. Id. Additionally, partitions were installed between the urinals in the boys' restrooms. Id.

Sometime after the actions of the School Board, G.G. began receiving hormone treatment in December 2014. Id. ¶ 26 These treatments have deepened his voice, increased the growth of his facial hair, and given him a more masculine appearance. Id.

It is alleged that "[u]sing the girls' restroom is not possible for G.G." Id. ¶ 46. G.G. alleges that prior to his treatment for Gender Dysphoria, girls and women who encountered G.G. in female restrooms would react negatively because of his masculine appearance; that in eighth and ninth grade, the period from September 2012 to June 2014, girls at school would ask him to leave the female restroom; and that use of the girls' restroom would also cause G.G. "severe psychological stress" and would be "incompatible with his medically necessary treatment for Gender Dysphoria." Id.

G.G. further alleges that he refuses to use the separate single-stall restrooms installed by the school because the use of them would stigmatize and isolate him; that the use of these restrooms would serve as a reminder that the school views him as "different"; and that the school community knows that the restrooms were installed for him. Id.

From these alleged facts, on June 11, 2015, G.G. brought the present challenge to the School Board's restroom policy under the Equal Protection Clause and Title IX. ECF No. 8. On that same day, G.G. filed the instant Motion for Preliminary Injunction, requesting that the Court issue an injunction allowing G.G. to use the boys' bathroom at Gloucester High School until this case is decided at trial. ECF No. 11. On June 29, 2015, the United States ("the Government"), through the Department of Justice, filed a Statement of Interest, asserting that the School Board's

bathroom policy violated Title IX. ECF No. 28. The School Board filed an Opposition to the Motion for Preliminary Injunction on July 7, 2015, ECF No. 30, along with a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court granted the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court denied the Motion for Preliminary Injunction. ECF No. 53. This opinion memorializes the reasons for these orders.

II. MOTION TO DISMISS

A. STANDARD OF REVIEW

The function of a motion to dismiss under Rule 12(b)(6) is to test "the sufficiency of a complaint." Occupy Columbia v. Haley, 738 F.3d 107, 116 (4th Cir. 2013). "[I]mportantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). "To survive such a motion, the complaint must allege facts sufficient 'to raise a right to relief above the speculative level' and 'state a claim to relief that is plausible on its face.'" Haley, 738 F.3d at 116. When reviewing the legal sufficiency of a complaint, the Court must accept "all well-pleaded allegations in the plaintiff's complaint as true" and draw "all reasonable factual inferences from those facts in the plaintiff's favor." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). Legal conclusions, on the other hand, are not entitled to the assumption of truth if they are not supported by factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). However, a motion to dismiss should be granted only in "very limited circumstances." Rogers v. Jefferson–Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989).

B. COUNT II - TITLE IX

G.G. also alleges that the School Board's bathroom policy violates Title IX. Under Title

IX, "[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 . . . ." 20 U.S.C. § 1681(a). "Under Title IX, a prima facie case is established by a plaintiff showing (1) that [he or] she was excluded from participation in (or denied the benefits of, or subjected to discrimination in) an educational program; (2) that the program receives federal assistance; and (3) that the exclusion was on the basis of sex." Manolov v. Borough of Manhattan Comm. Coll., 952 F. Supp. 2d 522, 532 (S.D.N.Y. 2013) (quoting Murray v. N.Y. Univ. Coll. of Dentistry, No. 93 Civ. 8771, 1994 WL 533411, at *5 (S.D.N.Y. Sept. 29, 1994)); Bougher v. Univ. of Pittsburgh, 713 F. Supp. 139, 143–44 (W.D. Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989)).

The School Board Resolution expressly differentiates between students who have a gender identity congruent with their birth sex and those who do not. Compl. ¶ 34. G.G. alleges that this exclusion from the boys' bathroom based on his gender identity constitutes sex discrimination under Title IX. Compl. ¶¶ 64, 65.

1. Arguments

The parties contest whether discrimination based on gender identity is barred under Title IX. To support their respective contentions, both parties cite to cases interpreting Title VII, upon which courts have routinely relied in determining the breadth of Title IX. See Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

The School Board argues that sex discrimination does not include discrimination based on gender identity. For support, the School Board cites Johnston v. University of Pittsburgh of Commonwealth System of Higher Education, --- F. Supp. 3d ---- , 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015). In Johnston, the Western District of Pennsylvania found that a policy separating the bathrooms by birth sex at the University of Pittsburgh did not violate Title IX because sex

discrimination does not include discrimination against transgender individuals. 2015 WL 1497753, at *12–19. The School Board asserts that Johnston establishes that Title IX does not incorporate discrimination based on gender or transgender status.

In response, G.G. maintains that sex discrimination includes discrimination based on gender. G.G. cites to a number of Title VII cases in which courts have found sex discrimination to include gender discrimination. See, e.g., Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004); Finkle v. Howard Cnty., Md., 12 F. Supp. 3d 780, 788 (D. Md. 2014); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); see also Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) ("'[S]ex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.").

In addition, G.G. contends that the cases Johnston cited to support its proposition, Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), and, Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982), cert. denied, 471 U.S. 1017 (1985),[5] are no longer good law. In both Ulane and Sommers, the courts refused to extend sex discrimination to include discrimination against transgender individuals or those with nonconforming gender types. However, G.G. asserts that Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), overruled these cases. In Price Waterhouse, the Supreme Court considered a Title VII claim based on allegations that an employee at Price Waterhouse was denied partnership because she was considered "macho" and "overcompensated for being a woman." 490 U.S. at 235. She had been advised to "walk more femininely, talk more

[5] The more recent case Johnston cites is a Tenth Circuit case, in which the court avoided deciding the issue. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) ("This court need not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex' and we need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex.").

femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. The Court found that such comments were indicative of gender stereotyping, which Title VII prohibited as sex discrimination. The Court explained that

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

Id. at 251 (quoting L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). Accordingly, the Court found that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be" has acted on the basis of sex. Id. at 251.

Other courts have found that Price Waterhouse overruled the cases cited in Johnston. "[S]ince the decision in Price Waterhouse, federal courts have recognized with near-total uniformity that 'the approach in . . . Sommers, and Ulane . . . has been eviscerated' by Price Waterhouse's holding." Glenn, 663 F.3d at 1318 n.5 (quoting City of Salem, 378 F.3d at 573)); see also Schwenk, 204 F.3d at 1201 ("The initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse."); Lopez, 542 F. Supp. 2d at 660. Based on Price Waterhouse and its progeny, G.G. claims that discrimination against transgender individuals or other nonconforming gender types is now prohibited as a form of sex discrimination. Accordingly, G.G. asserts that the Resolution's differentiation between students who have a gender identity congruent with their birth sex, and those who do not, amounts to sex discrimination under Title IX.

2. Analysis

Although the primary contention between the parties is whether gender discrimination fits within the definition of sex discrimination under Title IX, G.G.'s claim does not rest on this

distinction. Rather, the Court concludes that G.G.'s Title IX claim is precluded by Department of Education regulations. As noted above, 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. However, this prohibition on sex-based decision making is not without exceptions. Among the exceptions listed in Title IX is a provision stating that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Although the statute does not expressly state that educational institutions may maintain separate bathrooms for the different sexes, Department of Education regulations stipulate:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33. This regulation (hereinafter, "Section 106.33") expressly allows schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable. When Congress delegates authority to any agency to "elucidate a specific provision of the statute by regulation, any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." United States v. Mead Corp., 533 U.S. 218, 227 (2001). The Department of Education's regulation is not "arbitrary, capricious, or manifestly contrary to the statute."[6] Rather, Section 106.33 seems to effectuate Title IX's provision allowing separate living facilities based on sex.[7] Therefore, Section 106.33

[6] It is significant that neither party raised, nor even hinted at raising, a challenge to the validity of Section 106.33 under Title IX.

[7] The term "living facilities" in 20 U.S.C. § 1686 is ambiguous, and legislative history of Title IX does not

is given controlling weight.

In light of Section 106.33, G.G. fails to state a valid claim under Title IX. G.G. alleges that the School Board violated Title IX by preventing him from using the boys' restrooms despite the fact that his gender identity is male. Compl. ¶¶ 64, 65. According to G.G., the School Board's determination was based on the belief that Plaintiff is biologically female, not biologically male.[8] Id. ¶ 65. However, Section 106.33 specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable. Therefore, the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex.

In fact, the only way to square G.G.'s allegations with Section 106.33 is to interpret the use of the term "sex" in Section 106.33 to mean *only* "gender identity." Under this interpretation, Section 106.33 would permit the use of separate bathrooms on the basis of gender identity and *not* on the basis of birth or biological sex. However, under any fair reading, "sex" in Section 106.33 clearly includes biological sex. Because the School Board's policy of providing separate bathrooms on the basis of biological sex is permissible under the regulation, the Court need not decide whether "sex" in the Section 106.33 also includes "gender identity."

Instead, the Court need only decide whether the School Board's bathroom policy satisfies Section 106.33. Section 106.33 states that sex-segregated bathrooms are permissible unless such

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provide clear guidance as to its meaning. This term could be narrowly interpreted to mean living quarters, such as dormitories, or it could be broadly interpreted to include other facilities, such as bathrooms. See Implementing Title IX: The New Regulations, 124 U. Pa. L. Rev. 806, 811 (1976). Because the Department of Education's inclusion of bathrooms within "living facilities" is reasonable, the Court defers to its interpretation. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

[8] The Court is sensitive to the fact the G.G. disapproves of the School Board's term "biological gender." See Compl. ¶ 66 (placing biological in dismissive quotation marks). G.G. may also take issue with the Court's phrase biological sex. The Court is guided in its usage by the APA "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" from 2011, which the School Board submitted with its Brief in Opposition to Motion for Preliminary Injunction. Ex. 3, ECF No. 30. The APA defines "sex" as "a person's biological status," and identifies "a number of indicators of biological sex." Id.

facilities are not comparable. G.G. fails to allege that the bathrooms to which he is allowed access by the School Board—the girls' restrooms and the single-stall restrooms—are incomparable to those provided for individuals who are biologically male. In fact, none of the allegations in the Complaint even mention or imply that the facilities in the bathrooms are not comparable. Consequently, G.G. fails to state a claim under Title IX.

Nonetheless, despite Section 106.33, the Government urges the Court to defer to the Department of Education's interpretation of Title IX, which maintains that a policy that segregates bathrooms based on biological sex and without regard for students' gender identities violates Title IX. In support of its position, the Government attaches a letter (the "Letter"), dated January 7, 2015, issued by the Department of Education, through the Office for Civil Rights, apparently clarifying its stance on the treatment of transgender students with regard to sex-segregated restrooms. Statement of Interest 9, ECF No. 28; id. Ex. B, at 2, ECF No. 28-2. In the Letter, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights, writes:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school must treat transgender students consistent with their gender identity.

Id. at 9–10, Ex. B, at 2. The Letter cites a Department of Education significant guidance document (the "Guidance Document") published in 2014 in support of this interpretation. According to the Guidance Document:

> Under Title IX, a recipient must generally treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.

See Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (Dec. 1, 2014). Despite the fact that Section 106.33 has been in effect since 1975,[9] the Department of Education does not cite any documents published before 2014 to support the interpretation it now adopts.

The Department of Education's interpretation does not stand up to scrutiny. Unlike regulations, interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines "do not warrant Chevron-style deference" with regard to statutes. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000). Therefore, the interpretations in the Letter and the Guidance Document cannot supplant Section 106.33. Nonetheless, these documents can inform the meaning of Section 106.33. An agency's interpretation of its own regulation, even one contained in an opinion letter or a guidance document, is given controlling weight if (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. Id. at 588 ("Auer deference is warranted only when the language of the regulation is ambiguous."); Auer v. Robbins, 519 U.S. 452, 461 (1997) ("[The agency's] interpretation of [its own regulation] is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.").

Upon review, the Department of Education's interpretation should not be given controlling weight. To begin with, Section 106.33 is not ambiguous. It clearly allows the School Board to limit bathroom access "on the basis of sex," including birth or biological sex. Furthermore, the Department of Education's interpretation of Section 106.33 is plainly erroneous and inconsistent with the regulation. Even under the most liberal reading, "on the basis of sex" in Section 106.33 means both "on the basis of gender" *and* "on the basis of biological sex." It does

[9] Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and adopted by the Department of Education upon its establishment in 1980. 45 Fed. Reg. 30802, 30955 (May, 9 1980) (codified at 34 C.F.R. §§ 106.1–.71).

not mean "only on the basis of gender." Indeed, the Government itself states that "under Price Waterhouse, 'sex' . . . encompasses both sex—that is, the biological differences between men and women—*and* gender." Statement of Interest 6–7, ECF No. 28. Thus, at most, Section 106.33 *allows* the separation of bathroom facilities on the basis of gender. It does not, however, require that sex-segregated bathrooms be separated on the basis of gender, rather than on the basis of birth or biological sex. Gender discrimination did not suddenly supplant sex discrimination as a result of Price Waterhouse; it supplemented it.

To defer to the Department of Education's newfound interpretation would be nothing less than to allow the Department of Education to "create *de facto* a new regulation" through the use of a mere letter and guidance document. See Christensen, 529 U.S. at 588. If the Department of Education wishes to amend its regulations, it is of course entitled to do so. However, it must go through notice and comment rulemaking, as required by the Administrative Procedure Act. See 5 U.S.C. § 553. It will not be permitted to disinterpret its own regulations for the purposes of litigation. As the Court noted throughout the hearing, it is concerned about the implications of such rulings. Mot. to Dismiss & Prelim. Inj. Hr'g at Tr. 65:23–66:19; 73:6–74:7. Allowing the Department of Education's Letter to control here would set a precedent that agencies could avoid the process of formal rulemaking by announcing regulations through simple question and answer publications. Such a precedent would be dangerous and could open the door to allow further attempts to circumvent the rule of law—further degrading our well-designed system of checks and balances.

In light of Section 106.33, the Court cannot find that the School Board's bathroom policy violates Title IX.

III. MOTION FOR PRELIMINARY INJUNCTION

The Motion for Preliminary Injunction is entirely different. The complaint is no longer

the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence. G.G. has sought a preliminary injunction. This Motion requests that the Court issue an injunction allowing G.G. to resume using the boys' restrooms at Gloucester High School until there is a final judgment on the merits.[10] ECF No. 11. In support of his motion for a preliminary injunction, G.G. has submitted two declarations: one from G.G. and another from an expert in the field of Gender Dysphoria. Decl. of G.G., ECF No. 9 ("G.G. Decl."); The Expert Declaration of Randi Ettner, Ph.D, ECF No. 10 ("Ettner Decl."). The School Board contests the injunction and attaches single a declaration to its Opposition to the Motion for Preliminary Injunction from Troy Andersen, a member of the School Board and the 2014–15 Gloucester Point District Representative for the Gloucester County School Board. Decl. of Troy Andersen, ECF No. 30-1 ("Andersen Decl."). On July 27, 2015, the parties appeared before the Court to argue this Motion, and both parties were given the opportunity to introduce evidence supporting their respective positions. ECF No. 47. At the hearing, neither G.G. nor the School Board introduced additional evidence for support. Id.

As the Court has granted the School Board's motion to dismiss as to Count II, G.G.'s claim under Title IX, it need not discuss reasons for denying the Motion for Preliminary Injunction on this Count. While the Court has not yet ruled on whether G.G. has stated a claim under the Equal Protection Clause, the Court finds that, even if he has stated a claim, G.G. has not submitted enough evidence to establish that the balance of hardships weigh in his favor. Accordingly, the issuance of a preliminary injunction is not warranted.

A. STANDARD OF REVIEW

"The grant of preliminary injunctions [is] . . . an extraordinary remedy involving the

[10] G.G. claims that he does not intend to use the locker room at school. Mem. in Supp. of Mot. for Prelim. Inj., 8 n.2, ECF No. 18 ("Prelim. Inj."). However, the requested injunction allowing him to use the male restrooms would apply to the male restroom in the locker room.

exercise of a very far-reaching power, which is to be applied 'only in the limited circumstances' which clearly demand it." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1992) (quoting Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989)). A plaintiff must overcome the "uphill battle" of satisfying each of the four factors necessary to obtain a preliminary injunction. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 347 (4th Cir. 2009) (stating that the four factors must be "satisfied as articulated"), vacated on other grounds, 559 U.S. 1089 (2010). To obtain a preliminary injunction, "[p]laintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236 (4th Cir. 2014) (citing Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008)). The failure to make a clear showing of any one of these four factors requires the Court to deny the preliminary injunction.[11] Real Truth About Obama, Inc., 575 F.3d at 346.

A plaintiff seeking a preliminary injunction does not benefit from the presumption that the facts contained in the complaint are true. A plaintiff must introduce evidence in support of a Motion for Preliminary Injunction. While oral testimony is not strictly necessary, this Court has never granted a Preliminary Injunction without first hearing oral testimony. Declarations are frequently drafted by lawyers, and the evidence presented within them is not subject to the rigors of cross examination. A plaintiff relying solely on such weak evidence is unlikely to make the clear showing required for the issuance of a preliminary injunction. Additionally, this Court will

[11] The parties dispute whether the injunction sought is mandatory or prohibitory in nature. "Whereas mandatory injunctions alter the status quo, prohibitory injunctions 'aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.'" League of Women Voters of N.C., 769 F.3d at 236 (quoting Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013)). There is a heightened standard for mandatory injunctions. Taylor v. Freeman, 34 F.3d 266, 270 n.2 (4th Cir. 1994) ("Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances."). Because the Court finds that G.G. fails to show that a preliminary injunction is warranted even if the injunction sought is prohibitory, the Court does not decide the issue.

not consider evidence that would be inadmissible at trial, such as hearsay, that is contained within affidavits.

B. ARGUMENTS OF THE PARTIES AND FACTS IN EVIDENCE

G.G. characterizes the question of competing hardships as "not a close question." Mem. in Supp. of Mot. for Prelim. Inj., 40, ECF No. 18 ("Prelim. Inj."). He argues that this Court must weigh "the severe, documented, and scientifically supported harms" that the restroom policy continues to inflict upon G.G, who has been diagnosed with Gender Dysphoria, against the "School Board's unfounded speculation about harms that might occur to others at some future date." Id. The School Board by contrast implores this Court to consider the safety and privacy interests of all its students. Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. It emphasizes that while litigation is ongoing, G.G. may use the "girls' restroom, the three single-stall restrooms, or the restroom in the nurse's office." Id.

1. Facts and Arguments Concerning the Hardship to G.G.

G.G. relies on two declarations to establish the hardships he would suffer should this Court deny his Motion for Preliminary Injunction. ECF Nos. 9, 10. G.G.'s Declaration largely repeats the material in his complaint. Compare ECF Nos. 8 and 9. The Court recounts only those assertions that concern the effect that G.G.'s Gender Dysphoria has had on his schooling. G.G. alleges other harms he has suffered, such as being humiliated and forced to speak at the School Board hearing, G.G. Decl. ¶ 23, but these harms are not relevant to the issuance of an injunction allowing G.G. to use the male restroom during this litigation. Here the declaration of G.G. is a recital of the allegations in the complaint and is replete with inadmissible evidence including thoughts of others, hearsay, and suppositions. The Court recounts these allegations before analyzing their credibility.

G.G. claims that during his freshman year, which began in September 2013, he

"experienced severe depression and anxiety related to his untreated Gender Dysphoria." Id. ¶ 9. The depression and anxiety were so severe that G.G. did not attend school during the spring semester which began in January 2014. Id. There is nothing to corroborate that his "untreated Gender Dysphoria" was the reason for his absence. In April of 2014, weeks before his fifteenth birthday, G.G. first informed his parents that he is transgender. Id. ¶ 10. After his parents learned of his gender identity, G.G. began "therapy with a psychologist who had experience with working with transgender patients." Id. He claims that this psychologist diagnosed him with Gender Dysphoria and recommended that he begin to live as a boy in all respects, including in his use of the restroom. Id. ¶ 11. There is no report or declaration from this psychologist. In August 2014, G.G. and his mother informed officials at Gloucester High School of his gender identity. Id. ¶ 15 At the start of the school year, G.G. agreed to use a separate restroom in the nurse's office. Id. ¶ 19. G.G. then determined that it "was not necessary to continue to use the nurse's restroom." Id. He claims that he "found it stigmatizing to use a separate restroom." Id.

On December 9, 2014, the School Board adopted the restroom policy. Id. ¶ 22. With the new transgender restroom policy, G.G. feels like he has been "stripped of [his] privacy and dignity." Id. ¶ 23. He is unwilling to use the girls' restroom because, he claims, girls and women object to his presence there. Id. ¶ 25. Additionally, use of the girls' restroom would be incompatible with his treatment for Gender Dysphoria. Id. He claims that the new unisex restrooms are not located near his classes and that only one of these restrooms is located near where the single-sex restrooms are located. Id. ¶ 26. He refuses to use these restrooms because "they make him feel even more stigmatized and isolated than when [he] use[d] the restroom in the nurse's office." Id. ¶ 27. He claims that everyone knows that the restrooms were installed for him. Id. Because G.G. refuses to use any of the restrooms permitted for his use, he has held his

urine and developed urinary tract infections. Id. ¶ 28.

The Expert Declaration of Randi Ettner, Ph.D, adds little to these factual claims. Ettner is not the psychologist who analyzed G.G. after he first told his parents he was transgender; rather, he was retained by G.G.'s counsel in preparation for this litigation. See Ettner Decl. ¶¶ 1, 7, 9. Ettner met G.G. once before preparing his report. Id. ¶ 7. The bulk of his declaration describes the diagnosis and treatment of Gender Dysphoria. It defines Gender Dysphoria as the feeling of incongruence between one's gender identity and the sex assigned one at birth. Id. ¶¶ 11–12. It notes that Gender Dysphoria is "codified in the Diagnostic and Statistical [M]anual of Mental Disorders (DSM-V) (American Psychiatric Association) and the International Classifications of Diseases-10 (World Health Organization)." Id. ¶ 12. It describes the studies that have looked at transgender youth who could not use restrooms corresponding to their gender identity. Id. ¶¶ 18–27. However, beyond confirming that G.G. has a "*severe* degree of Gender Dysphoria," id. ¶ 29, there are no facts particular to G.G. in the report. See id. ¶¶ 28–30.

The School Board, supported by the declaration of Troy Andersen, emphasizes that any student may use the three unisex restrooms that were installed and open for use by December 16, 2014. Andersen Decl. ¶ 7; Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. Any student may also use the restroom in the nurse's office. Andersen Decl. ¶ 7. Moreover, the School Board contends that G.G. may use the female restrooms and locker rooms, Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30, and G.G. has made no showing that he is not permitted to use them.

2. Facts and Arguments Concerning Student Privacy

The School Board contends that granting the preliminary injunction and allowing G.G. to use the male restroom would endanger the safety and privacy of other students. Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. G.G. argues in response, without any independent factual

support, that his presence in the male restroom would not infringe upon the privacy rights of his fellow students. He claims that the student body itself is comfortable with his presence in the restroom because during the seven weeks in which he used the male restroom, he "never encountered any problems from other students." G.G. Decl. ¶ 20. The Andersen Declaration describes a different reaction to G.G.'s use of the male restroom. Andersen Decl. ¶ 4. According to Andersen, the School Board "began receiving numerous complaints from parents and students" the day after G.G. was granted permission to use the boys' bathroom. Id.

G.G. also contends that the improvements that the School Board made to the restrooms alleviated any concerns that parents or students may have had about "nudity involving students of different sexes." Prelim. Inj. at 33. His complaint describes these improvements, which include raising the doors and walls around the bathroom stalls so that students cannot see into an adjoining stall, and adding three unisex, single-stall restrooms. Compl. ¶¶ 47, 52. The School Board disputes the extent to which the improvements have increased privacy and claims that the restrooms, "and specifically the urinals," are "not completely private," although it also does not submit any evidence in support of this contention. Br. in Opp'n to Mot. for Prelim. Inj., 18 n.17, ECF No. 30.

Finally, G.G. argues that any student uncomfortable with his presence in the male restrooms may use the new unisex restrooms. Prelim. Inj. at 35, 39.

C. ANALYSIS

G.G.'s Motion for Preliminary Injunction asks this Court to allow him, a natal female, to use the male restroom at Gloucester High School. Mot. for Prelim. Inj., ECF No. 11. Restrooms and locker rooms are designed differently because of the biological differences between the sexes. See Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) ("differences between the genders demand a facility for each gender that is different"). Male restrooms, for instance, contain

urinals, while female restrooms do not. Men tend to prefer urinals because of the convenience. Furthermore, society demands that male and female restrooms be separate because of privacy concerns. Id.; see also Virginia v. United States, 518 U.S. 515, 550 n.16 (1996) ("[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements"). The Court must consider G.G.'s claims of stigma and distress against the privacy interests of the other students protected by separate restrooms.

In protecting the privacy of the other students, the School Board is protecting a constitutional right. The Fourth Circuit has recognized that prisoners have a constitutional right to bodily privacy. Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981). Although the Fourth Circuit has never held that the right to bodily privacy applies to all individuals, it would be perverse to suppose that prisoners, who forfeit so many privacy rights, nevertheless gained a constitutional right to bodily privacy. In recognizing the right of prisoners to bodily privacy the court spoke in universal terms: "Most people . . . have a special sense of privacy in their own genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating." Id.

Several circuits have recognized the right to bodily privacy outside the context of prisoner litigation. Doe v. Luzerne County, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); Brannum v. Overton County School Bd., 516 F.3d 489, 494 (6th Cir. 2008) (holding that a student's "constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms"); Poe v. Leonard, 282 F.3d 123, 138–39 (2d Cir. 2002) ("there is a right to privacy in one's

unclothed or partially unclothed body"); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). In these circuits, violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. See Doe, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); Brannum, 516 F.3d at 494 ("the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); York, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); Poe, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of defendant and plaintiff in York).

Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public school education is a protective environment. Furthermore, the School Board is tasked with providing safe and appropriate facilities for these students. Linnon v. Commonwealth, 752 S.E.2d 822, 826 (Va. 2014) (finding that "school administrators have a responsibility 'to supervise and ensure that students could have an education in an atmosphere conducive to learning, free of disruption, and threat to person.'" (quoting Burns v. Gagnon, 727 S.E.2d 634, 643 (Va. 2012)).

G.G.'s unsupported claims, which are mostly inadmissible hearsay, fail to show that his presence in the male restroom would not infringe upon the privacy of other students. G.G.'s claim that he "never encountered any problems from other students," G.G. Decl. ¶ 20, is directly contradicted by the Andersen Declaration. Andersen Decl. ¶ 4. Moreover, even if the Court accepted G.G.'s self-serving assertion, it would still not find that there was no discomfort among the students. It would not be surprising if students, rather than confronting G.G. himself,

expressed their discomfort to their parents who then went to the School Board.

G.G. further contends that the improvements that the School Board made to the restrooms minimize any privacy concerns. Prelim. Inj. at 33. However, G.G. does not introduce any evidence that would help the Court understand the extent of the improvements. He fails to recognize that no amount of improvements to the urinals can make them completely private because people sometimes turn while closing their pants. He does not submit any evidence that would show that other students would be comfortable with his presence in the male restroom because of the improvements. Finally, he fails to recognize that the School Board's interests go beyond preventing most exposures of genitalia. The mere presence of a member of the opposite sex in the restroom may embarrass many students and be felt a violation of their privacy. Accordingly, the privacy concerns of the School Board do not diminish in proportion to the size of the stall doors.

G.G.'s argument that other students may use the unisex restrooms if they are uncomfortable with his presence in the male restroom unintentionally reveals the hardship that the injunction he seeks would impose on other students. It does not occur to G.G. that other students may experience feelings of exclusion when they can no longer use the restrooms they were accustomed to using because they feel that G.G.'s presence in the male restroom violates their privacy. He would have any number of students use the unisex restrooms rather than use them himself while this Court resolves his novel constitutional challenge.

G.G.'s dismissal of the School Board's privacy concerns only makes sense if assumes that there are fewer or no privacy concerns when a student shares a restroom with another student of different birth sex but the same gender identity. If there were no privacy concerns in this situation, there would be no hardship if G.G. used the male restroom while this litigation

proceeds. Of course, this litigation is proof that not everyone—certainly not the Gloucester County School Board—shares in this belief. The Court gives great weight to the concerns of the School Board—which represents the students and parents in the community—on the question of the privacy concerns of students, especially at this early stage of litigation and in the complete absence of credible evidence to the contrary.

Against the School Board's strong interest in protecting student privacy, the Court must consider G.G.'s largely unsubstantiated claims of hardship. G.G. acknowledges that he may use the unisex restrooms or the nurse's restroom. His declaration fails to articulate the specific harms that would occur to him if he uses those restrooms while this litigation proceeds; it simply says that using these restrooms would cause him distress and make him feel stigmatized. It is telling to the Court that his declaration mirrors his complaint, a sign that it was drafted by his lawyers and not by him. G.G. attempts to support his claims of distress by describing the diagnosis of the first psychologist who saw him, but these allegations are hearsay and will not be considered.

Similarly, G.G. makes several claims about the thoughts and feelings of other students for which he has not submitted any admissible evidence or corroboration. He has nothing to substantiate his claims that other students view the unisex restrooms as designed solely for him. Nor has he submitted a layout of the school that would confirm his claim that the unisex restrooms are inconvenient for him to use.

The declaration of Dr. Ettner is almost completely devoid of facts specific to G.G. Dr. Ettner is not the psychologist who allegedly first diagnosed G.G. with Gender Dysphoria. Rather, he has been retained for this litigation. Having met G.G. only once, he has little to say about the harm that would occur to G.G. specifically if G.G. is not allowed to use the male restrooms during this litigation.

G.G. has been given an option of using a restroom in addition to the female restroom that corresponds to his biological sex. He has not described his hardship in concrete terms and has supported his claims with nothing more than his own declaration and that of a psychologist who met him only once, for the purpose of litigation and not for treatment. The School Board seeks to protect an interest in bodily privacy that the Fourth Circuit has recognized as a constitutional right while G.G. seeks to overturn a long tradition of segregating bathrooms based on biological differences between the sexes. Because G.G. has failed to show that the balance of hardships weighs in his favor, an injunction is not warranted while the Court considers this claim.

Having found that G.G. has not shown that the balance of the hardships are in his favor, the Court does not need to consider the other showings required for a preliminary injunction. However, the Court notes that just as G.G. has failed to provide adequate proof of the hardship that would occur if the injunction is not granted, he has also failed to make a clear showing of irreparable injury.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTED** the Motion to Dismiss as to Count II, Plaintiff's claim under Title IX, and **DENIED** the Plaintiff's Motion for a Preliminary Injunction. The Clerk is **DIRECTED** to forward a copy of this Opinion to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge

UNITED STATES DISTRICT JUDGE

Newport News, VA
September 17, 2015

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056

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

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee.

JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN &

STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert G. Doumar, Senior District Judge. (4:15-cv-00054-RGD-DEM)

Argued: January 27, 2016 Decided: April 19, 2016

Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

Reversed in part, vacated in part, and remanded by published opinion. Judge Floyd wrote the opinion, in which Senior Judge Davis joined. Senior Judge Davis wrote a separate concurring opinion. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part.

ARGUED: Joshua A. Block, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant. David Patrick Corrigan, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. **ON BRIEF:** Rebecca K. Glenberg, Gail

Deady, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC., Richmond, Virginia; Leslie Cooper, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant. Jeremy D. Capps, M. Scott Fisher, Jr., HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. Cynthia Cook Robertson, Washington, D.C., Narumi Ito, Amy L. Pierce, Los Angeles, California, Alexander P. Hardiman, Shawn P. Thomas, New York, New York, Richard M. Segal, Nathaniel R. Smith, PILLSBURY WINTHROP SHAW PITTMAN LLP, San Diego, California; Tara L. Borelli, Atlanta, Georgia, Kyle A. Palazzolo, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Chicago, Illinois; Alison Pennington, TRANSGENDER LAW CENTER, Oakland, California, for Amici School Administrators Judy Chiasson, David Vannasdall, Diana K. Bruce, Denise Palazzo, Jeremy Majeski, Thomas A. Aberli, Robert Bourgeois, Mary Doran, Valeria Silva, Rudy Rudolph, John O'Reilly, Lisa Love, Dylan Pauly, and Sherie Hohs. Suzanne B. Goldberg, Sexuality and Gender Law Clinic, COLUMBIA LAW SCHOOL, New York, New York; Erin E. Buzuvis, WESTERN NEW ENGLAND UNIVERSITY SCHOOL OF LAW, Springfield, Massachusetts, for Amici The National Women's Law Center, Legal Momentum, The Association of Title IX Administrators, Equal Rights Advocates, Gender Justice, The Women's Law Project, Legal Voice, Legal Aid Society-Employment Law Center, Southwest Women's Law Center, and California Women's Law Center. Jennifer Levi, GAY & LESBIAN ADVOCATES & DEFENDERS, Boston, Massachusetts; Thomas M. Hefferon, Washington, D.C., Mary K. Dulka, New York, New York, Christine Dieter, Jaime A. Santos, GOODWIN PROCTER LLP, Boston, Massachusetts; Shannon Minter, Asaf Orr, NATIONAL CENTER FOR LESBIAN RIGHTS, San Francisco, California, for Amici The World Professional Association for Transgender Health, Pediatric Endocrine Society, Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital, Center for Transyouth Health and Development at Children's Hospital Los Angeles, Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago, Fan Free Clinic, Whitman-Walker Clinic, Inc., GLMA: Health Professionals Advancing LGBT Equality, Transgender Law & Policy Institute, Michelle Forcier, M.D. and Norman Spack, M.D. David Dinielli, Rick Mula, SOUTHERN POVERTY LAW CENTER, Montgomery, Alabama, for Amici Gender Benders, Gay, Lesbian & Straight Education Network, Gay-Straight Alliance Network, iNSIDEoUT, Evie Priestman, ROSMY, Time Out Youth, and We Are Family. James Cole, Jr., General Counsel, Francisco Lopez, Vanessa Santos, Michelle Tucker, Attorneys, Office of the General Counsel, UNITED STATES DEPARTMENT OF EDUCATION, Washington, D.C.; Gregory B. Friel, Deputy Assistant Attorney General, Diana K. Flynn, Sharon M. McGowan, Christine A. Monta, Attorneys, Civil Rights Division, Appellate Section, UNITED

STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States of America. Alan Wilson, Attorney General, Robert D. Cook, Solicitor General, James Emory Smith, Jr., Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Amicus State of South Carolina; Mark Brnovich, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, Phoenix, Arizona, for Amicus State of Arizona; Jim Hood, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MISSISSIPPI, Jackson, Mississippi, for Amicus State of Mississippi; Patrick Morrisey, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Amicus State of West Virginia; Amicus Paul R. LePage, Governor, State of Maine, Augusta, Maine; Robert C. Stephens, Jr., Jonathan R. Harris, COUNSEL FOR THE GOVERNOR OF NORTH CAROLINA, Raleigh, North Carolina, for Amicus Patrick L. Mccrory, Governor of North Carolina. Mary E. McAlister, Lynchburg, Virginia, Mathew D. Staver, Anita L. Staver, Horatio G. Mihet, LIBERTY COUNSEL, Orlando, Florida, for Amici Liberty Center for Child Protection and Judith Reisman, PhD. Jeremy D. Tedesco, Scottsdale, Arizona, Jordan Lorence, Washington, D.C., David A. Cortman, J. Matthew Sharp, Rory T. Gray, ALLIANCE DEFENDING FREEDOM, Lawrenceville, Georgia, for Amici The Family Foundation of Virginia, John Walsh, Lorraine Walsh, Mark Frechette, Jon Lynsky, Bradly Friedlin, Lisa Terry, Lee Terry, Donald Caulder, Wendy Caulder, Kim Ward, Alice May, Jim Rutan, Issac Rutan, Doretha Guju, Rodney Autry, James Larsen, David Thornton, Kathy Thornton, Joshua Cuba, Claudia Clifton, Ilona Gambill, and Tim Byrd. Lawrence J. Joseph, Washington, D.C., for Amicus Eagle Forum Education and Legal Defense Fund.

FLOYD, Circuit Judge:

G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: "[n]o

person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education's (the Department) regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." J.A. 55. Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical

condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery.[1]

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom.[2] G.G. used this restroom without incident for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted

[1] The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association. Id. The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

[2] G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case.

the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." J.A. 15. Hook proposed the following resolution (hereinafter the "transgender restroom policy" or "the policy"):

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

J.A. 15-16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to

him as a "young lady." J.A. 16. Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or "young lady." J.A. 18. One speaker called G.G. a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. Id. Following this second comment period, the Board voted 6-1 to adopt the proposed policy, thereby barring G.G. from using the boys' restroom at school.

G.G. alleges that he cannot use the girls' restroom because women and girls in those facilities "react[] negatively because they perceive[] G.G. to be a boy." Id. Further, using the girls' restroom would "cause severe psychological distress" to

G.G. and would be incompatible with his treatment for gender dysphoria. J.A. 19. As a corollary to the policy, the Board announced a series of updates to the school's restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they "make him feel even more stigmatized . . . . Being required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different.'" Id. G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences "severe and persistent emotional and social harms." Id. G.G. avoids using the restroom while at school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys' restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution.

On July 27, 2015, the district court held a hearing on G.G.'s motion for a preliminary injunction and on the Board's motion to dismiss G.G.'s lawsuit. At the hearing, the district court orally dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. The district court followed its ruling from the bench with a written order dated September 4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.'s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed that the regulations implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.'s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.'s request for an injunction, the district court found that G.G. had not made the required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly

burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.'s presence in the boys' restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court's dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court's rulings and also asks us to dismiss G.G.'s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an amicus brief supporting G.G.'s Title IX claim in order to defend the government's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

We turn first to the district court's dismissal of G.G.'s Title IX claim.[3] We review de novo the district court's grant of

[3] We decline the Board's invitation to preemptively dismiss G.G.'s equal protection claim before it has been fully considered by the district court. "[W]e are a court of review, not of first view." Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1335 (2013) (citation and quotation marks omitted). We will not proceed to the merits of G.G.'s equal protection claim (Continued)

a motion to dismiss. Cruz v. Maypa, 773 F.3d 138, 143 (4th Cir. 2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations and quotations omitted).

As noted earlier, Title IX provides: "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm.[4] See Preston v.

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on appeal without the benefit of the district court's prior consideration.

[4] The Board suggests that a restroom may not be educational in nature and thus is not an educational program covered by Title IX. Appellee's Br. 35 (quoting Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 682 (W.D. Pa. 2015)). The Department's regulation pertaining to "Education programs or activities" provides:

> Except as provided in this subpart, in providing any aid, benefit, or service to a

(Continued)

Virginia ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 680 (1979)). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007).

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of

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> student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> . . .
>
> (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). We have little difficulty concluding that access to a restroom at a school, under this regulation, can be considered either an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity," which, when offered by a recipient institution, falls within the meaning of "educational program" as used in Title IX and defined by the Department's implementing regulations.

separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department's regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."[5] J.A. 55.

[5] The opinion letter cites to OCR's December 2014 "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities." This document, denoted a "significant guidance document" per Office of Management and Budget regulations, states: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) (Continued)

A.

G.G., and the United States as amicus curiae, ask us to give the Department's interpretation of its own regulation controlling weight pursuant to Auer v. Robbins, 519 U.S. 452 (1997). Auer requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. Id. at 461. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, "reflect the agency's fair and considered judgment on the matter in question." Id. at 462. An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded Auer deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a

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available at http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

The dissent suggests that we ignore the part of OCR's opinion letter in which the agency "also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities," as the Board did here. Post at 66. However, because G.G. does want to use shared sex-segregated facilities, the agency's suggestion regarding students who do not want to use such shared sex-segregated facilities is immaterial to the resolution of G.G.'s claim. Nothing in today's opinion restricts any school's ability to provide individual-user facilities.

convenient litigating position, or when the interpretation is a post hoc rationalization. Christopher v. Smithkline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (citations omitted).

The district court declined to afford deference to the Department's interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because "[i]t clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." G.G. v. Gloucester Cty. Sch. Bd., No. 4:15cv54, 2015 WL 5560190, at *8 (E.D. Va. Sept. 17, 2015). The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone. Id.

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls "without running afoul of Title IX." Br. for the United States as Amicus Curiae 24-25 (hereinafter "U.S. Br."). However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because "the regulation is silent on what the phrases 'students of one sex' and 'students of the other sex' mean in the context of transgender students." Id. at 25. The United

States contends that the interpretation contained in OCR's January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

We will not accord an agency's interpretation of an unambiguous regulation Auer deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to provide "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

"[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine de novo." Humanoids Grp. v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004). We determine ambiguity by analyzing the language under the three-part framework set forth in Robinson v. Shell Oil Co., 519 U.S. 337 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole. Id. at 341.

First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX . . . ." U.S. Br. 22 n.8. Third, the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited."[6] This repeated formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By

[6] For example, § 106.32(b)(2) provides that "[h]ousing provided . . . to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: proportionate in quantity . . . and [c]omparable in quality and cost to the student"; § 106.37(a)(3) provides that an institution generally cannot "[a]pply any rule . . . concerning eligibility [for financial assistance] which treats persons of one sex differently from persons of the other sex with regard to marital or parental status"; and § 106.41(b) provides that "where [an institution] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex . . . members of the excluded sex must be allowed to try-out for the team offered . . . ."

implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity. Cf. Dickenson-Russell Coal Co. v. Sec'y of Labor, 747 F.3d 251, 258 (4th Cir. 2014) (refusing to afford Auer deference where the language of the regulation at issue was "not susceptible to more than one plausible reading" (citation and quotation marks omitted)). It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that

in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

C.

Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to Auer deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. Auer, 519 U.S. at 461. "Our review of the agency's interpretation in this context is therefore highly deferential." Dickenson-Russell Coal, 747 F.3d at 257 (citation and quotation marks omitted). "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013). An agency's view need only be reasonable to warrant deference. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991) ("[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency's] view need be only reasonable to warrant deference.").

Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. 45 Fed. Reg. 30802, 30955 (May 9, 1980). Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished . . . ." American College Dictionary 1109 (1970). The second defines "sex" as:

> the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . .

Webster's Third New International Dictionary 2081 (1971).

Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not

universally descriptive.[7] The dictionaries, therefore, used qualifiers such as reference to the "sum of" various factors, "typical dichotomous occurrence," and "typically manifested as maleness and femaleness." Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual "dichotomous occurrence" of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the "character of being either male or female" where those indicators diverge. We conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation. The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older

[7] Modern definitions of "sex" also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." Black's Law Dictionary 1583 (10th ed. 2014). The American Heritage Dictionary includes in the definition of "sex" "[o]ne's identity as either female or male." American Heritage Dictionary 1605 (5th ed. 2011).

dictionary, "the morphological, physiological, and behavioral peculiarities"—included in the term "sex."

D.

Finally, we consider whether the Department's interpretation of § 106.33 is the result of the agency's fair and considered judgment. Even a valid interpretation will not be accorded Auer deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a post hoc rationalization. Christopher, 132 S. Ct. at 2166 (citations omitted).

Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice. See Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2263 (2011). As the United States explains, the issue in this case "did not arise until recently," see id., because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities. The Department contends that "[i]t is to those 'newfound' policies that [the Department's]

interpretation of the regulation responds." U.S. Br. 29. We see no reason to doubt this explanation. See Talk Am., Inc., 131 S. Ct. at 2264.

Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014. See J.A. 55 n.5 & n.6 (providing examples of OCR enforcement actions to secure transgender students access to restrooms congruent with their gender identities). Finally, this interpretation cannot properly be considered a post hoc rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.[8] U.S. Br. 17 n.5 & n.6 (citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and

[8] We disagree with the dissent's suggestion that the result we reach today renders the enforcement of separate restroom facilities impossible because it "would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity." Post at 65. Accepting the Board's position would equally require the school to assume "biological sex" based on "appearances, social expectations, or explicit declarations of [biological sex]." Certainly, no one is suggesting mandatory verification of the "correct" genitalia before admittance to a restroom. The Department's vision of sex-segregated restrooms which takes account of gender identity presents no greater "impossibility of enforcement" problem than does the Board's "biological gender" vision of sex-segregated restrooms.

Urban Development, and the Office of Personnel Management). None of the Christopher grounds for withholding Auer deference are present in this case.

E.

We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to Auer deference and is to be accorded controlling weight in this case.[9] We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that "sex" should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public

[9] The Board urges us to reach a contrary conclusion regarding the validity of the Department's interpretation, citing Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 657 (W.D. Pa. 2015). Although we recognize that the Johnston court confronted a case similar in most material facts to the one before us, that court did not consider the Department's interpretation of § 106.33. Because the Johnston court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in Johnston to be unpersuasive.

restrooms, locker rooms, and shower facilities on the basis of sex. We agree that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed.[10] Post at 56. It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys' restroom pursuant to the Department's interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court's guidance in Chevron, Auer, and Christopher and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as

[10] We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent. For example, G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present in Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 494 (6th Cir. 2008) (involving the videotaping of students dressing and undressing in school locker rooms), Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) (involving the indiscriminate strip searching of twenty male and five female students), or Supelveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).

this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns[11]—fundamentally questions of policy—is a task committed to the agency, not to the courts.

The Supreme Court's admonition in Chevron points to the balance courts must strike:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests

[11] The dissent accepts the Board's invocation of amorphous safety concerns as a reason for refusing deference to the Department's interpretation. We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the existence of danger caused by "sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." Post at 58. The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent's formulation, present a safety risk because of the "sexual responses prompted" by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.

> which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984). Not only may a subsequent administration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our Auer analysis complete, we leave policy formulation to the political branches.

III.

G.G. also asks us to reverse the district court's denial of the preliminary injunction he sought which would have allowed him to use the boys' restroom during the pendency of this lawsuit. "To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236 (4th

Cir. 2014) (citation omitted). We review a district court's denial of a preliminary injunction for abuse of discretion. Id. at 235. "A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." Morris v. Wachovia Sec., Inc., 448 F.3d 268, 277 (4th Cir. 2006) (citation and quotations omitted). "We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter de novo." Id. (citation omitted). Instead, "we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." Id. (citations and quotations omitted).

The district court analyzed G.G.'s request only with reference to the third factor—the balance of hardships—and found that the balance of hardships did not weigh in G.G.'s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions." G.G., 2015 WL 5560190, at *11.

The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." Id. at *9. Preliminary injunctions, however, are governed by less strict rules of evidence:

> 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.

Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); see also Elrod v. Burns, 427 U.S. 347, 350 n.1 (1976) (taking as true the "well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction"); compare Fed. R. Civ. P. 56 (requiring affidavits supporting summary judgment to be "made on personal knowledge, [and to] set out facts that would be admissible in evidence), with Fed R. Civ. P. 65 (providing no such requirement in the preliminary injunction context). Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for

the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial.

Additionally, the district court completely excluded some of G.G.'s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to "weight, not preclusion" and have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010); see also Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 718 (3d Cir. 2004); Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997); Levi Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." (citation and internal quotations omitted)); Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); Asseo v.

Pan Am. Grain Co., Inc., 805 F.2d 23, 26 (1st Cir. 1986); Flynt Distrib. Co., Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984). We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.'s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was "guided by erroneous legal principles." We therefore conclude that the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence. We vacate the district court's denial of G.G.'s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein.

IV.

Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." United States v. Guglielmi, 929 F.2d 1001, 1007 (4th Cir. 1991) (citation and internal quotation marks omitted). In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. Id. (citation omitted).

G.G. argues that both the first and second Guglielmi factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." Appellant's Br.

53. For example, the court accepted the Board's "mating" concern by noting:

> There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teen-age years. All of that is accepted by all medical science, as far as I can determine in reading information.

J.A. 85-86.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. J.A. 111-12. The district court characterized gender dysphoria as a "mental disorder" and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. See J.A. 88-91; 101-02. The district court also seemed to reject G.G.'s representation of what it meant to be transgender, repeatedly noting that G.G. "wants" to be a boy and not a girl, but that "he is biologically a female." J.A. 103-04; see also J.A. 104 ("It's his mind. It's not physical that causes that, it's what he believes."). The district court's memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Further, although the district court has a distinct way of proceeding in court, the hearing record and the district court's written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the Guglielmi standard. We deny G.G.'s request for reassignment to a different district judge on remand.

V.

For the foregoing reasons, the judgment of the district court is

REVERSED IN PART, VACATED IN PART, AND REMANDED.

DAVIS, Senior Circuit Judge, concurring:

I concur in Judge Floyd's fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, this Court would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013) (citing Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008)). The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board's restroom policy discriminates against him "on the basis of sex" in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context

of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989); see also Glenn v. Brumby, 663 F.3d 1312, 1316–19 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 573–75 (6th Cir. 2004); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse's office. See J.A. 32–33. His affidavit also indicates that he has "repeatedly developed painful urinary tract infections" as a result of holding his urine in order to avoid using the restroom at school. Id.

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.'s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is "inconsistent with evidence-based medical practice and

detrimental to the health and well-being of the child" and explains why access to a restroom appropriate to one's gender identity is important for transgender youth. J.A. 39. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board's restroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm." J.A. 41. In particular, Dr. Ettner opines that

> [a]s a result of the School Board's restroom policy, . . . G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his 'otherness,' undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

J.A. 42.

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.'s or Dr. Ettner's affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.'s presentation in support of his claim of irreparable harm, such as "evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s'] restroom," evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner "differentiating between the distress that G.G. may suffer by

not using the boy[s'] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12." Br. Appellee 42–43. As to the alleged deficiency concerning Dr. Ettner's opinion, the Board's argument is belied by Dr. Ettner's affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing "[a]s a result of the School Board's restroom policy." J.A. 42. With respect to the other purported inadequacies, the absence of such evidence does nothing to undermine the uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board's policy or Dr. Ettner's unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.'s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.

C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students' constitutional right to privacy will be imperiled by G.G.'s presence in the boys' restroom.

As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students' unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school's restrooms already undertaken by the Board. To the extent that a student simply objects to using the restroom in the presence of a transgender student even where there is no possibility that either student's genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.'s presence in the communal restroom thus does not tip the scale in the Board's favor. The balance of hardships weighs heavily toward G.G.

D.

Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest. Cf. Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (citation omitted) (observing that upholding constitutional rights is in the public interest).

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.

II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us. See, e.g., League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 248 (4th Cir. 2014) (expressly observing that appellate courts have the power to vacate a denial of a preliminary injunction and direct entry of an injunction); Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs., 197 F.3d 123, 134 (4th Cir. 1999) (directing entry of injunction "because the record clearly establishes the plaintiff's right to an injunction and [an evidentiary] hearing would not have altered the result").

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year.

With these additional observations, I concur fully in Judge Floyd's thoughtful and thorough opinion for the panel.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court's opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G's motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.'s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority's decision on those issues.

G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school's policy for assigning students to restrooms and locker rooms based on biological sex. The school's policy provides: (1) that the girls' restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys' restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school's three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls' restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates

against him because it denies him, as one who identifies as male, the use of the boys' restrooms, and he seeks an injunction compelling the high school to allow him to use the boys' restrooms.

The district court dismissed G.G.'s Title IX claim, explaining that the school complied with Title IX and its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex," so long as the facilities are "comparable." 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

Strikingly, the majority now reverses the district court's ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute's and regulations' use of the term "sex" means a person's gender identity, not the person's biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education's Office for Civil Rights to G.G., in which the Office for Civil Rights stated, "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally must treat transgender students consistent with their

gender identity." (Emphasis added). Accepting that new definition of the statutory term "sex," the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls' restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys' restrooms and locker rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And, unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the "severe psychological distress" it would inflict on him and because female students had "reacted negatively" to his presence in girls' restrooms. Surely biological males who identify as females would encounter similar reactions in the girls' restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and

safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is not law but which is the only authority on which the majority relies, states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]." This appears to approve the course that G.G.'s school followed when it created unisex restrooms in addition to the boys' and girls' restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, provided that the facilities are "proportionate" and "comparable," 34 C.F.R. § 106.32(b), and to provide "separate toilet, locker room, and shower facilities on the basis of sex," again provided that the facilities are "comparable," 34 C.F.R. § 106.33. Because the school's policy that G.G. challenges in this action

comports with Title IX and its regulations, I would affirm the district court's dismissal of G.G.'s Title IX claim.

I

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but "did not feel like a girl" from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one's biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of his requests. Officials changed school records to reflect G.G.'s new male name; the guidance counselor supported G.G.'s sending an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical

education requirement through a home-bound program, as he preferred not to use the school's locker rooms; and the school allowed G.G. to use a restroom in the nurse's office "because [he] was unsure how other students would react to [his] transition." G.G. was grateful for the school's "welcoming environment." As he stated, "no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns." And he was "pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy."

As the school year began, however, G.G. found it "stigmatizing" to continue using the nurse's restroom, and he requested to use the boys' restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving "numerous complaints from parents and students about [G.G.'s] use of the boys' restrooms." The School Board thus faced a dilemma. It recognized G.G.'s feelings, as he expressed them, that "[u]sing the girls' restroom[s] [was] not possible" because of the "severe psychological distress" it would inflict on him and because female students had previously "reacted negatively" to his presence in the girls' restrooms. It now also had to recognize that boys had similar feelings caused by G.G.'s use of the boys' restrooms, although G.G.

stated that he continued using the boys' restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

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

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education's Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When

> a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board's policy was discriminatory, in violation of the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction "requiring the School Board to allow [him] to use the boys' restrooms at school."

The district court dismissed G.G.'s Title IX claim because Title IX's implementing regulations permit schools to provide separate restrooms "on the basis of sex." The court also denied G.G.'s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it "will hear evidence" and "get a date set" for trial to better assess the claim.

From the district court's order denying G.G.'s motion for a preliminary injunction, G.G. filed this appeal, in which he also

challenges the district court's Title IX ruling as inextricably intertwined with the district court's denial of the motion for a preliminary injunction.

II

G.G. recognizes that persons who are born biologically female "typically" identify psychologically as female, and likewise, that persons who are born biologically male "typically" identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for "different and unequal treatment," "discriminat[ing] against him based on sex [by denying him use of the boys' restrooms], in violation of Title IX." He argues, "discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account." He concludes that the School Board's policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is "prevent[ed] . . . from using the same restrooms as other students and relegat[ed] . . . to separate, single-stall facilities."

As noted, the School Board's policy designates the use of restrooms and locker rooms based on the student's biological sex -- biological females are assigned to the girls' restrooms and unisex restrooms; biological males are assigned to the boys' restrooms and unisex restrooms. G.G. is thus assigned to the girls' restrooms and the unisex restrooms, but is denied the use of the boys' restrooms. He asserts, however, that because neither he nor the girls would accept his use of the girls' restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

> The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a) (emphasis added). The Act, however, provides, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." Id. § 1686 (emphasis added); see also 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing on the basis of sex" as long as the housing is "proportionate" and "comparable" (emphasis added)). Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33 (emphasis added). Thus, although Title IX and its regulations provide generally that a school receiving

federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on "sex," a term that must be construed uniformly throughout Title IX and its implementing regulations. See Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)); In re Total Realty Mgmt., LLC, 706 F.3d 245, 251 (4th Cir. 2013) ("Canons of construction . . . require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning. This presumption of consistent usage . . . ensure[s] that the statutory scheme is coherent and consistent" (alterations in original) (internal quotation marks and citations omitted)); see also Kentuckians for Commonwealth Inc. v. Riverburgh, 317 F.3d 425, 440 (4th Cir. 2003) ("[B]ecause a regulation must be consistent with the statute it

implements, any interpretation of a regulation naturally must accord with the statute as well" (quoting John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 627 n.78 (1996))).

Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. See, e.g., Doe v. Luzerne Cnty., 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to

viewing by the opposite sex"); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies"); Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1989) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating").

Moreover, we have explained that separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. See Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"). Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from

the other sex." United States v. Virginia, 518 U.S. 515, 550 n.19 (1996). Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women," which, as the Supreme Court explained, are "enduring" and render "the two sexes . . . not fungible," id. at 533 (distinguishing sex from race and national origin), not because of "one's sense of oneself as belonging to a particular gender," as G.G. and the government as amicus contend.

Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote the privacy and safety of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an

environment where children are still developing, both emotionally and physically."

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term "sex" were to encompass only a person's gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls' dorm or shower in a girls' shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower. G.G.'s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to "restroom access by transgender individuals." Ante at 26. But this effort to restrict the effect of G.G.'s argument hardly matters when the term "sex" would have to be applied uniformly throughout the statute and regulations, as noted above and, indeed, as agreed to by the majority. See ante at 26.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute

and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of enactment. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (explaining that courts should not defer to an agency's interpretation of its own regulation if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation" (emphasis added) (internal quotation marks and citation omitted)); see also Auer v. Robbins, 519 U.S. 452, 461 (1997) (discussing dictionary definitions of the regulation's "critical phrase" to help determine whether the agency's interpretation was "plainly erroneous or inconsistent with the regulation" (internal quotation marks and citation omitted)). Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions. See, e.g., The Random House College Dictionary 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); Webster's New Collegiate Dictionary 1054 (1979) ("the sum of the structural,

functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); Webster's Third New International Dictionary 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); The American College Dictionary 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . . "). Indeed, although the contemporaneous meaning controls our analysis, it is notable that, even today, the term "sex" continues to be defined based on the physiological distinctions between males and females. See, e.g., Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); The American Heritage Dictionary 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); Merriam-Webster's Collegiate Dictionary 1140 (11th

ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"). Any new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of "sex" as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term "sex" in Title IX and its regulations refers to a person's "gender identity" simply to accommodate G.G.'s wish to use the boys' restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term "sex" as used in Title IX and its regulations refers (1) to both biological sex and gender identity; (2) to either biological sex or gender identity; or (3) to only "gender identity." In his brief, G.G. seems to take the position that the term "sex" at least includes a reference to gender identity. This is the position taken in his complaint

when he alleges, "Under Title IX, discrimination 'on the basis of sex' encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity." The government seems to be taking the same position, contending that the term "sex" "encompasses both sex -- that is, the biological differences between men and women -- and gender [identity]." (Emphasis in original). The majority, however, seems to suggest that the term "sex" refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights' letter of January 7, 2015, which said, "When a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally must treat transgender students consistent with their gender identity." (Emphasis added). But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term "sex" as used in the statute and regulations refers to both biological sex and gender identity, then, while the School Board's policy is in compliance with respect to most students, whose biological sex aligns with their gender

identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished consistent with the regulation because a transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools' ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms, a position that G.G. does not advocate.

If the position of G.G., the government, and the majority is that the term "sex" means either biological sex or gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys' restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that "sex" as used in Title IX and its regulations means only gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological

males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a separate use "on the basis of sex," and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom.

Yet, by interpreting Title IX and the regulations as "requiring schools to treat students consistent with their gender identity," and by disallowing schools from treating students based on their biological sex, the government's position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls' restrooms, G.G. states that "it makes no sense to place a

transgender boy in the girls' restroom in the name of protecting student privacy" because "girls objected to his presence in the girls' restrooms because they perceived him as male." But the same argument applies to his use of the boys' restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex" if "sex" means gender identity.

The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools "generally must treat transgender students consistent with their gender identity," whatever that means, and in the next sentence, it encourages schools to provide "gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High

School, to provide unisex single-stall restrooms for any students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, on the basis of sex, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.'s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse's restroom. And, after both girls and boys objected to his using the girls' and boys' restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm the district

court's decision dismissing G.G.'s Title IX claim and therefore dissent.

I also dissent from the majority's decision to vacate the district court's denial of G.G.'s motion for a preliminary injunction. As the Supreme Court has consistently explained, "[a] preliminary injunction is an extraordinary remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," and "'[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.'" Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22-24 (2008) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)). Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can "form a definite and firm conviction that the court below committed a clear error of judgment," Morris v. Wachovia Sec., Inc., 448 F.3d 268, 277 (4th Cir. 2006) (quotation marks and citation omitted), particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

As noted, however, I concur in Part IV of the court's opinion.

APPENDIX C

PUBLISHED

FILED: May 31, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056
(4:15-cv-00054-RGD-DEM)

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

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee,

JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW

& POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph. D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee.

O R D E R

Appellee's petition for rehearing en banc and filings relating to the petition were circulated to the full court.

No judge having requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc, the petition is denied.

Judge Niemeyer wrote an opinion dissenting from the denial of the petition for rehearing.

Entered at the direction of Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

NIEMEYER, Circuit Judge, dissenting from the denial of the petition for rehearing:

Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom. Have we not universally condemned as inhumane such forced exposure throughout history as it occurred in various contexts, such as in prisons? And do parents not universally find it offensive to think of having their children's bodies exposed to persons of the opposite biological sex?

Somehow, all of this is lost in the current Administration's service of the politically correct acceptance of gender identification as the meaning of "sex" -- indeed, even when the statutory text of Title IX provides no basis for the position. The Department of Education and the Justice Department, in a circular maneuver, now rely on the majority's opinion to mandate application of their position across the country, while the majority's opinion had relied solely on the Department of Education's earlier unprecedented position. The majority and the Administration -- novelly and without congressional authorization -- conclude that despite Congress's unambiguous authorization in Title IX to provide for the separation of restrooms, showers, locker rooms, and dorms on the basis of sex, see 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32,

106.33, they can override these provisions by redefining sex to mean how any given person identifies himself or herself at any given time, thereby, of necessity, denying all affected persons the dignity and freedom of bodily privacy. Virtually every civilization's norms on this issue stand in protest.

These longstanding norms are not a protest against persons who identify with a gender different from their biological sex. To the contrary, schools and the courts must, with care, seek to understand their condition and address it in permissible ways that are as helpful as possible in the circumstances. But that is not to say that, to do so, we must bring down all protections of bodily privacy that are inherent in individual human dignity and freedom. Nor must we reject separation-of-powers principles designed to safeguard Congress's policymaking role and the States' traditional powers.

While I could call for a poll of the court in an effort to require counsel to reargue their positions before an en banc court, the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application. And the facts of this case, in particular, are especially "clean," such as to enable the Court to address the issue without the distraction of subservient issues. For this reason only and not because the issue is not sufficiently weighty for our en banc court, I am not requesting a

poll on the petition for rehearing en banc. I do, however, vote to grant panel rehearing, which I recognize can only be symbolic in view of the majority's approach, which deferred to the Administration's novel position with a questionable application of Auer v. Robbins, 519 U.S. 452 (1997). Time is of the essence, and I can only urge the parties to seek Supreme Court review.

APPENDIX D

FILED: June 9, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056
(4:15-cv-00054-RGD-DEM)

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

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee,

JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER;

SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph. D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee,

CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; PUBLIC ADVOCATE OF THE UNITED STATES; STATE OF KANSAS; STATE OF NEBRASKA; STATE OF TEXAS; STATE OF UTAH; 50 GLOUCESTER STUDENTS, PARENTS, GRANDPARENTS, AND COMMUNITY MEMBERS; UNITED STATES JUSTICE FOUNDATION,

Amici Supporting Rehearing Petition.

O R D E R

Upon consideration of the motion to stay mandate pending filing of petition for writ of certiorari, the court denies the motion.

Judge Floyd and Senior Judge Davis voted to deny the motion. Judge Niemeyer voted to grant the motion.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff

v. **CIVIL NO. 4:15cv54**

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

ORDER

This matter is before the Court on Plaintiff G.G.'s Motion for Preliminary Injunction. ECF No. 11. On September 4, 2015, this Court denied the Motion. ECF No. 53. On appeal, the Court of Appeals vacated this denial and remanded the case for reevaluation of the Motion under a different evidentiary standard. Op. of USCA, ECF No. 62 at 33. The Court of Appeals also reversed this Court's dismissal of G.G.'s claim under Title IX. Id. at 26. In a concurrence, Judge Davis explained why the Preliminary Injunction should issue in light of the Court of Appeals' analysis of Title IX. Id. at 37–44. It appears to the Court from the unrebutted declarations submitted by the parties that the plaintiff is entitled to use the boys' restroom. Therefore, for the reasons set forth in the aforesaid concurrence and based on the declarations submitted by the parties, the Court finds that the plaintiff is entitled to a preliminary injunction.

As noted in the Opinion of the Court of Appeals, this case is only about G.G.'s access to the boys' restrooms; G.G. has not requested access to the boys' locker rooms. Id. at 7 n. 2 ("G.G.

does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case."). Accordingly, this injunction is limited to restroom access and does not cover access to any other facilities.

Based on the evidence submitted through declarations previously proffered for the purpose of the hearing on the Preliminary Injunction, this Court, pursuant to Title IX, hereby **ORDERS** that Gloucester County School Board permit the plaintiff, G.G., to use the boys' restroom at Gloucester High School until further order of this Court.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Newport News, VA
June 23, 2016

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiffs,

v. **CIVIL NO. 4:15cv54**

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

ORDER

This matter is before the Court on Defendant's Motion for Stay Pending Appeal. ECF No. 71. With this Motion the defendant, Gloucester County School Board ("Defendant"), asks this Court to stay the Preliminary Injunction issued by the Court on June 23, 2016 pending Defendant's appeal of that Order. Id.

On June 11, 2015, the plaintiff in this case, G.G. ("Plaintiff"), filed a Motion for Preliminary Injunction. ECF No. 11. On September 4, 2015, this Court denied the Motion. ECF No. 53. On appeal, the Court of Appeals vacated this denial and remanded the case for reevaluation of the Motion under a different evidentiary standard. Op. of USCA, ECF No. 62 at 33. The Court of Appeals also reversed this Court's dismissal of G.G.'s claim under Title IX. Id. at 26. In a concurrence, Judge Davis explained why the Preliminary Injunction should issue in light of the Court of Appeals' analysis of Title IX. Id. at 37–44.

The Court of Appeals denied Defendant's motion for a rehearing en banc, Order of

USCA, ECF No. 65, and its motion to stay the mandate pending the filing of a writ of certiorari, Order of USCA, ECF No. 67. On June 17, 2016, the Court of Appeals issued its mandate. ECF No. 68.

Based on the opinion of the Fourth Circuit and the evidence submitted by declaration, the Court granted the Preliminary Injunction on June 23, 2016. Order, ECF No. 69. Defendant filed a notice of appeal on June 27, 2016. ECF No. 70. On June 28, 2016, Defendant filed the instant Motion to Stay along with a Memorandum in Support. ECF Nos. 71–72. Plaintiff responded to the Motion on July 1, 2016. ECF No. 75.

This Court is bound by the Judgment of the Court of Appeals. The Court of Appeals' actions in denying a rehearing en banc and a stay of its mandate indicate that it desires that its Judgment take effect immediately. The Court of Appeals itself is bound by its own prior precedents. Although Defendant has filed an appeal of the Preliminary Injunction, the Court of Appeals' prior opinion in this case will control in that appeal. This Court believes that based on the law as laid out in that opinion and the evidence submitted by declarations in this case, the Preliminary Injunction was warranted. There are no grounds for a stay. Accordingly, the Court **DENIES** the Motion for Stay Pending Appeal. ECF No. 71.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Newport News, VA
July 6, 2016

APPENDIX G

UNPUBLISHED

FILED: July 12, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1733
(4:15-cv-00054-RGD-DEM)

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

Plaintiff - Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellant.

O R D E R

Upon consideration of submissions relative to the motion of appellant for stay pending appeal, the court denies the motion.

Entered at the direction of Judge Floyd. Senior Judge Davis wrote an opinion concurring in the denial of a stay pending the filing of, and action on, a petition for certiorari. Judge Niemeyer wrote an opinion dissenting from the denial of a stay pending appeal.

For the Court

/s/ Patricia S. Connor, Clerk

DAVIS, Senior Circuit Judge, concurring in the denial of a stay pending the filing of, and action on, a petition for certiorari:

I vote to deny the motion for stay.

In Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989), plaintiff Ann Hopkins received comments from partners describing her as "macho," suggesting that she "overcompensated for being a woman," and "advis[ing] her to take a course at charm school" during her bid for partnership. Price Waterhouse, 490 U.S. 228, 235 (1989) (citations omitted). Hopkins was told that to improve her chances of attaining partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. (citation omitted). Rejecting Price Waterhouse's insinuation that acting in reliance on sex stereotyping was not prohibited by Title VII, the Supreme Court unequivocally stated otherwise:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Id. at 251 (second alteration in original) (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707, n.13 (1978)). The Supreme Court has expressly recognized that claims based on an individual's failure to conform to societal expectations based on that person's gender constitute discrimination "because of sex"

under Title VII. Id. at 250–51 (plurality); Price Waterhouse, 490 U.S. at 272-73 (O'Connor, J., concurring); Price Waterhouse, 490 U.S. at 260-61 (White, J., concurring).

The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution. See Glenn v. Brumby, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause following the reasoning of Price Waterhouse); Smith v. City of Salem, Ohio, 378 F.3d 566, 573–75 (6th Cir. 2004) (holding that transgender employee had stated a claim under Title VII based on the reasoning of Price Waterhouse); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act based on Price Waterhouse); Schwenk v. Hartford, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (holding that a transgender individual could state a claim under the Gender Motivated Violence Act under the reasoning of Price Waterhouse).

On this long-settled jurisprudential foundation, our friend's assertion that the majority opinion issued when this case was

previously before us is "unprecedented" misses the mark. In any event, as regards the standards for a stay, the dissent contains its own rebuttal. Contrary to the dissent's assertion that "the School Board has constructed three unisex bathrooms to accommodate any person who feels uncomfortable using facilities separated on the basis of sex," the three unisex bathrooms are in fact available to "any student" at the school. Mot. for Stay at 5.

In short, there is no reason to disturb the district court's exercise of discretion in denying the motion to stay its preliminary injunction.

NIEMEYER, Circuit Judge, dissenting from the denial of a stay pending appeal:

I would grant Gloucester County School Board's motion for a stay pending appeal. See Long v. Robinson, 432 F.2d 977 (4th Cir. 1970); cf. Winter v. National Resources Defense Council, Inc., 555 U.S. 7 (2008). Facially, the district court conducted no analysis required by Winter for the entry of a preliminary injunction, relying only on our earlier decision in this case. And under the balancing analysis prescribed by Long, I conclude that a stay is appropriate, based on the following:

1. The earlier groundbreaking decision of this court is, as I have noted previously, unprecedented. Indeed, it appears to violate the clear, unambiguous language of Title IX, which explicitly authorizes the provision of various separate facilities

"on the basis of sex." Moreover, the court's decision applying deference under Auer v. Robins, 519 U.S. 452 (1997), is questionable, and, even if deference were appropriate, it relies solely on a letter from the U.S. Department of Education, imposing an entirely new interpretation of "sex" in Title IX without the support of any law. In view of this, it is difficult to understand how the decision is sustainable.

2. By enforcing the injunction now, male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents. These consequences are likely to cause disruption both in the school and among the parents.

3. While I recognize the sensitivities of G.G.'s gender transition, I nonetheless conclude that he is unlikely to suffer substantial injury from a stay of the district court's injunction, particularly because the School Board has constructed three unisex bathrooms to accommodate any person who feels uncomfortable using facilities separated on the basis of sex.

4. The public interest in a final and orderly resolution of G.G.'s claims before enforcement of this court's decision is served by a stay pending appeal. The changes that this injunction would require -- and that the Department of Justice and Department of

Education now seek to impose nationwide on the basis of our earlier decision -- mark a dramatic departure from the responsibilities local school boards have heretofore understood and the authorizations that Congress has long provided. These school boards and the communities they serve would benefit from the thoughtful and final disposition of G.G.'s claims, and from ultimate guidance from the Supreme Court or Congress, before having to undertake these sweeping reforms.

In short, I conclude that the Gloucester County School Board has adequately made its case for a stay pending appeal, and I would grant its motion for such a stay.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM, Plaintiffs,	)	Civil No. 4:15-cv-00054-RGD-DEM
v.	)	
GLOUCESTER COUNTY SCHOOL BOARD, Defendant.	)	

CORRECTED DECLARATION OF G.G.

1. I am the plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. My name is G.G.

3. Several photographs of me taken over the past year are attached to this declaration as Exhibit A.

4. I was born in Gloucester County on May 4, 1999, and have lived in Gloucester County my entire life.

5. I am a student at Gloucester High School. I will begin my junior year of high school in September 2015.

6. Although my sex assigned at birth was female, I was aware at a very young age that I did not feel like a girl. I have always felt uncomfortable wearing "girl" clothes, and by the age of six, I adamantly refused to do so. I insisted upon buying all of my clothes in the boys' department.

7. At approximately age twelve, I acknowledged my male gender identity to myself. I gradually began disclosing this fact to close friends. Since the reactions of my friends were generally positive and supportive, I disclosed my gender identity to more friends.

8. In approximately ninth grade, most of my friends were aware of my gender identity, and I lived openly as a boy when socializing with friends away from home and school.

9. During my freshman year, I experienced severe depression and anxiety related to my untreated Gender Dysphoria and the stress of concealing my gender identity from my family. The depression and anxiety was so severe that I could not attend school during the spring semester of my freshman year. Instead, I took classes through a home-bound program that follows the public high school curriculum.

10. In April 2014, I told my parents that I am transgender. At my request, I began therapy with a psychologist who had experience with working with transgender patients.

11. The psychologist diagnosed me with Gender Dysphoria. The psychologist recommended that I immediately begin living as a boy in all respects. That included using a male name and pronouns and using boys' restrooms. The psychologist gave me a "Treatment Documentation Letter" confirming that I am receiving treatment for Gender Dysphoria and that, as part of that treatment, I should be treated as a boy in all respects, including with respect to my use of the restroom. In addition, the psychologist recommended that I see an endocrinologist to begin hormone treatment for Gender Dysphoria.

12. In July 2014, I petitioned the Circuit Court of Gloucester County to change my legal name to G.G., and the court granted the petition. I now use that name for all purposes, and my friends and family refer to me using male pronouns.

13. I use the boys' restrooms when out in public, e.g., at restaurants, libraries, shopping centers.

14. I have been receiving hormone treatment since December 2014. The hormone treatment has deepened my voice, increased my growth of facial hair, and given me a more masculine appearance.

15. In August 2014, my mother and I informed officials at Gloucester High School that I am transgender and that I changed my legal name. The high school agreed to change my name in my official school records.

16. Before the beginning of my sophomore year, my mother and I met with Gloucester High School Principal T. Nathan Collins and guidance counselor Tiffany Durr to discuss my treatment for Gender Dysphoria and the need for me to socially transition at school as part of my medical treatment. Mr. Collins and Ms. Durr both expressed support for me and a willingness to ensure a welcoming environment for me at school.

17. Ms. Durr and I agreed that I would send an email to teachers explaining that I was to be addressed using the name G.G. and to be referred to using male pronouns. To the best of my knowledge, no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling me by my legal name or referring to me using male pronouns.

18. I requested, and was permitted, to continue with the home-bound program only for my physical education requirement while returning to school for the rest of my classes. For this reason, I do not intend to use a locker room at school.

19. I initially agreed to use a separate restroom in the nurse's office because I was unsure how other students would react to my transition. When the 2014-15 school year began, I was pleased to discover that my teachers and the vast majority of my peers respected the fact that

I am a boy. I quickly determined that it was not necessary for me to continue to use the nurse's restroom, and I found it stigmatizing to use a separate restroom. The nurse's bathroom was also very inconvenient to reach from my classrooms, making it difficult for me to use the restroom between classes. For these reasons, I asked Mr. Collins to be allowed to use the boys' restrooms.

20. On or about October 20, 2014, Mr. Collins agreed that I could use the boys' restrooms. For approximately the next seven weeks, I used the boys' restrooms at school. When I used the boys' restrooms, I never encountered any problems from other students.

21. On November 10, 2014, I learned that the School Board would be voting on a proposal at its meeting on November 11, 2014, to adopt a transgender restroom policy that would prohibit me from continuing to use the boys' restroom. My parents and I attended the meeting to speak against the policy. In doing so, I was forced to identify myself to the entire community, including local press covering the meeting, as the transgender student whose restroom use was at issue.

22. I also attended the School Board's meeting on December 9, 2014, when it adopted the transgender restroom policy.

23. As a result of the School Board meetings and the new transgender restroom policy, I feel like I have been stripped of my privacy and dignity. Having the entire community discuss my genitals and my medical condition in a public setting has made me feel like a walking freak show. This personal information about my medical status, and about my very anatomy, has become a public spectacle. My entire community can now identify me as "the transgender student who wants to use the boys' room," which makes me incredibly anxious and fearful.

24. The day after the school board meeting, Mr. Collins told me that I would no longer be allowed to use the boys' restrooms and that there would be disciplinary consequences if I tried to do so.

25. Using the girls' restroom is not a possibility for me. Even before I began receiving treatment for Gender Dysphoria, girls and women who encountered me in female restrooms reacted negatively because they perceived me to be a boy. For example, when I used the girls' restroom in eighth and ninth grade, girls would tell me "this is the girls' room" and ask me to leave. My appearance now is even more masculine. In addition, using the girls' room would cause me to experience severe psychological distress and would be incompatible with my treatment for Gender Dysphoria.

26. To the best of my knowledge, there are now three single-stall unisex restrooms at Gloucester High School that I am permitted to use. Only one of the single-stall restrooms is located anywhere near the restrooms used by other students. Unlike some of the boys' restrooms, none of the new single stall restrooms are located near my classes. As far as I am aware, none of the other students uses the single-stall unisex restrooms.

27. I refuse to use the separate single-stall restrooms because they make me feel even more stigmatized and isolated than when I use the restroom in the nurse's office. They designate me as some type of "other" or "third" sex that is treated differently than everyone else. Everyone knows that they were installed for me in particular so that other boys would not have to share the same restroom as me.

28. Instead of using the separate restrooms, I try to avoid using the restrooms entirely while at school, and, if that is not possible, I use the nurse's restroom. I limit the amount of liquids I drink and try to "hold it" when I need to urinate during the school day. As a result of

trying to avoid using the restroom, I have repeatedly developed painful urinary tract infections. "Holding it" is also uncomfortable and distracting when I am trying to focus in class.

29. Every time I use the restroom at school, I am reminded that nearly every person in my community now knows I am transgender and that I have now been publically identified as "different." It also stark reminder that I was born in the wrong sex, which increases my feelings of dysphoria, anxiety, and distress.

30. It is embarrassing that, every time I use the restroom, everyone who sees me enter the nurse's office knows exactly why I am in there. They know it is because I am transgender and I have been prohibited from using the same boys' restrooms that the other boys use.

31. It also feels humiliating that, whenever I have to use the restroom, I am effectively reminding anyone who sees me go to the nurse's office that, even though I am living and interacting with the world in accordance with my gender identity as a boy, my genitals look different.

32. I just want to live my life like any other boy. And I want to perform the basic human function of using the restroom without being made to feel alienated, humiliated, and different than everyone else.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 3, 2015.

By: [SIGNATURE FILED UNDER SEAL]

G.G.

APPENDIX I

Ms. Massie Ritsch
Acting Assistant Secretary
Office of Communications and Outreach
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Transmitted via e-mail

Dear Ms. Ritsch:

Last week, numerous reporters wrote stories regarding the actions of a school board in Gloucester County, Virginia. In response to the presence of a transgender student in the local high school, the school board passed the following proposal, establishing it as official policy for Gloucester County Public Schools:

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

The U.S. Department of Education has recently received praise from the transgender community for noting in several guidance documents that Title IX's ban on discrimination on the basis of sex includes, consistent with the Equal Employment Opportunity Commission's decision in *Macy v. Holder*, discrimination on the basis of gender identity. It is my sincere hope that the Department will continue to provide such guidance, particularly on this issue that so frequently erupts whenever states or localities consider prohibiting discrimination on the basis of gender identity.

While I understand that the Department is unable to comment on any matters that may be under investigation, this story does raise a question: does the Department have any guidance or rules for what is or is not acceptable for a school to do when establishing policies for transgender students to access restrooms and other similar sex-segregated facilities? Specifically, the articles lead the reader to a number of questions:

- Does the Department have guidance or rules on whether a transgender student may be required to use a different restroom than other students, such as a restroom in a nurse's office or a restroom designated for school employees?

- Does the Department have guidance or rules on whether an organization such as a school, a school district, or a university may limit access to facilities to only those whose gender identity is consistent with their sex assigned at birth (i.e., cisgender individuals)?

- Has the Department communicated any guidance or rules on these questions to organizations such as schools, school districts, or universities to eliminate unnecessary confusion over proper implementation of Title IX?

I have copied one of the writers, Ms. Barbara King, a contributor to NPR and Chancellor Professor of Anthropology at the College of William and Mary, who wrote about the topic in an NPR blog post on December 11, 2014. I will gladly share your response with the authors of the other news stories I have seen on this issue, such as Dominic Holden of BuzzFeed and John Riley of Metro Weekly.

I look forward to working with your office to answer these questions.

Sincerely,

Emily T. Prince, Esq.

cc: Barbara J. King, Chancellor Professor of Anthropology, College of William and Mary.

APPENDIX J

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

January 7, 2015

REDACTED - PII

Dear REDACTED - PII

I write in response to your letter, sent via email to the U.S. Department of Education (the Department) on December 14, 2014, regarding transgender students' access to facilities such as restrooms. In your letter, you mentioned statements in recent guidance documents issued by the Department concerning the application of Title IX of the Education Amendments of 1972 (Title IX) to gender identity discrimination. In addition, you identified a particular school district's policy about access to restrooms and asked about the existence and distribution of any guidance by the Department about policies or practices regarding transgender students' access to restrooms. Your letter has been referred to the Department's Office for Civil Rights (OCR), and I am happy to respond.

As you know, OCR's mission includes enforcing Title IX, which prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity and failure to conform to stereotypical notions of masculinity or femininity.[1] OCR enforces and interprets Title IX consistent with case law,[2] and with the adjudications and guidance documents of other Federal agencies.[3]

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[1] *See* OCR's April 2014 Questions and Answers on Title IX and Sexual Violence at B-2, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[2] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII of the Civil Rights Act of 1964's (Title VII) prohibition on sex discrimination bars discrimination based on gender stereotyping, that is "insisting that [individuals] matched the stereotype associated with their group"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of transgender police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (applying *Price Waterhouse* to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire.... did not accord with his male gender"); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that discrimination against transgender females—*i.e.*, "as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity"—is actionable discrimination "because of sex" under the Gender Motivated Violence Act").

[3] *See, e.g.*, U.S. Dept. of Justice, Memorandum from the Attorney General regarding the Treatment of

The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.[4] OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation, and does not release information about its pending investigations. Nevertheless, it may be useful to be aware that in response to OCR's recent investigations of two complaints of gender identity discrimination, recipients have agreed to revise policies to make clear that transgender students should be treated consistent with their gender identity for purposes of restroom access. For examples of how OCR enforces Title IX in this area, please review the following resolutions of OCR investigations involving transgender students: Arcadia Unified School District;[5] and Downey Unified School District.[6]

OCR is committed to helping all students thrive at school and ensuring that schools take action to prevent and respond promptly and effectively to all forms of discrimination, including gender-identity discrimination. OCR staff is also available to

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Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014) (stating that the protection of Title VII extends to claims of discrimination based on an individual's gender identity, including transgender status), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; *see also Macy v. Holder*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012) (holding that gender identity and transgender status did not need to be specifically addressed in Title VII in order to be prohibited bases of discrimination, as they are simply part of the protected category of "sex"), http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt; U.S. Dept. of Health & Human Services, Office for Civil Rights, *Letter to Maya Rupert, Esq.*, Transaction No. 12-0008000 (July 12, 2012) (stating that Section 1557 of the Affordable Care Act, which incorporates Title IX's prohibition on sex discrimination, "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity"), http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services; U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, *Gender Identity and Sex Discrimination*, Directive 2014-02 (Aug. 14, 2014) (directing that for purposes of Executive Order 11246, which prohibits employment discrimination on the basis of sex by federal contractors and subcontractors, "discrimination based on gender identity or transgender status ... is discrimination based on sex"), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[4] *See, e.g.*, OCR's December 2014 Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, at Q. 31, http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

[5] OCR Case No. 09-12-1020 (July 24, 2013), http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf (resolution letter); and http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf (resolution agreement).

[6] OCR Case No. 09-12-1095 (October 14, 2014), http://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf (resolution letter); and http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (resolution agreement).

offer schools technical assistance on how to comply with Title IX and ensure all students, including transgender students, have equal access to safe learning environments.

If you have questions, want additional information or technical assistance, or believe that a school is engaging in discrimination based on gender identity or another basis protected by the laws enforced by OCR, you may visit OCR's website at www.ed.gov/ocr or contact OCR at (800) 421-3481 (TDD: 800-877-8339) or at ocr@ed.gov. You may also fill out a complaint form online at www.ed.gov/ocr/complaintintro.html.

I hope that this information is helpful and thank you for contacting the Department.

Sincerely,

James A. Ferg-Cadima
Acting Deputy Assistant Secretary for Policy
Office for Civil Rights

APPENDIX K

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX

requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms**. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own

sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations**. Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules**. Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records**. FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may

violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

  - Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
  - Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/	/s/
Catherine E. Lhamon	Vanita Gupta
Assistant Secretary for Civil Rights	Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Education	U.S. Department of Justice

[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] *See G.G.*, 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

[9] *See, e.g.,* Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist*., *CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] *See, e.g.*, OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] *See, e.g.*, Resolution Agreement, *In re Cent. Piedmont Cmty. Coll., NC,* OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id*. § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially

equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.,* Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G.,

Plaintiff,

v. Case No. 4:15-cv-00054-RGD-TEM

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

DECLARATION OF TROY M. ANDERSEN

On this 7th day of July 2015, I, Troy M. Andersen, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.

2. I am the Gloucester Point District Representative for the Gloucester County School Board ("the School Board" or "GCSB"), and I served in that capacity during the 2014-2015 school year. I am still a member of the School Board and currently serve as its chairman.

3. It has always been the practice of Gloucester County Schools to separate restrooms and locker rooms at school facilities on the basis of the students' biological sex, and this practice has been in place the entire time that Plaintiff has been a student within the Gloucester County school system. It is my understanding that Plaintiff enrolled as a freshman at Gloucester High School for the 2013-2014 school year as a female student.

4. While Plaintiff was granted permission at the school level to begin using the boys' restrooms at Gloucester High School on October 20, 2014, no decision was made by the School Board until December 9, 2014. Beginning on October 21, 2014, the School Board began

EXHIBIT
1

receiving numerous complaints from parents and students about Plaintiff's use of the boys' restrooms.

5. On December 9, 2014, the School Board adopted a restroom and locker room resolution that provided:

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

6. The restroom and locker room resolution reflects what has always been the practice of the schools. The resolution was developed to treat all students and situations the same.

7. The School Board had three single-stall unisex bathrooms constructed at Gloucester High School. All three restrooms were open for use by December 16, 2014. Any student can use these unisex bathrooms, regardless of their biological sex, if they are uncomfortable using a communal bathroom, or for any other privacy reason. Students may also use a restroom located in the nurse's office.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on: 7/7/15 (date)

Troy M. Andersen

APPENDIX M

Agenda Item Details

Meeting	Jun 09, 2016 - Regular Meeting No. 21
Category	4. Action Items 8:45 p.m.
Subject	4.03 Student Rights and Responsibilities, Regulation 2601.30P
Type	Action
Recommended Action	That the School Board adopt Regulation 2601.30P, Student Rights and Responsibilities, as detailed in the agenda item.

Staff Contact: Jane H. Lipp, assistant superintendent, Department of Special Services

Meeting Category: June 9, 2016 Regular Meeting

Subject: Student Rights and Responsibilities, Regulation 2601.30P

School Board Action Required: Decision

Related To: Legal Requirement

Key Points:

Note: The cover sheet and attached Regulation 2601 posted on June 2, 2016 for consideration at the June 9, 2016 Board meeting, included a proposed change regarding Chapter 1, Section J. This proposal has been withdrawn.

A. In chapter I.I.2., changed "The principal's decision on a complaint may be appealed by the student or parent to the regional assistant superintendent within two school days following receipt of the principal's decision" to read "The
principal's decision on a complaint may be submitted for review by the student or parent to the regional assistant superintendent within two school days following receipt of the principal's decision." (page 9)

B. In chapter II.A.3.a.(1) footnote 8 deleted "High school students shall participate in the FCPS Tobacco Intervention Seminar. Elementary and middle schools students shall participate in an in-school intervention support program to be
conducted by the Student Safety and Wellness Office" and added "to be conducted by the Student Safety and Wellness Office." (page 16)

C. In chapter II,A.3.d.(2)(c), changed "Theft or attempted theft of a student's prescription drug. A report shall be made to the police in accordance with the Code of Virginia" to read "Theft of a student's prescription drug. A report shall be
made to the police in accordance with the Code of Virginia." (page 20)

D. In chapter II,A.4.b.(4), added "Attempted theft of another person's prescription medication. A report shall be made to the police in accordance with the Code of Virginia where the attempted theft is of student medication(s)." (page 21)

E. In chapter II,C.3.e., changed "Emergency Suspension" to read "Emergency Temporary Removal" and change "disruption may be summarily removed" to read "disruption may be removed." (page 29)

F. In chapter II.C.6., removed "or the Restorative Behavior Intervention Seminar." (page 32)

Proposed Board Amendments

1. I move that the Board's action regarding R2601 be postponed until the June 30 Board meeting. **[Wilson]**

2. I move to amend the motion by replacing the first sentence of Chapter I, Section J with the following: No student in FCPS shall, on the basis of age, race, color, sex, sexual orientation, gender identity, religion, national origin,

marital status, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity. **[McElveen]**

3. I move to delay consideration of Mr. McElveen's motion until the June 30 Board meeting to i) allow public notice of a significant, substantive change to R2601, (ii) give time for Board discussions with staff at a work session on issues related to Mr. McElveen's proposed changes, and (iii) provide time for the Board to discuss proposed changes with each other and our communities. **[Wilson]**

4. I believe the numerous questions raised by Mr. McElveen's amendment raise unique and complex questions that require considerably more study and investigation than is possible tonight. Thus, I move to refer the proposed new language to a special committee to study and investigate with staff these questions. I propose that the committee be made up of several Board members, including, but not limited to, Mr. McElveen, Mrs. Hough, Mrs. Corbett-Sanders and me. **[Wilson]**

Recommendation:

That the School Board adopt Regulation 2601.30P, Student Rights and Responsibilities, as detailed in the agenda item.

Attachment:
R2601.30P – 6-9-16 Strikethrough copy FY2016-17
R2601.30P – 6-9-16 Clean copy FY2016-17

6-9-16 R2601.30P Aug 2016 StrikeThroughCopy.pdf (692 KB)

6-9-16 R2601.30P Aug 2016 CleanCopy.pdf (566 KB)

Motion & Voting

I believe the numerous questions raised by Mr. McElveen's amendment raise unique and complex questions that require considerably more study and investigation than is possible tonight. Thus I move to postpone the vote on Mr. McElveen's amendment for an indefinite period of time so that we may refer the proposed new language to a special committee to study and investigate with staff these questions. I propose that the committee be made up of several Board members, including, but not limited to, Mr. McElveen, Mrs. Hough. Mrs. Corbett Sanders and me.

Motion by Tom Wilson, second by Elizabeth Schultz.
Final Resolution: Motion Fails
Yes: Jeanette Hough, Tom Wilson, Elizabeth Schultz
No: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Megan McLaughlin, Dalia Palchik

I move to delay consideration of Mr. McElveen's motion until the June 30 Board meeting to i) allow public notice of a significant, substantive change to R2601, (ii) give time for Board discussions with staff at a work session on issues related to Mr. McElveen's proposed changes, and (iii) provide time for the Board to discuss proposed changes with each other and our communities.

Motion by Tom Wilson, second by Megan McLaughlin.
Final Resolution: Motion Fails
Yes: Jeanette Hough, Tom Wilson, Megan McLaughlin, Elizabeth Schultz

No: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Dalia Palchik
Abstain: Karen Corbett Sanders

I move to amend the motion by replacing the first sentence of Chapter I, Section J with the following: No student in FCPS shall, on the basis of age, race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity.

Motion by Ryan McElveen, second by Ilryong Moon.
Final Resolution: Motion Carries
Yes: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Megan McLaughlin, Dalia Palchik
No: Jeanette Hough, Tom Wilson, Elizabeth Schultz

I move that the Board's action regarding R2601 be postponed until the June 30 Board meeting.

Motion by Tom Wilson, second by Elizabeth Schultz.
Final Resolution: Motion Fails
Yes: Jeanette Hough, Tom Wilson, Elizabeth Schultz
No: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Dalia Palchik
Abstain: Megan McLaughlin

That the School Board adopt Regulation 2601.30P, Student Rights and Responsibilities, as amended and as detailed in the agenda item.

Motion by Sandra S Evans - Vice Chairman, second by Tamara D Kaufax.
Final Resolution: Motion Carries
Yes: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Megan McLaughlin, Dalia Palchik
No: Jeanette Hough, Tom Wilson, Elizabeth Schultz

Exhibit C

No. 16A52

In the
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Applicant,

v.

G.G., by and through his mother, DEIRDRE GRIMM,

Respondent.

RESPONSE TO APPLICATION TO STAY PRELIMINARY INJUNCTION AND RECALL AND STAY MANDATE PENDING A PETITION FOR CERTIORARI

Directed To The Honorable John G. Roberts, Jr.
Chief Justice Of The Supreme Court Of The United States And Circuit Justice For The United States Court Of Appeals For The Fourth Circuit

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

G.G., by and through his mother, Deirdre Grimm, submits the following Response to the Application to Stay the Preliminary Injunction and Recall and Stay the Mandate Pending a Petition for Certiorari filed by the Gloucester County School Board (the "Board").

INTRODUCTION

The Board has utterly failed to demonstrate that it will suffer irreparable harm if G.—and only G.—is allowed to use the boys' restroom at Gloucester High School while this Court considers the Board's forthcoming petition for certiorari. Stay App'x G-4 (Davis, J., concurring). The narrow, limited preliminary injunction will not inflict any of the purported irreparable injuries the Board claims it will suffer. It does not force the Board to develop "new policies" for students in "kindergarten through twelfth grade," Stay Application at 34; it does not apply to locker rooms, showers, or other situations in which students may be "in a state of full or complete undress," *id.* 35; and it certainly does not "extend[] to every school district in the Fourth Circuit" or "the entire Nation," *id.* at 38. No irreparable harm will occur if G. is allowed to use the boys' restroom while this Court considers whether to grant certiorari.

That is enough to deny the current application. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621 (2014) (Roberts, C.J., in chambers). Attempting to compensate for that deficiency, the Board asserts that the Fourth Circuit's decision

will have far-reaching consequences in future cases for the Gloucester County School District and other school districts nationwide. On this application for an emergency stay, however, purported harms resulting from how precedent applies in future cases are beside the point. The district courts in North Carolina and elsewhere are fully capable of presiding over the legal proceedings before their courts, and the parties in those proceedings will have all the protections of judicial review, including the opportunity to seek a stay at the appropriate time if actually confronted with irreparable injury. An application for an emergency stay, however, is not a mechanism for obtaining the equivalent of a declaratory judgment to enjoin future legal disputes that could develop as a result of the precedential force of the lower court's decision. "[T]he expense and annoyance of litigation" does not constitute "irreparable injury." *FTC v. Standard Oil. Co. of Cal.*, 449 U.S. 232, 244 (1980).

Moreover, the Board's anticipated petition for certiorari has little prospect of being granted. This Court does not usually intervene without waiting for a final judgment[1] or a conflict among the Courts of Appeals. Even if this Court were to overlook those procedural obstacles, the Board's request for this Court to grant certiorari to reconsider *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), is unlikely to garner the support of

[1] The Board contends that its forthcoming petition for certiorari will seek review of a final judgment by the Fourth Circuit. Stay App'x A-16. There has been no final judgment in this case. The Board seeks review of a Fourth Circuit decision that overturned a district court ruling in the Board's favor on a motion to dismiss and vacated the denial of a preliminary injunction. On remand, the district court issued a preliminary injunction that has not yet been reviewed by the Fourth Circuit.

four Justices in light of the Court's recent denial of certiorari on that precise issue in *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607 (2016). This Court is also not likely to be persuaded by the Board's fallback attempt to cobble together a circuit split with respect to how the Courts of Appeals apply *Auer*. There is no disagreement among the circuits regarding the underlying legal principles. The Board simply disagrees with how the Fourth Circuit applied those principles to the facts of this case.

Finally, if the Court does grant certiorari, it is not likely to reverse the Fourth Circuit's decision. The Fourth Circuit correctly determined that the term "sex" in Title IX and its implementing regulations encompasses all of the "morphological, physiological, and behavioral" components of an individual's sex. Stay App'x B-22.[2] That conclusion is consistent with the dictionary definition of the term and with this Court's landmark decisions in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). When a school singles out a transgender student and declares that he is so inherently gender non-conforming that he cannot use the common restrooms the school has established for everyone else, that student has unquestionably been "excluded from participation in" and "denied the benefits of" an "education program or activity" on the basis of sex. 20 U.S.C. § 1681(a).

[2] The Board's assertion that the Fourth Circuit did not "interpret[] the text of Title IX or its implementing regulation," Stay Application at 2, is inaccurate. *See* Stay Application App'x B-19-20, 22-24.

Title IX categorically prohibits disparate treatment on the basis of sex unless that disparate treatment is explicitly authorized by an exception in the statute or regulations. Title IX's implementing regulations provide a narrow exception allowing schools to create separate restrooms for boys and girls, but they do not authorize schools to single out transgender students in this manner. 34 C.F.R. § 106.33. The plain text of the regulation does not address how restrooms should be assigned in the context of a transgender student, for whom the various "morphological, physiological, and behavioral" components of sex are not all aligned Stay App'x B-23-24. In light of that textual ambiguity, the Department of Education has issued an opinion letter and comprehensive guidance explaining that the regulation does not authorize schools to effectively banish transgender students from the common restrooms by prohibiting them from using restrooms consistent with their gender identity. The Department's interpretation of its own regulation is the only interpretation that harmonizes the text of 34 C.F.R. § 106.33 with the underlying non-discrimination requirements of 20 U.S.C. § 1681(a). At a bare minimum, the Department's interpretation is reasonable and, therefore, entitled to controlling deference under *Auer*.

Because the Board has failed to establish a likelihood of irreparable harm, a reasonable probably of this Court granting certiorari, or a fair prospect of reversal, the application for a stay and/or recall of the mandate should be denied.

STATEMENT

A. Factual Background

1. G. is a 17-year-old transgender boy who has just completed his junior year at Gloucester High School. He is a boy and lives accordingly in all aspects of his life, but the sex assigned to him at birth was female.[3] In accordance with the standards of care for treating Gender Dysphoria, he is undergoing hormone therapy, he has legally changed his name, and his state identification card identifies him as male. Stay App'x H-2-3; Response App'x 1a. In every context outside school, he uses the boys' restrooms, just like any other boy would. Stay App'x H-3.

"Gender identity" is a well-established medical concept, referring to one's sense of oneself as belonging to a particular gender. Response App'x 3b. It is an innate and immutable aspect of personality that is firmly established by age four, although individuals may come to understand and express their gender identity at different ages. *Id.* Gender Dysphoria is the medical diagnosis for a feeling of

[3] The terms "biological sex" or "biological gender," which the Board uses to refer to a transgender person's sex assigned at birth, do not accurately distinguish between sex assigned at birth and gender identity because gender identity also is an immutable characteristic with biological roots. See Aruna Saraswat, M.D., et. al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (2015). For these reasons, current guidelines from the American Psychological Association no longer use the term "biological sex" when referring to sex assigned at birth. *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, App. A (December 2015), http://www.apa.org/practice/guidelines/transgender.pdf.

incongruence between an individual's gender identity and an individual's sex assigned at birth, and the resulting distress caused by that incongruence. *Id.* Gender Dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International Classification of Diseases (ICD-10). *Id.* The criteria for diagnosing Gender Dysphoria are set forth in the DSM-V (302.85). Response App'x 4b. Untreated Gender Dysphoria can result in significant clinical distress, debilitating depression, and suicidal thoughts and acts. *Id.* The World Professional Association for Transgender Health has established international Standards of Care for treating people with Gender Dysphoria (the "WPATH Standards"). *Id.* The leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, and the American Psychological Association, recognize the WPATH Standards as the authoritative standards of care for Gender Dysphoria. *Id.*

Under the WPATH Standards, treatment for Gender Dysphoria is designed to help transgender individuals live congruently with their gender identity and eliminate clinically significant distress. Response App'x 5b. Attempting to change a person's gender identity to match the person's sex assigned at birth is ineffective and harmful to the patient. *Id.* "It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition." Am. Psychiatric Ass'n, *Gender Dysphoria Fact Sheet*, at 1 (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf.

Living one's life fully in accordance with one's gender identity is a critical component of treatment for Gender Dysphoria under the WPATH standards. Response App'x 5b. For a transgender male, that typically includes dressing and grooming as a male, adopting a masculine name, and presenting oneself to the community as a boy or man. *Id.* The social transition takes place at home, at work or school, and in the broader community. *Id.* Impeding any aspect of social transition undermines a person's entire transition. *Id.* Negating a person's gender identity poses serious health risks, including depression, post-traumatic stress disorder, hypertension, and self-harm. Response App'x 7b.

2. At a very young age, G. was aware that he did not feel like a girl. Stay App'x H-1. By approximately age twelve, G. acknowledged his male gender identity to himself and to close friends. Stay App'x H-2. By ninth grade, most of G.'s friends knew his gender identity, and they treated him as male when socializing away from home and school. *Id.*

G.'s untreated Gender Dysphoria, and the stress of concealing his gender identity from his family, caused him to experience severe depression and anxiety. *Id.* G.'s mental distress was so serious that he could not attend school in 2014 during the spring semester of his freshman year. *Id.* Instead, he took classes through a home-bound program that follows the public high school curriculum. *Id.*

In April 2014, G. told his parents that he is transgender. *Id.* At his request, he began seeing a psychologist with experience working with transgender youth. *Id.* G.'s psychologist diagnosed G. with Gender Dysphoria and, consistent with the

WPATH Standards, recommended that he begin living in accordance with his male gender identity in all aspects of his life. *Id.* G.'s psychologist also provided G. with a "Treatment Documentation Letter" confirming he was receiving treatment for Gender Dysphoria and, as part of that treatment, should be treated as a boy in all respects, including his use of the restroom. *Id.* G. uses the boys' restrooms in public venues such as restaurants, libraries, and shopping centers. Stay App'x H-3.

Also consistent with the WPATH Standards, G.'s psychologist recommended that he see an endocrinologist to begin hormone treatment. Stay App'x H-2. G. has received hormone treatment since late December 2014. Stay App'x H-3. Among other therapeutic benefits, the hormone treatment has deepened G.'s voice, increased his growth of facial hair, and given him a more masculine appearance. *Id.*

G. successfully petitioned the Circuit Court of Gloucester County to change his legal name to G. Stay App'x H-2. G. now uses that name for all purposes, and his friends and family refer to him using male pronouns. *Id.* The Virginia Department of Motor Vehicles has also approved G.'s request for the sex designation "M" for male to appear on his driver's license or identification card. Response App'x 1a.

3. In August 2014, before beginning his sophomore year, G. and his mother informed officials at Gloucester High School that G. is a transgender boy and that he had legally changed his name to G. Stay App'x H-3. G. and his mother also met with the school principal and guidance counselor to explain that G. is a transgender

boy and that, consistent with his medically supervised treatment, he would be attending school as a male student. *Id.*

With the permission of school administrators, G. used the boys' restrooms at school for seven weeks without incident. Stay App'x H-4.[4] After some parents complained, however, the Board adopted a new policy that singles out transgender students for different treatment than all other students. Stay App'x L-2.[5] The policy states that restrooms will be restricted to students based on their "biological gender" and that students with "gender identity issues" will be provided an "alternative appropriate private facility." *Id.*[6]

According to the Board member who drafted the policy, the new policy was not based on concerns that G.'s use of the restrooms would disrupt the learning

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[4] G. requested and was permitted to continue using the home-bound program for his physical education requirements. He therefore does not use the school locker rooms. Stay Appx. H-3. The Board's assertion that he requested to use the home-bound program *because* he did not wish to use those locker rooms is incorrect. Stay Application 5.

[5] The Board has never disclosed the source or content of the complaints it received.

[6] Six days before voting on the new policy, the Board announced in a press release that it planned to increase privacy in restrooms for all students—whether transgender or not—by "adding or expanding partitions between urinals in male restrooms," "adding privacy strips to the doors of stalls in all restrooms," and "designat[ing] single-stall, unisex restrooms . . . to give all students the option for even greater privacy." See Gloucester County School Board Press Release, Dec. 3, 2014 ("Dec. 3 Press 11 Release") at 2, http://gets.gc.k12.va.us/Portals/Gloucester/District/docs/SB/GlouSBPressRelease120314.pdf. At the school board meeting, however, several adult speakers voiced their opinion that the added privacy protections would be insufficient and threatened to vote the Board members out of office if they did not also prohibit transgender students from using restrooms consistent with their gender identity. Stay App'x B-9.

environment, and was designed solely to protect students' privacy. Gloucester County School Board Video Tr., Dec. 9, 2014, ("Dec. 9 Video Tr.") at 1:48:37, 1:49:52. http://gloucester.granicus.com/MediaPlayer.php?view_id=10&clip_id=1090. The dissenting Board member warned that the policy conflicted with guidance and consent agreements by the Department of Justice and the Department of Education's Office of Civil Rights. *Id.* at 2:07:02.

The new policy had no effect on other students because, for non-transgender students, assigning restrooms based on sex assigned at birth or gender identity is a distinction without a difference. The one and only result of the policy was that G. could no longer use the same restrooms as other boys and was relegated to single-stall, unisex restrooms that no other student is required to use. The separate restrooms physically and symbolically mark G. as "different," isolate G. from his peers, and brand him as unfit to share the same restrooms as other students. Stay App'x. H-5-6.[7]

To escape such stigma and humiliation, G. tries to avoid using the restroom entirely while at school, and, if that is not possible, he has used the nurse's restroom. Stay App'x H-5. Using the nurse's restroom makes him feel embarrassed

[7] The Board asserted below that G. is permitted to use the girls' restroom, but that is not a viable possibility for G. The claim that G. has the choice of using the girls' restroom is reminiscent of the sophistry that gay people were free to marry as long as they married a different-sex partner. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (explaining that the "immutable nature" of sexual orientation "dictates that same-sex marriage is [the] only real path to this profound commitment" for lesbians and gay men). For all practical purposes, denying G. access to the boys' restroom denies G. access to the common restrooms entirely.

and humiliated, which increases his dysphoria, anxiety, and distress. Stay App'x H-5-6. G. feels embarrassed that everyone who sees him enter the nurse's office knows he is there because he has been prohibited from using the same boys' restrooms that the other boys use. Stay App'x H-6. To avoid using the restroom, G. limits the amount of liquids he drinks and tries to "hold it" when he needs to urinate during the school day. Stay App'x H-5. As a result, G. has repeatedly developed painful urinary tract infections and has felt distracted and uncomfortable in class. Stay App'x H-6. The stress at school also places G. at increased risk for lifelong harms, including post-traumatic stress disorder, depression, anxiety, and suicidality in adulthood. Response App'x 8b. A nationally recognized expert in the treatment of Gender Dysphoria in adolescents has evaluated G. and concluded that the stigma he experiences every time he needs to use the restroom "is a devastating blow to G.G and places him at extreme risk for immediate and long-term psychological harm." Response App'x 9b.

B. Proceedings Below.

1. The day after the end of the 2014-15 school year, G. filed a Complaint and Motion for Preliminary Injunction against the Board, arguing that the Board's new policy discriminated against G. on the basis of sex, in violation of Title IX and the Equal Protection Clause. Stay App'x B-10. In support of his arguments, G. relied on case law holding that discrimination against transgender individuals constitutes discrimination on the basis of "sex" under federal statutes and the Fourteenth Amendment. *See Glenn v. Brumby*, 663 F.3d 1312, 1315-16 (11th Cir.

2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

One of Title IX's implementing regulations authorizes schools to provide separate restrooms for boys and girls, but does not specifically address which restrooms transgender boys and transgender girls should use. The regulation states: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Department of Education issued an opinion letter clarifying that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." Stay App'x J-2.[8] The opinion letter was consistent with the position the Department had previously taken in multiple enforcement actions since 2013. *Id.* It was also consistent with previous guidance the Department had issued with respect to the treatment of transgender students in sex-segregated programming. *Id.*

Before the district court, G. argued that the Department's interpretation of 34 C.F.R. § 106.33 is the only interpretation that harmonizes the regulation with

[8] The dissent below incorrectly states that G. "sought an opinion letter about his situation." Stay App'x B-51 (Nieymeyer, J., dissenting). G. did not seek the opinion letter, and the identity of the individual who requested the letter has not been disclosed by the Department.

Title IX's mandate of equal educational opportunity. G. further argued that, at a minimum, the Department's interpretation is reasonable and entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997). After hearing G.'s motion for a preliminary injunction together with the Board's cross-motion to dismiss, the district court granted the Board's motion to dismiss the Title IX claim and denied G.'s motion for a preliminary injunction. Stay App'x A. The district court refused to extend *Auer* deference to the Department's interpretation of its own regulation because, in the court's view, the authorization to assign restrooms based on "sex" necessarily authorizes schools to require transgender students to use restrooms based on the sex that was assigned to them at birth, as opposed to their gender identity. Stay App'x A-12, A-14-15. The district court then denied G.'s motion for a preliminary injunction because G.'s claim under Title IX had been dismissed and because the evidence G. presented regarding the balance of harms contained hearsay that would be inadmissible at trial. Stay App'x A-15-18.

2. G. filed an interlocutory appeal from the denial of a preliminary injunction with the U.S. Court of Appeals for the Fourth Circuit and asked the court to exercise pendant appellate jurisdiction to review the district court's dismissal of G.'s Title IX claim. Stay App'x B-12. On April 19, 2016, the Fourth Circuit reversed the district court's dismissal of the Title IX claim and vacated the district court's denial of G.'s motion for preliminary injunction. Stay App'x B-1-36.

With respect to G.'s Title IX claim, the Fourth Circuit held that "the Department's interpretation of its own regulation, [34 C.F.R.] § 106.33, as it relates

to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case." Stay App'x B-26. In reaching that conclusion, the Fourth Circuit methodically considered all the conditions for *Auer* deference. First, the Fourth Circuit examined the text of the regulation to determine whether the text unambiguously resolved which restroom a transgender student should use. Stay App'x B-18-21. The Fourth Circuit concluded that "[a]lthough the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." Stay App'x B-20.

The Fourth Circuit then examined whether the Department's interpretation of 34 C.F.R. § 106.33 was plainly erroneous or inconsistent with the regulation's text. Stay App'x B-21-24. Once again, the Fourth Circuit independently reviewed the text of the regulation and determined that, in the context of a transgender student using the restroom, the plain meaning of "sex" did not unambiguously refer to the student's sex assigned at birth. The Fourth Circuit looked to dictionaries contemporaneous to the passage of Title VII and Title IX, which defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral peculiarities . . . that is typically manifested as maleness or femaleness." Stay App'x B-22. The court concluded that the dictionary definitions of the term "sex" indicate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally

descriptive." Stay App'x B-22-23. The dictionary definition thus "sheds little light on how exactly to determine the 'character of being either male or female'" where the morphological, physiological, and behavioral indicators of sex "diverge." Stay App'x B-23.

Finally, the Fourth Circuit determined that the Department's interpretation was the product of the Department's fair and reasoned judgment and not adopted as a post-hoc litigating position. Stay App'x B-24-26. As the court noted, the Department's interpretation was consistent with "the existing guidance and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities." Stay App'x B-25.

In response to the argument that G.'s use of the boy's restroom would infringe the constitutional privacy rights of other students, the Fourth Circuit noted that this case is not analogous to the cases cited by the Board, which involved students who were videotaped naked in a locker room or indiscriminately subject to a strip search. "G.G.'s use—or for that matter any individual's appropriate use—of a restroom [does] not involve the [same] type of intrusion." Stay App'x B-27 n.10. What is true generally is especially true here. The likelihood that anyone in the restroom would be accidently exposed to nudity has been virtually eliminated by the extra privacy protections installed by the Board, such as partitions between urinals in male restrooms and privacy strips for the doors of stalls in all restrooms. All students who want greater privacy for any reason also have the option of using one

of the new single-stall restrooms installed by the Board. Stay App'x B-10; *accord* Stay App'x B-41 (Davis, J., concurring); Stay App'x G-4 (Davis, J., concurring).

After reversing the district court's dismissal of the Title IX claim, the Fourth Circuit also vacated the district court's denial of G.'s motion for preliminary injunction. Stay App'x B-29-33. The Fourth Circuit explained that the district court applied an improper evidentiary standard for a motion for preliminary injunction; specifically, "it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial." Stay App'x B-31-32.

Senior Judge Davis issued a concurring opinion stating that "while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, *this Court* would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record." Stay App'x B-37 (Davis, J., concurring) (emphasis in original). Judge Davis noted that "[t]he uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past." Stay App'x B-40. Finally, Judge Davis urged the district court on remand to take "prompt action" and noted that "[b]y the time the district court

issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year." Stay App'x B-43.

Judge Niemeyer dissented. Stay App'x B-45-69. His dissent, however, did not identify any privacy concerns raised by the facts of this case and acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Stay App'x B-60. The dissent instead focused on transgender students' use of locker rooms and dormitory facilities, an issue not presented here. *Id.*

After the Fourth Circuit issued its decision, the Department of Education and the Department of Justice issued comprehensive guidance for schools on how to provide transgender students equal access to educational resources consistent with Title IX. Stay App'x K-1-7. In a separate document, the Department of Education's Office of Elementary & Secondary Education provided examples of school policies from across the country to address questions, such as "How do schools confirm a student's gender identity?" and "How do schools protect the privacy rights of all students in restrooms or locker rooms?"[9]

On May 31, 2016, the Fourth Circuit denied the Board's petition for rehearing en banc, noting that no judge had called for an en banc poll. Stay App'x C-2. Judge Niemeyer dissented from the denial of panel rehearing. Stay App'x C-3-5. On June 9, 2016, the Fourth Circuit denied the Board's motion to stay the

[9] U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* ("*Examples of Policies*") at 1-2, 7-8 (May 2016), http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

mandate pending disposition of a forthcoming petition for certiorari. Stay App'x D-1-3.

4. On remand, the district court entered a preliminary injunction on June 23, 2016, allowing G. to use the boys' restroom at Gloucester High School. Stay App'x E-1. The court emphasized that the preliminary injunction applies only to G. and does not apply to any facilities other than restrooms. Stay App'x E-2. The district court and the Fourth Circuit denied the Board's motions to stay the preliminary injunction pending appeal. Stay App'x F-1-2, G-1. In an opinion concurring in the denial of a stay, Judge Davis responded to the dissent's assertion that the *G.G.* opinion was "unprecedented." Stay App'x G-4. Judge Davis explained that, in accordance with this Court's decision in *Price Waterhouse*, "[t]he First Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on the person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Stay App'x G-3 (Davis, J., concurring). Judge Davis explained that the Fourth Circuit's decision to defer to the Department of Education's interpretation of its own regulations rested on "this long-settled jurisprudential foundation." *Id.* In response to the dissent's argument that the Board would suffer irreparable injury absent a stay, Judge Davis noted that "the dissent contains its own rebuttal." Stay App'x G-3 (Davis, J., concurring).

ARGUMENT

Three conditions must be met before the Court issues a stay pursuant to 28 U.S.C. § 2101: "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Teva Pharm.*, 134 S. Ct. at 1621 (internal quotation marks and brackets omitted). However, the three conditions "*necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (emphasis in original). "It is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (internal quotation marks omitted).

The Board's requests to stay of the preliminary injunction and recall and stay of the mandate satisfy none of these fundamental requirements. Presented with essentially the same arguments, both lower courts in this case denied a stay. Under these circumstances, "a heavy burden rests on the applicant to demonstrate the need for a stay." Stephen M. Shapiro, *et al.*, Supreme Court Practice 907 (10th ed. 2013) (and collected cases). That burden has not been met here.

I. THE BOARD HAS NOT IDENTIFIED ANY FORM OF IRREPARABLE HARM.

"The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury." *Nken v. Holder*, 556 U.S. 418, 432 (2009) (internal quotation marks omitted). If an applicant fails to establish a likelihood of

irreparable harm, the request for a stay must be denied. *Teva Pharm.*, 134 S. Ct. at 1621 (denying stay for lack of irreparable harm even though there was a reasonable probability of granting certiorari and a fair prospect of reversal); *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (denying stay after finding no irreparable harm). The Board has failed to articulate any irreparable harm that would occur if the preliminary injunction is not stayed or the mandate is not recalled.

The Board's arguments for staying the preliminary injunction have little connection to the injunction that was actually issued by the district court. The preliminary injunction applies only to G.; it applies only to the boy's restrooms; and it applies only at Gloucester High School. The preliminary injunction does not force the Board to develop "new policies" for students in "kindergarten through twelfth grade," Stay Application 34; it does not apply to locker rooms or other situations in which students may be "in a state of full or complete undress," *id.* at 35; and it certainly does not "extend[] to every school district in the Fourth Circuit" or "the entire Nation," *id.* at 38. *See Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 834 (10th Cir. 1993) ("Because this is not a class action, the broad sweep of the remedy exists only in defendant's imagination."). Any broader implications this case might have for other students, other facilities, or other school districts would follow from

the precedential effect of *G.G.*—not from the preliminary injunction issued by the district court.[10]

The narrow preliminary injunction will not infringe upon other students' right to bodily privacy. Stay Application 36-37. As the Fourth Circuit explained, "G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in the cases cited by the Board. Stay App'x B-27 n.10. Even the dissent acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Stay App'x B-60 (Niemeyer, J., dissenting). *Cf. Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing transgender woman to use women's restroom created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present"). If any other male student is uncomfortable using the same restroom as G., that student also has the option to use one of the three single-user facilities installed by the

[10] The Board attempts to bolster its argument by relying on "in chambers" opinions of individual Justices stating that "any time a State is enjoined by a court from effectuating statues enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The Gloucester County School Board, however, is not a State and its restroom policy is not a statute. "Municipalities are not sovereign. And for this reason, federal law often treats municipalities differently from States." *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1122 (2015) (Alito, J., dissenting) (citation omitted).

Board. Stay App'x B-10; *accord* Stay App'x B-41 (Davis, J., concurring); Stay App'x G-4 (Davis, J., concurring).[11]

The Board asserts that G.'s use of the restrooms will cause "disruption" because people will complain to the Board. Stay Application 34. The uncontested record, however, demonstrates that, while some people complained to the Board, G's use of the restrooms for seven weeks did not cause any physical disruption at all. Stay App'x H-4. Indeed, the Board member who authored the new policy emphasized that the proposal was *not* based on concerns that G.'s use of the restrooms would disrupt the learning environment, and was designed solely to protect students' privacy. Dec. 9 Video Tr. 1:48:37, 1:49:52.

In contrast, a stay would have irreparable consequences for G., who, according to the uncontested evidence before the district court, experiences painful urinary tract infections and daily psychological harm as a result of the Board's policy. Stay App'x B-40 (Davis, J., concurring). Moreover, a stay would almost certainly mean that G. will be prohibited from using the same restrooms as his peers for the remainder of his time at Gloucester High School. *Cf. Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d. 771, 778 (S.D.W.V. 2012) (granting a preliminary

[11] Parents' fundamental rights to direct the upbringing and education of their children are not at issue in this case. Stay Application 35. "While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

injunction because plaintiffs "will experience their middle school years only once during their life").

The Board's further request for this Court to recall and stay the Fourth Circuit's mandate in *G.G.* fails to identify any irreparable harm at all. The Board asserts that the mandate must be recalled because the precedent in *G.G.* has been cited in formal guidance issued by the Department of Education and the Department of Justice, and has led to additional litigation in North Carolina and elsewhere. Stay Application at 29 n.9, 27-28, 38. This Court, however, has made clear, time and time again, that "the expense and annoyance of litigation" does not constitute "irreparable injury." *Standard Oil*, 449 U.S. at 244 (citing *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938), and *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *cf. Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108-09 (2009). The district courts in North Carolina and elsewhere are fully capable of presiding over the legal proceedings before their courts, and the parties in those proceedings will have all the protections of judicial review, including the opportunity to seek a stay at the appropriate time if actually confronted with irreparable injury. An application for an emergency stay, however, is not a mechanism for obtaining the equivalent of a declaratory judgment to enjoin future legal disputes that could develop as a result of the precedential force of the lower court's decision.

II. THE BOARD HAS NOT SHOWN A REASONABLE PROBABILITY THAT CERTIORARI WILL BE GRANTED.

There is no reasonable probability that this Court will grant certiorari in this case without a final judgment or circuit split. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for certiorari); *accord Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of petition for certiorari because "[t]he current petitions come to us in an interlocutory posture").

Moreover, there is no disagreement among the Courts of Appeals that could justify granting certiorari before final judgment. Sup. Ct. R. 10(a). Indeed, the Fourth Circuit is the only Court of Appeals to rule on whether Title IX and its implementing regulations protect the ability of transgender students to use restrooms consistent with their gender identity. The Board asks this Court to grant certiorari now because lawsuits raising similar issues are currently pending in various district courts across the country. Stay Application at 28-29 & n.9. This Court's ordinary practice, however, would be to wait until those cases are actually decided and grant certiorari if a circuit split develops. Granting certiorari now, without the benefit of consideration by any other Court of Appeals, would be an unwarranted deviation from this Court's settled practice.

In addition to these prudential considerations about the timing of review, there is no reasonable probability that four Justices will vote to grant certiorari on the questions to be presented. The Board notes that three Justices in dissenting

and concurring opinions have either called for *Auer* and *Seminole Rock* to be overruled or expressed interest in reconsidering those precedents. Stay Application 18-20. The majority of this Court, however, has never embraced those views. Moreover, this Court passed up the opportunity to consider these questions last term when it denied certiorari in *United Student Aid Funds*, 136 S. Ct. at 1608. There is not a reasonable probability that four Justices will grant certiorari to reconsider *Auer* deference so recently after declining to grant certiorari in that case.

The Board also attempts to cobble together a circuit split by identifying cases in which other Courts of Appeals have examined an agency's interpretation of a regulation and concluded that *Auer* deference was unwarranted based on the particular circumstances at issue. The purported "splits" identified by the Board are nonexistent.

First, the Board asserts that the circuits are split over whether an agency's interpretation of its regulation must appear in a format that carries the force of law in order to qualify for *Auer* deference. Stay Application at 21. If an interpretation carried the force of law, however, it would qualify for deference under *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, (1984). The whole point of *Auer* deference is to allow agencies to interpret and apply existing regulations without undergoing full notice-and-comment rulemaking. The Board purports to identify such a requirement in the First Circuit's decision in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129, 139-40 n.13 (1st Cir. 2013). The First Circuit's reference to the

lack of notice-and-comment rulemaking, however, was contained in a paragraph explaining why an unpublished agency letter was not entitled to *Chevron* deference. The First Circuit then turned to the issue of *Auer* deference and concluded that deference was inappropriate because the letter would impose monetary liability for conduct that took place before the interpretation was issued. *See Christopher v. SmithKline Beecham Corp.,* 132 S. Ct. 2156 (2012). The lack of notice-and-comment rulemaking played no role in the court's application of *Auer*. *Cf. Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 76 (1st Cir. 2006) (applying *Auer* deference to statements in agency manual despite lack of notice-and-comment rulemaking).[12]

Second, the Board asserts there is a split within the circuits regarding whether *Auer* deference applies when an interpretation is advanced for the first time in litigation. Every circuit, including the Fourth Circuit, agrees that *Auer* deference is inappropriate when an interpretation is "a convenient litigating position." Stay App'x B-24. That principle, however, applies when an interpretation is a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462. In contrast, when an agency is not itself a party, this Court has repeatedly applied *Auer* deference even when an

[12] Similarly, the cited decisions from the Sixth and Seventh Circuits do not require notice-and-comment rulemaking before applying deference. Stay Application at 23 & n.4. They withheld deference because the agencies themselves disclaimed the relevant interpretations as an authoritative representation of the agency's views. Stay Application at 23 & n.4. The Fourth Circuit, like every other Court of Appeals, agrees that *Auer* deference is inappropriate when an interpretation does not reflect "the agency's fair and considered judgment." Stay App'x B-24.

agency advances an interpretation for the first time in an amicus brief. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209 (2011); *Auer*, 519 U.S. at 462. The Department of Education "is not a party to this case," *Chase Bank*, 562 U.S. at 209, and it had adhered to its interpretation of 34 C.F.R. § 106.33 long before this dispute arose. Stay App'x B-25.

Finally, the Board asserts that the Fourth Circuit's decision conflicts with decisions in other circuits that withhold deference when an interpretation is inconsistent with the understanding of a regulation at the time it was enacted. The Fourth Circuit agrees with that underlying principle. *See Dickenson-Russell Coal Co., LLC v. Sec'y of Labor*, 747 F.3d 251, 257 (4th Cir. 2014). The Fourth Circuit simply disagrees with the Board's assertion that the original understanding of 34 C.F.R. § 106.33 was that a transgender student like G. would be assigned restrooms based his sex assigned at birth even when that assignment conflicts with his gender identity, his secondary-sex characteristics resulting from hormones, and the gender marker on his government identification card. The Fourth Circuit explained that the regulation "assume[d] a student population composed of individuals" for whom "the various indicators of sex all point in the same direction," and, therefore, "sheds little light" on which restroom a transgender student should use "where those indicators diverge." Stay App'x B-23.

The Fourth Circuit follows the same legal principles as every other Court of Appeals. The Board has not identified a circuit split. It simply disagrees with how the Fourth Circuit applied those principles to the facts of this case.

III. THE BOARD HAS NOT SHOWN A FAIR PROSPECT OF REVERSAL.

There is no fair prospect that a majority of this Court would vote to reverse the Fourth Circuit's decision, which is consistent with Title IX and its implementing regulations and faithfully applies this Court's precedents.

A. The Term "Sex" In Title IX Encompasses All The "Morphological, Physiological, And Behavioral" Components Of An Individual's Sex.

The Fourth Circuit correctly determined that the term "sex" in Title IX and its implementing regulations encompasses all of the "morphological, physiological, and behavioral" components of an individual's sex. Stay App'x B-23-24. The Board's attack on the Fourth Circuit's decision is built on factually incorrect assertions about the plain meaning of the term "sex" in Title IX, and a method of interpretation that this Court repudiated in *Oncale* and *Price Waterhouse*.

Relying on an anachronistic distinction between "sex" as a physical term and "gender" as a behavioral term, the Board asserts that the term "sex" in Title IX and its implementing regulations unambiguously refers solely to a student's so-called "biological sex." At the time that Title VII and Title IX were drafted, however, contemporaneous dictionaries did not distinguish between sex and gender as distinct concepts, and they included psychological and behavioral differences within the definition of "sex." As the Fourth Circuit explained, contemporaneous dictionaries defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral peculiarities . . . that is typically

manifested as maleness or femaleness." Stay App'x B-22.[13] Those dictionary definitions indicate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive." Stay App'x B-22-23. The dictionary definition of the term sex therefore "sheds little light on how exactly to determine the 'character of being either male or female'" where the morphological, physiological, and behavioral indicators of sex "diverge." Stay App'x B-23.

The Board's assertions about the "plain meaning" of "sex" are really assertions about what was in the minds of individual legislators in 1972. No one contends that those legislators considered how the statute would apply to transgender individuals. This Court, however, has steadfastly refused to restrict the meaning of the word "sex" to what was in the minds of legislators who drafted Title VII or Title IX. For example, under Title IX, sexual harassment is discrimination on the basis of sex, even though "[w]hen Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting). Title VII (like Title IX) also protects against discrimination between members of the same sex even

[13] *See also* Am. Heritage Dictionary 548, 1187 (1973) (defining "sex" as, *inter alia*, "the physiological, functional, and psychological differences that distinguish the male and the female" and defining "gender" as "sex"); Webster's Seventh New Collegiate Dictionary 347, 795 (1970) (defining "sex" to include "behavioral peculiarities" that "distinguish males and females" and defining "gender" as "sex"); 9 Oxford English Dictionary ("OED") 577-78 (1st ed. 1939) (defining "sex" as, *inter alia*, a "distinction between male and female in general").

though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*; *cf. Barr v. United States*, 324 U.S. 83, 90 (1945) ("[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.")

Moreover, the Board's attempt to restrict the definition of "sex" to chromosomes or genitals conflicts with *Price Waterhouse,* in which six Justices agreed that an employer discriminated on the basis of "sex" when it denied promotion to an employee based, in part, on her failure to conform to stereotypes about how women should behave. 490 U.S. at 251 (plurality); *id.* at 260-61 (White, J., concurring the judgment); *id.* at 272 (O'Connor, J., concurring in the judgment). The employee was advised that if she wanted to advance in her career she should be less "macho" and learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. In ruling for the plaintiff, *Price Waterhouse* confirmed "that Title VII barred not just discrimination based on the fact that [the employee] was a woman, but also discrimination based on the fact that she failed 'to act like a woman.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). *Price Waterhouse* thus "eviscerated" the reasoning of some lower court decisions that attempted to narrow Title VII by

drawing a distinction between discrimination based on sex and discrimination based on gendered behavior. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). Consistent with *Price Waterhouse*, the First, Sixth, Eleventh, and Ninth Circuits have all held that discrimination against transgender individuals is discrimination on the basis of sex. *See Glenn v. Brumby*, 663 F.3d 1312, 1317-18 (11th Cir. 2011); *Smith*, 378 F.3d at 573; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk*, 204 F.3d at 1202; Stay Application at G-3 (Davis, J., concurring). "The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination" under our civil rights laws, including Title IX. *Glenn*, 663 F.3d at 1319.

Far from redefining the word "sex," the Fourth Circuit's recognition that an individual's sex includes more than genitals and chromosomes is fully consistent with the plain meaning of the term and faithful to this Court's precedents. "There is nothing unplain, untraditional, unusual, or new-fangled about this understanding." *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *13 (D. Conn. Mar. 18, 2016). The Board's arguments, in contrast, would turn back the clock thirty years and reinstate a method of statutory interpretation this Court repudiated long ago.

B. The Only Way To Reconcile 34 C.F.R. § 106.33 With The Underlying Requirements Of Title IX Is To Allow Transgender Students To Use Restrooms Consistent With Their Gender Identity.

The Department's interpretation of 34 C.F.R. § 106.33 is not merely reasonable; it is the only interpretation of the regulation that prevents transgender students from being excluded from participation in or denied the benefits of educational opportunities on the basis of sex. When a school establishes common restrooms for boys and girls, it must allow transgender boys and transgender girls to use those restrooms too. Excluding transgender students from the restrooms consistent with their gender identity effectively banishes those students from the common restrooms entirely.

"Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). The statute contains exceptions for activities such as father-daughter dances, 20 U.S.C. § 1681(a)(8); scholarships for beauty pageants, *id.* §1681(a)(9); and separate living facilities, *id.* §1686. But the statute creates no exemptions for school restrooms. Instead, Congress delegated broad power to the administrative agencies to decide whether additional exceptions should be created as part of the rulemaking process. 20 U.S.C. § 1682. Any disparate treatment that is not specifically authorized by one of the statutory or regulatory exceptions is prohibited.[14]

[14] Congress was well aware that policy decisions regarding access to restrooms and locker rooms would be made by the administrative agencies. When asked how the

The implementing regulations recognize that, under certain circumstances, some distinctions based on sex may not constitute a denial of educational benefit and opportunity under Title IX. In particular, the simple act of providing separate restrooms for boys and girls does not ordinarily stigmatize individuals or interfere with their ability to thrive in school. In recognition of that social context, 34 C.F.R. § 106.33 authorizes schools to provide separate restrooms for members of "one sex" and members of "the other sex." The regulation clarifies that "the mere act of providing separate restroom facilities for males and females does not violate Title IX." Stay App'x B-19.

The Board's policy is very different. By declaring that G. cannot use the same restroom as other boys, the Board's policy effectively banishes G. from the communal restrooms entirely. The Board does not argue that it would be appropriate for a transgender boy like G. to use the girls' restroom. The Board's policy thus singles out G. and declares that he is so inherently gender non-conforming that he cannot use the restrooms the school has established for everyone else. *Cf. Oncale*, 523 U.S. at 81-82 (recognizing that the discrimination must be assessed from "the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" which "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target").

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text of the statute would affect sex-segregated facilities like locker rooms, Senator Bayh stated that "the rulemaking powers . . . give the Secretary discretion to take care of this particular policy problem"—not that the plain text of Title IX would not apply. 117 Cong. Rec. 30407 (1971); *accord* 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) ("[R]egulations would allow enforcing agencies to permit differential treatment by sex . . . where personal privacy must be preserved.").

Being forced to use separate restrooms also impairs transgender students' physical and psychological wellbeing, which necessarily interferes with their ability to thrive at school. *Cf. Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014) (evidence "established that a student's psychological well-being and educational success depend[ed] upon being permitted to use the communal bathroom consistent with her gender identity").

Banishing transgender students from the restrooms used by their peers unquestionably interferes with their equal educational opportunity under Title IX. The text of Title IX not only protects students "from discrimination, but also specifically shield[s] [them] from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.'" *Davis*, 526 U.S. at 650 (quoting 20 U.S.C. § 1681(a)). "The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Id.*

Nothing in the text of 34 C.F.R. § 106.33 authorizes schools to relegate transgender students to separate single-stall restrooms. The regulation allows schools to provide separate restrooms for boys and girls, but the school must allow transgender boys and transgender girls to use those restrooms too. In order to ensure that transgender students are not effectively banished from the common restrooms entirely, the Department properly concluded that when a school creates separate restrooms for boys and girls, transgender boys and transgender girls must be allowed to use the restroom consistent with their gender identity. That

interpretation does not impose new regulatory obligations on funding recipients; it simply clarifies how the existing regulation applies when a student is transgender.

Allowing transgender students to use restrooms consistent with their gender identity also coincides with social mores regarding sex-segregated restrooms. No one disputes that separating restrooms on the basis of sex reflects traditions of modesty between men and women. But, as the panel explained, "the truth of these propositions" does not answer the question of which restroom a transgender boy like G. should use. Stay App'x B-27. The Board, like the dissent, assumes that social customs regarding privacy are built entirely around a person's genitals even in contexts where there is no exposure to nudity. But that assertion is hardly self-evident. For many people, the presence of a transgender man (who may look indistinguishable from a non-transgender man) in the women's restroom would be far more disruptive and discomfiting than the presence of a transgender woman (who may look indistinguishable from a non-transgender woman). *See* Stay App'x B-25 n.8.

Allowing transgender boys to use the boys' restroom and transgender girls to use the girls' restroom is the only option that is consistent with the text of 34 C.F.R. § 106.33, social customs regarding modesty, and the underlying requirements of Title IX.

C. The Fourth Circuit Appropriately Deferred To The Department's Reasonable Interpretation Of Its Own Regulation.

Instead of deciding whether the Department' s interpretation is mandated by Title IX, the Fourth Circuit resolved the appeal on the narrowest available grounds by deferring to the Department's interpretation of its own regulations. Even without the benefit of deference, the Department's interpretation would have the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994). But because the Department's interpretation is at the very least reasonable, it is entitled to controlling deference under *Auer*.

None of the Board's attacks on the Fourth Circuit's application of *Auer* hits its target. The Board argues that because the word "sex" is contained in both the regulation and the underlying statute, the Fourth Circuit improperly applied *Auer* deference to the agency's interpretation of the statute itself. Stay Application 30. But this is not a case in which the Department has interpreted a "parroting" regulation that "does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). The policy decision to permit sex-segregated restrooms is "a creature of the Secretary's own regulations." *Id.* at 256. The regulation reflects the Department's policy judgment that the mere act of providing separate restrooms for boys and girls does not deprive students of equal educational opportunity under Title IX. Having made that policy decision, the Department's interpretation of 34 C.F.R. § 106.33 clarifies that the regulation does

not permit schools to deny transgender students equal educational opportunity by excluding them from restrooms consistent with their gender identity.

Moreover, the Board is in no position to argue that the Department's interpretation of the regulation resulted in "unfair surprise." Stay Application 25. The Board was well aware of the Department's position at the time it passed the new policy. Assertions of unfair surprise do not relieve parties of their obligation "to conform their conduct to an agency's interpretations once the agency announces them." *Christopher*, 132 S. Ct. at 2168.

There is not a reasonable probability that a majority of this Court will agree with the Board's arguments and vote to reverse the Fourth Circuit's decision.

CONCLUSION

For all these reasons, the Application to Stay the Preliminary Injunction and Recall and Stay the Mandate Pending a Petition for Certiorari should be denied.

Respectfully submitted,

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Dated: July 26, 2016

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM, Plaintiffs, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant.	)	Civil No. 4:15cv54

SUPPLEMENTAL DECLARATION OF G.G.

1. My name is G.G. I am the plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. On or about May 27, 2015, I went to a local branch of the Virginia Department of Motor Vehicles (DMV) to apply for a learner's permit and to complete Gender Change Designation Request in order to ensure that the permit would reflect my gender as male.

3. I subsequently received a letter from DMV dated June 5, 2015 stating: "The Department of Motor Vehicles (DMV) has approved your request to have the gender indicator on your credential changed from F to M." A copy of the letter (with my name, address, and DMV Customer Number redacted) is attached to this Declaration as Exhibit A.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 10, 2015.

By: G.G.
G.G.

COMMONWEALTH of VIRGINIA

Department of Motor Vehicles
2300 West Broad Street

Richard D. Holcomb
Commissioner

Post Office Box 27412
Richmond, VA 23269-0001

June 5, 2015

Dear

The Department of Motor Vehicles (DMV) has approved your request to have the gender indicator on your credential changed from F to M.

Please visit your local DMV to complete this transaction. Please present this letter to the Customer Service Representative (CSR) as it will help to expedite your request. You will then be issued a new credential with the new gender indicator.

Please retain this letter in the event you need to return to a Customer Service Center for a replacement or reissue credential.

If you or the CSR has any questions regarding the re-issuance of your credential or our gender change policy, you may contact us Monday-Friday from 8:15 a.m. until 5:00 p.m. at (804) 367-6203.

Sincerely,

R. Smalls

R. Smalls
Medical Evaluator Senior
Medical Review Services

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM,	)	
Plaintiffs,	)	
	)	Civil No. 4:15-cv-00054-RGD-DEM
v.	)	
GLOUCESTER COUNTY SCHOOL BOARD,	)	
Defendant.	)	

CORRECTED EXPERT DECLARATION OF RANDI ETTNER, Ph.D

PRELIMINARY STATEMENT

1. I have been retained by counsel for Plaintiff as an expert in connection with the above-captioned litigation. I have actual knowledge of the matters stated in this declaration.

2. My professional background, experience, and publications are detailed in my curriculum vitae, a true and accurate copy which is attached as Exhibit A to this report. I received my doctorate in psychology from Northwestern University in 1979. I am the chief psychologist at the Chicago Gender Center, a position I have held since 2005.

3. I have expertise working with children and adolescents with Gender Dysphoria. During the course of my career, I have evaluated or treated between 2,500 and 3,000 individuals with Gender Dysphoria and mental health issues related to gender variance. Approximately 33% of those individuals were adolescents. I have also served as a consultant to the Wisconsin and Chicago public school systems on issues related to gender identity.

4. I have published three books, including the medical text entitled "Principles of Transgender Medicine and Surgery" (co-editors Monstrey & Eyler; Routledge, 2007). I have

authored numerous articles in peer-reviewed journals regarding the provision of health care to this population. I have served as a member of the University of Chicago Gender Board, and am a member of the editorial board for the *International Journal of Transgenderism*.

5. I am a member of the Board of Directors of the World Professional Association for Transgender Health (WPATH) (formerly the Harry Benjamin International Gender Dysphoria Association), and an author of the WPATH *Standards of Care* (7th version), published in 2011. The WPATH-promulgated Standards of Care are the internationally recognized guidelines for the treatment of persons with Gender Dysphoria and serve to inform medical treatment in the United States and throughout the world.

6. In preparing this report, I reviewed the materials listed in the attached Bibliography (Exhibit B). I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this report, as additional support for my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein. The materials I have relied upon in preparing this report are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject.

7. In addition to the materials in Exhibit B, I personally met with G.G. and Deirdre Grimm on May 26, 2015, to conduct a clinical assessment of G.G. The evaluation consisted of a clinical interview with, and observation of, G.G.; a subsequent interview with his mother; the administration of psychological testing; and a review of health records from his pediatrician and endocrinologist. I am confident that the opinions I hereafter render based on that assessment are both reliable and valid.

8. In the past four years, I have testified as an expert at trial or deposition in the following matters: *Kothmann v. Rosario*, Case No. 5:13-cv-28-Oc-22PRL (M.D. Fla.); *Doe et al v. Clenchy*, Case No cv-09-201 (Me. Super. Ct.)

9. I am being compensated at an hourly rate for actual time devoted, at the rate of $245 per hour for any clinical services, review of records, or report; $395 per hour for deposition and trial testimony; and $900 per day for travel time spent out of the office. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

GENDER IDENTITY AND GENDER DYSPHORIA

10. The term "gender identity" is a well-established concept in medicine, referring to one's sense of oneself as male or female. All human beings develop this elemental internal view: the conviction of belonging to one gender or the other. Gender identity is an innate and immutable aspect of personality that is firmly established by age four, although individuals vary in the age at which they come to understand and express, their gender identity.

11. Typically, people born with female anatomical features identify as girls or women, and experience themselves as female. Conversely, those persons born with male characteristics ordinarily identify as males. However, for transgender individuals, this is not the case. For transgender individuals, the sense of one's self—one's gender identity—differs from the natal, or birth-assigned sex, giving rise to a sense of being "wrongly embodied."

12. The medical diagnosis for that feeling of incongruence is Gender Dysphoria, which is codified in the Diagnostic and Statistical manual of Mental Disorders (DSM-V) (American Psychiatric Association) and the International Classification of Diseases-10 (World Health Organization). The condition is manifested by symptoms such as preoccupation with

ridding oneself of primary and secondary sex characteristics. Untreated Gender Dysphoria can result in significant clinical distress, debilitating depression, and often suicidality.

13. The criteria for establishing a diagnosis of Gender Dysphoria in adolescents and adults are set forth in the DSM-V (302.85):

A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).

2. A strong desire to be rid of one's primary/and or secondary sex characteristics because of a marked incongruence with one's experienced/ expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

3. A strong desire for the primary and /or secondary sex characteristics of the other gender.

4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

14. The World Professional Association for Transgender Health (WPATH) has established internationally accepted Standards of Care (SOC) for the treatment of people with Gender Dysphoria. The SOC have been endorsed as the authoritative standards of care by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, and the American Psychological Association.

15. In accordance with the SOC, individuals undergo medically-recommended transition in order to live in alignment with their gender identity. Treatment of the condition is multi-dimensional and varies from individual to individual depending on their needs, but can consist of social role transition, hormone therapy, and surgery to alter primary and/or secondary sex characteristics to help the individual live congruently with his or her gender identity and eliminate the clinically significant distress caused by Gender Dysphoria.

16. Social role transition is a critical component of the treatment for Gender Dysphoria. Social role transition is living one's life fully in accordance with one's gender identity. That typically includes, for a transgender male for example, dressing and grooming as a male, adopting a male name, and presenting oneself to the community as a boy or man. Social transition is crucial to the individual's consolidation of his or her gender identity. The social transition takes place at home, at work or school, and in the broader community. It is important that the individual is able to transition in all aspects of his or her life. If any aspect of social role transition is impeded, however, it undermines the entirety of a person's transition.

17. In prior decades before Gender Dysphoria was well-studied and understood, some considered it to be a mental condition that should be treated by psychotherapy aimed at changing the patient's sense of gender identity to match assigned sex at birth. There is now a medical consensus that such treatment is not effective and can, in fact, can cause great harm to the patient.

TREATMENT OF GENDER DYSPHORIA IN ADOLESCENTS AND HARMFUL EFFECTS OF EXCLUSIONS FROM SCHOOL RESTROOMS

18. As with adults, treatment for Gender Dysphoria in adolescents frequently includes social transition and hormone therapy, but genital surgery is not permissible under the WPATH Standards of Care for persons who are under the legal age of majority. Hormone therapy has a

profound virilizing effect on the appearance of a transgender boy. The voice deepens, there is growth of facial and body hair, body fat is redistributed, and muscle mass increases.

19. As with adults, for teenagers with Gender Dysphoria, social transition is a critical part of treatment. And as with adults, it is important that the social transition occur in all aspects of the individual's life. For a gender dysphoric teen to be considered male in one situation, but not in another, is inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child. The integration of a consolidated identity into the daily activities of life is the aim of treatment. Thus, it is critical that the social transition is complete and unqualified—including with respect to the use of restrooms.

20. Access to a restroom available to other boys is an undeniable necessity for transgender male adolescents. Restrooms, unlike other settings (e.g. the library), categorize people according to gender. There are two, and only two, such categories: male and female. To deny a transgender boy admission to such a facility, or to insist that one use a separate restroom, communicates that such a person is "not male" but some undifferentiated "other," interferes with the person's ability to consolidate identity, and undermines the social-transition process.

21. When transgender adolescents are not permitted to use restrooms that match their appearance and gender identity, the necessity of using the restroom can become a source of anxiety. The Chicago Gender Center physicians clinically report that youngsters often avoid drinking fluids during the day and hold their urine for the entire school day, making them prone to developing urinary tract infections, dehydration, and constipation. Anxiety regarding use of the restroom also makes it difficult for students to concentrate on learning and school activities.

22. Transgender adolescents like G.G. are particularly vulnerable during middle adolescence. Middle adolescence, approximately 15-16 years, is the period of development

when a teenager becomes extremely concerned with appearance and one's own body. This stage is accompanied by dramatic physical changes, including height and weight gains, growth of pubic and underarm hair, and breast development and menstruation in girls. Boys will experience growth of testicles and penis, a deepening of the voice and facial hair growth. There is an increased effort to make new friends, and an intense emphasis on the peer group. "Fitting in" is the overarching motivation at this stage of life.

23. While peers are developing along a "normal" and predictable trajectory, however, transgender teens like G.G. feel betrayed by the body, anxious about relationships, and frustrated by the challenges of a "non-normative" existence. At the very time of life when nothing is more important than being part of a peer group, fitting in, belonging, they may conspicuously stand out. Research shows that transgender students are at far greater risk for severe health consequences – including suicide – than the rest of the student population, and more than 50% of transgender youth will have had at least one suicide attempt by age 20.

24. If school administrators amplify this discomfort by sending a message that the student is different than his peers or shameful, they stigmatize nascent identity formation, which can be devastating for the student. Studies show that external attempts to negate a person's gender identity constitute *identity threat*. Developing and integrating a positive sense of self—identity formation—is a developmental task for all adolescents. For the transgender adolescent, this is more complex, as the "self" violates society's norms and expectations. Attempts to negate a person's gender identity – such as excluding a transgender male adolescent from the restrooms used by other boys – challenge this blossoming sense of self and pose health risks, including depression, post-traumatic stress disorder, hypertension, and self-harm.

25. School administrators and other adults play a critical role in "setting the tone" for whether a student will be stigmatized and ostracized by peers. Excluding a transgender adolescent from the same restroom as his peers puts a "target on one's back" for potential victimization and bullying. When adults—authority figures—deny an adolescent access to the restroom consistent with his lived gender, they shame him—negating the legitimacy of his identity and decimating confidence. In effect, they revoke membership from the peer group.

26. In a study of transgender youth age 15 to 21, investigators found school to be the most traumatic aspect of growing up. Experiences of rejection and discrimination from teachers and school personnel led to feelings of shame and unworthiness. The stigmatization they were routinely subjected to led many to experience academic difficulties and to drop out of school.

27. Until recently, it wasn't fully understood that these experiences of shame and discrimination could have serious and enduring consequences. But it is now known that stigmatization and victimization are some of the most powerful predictors of current and future mental health problems, including the development of psychiatric disorders. The social problems these transgender teens face at school actually create the blueprint for future metal health, life satisfaction, and even physical health. A recent study of 245 gender non-conforming adults found that stress and victimization at school was associated with a greater risk for post-traumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality in adulthood.

ASSESSMENT OF G.G.

28. It is my professional opinion that the Gloucester County School Board's policy of excluding G.G. from the communal restroom used by other boys and effectively banishing him to separate single-stall restroom facilities is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm.

29. As noted above, I personally met with G.G. on May 26, 2015, to conduct a clinical assessment. G.G. meets the criteria for Gender Dysphoria in adolescents and adults (302.85), in the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (F64.1) in the International Classification of Diseases. Indeed, G.G. has a *severe* degree of Gender Dysphoria. By adolescence, children with G.G.'s severe degree of Gender Dysphoria are so dysphoric they cannot even attempt to live as female. Such individuals seek hormones and, when they are old enough, surgeries that can offer them the only real hope of a normal life. As an adolescent, medically necessary treatment for G.G. currently includes testosterone therapy and social transition in all aspects of his life – including with respect to use of the restrooms. Untreated, many of these youngsters commit suicide.

30. As a result of the School Board's restroom policy, however, G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his "otherness," undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 2, 2015.

By: [ORIGINAL SIGNATURE UNDER SEAL]

Randi Ettner Ph.D.

RANDI ETTNER, PHD

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POSITIONS HELD

Clinical Psychologist
Forensic Psychologist
Fellow and Diplomate in Clinical Evaluation, American Board of Psychological Specialities
Fellow and Diplomate in Trauma/PTSD
President, New Health Foundation Worldwide
Board of Directors, World Professional Association of Transgender Health (WPATH)
Chair, Committee for Incarcerated Persons, WPATH
University of Minnesota Medical Foundation: Leadership Council
Psychologist, Chicago Gender Center
Adjunct Faculty, Prescott College
Editorial Board, International Journal of Transgenderism
Television and radio guest (more than 100 national and international appearances)
Internationally syndicated columnist
Private practitioner
Medical staff privileges attending psychologist Advocate Lutheran General Hospital

EDUCATION

PhD, 1979 Northwestern University (with honors)
Evanston, Illinois

MA, 1976 Roosevelt University (with honors)
Chicago, Illinois
Major: Clinical Psychology

BA, 1969-72 Indiana University (cum laude)
Bloomington, Indiana
Major: psychology, Minor: sociology

1972 Moray College of Education
Edinburgh, Scotland
International Education Program

1970 Harvard University
Cambridge, Massachusetts
Social relation undergraduate summer program in group dynamics and processes

CLINICAL AND PROFESSIONAL EXPERIENCE

Present	Psychologist: Chicago Gender Center Consultant: Walgreens; Tawani Enterprises Private practitioner
2011	Instructor, Prescott College: Gender - A multidimensional approach
2000	Instructor, Illinois Professional School of Psychology
1995-present	Supervision of clinicians in counseling gender non-conforming clients
1993	Post-doctoral continuing education with Dr. James Butcher in MMPI-2 interpretation University of Minnesota
1992	Continuing advanced tutorial with Dr. Leah Schaefer in Psychotherapy
1983-1984	Staff psychologist, Women's Health Center, St. Francis Hospital, Evanston, Illinois
1981-1984	Instructor, Roosevelt University, Department of Psychology: Psychology of Women, Tests and Measurements, Clinical Psychology, Personal Growth, Personality Theories, Abnormal Psychology
1976-1978	Research Associate, Cook County Hospital, Chicago, Illinois Department of Psychiatry
1975-1977	Clinical Internship, Cook County Hospital, Chicago, Illinois Department of Psychiatry
1971	Research Associate, Department of Psychology, Indiana University
1970-1972	Teaching Assistant in Experimental and Introductory Psychology Department of Psychology, Indiana University
1969-1971	Experimental Psychology Laboratory Assistant, Department of Psychology, Indiana University

LECTURES AND HOSPITAL GRAND ROUNDS PRESENTATIONS

Gender reassignment surgery- Midwestern Association of Plastic Surgeons, 2015

Adult development and quality of life in transgender healthcare- Eunice Kennedy Shriver National Institute of Child Health and Human Development, 2015

Healthcare for transgender inmates- American Academy of Psychiatry and the Law, 2014

Supporting transgender students: best school practices for success- American Civil Liberties Union of Illinois and Illinois Safe School Alliance, 2014

Addressing the needs of transgender students on campus- Prescott College, 2014

The role of the behavioral psychologist in transgender healthcare – Gay and Lesbian Medical Association, 2013

Understanding transgender- Nielsen Corporation, Chicago, Illinois, 2013;

Role of the forensic psychologist in transgender care; *Care of the aging transgender patient*- University of California San Francisco, Center for Excellence, 2013

Evidence-based care of transgendered patients- North Shore University Health Systems, University of Chicago, Illinois, 2011; Roosevelt-St. Vincent Hospital, New York; Columbia Presbyterian Hospital, Columbia University, New York, 2011

Children of Transsexuals-International Association of Sex Researchers, Ottawa, Canada, 2005; Chicago School of Professional Psychology, 2005

Gender and the Law- DePaul University College of Law, Chicago, Illinois, 2003; American Bar Association annual meeting, New York, 2000

Gender Identity and Clinical Issues – WPATH Symposium, Bangkok, Thailand, 2014; Argosy College, Chicago, Illinois, 2010; Cultural Impact Conference, Chicago, Illinois, 2005; Weiss Hospital, Department of Surgery, Chicago, Illinois, 2005; Resurrection Hospital Ethics Committee, Evanston, Illinois, 2005; Wisconsin Public Schools, Sheboygan, Wisconsin, 2004, 2006, 2009; Rush North Shore Hospital, Skokie, Illinois, 2004; Nine Circles Community Health Centre, University of Winnipeg, Winnipeg, Canada, 2003; James H. Quillen VA Medical Center, East Tennessee State University, Johnson City, Tennessee, 2002; Sixth European Federation of Sexology, Cyprus, 2002; Fifteenth World Congress of Sexology, Paris, France, 2001; Illinois School of Professional Psychology, Chicago, Illinois 2001; Lesbian Community Cancer Project, Chicago, Illinois 2000; Emory University Student Residence Hall, Atlanta, Georgia, 1999; Parents, Families and Friends of Lesbians and Gays National Convention, Chicago, Illinois, 1998; In the Family Psychotherapy Network National Convention, San Francisco, California, 1998; Evanston City Council, Evanston, Illinois 1997; Howard

Brown Community Center, Chicago, Illinois, 1995; YWCA Women's Shelter, Evanston, Illinois, 1995; Center for Addictive Problems, Chicago, 1994

Psychosocial Assessment of Risk and Intervention Strategies in Prenatal Patients- St. Francis Hospital, Center for Women's Health, Evanston, Illinois, 1984; Purdue University School of Nursing, West Layette, Indiana, 1980

Psychonueroimmunology and Cancer Treatment- St. Francis Hospital, Evanston, Illinois, 1984

Psychosexual Factors in Women's Health- St. Francis Hospital, Center for Women's Health, Evanston, Illinois, 1984

Sexual Dysfunction in Medical Practice- St. Francis Hospital, Dept. of OB/GYN, Evanston, Illinois, 1980

Sleep Apnea - St. Francis Hospital, Evanston, Illinois, 1996; Lincolnwood Public Library, Lincolnwood, Illinois, 1996

The Role of Denial in Dialysis Patients - Cook County Hospital, Department of Psychiatry, Chicago, Illinois, 1977

PUBLICATIONS

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"Post-traumatic Stress Disorder," *Chicago Daily Law Bulletin*, 1995.

"Compensation for Mental Injury," *Chicago Daily Law Bulletin*, 1994.

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PROFESSIONAL AFFILIATIONS

University of Minnesota Medical School –Leadership Council
American College of Forensic Psychologists
World Professional Association for Transgender Health
Advisory Board, Literature for All of Us
American Psychological Association
American College of Forensic Examiners
Society for the Scientific Study of Sexuality
Screenwriters and Actors Guild
Board of Directors, Chiaravalle Montessori School
Phi Beta Kappa

AWARDS AND HONORS

Phi Beta Kappa, 1971
Indiana University Women's Honor Society, 1969-1972
Indiana University Honors Program, 1969-1972
Merit Scholarship Recipient, 1970-1972
Indiana University Department of Psychology Outstanding Undergraduate Award Recipient, 1970-1972
Representative, Student Governing Commission, Indiana University, 1970

LICENSE

Clinical Psychologist, State of Illinois, 1980

BIBLIOGRAPHY

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Exhibit D

No. 16A52

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

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

REPLY IN SUPPORT OF PETITIONER'S APPLICATION FOR RECALL AND STAY OF THE FOURTH CIRCUIT'S MANDATE PENDING PETITION FOR CERTIORARI

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

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July 29, 2016

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INTRODUCTION

Respondent G.G. ("G.G.") opposes the stay application of the Gloucester County School Board ("Board") based largely on the argument that the Fourth Circuit's April 19 decision, and the resulting preliminary injunction, threaten no irreparable harm to the Board or to Gloucester High School's students and parents. Opp. at 1. But to anyone familiar with public schools in the real world, the irreparable harms flowing from the Fourth Circuit's decision are obvious.

First, as G.G. tacitly concedes (Opp. 21 n. 10), the Fourth Circuit's decision deprives the people of Gloucester County of their ability, acting through elected school board representatives, to establish a policy on one of the most sensitive matters imaginable—who may access single-sex student bathrooms. Indeed, the whole point of the decision below is to overturn the "commonplace and universally accepted" principle that such facilities may be separated by biological sex, App. B-57, and to replace it with principle that access should turn instead on a student's subjective "gender identity," App. B-6, a notion that even the panel majority found "novel" and "perhaps not … intuitive." App. B-24, B-23.

Second, if the recent past is any guide, the Fourth Circuit's decision is highly "likely to cause disruption both in the school and among the parents." App. G-5. Overturning long-settled expectations about who may access boys' and girls' restrooms understandably alarms parents and students alike. When this issue first arose at Gloucester High School, it provoked an immediate and vocal reaction. App. L. This should not be surprising since, as Judge Niemeyer put it, "parents … universally find it offensive to think of having their children's bodies exposed to

persons of the opposite biological sex." App. C-3. If the decision below is not stayed, there is every reason to expect a similar reaction as the new school year approaches.

Third, as Judge Niemeyer warned, the panel's "holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes." App. B-47. And the resulting injunction ensures that "male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents." App. G-5.

These consequences—both to the Board and to the students and parents the Board represents—flow directly from the Fourth Circuit's decision and the resulting injunction, and they belie any notion that the Board "has not identified any form of irreparable harm." Opp. 19. Furthermore, as explained below and in the Board's application, the remaining stay factors also counsel strongly in favor of staying the lower court decisions pending disposition of the Board's certiorari petition.

ARGUMENT

I. Respondent's arguments do not undermine the likelihood that four Justices will vote to grant review now.

First, G.G. has not undermined the Application's showing of a substantial likelihood that this Court will grant review. G.G. does not dispute that three sitting Justices have already indicated a desire to revisit and resolve a central question presented in this case, that is, whether the doctrine of judicial deference to agency interpretations of their own regulations—as expressed in *Auer* v. *Robbins*, 519 U.S.

452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)—should be overruled or modified. See App. 4. Instead, G.G. asserts "there is no reasonable probability that this Court will grant certiorari" because, according to G.G., (1) this case remains in an interlocutory posture; (2) the Court recently passed up an opportunity to revisit *Auer*; and (3) there are no circuit splits on the proper application of *Auer*. Opp. 24-27. On each point, G.G. is wrong.

1. Although 28 U.S.C. § 1254(1) expressly permits certiorari review of cases in the courts of appeals "before *or* after rendition of judgment," G.G. is of course correct that the Court often exercises its discretion to deny review when the case is "in an interlocutory posture." *Mount Soledad Mem'l Ass'n* v. *Trunk,* 132 S.Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of petition for certiorari). But for at least two reasons, that general practice likely will not prevent review here.

First, unlike the situation in *Mount Soledad* and other cases in which a lack of finality prevented review, here there is no doubt about the implications of the Fourth Circuit's April 19 decision for these proceedings. Indeed, it was based on that decision that the district court *immediately* granted an injunction in G.G.'s favor. See App. F-2. The posture of this case thus stands in sharp contrast to cases like *Mount Soledad,* in which at the time certiorari was sought "it remain[ed] unclear precisely what action the … Government will be required to take" as a result of the court of appeals' decision. 132 S.Ct. at 2536 (Alito, J., concurring). Here there is no doubt about the ultimate outcome in the district court—the injunction has already been entered—or in the subsequent Fourth Circuit appeal.

Second, in any event, the Board also intends to seek certiorari before judgment in the *pending* Fourth Circuit case (which challenges the district court's injunction) at the same time it seeks review of the Fourth Circuit's April 19 decision. Thus, if the Court feels a need to have the preliminary injunction before it when it addresses the Fourth Circuit's April 19 decision, the Court will have that option. And there is no question that the district court's preliminary injunction is a final order subject to appellate review.[1]

2. G.G. also makes much of the Court's recent denial of certiorari in *United Student Aid Funds, Inc.* v. *Bible,* 136 S.Ct. 1607 (2016), which involved regulations governing collection practices for student loans. However, as the brief in opposition there pointed out, that case did not squarely present the issue of the validity of *Auer* deference. Two of the three judges on the Seventh Circuit panel believed the pertinent agency regulation was unambiguous, and therefore did not find it necessary to determine whether *Auer* even applied. See *Bible* v. *United Student Aid Funds, Inc.*, 799 F.3d 633, 645 (7th Cir. 2015) (reaching *Auer* only as an alternative ground); *id.* at 674 (Manion, J., concurring in part and dissenting in part) (arguing *Auer* does not apply). Here, by contrast, both judges in the majority below concluded that the Department of Education regulation at issue here *is* ambiguous, and therefore

[1] See 28 U.S.C. § 1292(a) (noting that "courts of appeals shall have jurisdiction of appeals from [i]nterlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions."). Indeed, for reasons discussed in the Application and this reply brief, this case satisfies Rule 11's standard for certiorari before judgment as well as the usual standards for certiorari outlined in Rule 10. Given that the Fourth Circuit's April 19 decision immediately spawned a nationwide "transgender non-discrimination" policy imposed by the U.S. Departments of Justice and Education, this is undoubtedly a case of "imperative public importance." See App. 27-29.

unambiguously held that *Auer* deference applies. App. B-16-21. Accordingly, in this case this Court can easily reach and decide whether *Auer* remains good law and, if so, how it applies in cases such as this.

3. G.G. has also failed to undermine the Board's elucidation of existing circuit conflicts as to the *circumstances* in which *Auer* deference can apply. For example, on the first conflict—whether an agency's interpretation must appear in a format that carries the force of law—G.G. simply misrepresents the First Circuit's decision in *Sun Capital Partners III, LP* v. *New England Teamsters,* 724 F.3d 129 (1st Cir. 2013). That decision clearly held that an agency opinion was not entitled to *Auer* deference because it "was not the result of public notice and comment, and merely involved an *informal* adjudication resolving a dispute between a pension fund and the equity fund." *Id.* at 140 (emphasis added). G.G. says this part of the opinion was addressing *Chevron* and not *Auer* deference, but that is flatly wrong: *Chevron* deference wasn't even asserted, *Auer* deference was.[2]

On the second conflict—whether *Auer* applies when an interpretation is advanced for the first time in the specific litigation in which it is applied—G.G. does not even address the key Ninth and Federal Circuit decisions discussed in the

[2] See *id.* at 140 ("The [agency] does not assert that its 2007 letter is entitled to deference under [*Chevron*]. It does, however, claim entitlement to deference under [*Auer*]. We disagree. … The letter was not the result of public notice and comment."). G.G. also admits in a footnote (Opp. 26 n. 12) that the Sixth and Seventh Circuits will not defer to agency interpretations where the agencies themselves disclaim the interpretation is binding. But that is exactly why those decisions conflict with the Fourth Circuit's decision in this case: The agency interpretation here—to which the Fourth Circuit deferred—expressly disclaims any intent to bind anyone. See App J-2 (noting that "OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation.").

Application. See App. 24-25. Nor does G.G. dispute that those decisions squarely conflict with the decision of the Fourth Circuit here, and with similar decisions in the Sixth, Seventh, Tenth and Eleventh Circuits. *Id.* Instead, G.G. attempts to sidestep this conflict by focusing instead on a *different* limitation, one the Application did not invoke—that is, that the agency interpretation not be a mere "convenient litigation position" or "*post hoc* rationalizatio[n] … seeking to defend past agency action against attack." Opp. 26 (quoting *Auer,* 519 U.S. at 462). G.G.'s evasiveness merely confirms the Application's analysis of these circuit conflicts.

II. Respondent has failed to undermine the Board's showing of a fair prospect of reversal.

G.G. has likewise failed to undermine the Board's showing that it has a fair prospect of prevailing on the merits. Indeed, most of G.G.'s argument on this point is based on a false premise: G.G. assumes that, if the Court grants review, it will necessarily interpret Title IX and/or 34 C.F.R. § 106.33 *de novo*, and will do so *before* determining whether *Auer* should be overruled and, if not, whether the Fourth Circuit correctly invoked *Auer* given the circumstances. See Opp. 28-35. But that is not how this Court typically operates. If it grants review and decides that the Fourth Circuit incorrectly invoked *Auer* deference, the Court will likely vacate and remand to the Fourth Circuit to address in the first instance the remaining issues concerning the proper application of Title IX and §106.33. And that means the Board could win in this Court in any of three ways: (1) an outright overruling of *Auer*; *or* (2) a determination that *Auer* remains valid but that the Fourth Circuit transgressed a settled limitation on its application; *or* (3) a determination that the Fourth Circuit

and the Department simply misinterpreted Title IX and/or § 106.33. For reasons explained in the Application, the Board has a fair prospect of success in each of these scenarios individually, and it certainly has a fair prospect of success when those scenarios are viewed collectively.

1. G.G. does not dispute the numerous conceptual problems with *Auer* deference, that *Auer*'s own author and other Justices have advocated overturning the doctrine, or that it "is on its last gasp," *United Student Aid Funds, Inc.* v. *Bible*, 136 S.Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari); see App. 29. In short, G.G. does not dispute that there is a fair prospect of this Court's deciding to overrule *Auer* entirely. And that alone establishes a fair prospect that the Fourth Circuit's decision to apply *Auer* will be reversed and the judgment vacated.

2. G.G. also does not dispute that, even if *Auer* survives (or if the Court fails to reach that question), there is a fair prospect this Court will hold that the Fourth Circuit transgressed an appropriate limitation on that doctrine. For example, as explained in the Application (at 21-25) and in the discussion above, several courts of appeals have held that *Auer* deference cannot be invoked when the agency interpretation was developed for the very litigation in which deference is sought or issued in circumstances in which the interpretation does not carry the force of law. Here again, although G.G. disputes that there is a circuit conflict on these issues, G.G. does *not* dispute that the Fourth Circuit's decision to invoke *Auer* deference can and should be reversed on either of these bases. And once again, that alone establishes a fair prospect that the Fourth Circuit's decision to apply *Auer* will be reversed and the judgment vacated.

3. As noted, G.G. devotes nearly all of the "merits" portion of the Opposition to defending the Fourth Circuit's and Department's interpretation of Title IX and § 106.33. See Opp. 28-37. Because most of G.G.'s arguments have already been rebutted in detail in Judge Niemeyer's dissent and in the Application, that analysis will not be repeated here. But three points are worth emphasizing.

First, G.G.'s statutory interpretation argument—like that of the Fourth Circuit—fails on its own terms. Like the Fourth Circuit, G.G. argues (purportedly on the basis of contemporaneous dictionary definitions) that the term "sex" is not limited to "chromosomes or genitals" (Opp. 30), but embraces "*all* the 'morphological, physiological and behavioral' components of an individual's sex." (Opp. 28). That understanding of "sex" is implausible for all the reasons explained in the Application and in Judge Niemeyer's dissent. See App. at 29-32; App. B-57-B-68. But even if "sex" could be construed so broadly, such an interpretation would still not justify the Department's inclusion of "gender *identity*" within that term.

By definition, gender identity is a subjective perception – as G.G. and the Fourth Circuit put it, "one's *sense of oneself* as belonging to a particular gender." Opp. 5 (emphasis added); see also App. B-6-B-7 (describing "incongruence between a person's gender identity and the person's birth-assigned sex.") By contrast, all of the "components" of an individual's sex identified in the definition cited by G.G. and the Fourth Circuit are *objective* characteristics, be they "morphological, physiological [or] behavioral." To be sure, a person's decision to "transition" from, say, a woman to a transgender man might result (with the help of hormone therapy and/or surgery) in the person's developing objective characteristics more commonly found in men. But

even then, the subjective *perception* of "identifying" with one sex or the other does not qualify as a "morphological, physiological or behavioral" characteristic—and therefore could not possibly be considered included in the term "sex."

In short, unlike arguments that fail because they prove too much, G.G.'s (and the Fourth Circuit's) central argument on the meaning of "sex" in Title IX and § 106.33 fails because it proves too little. On that basis alone, the Board has at least a fair prospect of establishing that both the Department and the Fourth Circuit have misconstrued Title IX and its implementing regulation, and on that basis obtaining a reversal of the decision below.

Second, for similar reasons, this Court's decisions in *Price Waterhouse* and *Oncale* do not help G.G. Again, like the Fourth Circuit, G.G. must defend a Department decision to include a person's *subjective* "gender identity" within the meaning of the statutory term "sex." But whatever else they may have done, *Price Waterhouse* and *Oncale* did not allow plaintiffs to assert claims under Title VII based on subjective, gender-related perceptions or "senses." *Price Waterhouse* allowed a claim based upon *observable* sex-related behavior—i.e., acting or dressing in ways that departed from the perceived "norm" for women. See *Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 232-37 (1989). Similarly, *Oncale* allowed a claim for *observable* sex-related conduct—harassment—towards another person. See *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77-78 (1998). Neither decision allowed a claim for discrimination based upon the victim's internal, subjective "sense of oneself." And neither decision suggested that such a subject characteristic was included in the statutory term "sex."

Third, for similar reasons, statutory law has always distinguished "sex" and "gender" from "gender identity."[3] And in briefing on the merits, Petitioner will demonstrate that scores of proposed bills at the federal and state levels have made this express distinction. Thus, legislators have always used a definition of "sex" that by its terms does *not* include "gender identity." It therefore makes no sense to now treat the word "sex" in Title IX as though it included that subjective concept.

For all these reasons, and those explained by Judge Niemeyer and in the Application, the Board has at least a fair prospect of reversal.

III. Respondent has failed to rebut the showing of irreparable injury to the School Board, its parents and students.

While blithely asserting that "the Board has not identified any form of irreparable harm," Opp. at 19, the Opposition leaves virtually unrebutted the Board's substantial showing on that very point. See App. 33-36.

1. For example, G.G. does not dispute that the Board and its constituents have suffered the very type of irreparable injury described in decisions such as *Maryland* v. *King*, 133 S.Ct. 1 (2012) (Roberts, C.J., in chambers). App. 33-34. *King* observed that "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Id.* at 3 (quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Here, by requiring the Board to allow G.G. to

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

use the boys' bathrooms, the decision below has clearly "enjoined" the Board "from effectuating" a policy "enacted by representatives of [the] people."

That is no doubt why G.G., besides ignoring *King* and burying the entire point in a footnote, offers only a factual distinction—namely, that the Board "is not a State and its restroom policy is not a statute." Opp. at 21 n. 10. But the Opposition identifies no *reason* why the principle articulated in *King* and *New Motor Vehicle* would not also apply to an elected school board writing school policies on sensitive issues. And there is none: Although the invalidation of a state statute may be a *broader* intrusion into the people's right to govern themselves, the nature of the intrusion is the same. It is a difference of degree, not of kind. And in either case, the injury is irreparable because, for however long the injunction lasts, the people will have been deprived of their ability to govern themselves.

2. G.G. also attempts to minimize the disruption caused by the decision below by erroneously suggesting that G.G. previously used the boys' restroom for seven weeks "without incident." Opp. at 9, 22. To the contrary, students and parents began protesting *the day after* the school let G.G. use the boys' restroom. See App. L-1-2. And the "disruption" caused was not solely to "the learning environment" (Opp. 22), but also to the relationship between the school and the parents and students who found this situation alarming.

This should surprise no one. The idea that public bathrooms are separated by biological sex has been a "commonplace and universally accepted" part of our customs and laws since time-out-of-mind, App. B-57, and, moreover, has been explicitly allowed by Title IX regulations for over four decades. Now that those basic

expectations have been overridden by a federal court, G.G. cannot credibly claim there is no irreparable harm to anyone—not to students, or to parents, or to the school system. See, *e.g.*, App. G-5 (Niemeyer, J., dissenting from denial of stay pending appeal) (explaining that enforcement of the injunction will "den[y] [students] bodily privacy when using the facilities, to the dismay of students and their parents").

3. G.G. also baldly asserts that the decision below "will not infringe upon other students' right to bodily privacy." Opp. 21. But G.G. makes no real effort to dispute Judge Niemeyer's showing that the decision creates irreparable harm by intruding upon students' "legitimate and important interest in bodily privacy." App. B-57. Indeed, instead of addressing Judge Niemeyer's analysis, G.G. attempts to put in Judge Niemeyer's mouth the concession that "the risks of privacy and safety are far reduced" in restrooms. But that was *G.G.*'s argument, not Judge Niemeyer's. See Opp. 17; App. B-60. To the contrary, in multiple dissenting opinions, Judge Niemeyer forcefully underscored the harms to student privacy caused by the Fourth Circuit's decision and the resulting injunction. For instance, Judge Niemeyer demonstrated:

- that sex-separated facilities, such as restrooms, respond to "the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes" (App. B-59);
- that "bodily privacy is historically one of the most basic elements of human dignity and individual freedom" and, consequently, "forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom" (App. C-3);
- and that, because of the injunction resulting from the decision below, "male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents" (App. G-5).

G.G.'s proposed solution to the privacy problem created by the Fourth Circuit's decision is also not credible. G.G. suggests that any male student "uncomfortable using the same restroom" as G.G. may simply use a unisex bathroom. Opp. 21-22. Putting aside the capacity problems that solution creates (with only three unisex bathrooms), forcing boys who value their privacy to use *another* bathroom in order to avoid potentially exposing themselves to an anatomically female student constitutes irreparable harm in its own right. *See*, *e.g.*, *Doe* v. *Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing individual's "constitutionally protected privacy interest in his or her partially clothed body," "particularly while in the presence of members of the opposite sex").

4. Finally, G.G. essentially admits that the decision below may lead at least some parents to "remove their children from the [public] school system." App. 35. In a footnote, G.G. states that parents "have a fundamental right to decide *whether* to send their child to a public school …." Opp. 22 n. 11 (emphasis added). But that is exactly the point: Some (and perhaps many) parents, exercising their fundamental right to direct the upbringing and education of their children, may choose to *remove* their children from public schools in the face of the privacy and safety problems now caused by the Fourth Circuit's decision.

Their exit would likewise impose irreparable injury on the Board and its schools. The loss of those children—and the state and federal funding they bring with them—will irreparably injure the Board, its schools and the students left behind.

For all these reasons, the Board has clearly established that the decision below imposes the requisite risk of irreparable injury. And contrary to G.G.'s

mischaracterization, the Board's showing of irreparable injury is not at all based on the "expense and annoyance of litigation." Opp. 2 (citing *FTC* v. *Standard Oil*, 449 U.S. 232, 244 (1980)). That showing is based instead on real and irrefutable harms.

IV. Respondent does not dispute that the balance of equities and public interest support a stay.

Finally, G.G. does not even address the Board's showing that the balance of equities and the public interest strongly support a stay. See App. 36-40. That omission is hardly surprising, given the clarity of the public interest in preserving the traditional, well-established rule that biological males use the boys' room and biological females use the girls' room. A stay would serve the public interest not only by preserving the Board's ability to maintain that rule in its own schools, but also by facilitating the efforts of school boards throughout the Nation to preserve that rule in the face of the radical "access" agenda now being pushed on virtually every school in the Nation by the Departments of Justice and Education, in direct reliance on the decision below. See App. 3, 38-40.

The closest G.G. comes to analyzing the pertinent equities is the assertion (at 22) that "a stay would have irreparable consequences" for G.G. because G.G. "experiences painful urinary tract infections and daily psychological harm as a result of the Board's policy." While the Board does not minimize G.G.'s psychological pain, that pain is assuredly not the "result of the Board's policy." Any anatomical female wishing or attempting to live as a teenage boy is bound to face a variety of psychological challenges, whatever policy the Board adopts.

Moreover, the claim that G.G. suffers "urinary tract infections" *because* of G.G.'s exclusion from the boys' bathrooms is not plausible in light of the Board's installation of multiple single-user restrooms for any student's use, and the continued availability of the nurse's restroom, which G.G. has agreed to use in the past. There is simply no reason, attributable to the school, for G.G. to endure any pain resulting from the unavailability of single-sex boys' restrooms.

In short, whatever psychological harm G.G. may or may not suffer, it is not the result of the Board's policy. And any harm to G.G. is more than outweighed by society's compelling interest, as Judge Niemeyer put it, in preserving the bodily "privacy … inherent in the nature and dignity of humankind." App. B-58.

CONCLUSION

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

Respectfully submitted,

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July 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I caused to be sent a copy by United States mail as well as an electronic copy of the foregoing to the following counsel of record:

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