

Case No. 16-3522

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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Appeal from the United States District Court  
for the Eastern District of Wisconsin  
Case No. 16-CV-943  
The Honorable Judge Pamela Pepper

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**KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND  
SUE SAVAGLIO-JARVIS' APPELLATE BRIEF**

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Appellate Court No: 16-3522

Short Caption: Whitaker v. Kenosha Unified School District No. 1, et al.

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## JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) because the claims involve questions under a federal statute—Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and its implementing regulations, specifically 34 C.F.R. § 106.33—and Constitutional provisions under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

This appeal is taken from an injunction order of the U.S. District Court for the Eastern District of Wisconsin entered on September 22, 2016 by the Honorable Pamela Pepper (Case No. 16-CV-943). A37-54.<sup>1</sup> This Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 1292(a)(1). This Court also has discretion to take pendent jurisdiction and review the District Court’s non-final order denying Defendants’ motion to dismiss, A55-56, as that order is “inextricably intertwined” with the appealable preliminary injunction. *See Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass’n, Inc.*, 707 F.3d 883, 886 (7th Cir. 2013), *as amended* (Apr. 29, 2013).

The Notice of Appeal was filed with the District Court on September 23, 2016 and included a request for the Court to take pendent jurisdiction over the denial of the motion to dismiss. (Dkt. No. 34). A formal motion to take pendent jurisdiction over the motion to dismiss order was filed on December 1, 2016. (App. Dkt. No. 20-1).

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<sup>1</sup> Citations to Defendants’ short appendix or separate appendix, contemporaneously filed, will appear as “A\_.”

## STATEMENT OF THE ISSUES

1. Did the district court err in granting Plaintiff-Respondent, Ashton Whitaker, a minor, by his Mother and next friend, Melissa Whitaker’s (“Plaintiff”), motion for preliminary injunction allowing Plaintiff, a biological female, to use the men’s restroom? The District Court found that Plaintiff had a likelihood of success on the merits on this issue, that Plaintiff had no adequate remedy at law and would suffer irreparable harm, and that a balancing of the respective harms and considerations of public interest weighed in favor of granting the injunction.

## STATEMENT OF THE CASE

### **I. NATURE OF THE CASE**

This case is about whether a public school is required by law to permit any student that self-identifies as “transgender” to use a bathroom designated for students of the opposite biological sex.

The majority of the background facts pertaining to this case are set forth in the unpublished opinion of *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016) (Dkt. No. 33); A1-18, which relied on the allegations in Plaintiff’s Amended Complaint and, for the purposes of this Brief, and are not in dispute. Plaintiff is now a seventeen-year-old student in the Kenosha Unified School District No. 1 (“KUSD”)<sup>2</sup>. Pltf.’s Amd. Compl. (Dkt. No. 12) at ¶1; A64. Plaintiff was born as a biological female with

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<sup>2</sup> Defendants-Appellants, Kenosha Unified School District No. 1 Board of Education and Dr. Sue Savaglio-Jarvis, in her official capacity as Superintendent of the Kenosha Unified School District No. 1 will be collectively referred to as “KUSD” herein.

a birth certificate that designates her sex as “female”. *Id.* Plaintiff “identifies” as being transgender and currently “identifies” as male. *Id.* Plaintiff has not undergone any sex change surgeries. *Id.* at ¶45; A77.

KUSD requires its students to use the bathroom that corresponds to their birth sex or to use one of several single-user, sex neutral bathrooms. *Id.* at ¶27; A71-72. KUSD’s policy was set in place in order to respect the privacy rights of all students to undress and perform personal bodily functions outside the presence of the opposite sex.

## II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This lawsuit was filed on July 19, 2016. *See* Pltf.’s Compl. (Dkt. No. 1). On August 15, 2016, Plaintiff filed an Amended Complaint and Motion for Preliminary Injunction with supporting memorandum and exhibits. *See* Pltf.’s Amd. Compl. (Dkt. No. 12); A64-99; Pltf.’s Motion for Preliminary Injunction (Dkt. No. 10); Pltf.’s Memo. of Law (Dkt. No. 11). On August 16, 2016, KUSD filed a Motion to Dismiss Plaintiff’s Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Def.’s Motion to Dismiss (Dkt. No. 14). On September 21, 2016 the District Court denied the motion to dismiss (Dkt. No. 29).<sup>3</sup> On September 22, 2016 the District Court granted Plaintiff’s motion for temporary injunction. *See Whitaker*, 2016 WL 5239829 (Dkt. No. 33); A1-18. The District Court relied in part on the reasoning it employed in denying the motion to dismiss to support its finding that

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<sup>3</sup> On September 24, 2016, the District Court issued an Amended Order denying KUSD’s motion to dismiss removing language from the original ordering certifying the Order for interlocutory appeal. A19-20.

Plaintiff had a likelihood of success on the merits on the issue of whether Plaintiff could use the men's bathrooms. *See id.* at \*3; A8-9; Transcript of Oral Decision on Motion to Dismiss; A21-63. On September 23, 2016, KUSD filed a Petition for Permission to Appeal the order denying the motion to dismiss pursuant to 28 U.S.C. § 1292(b). (Case No. 16-8019, App. Dkt. No. 1). On September 23, 2016, KUSD filed a notice of appeal as of right as to the motion for temporary injunction pursuant to Fed. R. App. P. 3 and 28 U.S.C. § 1292(a)(1). (Case No. 16-3522 App. Dkt. No. 1); (Dkt. No. 34).

The temporary injunction is limited to the use of restrooms and provides that KUSD is enjoined from:

- (1) denying Ash Whitaker access to the boys' restrooms;
- (2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;
- (3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and
- (4) monitoring or surveilling in any way Ash Whitaker's restroom use.

*Whitaker*, 2016 WL 5239829, at \*8; A18.

### SUMMARY OF ARGUMENT

The District Court erred in granting Plaintiff's motion for preliminary injunction because: the District Court failed to resolve whether the term "sex" in Title IX encompassed transgender status and as a matter of law the term "sex" only contemplates "male" and "female"; the "Dear Colleague" Letter is not entitled to deference; a student cannot unilaterally declare their gender then demand that they be treated like "all others" in that sex classification; providing for separate

bathrooms based on the anatomical differences between men and women is not sex-stereotyping; and transgender is not a suspect class entitled to heightened scrutiny and KUSD's policy is presumptively constitutional.

Additionally, the District Court erred in finding that Plaintiff showed irreparable injury and no adequate remedy at law, because: the District Court relied upon unquantified expert opinions; did not consider that emotional harm can be redressed by monetary damages; and did not take into account the alternative accommodations made available to Plaintiff. Moreover, the District Court did not consider Plaintiff's excessive delay in moving for an injunction or that the lawful implementation of Title IX cannot be the basis for irreparable harm.

Furthermore, the District Court erred in its balancing of the respective harms because the infringement on the constitutionally protected rights of KUSD and the students and parents it serves outweighs the individualized harms alleged by Plaintiff.

Finally, the District Court erred in finding that the injunction would not negatively impact the public interest because the injunction will have a negative impact on school districts throughout Wisconsin and the nation and create confusion and uncertainty.

## ARGUMENT

### **I. STANDARD OF REVIEW**

A preliminary injunction is an extraordinary remedy and is never awarded as of right. *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016). In reviewing the grant

or denial of a preliminary injunction, this Court reviews a district court's findings of fact for clear error. *Platinum Home Mortgage Corp. v. Platinum Fin. Grp., Inc.*, 149 F.3d 722, 726 (7th Cir. 1998) (citing *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111, 1114 (7th Cir. 1997)). The balancing of the facts is reviewed under an abuse of discretion standard. An "abuse occurs only when a court has acted contrary to the law or reached an unreasonable result." *In re Sokolik*, 635 F.3d 261, 269 (7th Cir. 2011). *See also Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 800 (7th Cir. 2013).

The District Court's legal conclusions are reviewed de novo, "which is to say with no deference given the district court." *Scaife v. Racine Cty.*, 238 F.3d 906, 907 (7th Cir. 2001). Significantly, it has long been held that "an error of law by the district court constitutes an abuse of discretion..." *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 n.2 (7th Cir. 1986).

When evaluating the merits of a motion for preliminary injunctive relief, a district court must determine whether the party seeking the preliminary injunction has demonstrated that: (1) it has a reasonable likelihood of success on the merits of its claim; (2) no adequate remedy at law exists; and (3) it will suffer irreparable harm if preliminary injunctive relief is denied. *Platinum Home Mortgage Corp. v. Platinum Fin. Grp., Inc.*, 149 F.3d 722, 726 (7th Cir. 1998). The threshold consideration in a motion for a preliminary injunction is the moving party's likelihood of success on the merits of the underlying claim. *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir. 1997).

When the threshold consideration of the moving party's likelihood of success on the merits largely involves questions of law, the Court of Appeals is in a good position to determine whether the district court's decision to grant a preliminary injunction can be justified by a low probability of their success on the merits.

*Libertarian Party of Indiana v. Packard*, 741 F.2d 981, 986 (7th Cir. 1984).

## II. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFF HAD A LIKELIHOOD OF SUCCESS ON THE MERITS.

The threshold consideration in the motion for preliminary injunction was Plaintiff's likelihood of success on the merits of showing that not being allowed to use the men's restroom violates Title IX and Equal Protection. *See Rust Environment & Infrastructure*, 131 F.3d at 1213. If a plaintiff cannot state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the plaintiff cannot demonstrate a likelihood of success on the merits. *See Wisconsin Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1044 (E.D. Wis. 2001) (addressing defendant's motion to dismiss before plaintiff's motion for preliminary injunction, because "the question of whether the plaintiff has demonstrated a reasonable likelihood of success on the merits of its claims is, to a large degree, bundled up with the issues raised by the defendants' motion to dismiss" and if plaintiff "fails to state a claim upon which relief can be granted, then it follows that a preliminary injunction would be inappropriate precisely because the plaintiff would not have satisfied the first of the preliminary injunction standards").

The District Court erred in concluding that Plaintiff had a likelihood of success on the merits because Plaintiff's asserted right to use the men's bathroom

under Title IX and Equal Protection fails as a matter of law. The District Court’s decision was incorrect as a matter of law because: (1) “sex” as used in Title IX does not encompass transgender status; (2) a student does not have the right to unilaterally declare his or her sex and then demand to be treated like “all other” students of that biological sex; (3) restricting bathroom use to the sex shown on a student’s birth certificate merely reflects the anatomical differences between men and women and is not sex-stereotyping as a matter of law; and (4) transgender is not a suspect class subject to heightened scrutiny under a constitutional analysis.

**A. The District Court Erred In Not Resolving Whether The Term “Sex” As Used In Title IX Encompasses Transgender Status.**

Before diving into the issues it is important to take a moment to define the various terms which will be used in this brief. Often people tend to use the terms “sex” and “gender” interchangeably without appreciating the differences between the two. “Sex” relates to a person’s actual “biological status.” *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, American Psychologist, Jan. 2012, p. 11; A101.<sup>4</sup> In other words, one’s sex is defined by one’s physical characteristics and biological information such as one’s “chromosomes, gonads, internal reproductive organs, and external genitalia.” *Id.* “Gender,” on the other hand, “refers to the attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex.” *Id.* “Gender identity” refers to “one’s sense of oneself as male, female, or transgender. When one’s gender identity and

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<sup>4</sup> The relevant excerpts are included in the appendix, A100-102.

biological sex are not congruent, the individual may identify as transsexual, or as another transgender category.” *Id.*

“Sex” is based on our physical characteristics and biological information, including our chromosomes. These cannot be changed over time. Simply put, there is no way to change sex because one cannot change the 23rd chromosome (XX or XY) located in the nucleus of each one of a person’s trillions of cells. *See generally id.* at pp. 10-12; A100-102.

Surprisingly, in ruling that Plaintiff had a reasonable likelihood of success on the Title IX claim, the District Court failed to make a ruling as to whether the term “sex” under Title IX encompasses “transgender” status. The District Court noted that it:

found that, because no case defines ‘sex’ for the purposes of Title IX, the plaintiff might succeed on his claim that that word includes transgender persons. The court found that, while the defendants raised a number of arguments in support of their claim that the word ‘sex’ does not encompass transgender persons, much of that case law came from cases interpreting Title VII, a different statute with a different legislative history and purpose.

*Whitaker*, 2016 WL 5239829, at \*3; A8. Rather than determining whether the term “sex” as used in Title IX encompasses transgender status the District Court simply concluded that because the issue was unresolved, Plaintiff “might” ultimately prevail. The fact that a legal issue is not well-settled and could ultimately go either way does not demonstrate a reasonable likelihood of success on the merits.

**B. As A Matter Of Law The Term “Sex” As Used In Title IX Does Not Encompass Transgender Status.**

A plain language reading of Title IX supports the conclusion that transgender status is not encompassed within the term “sex” and therefore is not subject to protection under Title IX. This Circuit’s precedent supports such a conclusion. Thus, it was error to conclude that Plaintiff showed a likelihood of success on the merits that Title IX encompasses transgender status.

**1. The Plain, Unambiguous Language Of Title IX Extends Only To Sex—Male or Female—Not To Transgender.**

Title IX prohibits sex discrimination in educational programs that receive federal funding and states: “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<sup>5</sup> receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (emphasis added). The term “on the basis of sex” as used in the statute does not include being transgender. “Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute.” *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

Title IX and the regulations implementing Title IX clearly suggest that “sex” encompasses only two categories, male and female. The Title IX regulations

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<sup>5</sup> At least one court has reasoned that prohibiting a transgender student from using a restroom consistent with his or her sex does not constitute discrimination under Title IX, because “it would be a stretch to conclude that a ‘restroom,’ in and of itself, is educational in nature and thus an education program” as required to state a prima facie case under the statute. *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 682 (W.D. Pa. 2015) (internal citations omitted).

specifically permit educational institutions subject to Title IX to provide separate bathrooms on the basis of “sex”: “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. Quite clearly the regulation recognizes that there are two sexes: “one sex” and “the other sex.” There are only two sexes: male and female.

Finding that the term “sex” in 34 C.F.R. § 106.33 only refers to the biological and anatomical differences between men and women is supported by the common understanding of that term during the enactment of Title IX and the promulgation of the regulations:

It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by [Department of Education] following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth . . . [a]dditionally, it cannot reasonably be disputed that [Department of Education] complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students . . . this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33 . . . This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts, and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy.

*Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495, at \*14-15 (N.D. Tex. Aug. 21, 2016)<sup>6</sup>.

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<sup>6</sup> Copies of all unpublished opinions are provided in the appendix, pages A103-315.

The clear language of Title IX shows that it applies to one's sex, i.e., being male or female, and, because the language of the statute specifically permits schools to provide students with sex-segregated bathrooms, i.e., one for men and another for women, there is no room for an interpretation that being transgendered is also protected under the law. *See Johnston*, 97 F. Supp. 3d at 678.

2. Seventh Circuit Precedent Supports The Conclusion That Title IX's Prohibition Of Discrimination "On The Basis Of Sex" Does Not Encompass Transgender Status.

While district courts are often said to be the "front line experimenters in the laboratories of difficult legal questions," they are bound to follow circuit precedent. *Carcano v. McCrory Berger*, No. 1:16CV236, 2016 WL 4508192, at \*15 (M.D.N.C. Aug. 26, 2016) (citing *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 703 (7th Cir. 2016), *amended*, No. 15-1720, 2016 WL 5921763 (7th Cir. Aug. 3, 2016), *reh'g en banc granted, opinion vacated* (No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016))).<sup>7</sup>

The District Court did not believe that cases analyzing the term "sex" under Title VII of the Civil Rights Act of 1964 ("Title VII") could be relied upon in analyzing the term "sex" under Title IX. *Whitaker*, 2016 WL 5239829, at \*3; A8. Nevertheless, numerous other courts have recognized that in applying Title IX courts may borrow from the law developed under Title VII. *See Johnston*, 97 F. Supp. 3d at 674 (providing that when there is a lack of controlling precedent on a

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<sup>7</sup> While the opinion in *Hively* was recently vacated and does not have precedential effect, the reasoning set forth in the opinion still has persuasive value. *See Christianson v. Colt Industries Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) (holding that a vacated opinion is persuasive but not binding).

question of Title IX, parties necessarily rely on cases in the Title VII context to construct the appropriate framework to answer the question); *see also Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012) (maintaining that “the legislative history of Title IX strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII”); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 733 (E.D. Va. 2015) (“In applying Title IX, many courts borrow from the law developed under Title VII.”); *Doe By & Through Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1572 (N.D. Cal. 1993) (stating that the legislative history of Title IX indicates that it was patterned after Title VII and that the Supreme Court has relied on Title VII cases in analyzing claims under Title IX).

No court in this Circuit has yet to specifically address whether Title IX’s prohibition of discrimination on the basis of sex encompasses transgender status. Nevertheless, courts have considered this issue in the context of Title VII, and it is appropriate and instructive to rely on those cases in interpreting Title IX.

This Court has found that Title VII’s prohibition against employment discrimination based upon sex does not extend to transgender individuals. This Court reached this conclusion in *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) *cert denied*, 471 U.S. 1017 (1985). *Ulane* held that:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. **The words of Title VII do not outlaw discrimination against a person who has a sexual identity** disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a

female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

742 F.2d at 1085 (emphasis added).<sup>8</sup>

Other courts, including district courts within this circuit, have followed *Ulane's* proclamation that Title VII's prohibition against sex discrimination does not encompass transgender status. *See Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual."); *Creed v. Family Exp. Corp.*, 2009 WL 35237, at \*6 (N.D. Ind. Jan. 5, 2009) ("Although discrimination because one's behavior doesn't conform to stereotypical ideas of one's gender may amount to actionable discrimination based on sex, harassment based on . . . transgender status does not."); *Sweet v. Mulberry Lutheran Home*, 2003 WL 21525058, at \*2 (S.D. Ind. June 17, 2003) (stating that "discrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not . . . sexual identity, including an intention to change sex").

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<sup>8</sup> Some question whether *Ulane* is still good law following *Price Waterhouse*. Although *Price Waterhouse* created a cause of action for sex-stereotyping, nothing within *Ulane* suggests that the plaintiff was subjected to sex-stereotyping. The plaintiff was fired because the employer disapproved of "transsexuals." The employer did not welcome both male transsexuals and female transsexuals. Therefore, its action was not "because of gender." Likewise, Ms. Ulane had fully transitioned to being a female, including reconstructive surgery, hormone treatments, and a newly signed birth certificate that officially changed her gender to female. This Court found that there was no evidence to suggest that the employer acted against her because she was female. *Ulane*, 742 F.2d at 1087.

This Court has accepted that the definition of “sex” under Title VII is biological sex, not transgender status. *See Ulane*, 742 F.2d at 10. “The prohibition against discrimination based on an individual’s sex **is not synonymous with a prohibition against discrimination based on an individual’s sexual identity.**” *Id.* The Tenth Circuit has also explained that “discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII” because “the plain language of the statute . . . guides our interpretation of Title VII.” *Etsitty*, 502 F.3d at 1221. The plain meaning of “sex” does not encompass “anything more than male and female.” *Id.* at 1222.

*Ulane*’s holding that gender identity is not protected by Title VII has never been overturned. The precedent in this Circuit establishes that the term “sex” in Title IX does not encompass transgender status. This Court has stated that it will not depart from past precedent unless instructed to do so by the Supreme Court or by new legislation, *see Hively*, 830 F.3d at 718, and past precedent holds that discrimination based on an individual’s “sex” is not synonymous with a prohibition against discrimination based on an individual’s sexual identity. *Ulane*, 742 F.2d at 1085.

A conclusion that the term “sex” as used in Title IX encompasses transgender status would act to overrule the narrow definition of sex applied by this Circuit in analyzing claims under Title VII. There is no basis for doing so.

3. Extending Title IX To Cover Transgender Status Can Only Be Effectuated By Congress.

As explained above, the statutory language of Title IX and its implementing regulations says nothing about gender identity, gender expression, or any other concept related to transgender individuals. *See* 20 U.S.C. §§ 1681-1688; 34 C.F.R. §§ 106.33, 106.61. Courts are not vested with legislative power and it is their “duty to interpret and not change statutory law.” *Zonolite Co. v. United States*, 211 F.2d 508, 513 (7th Cir. 1954). This Court has made this province clear:

We as judges of the U.S. Court of Appeals have only the power to interpret the law; it is the duty of the legislative branch to make the law. We must refuse to infringe on the legislative prerogative of enacting statutes to implement public policy. The problems of public policy are for the legislature and our job is one of interpreting statutes, not redrafting them.

*Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1270-71 (7th Cir. 1993) (internal citations omitted); *see also Johnston*, 97 F. Supp. 3d at 683 n.22 (citing *Oiler v. Winn–Dixie Louisiana, Inc.*, 2002 WL 31098541, at \*6 (E.D.La. Sept. 16, 2002)) (“The Court recognizes the changing perceptions in society concerning transgender individuals. ‘However, the function of this Court is . . . to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress.’”).

The analysis undertaken by this Court in determining that it was without authority to expand the interpretation of “sex” in the Title VII context applies equally as forceful when deciding the issue under Title IX in this case. As stated by this Court in *Ulane*:

Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has **reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress** . . . Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals **would take us out of the realm of interpreting and reviewing and into the realm of legislating**. This we must not and will not do.

742 F.2d at 1086 (internal citations omitted) (emphasis added).

Here too, for this Court to now hold that Title IX protects transgender status would take it out of the realm of interpreting a statute and into the realm of legislating. The legislative history of the statute provides that “the intent of Congress in enacting Title IX was to open up educational opportunities for girls and women in education.” *Johnston*, 97 F. Supp. 3d at 672.<sup>9</sup> Moreover, as with Title VII, Congress has not acted to expand the scope of Title IX despite multiple

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<sup>9</sup> The District Court in *Hoffman v. Saginaw Pub. Sch.*, 2012 WL 2450805, at \*5 (E.D. Mich. June 27, 2012), summarized the legislative history of Title IX stating that:

The purpose of Title IX, as originally conceived, was ‘banning discrimination against women in the field of education.’ *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). Summarizing the bill that would become Title IX, Senator Birch Bayh explained: ‘Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs . . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment.’ *Id.* at 524 (emphasis omitted) (quoting 118 Cong. Rec. 5803 (1972)). Responding to a fellow senator’s question regarding the scope of the proposed protections, Senator Bayh elaborated: ‘[W]e are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution.’

attempts by its members. Members of Congress have proposed the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015), that would prohibit discrimination based on sexual orientation or gender identity under Title IX. However, Congress had repeatedly refused to enact this proposed legislation rejecting it in various forms at least four times. This lack of congressional action in the face of public opinion exemplifies that Congress is aware of the issues facing transgender people, but has consciously chosen not to act.

Therefore, in the absence of legislatively enacted changes, this Court should not expand the statutory rights of Title IX beyond the plain language of the statute and the accepted definition of “on the basis of sex” in this Circuit as explained above. Regardless of any changing perceptions, evolving norms, or societal pressures, this Court should not expand the statutory rights under Title IX by changing the definition of “sex” to include transgender status, absent direction from Congress. *See Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir. 1972) (maintaining that it is for the legislature, not the courts, to expand the class of people protected by a statute).

KUSD recognize that this Court vacated *Hively* and that it is under consideration after *en banc* review was certified. One of the issues raised in *Hively* was whether it is appropriate for this Court to expand Title VII’s protection of “sex” to “sexual orientation.” While this Court will need to resolve that issue in *Hively*, Defendants submit that the analysis in *Hively* is very different than the analysis here.

At oral argument in *Hively*, members of the Court pondered why sexual orientation discrimination is not actionable as discrimination under the “but for sex” analysis or as sex stereotyping. These questions seemed to recognize that the Court, or at least some members of the Court, were willing to look at the well-recognized scope of Title VII and determine whether sexual orientation discrimination falls within it. Whether sexual orientation discrimination is within the scope of “sex” discrimination under the “but for sex” analysis or as sex stereotyping is an interpretation of existing rights, and is in line with the EEOC’s position that:

‘ . . . sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.’ *Id.* at \*5 (proffering the example of a woman who is suspended for placing a photo of her female spouse on her desk, and a man who faces no consequences for the same act). Second, it explained that ‘sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex,’ in which an employer discriminates against lesbian, gay, or bisexual employees based on who they date or marry. *Id.* at \*6-7. Finally, the EEOC described sexual orientation discrimination as a form of discrimination based on gender stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances. *Id.*

*Hively*, 830 F.3d at 703 (citing *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*5, \*10 (July 16, 2015)).

The status of being transgender is very different than one’s sexual orientation and invokes a question different than the one raised in *Hively*. As noted above, “gender identity” refers to how one internally perceives their gender as male, female or transgender. “Sexual orientation,” on the other hand, “refers to the sex of

those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals)." *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, American Psychologist, Jan. 2012, p. 11; A101.

Additionally, the concerns outlined by the EEOC in regard to sexual orientation discrimination do not hold true in regard to transgender status and therefore the outcome of *Hively* will have no effect on this case. While having a rule that prohibits a woman, and not a man, from dating a woman may be treating an employee less favorably because of the employee's sex i.e., "but for sex", a rule requiring men and women to use the bathroom that corresponds to the sex on their birth certificate is not a "but for sex" requirement as it does not treat men and women differently. In this case, both men and women are required to use the bathroom that corresponds to the sex on their birth certificate. Second, while sexual orientation discrimination may be viewed as sex discrimination because it is associational discrimination on the basis of sex, a rule requiring men and women to use the bathroom that corresponds to the sex on their birth certificate carries with it no such associational discrimination. And, lastly, while sexual orientation discrimination may invoke sex stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances (i.e. who they choose to date), a rule requiring men and women to use the bathroom that corresponds to the sex on

their birth certificate does not invoke sex stereotyping. Regardless of how a man looks, behaves, or acts he must use the men’s bathroom. Regardless of how a woman looks, behaves, or acts she must use the women’s bathroom.

Thus, in *Hively* this Court will need to resolve whether “sexual orientation” falls within the recognized scope of “sex” as that term is used in Title VII. KUSD submit that the analysis in *Hively* is very different than the analysis here. Plaintiff here does not seek to draw “transgender” into the existing scope of “sex” under Title IX. Rather, Plaintiff seeks to have this Court expand Title IX. That is not permissible unless this Court is directed to do so by Congress.

**C. The Department Of Education’s Dear Colleague Letter Is Not Entitled To Deference And Therefore It Does Not Assist Plaintiff.**

The District Court relied upon the Department of Education’s (“DOE”) Dear Colleague Letter in concluding that Plaintiff “might” prevail under Title IX. *Whitaker*, 2016 WL 5239829, at \*3; A8-9. In relying upon the letter, the District Court concluded that it should accord *Auer* deference<sup>10</sup> to the DOE’s interpretations. The District Court’s conclusion was erroneous: the DOE Dear Colleague Letter is not entitled to deference.

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<sup>10</sup> It is undisputed that the Dear Colleague Letter does not have the force of law as it is not a regulation entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

1. The Dear Colleague Letter Is Not Entitled To Deference Because Title IX Is Unambiguous On Its Face.

The Dear Colleague Letter is the DOE's interpretation of Title IX. An agency's opinion letter interpreting its own regulation may be given deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) ("*Auer* deference"). Under *Auer* deference, an agency's interpretation of its own regulation is entitled to deference only when the language of the regulation is ambiguous and the interpretation is not plainly erroneous or inconsistent with the regulation. *Christensen v. Harris Cty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621 (2000); *Auer*, 519 U.S. at 461. When a regulation is not ambiguous, to defer to the agency's position "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

The Supreme Court has been skeptical of federal agencies' interpretations of their own regulations, because by giving those interpretations *Auer* deference, the agency can make binding regulations without notice and comment. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212, 191 L. Ed. 2d 186 (2015) (Scalia, J., concurring); *see also United States v. Raupp*, 677 F.3d 756, 765 (7th Cir. 2012) ("Indeed, there are signs on the horizon that the Supreme Court may be about to revisit *Auer* and endorse a more skeptical review of agency interpretations of their own regulations.") "Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212. "To expand this domain, the agency need only write substantive rules more

broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.” *Id.* This skepticism is shared in this Circuit. *See Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 577 (7th Cir. 2012); *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003).

The first step in determining whether *Auer* deference is due is to determine whether the statutory language is ambiguous. To determine whether a statute is ambiguous, courts employ the first step in the cardinal canons of statutory interpretation—look at the text of the statute. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says.”); *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 543-44 (7th Cir. 2003) (providing that when addressing questions of statutory interpretation, courts begin with the text of the statute). When a statute is unambiguous, the inquiry “starts and stops” with the text. *United States v. All Funds on Deposit with R.J. O’Brien & Associates*, 783 F.3d 607, 622 (7th Cir. 2015) (“*All Funds*”). In the ordinary case, “absent any indication that doing so would frustrate Congress’s clear intention or yield patent absurdity,” a court’s obligation is to apply a federal statute “as Congress wrote it.” *United States v. Ranum*, 96 F.3d 1020, 1029 (7th Cir. 1996).

Any deviation from the generalized, common definition of “sex” would be contrary to the plain language of Title IX and counter to the definition of “sex” as

used in the Seventh Circuit. *See Hively*, 830 F.3d at 700 (stating that the Seventh Circuit acknowledges that Congress in passing legislation targeted at sex discrimination intends a very narrow reading of the term “sex”). Here, “on the basis of sex” by its plain reading refers to birth sex, not a person’s subsequent “gender identity.” This reading is in accord with Seventh Circuit precedent: “The prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity.” *Ulane*, 742 F.2d at 1085.

The regulations implementing Title IX state that: “A recipient may provide separate toilet ... facilities on the basis of sex.” 34 C.F.R. § 106.33. This is unambiguous language. *Texas*, 2016 WL 4426495, at \*14.

It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by [Department of Education] following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth . . . [a]dditionally, it cannot reasonably be disputed that [Department of Education] complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students . . . this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33 . . . This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts, and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy.

*Id.* at \*14-15 (internal citations omitted). Therefore, the Dear Colleague Letter’s interpretation of Title IX is clearly at odds with the plain, unambiguous meaning of “sex” as used in that statute and its regulations.

Even though the DOE may have good intentions in interpreting a greater breadth of protection into Title IX, an interpretation “no matter how noble or just, cannot defy the unambiguous and plain meaning of its text.” *All Funds*, 783 F.3d at 612. The Seventh Circuit’s conclusion that “to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation” should apply equally to this Court’s construction of Title IX. *See Ulane*, 742 F.2d at 1086. Therefore, the unambiguous and plain meaning of “sex” in Title IX can only be birth sex, not gender identity. And because of this, the Dear Colleague Letter is not entitled to deference.

2. Even If Title IX Is Ambiguous, The Dear Colleague Letter Is Plainly Erroneous And Inconsistent With Title IX And Its Implementing Regulations.

Agency interpretations are not due any deference when the interpretation is “plainly erroneous or inconsistent with the regulation.” *L.D.G. v. Holder*, 744 F.3d 1022, 1029 (7th Cir. 2014). “Interpretations that are flatly at odds with the language of a regulation cannot be followed.” *Id.* An agency’s interpretation of its own regulation is not entitled to deference when the interpretation is erroneous or inconsistent with the regulation. *Christensen*, 529 U.S. at 588; *Auer*, 519 U.S. at 461.

Here, the DOE’s interpretation as set forth in the Dear Colleague Letter is erroneous and inconsistent with the statute and regulations. Specifically, the Dear Colleague Letter states that the agencies should “treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.”

With regard to sex-segregated restrooms, the Dear Colleague Letter maintains that a “school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.”

These interpretations are completely at odds with the regulations implementing Title IX. Specifically, Title IX and its regulations, permit schools to provide separate restrooms “on the basis of sex,” so long as the facilities are comparable. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734-35 (4th Cir. 2016), *cert. granted in part*, No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016) (Niemeyer, Circuit Judge, concurring in part and dissenting in part) (citing 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33). By conflating the term “sex” with the concept of “gender identity”, the Dear Colleague Letter’s new interpretation blatantly ignores that Title IX expressly authorizes the provision of facilities and programs separated by “sex”, including bathrooms. *See* 34 C.F.R. §106.33. Only by changing the definition of the statutory term “sex,” can the Dear Colleague Letter advocate that public high schools may “not provide separate restrooms ... on the basis of biological sex.” *See G.G.*, 822 F.3d at 730. Such an expanded definition requires schools to “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.” *See id.* This interpretation “completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes.” *See id.*

The Dear Colleague Letter also seems to suggest that the term “sex” in Title IX refers only to gender identity, and the effect of this new definition of sex is illogical and unworkable. *See id.* at 737; *see also* Texas, 2016 WL 4426495, at \*15 (“A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased.”). “This construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex.” *G.G.*, 822 F.3d at 738. “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.” *Id.* “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.” *Id.* Moreover, “enforcement of any separation would be virtually impossible” as “[b]asing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which . . . would render Title IX and its regulations nonsensical.” *Id.* Finally, it is impossible to determine how the Dear Colleague Letter’s interpretation would apply to 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. *Id.* at 738.

The Dear Colleague Letter’s expansion of the definition of “sex” in Title IX to now mean “gender identity” creates an impractical and unworkable situation in which any student who self identifies as the opposite sex could use the corresponding bathroom without any restriction. This result renders the Dear Colleague Letter’s interpretation of Title IX erroneous and inconsistent with the regulations that permit separate bathroom and living facilities on the basis of sex.

Finally, a simple exercise in logic shows the fallacy of the interpretation set forth in the Dear Colleague Letter. If the term “sex” in Title IX includes “transgender status” as the DOE and Plaintiff advocate, and given that the statute and regulations specifically allow a school to provide separate restrooms, locker rooms, and living facilities on the basis of “sex,” then the statute and regulations specifically allow a school to provide separate restrooms, locker rooms, and living facilities on the basis of transgender status. The DOE and Plaintiff’s interpretation of Title IX is actually self-destructive.

**D. There Is No Support For Plaintiff’s Claim That One Can Unilaterally Declare Their Sex And Then Insist On Being Treated Like “All Other” Students Of That Sex.**

Plaintiff’s position on Title IX has been somewhat inconsistent. In the Amended Complaint, Plaintiff takes the position that “being” transgender is a protected category under Title IX as falling within the meaning of “sex.” *See* Pltf.’s Amd. Compl. at ¶111; A92. In the injunction pleadings, however, Plaintiff asserted a different position. Plaintiff now asserts that a transgender person can unilaterally designate his or her sex and then all recipients of federal funds must

respect that unilateral designation. *See* Pltf.'s Memo. In Supp. of Inj. (Dkt. No. 11) at pp. 16-17 (“Ash has a clear claim of discrimination ‘on the basis of sex.’ KUSD has treated him differently from other boys...”). From this, Plaintiff declares that once one declares their sex as changing from female to male, one must now be treated as “all other” male students. Plaintiff concludes that if a female who declares her sex to be male is not then treated like “all other” males, such treatment is discrimination on the basis of sex.

Plaintiff's assertion of a unilateral right to declare one's sex and to be treated like all others who are that sex is not supported in the plain language of Title IX or its regulations. Title IX says nothing about one's ability to change or declare one's sex. This cannot be the basis for a reasonable probability of success on the merits when the right is non-existent.

**E. Separating Bathrooms Based Upon The Anatomical Differences Between Men And Women Is Not Sex-Stereotyping.**

The District Court erred in finding that “the plaintiff had alleged sufficient facts to support a claim of gender stereotyping, alleging that the defendants had discriminated against him because he did not fit standard stereotypes of girls.”

*Whitaker*, 2016 WL 5239829, at \*4; A9. Sex stereotyping is actionable as a form of discrimination, but nothing about restricting Plaintiff to using the girl's restroom is sex stereotyping. This Court should follow the line of cases finding that policies concerning bathroom usage that merely reflect the anatomical differences between males and females are not sex-stereotyping as matter of law.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), the plaintiff was a woman who was denied partnership in an accounting firm at least in part because she was “macho,” “somewhat masculine,” and “overcompensated for being a woman.” 490 U.S. at 235. One partner advised her she could improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* In concluding the plaintiff had met her burden of establishing that sex played a motivating part in the employment decision, a plurality of the court explained 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 gender.” *Id.* at 250. The court stated 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.” *Id.* at 251. This claim has come to be known as a “sex-stereotyping” claim.

Courts throughout the country have held that policies, especially concerning bathroom usage, that merely reflect the anatomical differences between men women are not sex-stereotyping as a matter of law. For example, in *Etsitty*, 502 F.3d at 1222-23, the plaintiff argued that even if transsexuals are not entitled to protection under Title VII, “she is nevertheless entitled to protection as a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear.” The plaintiff argued that although courts have previously declined to extend Title VII protection to transsexuals based on the

interpretation of “sex,” this approach has been supplanted by the more recent rationale of *Price Waterhouse*. *Id.* at 1223. The Tenth Circuit, while not deciding whether discrimination based on an employee’s failure to conform to sex stereotypes always constitutes discrimination “because of sex”, held that the plaintiff failed to rebut the defendant’s legitimate nondiscriminatory reasons: “it[s] decision to discharge Etsitty was based solely on her intent to use women’s public restrooms while wearing a UTA uniform, despite the fact she still had male genitalia.” *Id.* at 1224.

The plaintiff in *Johnston*, 97 F. Supp. 3d at 680, made a similar attempt to cloak a Title IX claim in sex-stereotyping clothing, and this too was rejected. In rejecting this claim, the court noted that the plaintiff did not allege that “Defendants discriminated against him because of the way he looked, acted, or spoke. Instead, Plaintiff alleges only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex.” *Id.* The court determined that plaintiff failed to state a claim under *Price Waterhouse* because the pleadings established that the plaintiff had not alleged that the defendants discriminated against him because he did not “behave, walk, talk, or dress in a manner inconsistent with any preconceived notions of gender stereotypes.” *Id.* at 681.

In yet another case in which a transgender plaintiff’s sex-stereotyping claim was rejected, *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003), *aff’d*, 98 F. App’x 461 (6th Cir. 2004), the plaintiff argued that *Ulane’s*

holding that Title VII did not protect plaintiff's transgender status did not apply because plaintiff was not alleging discrimination based on transsexuality *per se*; rather, she asserted that the defendant engaged in "sexual stereotyping." The district court found that plaintiff's allegation that the defendant fired her because her appearance and behavior did not meet the company's sex stereotypes of a woman was "a disingenuous re-characterization of a transsexuality discrimination claim." *Id.* at 999. The district court held that the defendant "did not require Plaintiff to conform her *appearance* to a particular gender stereotype, instead, the company only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms," and therefore, "insofar as Plaintiff's appearance was not challenged by her employer," the Court found that Plaintiff did not state a valid claim for sex-stereotyping as that practice has been interpreted by *Price Waterhouse* and its progeny. *Id.* at 1000.

There are cases that claim that any alleged discrimination against transgender individual constitutes sex-stereotyping, reasoning that a person is defined as transgender because of the perception that his or her behavior does not conform with sex stereotypes. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). These cases, however, run contrary to the decisions of other courts issued after *Price Waterhouse* that evidence of gendered statements or acts that target a plaintiff's conformance with traditional conceptions of masculinity or femininity are required to state a claim for sex-stereotyping. *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex.

2014); *see, e.g., E.E.O.C. v. Boh Bros.*, 731 F.3d 444, 454 (5th Cir. 2013) (finding that evidence that the plaintiff’s coworkers taunted him with “sex-based epithets” “directed at [his] masculinity,” as well as physical acts of simulated anal sex, simulated male-on-male oral sex, and genital exposure was sufficient to prevail on a gender-stereotyping theory); *Nichols v. Azteca Res. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (finding that evidence that the male plaintiff was “attacked for walking and carrying his tray ‘like a woman’—i.e., for having feminine mannerisms,” that coworkers called the plaintiff names “cast in female terms,” and that coworkers and supervisors referred to him as “she” and “her” was sufficient to prevail on a sex stereotyping theory).

Plaintiff alleges that KUSD engaged in “sex-stereotyping” because it had a policy of requiring students to either use a bathroom consistent with their birth sex or a sex-neutral single-user bathroom and enforced that policy by monitoring students use of bathrooms. Pltf.’s Amd. Compl. at ¶2; A64-65.<sup>11</sup> This allegation, even if assumed true, only relates to Plaintiff’s birth sex and the recognized anatomical differences between men and women. It does not reflect on whether the bathroom users “behave, walk, talk, or dress in a manner inconsistent with any preconceived notions of gender stereotypes.” Even in light of *Price Waterhouse*, requiring a biological female to use the woman’s bathroom, is not sex-stereotyping as a matter of law.

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<sup>11</sup> Plaintiff also alleged in the Complaint the existence of an unsubstantiated future policy of requiring Plaintiff to use a green wristband. However, at oral argument, the District Court held there was a lack of evidence indicating that KUSD was enforcing a policy requiring Plaintiff to wear a green wristband. *See* Court Minutes, at 1 (Dkt. No. 31).

**F. Transgender Is Not A Suspect Class Entitled To Heightened Scrutiny And KUSD's Policy Is Presumptively Constitutional Under Rational Basis Review.**

The District Court also erred in finding that Plaintiff had a likelihood of establishing an equal protection violation.

First, the District Court erred in not deciding what level of scrutiny should be applied to a claim that transgender status is entitled to equal protection. *See Whitaker*, 2016 WL 5239829, at \*4; A9 (stating that “the court did not, at the motion to dismiss stage, and does not now have to decide whether a rational basis or a heightened scrutiny standard of review applies to the plaintiff’s equal protection claim”). The determination of that issue is critical to addressing whether one states a claim for relief.

The level of scrutiny to be applied to a court’s review of governmental action is critical because governmental action is presumed to be valid if it is evaluated under the rational-basis standard of review. *See Smith v. City of Chicago*, 457 F.3d 643, 650 (7th Cir. 2006). Only if the action is based upon suspect classifications does the level of scrutiny increase and become subject to a heightened standard. *See id.*

The Supreme Court has admonished lower courts to not create new suspect classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 3255, 87 L. Ed. 2d 313 (1985). The Supreme Court and this Court have also never recognized transgender status as a suspect classification entitled to

heightened scrutiny under the Equal Protection clause. *See Johnston*, 97 F. Supp. 3d at 668 (as to the Supreme Court).

Numerous courts across the country have considered the allegations of transgender plaintiffs under rational basis review.<sup>12</sup> Under rational basis review, a non-suspect classification is “accorded a strong presumption of validity” and “cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Richenberg v. Perry*, 909 F. Supp. 1303, 1311 (D. Neb. 1995), *aff’d*, 97 F.3d 256 (8th Cir. 1996) (citing *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257 (1993)). The subject action, policy, or statute is presumed constitutional and the government has no obligation to produce evidence to sustain the rationality of the classification.” *Heller*, 509 U.S. at 320.

Requiring students to use facilities that correspond to their birth sex in order to provide privacy to all students has been recognized as a rational basis by multiple courts. *See Johnston*, 97 F. Supp. 3d at 669-70 (citing *Etsitty*, 502 F.3d at 1224; *Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975)). The right to privacy

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<sup>12</sup> The following cases all reject the notion that transsexual or transgender is a suspect class: *Johnston*, 97 F. Supp. 3d at 668; *Etsitty*, 502 F.3d at 1227-28; *Brown v. Zavaras*, 63 F.3d 967, 970-71 (10th Cir. 1995); *Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981); *Braninburg v. Coalinga State Hosp.*, No. 1:08-CV-01457-MHM, 2012 WL 3911910, at \*8 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue*, No. CIV S-11-2056 WBS, 2012 WL 996383, at \*3 (E.D. Cal. Mar. 23, 2012); *Kaeo-Tomaselli v. Butts*, No. CIV. 11-00670 LEK, 2013 WL 399184, at \*5 (D. Haw. Jan. 31, 2013); *Lopez v. City of New York*, No. 05 CIV. 10321(NRB), 2009 WL 229956, at \*13 (S.D.N.Y. Jan. 30, 2009); *Starr v. Bova*, No. 1:15 CV 126, 2015 WL 4138761, at \*2 (N.D. Ohio July 8, 2015); *Murillo v. Parkinson*, No. CV 11-10131-JGB VBK, 2015 WL 3791450, at \*12 (C.D. Cal. June 17, 2015); *Druley v. Patton*, 601 F. App’x 632, 635 (10th Cir. 2015); *Stevens v. Williams*, No. 05-CV-1790-ST, 2008 WL 916991, at \*13 (D. Or. Mar. 27, 2008); *Rush v. Johnson*, 565 F. Supp. 856, 868 (N.D. Ga. 1983).

is a longstanding fundamental right under the Constitution. *See Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 280 (7th Cir. 1982) (“The right to privacy is one of the most cherished rights an American citizen has; the right to privacy sets America apart from totalitarian states in which the interests of the state prevail over individual rights.”).

“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.” *G.G.*, 822 F.3d at 734. “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” and “courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind.” *Id.* at 734-35 (citing *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

Here, KUSD acknowledges its students’ constitutional right to perform personal bodily functions outside the presence of members of the opposite sex. Students at KUSD have the right to use the bathroom to perform personal bodily functions without the presence of members who do not share their birth sex. This

reason is presumptively constitutional and because this rational reason is “conceivable and plausible” considering Plaintiff’s allegations. *See St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 639 (7th Cir. 2007).

Even if a heightened standard of review were to apply in this case, Plaintiff’s Amended Complaint must still be dismissed as the policy of separating bathrooms, on the basis of birth sex is “substantially related to a sufficiently important government interest.” *Johnston*, 97 F. Supp. 3d at 669. The Court in *Johnston* aptly explained why separating on the basis of birth sex does not violate the Equal Protection Clause:

The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: “The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: ‘[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’”...As such, **separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause.** Thus, ‘while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.’

*Id.* at 670 (emphasis added) (internal citations omitted).

Simply put, KUSD is applying a policy that respects and protects the privacy rights of all students. All students are treated equally under the policy. No student may use a bathroom that does not correspond to his or her birth sex. Even if an intermediate standard of review applied, KUSD’s policy, which does not permit students with a birth sex of female, like Plaintiff, to perform personal bodily

function in the male bathroom, serves the important purpose of respecting and protecting the privacy rights of all students.

**III. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF HAD SHOWED IRREPARABLE INJURY AND NO ADEQUATE REMEDY AT LAW.**

**A. The District Court Relied Upon Unquantified Expert Opinions, Did Not Consider That Emotional Harm Is Generally Redressed By Money Damages, And Did Not Take Into Account Alternative Accommodations Made Available To Plaintiff.**

The requirement that a preliminary injunction may not issue unless plaintiffs have no adequate remedy at law is closely related to the requirement of irreparable harm. Many courts fuse them into a single requirement. *Milwaukee Cty. Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016, 1033 (W.D. Wis.), *modified*, 710 F. Supp. 1532 (W.D. Wis. 1989).<sup>13</sup> Irreparable harm is harm “which cannot be repaired, retrieved, put down again, atoned for. The injury must be of a particular nature, so that compensation in money cannot atone for it.” *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997) (internal citations omitted).

The District Court stated at the September 20, 2016 hearing, that Plaintiff was not required to prove that Plaintiff “will be forever irreversibly damaged in order to prove irreparable harm.” *Whitaker*, 2016 WL 5239829, at \*5; A13.

The District Court reviewed “declarations from Dr. Stephanie Budge and Dr. R. Nicholas Gorton, M.D., which explain gender dysphoria and discuss, both in

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<sup>13</sup> The District Court chose not to fuse these factors into a single requirement and found that KUSD did not set forth arguments against Plaintiff’s adequate remedy at law contention. However, if Plaintiff cannot demonstrate irreparable harm, then there is necessarily an adequate remedy at law.

terms specific to the plaintiff (Dr. Budge) and terms general to persons suffering from gender dysphoria (Dr. Gorton) the effects on persons with gender dysphoria of not being allowed to live in accordance with their gender identity.” *Id.*; A11 (citing Dkt. Nos. 10-2, 10-3). However, neither expert quantified the harm Plaintiff suffered. Dr. Budge’s ultimate conclusion is that plaintiff will have “immediate and long-term significant consequences” to Plaintiff’s mental health. (Dkt. No. 10-2), at ¶55). Dr. Gorton, speaking generally, stated that his “patients who were allowed to transition at young ages show far more resilience, health, and well-being than those who were forced to live in accordance with their birth-assigned sex.” (Dkt. No. 10-3, at ¶28). These experts did not establish that Plaintiff would suffer irreparable harm. Moreover, any such harm was described as mental health related, and as stated below, emotional distress is not irreparable.

The District Court reviewed the expert declarations, but primarily based its decision on Plaintiff’s declarations and held that “plaintiff’s declaration establishes that he has suffered emotional distress as a result of not being allowed to use the boys’ restrooms.” *Id.*; A11-412. Suffering harm does not establish irreparable harm. Harm is irreparable when it is “difficult—if not impossible—to reverse.” *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011). However, “emotional suffering is commonly compensated by monetary awards” in our legal system. *Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, No. 10 C 8296, 2011 WL 221823, at \*5 (N.D. Ill. Jan. 24, 2011).

In addition to the injunctive relief sought, Plaintiff specifically requests in this lawsuit an award of compensatory damages to compensate Plaintiff for emotional distress caused by KUSD's alleged conduct. Pltf.'s Amd. Compl. at Prayer for Relief (d); A98. The District Court did not take into account that emotional harm could be monetarily compensated and instead incorrectly framed the alleged harm as "fear" of being disciplined and "feeling" singled out in holding that this is not harm that can be rectified by a money judgment. *Whitaker*, 2016 WL 5239829, at \*6; A13.

Further, harm is not irreparable if the moving parties fail to take advantage of readily available alternatives and thereby effectively inflict the harm on themselves. *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012); *see also Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013) ("[I]rreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary."). Plaintiff states in the Amended Complaint that a single-user restrooms were made available. *See, e.g.*, Pltf.'s Amd. Compl. at ¶61; A80-81. Plaintiff refused to use the single-user bathroom, in part, due to the alleged inconvenient location of the single-user bathrooms, *see id.*, and fear of being subjected to harassment or violence from other students. *See id.* at ¶81; A86.

The inconvenience of the location of the single user restrooms is not irreparable harm. *See Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at \*38 (N.D. Ill. Oct. 18, 2016). "[T]he mere inconvenience of

walking to a facility that is farther does not constitute irreparable harm.” *Id.* (citing *Mclean v. Aurora Loan Servicing*, No. 11CV0455-LAB NLS, 2011 WL 4635027, at \*1 (S.D. Cal. Oct. 5, 2011); *Corbett v. United States*, No. 10-24106-CIV, 2011 WL 1226074, at \*5 (S.D. Fla. Mar. 2, 2011)) (both stating that mere inconveniences are not irreparable harms). Also, there is no indication in the record that Plaintiff was ever bullied or risked being bullied or threatened with violence if Plaintiff were to use the single-user bathroom. *See Student*, 2016 WL 6134121, at \*38.

**B. Plaintiff’s Excessive Delay In Moving For An Injunction Belied Any Claim For Irreparable Harm.**

The District Court erred in not considering Plaintiff’s excessive delay in bringing this lawsuit and seeking an injunction. Excessive delay may counsel against a finding of irreparable harm if the plaintiff has failed to prosecute a claim for injunctive relief promptly, and if there is no reasonable explanation for the delay. *Texas Children’s Hosp. v. Burwell*, 76 F. Supp. 3d 224, 244 (D.D.C. 2014). “An unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.” *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005). Courts will deny a preliminary injunction because excessive delay in seeking that relief belies any legitimate claim of irreparable harm. *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275-76 (2d Cir.1985)). “[D]elay alone may justify the denial of a preliminary injunction when the delay is inexplicable in light of a plaintiff’s knowledge of the conduct of the defendant.” *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 894 (8th Cir. 2013).

Here, Plaintiff was contemplating this lawsuit from at least April 2016. The allegations contained in the Amended Complaint and in the Motion for Preliminary Injunction were set forth in the April 19, 2016, letter from Plaintiff's counsel to KUSD. *See* Turner Letter (Dkt. No. 18-1). KUSD responded and set forth the same position that it is taking now on April 26, 2016. *See* M&Z Letter (Dkt. No. 18-2). The April 19, 2016, letter demanded that KUSD take the very action that Plaintiff now seeks in the form of an injunction. *See* Turner Letter (Dkt. No. 18-1).

Plaintiff has known since April 19, 2016 that the 2016-2017 school year would begin in early September and that KUSD would not voluntarily honor the request to allow Plaintiff to unilaterally determine which restroom to use. Plaintiff inexplicably waited almost three months (July 19, 2016) to file a law suit, and further waited another month, until the eve of the school year (August 15, 2016), to file a motion for an injunction. Nothing changed from April to August to render the perceived need for an injunction any more pressing.

Plaintiff appears to have waited until August to seek the requested relief in an attempt to artificially create an urgency to bolster claims of immediate irreparable harm. Plaintiff offered nothing to justify this excessive delay. Plaintiff had no reasonable excuse for waiting at least three months to move for an injunction, and such a delay belies any legitimate claim of irreparable harm. *See Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975) (affirming denial of temporary injunctive relief where movant, among other things, delayed three months in making its request); *Tough Traveler, Ltd. v. Outbound Products*, 60

F.3d 964, 968 (2d Cir. 1995) (vacating preliminary injunction where movant waited four months to seek a preliminary injunction after filing suit); *Citibank, N.A.*, 756 F.2d at 276 (ten week delay in seeking injunction undercut claim of irreparable harm).

**C. The Lawful Implementation of Title IX Cannot Form The Predicate For Irreparable Harm.**

Even if Plaintiff could prove the existence of irreparable harm, that harm alone is not a justification for an injunction where KUSD has not violated the law. If irreparable harm was not caused by a violation of the law, a preliminary injunction cannot issue. *See Am. Mach. & Metals v. DeBothezat Impeller Co.*, 180 F.2d 342, 349 (2d Cir. 1950).

The Code of Federal Regulations permits a school district to provide separate bathrooms on the basis of students' sex. *See* 34 C.F.R. § 106.33 ("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."). The policy that Plaintiff complains of—requiring students to use the bathroom that corresponds with his or her birth sex—is specifically permitted under the law. Absent the ability to point to specific violations of law, Plaintiff's motion for a preliminary injunction cannot issue regardless of whether Plaintiff can point to irreparable harm.

#### IV. THE DISTRICT COURT ERRED IN ITS BALANCING OF THE RESPECTIVE HARMS.

Courts consider whether the irreparable harm the applicant will suffer without injunctive relief is greater than the harm the opposing party will suffer if the preliminary injunction is granted. *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 474–75 (7th Cir. 2001).

A balancing of the respective harms weighs against granting an injunction because Plaintiff’s alleged harms are unique and isolated to Plaintiff, while the harm to KUSD extends to all students<sup>14</sup> within the school district and the community at large. Plaintiff’s alleged harms—depression, anxiety, migraines, dizziness, fainting, decreased academic performance, and possible disciplinary action during senior year—are limited to Plaintiff. In contrast, if the preliminary injunction is granted, KUSD, including parents and children in the school district will all suffer irreparable harm.

The requested injunction will have the effect of forcing policy changes and stripping KUSD of its basic authority to enact policies that accommodate the need for privacy of all students. The injunction has placed KUSD in the untenable position of being required to make policy changes to implement an interpretation of Title IX that the Federal Government has no power to enforce against it. *See Texas*, 2016 WL 4426495, at \*17. The injunction also sets the stage for a situation where any student who verbally identifies as being transgender would claim to be

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<sup>14</sup> KUSD’s total student enrollment during the 2015-2016 school year was 22,160 students. *See* WI Dept. of Public Instruction, 2015-16 Public Enrollment (Dkt. No. 18-4).

entitled to use any bathroom, locker room, or overnight accommodation, regardless of their biological sex.

Compliance with the requested 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. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (stating that it is the fundamental right of parents to make decisions concerning the care, custody, and control of their children); *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 627, 67 L. Ed. 1042 (1923) (acknowledging the right for parents to control the education of their children).

Likewise, individual students will have their constitutionally protected right of privacy violated if forced to comply with the proposed injunction. *See G.G.*, 822 F.3d at 734-35 (“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” and “courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind.”); *Doe*, 660 F.3d at 176-77 (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 presence of members of the opposite sex”); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736,

751 (E.D. Va. 2015), *rev'd in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016)

(“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.”).

Moreover, KUSD as a public school district and extension of the state, has the right to apply Title IX, and 34 C.F.R. § 106.33, in a manner consistent with the unambiguous language of those laws. An injunction that prevents a government actor from applying federal law constitutes irreparable harm:

the authorities hold, ‘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.’ *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (stating, whenever an enactment of a state’s people is enjoined, the state suffers irreparable injury); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (‘When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.’)

*Texas*, 2016 WL 4426495, at \*16.

The potential irreparable harm facing KUSD far outweighs the individualized harms that Plaintiff alleges, and a balance of the equities favors denying the requested injunction. The granting of the injunction would strip KUSD of its authority to enact a bathroom, locker room, and overnight accommodation policy which is necessary to protect the basic expectations of bodily privacy of its students. *See Quilici*, 695 F.2d at 280. It is KUSD’s responsibility to safeguard

these privacy expectations for all students and the DOE. is powerless to enforce its interpretation of Title IX against KUSD.

Therefore, the potential irreparable harm facing KUSD's students and parents at large outweighs the individualized, subjective harms alleged by Plaintiff.

**V. THE DISTRICT COURT ERRED IN FINDING THAT THE INJUNCTION WOULD NOT NEGATIVELY IMPACT THE PUBLIC INTEREST.**

The District Court summarily found that the public interest would not be harmed, because only KUSD is bound by the injunction. *Whitaker*, 2016 WL 5239829, at \*6; A15. The Court abused its discretion in failing to “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376-77, 172 L. Ed. 2d 249 (2008) (internal citations omitted). In assessing whether a preliminary injunction is warranted, a court must consider whether the moving party has demonstrated that the preliminary injunction will not harm the public interest. *Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. 2d at 1044. The public interest meaning “the consequences of granting or denying the injunction to non-parties.” *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992).

In considering the effect of the requested injunction on the broader public interest, this Court should consider the harm that would extend to other school districts in Wisconsin and across the nation. The requested injunction would force school districts in Wisconsin and within the Seventh Circuit to contemplate whether they must change their policies and alter their facilities or risk being found out of compliance with Title IX by the DOE and risk losing their federal funding.

Moreover, the *Texas* decision has made matters even more difficult for these school districts as the policy changes demanded by the Executive Branch cannot be enforced until the stay is lifted in the *Texas* case. The public interest will be served by stopping KUSD from being forced to implement a policy that has been significantly questioned by the courts, including the Supreme Court of the United States. The current injunction has the effect of enforcing the Dear Colleague Letter. That policy statement has been found to violate federal law and not entitled to deference. *See Texas*, 2016 WL 4426495, at \*13, 15. The district court in *Texas* issued a nationwide injunction enjoining the DOE from enforcing the guidelines set forth in the Dear Colleague Letter. *Id.* at \*17-18. The federal government is currently enjoined from enforcing any of the policies set forth in the Dear Colleague Letter against any school district in Wisconsin. *See id.* at \*1 n.2.

Furthermore, an identical injunction was stayed by the Supreme Court in *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016). The standards for granting a stay in the Supreme Court are substantially similar to those utilized in this circuit. *Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010) (per curiam) (noting that a stay is appropriate if there is “a fair prospect that a majority of the Court will vote to reverse the judgment below.”). The Supreme Court or a Circuit Justice rarely grant a stay application, but they will do so if they “predict” that a majority of “the Court would . . . set the [district court] order aside.” *San*

*Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302-03 (2006)  
(Kennedy, J., in chambers).<sup>15</sup>

**VI. BECAUSE THE INJUNCTION ANALYSIS DEMONSTRATES THAT PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW, PLAINTIFF'S CLAIMS SHOULD HAVE BEEN DISMISSED ON KUSD'S MOTION TO DISMISS.**

In bringing this appeal, KUSD asserted that the denial of its motion to dismiss and the granting of the preliminary injunction were “inextricably intertwined” and thus, the motion to dismiss order should also be reviewed by this Court in this proceeding. (Dkt. No. 34). After this Court denied KUSD’s separate petition to appeal the motion to dismiss order (Case No. 16-8019, App. Dkt. No. 16), KUSD filed a formal motion in this appeal asking this Court to take pendent jurisdiction over the decision on the motion to dismiss. (App. Dkt. No. 20-1).

This Court should take pendent jurisdiction and rule on the motion to dismiss. The arguments set forth above as to why the District Court erred in finding a likelihood of success on the merits support a finding that Plaintiff failed to state a claim upon which relief can be granted. *See Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. at 1044 (“Obviously, the question of whether the plaintiff has demonstrated a reasonable likelihood of success on the merits of its claims is, to a

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<sup>15</sup> The Supreme Court takes such actions only on the rarest of occasions. *See Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) (“On such an application, since the Court of Appeals refused the stay . . . this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari.”); *See also Russo v. Byrne*, 409 U.S. 1219, 1221 (1972).

large degree, bundled up with the issues raised by the defendants' motion to dismiss.”).

Here, Plaintiff has failed to state a cognizable claim because: “sex” under Title IX does not encompass transgender status; a student does not have the right to unilaterally declare his or her sex and demand to be treated like the member of the opposite sex; a policy that acknowledges the anatomical differences between men and women is not sex-stereotyping; and transgender is not suspect class under equal protection. The arguments set forth above on each of these issues shows that not only did Plaintiff fail to demonstrate a likelihood of success on the merits, but that all of Plaintiff's claims fail as a matter of law and should have been dismissed by the District Court for failure to state a claim.

### CONCLUSION

KUSD respectfully requests that this Court issue an Order reversing the District Court's decision granting Plaintiff's motion for a preliminary injunction and further reverse the District Court and grant KUSD's motion to dismiss for failure to state a claim.

Dated this 12th day of December, 2016.

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**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)**

The undersigned, counsel of record for the Defendants-Appellants, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that his Brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced serif font. The length of the brief, from Statement of the Issues through Conclusion, is 13,998 words.

Dated this 12th day of December, 2016.

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**CIRCUIT RULE 31(e)(1) CERTIFICATION**

I certify that the full contents of this Appellate Brief, from cover to conclusion, plus the Separate Appendix, has been electronically filed on December 12, 2016.

Dated this 12th day of December, 2016.

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## CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendant-Appellants hereby certifies that on December 12, 2016, an electronic copy of the Appellate Brief and Separate Appendix was served on counsel for Plaintiff-Appellee through the ECF system as all parties are registered users.

Dated this 12th day of December, 2016.

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Case No. 16-3522

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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Appeal from the United States District Court  
for the Eastern District of Wisconsin  
Case No. 16-CV-943  
The Honorable Judge Pamela Pepper

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SHORT APPENDIX OF KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD  
OF EDUCATION AND SUE SAVAGLIO-JARVIS

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I hereby certify that the short required appendix bound with the brief includes all materials required by Circuit Rule 30(a) while this separate appendix complies with Circuit Rule 30(b).

Dated this 12th day of December, 2016.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

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

Plaintiff,

Case No. 16-CV-943-PP

v.

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

Defendants.

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

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**I. INTRODUCTION**

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

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

## **II. BACKGROUND**

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

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

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

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

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<sup>1</sup> “Vasovagal syncope . . . occurs when you faint because your body overreacts to certain triggers, such as the sight of blood or extreme emotional distress. It may also be called neurocardiogenic syncope.”

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

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

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

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

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

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

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

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

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

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

### **III. DISCUSSION**

#### **A. Preliminary Injunction Standard**

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

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

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

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

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

(quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)).

In the Seventh Circuit, the court “only needs to determine that the plaintiff has some likelihood of success on the merits.” Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 896 (7th Cir. 2001). As the plaintiffs argued, this is a relatively low standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**G. The Defendants' Request for a Bond**

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

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

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

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

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

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

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

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

#### **IV. CONCLUSION**

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

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

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

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

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

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

Dated in Milwaukee, Wisconsin this 22<sup>nd</sup> day of September, 2016.

**BY THE COURT:**



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**HON. PAMELA PEPPER**  
**United States District Judge**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

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

Case No. 16-cv-00943-pp

Plaintiff,

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

Defendants.

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

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

For the reasons stated on the record during that oral ruling, the court

**ORDERS** that the defendants' Rule 12(b)(6) motion to dismiss the amended complaint is **DENIED**. Dkt. No. 14.

Dated in Milwaukee, Wisconsin this 24<sup>th</sup> day of September, 2016.

**BY THE COURT:**



---

**HON. PAMELA PEPPER**  
**United States District Judge**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

-----

ASHTON WHITAKER, a minor, by his	)	
mother and next friend, MELISSA	)	
WHITAKER,	)	
	)	
Plaintiff,	)	
	)	Case No. CV 16-943
vs.	)	Milwaukee, Wisconsin
	)	
	)	September 19, 2016
KENOSHA UNIFIED SCHOOL DISTRICT	)	3:34 p.m.
NO. 1 BOARD OF EDUCATION and SUE	)	
SAVAGLIO-JARVIS, in her official	)	
capacity as Superintendent of the	)	
Kenosha Unified School District No. 1,	)	
	)	
Defendants.	)	

-----

**TRANSCRIPT OF ORAL DECISION ON MOTION TO DISMISS**  
BEFORE THE HONORABLE PAMELA PEPPER  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic recording,  
transcript produced by computer aided transcription.



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1 TRANSCRIPT OF PROCEEDINGS

2 Transcribed From Audio Recording

3 \* \* \*

4 THE COURT: Have a seated everyone, please.

5 THE CLERK: Court calls a civil case, 2016-CV-943,  
6 Ashton Whitaker vs. Kenosha Unified School District No. 1 Board  
7 of Education, et al.

8 Please state your appearances starting with the  
9 attorneys for the plaintiffs -- or for the plaintiff.

10 MR. WARDENSKI: Joseph Wardenski for plaintiff.

11 MR. ALLEN: This is Michael Allen with Relman Dane  
12 Colfax, also for the plaintiff.

13 THE COURT: Okay, sorry. So we have Mr. Wardenski, we  
14 have Mr. Allen and going on Mr. Pledl.

15 MR. PLEDL: Robert Theine Pledl also for the  
16 plaintiffs.

17 THE COURT: Anybody else for the plaintiffs?

18 MS. TURNER: This is Ilona Turner with Transgender Law  
19 Center for the plaintiff.

20 THE COURT: Thank you.

21 MS. PENNINGTON: And Allison Pennington with  
22 Transgender Law Center for the plaintiff.

23 THE COURT: Okay. And for the defendant?

24 MR. STADLER: Good afternoon, Judge. Attorney Ron  
25 Stadler on behalf of the defendants.

1 MR. SACKS: Jonathan Sacks on behalf of the  
2 defendants.

3 THE COURT: Good afternoon to everyone.

4 As I think everyone's aware, we had scheduled today's  
5 hearing after you all had presented -- or Mr. Wardenski and  
6 Mr. Stadler presented oral argument on the defendant's motion to  
7 dismiss. And I asked you all, especially given the lateness of  
8 the hour when we finished up those oral arguments, to give me  
9 some time to consider them prior to issuing a ruling. And I  
10 told you that I was going to issue an oral ruling today because  
11 of the fact that there's also a preliminary -- new motion for a  
12 preliminary injunction and depending on how the motion to  
13 dismiss were to go we'd need to decide whether or not to proceed  
14 further on a motion for preliminary injunction. So the purpose  
15 of today's hearing is for me to give you a ruling on the motion  
16 to dismiss.

17 As you all are aware, the standard for the motion to  
18 dismiss or for a ruling on a 12(b)(6) motion to dismiss is  
19 pretty straightforward. A motion to dismiss under 12(b)(6)  
20 challenges the sufficiency of the complaint, not the merits in  
21 the complaint. So in order to consider a motion to dismiss I  
22 have to accept as true all the well-pleaded facts in the  
23 complaint and whatever inferences can be drawn those have to be  
24 drawn in favor of the plaintiff.

25 So the complaint has to provide the defendant with

1 fair notice of the basis for the claim and also the allegations  
2 in it have to be facially plausible. A claim is facially  
3 plausible when the plaintiff pleads factual content that allows  
4 the court to draw the reasonable inference that the defendant is  
5 liable for the misconduct that's alleged.

6 And I'm quoting there from *Ashcroft vs. Iqbal*, 556  
7 U.S. 662 at 678, 2007.

8 The standard for dismissal or considering a motion to  
9 dismiss, of course, is also stated in *Bell Atlantic Corporation*  
10 *vs. Twombly*, 550 U.S. 544, 555. Sorry, *Iqbal* is 2009. *Twombly*  
11 is 2007.

12 So there is the standard that has to be considered.  
13 And at the end of the oral argument a week or so ago, after the  
14 parties had gone into extensive discussions I noted that we  
15 needed to come back to that standard in evaluating the parties'  
16 arguments.

17 Parties discussed a lot of facts and went into some  
18 deep detail on a number of different cases, and I wanted to pull  
19 us back to the issue of a motion to dismiss and whether or not  
20 we were in a situation where the complaint had enough  
21 well-pleaded facts to sustain in reasonable inferences in favor  
22 of the plaintiff to sustain notice of the claim and facial  
23 plausibility.

24 In the motion to dismiss I believe the defendants --  
25 or I would characterize the defendants' arguments as being that

1 in many respects regardless of the factual claims that the  
2 plaintiffs alleged that the plaintiffs could not prevail as a  
3 matter of law on the two claims raised in the complaint. And  
4 those two claims are: Number one, that the defendants violated  
5 Title IX of the Education Amendments of 1972, and; number two,  
6 that under 42 U.S.C. 1983, the defendants violated the  
7 plaintiff's constitutional rights under the Equal Protection  
8 Clause.

9 So those are the two claims pending in the complaint.  
10 And the defendants argued that the plaintiffs could not prevail  
11 as a matter of law on either one of those claims, and so most of  
12 defendants' arguments were with regard to those legal issues.

13 The plaintiffs emphasized a number of the factual  
14 allegations in the complaint in support of their arguments, but  
15 I would think that for the most part the discussions the last  
16 time we were together were in relation to the law. So I'm going  
17 to start with a discussion of the law that the parties raised  
18 and start with Title IX, which is the first cause of action in  
19 the complaint.

20 Title IX, as the parties both agree, indicates that no  
21 person in the United States shall, on the basis of sex, be  
22 excluded from participation in, be denied the benefits of, or be  
23 subjected to discrimination under any education program or  
24 activity receiving financial assistance.

25 And the plaintiffs begin by alleging that, in Count 1,

1 that the defendants do receive federal funding which is one of  
2 the basic starting premises for being covered by Title IX. I  
3 don't understand there to be any objection or dispute as to that  
4 issue. So the issue is really with regard to whether or not the  
5 defendants discriminated against the plaintiff, are treating him  
6 differently from other students -- and I'm now using the  
7 language of the complaint -- "based on his gender identity, the  
8 fact that he is transgender, and his nonconformity to male  
9 stereotypes."

10 We spent a great deal of time at the oral arguments  
11 when we were last together on the word "sex," S-E-X. Title IX  
12 indicates, as I just stated, that it is prohibited for any  
13 person to be discriminated against on the basis of sex.

14 The defendants argued -- first of all, I think they  
15 acknowledged that there's no caselaw, there's no court in the  
16 Seventh Circuit, lower court or appellate court that has looked  
17 at the question of whether that word "sex" covers transgender  
18 persons in the Title IX context. So we don't have any guidance  
19 in Seventh Circuit caselaw on that issue.

20 But the defendants argued that it was clear that the  
21 word "sex" was the gender that appeared on one's birth  
22 certificate. And I think that Mr. Stadler and I discussed that  
23 in some detail several times. And I inquired of both parties  
24 whether or not either party could cite a case that defined "sex"  
25 for the purposes of Title IX, the word "sex" for the purposes of

1 Title IX as the gender that appeared on one's birth certificate.

2 The defendants, Mr. Stadler, indicated that he  
3 couldn't point to a case that said as much. Mr. Wardenski  
4 indicated that he recalled, but didn't want to be held to it,  
5 that *Doe vs. City of Belleville, Illinois*, a Seventh Circuit  
6 decision, had indicated that "sex" was not confined -- the  
7 definition of "sex" was not confined in the Title VII context to  
8 the gender that appeared on one's birth certificate. He later  
9 then submitted a letter indicating that while that decision  
10 didn't specifically say that, it did indicate that the term  
11 "sex" encompassed more than biology.

12 So in my mind the starting point for this discussion  
13 about whether the complaint states a claim is whether or not  
14 there is any set of circumstances or whether or not it is  
15 plausible, to use the language of *Iqbal* and *Twombly*, for the  
16 plaintiffs to argue that there's a question as to whether or not  
17 the word "sex" for the purposes of Title IX encompasses the  
18 plaintiff.

19 In considering that question I followed the lead of a  
20 case that the parties discussed at some length, which is the  
21 *G.G.* case out of the Fourth Circuit. And I understand that that  
22 case right now, the Supreme Court has stayed the preliminary  
23 injunction order, but that court began by looking at whether or  
24 not at the time that the law was passed the dictionary  
25 definition of "sex" confined "sex" to if -- to use the

1 defendant's words, the gender on one's birth certificate.

2           If one takes a look right now at dictionary  
3 definitions of "sex," one finds some variety. Merriam-Webster  
4 Dictionary defines "sex" as, quote, the state of being male or  
5 female, unquote. And then it defines the term "male," the word  
6 "male," as a man or boy, a male person.

7           Webster's New World College Dictionary, which if you  
8 look at it online is entitled, "Your Dictionary," defines "sex"  
9 as "either of the two divisions, male or female, into which  
10 persons, animals, or plants are divided, with reference to their  
11 reproductive functions."

12           And then there's a secondary definition: "the  
13 character of being male or female; all the attributes by which  
14 males and females are distinguished."

15           If you look at the term "male" under that dictionary,  
16 the Webster's New World College Dictionary, it says "male" as  
17 "someone of the sex that produces sperm, or something that  
18 relates to this sex," and then the secondary definition seems to  
19 be almost identical to the first one except that it adds, "as  
20 opposed to a female who produces an egg."

21           Dictionary.com, online dictionary, is similar to the  
22 Webster's New World College Dictionary, it defines "sex" as  
23 "either the male or female division of a species, especially as  
24 differentiated with reference to the reproductive functions."

25           It defines "male" as "a person bearing an X and Y

1 chromosome pair in the cell nuclei and normally having a penis,  
2 scrotum, and testicles, and developing hair on the face at  
3 adolescence; a boy or a man."

4           So those are current dictionary definitions from three  
5 different dictionaries. In the *G.G.* case, *G.G. vs. Gloucester*  
6 *County School Board*, 822 F.3d 709, Fourth Circuit, April 19th of  
7 2016, at page 720 I believe it is, that quote started with  
8 dictionary definitions from the drafting era of the statute.  
9 And they had indicated that if you looked at the American  
10 College Dictionary circa 1970, you would find the definition of  
11 "sex" as "the character of being either male or female." That's  
12 the same as that Merriam-Webster definition. Or "the sum of  
13 those anatomical and physiological differences with reference to  
14 which the male and female are distinguished."

15           Then it also looked to Webster's Third New  
16 International Dictionary. There are 1800 different kinds of  
17 Webster's dictionaries one discovers when one engages in one of  
18 these exercises.

19           Webster's Third New International Dictionary defines  
20 "sex" as "the sum of the morphological, physiological and  
21 behavioral peculiarities of living beings that subserves  
22 biparental reproduction with its concomitant genetic  
23 segregations and recombination which underlie most evolutionary  
24 change, that in its typical dichotomous occurrence is usually  
25 genetically controlled and associated with special sex

1 chromosomes, and that is typically manifested as maleness or  
2 femaleness."

3           The conclusion that the *G.G.* court came to when it  
4 reviewed those two definitions, the second of which was  
5 virtually unpronounceable, is "that a hard-and-fast binary  
6 division on the basis of reproductive organs -- although useful  
7 in most cases -- was not universally descriptive. The  
8 dictionaries, therefore," and by "dictionaries" it means those  
9 two to which it referred -- "used qualifiers such as reference  
10 to the 'sum of' various factors, or ' typical dichotomous  
11 occurrence,' and 'typically manifested as maleness and  
12 femaleness.'"

13           When the *G.G.* court concluded that none of that  
14 terminology was particularly helpful in determining what it  
15 means to have the character of being either male or female, if  
16 any of those indicators or if -- or if more than one of those  
17 indicators points in different directions.

18           In other words, if -- if a morphological indicator  
19 points to "maleness" and a behavioral peculiarity points to  
20 "femaleness," the *G.G.* court said that those definitions didn't  
21 really help you if you had characteristics that pointed in  
22 different directions.

23           And given the variety of dictionary definitions that I  
24 have just recounted between the two that are listed in *G.G.* and  
25 the three that I found myself, I agree with that court's

1 conclusion. None of these definitions assist in figuring out  
2 whether or not the word "sex" -- how to interpret the word "sex"  
3 if there's an individual who shows some of the characteristics  
4 that we associate with biological sex and some of the  
5 characteristics that we associate with other definitions of sex.

6 The Seventh Circuit has acknowledged in the Title VII  
7 context, the employment statute context, in several cases, the  
8 difficulties that arise in trying to -- to use that word "sex"  
9 -- or in some cases "gender" which we sort of tend to use  
10 interchangeably with "sex" -- to categorize individuals under  
11 Title VII.

12 So in *Doe vs. City of Belleville*, 119 F.3d 563, the  
13 1997 decision to which the plaintiffs referred, the panel  
14 writing, Judges Ripple, Manion and Rovner -- Judge Rovner was  
15 the author -- went through an extended discussion and I would  
16 say a struggle to consider why it is that if a plaintiff claims  
17 to have been harassed by someone making sexual advances toward  
18 that plaintiff that have sexual overtones, the court struggled  
19 with why it should matter whether the victim was harassed on the  
20 basis of his or her sex.

21 The court talked about the fact that having someone  
22 make sexual advances to you when you don't want them doesn't  
23 seem so much related to what your gender is but the fact that  
24 you're being put in the position where you're being subjected to  
25 sexual advances that you don't want to be subjected to.

1           In the Seventh Circuit's decision in *Hively*, which we  
2 discussed at the last hearing as well, 2016 Westlaw 4039703, the  
3 *Hively* court talked about discrimination based on sexual  
4 orientation and stated that it "does not condone," and I quote:  
5 "a legal structure in which employees can be fired, harassed,  
6 demeaned, singled out for undesirable tasks, paid lower wages,  
7 demoted, passed over for promotions, and otherwise discriminated  
8 against solely based on who they date, love, or marry."

9           Now, that was related to a sexual orientation claim  
10 under Title VII. That's at page 14 of that decision, Seventh  
11 Circuit, July 28th of 2016.

12           There are cases out there, not necessarily binding in  
13 this court -- not binding on this court, but that discuss how  
14 sometimes absurd results can obtain by trying to fit people into  
15 biological gender boxes.

16           For example, *Schroer*, which we talked about at the  
17 last hearing, *Schroer vs. Billington*, 577 F Supp.2d 293, 307,  
18 that's the D.C. District Court 2008, it discussed this  
19 hypothetical:

20           Imagine that an employee is fired because she  
21 converts from Christianity to Judaism. Imagine  
22 too that her employer testifies that he harbors  
23 no bias toward either Christians or Jews but  
24 only toward "converts." That would be a clear  
25 case, said the court, of discrimination

1 "because of religion." No courts would take  
2 seriously the notion that "converts" are not  
3 covered by the statute. Discrimination  
4 "because of religion" easily encompasses  
5 discrimination because of a change of religion.  
6 But in cases where the plaintiff has changed  
7 her sex, and faces discrimination because of  
8 the decision to stop presenting as a man and to  
9 start appearing as a woman, courts have  
10 traditionally carved such persons out of the  
11 statute -- and again this is Title VII, not  
12 Title IX -- carved such persons out of the  
13 statute by concluding that "transsexuality" is  
14 unprotected by Title VII. In other words,  
15 courts have allowed their focus on the label  
16 "transsexual" to blind them to the statutory  
17 language itself.

18 Again, statutory language of Title VII. There are  
19 other courts which reach a similar conclusion.

20 The defendants argued in the motion to dismiss that  
21 pursuant to or under the Seventh Circuit's decision in *Ulane vs.*  
22 *Eastern Airlines*, 742 F.2d 1081, which is a Seventh Circuit  
23 decision from 1984, that there was simply no way or there is no  
24 way that the plaintiffs could prevail on an argument that the  
25 word "sex" in Title IX would apply to the plaintiff. And that

1 case does definitively say that under Title VII, Title VII does  
2 not provide protection for "transsexual" I think is the word  
3 that's used there, or "transsexual persons."

4 We had some discussion at the previous hearing about  
5 the fact that that's a 1984 case. A lot of water has passed  
6 under the bridge since that time. But the defendants also  
7 argued that it hasn't been overruled by the Seventh Circuit or  
8 by the United States Supreme Court and it remains on the books  
9 as good law.

10 So the question is whether or not that decision from  
11 the Seventh Circuit in 1984, in the context of Title VII,  
12 mandates that the plaintiffs cannot prevail in a Title IX case  
13 as presented here today. I don't believe that that is the case  
14 sufficient to grant a motion to dismiss, for several reasons.

15 First, *Ulane* stated at page 1085:

16 It is a maxim of statutory construction that,  
17 unless otherwise defined, words should be given  
18 their ordinary, common meaning.

19 Quoting *Perrin vs. United States*, 444 U.S. 37, 42,  
20 1979.

21 The phrase in Title VII prohibiting  
22 discrimination based on sex, in its plain  
23 meaning, implies that it is unlawful to  
24 discriminate against women because they are  
25 women and against men because they are men.

1           The words of Title VII do not outlaw  
2           discrimination against a person who has a  
3           sexual identity disorder, i.e., a person born  
4           with a male body who believes himself to be  
5           female, or a person born with a female body who  
6           believes herself to be male; a prohibition  
7           against discrimination based on an individual's  
8           sex is not synonymous with a prohibition  
9           against discrimination based on an individual's  
10          sexual identity disorder or discontent with the  
11          sex into which they were born.

12          That's a quote from the *Ulane* decision.

13          Interestingly, though, *Ulane* does not dig into the  
14          definition of the word "sex" any more than some of its  
15          contemporary decisions do. Instead it says that the "plain  
16          meaning" of the word "sex" implies that it's unlawful to  
17          discriminate against women because they're women and men because  
18          they're men. It doesn't actually state a definition of the word  
19          "sex."

20          Second of all, the court in *Ulane* conceded that -- and  
21          again, *Ulane* is a Title VII case -- that there's almost no  
22          legislative history regarding the prohibition of sex  
23          discrimination in Title VII.

24          And the court goes into some discussion about how the  
25          prohibition in Title VII was originally designed to prohibit

1 discrimination based on race and that at the last minute there  
2 were some what I think the *Ulane* court might have characterized  
3 as machinations to throw sex in for political reasons, but that  
4 there really is no legislative history regarding what the  
5 legislator meant by -- the legislature meant by "sex" when it  
6 included it in Title VII.

7           That discussion, of course, is unique to Title VII.  
8 This is a Title IX case. So the issue of legislative history or  
9 lack thereof relating to Title VII, doesn't really apply in the  
10 Title IX context. There may be reasons, there may not be  
11 reasons for looking at the word "sex" differently under Title IX  
12 and under Title VII. We haven't gotten that far yet because  
13 again we're at the motion-to-dismiss stage.

14           In addition, there were some discussion during oral  
15 argument between the parties or disagreement between the parties  
16 about whether or not the fact that Congress has not put a  
17 further gloss on the definition of the word "sex" in either  
18 Title VII or Title IX indicates a legislative intent either to  
19 exclude or to include, or something else, transgender persons.  
20 And both sides had arguments with regard to what the failure of  
21 the statute to change might mean.

22           In my mind that simply illustrates that there are two  
23 different arguments to be made on that topic and we haven't  
24 gotten to the point of flushing out those arguments as of yet.

25           Third, with regard to *Ulane*. As we did discuss at the

1 last hearing, *Ulane* predates the Supreme Court's decision in  
2 *Price Waterhouse vs. Hopkins* by five years. The Seventh Circuit  
3 has stated in the *Hively* decision that Congress intended, and I  
4 quote, "to strike at the entire spectrum of disparate treatment  
5 of men and women resulting from sex stereotypes." And it quotes  
6 *Price Waterhouse* at page 251 in support of that statement.

7 So *Price Waterhouse* does exist, it does say what it  
8 says, and it came along five years after the *Ulane* decision.

9 And I've already noted, finally, that the *Ulane*  
10 decision deals with Title VII and not with Title IX.

11 *Ulane* also, I note -- the court in *Ulane* also  
12 indicated -- the district court in *Ulane* had made a finding that  
13 the plaintiff in that case was female. And the *Ulane* court,  
14 toward the end of the decision, indicated that even if the court  
15 accepted the district court's finding that the plaintiff is  
16 female, the court had not made factual findings relating to  
17 whether or not the defendant had actually discriminated against  
18 her based on the fact that she was female.

19 The *Ulane* case, therefore, was in a different  
20 procedural posture than this one, because at this point there  
21 has not even been a legal determination made, although I think  
22 the parties have urged me to do so, as to whether or not the  
23 plaintiff is male pursuant to whatever the definition of sex is  
24 under Title IX.

25 So, to sum up, there is no case in the Seventh Circuit

1 that defines "sex" under Title IX. No court has specifically  
2 addressed whether or not the prohibition of discrimination on  
3 sex that's described in Title IX encompasses transgender  
4 students. The caselaw is scattered, I would say.

5 In the Title VII context, if that is, in fact, the  
6 appropriate context to draw from in interpreting Title IX, there  
7 is a dispute -- one can assume, although it may not be  
8 specifically stated but there were arguments to this effect at  
9 the last hearing -- with regard to whether or not the plaintiff  
10 is male or female, an issue that would need to be resolved in  
11 order to get to the question of discrimination. And as I  
12 indicated, I don't believe that *Ulane* prohibits a cause of  
13 action at the motion-to-dismiss stage.

14 I'd also like to briefly address the *G.G.* case. As  
15 the defendants pointed out, the Supreme Court took the step to  
16 stay the issuance of the preliminary injunction that the Fourth  
17 Circuit had approved. And I am not relying on *G.G.* as being  
18 binding precedent. It wouldn't be binding precedent on this  
19 court even if the Supreme Court had not stayed the issuance of  
20 the preliminary injunction, of course, because the Seventh  
21 Circuit law binds this court not the Fourth Circuit.

22 But I note that one of the defendant's arguments was  
23 that aside from the Supreme Court's action, perhaps casting  
24 doubt on some of the holding in *G.G.*, and there are a number of  
25 holdings in *G.G.*, that *Texas vs. United States*, 2016 Westlaw

1 4426495 in the Northern District of Texas, August 21st, 2016,  
2 might also cast doubt on *G.G.*

3 The Texas case was the case in which the State of  
4 Texas attempted to push back against a request for national  
5 injunctive relief. That case may or may not cast doubt on the  
6 reasoning in *G.G.* I think that is an issue that is beyond the  
7 scope of the motion to dismiss because, again, *G.G.* is not the  
8 binding precedent here.

9 Even if we reach a stage at some point where I were to  
10 conclude or some other judge in this district were to conclude  
11 that Title IX does not project -- protect transgender persons --  
12 and I note that I haven't reached a decision one way or the  
13 other. I think it's premature to reach that decision. But if a  
14 court were to reach that decision in this instance, I believe  
15 that the plaintiffs have alleged sufficient facts to sustain a  
16 gender stereotype claim.

17 And again, I would refer back to *Price Waterhouse vs.*  
18 *Hopkins*, 490 U.S. 228 at 251, 1989. Price Waterhouse discussed  
19 clearly and in detail the legal relevance of sex stereotyping  
20 and the fact that sex stereotyping is not allowed, at least  
21 again in the Title VII context.

22 Also, the *Kastl, K-A-S-T-L, vs. Maricopa County* case,  
23 325 F.Appx. 492 at 493, Ninth Circuit, a 2009 case, finding that  
24 after *Price Waterhouse* and a Ninth Circuit decision, *Schwenk vs.*  
25 *Hartford*, 205 F.3d 1187, at 1201-02, year 2000, Ninth Circuit

1 case, "it is unlawful to discriminate against a transgender or  
2 any other person because he or she does not behave in accordance  
3 with an employer's expectations for men or women."

4 Again, in Title VII context that's the reference to  
5 employers.

6 And so regardless of what conclusion a court might  
7 come to with regard to the word "sex" and whether it covers the  
8 plaintiff in the Title IX discrimination context in terms of  
9 discrimination, there are facts pleaded in the complaint, and I  
10 think they're clear enough to place the defendants on notice  
11 that the defendants -- or the plaintiff alleges that the  
12 defendants treated him differently because they didn't conform  
13 to gender stereotypes associated with being a biological female.

14 So for those reasons, I believe that there is  
15 sufficient -- there are sufficient legal claims alleged here  
16 that would be in dispute to survive a motion to dismiss.

17 As an aside, I also want to indicate -- I had asked  
18 the defense some questions -- or the plaintiff, I'm sorry --  
19 some questions about denial of educational opportunities.

20 Obviously one of the things that Title IX prohibits, the major  
21 thing that Title IX prohibits is that an educational institution  
22 deny someone educational opportunities based on one's sex. And  
23 I did ask the plaintiffs with regard to the fact that this is an  
24 allegation that the plaintiff cannot use bathrooms, the boys'  
25 bathroom, whether or not the use of a restroom facility

1 constituted an educational opportunity.

2           There are cases out there which indicate that clearly  
3 the ability to be able to conduct one's bodily functions impacts  
4 on one's educational opportunities. The plaintiff cited some in  
5 the supplemental letter that was filed after the hearing.

6           So, again, in order to survive a motion to dismiss the  
7 question is whether there is any plausible or there are  
8 plausible claims that the plaintiff could make in support of  
9 that argument. I believe the caselaw that exists out there  
10 shows that at least, yes, there is a plausible argument to be  
11 made there.

12           In addition, there was some argument at the last  
13 hearing with regard to whether the Department of Education's  
14 "Dear Colleague" letter should be accorded any deference in  
15 terms of the Court's consideration of Title IX and whether or  
16 not the word "sex" encompasses the plaintiff.

17           I do agree with the defendants in their first two  
18 arguments in that regard and then that that "Dear Colleague"  
19 letter does not constitute a statute or a law. And, second of  
20 all, that it's not entitled to *Chevron* deference because it  
21 isn't a regulation either, it is a letter and the defendants are  
22 correct about that.

23           However, I find that there is reason to consider that  
24 the letter ought be granted *Auer* deference. And again, while  
25 I'm not relying on *G.G.*, I think that its reasoning in that

1 regard is persuasive when it points out that again the relevant  
2 regulation promulgated under Title IX allows schools -- and it  
3 gives them the discretion actually, the language is "may" --  
4 gives educational institutions the discretion to create  
5 segregated bathrooms, male/female bathrooms, and it actually  
6 uses the same word that the statute uses which is the word  
7 "sex." It allows them to create separate bathrooms based on  
8 sex.

9 For the same reasons that I just discussed with regard  
10 to the word "sex" in Title IX, I think the use of the word "sex"  
11 in the regulation could be considered ambiguous based on the  
12 varying definitions of sex. The regulation, just like Title IX,  
13 does not address how that word applies to transgender persons.

14 And if, in fact, that word is ambiguous because it  
15 doesn't address transgender persons and it doesn't define "sex"  
16 for the purposes that I iterated above, then I have to grant a  
17 deference to the agency's consideration of that language. And  
18 at this point I can't conclude -- at this stage in the  
19 proceedings, at the motion-to-dismiss stage -- that the agency's  
20 interpretation is plainly erroneous or inconsistent with the  
21 regulation.

22 In particular the defendants argued that if -- if  
23 "sex" were to cover transgender persons, if a transgender person  
24 could use the restroom with which he or she identifies, that  
25 this would gut a school's ability to create segregated -- to use

1 its discretion under the regulation and to create segregated  
2 facilities.

3 I don't follow the argument that there's nothing there  
4 that would prohibit a school from continuing to create  
5 segregated facilities, a boys' bathroom and the girls' bathroom  
6 or men's bathroom and a women's bathroom. And as I understand  
7 the plaintiff's argument at this stage, the plaintiff's argument  
8 is that it could continue to allow boys who identify as boys to  
9 use the boys' restroom and girls who identify as girls to use a  
10 girls' restroom, that the plaintiff's arguing -- the plaintiffs  
11 are arguing that the plaintiff should be able to use the boys'  
12 restroom because he identifies as a boy and, therefore, boys  
13 should use the boys' restroom.

14 I don't see that argument, whether or not ultimately  
15 it prevails, as being an argument that if accepted would gut a  
16 school's ability to create segregated restrooms.

17 The defendants also argue that the only way to keep  
18 that letter from being at odds with the regulation is to change  
19 the statutory definition of "sex." That we circle back around  
20 to my original point, the statute doesn't define "sex." The  
21 regulation doesn't define "sex."

22 The defendants also argue that if sex were to include  
23 transgender persons that it would be left up to the schools then  
24 to try to assume gender identity based on appearances, social  
25 expectations or explicit declarations of identity. The dissent

1 in *G.G.* raise that issue as well.

2 That may or may not be, and that's an issue I guess to  
3 be -- a bridge to be crossed for another day. But the question  
4 of whether or not that makes the interpretation that the  
5 plaintiffs urge inconsistent with the regulation is a separate  
6 question. You can still have segregated facilities.

7 So for all of those reasons with regard to the  
8 defendants' argument that there is not a plausible basis for the  
9 plaintiffs to succeed at law, I disagree.

10 That leaves then only the question of whether or not  
11 the plaintiffs have alleged sufficient facts to indicate that  
12 they could make a plausible claim for discrimination. I think  
13 that is -- that question is less in dispute at the  
14 motion-to-dismiss stage.

15 There are a number of allegations that the plaintiffs  
16 make in the complaint that Ash is not allowed to use the boys'  
17 restroom; that he -- that there are -- have been teachers or  
18 other school personnel that have been assigned the task of  
19 watching him to make sure that he doesn't use the boys'  
20 restroom; that he's been given the key to a single-use restroom  
21 which only he is directed to use and only he has the key to use;  
22 that he was denied the ability to put his name in or run for  
23 prom king initially, although I think that then changed.

24 There are a number of facts alleged in the complaint  
25 that -- that would indicate discrimination if, in fact, there

1 were a conclusion that the statute did cover the plaintiff. So  
2 I think it's clear that there are sufficient facts alleged in  
3 the complaint to support a claim at the motion-to-dismiss stage.

4 The second allegation in the complaint, the second  
5 count, alleges that the defendants violated a 1983 and the  
6 Fourteenth Amendment Equal Protection Clause. Under 1983, in  
7 order to prove a claim under 1983, the plaintiff has to allege:

8 Number one, that he was deprived of a right that was  
9 secured by the Constitution or laws of the United States;

10 And, number two, that that deprivation was caused by a  
11 person or persons acting under color of state law.

12 And I am obligated to review that claim pursuant to  
13 the Fourteenth Amendment which is the constitutional provision  
14 that the plaintiff claims.

15 In this case the complaint clearly states both the  
16 1983 requirements:

17 Number one, the plaintiff does claim that he was  
18 deprived of equal protection under the Fourteenth Amendment,  
19 that is an acknowledged constitutional right, and;

20 Number two, that the declaration was caused by a  
21 person or persons acting under color of state law, in this case  
22 the school district -- employees at the school district.

23 So the 1983 elements are alleged in the complaint.  
24 And that takes us to the question of whether or not the elements  
25 of an equal protection claim have been alleged in the complaint.

1           In order to make out an equal protection claim a  
2 plaintiff must present evidence that the defendants treated him  
3 differently from others who were similarly situated.

4           He also has to present evidence that the defendants  
5 intentionally treated him differently because of his membership  
6 in a class to which he belonged.

7           And I'm citing *Personnel Administrator of*  
8 *Massachusetts vs. Feeney*, 442 U.S. 256 at 279, 1979; also  
9 *Nabozny, N-A-B-O-Z-N-Y, vs. Podlesny, P-O-D-L-E-S-N-Y*, 92 F.3d  
10 446 at 453, Seventh Circuit 1996.

11           The complaint alleges that the school treated the  
12 plaintiff differently from, and I quote, "other male students  
13 based on his gender identity, the fact that he is transgender,  
14 and his nonconformity to male stereotypes." That's from the  
15 complaint at Docket No. 1 at pages 32 to 33.

16           So, if at a later stage in the proceedings the factual  
17 conclusion is that the plaintiff is male, it is clear that he  
18 has alleged sufficient facts to indicate discrimination relative  
19 to other males. Other males are allowed to use the boys'  
20 bathroom; other males don't have teachers monitoring them; other  
21 males presumably are allowed to run for prom king if they wish  
22 to do so or if they're nominated or however that process works,  
23 et cetera.

24           There doesn't seem to be any dispute that the  
25 plaintiff is transgender. And if the court were to conclude at

1 a later stage in the proceedings that that is a suspect class,  
2 then he's also alleged sufficient facts to show discrimination  
3 on that basis. Now, at this point, because again we're at the  
4 motion-to-dismiss stage, I don't have to make a finding as to  
5 whether or not transgender constitutes a suspect class.

6 And finally, as I indicated earlier, the plaintiff has  
7 alleged sufficient facts at the motion-to-dismiss stage to show  
8 discrimination based on gender stereotypes.

9 Now, I noted earlier, I don't have to decide whether  
10 transgender is a suspect class at the motion-to-dismiss stage.  
11 And for that I refer you to *Durso, D-U-R-S-O, vs. Rowe, R-O-W-E*,  
12 579 F.2d 1365 at page 1372. It's a Seventh Circuit decision  
13 from 1978. That was a case that involved an incarcerated  
14 plaintiff alleging an equal protection claim. But the court  
15 stated:

16 "A state prisoner need not allege the presence of a  
17 suspect classification or the infringement of a fundamental  
18 right in order to state a claim under the Equal Protection  
19 Clause. The lack of a fundamental constitutional right or the  
20 absence of a suspect class merely affects the court's standard  
21 of review; it does not destroy the cause of action."

22 Now, the parties argued in their pleadings on the  
23 motion to dismiss rather extensively the question of whether or  
24 not in reviewing an equal protection claim the court ought to  
25 use the rational basis standard of review or it ought to use a

1 strict scrutiny or a heightened scrutiny -- or not strict  
2 scrutiny. Neither party ought think his argument with strict  
3 scrutiny, but a heightened scrutiny standard of review.

4 And again, at the motion-to-dismiss stage I don't have  
5 to make that determination. What I have to determine at this  
6 stage is whether or not the plaintiff has stated a claim, stated  
7 sufficient facts in support of a claim that would entitle him to  
8 proceed on an equal protection cause of action. And as I've  
9 indicated both under the elements of a 1983 claim and under the  
10 elements of an equal protection claim, he has asserted those  
11 facts taking or construing those facts in the light most  
12 favorable to the plaintiff.

13 So for all of those reasons I am denying the motion to  
14 dismiss. And as I had indicated at the last hearing, I wanted  
15 to take up the motion to dismiss because if the case were not  
16 going to proceed then there wouldn't be any reason for the  
17 parties to then continue to discuss the preliminary injunction.  
18 The denial of the motion to dismiss obviously means that the  
19 case is going to proceed beyond this point and, therefore, it  
20 looks like there is a need then to be able to discuss the issue  
21 of the preliminary injunction.

22 Now, I want to -- I'm going to turn to the parties in  
23 just a second to talk about how to proceed with that, but one  
24 thing I did want to note is that the motion for the preliminary  
25 injunction was filed back about the same time that the motion to

1 dismiss was filed, give or take. It was filed before the school  
2 year started and there were some questions I think raised by the  
3 defendants with regard to whether some of the activities that  
4 the plaintiffs had predicted or some of the actions that the  
5 plaintiffs had predicted the defendants might engage in would  
6 actually be taking place in this school year. By the time we  
7 held a hearing I believe that Mr. Whitaker had started school  
8 and Mr. Wardenski argued that at least with regard to the use of  
9 the restroom issue that that seemed to remain the same as it had  
10 last year. But there were no discussions about whether any of  
11 the other issues were going on and what was happening.

12 I bring all that up to indicate that in terms of what  
13 actions the plaintiff may be seeking to enjoin, I understand  
14 that that may have morphed or developed since the time the  
15 original motion for the preliminary injunction was filed so I  
16 just wanted to note that.

17 So, Mr. Wardenski, with regard to the motion for a  
18 preliminary injunction, suggestions for moving forward?

19 MR. WARDENSKI: Yes, Your Honor. Given the hour we  
20 could try to present argument briefly today, but we're also  
21 happy to come back soon if that would be easier on both sides.

22 The scope of the relief we're seeking is still the  
23 same.

24 THE COURT: Okay.

25 MR. WARDENSKI: The restroom policy and practice has

1 not changed. We would like to advise the court that Ash, as we  
2 had noted in our briefs, had petitioned the Kenosha County Court  
3 for a name change and that was granted on Thursday. So he has  
4 requested that his student records be updated with regard to his  
5 name. It's my understanding that that request has been approved  
6 and they're in the process of figuring out what that means in  
7 terms of his records.

8 But I think we would still seek the relief of the  
9 staff not referring to him by his birth name or by the female  
10 designation, by female pronouns which may still occur regardless  
11 of what's on his official records.

12 As far as I know there's been no further talk of the  
13 green wristbands issue, which is fine, but we certainly would  
14 like to leave in that piece of the PI motion that would enjoin  
15 the districts from identifying in any sort of physical manner or  
16 visible manner a transgendered student through something along  
17 those lines.

18 So the primary issue is restrooms, although names and  
19 pronouns may still be an issue and otherwise identifying Ash as  
20 anything other than Ash or [Indiscernible] while the  
21 [Indiscernible] determination proceeds.

22 THE COURT: Thank you. Mr. Stadler?

23 MR. STADLER: Thank you, Judge. I would agree that  
24 certainly the bathroom policy is still at issue. The issue of  
25 the name I don't believe is going to be at issue at all because

1 we have a court order that has changed the name so that is  
2 clear.

3 I do want to be clear, though, that a circuit court's  
4 change of name order orders that a birth certificate be amended  
5 to reflect a new name, it does not change the gender on the  
6 birth certificate. So we will continue to have a birth  
7 certificate that lists Ashton Whitaker as female. So if the  
8 plaintiff is asking for us to be enjoined from ever referring to  
9 Ashton as female, I think that's probably going to be an issue  
10 in this matter as well because we're between a rock and a hard  
11 place in regard to having a legal document that says the gender  
12 of this student is female versus the student's desire to say  
13 otherwise. So I think that still is at issue.

14 The issue in regard to somehow identifying transgender  
15 students in any manner is not an issue, it's never happened,  
16 it's never been done, it's never been proposed.

17 THE COURT: Oh, but what do you mean it's never  
18 happened? Do you mean the wrist --

19 MR. STADLER: This wristband thing?

20 THE COURT: Okay.

21 MR. STADLER: Never happened. Never been a policy of  
22 the district. Has never been the intent of the district to do  
23 that.

24 THE COURT: Okay.

25 MR. STADLER: I don't believe they can make any

1 allegation that anyone has come forward to Ash or any other  
2 transgender student and insisted that they wear a green  
3 wristband or identify themselves in any other manner.

4 THE COURT: Well, it sounds like one way or the other  
5 obviously it sounds like the plaintiffs still are requesting  
6 that the district not refer to Ash by a female name or a female  
7 pronoun regardless of what the birth certificate -- and I  
8 understand your point, Mr. Stadler, that the birth certificate  
9 is not necessarily going to change gender -- the reference on  
10 the birth certificate is not going to necessarily change.

11 So it does sound like that is being requested and so  
12 you're indicating that you're opposing that. So the question  
13 is -- and as for the green wristband issue or any other form of  
14 identifying the plaintiff as a transgender student, I think this  
15 is where we get into a discussion of the evidence that needs to  
16 be presented with regard to a preliminary injunction.

17 So the question is, you know, I realize the defense  
18 may want to process a little bit of what the decision is today  
19 and perhaps the plaintiffs may also want to take a little bit of  
20 time to do that. I realize not a lot but a little bit. So the  
21 question and let me just ask you guys practically because you  
22 know how we've been working in terms of scheduling here, how  
23 much time in terms of minutes/hours -- I'm assuming hours -- do  
24 you think you would need to be able to present your evidence in  
25 support of the preliminary injunction? And given that it's the

1 plaintiff's motion, Mr. Wardenski, I'll ask you first.

2 MR. WARDENSKI: We think the argument can be brief.  
3 You know, frankly I think we presented our evidence in our  
4 filings and so if the court, you know, wished to rule on the  
5 papers we wouldn't be opposed to that.

6 But to the extent that a hearing would be helpful I'm  
7 prepared to present argument in 10 or 15 minutes. We've already  
8 gotten into, you know, some discussion of the merits on the  
9 motion-to-dismiss arguments so there's no need to rehash those.  
10 So I think it can be a shorter proceeding than the last one was.  
11 And it's just a matter of me flying back out here. So -- and I  
12 can be -- either tomorrow before I leave or sometime soon with  
13 12 hours' notice.

14 THE COURT: Let me ask you this. Well, okay,  
15 Mr. Stadler. Sorry, I asked Mr. Wardenski a question about time  
16 so I'll ask you the same question.

17 MR. STADLER: I think 10 to 15 minutes is a little  
18 light on the time. But I would agree that the issues for an  
19 injunction hearing have certainly been narrowed because I think  
20 one of the primary issues was reasonable probability of success.  
21 I don't see us revisiting that in depth beyond of what we've  
22 already argued with regard to the motion to dismiss. So I think  
23 we've covered a lot of that ground already.

24 I think irreparable harm is going to be an issue that  
25 gets a lot of attention. I would think we probably need an hour

1 to an hour and a half.

2 THE COURT: Okay. Then let me go back to what I was  
3 going to ask Mr. Wardenski. Mr. Wardenski, you indicated that  
4 you felt like you all had pretty much made most of your  
5 arguments in your motion-to-dismiss papers and the pleadings on  
6 the preliminary injunction. But of the three forms of  
7 injunctive relief -- or the three actions you're asking to  
8 enjoin, I think the one I'm still a little bit short on  
9 information on is the green wristband argument, if that's the  
10 form of identification that you all are seeking to have  
11 enjoined.

12 I believe that your papers indicated that there was  
13 some talk or some reference to the fact that the school might  
14 consider doing that, that your client had heard that.  
15 Mr. Stadler has responded that's never been required, it's never  
16 been requested, it's not being requested now. So I guess that's  
17 the one piece of information.

18 I understand what you're arguing on the restroom. I  
19 understand what you're arguing on the use of his name and  
20 pronouns. But the wristband I'm -- I mean is it taking place  
21 right now? It doesn't sound like --

22 MR. WARDENSKI: No -- and I can -- as far as I know.  
23 And I can try to, you know, respond to Mr. Stadler's argument.  
24 We did present evidence in the form of the testimonial -- the  
25 declarations from Ash and his mother Melissa Whitaker as well as

1 a photograph of the wristband that was distributed to guidance  
2 counselors.

3 That said, we, you know, are taking the district at  
4 its word that that was something that was never -- even if it  
5 was proposed it was not implemented and it's not being  
6 implemented this school year. So our focus and certainly the  
7 timeliness of our motion for a preliminary injunction is on the  
8 restroom access and on the name and pronoun usage.

9 So, you know, we could always -- if there were, you  
10 know, some development later where there was some other  
11 signifier separate and apart from the green wristband or if that  
12 somehow materialized again we could come back to the court, but  
13 I think the relief we're seeking is primarily the first two  
14 issues. And there seems to be a little dispute on those as to  
15 the facts.

16 And, you know, and I would just note that the district  
17 did not present any affidavits or declarations or any other  
18 evidence with its filings, so that's part of the reason why we  
19 think that the time needed for that hearing does not need to be  
20 extensive.

21 THE COURT: Okay. I would -- I would -- I think at  
22 this point I would deny any request for injunctive relief as it  
23 relates to the green wristband issue given the fact that I'm not  
24 sure how one can argue irreparable harm if, in fact, it's not  
25 being implemented right now. Now, if -- if there is some sort

1 of process that's put in place later in the school year, whether  
2 it be a green wristband or anything else, then you obviously  
3 have the ability to come back and seek injunctive relief. But  
4 at this point we don't have it. And so I'm not sure what I  
5 would be enjoining other than enjoining something that might or  
6 might not happen in the future.

7 So given that, I think the two issues, as Mr. Stadler  
8 said, the [Indiscernible] issues then are the question of the  
9 restroom policy and practice and the use of the name. And if  
10 that's the case then I guess the next question -- and,  
11 Mr. Stadler, you indicated that you thought 10 or 15 minutes was  
12 a little short shrift, are the defendants anticipating  
13 presenting any kind of evidence or is this more argument with  
14 regard to whether or not the practices alleged would give rise  
15 to irreparable harm?

16 MR. STADLER: I anticipate mostly argument on that  
17 issue.

18 THE COURT: Okay.

19 MR. STADLER: I want to give some thought to whether  
20 we would present evidence on the issue.

21 THE COURT: Okay.

22 MR. STADLER: But I also want to be clear on one other  
23 thing and that is the name issue. With a court order changing a  
24 student's name, the district will be changing Ash Whitaker's  
25 name on all of its documentation. It will get changed. So

1 there is no issue about name. My hang-up was pronoun. And I  
2 say that only because I need to give some thought to that issue  
3 as well. Regardless of whether your name has been changed, the  
4 gender hasn't been changed and so the district has to give  
5 thought as to what it does with a student who has a  
6 male-sounding name but a female birth certificate. And I can't  
7 speak for the district right now on that issue. It's gonna have  
8 to do some thinking itself. That's more the issue. It's not  
9 the name issue, it's just the pronoun, and then, you know, are  
10 we going to have people thrown in jail because they slip on a  
11 pronoun.

12 THE COURT: I don't think I have the ability to throw  
13 anybody in jail in this civil case.

14 MR. STADLER: That is good.

15 THE COURT: Unless somebody knows about an indictment  
16 that I don't know about.

17 MR. STADLER: You do have contempt power so --

18 THE COURT: I try not to use those if I can possibly  
19 avoid it.

20 Then if that's the case, if it's going to mostly be --  
21 I mean I want to give everybody the time that they need to  
22 consult with clients and do what they need to do. I also, if I  
23 don't have to make Mr. Wardenski get on another airplane -- if  
24 any of us don't have to get on airplanes I think our lives are  
25 highly improved given the state of flight in the United States

1 these days. But we could also schedule -- if it's mostly going  
2 to be argument and not really presentation of evidence in terms  
3 of what's going on here, we could do that by telephone because,  
4 you know -- otherwise, I mean, I don't know what time you're  
5 leaving in the morning, Mr. Wardenski, but I got a nine o'clock  
6 hearing, I got a 10:30, I have a gap between noon and 2:00 and  
7 then I got a couple more hearings.

8 MR. WARDENSKI: Well, I actually -- I have a hearing  
9 in Chicago first thing in the morning, but I'm not flying home  
10 until later in the day so if there was something in the  
11 afternoon that would be possible.

12 THE COURT: Well, I guess then it depends,  
13 Mr. Stadler, on how much time you're going to need to touch base  
14 with your client and talk to your client.

15 MR. STADLER: The problem with my client is there's  
16 seven of them.

17 THE COURT: Yeah, no. It's -- I understand.

18 MR. STADLER: So I need a little more than 24 hours to  
19 be able to round up a school board and to be able to talk to  
20 them on those issues.

21 THE COURT: Okay. So tell me when you think you may  
22 be able to do that and perhaps what we can do is take the  
23 argument by phone.

24 MR. STADLER: I'm sorry, I didn't hear the last part.

25 THE COURT: I ask you to tell me when you think you

1 may be able to get with your peeps and then we can do the  
2 argument by phone.

3 MR. STADLER: Again, this is an assumption on my part  
4 but I would suspect that I can confer with them sometime this  
5 week. So if we were back next week sometime I think that would  
6 be sufficient.

7 THE COURT: Okay. Hold on a second.

8 (Brief pause.)

9 MR. WARDENSKI: Your Honor, if I may, if the issue is  
10 the pronouns that Mr. Stadler needs to consult with this whole  
11 district about, I wonder if there's a way that we could address  
12 the restroom arguments first and then to the extent that there  
13 is still a dispute over the name and pronoun use, which may be  
14 resolved in the next few days, the name change just happened,  
15 you know, two days ago, that we could address that separately.

16 THE COURT: Do you need, Mr. Stadler, to consult with  
17 your clients with regard to the restroom policy?

18 MR. STADLER: I do not.

19 THE COURT: Okay.

20 MR. STADLER: I mean, I have so I do not need further.

21 THE COURT: Would you all be able to make arguments on  
22 the restroom policy now in terms of irreparable harm? Or -- or  
23 at some point tomorrow?

24 MR. WARDENSKI: Either way.

25 MR. STADLER: I can do tomorrow. I've got -- your

1 morning I believe, Judge, was you said fairly packed?

2 THE COURT: Well, yeah. I mean, I've got a 9:00 a.m.  
3 and a 10:30.

4 MR. WARDENSKI: Yeah, it would probably be afternoon  
5 that I could get here.

6 THE COURT: I could do one o'clock.

7 MR. WARDENSKI: That would be great.

8 MR. STADLER: I've got a one o'clock phone conference  
9 on a different case, but I will move that to a different time.

10 THE COURT: Are you sure?

11 MR. STADLER: Yup.

12 THE COURT: Okay. Shall we say one o'clock tomorrow?

13 And the arguments -- just so I'm clear so everybody is  
14 on the same page, the arguments tomorrow will be on the restroom  
15 use policy. We'll set aside the issue of this district's  
16 position on pronouns until Mr. Stadler has had an opportunity to  
17 talk with his clients. And maybe we can -- you know, if we need  
18 further argument on that we can set up a phone hearing on that.

19 MR. WARDENSKI: Thank you, Your Honor.

20 MR. STADLER: Thank you.

21 THE COURT: Okay.

22 MR. STADLER: That's fine.

23 THE COURT: Anything else then that we need to get  
24 taken care of this afternoon?

25 MR. WARDENSKI: No, Your Honor.

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MR. STADLER: No. Thank you.

THE COURT: All right. Thank you all.

THE CLERK: All rise.

(Audio file concluded at 4:38 p.m.)

\* \* \*

C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified September 27, 2016.

/s/John T. Schindhelm

John T. Schindhelm

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Case No. 16-3522

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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Appeal from the United States District Court  
for the Eastern District of Wisconsin  
Case No. 16-CV-943  
The Honorable Judge Pamela Pepper

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**SEPARATE APPENDIX OF KENOSHA UNIFIED SCHOOL DISTRICT NO. 1  
BOARD OF EDUCATION AND SUE SAVAGLIO-JARVIS**

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**STATEMENT THAT ALL REQUIRED MATERIALS ARE IN APPENDIX  
PURSUANT TO CIRCUIT RULE 30(d)**

The undersigned, counsel of record for the Defendants-Appellants, furnishes the following in compliance with Circuit Rule 30(d).

I hereby certify that the short required appendix bound with the brief includes all materials required by Circuit Rule 30(a) while this separate appendix complies with Circuit Rule 30(b).

Dated this 12th day of December, 2016.

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## CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendant-Appellants hereby certifies that on December 12, 2016, an electronic copy of the foregoing was served on counsel for Plaintiff-Appellee through the ECF system as all parties are registered users.

Dated this 12th day of December, 2016.

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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

Plaintiff,

v.

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

Defendants.

Civ. Action No. 2:16-cv-00943

**AMENDED COMPLAINT**

**INTRODUCTION**

1. Plaintiff Ashton (“Ash”) Whitaker, a 16-year-old boy, is a rising senior at George Nelson Tremper High School (“Tremper”) in the Kenosha Unified School District No. 1 (“KUSD”) in Kenosha, Wisconsin. Ash is a boy. He is also transgender. Ash was assumed to be a girl when he was born, and was designated “female” on his birth certificate, but has a male gender identity and lives as a boy in all aspects of his life. Ash’s family, classmates, medical providers, and others recognize Ash as a boy, respect his male gender identity, and support his right to live and be treated consistent with that gender identity.

2. Defendants Kenosha Unified School District No. 1 Board of Education (the “Board”), Superintendent Sue Savaglio-Jarvis, and their agents, employees, and representatives, have repeatedly refused to recognize or respect Ash’s gender identity and have taken a series of discriminatory and highly stigmatizing actions against him based on his sex, gender identity, and transgender status. The actions, as described more fully herein, have included (a) denying him

access to boys' restrooms at school and requiring him to use girls' restrooms or a single-occupancy restroom; (b) directing school staff to monitor his restroom usage and to report to administrators if he was observed using a boys' restroom; (c) intentionally and repeatedly using his birth name and female pronouns, and failing to appropriately inform substitute teachers and other staff members of his preferred name and pronouns, resulting in those staff referring to him by his birth name or with female pronouns in front of other students; (d) instructing guidance counselors to issue bright green wristbands to Ash and any other transgender students at the school, to more easily monitor and enforce these students' restroom usage; (e) requiring him to room with girls on an orchestra trip to Europe and requiring, as a condition of his ability to participate in a recent overnight school-sponsored orchestra camp held on a college campus, that he stay either in a multi-room suite with girls, or alone in a multi-room suite with no other students, while all other boys shared multi-room suites with other boys; and (f) initially denying him the ability to run for junior prom king, despite being nominated for that recognition based on his active involvement in community service, instructing him that he could only run for prom queen, and only relenting and allowing him to run for prom king after a protest by many of those same classmates.

3. Through these actions, Defendants have discriminated against Ash on the basis of sex, including on the basis of his gender identity, transgender status, and nonconformity to sex-based stereotypes, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and on the basis of sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants' actions have denied Ash full and equal access to KUSD's education program and activities on the basis of his sex.

4. Plaintiff, through his mother and next friend, Melissa Whitaker, brings this action against Defendants based on these unlawful and discriminatory actions.

5. Plaintiff seeks a declaratory judgment, preliminary and permanent injunctive relief, and damages resulting from Defendants' discriminatory actions.

### **PARTIES**

6. Plaintiff Ash Whitaker is a 16-year-old boy. He was born in 1999. He resides in Kenosha, Wisconsin and is a student at Tremper High School, a public high school in the Kenosha Unified School District No. 1. He will begin his senior year at Tremper on September 1, 2016.

7. Melissa Whitaker is Ash's mother and brings this action as his next friend. Ms. Whitaker resides in Kenosha, Wisconsin and is employed by the Kenosha Unified School District No. 1 as a high school teacher at Tremper.

8. Defendant Kenosha Unified School District No. 1 Board of Education is a seven-member elected body responsible for governing the Kenosha Unified School District No. 1, a public school district serving over 22,000 students in kindergarten through 12th grade who reside in the City of Kenosha, Village of Pleasant Prairie, and Town and Village of Somers. The Board derives its authority to govern KUSD directly from the Wisconsin Constitution and state statutes. The school district is a recipient of federal funds from the U.S. Department of Education, the U.S. Department of Agriculture, and the U.S. Department of Health and Human Services, and, as such, is subject to Title IX of the Education Amendments of 1972, which prohibits sex discrimination against any person in any education program or activity receiving Federal financial assistance. The Board designates responsibility for the administration of KUSD to its Superintendent of Schools, currently Dr. Sue Savaglio-Jarvis, who oversees a number of district-

level administrators. KUSD operates 42 schools, including six high schools. One of the high schools is Tremper, a 1,695-student public high school located in Kenosha, serving students in grades 9 through 12. Tremper's administration includes a principal and three assistant principals. The Board is vicariously liable for the acts or omissions of its employees, agents, and representatives, including those of the other Defendant Savaglio-Jarvis and other Tremper administrators, staff, and volunteers.

9. Defendant Sue Savaglio-Jarvis is the Superintendent of the Kenosha Unified School District and is sued in her official capacity. At all times relevant to the events described herein, Savaglio-Jarvis acted within the scope of her employment as an employee, agent, and representative of the Board. In such capacity, she carried out the discriminatory practices described herein (a) at the direction of, and with the consent, encouragement, knowledge, and ratification of the Board; (b) under the Board's authority, control, and supervision; and (c) with the actual or apparent authority of the Board.

### **JURISDICTION AND VENUE**

10. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343(a)(3), and is authorized to order declaratory relief under 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper in the Eastern District of Wisconsin under 28 U.S.C. § 1391(b) because the claims arose in the District, the parties reside in the District, and all of the events giving rise to this action occurred in the District.

### **FACTS**

#### ***Gender Identity and Gender Dysphoria***

12. Sex is a characteristic that is made up of multiple factors, including hormones, external physical features, internal reproductive organs, chromosomes, and gender identity.

13. Gender identity—a person’s deeply felt understanding of their own gender—is the determining factor of a person’s sex. Gender identity is often established as early as two or three years of age, though a person’s recognition of their gender identity can emerge at any time. There is a medical consensus that efforts to change a person’s gender identity are ineffective, unethical, and harmful. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.

14. The phrase “sex assigned at birth” refers to the sex designation recorded on an infant’s birth certificate. For most people, gender identity aligns with the person’s sex assigned at birth, a determination generally based solely on the appearance of a baby’s external genitalia at birth. For transgender people, however, the gender they were assumed to be at birth does not align with their gender identity. For example, a transgender boy is a person who was assumed to be female at birth but is in fact a boy. A transgender girl is a person who was assumed to be a boy at birth but is in fact a girl.

15. Gender Dysphoria is a condition recognized by the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, 5th edition (“DSM-5”). It refers to clinically significant distress that can result when a person’s gender identity differs from the person’s assumed gender at birth. If left untreated, Gender Dysphoria may result in profound psychological distress, anxiety, depression, and even self-harm or suicidal ideation.

16. Treatment for Gender Dysphoria is usually pursuant to the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (“Standards of Care”), published by the World Professional Association for Transgender Health (“WPATH”) since 1980. WPATH is an international, multidisciplinary, professional association of medical providers, mental health providers, researchers, and others, with a mission of promoting

evidence-based care and research for transgender health, including the treatment of Gender Dysphoria. WPATH published the seventh and most recent edition of the Standards of Care in 2011.

17. Consistent with the WPATH Standards of Care, treatment for Gender Dysphoria consists of the person “transitioning” to living and being accepted by others as the sex corresponding to the person’s gender identity. A key stage in that process is a “social transition,” in which the individual lives in accordance with his gender identity in all aspects of life. A social transition, though specific to each person, typically includes adopting a new first name, using and asking others to use pronouns reflecting the individual’s true gender, wearing clothing typically associated with that gender, and using sex-specific facilities corresponding to that gender. Failing to recognize or respect a transgender person’s gender is contrary to established medical protocols and can exacerbate an individual’s symptoms of Gender Dysphoria.

18. Medical treatments, such as hormone therapy or surgical procedures, may also be undertaken to facilitate transition and alleviate dysphoria, typically after an individual’s social transition. Under the WPATH Standards of Care, living full-time in accordance with one’s gender identity in all aspects of life for at least one year is a prerequisite for any medical interventions. Medical treatments are not necessary or appropriate in all cases.

19. A social transition requires that a transgender boy be recognized as a boy and treated the same as all other boys by parents, teachers, classmates, and others in the community. This includes being referred to exclusively with the student’s new name and male pronouns, being permitted to use boys’ restrooms and overnight accommodations on the same footing as other male students, and having the right to keep information about the student’s transgender status private. Singling out a transgender student and treating him differently than other boys

communicates the stigmatizing message to that student and the entire school community that he should not be recognized or treated as a boy, simply because he is transgender. This undermines the social transition and exposes the student to the risk of renewed and heightened symptoms of Gender Dysphoria such as anxiety and depression. It also frequently leads transgender students to avoid using school restrooms altogether, often resulting in adverse physical health consequences such as urinary tract infections, kidney infections, and dehydration, and other consequences such as stress and difficulty focusing on classwork.

### ***Plaintiff's Background***

20. Ash has been a student in KUSD's schools since kindergarten. On September 1, 2016, he will begin his senior year at Tremper High. Ash is an excellent student: he has a high grade point average and is currently ranked in the top five percent of his class of over 400 students. All of his academic classes in his junior year were either Advanced Placement or Honors level classes. He is also very involved in many school activities, including the school's Golden Strings orchestra, theater, tennis team, National Honor Society, and Astronomical Society. After graduation, he hopes to attend the University of Wisconsin-Madison and study biomedical engineering. Ash also works part-time as an accounting assistant in a medical office.

21. Ash is a boy. He is also transgender. He was designated "female" on his birth certificate and lived as a girl until middle school, when he recognized that he is, in fact, a boy, and he began to experience profound discomfort with being assumed to be a girl by others.

22. At the end of eighth grade, in the spring of 2013, Ash told his parents that he is transgender and a boy. Shortly thereafter, he told his older brothers.

23. During the 2013-2014 school year, Ash's freshman year of high school at Tremper, Ash began confiding to a few close friends that he is a boy. He slowly began

transitioning more publicly to live in accordance with his male identity: he cut his hair short, began wearing more traditionally masculine clothing, and began to go by a typically masculine name and masculine pronouns.

24. At the beginning of his sophomore year, in the fall of 2014, Ash told all of his teachers and peers that he is a boy, requesting that he be referred to using male pronouns and his new name. On Christmas, 2014, Ash told his extended family, including grandparents, aunts, uncles, and cousins, that he is a boy.

25. Ash has undertaken his gender transition under the guidance and care of therapists and medical doctors. He was diagnosed with Gender Dysphoria by his pediatrician. Around the time of his public transition, Ash began seeing a gender specialist therapist to support him in his transition. He is currently under the care of clinical psychologist, who is also a gender specialist. In April 2016, he began consulting with an endocrinologist at Children's Hospital of Wisconsin to discuss hormonal therapy. Ash began receiving testosterone treatment under the care of an endocrinologist in July 2016.

26. Since Ash's transition at school, he has been widely known and accepted as a boy by the school community. At a Golden Strings orchestra performance at a hotel on January 17, 2015, Ash wore a tuxedo, just like all the other boys, with the support of his orchestra teacher, Helen Breitenbach-Cooper. Students and teachers who did not know Ash prior to his transition did not and would not have recognized him as different from any other boy until the discriminatory events described in this complaint took place.

***KUSD's Refusal to Permit Plaintiff Access to Restrooms Consistent with His Gender Identity***

27. In the spring of 2015, during Ash's sophomore year, Ash and his mother had several meetings with Ash's guidance counselor, Debra Tronvig, during which they requested

that Ash be permitted to use the boys' restrooms at school. The counselor spoke to the school's principal, Richard Aiello, and one of its assistant principals, Brian Geiger, and she advocated that Ash be permitted to use the boys' restrooms. However, at a meeting in March 2015, she reported back to Ash and his mother that the school administrators had decided that Ash would only be permitted to use the girls' restrooms or the single-user, gender-neutral restroom in the school office. Tronvig and the school administrators did not suggest or indicate any circumstance under which Ash might be permitted to use the boys' restrooms in the future.

28. After that meeting, Ash felt overwhelmed, helpless, hopeless, and alone. Both of the restroom options offered by Defendants were discriminatory, burdensome, or unworkable. Ash was deeply distressed by the prospect of using the girls' restrooms, as it would hinder and be at odds with his public social transition at school, undermine his male identity, and convey to others that he should be viewed and treated as a girl. He was also deeply distressed by the prospect of using the office restroom, which is located in the rear of the office, behind the office secretaries' work stations—far out of the way from most of his classes—and is only used by office staff and visitors. It is Ash's understanding that no other students are allowed to use the office restroom. Ash feared the questions he would face from students and staff about why he was using that particular restroom; the inconvenience of traveling long distances from (and missing time in) his classes to use that restroom; and the fact that he would be segregated from his classmates and further stigmatized for being "different."

29. At the same time, Ash was fearful of the potential disciplinary consequences if he failed to comply with the administrators' directives not to use the boys' restroom. He worried that such a disciplinary record could potentially interfere with his ability to get into college, as he had no prior record of discipline. As a result of that fear and anxiety, seeing no plausible

options, Ash largely avoided using any restrooms at school for the rest of that school year, and, when absolutely necessary, he only used a single-user girls' restroom near his theater classroom.

30. In order to avoid using restrooms at school, Ash severely restricted his liquid intake. This was particularly dangerous because Ash suffers from vasovagal syncope, a medical condition that results in fainting upon certain physical or emotional triggers. The triggers cause a person's heart rate and blood pressure to drop suddenly, reducing blood flow to the brain and resulting in a loss of consciousness. Because dehydration and stress trigger his fainting episodes, Ash's primary care doctor requires him to drink 6-7 bottles of water and a bottle of Gatorade daily.

31. In addition to vasovagal syncope, Ash also suffers from migraines triggered by stress. During his sophomore year, while avoiding using restrooms, Ash experienced greatly heightened symptoms of both vasovagal syncope and stress-related migraines. He also experienced increased symptoms associated with Gender Dysphoria, including depression, anxiety, and suicidal thoughts.

32. Ash also worried that the emotional and physical toll caused by the school's treatment of him would lead to medical or psychological harm that would delay or make it unsafe for him to begin hormone treatment as part of his transition. This anxiety further increased his symptoms of Gender Dysphoria.

33. In July 2015, Ash took a trip to Europe with his school orchestra group, Golden Strings. In response to Ash's request to room with other boys, his orchestra teacher, Breitenbach-Cooper, checked with school administrators and then informed him that he would not be permitted to do so. Ash felt hurt and embarrassed when he learned of the school's decision. Once again, he understood the school's decision to be based on a perception that he is

not really a boy, and he felt degraded and humiliated by the administrators' continued failure to recognize and respect his gender identity.

34. As a result of the school's decision, Ash was forced to share a room with a girl. During the trip, the students were frequently grouped by gender while traveling between destinations, and Ash was consistently grouped with girls.

35. In July 2015, while on the trip to Europe, feeling less scrutinized, Ash began to use male-designated bathrooms. During that trip, Ash saw a news story about a lawsuit against the Gloucester County School District in Virginia by another transgender student who was denied access to boys' restrooms at his high school. That story reported that the U.S. Department of Justice had concluded that transgender students have the right to use restrooms in accordance with their gender identity under Title IX and had filed a brief in the Virginia case, *G.G. v. Gloucester County School Board*, asserting that the school district's policy violated transgender students' rights under Title IX. Ash was elated to learn that he did, in fact, have the legally protected right to use the restroom consistent with his gender. For the rest of the trip, Ash exclusively used male-designated bathrooms, and he continued to do so upon returning to the United States.

36. When he returned to school for his junior year, in September 2015, Ash continued exclusively using boys' restrooms, including at Tremper. He did so for the first seven months of the school year without any incident. No other students ever made an issue of Ash using the boys' bathroom. Ash did not discuss this decision with administrators or teachers, because he understood it to be his legal right.

37. In late February 2016, after observing Ash using a boys' bathroom, a Tremper teacher advised two assistant principals, Geiger and Wendy LaLonde, of that fact. Geiger then

informed the other administrators of Ash's restroom use and asked them what the school's policy was.

38. Aiello, LaLonde, Geiger, and the third assistant principal, Holly Graf, agreed that, although neither KUSD nor Tremper had any existing written policy on students' restroom usage, the school's policy should be that transgender students, including Ash, would not be permitted to use school restrooms corresponding to their gender identity. Consistent with the school's previous decision in spring 2015, they decided that Ash would not be permitted to use the boys' restroom and, instead, would only be permitted to use the girls' restrooms or the single-user restroom in the school office.

39. Following that decision, Graf emailed Ash's guidance counselor, Tronvig, and requested that Tronvig relay the school's restroom policy to Ash and his mother. Tronvig responded by email that she did not know what that policy was. Graf and Tronvig then met in person and Graf explained to Tronvig that Ash would not be permitted to use the boys' restrooms.

40. In late February 2016, Tronvig called Ms. Whitaker to inform her of the administration's decision that Ash would only be permitted to use the girls' restrooms or the single-user restroom in the school's main office.

41. When Ash learned about the school's decision, in early March 2016, he was distressed. He felt humiliated and deeply uncomfortable by the idea of using a girls' restroom, even more so than the previous year—because he is not a girl, he had not used female-designated restrooms at school or elsewhere for a long time, and because using the girls' restrooms as a boy risked subjecting him to ridicule, scrutiny, stigma, and harassment by other students and school staff. For the reasons alleged above, he also felt deeply uncomfortable with using the single-user

main office restroom. He believed that either alternative would imply his status as a transgender boy required him to be segregated from other students, despite the fact that he had used the boys' restrooms regularly and otherwise been treated as a boy by nearly everyone in the school community for many months.

42. Ash was also afraid of what disciplinary consequences he might face if he failed to comply with the school's policy. Faced with two unacceptable options proposed by the school administrators, Ash continued to use the boys' restrooms, as he had been doing already. That approach was the only way Ash felt he could mitigate the physical harm that he would suffer if he refrained from all restroom use during the school day and during his after-school extracurricular activities. Because of his active involvement in after-school activities, a typical school day for Ash lasts from 7 a.m. to 4 or 5 p.m., *i.e.*, 9 or 10 hours. Some activities require him to be on Tremper's campus until as late as 10 p.m., a 15-hour day. These long days at school make avoiding restrooms altogether impossible.

43. Ash's decision to use the boys' restroom consistent with his legal right, though in defiance of school policy, nevertheless exacted an emotional toll. Ash became more depressed and anxious, grew distracted from his school work, and began to have trouble sleeping.

44. On or about March 10, 2016, Ash and his mother met with Graf and Tronvig. During that meeting, Graf referred to Ash exclusively by his birth name. In that meeting, Graf told Ms. Whitaker that the reason Ash could not use the boys' restrooms was because he could only use restrooms consistent with his gender as listed in the school's official records. Graf said that the only way the school could change Ash's gender in its records would be if the school received legal or medical documentation confirming his transition to male.

45. Ms. Whitaker explained that, to her knowledge, Ash was too young for transition-related surgery. Graf repeated that the school would need some kind of medical documentation, but declined to indicate what type of medical “documentation” would be sufficient to demonstrate that Ash’s gender marker should be changed on his school records and that he could use boys’ restrooms.

46. In response, Ms. Whitaker contacted Ash’s pediatrician. The pediatrician faxed a letter to the school on or about March 11, 2016, confirming that Ash is a transgender boy and recommending that Ash be allowed to use male-designated facilities at school. At Ms. Whitaker’s request, the pediatrician subsequently sent the school a second letter, reiterating her recommendation about Ash’s restroom usage.

47. Despite the letters from Ash’s doctor, Aiello emailed Ms. Whitaker that the school would continue to deny boys’ restroom access to Ash because he had not completed a medical transition.

48. Ash continued to use the boys’ restrooms when needed, but he mainly attempted to avoid using restrooms altogether by not drinking or eating while at school, in order to avoid the scrutiny, fear, and humiliation he faced when he had to use a restroom at school. His anxiety and depression increased further. He also experienced increased physical symptoms relating to his vasovagal syncope, including dizziness, nearly fainting, and migraines. Ash returned to see his pediatrician in late March 2016 to have his symptoms evaluated. The pediatrician again instructed him to eat and drink regularly to avoid those symptoms. Nonetheless, Ash was unable to comply with those instructions, out of fear of using the restrooms at school. Concerned about his physical health, his mother would regularly hand him a bottle of water and tell him to drink it

to avoid dehydration, and he would refuse, saying that he did not want to have to use the restroom.

49. On or about March 17, 2016, Geiger observed Ash as he entered a boys' restroom, and reported that fact to Graf. Minutes later, Graf insisted that Ash leave his acting class and come to her office, and met with him alone for half an hour, lecturing him about his use of the boys' restrooms.

50. During that same meeting, Graf asked Ash why he was not using the girls' restroom or single-user restroom as directed. He informed her that the school's policy violated his rights as a transgender student under Title IX. When Ash made clear he could not use girls' restrooms because he is not a girl, she again asked him to compromise and use the single-user restroom in the main office. He again refused because of the humiliation, stigma, and lost class time that he would face using that bathroom. Graf then reiterated her instruction that Ash cease his use of boys' restrooms.

51. During that March 17 meeting—as well as at virtually all other times—Graf consistently referred to Ash using his traditionally female birth name and female pronouns, despite Ash's request that she use his new name and male pronouns. In that meeting, when Ash became upset by Graf's restroom directive and refusal to respect his male gender, Graf said, “S---, calm down,” using his birth name. Ash, angry and embarrassed, said, “No, I'm leaving,” and left the office.

52. During that meeting, Graf directly threatened that Ash would be subject to disciplinary action if he continued to use the boys' restrooms. Specifically, she indicated Ash would have to “go down to 109 or 203”—referring to Room 109, the in-school suspension room, and Room 203, the school's disciplinary office.

53. Following the meeting with Graf, Ash began to cry in the hallway. He had difficulty concentrating in his classes for the remainder of the day, holding back tears. He skipped work that afternoon and did not do any homework. Instead, he just went home after school and lay in bed feeling terrible.

54. When he absolutely needed to use the restroom, Ash continued to use the boys' restrooms exclusively through June 9, 2016, the final day of the school year. As a result, Graf continued to call Ash, his mother, or both into her office for periodic meetings. At those meetings, Graf would inquire about Ash's restroom use, and, when told he was still using the boys' restrooms, would repeat the school's policy that he must use the girls' restroom or a single-user restroom. During these meetings, Graf continued to refer to Ash by his birth name and female pronouns.

55. Ash grew increasingly embarrassed by Graf's repeated inquiries about his restroom use, which he felt to be an invasion of his privacy. Since each meeting with administrators occurred during class time, Ash was also concerned about the effect of these repeated meetings on his academic performance and feared that he would face scrutiny from other students and teachers about why he was being removed from class so frequently. Ash, who continued to have no disciplinary record at the school, also became more worried about the increasingly real prospect of disciplinary consequences that might affect his ability to participate in extracurricular activities and negatively impact his college application process in the upcoming school year.

56. In April 2016, Ms. Whitaker learned that school administrators had sent an email to all of the school's security guards, instructing them to notify administrators if they spotted any

students who appear to be going into the “wrong” restroom. Individual security guards later told Ms. Whitaker that they understood the directive to be targeted at Ash.

57. Ash felt very uncomfortable and distressed knowing that security guards and administrators were actively monitoring his restroom use.

58. On April 5, 2016, Ms. Whitaker was pulled out of her Tremper classroom and summoned to a meeting with two KUSD district-level administrators: Dr. Bethany Ormseth, KUSD’s Chief of School Leadership, and Susan Valeri, KUSD’s Chief of Special Education and Student Support.

59. In that meeting, Ms. Whitaker asked Ormseth and Valeri whether KUSD had adopted any policy concerning transgender students and restroom use. They provided no answer to Ms. Whitaker’s question, other than to say that a policy was in the process of being created by a committee of the school board. Ms. Whitaker responded, “You don’t need a policy—it’s a federal law.” Later in the school year, Ms. Whitaker learned that Rebecca Stevens, a KUSD school board member, had contradicted Ormseth and Valeri’s account, stating to another board member that no committee had yet been formed and no policy was being written.

60. In fact, despite repeated requests by Ms. Whitaker to see the written policy about transgender students’ restroom use during the course of the 2015-2016 school year, no Tremper or KUSD official has ever provided such a policy. Ms. Whitaker reasonably believes no such policy exists. Rather, the Tremper administration developed and enforced a school “policy” in direct and specific response to those administrators’ discomfort with the restroom usage of one student: Ash.

61. The next day, on April 6, 2016, Ash and Ms. Whitaker attended a meeting with Aiello, Graf, and Valeri. At that meeting, the administrators offered Ash a further

“accommodation” regarding his restroom use: they informed him that he would also be allowed to use two single-user restrooms located on the far opposite sides of campus. Those restrooms had previously been available for any student’s use, but new locks had been installed and Ash alone was given the key to open them. The stigma of being assigned personal, segregated restrooms—to which he alone of all the 1,695 students in the building had a key—caused Ash additional significant emotional distress. In addition, neither of these single-occupancy restrooms was convenient to Ash’s classes and would have required him to miss more class time than his peers if he used those restrooms during class.

62. At the April 6 meeting, Ash asked Valeri for KUSD’s rationale for prohibiting his use of the boys’ restrooms. Valeri replied with a statement to the effect of, “Well, we’ve never had a student who identifies as male but was born female.”

63. Ash replied by asserting that Title IX prohibits discrimination based on sex, which protects transgender students and requires schools to permit them to use restrooms consistent with the student’s gender identity.

64. Valeri denied that Title IX protects transgender students’ access to bathrooms consistent with their gender identity.

65. When Ash asked Valeri to explain her understanding of Title IX, she refused to do so, stating words to the effect of, “I don’t think I’m going to give you any reasons.”

66. In order to avoid disciplinary sanctions from Tremper administrators for using boys’ restrooms on the one hand, and the scrutiny and embarrassment that would result from using individually assigned restroom facilities on the other, Ash continued to avoid using school restrooms as much as possible. He has never used the designated locked single-user restrooms, as doing so would call unwanted attention to himself by using a key to enter a restroom to which

no other student has access, and because of his desire not to spend unnecessary time out of class traveling to those inconveniently located restrooms.

67. As a result of the stress caused by the school's discriminatory actions, and his attempts to avoid using any restrooms at school, Ash's migraines and episodes of fainting and dizziness continued to worsen. His depression, anxiety, and dysphoria also deepened. He became severely depressed and lethargic, and no longer wanted to get out of bed in the morning.

68. Due to the serious consequences the school's actions were having on Ash's physical and psychological well-being, he considered withdrawing from Tremper and transferring to an online school to finish high school. He ultimately decided not to withdraw at that time, due to his involvement in activities like the school orchestra that would not be available if he were enrolled in an online school, and because changing schools would put him further behind in his classwork.

***School's Refusal to Permit Ash to Be Considered for Junior Prom King***

69. Tremper High's junior prom was scheduled for May 7, 2016. In late March, the faculty advisor for the junior prom, Lorena Danielson, submitted the names of candidates for the prom court to Aiello. Candidates for prom king and queen are required to earn volunteer hours in order to participate and whoever earns the most hours is selected for prom court. Based on his community service hours, the junior prom advisor designated Ash as a candidate for prom king and then met with Aiello to confirm the list.

70. After meeting with the junior prom advisor, Aiello called Ms. Whitaker in for a meeting with him and Graf on or about March 22, 2016, during which he told her that Ash could be on the prom court, but could only be a candidate for prom queen, not prom king. When Ash learned about this, he was devastated. He was humiliated at the prospect of running for prom

queen, when all his classmates knew him to be a boy. He felt deeply disrespected and angry that the administrators failed to recognize how hurtful and unfair this additional form of discrimination was.

71. On April 4, 2016, Ash and his friends presented a MoveOn.org petition to Tremper administrators demanding that Ash be allowed to run for prom king and to use the boys' restrooms at school, which was signed by many members of the Tremper community and thousands of others around the country. When administrators failed to respond, on April 5, 2016, 70 students participated in a sit-in at Tremper's main office to show their support for Ash. The students held signs expressing the view that transgender students should be treated equally, and supporting Ash's right to be allowed to run for prom king and to use the boys' restrooms at school.

72. Following the sit-in and media attention about KUSD's treatment of Ash, in the April 6, 2016 meeting referenced above, Aiello, Graf, and Valeri informed Ash and Ms. Whitaker that Ash would be permitted to run for prom king.

73. Although Ash was pleased to have the opportunity to run for prom king and heartened by the outpouring of support from his classmates, he continued to feel deeply distressed as a result of the school administrators' initial decision that he could only run for prom queen and their continued pattern of refusing to recognize or respect his male gender identity.

#### ***Name and Gender in School Records***

74. KUSD has not changed Ash's name on his official records and other documents, including classroom attendance rosters used by his teachers. Although most of Ash's teachers refer to him by his male name, substitute teachers have frequently referred to him by his birth name in front of his classmates because that is the name that appears on the attendance rosters.

In response, and in order to avoid embarrassment or discomfort from his classmates, Ash has been compelled to approach all of his teachers at the beginning of each term to advise them of his preferred name and pronouns and request that they do not refer to him by his birth name. He similarly must approach substitute teachers before class every time a teacher is absent. Although some teachers note his correct name on the class roster, others have not documented that name on the roster, and occasionally substitute teachers still refer to him by his birth name in class. Being called a traditionally female name in front of all his classmates reveals that he is transgender to all of his peers and makes Ash feel embarrassed and distressed. The practice has resulted in Ash experiencing increased symptoms of Gender Dysphoria, including anxiety and depression.

75. In the meetings with administrators on March 6 and March 22, Ms. Whitaker requested that the school change Ash's name and gender in its official records to avoid those problems. In both meetings, Graf told Ms. Whitaker that in order to change Ash's name or gender in the school's official records, the school would need to see legal or medical documentation. The medical documentation Ash's pediatrician sent was deemed insufficient, although Graf and Aiello refused to specify what the contents of acceptable documentation would be, despite repeated requests for clarification. They also failed to specify what type of "legal documentation" would be necessary to update the school records.

76. In August 2016, Ash filed a petition in Kenosha county court seeking a court-ordered name change, which is pending as of the date of this Amended Complaint. Even if KUSD is unable to change Ash's name or gender in its official school records because Ash has not yet obtained a legal name change, KUSD can and should take steps to avoid intentional or inadvertent disclosure of Ash's birth name or sex assigned at birth to KUSD employees or

students, including by modifying informal or public-facing documents, such as attendance rosters, to reflect Ash's male name and male gender.

***Other Harassing and Stigmatizing Treatment Faced by Ash at School***

77. After news broke about the petition for Ash to run for prom king and use boys' restrooms at school, some parents and other Kenosha residents began to speak out in opposition to Ash's right to use boys' restrooms. On May 10, 2016, shortly after the junior prom, at a meeting of the Board, several community members spoke in opposition to allowing transgender students to use restrooms in accordance with their gender identity. One parent told the Board that he was opposed to permitting transgender students to use gender-appropriate restrooms because such a policy would permit sexual predators to enter women's restrooms and put his daughters at risk.

78. That person's wife, who volunteers as a pianist with the school orchestra, has created and maintains a public Facebook group called "KUSD Parents for Privacy," which contains numerous posts critical of transgender students' rights. Several posts on that page have mentioned Ash and his mother by name, accompanied by their photographs. One post, on May 14, 2016, linked to an article about Ash, contains a photograph of him and his mother, and describes him as a "pawn."

79. At an orchestra rehearsal at the school on May 11, 2016, the day following the Board meeting at which her husband spoke, this woman approached Ash, put her hands on his shoulders, and said words to the effect of, "A---, honey, this isn't about you, this is bigger than you. I'm praying for you." Ash was extremely uncomfortable and embarrassed, and did not respond. Ms. Whitaker and Ash later brought this incident to Aiello's attention. Aiello requested that Breitenbach-Cooper, the orchestra teacher, call the volunteer to advise her not to

talk to students like that, but took no further action. Nothing changed as a result. She is still a regular volunteer with the school orchestra and has continued to attend every rehearsal. Her constant presence substantially diminishes Ash's enjoyment of an extracurricular activity that has formed an important part of his educational experience at Tremper.

***Green Wristbands to Mark Transgender Students***

80. In May 2016, Ash's guidance counselor, Tronvig, showed Ms. Whitaker what appeared to be a bright green wristband (comprised of green adhesive stickers). Tronvig told Ms. Whitaker that a school administrator had given her these wristbands with the instruction that they were to be given to any student who identified himself or herself as transgender. Ms. Whitaker understood this to mean that the school intended to use the wristbands to mark students who are transgender and monitor their restroom usage. Upon information and belief, other guidance counselors were also provided these wristbands and instructed them to give them to transgender students.

81. Branding transgender students in this way would single them out for additional scrutiny, stigma, and potentially harassment or violence, and violate their privacy by revealing their transgender status to others.

82. Upon learning about the school's proposed green wristband practice, Ash felt sickened and afraid. He was aware of the prevalence of violent attacks against transgender people nationwide, and grew very afraid that the school would attempt to force him to wear the wristband on penalty of discipline. If he did wear the wristband, he knew that other students would likely ask him repeatedly why he was wearing it, and he would have to explain over and over that he is transgender. He expected that some students would stare, and others would outright ridicule him. He felt like his safety would be even more threatened if he had to wear this visible badge of his transgender status.

83. To Plaintiff's knowledge, the green wristband practice proposed at the end of the school year may be implemented in the new school year, such that guidance counselors will be expected to provide these wristbands to transgender students in the upcoming school year.

***Overnight Accommodations at Summer Orchestra Camp***

84. Ash participated in a five-day, school-sponsored summer orchestra camp from June 12-16, 2016. The camp was held on the campus of the University of Wisconsin-Oshkosh, and students stayed in dormitories on campus. The dorms used for the camp were suites with two to four bedrooms and a common living room, kitchenette, and two single-occupancy restrooms. Each suite had either four separate, single-occupancy bedrooms, or two double-occupancy rooms. During the evenings, school chaperones placed tape across each of the bedroom doorways to prevent students from leaving the bedrooms at night. The suites were designated either male or female.

85. In advance of the camp, the school allowed students to sign up for dorm rooms with their friends. Ash had signed up to stay in a boys' suite with one of his best friends, a male student.

86. Breitenbach-Cooper, the orchestra teacher, told Aiello about Ash's request to stay in the same suite as his friend and other male students. Aiello replied that Ash could not do so because, under Tremper's policy, he could not stay with other boys. Aiello told Breitenbach-Cooper that Ash would have to stay in a suite with girls or alone in a suite, segregated from all of his peers.

87. In order to participate in the orchestra camp, Ash reluctantly agreed to stay in double-bedroom suite all alone, with no other students sharing the suite. He rejected the "option" to stay in a suite with girls because he is a boy and he felt uncomfortable staying with girls.

88. This arrangement excluded Ash from socializing with other students during the entire five-day camp. Students were prohibited from entering other suites, and could only socialize within their own suite or in common areas of the building. Since almost all the other students remained in their suites to socialize in the evenings, Ash stayed in his room alone each evening while the other students enjoyed time to socialize with their friends. He felt lonely and depressed, and disappointed that he was not able to have the same good memories of his final year at camp as all the other students.

89. The school's decision to segregate Ash from the other boys also left him feeling hurt and embarrassed. He understood the school's decision to be based on a perception that he might engage in sexual activity with another boy, and he felt degraded and humiliated by the idea that administrators were thinking about him in those terms.

***District's Failure to Change its Discriminatory Policies after Notice of Legal Obligations***

90. Ash and Ms. Whitaker have repeatedly advised KUSD officials that their actions violate Ash's right to attend school free from sex discrimination, as required by Title IX and the Equal Protection Clause. Despite being put on notice of the violations of Ash's statutory and constitutional rights, KUSD has refused to change its policies to date.

91. On April 19, 2016, through his attorneys, Ash sent a letter to Superintendent Savaglio-Jarvis demanding that KUSD permit him to use boys' restrooms at school.

92. By letter of April 26, 2016, KUSD's attorneys responded, acknowledging their awareness of U.S. Department of Education guidance documents interpreting Title IX to protect students from discrimination based on their gender identity—as well as the Fourth Circuit's April 19, 2016 opinion in *G.G. v. Gloucester County School Board*, a Title IX case brought by a transgender high school student who was denied access to boys' restrooms at school, in which

that appeals court deferred to the Department of Education's interpretation of Title IX and held that the plaintiff student was entitled to restroom access consistent with his gender identity. The letter nevertheless maintained that KUSD is not bound by these authorities and would not change its position on Ash's restroom use.

93. On May 12, 2016, Ash filed an administrative complaint with the U.S. Department of Education Office for Civil Rights ("OCR"), alleging that KUSD's actions violated Ash's rights under Title IX. Shortly before filing this lawsuit, Plaintiff's attorneys contacted OCR and requested to withdraw that complaint, without prejudice.

94. On May 13, 2016, the U.S. Department of Education and U.S. Department of Justice issued a joint guidance letter to all public schools, colleges, and universities in the country receiving Federal financial assistance, reiterating the federal government's previously stated position that, pursuant to Title IX, all public schools are obligated to treat transgender students consistent with their gender identities in all respects, including regarding name and pronoun usage, restroom access, and overnight accommodations.

95. Following the issuance of the federal guidance on May 13, 2016, KUSD officials publicly acknowledged the guidance but stated that they did not believe they were required to comply with it. KUSD issued a statement declaring, "[t]he Department of Education's . . . letter is not law; it is the Department's interpretation of the law," suggesting that it would not change its policy absent a court order.

96. To date, the Board has not articulated or adopted any formal policy regarding transgender students in KUSD's schools.

97. Based on the statements and actions of KUSD officials, Ash feels deep anxiety and dread about experiencing continued discrimination during his senior year and the effect that it will have on him during the college application process.

### **INJURY TO PLAINTIFF**

98. Through their actions described above, Defendants have injured and are continuing to injure Plaintiff.

99. Defendants have denied Ash full and equal access to KUSD's education programs and activities by denying him the full and equal access to student restrooms and overnight accommodations during school-sponsored trips offered to other male students.

100. Ash has experienced and continues to experience the harmful effects of being segregated from, and treated differently than, his male classmates at school and during school-sponsored events, including lowered self-esteem, embarrassment, social isolation, and stigma, as well as heightened symptoms of Gender Dysphoria, including depression and anxiety.

101. When school administrators and staff intentionally used his birth name or female pronouns (or allowed others to do so), instructed him not to use the boys' restrooms, instructed security personnel to surveil his movements, and otherwise undermined his male identity and singled him out as different from all other boys, he has felt deeply hurt, disrespected, and humiliated.

102. Defendants' discriminatory actions, and the efforts Ash has made to comply with the directive not to use the boys' restroom—limiting food and drink while at school—have led to a host of physical symptoms, including dehydration, dizziness, fainting, and migraines. All of those symptoms virtually disappeared once Ash returned home from the orchestra camp and

summer break began, and Ash was no longer facing daily scrutiny and anxiety and could eat and drink at a healthy level.

103. As a direct and continuing result of Defendants' discriminatory actions, Ash has suffered increased and continuing emotional distress over the last six months. He has experienced escalating symptoms of depression and anxiety, and his self-esteem has suffered, as a result of the discrimination he has experienced at school. Although he cried very little in the past, he frequently cries and fights back tears.

104. As a result of the depression and anxiety Defendants' actions caused, Ash has also had difficulty eating and sleeping properly, and difficulty concentrating in classes and on his homework.

105. As a result of Defendants' actions, and the feelings of fear and scrutiny he has grown used to, Ash now feels unsafe being outside of the house, afraid that he will be targeted for an assault by someone who knows he is transgender. He will typically only go out in groups of friends, and tries to avoid ever going out with only one other friend or alone.

106. Ash has also missed significant class time due to being compelled by KUSD officials to participate in repeated, lengthy meetings during class time to discuss his use of restrooms, his name and gender in school records, and the school's determination that he would be prohibited from running for prom king.

107. All of the above discriminatory treatment has undermined the efficacy of the social transition component of his gender transition and heightened his symptoms of Gender Dysphoria.

108. If Defendants refuse to grant Ash access to boys' restrooms by the time his senior year begins on September 1, 2016, he will likely experience the same social stigma, emotional

distress, academic harm, and detrimental impediments to his gender transition resulting from Defendants' conduct that he experienced during his junior year.

## CAUSES OF ACTION

### First Cause of Action

#### Violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

109. Plaintiff realleges and incorporates the facts and allegations contained in paragraphs 1 through 108 as fully set forth herein.

110. Under Title IX and its implementing regulations, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31 (Department of Education Title IX regulations); 7 C.F.R. § 15a.31 (Department of Agriculture Title IX regulations); 45 C.F.R. § 86.31 (Department of Health and Human Services Title IX regulations). Title IX’s prohibitions on sex discrimination extend to “any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient” of federal funding. 34 C.F.R. § 106.31; 7 C.F.R. § 15a.31; 45 C.F.R. § 86.31.

111. Title IX’s prohibition on discrimination “on the basis of sex” encompasses discrimination based on an individual’s gender identity, transgender status, and gender expression, including nonconformity to sex- or gender-based stereotypes.

112. Conduct specifically prohibited under Title IX includes, *inter alia*, treating one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; providing different aid, benefits, or services in a different manner; denying any person any such aid, benefit, or service; or otherwise

subjecting any person to separate or different rules of behavior, sanctions, or other treatment. 34 C.F.R. § 106.31; 7 C.F.R. § 15a.31; 45 C.F.R. § 86.31.

113. As a Federal funding recipient, Defendant Kenosha Unified School District No. 1 Board of Education, including the academic, extracurricular, and other educational opportunities provided by the Kenosha Unified School District and Tremper High School, is subject to Title IX's prohibitions on sex- and gender-based discrimination against any student.

114. As set forth in paragraphs 28 to 98 above, Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from accessing male-designated restrooms at school, and requiring that he use female-designated restrooms or single-occupancy restrooms, have discriminated and continue to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, and thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex, in violation of Title IX.

115. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from staying in male-designated overnight accommodations on school-sponsored trips, and requiring him to stay in female-designated overnight accommodations or segregated accommodations on those trips, has discriminated and continues to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, and thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational

opportunities offered by KUSD and Tremper High School, on the basis of sex, in violation of Title IX.

116. Defendants have further violated Title IX by failing to recognize fully and respect Plaintiff, a transgender boy, as a male student, including through administrators' repeated and intentional use of Plaintiff's traditionally female birth name and female pronouns to address him and refer to him to others; the failure to take necessary and appropriate action to update or modify Ash's official and/or informal student records, including classroom attendance rosters, to prevent teachers, substitute teachers, and other school staff from referring to him by his female birth name and female pronouns in the presence of other students; Tremper administrators' initial refusal to permit Ash to run for junior prom king and directive that he run for prom queen instead, withdrawn only after a student protest and media attention; and Tremper administrators' instruction to school guidance counselors to provide green wristbands to transgender students. Through these actions, individually and collectively, Defendants have and continue to exclude Plaintiff from participation in, deny him the benefits of, and subject him to discrimination in KUSD's education programs and activities, on the basis of sex, in violation of Title IX.

117. Defendants, through instructing Tremper staff to report the restroom use of any student who "appears" to be using the "wrong" restroom, operates an unlawful policy or practice of profiling Plaintiff and other students who are transgender and/or do not conform to sex- or gender-based stereotypes, and thereby deprive Plaintiff and similarly situated students of their rights under Title IX to be free from discrimination on the basis of sex, including on the basis of gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, in further violation of Title IX.

118. Plaintiff has been, and continues to be, injured by Defendants' discriminatory conduct and has suffered damages as a result.

**Second Cause of Action  
Violation of 42 U.S.C. § 1983 Based on  
Deprivation of Plaintiff's Rights under the  
Equal Protection Clause of the Fourteenth Amendment to the United States Constitution**

119. Plaintiff realleges and incorporate the facts and allegations contained in paragraphs 1 through 108 as fully set forth herein.

120. Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, discrimination based on sex, including gender, gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, as well as discrimination based on transgender status alone, is presumptively unconstitutional and is therefore subject to heightened scrutiny.

121. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from accessing male-designated restrooms at school, and requiring that he use female-designated restrooms or single-occupancy restrooms, have discriminated and continue to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

122. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from staying in male-designated overnight accommodations on school-sponsored trips, and requiring him to stay in female-designated overnight

accommodations or segregated accommodations on those trips, has discriminated and continues to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

123. Defendants have further violated Plaintiff's rights under the Equal Protection Clause by failing to recognize fully and respect Plaintiff, a transgender boy, as a male student, including through administrators' repeated and intentional use of Plaintiff's traditionally female birth name and female pronouns to address him and refer to him to others; the failure to take necessary and appropriate action to update or modify Ash's official and/or informal student records, including classroom attendance rosters, to prevent teachers, substitute teachers, and other school staff from referring to him by his female birth name and female pronouns in the presence of other students; Tremper administrators' initial refusal to permit Ash to run for junior prom king and directive that he run for prom queen instead, withdrawn only after a student protest and media attention; and Tremper administrators' instruction to school guidance counselors to provide green wristbands to any student who identified himself or herself as transgender. Through these actions, individually and collectively, Defendants have and continue to exclude Plaintiff from participation in, deny him the benefits of, and subject him to discrimination in KUSD's education programs and activities, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

124. Defendants, through instructing Tremper staff to report the restroom use of any student who “appears” to be using the “wrong” restroom, operates an unlawful policy or practice of profiling Plaintiff and other students who are transgender and/or do not conform to sex- or gender-based stereotypes, and thereby deprive Plaintiff and similarly situated students of their rights to be free from discrimination on the basis of sex, including on the basis of gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, in further violation of the Equal Protection Clause.

125. Defendants’ discrimination against Ash is not substantially related to any important governmental interest, nor is it rationally related to any legitimate governmental interest.

126. Defendants are liable for their violation of Ash’s Fourteenth Amendment rights under 42 U.S.C. § 1983.

127. Plaintiff has been, and continues to be, injured by Defendants’ conduct and has suffered damages as a result.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Ash Whitaker, by and through his mother and next friend, Melissa Whitaker, requests that this Court:

(a) enter a declaratory judgment that the actions of Defendants complained of herein are in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(b) issue preliminary and permanent injunctions (i) directing Defendants to provide Plaintiff access to male-designated restrooms at school, and otherwise to treat him as a boy in all respects for the remainder of his time as a student in Defendants’ schools or until resolution of

this lawsuit, whichever is later; (ii) restraining Defendants, their agents, employees, representatives, and successors, and any other person acting directly or indirectly with them, from adopting, implementing, or enforcing any policy or practice at the school or District level that treats transgender students differently from their similarly situated peers (*i.e.*, treating transgender boys differently from other boys and transgender girls differently from other girls); (iii) directing Defendants to clarify that KUSD and Tremper's existing policies prohibiting discrimination on the basis of sex apply to discrimination based on gender identity, transgender status, and nonconformity to sex- and gender-based stereotypes; (iv) ordering Defendants to provide training to all district-level and school-based administrators in the Kenosha Unified School District on their obligations under Title IX and the Equal Protection Clause regarding the nondiscriminatory treatment of transgender and gender nonconforming students; and (v) ensuring that all district-level and school-based administrators responsible for enforcing Title IX, including Defendants' designated Title IX coordinator(s), are aware of the correct and proper application of Title IX to transgender and gender nonconforming students;

(c) order all compensatory relief necessary to cure the adverse educational effects of Defendants' discriminatory actions on Plaintiff's education;

(d) award compensatory damages in an amount that would fully compensate Plaintiff for the emotional distress and other damages that have been caused by Defendants' conduct alleged herein;

(e) award Plaintiff his reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

(f) order such other relief as this Court deems just and equitable.

Dated: August 15, 2016

Respectfully submitted,

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\* *Application for admission to this Court to follow*

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# Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients

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American Psychological Association

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The “Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients” provide psychologists with (a) a frame of reference for the treatment of lesbian, gay, and bisexual clients<sup>1</sup> and (b) basic information and further references in the areas of assessment, intervention, identity, relationships, diversity, education, training, and research. These practice guidelines are built upon the “Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients” (Division 44/Committee on Lesbian, Gay, and Bisexual Concerns Joint Task Force on Guidelines for Psychotherapy with Lesbian, Gay, and Bisexual Clients, 2000) and are consistent with the American Psychological Association (APA) “Criteria for Practice Guideline Development and Evaluation” (APA, 2002a). They assist psychologists in the conduct of lesbian, gay, and bisexual affirmative practice, education, and research.

The term *guidelines* refers to pronouncements, statements, or declarations that suggest or recommend specific professional behavior, endeavors, or conduct for psychologists. Guidelines differ from standards in that standards are mandatory and may be accompanied by an enforcement mechanism. Thus, these guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and to help ensure a high level of professional practice by psychologists. These guidelines are not intended to be mandatory or exhaustive and may not be applicable to every clinical situation. They should not be construed as definitive and are not intended to take precedence over the judgment of psychologists. *Practice guidelines* essentially involve recommendations to professionals regarding their conduct and the issues to be considered in particular areas of psychological practice. Practice guidelines are consistent with current APA policy. It is also important to note that practice guidelines are superseded by federal and state law and must be consistent with the current APA “Ethical Principles of Psychologists and Code of Conduct” (APA, 2002b).<sup>2</sup>

## Background

In 1975, the APA adopted a resolution stating that “homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities” and urging “all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations” (Conger, 1975, p. 633). In the years following the adoption of this important policy, the APA indeed has taken the lead in

promoting the mental health and well-being of lesbian, gay, and bisexual people and in providing psychologists with affirmative tools for practice, education, and research with these populations. In 2009, the association affirmed that “same-sex sexual and romantic attractions, feelings, and behaviors are normal and positive variations of human sexuality regardless of sexual orientation identity” (APA, 2009a, p. 121).

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This article was published Online First August 29, 2011.

These guidelines were adopted by the APA Council of Representatives, February 18–20, 2011, and replace the original “Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients,” which were adopted February 26, 2000, and expired at the end of 2010. These revised and updated guidelines were developed by the Division 44/Committee on Lesbian, Gay, Bisexual, and Transgender Concerns Guidelines Revision Task Force. The task force included Kristin Hancock (chair) and members Laura Alic, Armand Cerbone, Sari Dworkin, Torry Gock, Douglas Haldeman, Susan Kashubeck-West, and Glenda Russell. The task force thanks Glenn Ally, Laura Brown, Linda Campbell, Jean Carter, James Croteau, Steven David, Randall Ehbar, Ruth Fassinger, Beth Firestein, Ronald Fox, John Gonsiorek, Beverly Greene, Lisa Grossman, Christine Hall, Tania Israel, Corey Johnson, Jennifer Kelly, Christopher Martell, Jonathan Mohr, David Pantalone, Mark Pope, and Melba Vasquez for their thoughtful contributions. The task force also acknowledges the long-standing support of Clinton Anderson, director of APA’s Lesbian, Gay, Bisexual, and Transgender Concerns Office, and APA staff liaisons Sue Houston (Board for the Advancement of Psychology in the Public Interest) and Mary Hardiman (Board of Professional Affairs) for their assistance.

Each of the 21 new guidelines provides an update of the psychological literature supporting it, includes sections on rationale and application, and expands upon the original guidelines to provide assistance to psychologists in areas such as religion and spirituality, the differentiation of gender identity and sexual orientation, socioeconomic and workplace issues, and the use and dissemination of research on lesbian, gay, and bisexual issues. The guidelines are intended to inform the practice of psychologists and to provide information for the education and training of psychologists regarding lesbian, gay, and bisexual issues. The revision was funded by Division 44 (Society for the Psychological Study of Lesbian, Gay, and Bisexual Issues) of the American Psychological Association (APA) and the APA Board of Directors.

This document is scheduled to expire as APA policy in 10 years (2020). After this date, users are encouraged to contact the APA Public Interest Directorate to confirm that this document remains in effect or is under revision.

Correspondence concerning this article should be addressed to the Public Interest Directorate, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242.

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<sup>1</sup> Throughout this document, the term *clients* refers to individuals across the life span, including youth, adult, and older adult lesbian, gay, and bisexual clients. There may be issues that are specific to a given age range, and, when appropriate, the document identifies these groups.

<sup>2</sup> Hereinafter, this document is referred to as the APA Ethics Code.

Sixteen years following APA's 1975 resolution, a gap in APA policy and the practice of psychologists was identified in a study by Garnets, Hancock, Cochran, Goodchilds, and Peplau (1991) that documented a wide variation in the quality of psychotherapeutic care to lesbian and gay clients. These authors and others (e.g., Fox, 1996; Greene, 1994b; Nystrom, 1997; Pilkington & Cantor, 1996) suggested that there was a need for better education and training in working with lesbian, gay, and bisexual clients. For this reason, the "Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients" (Division 44/Committee on Lesbian, Gay, and Bisexual Concerns Joint Task Force on Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients, 2000) were developed.

## Need

A revision of the guidelines is warranted at this point in time because there have been many changes in the field of lesbian, gay, and bisexual psychology. Existing topics have evolved, and the literature also has expanded into new areas of interest for those working with lesbian, gay, and bisexual clients. In addition, the quality of the data sets of studies has improved significantly with the advent of population-based research.

Furthermore, the past decade has seen a revival of interest and activities on the part of political advocacy groups in attempting to repathologize homosexuality (Haldeman, 2002, 2004). Guidelines grounded in methodologically sound research, the APA Ethics Code, and existing APA policy are vital to informing professional practice with lesbian, gay, and bisexual clients. These guidelines have been used nationally and internationally in practice and training and in informing public policy. They will expire or be revised in 10 years from the date they are adopted by APA.

## Compatibility

These guidelines build upon APA's Ethics Code (APA, 2002b) and are consistent with preexisting APA policy pertaining to lesbian, gay, and bisexual issues. These policies include but are not limited to the resolution titled "Discrimination Against Homosexuals" (Conger, 1975); the "Resolution on Sexual Orientation, Parents, and Children" (Paige, 2005); the "Resolution on Sexual Orientation and Marriage" (Paige, 2005); the "Resolution on Hate Crimes" (Paige, 2005); the "Resolution Opposing Discriminatory Legislation and Initiatives Aimed at Lesbian, Gay, and Bisexual Persons" (Paige, 2007); and the "Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts" (APA, 2009b). The guidelines are also compatible with policies of other major mental health organizations (cf. American Association for Marriage and Family Therapy, 1991; American Counseling Association, 1996; American Psychiatric Association, 1974; Canadian Psychological Association, 1995; National Association of Social Workers, 1996) which state that homosexuality and bisexuality are not mental illnesses.

## Development Process

These guidelines were developed collaboratively by Division 44/Committee on Lesbian, Gay, Bisexual, and Transgender Concerns. The guidelines revision process was funded by Division 44 and by the APA Board of Directors. Supporting literature for these guidelines is consistent with the APA Ethics Code (APA, 2002b) and other APA policy. In addition, the *Application* sections of the text were enhanced to provide psychologists with more information and assistance.

## Definition of Terms

*Sex* refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.

*Gender* refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender normative; behaviors that are viewed as incompatible with these expectations constitute gender nonconformity.

*Gender identity* refers to "one's sense of oneself as male, female, or transgender" (APA, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000).

*Gender expression* refers to the "way in which a person acts to communicate gender within a given culture; for example, in terms of clothing, communication patterns, and interests. A person's gender expression may or may not be consistent with socially prescribed gender roles, and may or may not reflect his or her gender identity" (APA, 2008, p. 28).

*Sexual orientation* refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). Although these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum (e.g., Kinsey, Pomeroy, Martin, & Gebhard, 1953; Klein, 1993; Klein, Sepekoff, & Wolff, 1985; Shively & De Cecco, 1977). In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women (e.g., Diamond, 2007; Golden, 1987; Peplau & Garnets, 2000).

*Coming out* refers to the process in which one acknowledges and accepts one's own sexual orientation. It also encompasses the process in which one discloses one's sexual orientation to others. The term *closeted* refers to a state of secrecy or cautious privacy regarding one's sexual orientation.

## Attitudes Toward Homosexuality and Bisexuality

**Guideline 1. Psychologists strive to understand the effects of stigma (i.e., prejudice, discrimination, and violence) and its various contextual manifestations in the lives of lesbian, gay, and bisexual people.**

**Rationale.** Living in a heterosexist society inevitably poses challenges to people with nonheterosexual orientations. Many lesbian, gay, and bisexual people face social stigma, heterosexism, violence, and discrimination (Herek, 1991b, 2009; Mays & Cochran, 2001; I. H. Meyer, 2003). Stigma is defined as a negative social attitude or social disapproval directed toward a characteristic of a person that can lead to prejudice and discrimination against the individual (VandenBos, 2007). Herek (1995) defined heterosexism as “the ideological system that denies, denigrates, and stigmatizes any nonheterosexual form of behavior, identity, relationship, or community” (p. 321). These challenges may precipitate a significant degree of minority stress for lesbian, gay, and bisexual people, many of whom may be tolerated only when they are “closeted” (DiPlacido, 1998). Minority stress can be experienced in the form of ongoing daily hassles (e.g., hearing antigay jokes) and more serious negative events (e.g., loss of employment, housing, custody of children, physical and sexual assault; DiPlacido, 1998). According to a probability sample study by Herek (2009), antigay victimization has been experienced by approximately 1 in 8 lesbian and bisexual individuals and by about 4 in 10 gay men in the United States. Enacted stigma, violence, and discrimination can lead to “felt stigma,” an ongoing subjective sense of personal threat to one’s safety and well-being (Herek, 2009).

Antigay victimization and discrimination have been associated with mental health problems and psychological distress (Cochran, Sullivan, & Mays, 2003; Gilman et al., 2001; Herek, Gillis, & Cogan, 1999; Mays & Cochran, 2001; I. H. Meyer, 1995; Ross, 1990; Rostosky, Riggle, Horne, & Miller, 2009). Equally important, as individuals form lesbian, gay, and bisexual identities in the context of extreme stigma, most lesbian, gay, and bisexual people have some level of internalized negative attitudes toward nonheterosexuality (Szymanski, Kashubeck-West, & Meyer, 2008a). Szymanski, Kashubeck-West, and Meyer (2008b) reviewed the empirical literature on internalized heterosexism in lesbian, gay, and bisexual individuals and found that greater internalized heterosexism was related to difficulties with self-esteem, depression, psychosocial and psychological distress, physical health, intimacy, social support, relationship quality, and career development.

There are significant differences in the nature of the stigma faced by lesbians, gay men, and bisexual individuals. Lesbians and bisexual women, in addition to facing sexual prejudice, must contend with the prejudice and discrimination posed by living in a world where sexism continues to exert pervasive influences (APA, 2007). Similarly, gay and bisexual men are confronted not only with

sexual prejudice but also with the pressures associated with expectations for conformity to norms of masculinity in the broader society as well as in particular subcultures they may inhabit (Herek, 1986; Stein, 1996). Bisexual women and men can experience negativity and stigmatization from lesbian and gay individuals as well as from heterosexual individuals (Herek, 1999, 2002; Mohr & Rochlen, 1999). Greene (1994b) noted that the cumulative effects of heterosexism, sexism, and racism may put lesbian, gay, and bisexual racial/ethnic minorities at special risk for stress. Social stressors affecting lesbian, gay, and bisexual youths, such as verbal and physical abuse, have been associated with academic problems, running away, prostitution, substance abuse, and suicide (D’Augelli, Pilkington, & Hershberger, 2002; Espelage, Aragon, Birkett, & Koenig, 2008; Savin-Williams, 1994, 1998). Less visibility and fewer lesbian, gay, and bisexual support organizations may intensify feelings of social isolation for lesbian, gay, and bisexual people who live in rural communities (D’Augelli & Garnets, 1995).

Research has identified a number of contextual factors that influence the lives of lesbian, gay, and bisexual clients and, therefore, their experience of stigma (Bieschke, Perez, & DeBord, 2007). Among these factors are race and ethnicity (e.g., L. B. Brown, 1997; Chan, 1997; Espin, 1993; Fygetakis, 1997; Greene, 2007; Szymanski & Gupta, 2009; Walters, 1997); immigrant status (e.g., Espin, 1999); religion (e.g., Davidson, 2000; Dworkin, 1997; Fischer & DeBord, 2007; Ritter & Terndrup, 2002); geographical location—regional dimensions, such as rural versus urban or country of origin (e.g., Browning, 1996; D’Augelli, Collins, & Hart, 1987; Kimmel, 2003; Oswald & Culton, 2003; Walters, 1997); socioeconomic status, both historical and current (Albelda, Badgett, Schneebaum, & Gates, 2009; Badgett, 2003; Díaz, Bein, & Ayala, 2006; Martell, 2007; G. M. Russell, 1996); age and historical cohort (G. M. Russell & Bohan, 2005); disability (Abbott & Burns, 2007; Shuttleworth, 2007; Swartz, 1995; Thompson, 1994); HIV status (O’Connor, 1997; Paul, Hays, & Coates, 1995); and gender identity and presentation (APA, 2008; Lev, 2007).

**Application.** Psychologists are urged to understand that societal stigmatization, prejudice, and discrimination can be sources of stress and create concerns about personal security for lesbian, gay, and bisexual clients (Mays & Cochran, 2001; Rothblum & Bond, 1996). Therefore, creating a sense of safety in the therapeutic environment is of primary importance (see Guideline 4). Central to this is the psychologist’s understanding of the impact of stigma and his or her ability to demonstrate that understanding to the client through awareness and validation. Psychologists working with lesbian, gay, and bisexual people are encouraged to assess the client’s history of victimization as a result of harassment, discrimination, and violence. In addition, overt and covert manifestations of internalized heterosexism should be assessed (Sánchez, Westefeld, Liu, & Vilain, 2010; Szymanski & Carr, 2008). Different combinations of contextual factors related to gender, race, ethnicity, cultural background, social class, religious background, disability, geographic region, and other

2016 WL 4426495

Only the Westlaw citation is currently available.

United States District Court,  
N.D. Texas, Wichita Falls Division.

State of Texas et al., Plaintiffs,

v.

United States of America et al., Defendants.

Civil Action No. 7:16-cv-00054-O

Signed August 21, 2016

### Synopsis

**Background:** Various states, state agencies, and school districts brought action against Department of Education, Department of Labor, and Department of Justice, among others, challenging defendants' assertion that Title VII and Title IX require that all persons must be afforded opportunity to have access to restrooms, locker rooms, and showers that match their gender identity rather than their biological sex. Plaintiffs moved for a preliminary injunction.

**Holdings:** The District Court, Reed O'Connor, J., held that:

- [1] plaintiffs had standing to bring suit;
- [2] plaintiffs' challenge was ripe for review;
- [3] federal guidelines were final agency action subject to judicial review;
- [4] guidelines were subject to notice and comment; and
- [5] deference was not owed to Department's interpretation of a Title IX implementing regulation.

Motion granted.

### Attorneys and Law Firms

Austin R. Nimocks, Office of the Texas Attorney General,  
Austin, TX, for Plaintiffs.

Benjamin Leon Berwick, US Department of Justice,  
Boston, MA, for Defendants.

### PRELIMINARY INJUNCTION ORDER

Reed O'Connor, UNITED STATES DISTRICT JUDGE

\*1 Before the Court are Plaintiffs' Application for Preliminary Injunction (ECF No. 11), filed July 6, 2016; Defendants' Opposition to Plaintiffs Application for Preliminary Injunction (ECF No. 40), filed July 27, 2016; and Plaintiffs' Reply (ECF No. 52), filed August 3, 2016. The Court held a preliminary injunction hearing on August 12, 2016, and counsel for the parties presented their arguments. *See* ECF No. 56.<sup>1</sup>

This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school. The sensitivity to this matter is heightened because Defendants' actions apply to the youngest child attending school and continues for every year throughout each child's educational career. The resolution of this difficult policy issue is not, however, the subject of this Order. Instead, the Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

That being the case, the issues Plaintiffs present require this Court to first decide whether there is authority to hear this matter. If so, then the Court must determine whether Defendants failed to follow the proper legal procedures before issuing the Guidelines in dispute and, if they failed to do so, whether the Guidelines must be suspended until Congress acts or Defendants follow the proper legal procedure. For the following reasons, the Court concludes that jurisdiction is proper here and that Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing the Administrative Procedures Act's notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts. Accordingly, Plaintiffs' Motion should be and is hereby **GRANTED**.

### I. BACKGROUND

The following factual recitation is taken from Plaintiffs' Application for Preliminary Injunction (ECF No. 11) unless stated otherwise. Plaintiffs are composed of 13 states and agencies represented by various state leaders, as well as Harrold Independent School District of Texas and Heber-Overgaard Unified School District of Arizona.<sup>2</sup> They have sued the U.S. Departments of Education ("DOE"), Justice ("DOJ"), Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials (collectively "Defendants"), challenging Defendants' assertions that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex.<sup>3</sup> Plaintiffs claim that on May 13, 2016, Defendants wrote to schools across the country in a Dear Colleague Letter on Transgender Students (the "DOJ/DOE Letter") and told them that they must "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk losing Title IX-linked funding." Mot. Injunction 1, ECF No. 11. Plaintiffs also allege Defendants have asserted that employers who "refuse to permit employees to utilize the intimate areas of their choice face legal liability under Title VII." *Id.* Plaintiffs complain that Defendants' interpretation of the definition of "sex" in the various written directives (collectively "the Guidelines")<sup>4</sup> as applied to Title IX of the Education Amendments of 1972 ("Title IX") and Title VII of the Civil Rights Act of 1964 ("Title VII") is unlawful and has placed them in legal jeopardy.

\*2 Plaintiffs contend that when Title IX was signed into law, neither Congress nor agency regulators and third parties "believed that the law opened all bathrooms and other intimate facilities to members of both sexes." Mot. Injunction. 1, ECF No. 11. Instead, they argue one of Title IX's initial implementing regulations, 34 C.F.R. § 106.33 ("§ 106.33" or "Section 106.33"), expressly authorized separate restrooms on the basis of sex. Section 106.33 provides: "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. Plaintiffs assert the term sex in the pertinent statutes and regulations means the biological differences between a male and female. Mot. Injunction 2, ECF No. 11.

Plaintiffs state that Defendants' swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines, coupled with Defendants' actions to enforce these new agency policies through investigations and compliance reviews, causes Plaintiffs to suffer irreparable harm for which a preliminary injunction is needed. *Id.* at 3–8; Pls.' Reply 3–7, ECF No. 54.

Defendants contend that the Guidelines and recent enforcement actions are designed to prohibit sex discrimination on the basis of gender identity and are "[c]onsistent with the nondiscrimination mandate of [Title IX]," and that "these guidance documents ... are merely expressions of the agencies' views as to what the law requires." Defs.' Resp. 2–4, ECF No. 40. Defendants also contend that the Guidelines "are not legally binding, and they expose [P]laintiffs to no new liability or legal requirements" because DOE "has issued documents of this nature for decades, across multiple administrations, in order to notify schools and other recipients of federal funds about how the agency interprets the law and how it views new and emerging issues." *Id.* at 4–5.<sup>5</sup> Defendants also state that the "[g]uidance documents issued by [DOE] 'do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations'" and these documents expressly state that they do not carry the force of law. *Id.* at 5 (citing Holder Memo 2, ECF No. 6–10, to clarify that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status," but the memo "is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case").

#### A. TITLE IX

Title IX, enacted in 1972, is the landmark legislation which prohibits discrimination among federal fund recipients by providing that no person "shall, on the basis of sex, ... be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. The legislative history shows Congress hailed Title IX as an indelible step forward for women's rights. Mot. Injunction at 2–4. After its passage, the DOE and its predecessor implemented a number of regulations which sought to enforce Title IX, chief among them, and at issue here, § 106.33. *See G.G.*

*ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir.2016) (stating that the Department of Health, Education, and Welfare (“HEW”) adopted its Title IX regulations in 1975 pursuant to 40 Fed. Reg. 24,128 (June 4, 1975), and DOE implemented its regulations in 1980 pursuant to 45 Fed. Reg. 30802, 30955 (May 9, 1980)). Section 106.33, as well as several other related regulations, permit educational institutions to separate students on the basis of sex, provided the separate accommodations are comparable.

## II. LEGAL STANDARDS

### A. The Administrative Procedure Act (the “APA”)

\*3 [1] “The APA authorizes suit by [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (quoting 5 U.S.C. § 702). “Where no other statute provides a private right of action, the ‘agency action’ complained of must be *final agency action*.” *Id.* at 61–62, 124 S.Ct. 2373 (quoting 5 U.S.C. § 704).<sup>6</sup> In the Fifth Circuit, “final agency action” is a jurisdictional threshold, not a merits inquiry. *Texas v. Equal Employment Opportunity Comm’n*, — F.3d —, —, No. 14–10949, 2016 WL 3524242 at \*5 (5th Cir. June 27, 2016) (“*EEOC*”); *see also Peoples Nat’l Bank v. Office of the Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir.2004) (“If there is no ‘final agency action,’ a federal court lacks subject matter jurisdiction.” (citing *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir.1999))).

[2] [3] [4] An administrative action is “final agency action” under the APA if: (1) the agency’s action is the “consummation of the agency’s decision making process;” and (2) “the action [is] one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948); and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970)). “In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court’s interpretation of the APA’s finality requirement as ‘flexible’ and ‘pragmatic.’” *EEOC*, — F.3d at —, 2016 WL 3524242, at \*5; *Qureshi v. Holder*,

663 F.3d 778, 781 (5th Cir.2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). When final agency actions are presented for judicial review, the APA provides that reviewing courts should hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 150–151, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991).

### B. Preliminary Injunction

[5] The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974). To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.*; *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir.2008).

\*4 [6] [7] To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir.2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women’s Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n. 15 (5th Cir.2001). A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

[8] [9] [10] [11] The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985) (citing *Canal*, 489 F.2d at 572). A preliminary injunction “is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion.” *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir.1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir.1985)). Even when a movant satisfies each of the

four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light Co.*, 760 F.2d at 621. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.*

### III. ANALYSIS

Plaintiffs argue that: (1) Defendants skirted the notice and comment process—a necessity for legislative rules; (2) the new mandates are incompatible with Title VII and Title IX and the agencies are not entitled to deference; (3) the mandates violate the clear notice and anti-coercion requirements which the federal government may attach to spending programs; and (4) nationwide relief is necessary to prevent the irreparable harm Defendants will cause Plaintiffs. Mot. Injunction 2–3, ECF No. 11.

Defendants assert that Plaintiffs are not entitled to a preliminary injunction because: (1) Plaintiffs do not have standing to bring their claims; (2) this matter is not ripe for review; (3) Defendants' Guidelines do not violate the APA; (4) Plaintiffs cannot demonstrate irreparable harm and they have an alternative remedy; (5) Defendants did not violate the Spending Clause; (6) and an injunction would harm Defendants and third parties. Defs.' Resp. 1–3, ECF No. 40. Defendants allege that should an injunction be granted, it should be implemented only to Plaintiffs in the Fifth Circuit. *Id.* The Court addresses these issues, beginning with Defendants' jurisdictional arguments.<sup>7</sup>

#### A. Jurisdiction

##### 1. Standing

\*5 [12] Defendants allege that “[P]laintiffs' suit fails the jurisdictional requirements of standing and ripeness ... because they have not alleged a cognizable concrete or imminent injury.” Defs.' Resp. 12, ECF No. 40 (citing *Lopez v. City of Hous.*, 617 F.3d 336, 342 (5th Cir.2010)). Defendants allege “a plaintiff must demonstrate that it has ‘suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’ ” *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendants contend that “[t]he agencies

have merely set forth their views as to what the law requires” regarding whether gender identity is included in the definition of sex, and “[a]t this stage, [P]laintiffs have alleged no more than an abstract disagreement with the agencies' interpretation of the law,” since “[n]o concrete situation has emerged that would permit the Court to evaluate [P]laintiffs' claims in terms of specific facts rather than abstract principles.” *Id.* at 13–14.

Defendants also allege that Plaintiffs “have [not] identified any enforcement action to which they are or are about to be subject in which a defendant agency is seeking to enforce its view of the law. As such, any injury alleged by plaintiffs is entirely speculative, as it depended on the initiation of some kind of enforcement action ... which may never occur.” Defs.' Resp. 14, ECF No. 40.

Plaintiffs state that Defendants are affirmatively using the Guidelines to force compliance as evidenced by various resolution agreements reached in enforcement cases across the country and from the litigation against the state of North Carolina, all of which is designed to force Plaintiffs to amend their policies to comply or place their federal funding in jeopardy. Hr'g Tr. at 78. Plaintiffs argue they are clearly the object of the Defendants' Guidelines, and those directives run afoul of various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities.<sup>8</sup> Hr'g Tr. at 77. Plaintiffs contend all of this confers standing according to the Fifth Circuit's opinion in *Texas v. Equal Employment Opportunity Commission*, — F.3d —, No. 14–10940, 2016 WL 3524242 (5th Cir. June 27, 2016). Hr'g Tr. 78.

\*6 Defendants counter that *EEOC* was wrongly decided and, regardless, the facts here are distinguishable from that case.<sup>9</sup> *Id.* Defendants primarily distinguish *EEOC* from this case based on the *EEOC* majority's view that the “guidance [at issue] contained a ‘safe harbor’ [provision]” and “the [guidance at issue had] the immediate effect of altering the rights and obligations of the ‘regulated community’ ... by offering them [ ] detailed and conclusive means to avoid an adverse *EEOC* finding.” Defs.' Resp. 15, ECF No. 40. Defendants claim that the same kind of facts are not present here. Defendants contend further that “the [transgender] guidance documents do not provide ‘an exhaustive procedural framework,’ [or] ... a safe harbor, but merely express[ ] the agencies' opinion about the proper interpretation of Title VII and Title IX.” *Id.* Thus,

they argue, the Court lacks jurisdiction and should decline to enter a preliminary injunction. *Id.*<sup>10</sup>

[13] [14] [15] The Court finds that Plaintiffs have standing. “The doctrine of standing asks ‘whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.’” *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir.2013) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant’s actions that will be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130. The injury in fact must be “concrete and particularized” and “actual or imminent,” as opposed to “conjectural” or “hypothetical.” *Id.* at 560, 112 S.Ct. 2130. When “a plaintiff can establish that it is an ‘object’ of the agency regulation at issue, ‘there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.’” *EEOC*, — F.3d at —, 2016 WL 3524242 at \*2; *Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130. The Fifth Circuit provided, “[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense.” *Id.* at —, 2016 WL 3524242 at \*6 (quoting *Contender Farms LLP v. U.S. Dep’t of Agric.*, 779 F.3d 258, 265 (5th Cir.2015)).

In *EEOC*, Texas sued the EEOC over employment guidance the EEOC issued to employers concerning their Title VII obligations. In response, the EEOC argued Texas lacked standing because the guidance was advisory only and imposed no affirmative obligation. The Fifth Circuit held that Texas had standing to seek relief because it was an object of the EEOC’s guidance as the guidance applied to Texas as an employer. *Id.* at —, 2016 WL 3524242 at \*4.

This case is analogous. Defendants’ Guidelines are clearly designed to target Plaintiffs’ conduct. At the hearing, Defendants conceded that using the definition in the Guidelines means Plaintiffs are not in compliance with their Title VII and Title IX obligations. Hr’g Tr. 74. Defendants argue that that this does not confer standing because the Guidelines are advisory only. Defs.’ Resp. 14, ECF No. 40. But this conflates standing with final agency action and the Fifth Circuit instructed district courts to address the two concepts separately.

*See EEOC*, — F.3d at —, 2016 WL 3524242 at \*3. Defendants’ Guidelines direct Plaintiffs to alter their policies concerning students’ access to single sex toilet, locker room, and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations.<sup>11</sup> Plaintiffs’ counsel argued the Guidelines will force Plaintiffs to consider ways to build or reconstruct restrooms, and how to accommodate students who may seek to use private single person facilities, as other school districts and employers who have been subjected to Defendants’ enforcement actions have had to do. Hr’g Tr. 80–81. That the Guidelines spur this added regulatory compliance analysis satisfies the injury in fact requirement. *EEOC*, — F.3d at —, 2016 WL 3524242 at \*4 (“[T]he guidance does, at the very least, force Texas to undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations ... overrides the State’s interest .... [T]hese injuries are sufficient to confer constitutional standing, especially when considering Texas’s unique position as a sovereign state ....”). That Plaintiffs have standing is strengthened by the fact that Texas and other Plaintiffs have a “stake in protecting [their] quasi-sovereign interests ... [as] special solicitude[s].” *Mass. v. E.P.A.*, 549 U.S. 497, 520, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (“Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”).

\*7 Accordingly, Plaintiffs have standing to pursue this lawsuit.

## 2. Ripeness

[16] Defendants also argue that this case is not ripe for review. According to Defendants, this Court should avoid premature adjudication to avoid entangling itself in abstract disagreements over administrative policies. Defs.’ Resp. 13, ECF No. 40 (citing *Nat’l Park Hosp. Ass’n v. Dep’t Interior*, 538 U.S. 803, 807, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003)). Defendants argue that more time should be given to allow the administrative process to run its course and develop more facts before the Court can address this case. *Id.* at 13 (citing *Abbott Labs.*, 387 U.S. 136, 149, 87 S.Ct. 1507 (1967)); Hr’g Tr. 62. Plaintiffs

counter that, taking into account recent events where Defendants have investigated other entities that do not comply with the Guidelines, this case is ripe. Pls.' Reply 4–7, ECF No. 52; Hr'g Tr. 79.

[17] “A challenge to administrative regulations is fit for review if (1) the questions presented are ‘purely legal one[s],’ (2) the challenged regulations constitute ‘final agency action,’ and (3) further factual development would not ‘significantly advance [the court’s] ability to deal with the legal issues presented.’ ” *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir.2007) (citing *Nat’l Park Hosp. Ass’n*, 538 U.S. at 812, 123 S.Ct. 2026).

The Court finds that Plaintiffs' case is ripe for review. Here, the parties agree that the questions at issue are purely legal. Hr'g Tr. 61. Defendants asserted at the hearing that Plaintiffs are not in compliance with their obligations under Title IX given their refusal to change their policies. Hr'g Tr. 74. Furthermore, for the reasons set out below, the Court finds that Defendants' actions amount to final agency action under the APA.<sup>12</sup> *EEOC*, — F.3d at — n. 9, 2016 WL 3524242 at \*11 n. 9 (“Having determined that the Guidance is ‘final agency action’ under the APA, it follows naturally that Texas’s APA claim is ripe for review. Texas’s challenge to the EEOC Guidance is a purely legal one, and as such it is unnecessary to wait for further factual development before rendering a decision.”) (Internal citations omitted).

Finally, the facts of this case have sufficiently developed to address the legal impact Defendants' Guidelines have on Plaintiffs' legal questions in this case. *Texas*, 497 F.3d at 498–99. The only other factual development that may occur, given Defendants' conclusion Plaintiffs are not in legal compliance, is whether Defendants actually seek to take action against Plaintiffs. But it is not clear how waiting for Defendants to actually take action would “significantly advance [the court’s] ability to deal with the legal issues presented.” *Texas*, 497 F.3d at 498–99. As previously stated, Defendants' Guidelines clash with Plaintiffs' state laws and policies in relation to public school facilities and Plaintiffs have called into question the legality of those Guidelines. Mot. Injunction 9–12, ECF No. 11. Therefore, “further factual development would not ‘significantly advance the courts ability to deal with the legal issues presented.’ ” *Texas*, 497 F.3d at 498–99. Accordingly, the Court finds that this case is ripe for review.

### 3. Final Agency Action under the APA

\*8 [18] The Court now evaluates whether the Guidelines are final agency action meeting the jurisdictional threshold under the APA. *EEOC*, — F.3d at —, 2016 WL 3524242 at \*5. Defendants argue that there has been no final agency action as the documents in question are merely “paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA.” Defs.' Resp. 18, ECF No. 40. Defendants also allege that the Guidelines are “[v]alid interpretations of the statutory and regulatory authorities on which they are premised” because although Title IX and § 106.33 provide that federal recipients may provide for separate, comparable facilities, the regulation and statute “do not address how they apply when a transgender student seeks to use those facilities ....” *Id.* at 20–21.

Plaintiffs allege that the agencies' Guidelines are binding nationwide and the Defendants' enforcement patterns in various states clearly demonstrate that legal actions against those that do not comply will follow. Mot. Injunction 9–12, ECF No. 11; Reply 2–8, ECF No. 52. Plaintiffs identify a number of similar cases where Defendants have investigated schools that refused to comply with the new Guidelines and where they sued North Carolina over its state law which, in part, made it legal to require a person to use the public restroom according to their biological sex. Reply 6, ECF No. 52.

An administrative action is “final agency action” under the APA if: (1) the agency's action is the “consummation of the agency's decision making process;” and (2) “the action [is] one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’ ” *Bennett*, 520 U.S. at 177–78, 117 S.Ct. 1154. “In evaluating whether a challenged agency action meets these two conditions, the court is guided by the Supreme Court's interpretation of the APA's finality requirement as ‘flexible’ and ‘pragmatic.’ ” *EEOC*, — F.3d at —, 2016 WL 3524242 at \*5 (quoting *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir.2011)).

The Court finds that the Guidelines are final agency action under the APA. Defendants do not dispute that the Guidelines are a “consummation” of the agencies' decision-making process. Hr'g Tr. 61; *Nat'l*

*Pork Producers Council v. E.P.A.*, 635 F.3d 738, 755–56 (5th Cir.2011) (citing *Her Majesty the Queen in Right of Ontario v. Env'tl. Prot. Agency*, 912 F.2d 1525, 1532 (D.C.Cir.1990) (deciding that EPA guidance letters constitute final agency actions as they “serve[d] to confirm a definitive position that has a direct and immediate impact on the parties ....”)).

The second consideration is also satisfied in this case because legal consequences flow from the Defendants' actions. Defendants argue no legal consequences flow to Plaintiffs because there has been no enforcement action, or threat of enforcement action. Hr'g Tr. 71. The Fifth Circuit held in *EEOC* however that “an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties.” — F.3d at —, 2016 WL 3524242 at \*8. According to the Fifth Circuit, “‘legal consequences’ are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability.” *Id.* (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, — U.S. —, 136 S.Ct. 1807, 1814–15, 195 L.Ed.2d 77 (2016) (holding that using the pragmatic approach, an agency action asserting that plaintiff's land was subject to the Clean Water Act's permitting process was a final agency action which carried legal consequences). The Fifth Circuit concluded that “[i]t is also sufficient that the Enforcement Guidance [at issue in *EEOC*] has the immediate effect of altering the rights and obligations of the ‘regulated community’ (i.e. virtually all state and private employers) by offering them a detailed and conclusive means to avoid an adverse EEOC finding ....” — F.3d at —, 2016 WL 3524242 at \*6.

\*9 In this case, although the Guidelines provide no safe harbor provision, the DOJ/DOE Letter provides not only must Plaintiffs permit individuals to use the restrooms, locker rooms, showers, and housing consistent with their gender identity, but that they find *no* safe harbor in providing transgender students individual-user facilities as an alternative accommodation. Indeed, the Guidelines provide that schools may, consistent with Title IX, make individual-user facilities available for *other* students who “voluntarily seek additional privacy.” See DOJ/DOE Letter 3, ECF No. 6-10. Using a pragmatic and common sense approach, Defendants' Guidelines and

actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants' Guidelines. *EEOC*, — F.3d at —, 2016 WL 3524242 at \*8 (“Instead, ‘legal consequences’ are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability.”); *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1056–57 (5th Cir.1993) (stating that “[w]ere HUD to formally define the phrase [at issue] ... [the plaintiffs] would undoubtedly have the right to review HUD's final agency action under § 702 [of the APA]”); *Frozen Foods Express v. United States*, 351 U.S. 40, 44–45, 76 S.Ct. 569, 100 L.Ed. 910 (1956) (holding an order specifying which commodities the Interstate Commerce Commission believed were exempt was final agency action, even though the order simply gave notice of how it would interpret the statute and would apply only when an action was brought): compare with *AT & T Co. v. E.E.O.C.*, 270 F.3d 973, 975–76 (D.C.Cir.2001) (holding that the EEOC's compliance manual was not a final agency action because the policy guidance did not intend to bind EEOC staff in their official conduct, the manual simply expressed the agency's view with respect to employers' actions and compliance with Title VII).

Accordingly, the Court finds that Defendants' Guidelines are final agency action such that the jurisdictional threshold is met. *EEOC*, — F.3d at —, 2016 WL 3524242 at \*5.

#### 4. Alternative Legal Remedy

[19] Defendants also contend that district court review is precluded and Plaintiffs should not be allowed to avoid the administrative process by utilizing the APA at this time. Defs.' Resp. 16, ECF No. 40. Defendants allege that “review by a court of appeals is an ‘adequate remedy’ within the meaning of the APA,” and “[s]ection 704 of the APA thus prevents plaintiffs from circumventing the administrative and judicial process Congress provided them.” *Id.* Defendants argue “Congress has precluded district court jurisdiction over pre-enforcement actions like this.” *Id.* at 17. Defendants cite several cases, including the Supreme Court's opinions in *Thunder Basin v. Reich*, 510 U.S. 200, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) and

*Elgin v. Department of Treasury*, — U.S. —, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012), in support of this argument.<sup>14</sup>

Defendants' assertion that there is no jurisdiction to review Plaintiffs' APA claims fails and their reliance on *Thunder Basin*, *Elgin*, and the other cited cases is misplaced. In *Thunder Basin*, the Supreme Court held that the Mine Act's statutory review scheme precluded the district court from exercising subject-matter jurisdiction over a pre-enforcement challenge. To determine whether pre-enforcement challenges are prohibited courts look to whether this "intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin*, 510 U.S. at 207, 114 S.Ct. 771 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)). The Supreme Court held that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history ... and whether the claims can be afforded meaningful review." *Id.* (internal citation omitted).

\*10 Although the Mine Act was silent about pre-enforcement claims, the Supreme Court held that "its comprehensive enforcement structure demonstrate[d] that Congress intended to preclude challenges," and the Mine Act "expressly authorize[d] district court jurisdiction in only two provisions ... [which allowed] the Secretary [of Labor] to enjoin [ ] violations of health and safety standards and to coerce payment of civil penalties." *Id.* at 209, 114 S.Ct. 771. Thus, plaintiffs had to "complain to the Commission and then to the court of appeals." *Id.* (italics omitted).

*Elgin* reached a similar conclusion, holding that the Civil Service Reform Act ("CSRA") was the exclusive avenue to judicial review for petitioners' claims against the Treasury Department. 132 S.Ct. 2126, 2128 ("Just as the CSRA's 'elaborate' framework [citation omitted] demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review.").

No similar elaborate statutory framework exists covering Plaintiffs' claims. Neither Title VII nor Title IX presents statutory schemes that would preclude Plaintiffs from bringing these claims in federal district court. Indeed, the Supreme Court has held that Title IX's enforcement

provisions, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory remedy for violations. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (holding that Title IX did not preclude a private right of action for damages). Given Defendants lack of authority to the contrary, the presumption of reviewability for all agency actions applies. *EEOC*, — F.3d at —, 2016 WL 3524242 at \*11 (citing *Abbott Labs.*, 387 U.S. at 140, 87 S.Ct. 1507) ("To wholly deny judicial review, however, would be to ignore the presumption of reviewability, and to disregard the Supreme Court's instruction that courts should adopt a pragmatic approach for the purposes of determining reviewability under the APA.").

Having concluded that Plaintiffs claims are properly subject to judicial review, the Court next evaluates whether a preliminary injunction is appropriate.

## B. Preliminary Injunction

### 1. Likelihood of Success on the Merits

The first consideration is whether Plaintiffs have shown a likelihood of success on the merits for their claims. Plaintiffs aver that they have shown a substantial likelihood that they will prevail on the merits because Defendants have violated the APA by (1) circumventing the notice and comment process and (2) by issuing final agency action that is contrary to law. Mot. Injunction 12–16, ECF No. 11. Furthermore, Plaintiffs contend that Defendants' new policies are not valid agency interpretations that should be granted deference because "[a]gencies do not receive deference where a new interpretation conflicts with a prior interpretation." Pls.' Reply 11, ECF No. 52 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)).

Defendants contend that their actions do not violate the APA because the Guidelines are interpretive rules and are therefore exempt from the notice and comment requirements. Defs.' Resp. 12–18, ECF No. 40. Defendants argue the Guidelines are exempt because they do not carry the force of law, even though "the agencies' interpretations of the law are entitled to some deference." Further, they argue because their interpretation is reasonable, this interpretation is entitled to deference.<sup>15</sup>

Defendants also assert they did not act contrary to law because the Guidelines are valid interpretations of Title IX as the statute and regulations “do not address how [the laws] apply when a transgender student seeks to use those facilities” or “how a school should determine a transgender student’s sex when providing access to sex-segregated facilities.” *Id.* at 20–21. Thus, according to Defendants, this situation presents an ambiguity in the regulatory scheme and Defendants are allowed to provide guidelines to federal fund recipients on this matter. *Id.* at 21.<sup>16</sup>

\*11 In their Reply, Plaintiffs counter that DOE’s implementing regulation, § 106.33, is not “ambiguous[.]” [a]s a physiologically-grounded regulation, it covers every human being and therefor all those within the reach of Title IX.” Reply 8, ECF No. 52. They contend further, “[t]o create legal room to undo what Congress (and preceding regulators) had done, Defendants manufacture an ambiguity, claiming that ‘these regulations do not address how they apply when a transgender student seeks to use those facilities ...’ ” *Id.* (citing Defs.’ Response 20–21, ECF No. 40). Plaintiffs continue, “[i]n enacting Title IX, Congress was concerned that women receive the same opportunities as men, [t]hus, Congress utilized ‘sex’ in an exclusively biological context[.] [and] “[t]he two sexes are not fungible.” *Id.* at 8–9 (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 91 L.Ed. 181 (1946)). It is the biological differences between men and women, Plaintiffs allege, that led Congress in 1972 to “permit differential treatment by sex only[.]” provide a basis for DOE “to approve ‘separate toilet, locker rooms, and shower facilities on the basis of sex’ in § 106.33, and led the Supreme Court “to conclude that educational institutions must ‘afford members of each sex privacy from the other sex.’ ” *Id.* at 9 (quoting 118 Cong. Rec. 5807 (1972)); *United States v. Virginia*, 518 U.S. 515, 550 n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)).

The Court finds that Plaintiffs have shown a likelihood of success on the merits because: (1) Defendants bypassed the notice and comment process required by the APA; (2) Title IX and § 106.33’s text is not ambiguous; and (3) Defendants are not entitled to agency deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).<sup>17</sup>

*i. Notice and Comment under the APA*

Defendants state that “[t]he APA does not require agencies to follow notice and comment procedures in all situations [, and the APA] specifically excludes interpretive rules and statements of agency policy from these procedures.” Defs.’ Resp. 17–18, ECF No. 40. Defendants allege “[t]he guidance documents are ... paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA.” *Id.* at 18. According to Defendants, “the interpretations themselves do not carry the force of law ....” *Id.* at 19. Defendants rely on *G. G.*, 822 F.3d 709, 720 (4th Cir.2016) to support their claim that DOE’s “interpretation of the single-sex facility regulation implementing Title IX is reasonable, and does not conflict with those regulations in any way.” *Id.*

Plaintiffs contend that Defendants’ rules are legislative because: “(1) they grant rights while also imposing significant obligations; (2) they amend prior legislative rules or longstanding agency practice; and (3) bind the agencies and regulated entities,” requiring them to go through the notice and comment process. Mot. Injunction 12, ECF No. 11.

[20] [21] The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them. 5 U.S.C. §§ 553(b)–(c). This is referred to as the notice and comment requirement. The purpose is to permit the agency to understand and perhaps adjust its rules based on the comments of affected individuals. *Prof’ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir.1995). However, not every action an agency takes is required to go through the notice and comment process. “The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy.” *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C.Cir.2014). “Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not.” *Id.* (citing 5 U.S.C. § 553). “In order for a regulation to have the ‘force and effect of law,’ it must have certain substantive characteristics and be the product of certain procedural requisites.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

[22] [23] The APA does not define a legislative or “substantive” rule, but in *Morton v. Ruiz*, 415 U.S. 199, 234, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), the Supreme Court held that a substantive rule or “a legislative-type rule,” is one that “affect[s] individual rights and obligations.” *Id.* at 232, 94 S.Ct. 1055. The Supreme Court also held, “the promulgation of these regulations must conform with any procedural requirements imposed by Congress.” *Chrysler Corp.*, 441 U.S. at 303, 99 S.Ct. 1705. Thus, agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which “assure fairness and mature consideration of rules of general application.” *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969)). If a rule is substantive, notice and comment requirements must be adhered to scrupulously. *Prof’ls and Patients for Customized Care*, 56 F.3d at 595.

\*12 “[L]egislative rules (and sometimes interpretive rules) may be subject to pre-enforcement review” because they subject a party to a binding obligation which can be the subject of an enforcement action. *McCarthy*, 758 F.3d at 251. (“An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule ....”). The APA treats interpretive rules and general statements of policy differently. *Id.* (“As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.”).<sup>18</sup>

[24] [25] [26] Courts have focused on several factors to evaluate whether rules are interpretative or legislative. Courts analyze the agency's characterization of the guidance and post-guidance events to determine whether the agency has applied the guidance as if it were binding on regulated parties. *McCarthy*, 758 F.3d at 252–53. However, “the most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.” *McCarthy*, 758 F.3d at 252 (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34; *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C.Cir.2002)). “A touchstone of a substantive rule is that it establishes a binding norm.” *Prof’ls and Patients for Customized Care*, 56 F.3d at 596; see also *Texas v. United States*, 809 F.3d 134, 202 (5th Cir.2015) (King, J., dissenting) (declaring

that an agency action establishing binding norms which permit no discretion is a substantive rule requiring notice and comment). If agency action “draws a ‘line in the sand’ that, once crossed, removes all discretion from the agency” the rule is substantive. *Id.* at 601.

[27] Here, the Court finds that Defendants rules are legislative and substantive. Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are “compulsory in nature.” See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C.Cir.2000);<sup>19</sup> see also *Prof’ls and Patients for Customized Care*, 56 F.3d at 596 (the label an agency places on its exercise of administrative power is not conclusive, rather it is what the agency does with that policy that determines the type of action). Defendants confirmed at the hearing that schools not acting in conformity with Defendants' Guidelines are not in compliance with Title IX. Hr'g Tr. 71. Further, post-Guidelines events, where Defendants have moved to enforce the Guidelines as binding, buttress this conclusion. *Id.* at 7; Mot. Injunction 15–16, ECF No. 11; Reply 4–8, ECF No. 52. The information before the Court demonstrates Defendants have “drawn a line in the sand” in that they have concluded Plaintiffs must abide by the Guidelines, without exception, or they are in breach of their Title IX obligations. Thus, it would follow that the “actual legal effect” of the Guidelines is to force Plaintiffs to risk the consequences of noncompliance. *McCarthy*, 758 F.3d at 252; *Catawba Cty.*, 571 F.3d at 33–34; *Gen. Elec. Co.*, 290 F.3d at 382; see also *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C.Cir.2005). Plaintiffs, therefore, are legally affected in a way they were not before Defendants issued the Guidelines. The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. *Panhandle Producers and Royalty Owners Ass'n v. Econ. Regulatory Admin*, 847 F.2d 1168, 1174 (5th Cir.1988) (stating that a substantive rule is one that establishes standards of conduct that carry the force of law). As such, Defendants should have complied with the APA's notice and comment requirement. 5 U.S.C. § 553; *Nat'l Min. Ass'n*, 758 F.3d at 251; *Chrysler Corp.*, 441 U.S. at 301–03, 99 S.Ct. 1705. Permitting the definition of sex to be defined in this way would allow Defendants to “create de facto new regulation” by agency action without complying with the proper procedures. *Christensen v. Harris Cty.*, 529 U.S. 576, 586–86, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). This is not permitted.

\*13 Accordingly the Court finds that Plaintiffs would likely succeed on the merits that Defendants violated the notice and comment requirements of the APA.

*ii. Agency Action Contrary to  
Contrary to Law (5 U.S.C. § 553)*

Plaintiffs contend that Defendants' Guidelines are contrary to the statutory and regulatory text, Congressional intent, and the plain meaning of the term. Mot. Injunction 14, ECF No. 11. When an agency acts contrary to law, its action must be set aside. 5 U.S.C. § 706(2)(A). Plaintiffs argue that Defendants' interpretation of the meaning of the term "sex" as set out in the Guidelines contradicts its meaning in Title VII, Title IX, and § 106.33. They assert "the meaning of the terms 'sex,' on the one hand, and 'gender identity,' on the other, both now and at the time Titles VII and IX were enacted, forecloses alternate constructions." Mot. Injunction 16, ECF No. 11 (citing *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S.Ct. 2381. They also allege that the ordinary meaning of the term controls. *Id.* at 17 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995)).

Defendants contend that Plaintiffs' arguments for legislative history and intent at the time of passage are irrelevant. Hr'g Tr. 33 ("But it may very well be that Congress did not intend the law to protect transgender individuals. [But,] ... as the Supreme Court has made it absolutely clear in *Oncale*, the fact that Congress may have understood the term sex to mean anatomical sex at birth is largely irrelevant.") Defendants also allege that "Title IX and Title VII should be construed broadly" to protect any person, including transgendered persons, from discrimination. Hr'g Tr. 33–34.

The starting point to analyze this dispute begins with the actual text of the statute or regulation, where the words should be given their ordinary meaning. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). When the words are unambiguous, the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)). The pertinent statutory text at issue in this

case 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. Title IX expressly permits educational institutions to maintain separate living facilities for the different sexes. *Id.* at § 1686. The other language at issue comes from one of the DOE regulations promulgated to implement Title IX, which 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.

Defendants assert the Guidelines simply provide clarity to an ambiguity in this regulation, and that ambiguity is how to define the term sex when dealing with transgendered students. Defs.' Resp. 20, ECF No. 40. Because they contend the regulation is ambiguous, Defendants argue "[f]oundational principles of administrative law instruct [the Court] to give controlling weight to [their] interpretations of their own ambiguous regulations unless [they are] plainly erroneous." *Id.*

\*14 Plaintiffs contend the text of both Title VII and Title IX is not ambiguous. Mot. Injunction 16–19, ECF No. 11. They argue when Congress passed both statutes it clearly intended sex to be defined based on the biological and anatomical differences between males and females. *See id.* at 17–18 (citing legislative history and common understanding of its meaning at the time of passage). Plaintiffs likewise assert § 106.33 is unambiguous, for the same reason, as it was designed to separate students based on their biological differences because they have a privacy right to avoid exhibiting their "nude or partially nude body, genitalia, and other private parts" before members of the opposite sex. Pls.' Reply 8–9, ECF No. 52. Based on this, they argue Defendants have manufactured an ambiguity so they can then unilaterally change the law to suit their policy preferences. *Id.* at 8.

*iii. Auer Deference*

[28] Because Defendants assert their regulation is ambiguous, the Court must determine whether their interpretation is entitled to deference. Defendants contend an agency may interpret its own regulation by issuing an

opinion letter or other guidance which should be given controlling weight if: (1) the regulation is ambiguous; and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. Defs.' Resp. 21, ECF No. 40; *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655 (“*Auer* deference is warranted only when the language of the regulation is ambiguous.”); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (“[An agency’s] interpretation of [its regulation] is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

[29] [30] [31] This deference is only warranted however when the language of the regulation is ambiguous. *Moore v. Hannon Food Services, Inc.*, 317 F.3d 489, 495 (5th Cir.2003). Legislation is ambiguous if it is susceptible to more than one accepted meaning. *Calix v. Lynch*, 784 F.3d 1000, 1005 (5th Cir.2015). “Multiple accepted meanings do not exist merely because a statute’s ‘authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.’” *Id.* (citing *Moore*, 317 F.3d at 497 and applying this rule of construction to regulations).

[32] [33] [34] If a regulation is not ambiguous, the agency’s interpretation may be considered but only according to its persuasive power. *Moore*, 317 F.3d at 495. “Thus, a court must determine whether ‘all but one of the meanings is ordinarily eliminated by context.’” *Calix*, 784 F.3d at 1005 (quoting *Deal v. United States*, 508 U.S. 129, 132–33, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993)). When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent. *D.C. Bd. of Elections & Ethics v. D.C.*, 866 A.2d 788, 798 n. 18 (D.C.2005) (“In finding the ordinary meaning, ‘the use of dictionary definitions is appropriate in interpreting undefined statutory terms.’”); *1618 Twenty-First St. Tenants Ass’n, Inc. v. Phillips Collection*, 829 A.2d 201, 203 (D.C.2003) (same). Furthermore, “an agency is not entitled to deference when it offers up an interpretation of [a regulation] that [courts] have already said to be unambiguously foreclosed by the regulatory text.” *Exelon Wind I, L.L.C. v. Nelson*, 766 F.3d 380, 399 (5th Cir.2014) (citing *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655).

Based on the foregoing authority, the Court concludes § 106.33 is not ambiguous. It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth. *See* 34 C.F.R. § 106.33; 45 Fed. Reg. 30955 (May 9, 1980); *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S.Ct. 2381 (holding that intent determined at the time the regulations are promulgated). It appears Defendants at least tacitly agree this distinction was the intent of the drafter. *See* Holder Memo 1, ECF No. 6-3 (“The federal government’s approach to this issue has also evolved over time.”); *see also* Hr’g Tr. 33 (“[I]t may very well be that Congress did not intend the law to protect transgender individuals.”).

\*15 Additionally, it cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students. Pls.’ Mot. Injunction 17–18, ECF No. 11 (citing legislative history and common understanding of its meaning at the time of passage). As the support identified by Plaintiffs shows, this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33. *See* Pls.’ Am. Compl. ¶¶ 8–13, ECF No. 6; *see also* *G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (providing comprehensive list of various definitions from the 1970s which demonstrated “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.”). This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their “nude or partially nude body, genitalia, and other private parts,” and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy. *See* *G.G.*, 822 F.3d at 723.

This conclusion is also supported by the text and structure of the regulations. Section 106.33 specifically permits educational institutions to provide separate toilets, locker rooms, and showers based on sex, *provided* that the separate facilities are comparable. The sections immediately preceding and following § 106.33 likewise permit educational institutions to separate students on the

basis of sex. For instance, § 106.32 permits educational institutions to provide separate housing for students on the basis of sex, again so long as the separate housing is comparable, and § 106.33 permits separate educational sessions for boys and girls when dealing with instruction concerning human sexuality. 34 C.F.R. §§ 106.32, 106.34. Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality, was to protect students' personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex. *G.G.*, 822 F.3d at 723. Accordingly, this interpretation of § 106.33 is consistent with the structure and purpose of the regulations.

Based on the foregoing, the Court concludes § 106.33 is not ambiguous. Given this regulation is not ambiguous, Defendants' definition is not entitled to *Auer* deference, meaning it does not receive controlling weight. *Auer*, 519 U.S. at 461, 117 S.Ct. 905. Instead, Defendants' interpretation is entitled to respect, but only to the extent it has the power to persuade. *Christensen*, 529 U.S. at 587, 120 S.Ct. 1655. In his dissent in *G.G.*, Judge Niemeyer characterized Defendants' definition as “illogical and unworkable.” *G.G.*, 822 F.3d at 737. He outlined a number of scenarios, which need not be repeated here, where the Defendants' interpretation only causes more confusion for educational institutions. *Id.* A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased. *See Morton*, 415 U.S. at 237, 94 S.Ct. 1055; *see also Christopher v. SmithKline Beecham Corp.*, — U.S. —, 132 S.Ct. 2156, 2168, 183 L.Ed.2d 153 (2012) (holding that an agency announcement of an interpretation preceded by a very lengthy period with no interpretation indicates agency considered prior practice lawful). Accordingly, the Court concludes Defendants' interpretation is insufficient to overcome the regulation's plain language and for the reasons stated above is contrary to law.

## 2. Threat of Irreparable Harm

[35] The Court next addresses irreparable harm. Defendants allege that Plaintiffs have not identified any pending or imminent enforcement action, and the Guidelines “expose [P]laintiffs to no new liability or legal

requirements.” Defs.' Resp. 7, ECF No. 40 (citing *Google v. Hood*, 822 F.3d 212, 227 (5th Cir.2016)). Defendants argue that, “[a]lthough [P]laintiffs *do* identify a small number of specific ‘policies and practices’ that they claim are in conflict with [D]efendants' interpretation of Title IX, they have identified no enforcement action being taken against them—now or in the future—as a result of these polices.” Defs.' Resp. 8–9, ECF No. 40. They assert that even if DOE were “to decide to bring an administrative enforcement action against plaintiffs for noncompliance ... at some point in the future, [P]laintiffs *still* would be unable to make a showing of irreparable harm because they would have an opportunity to challenge the interpretation in an administrative process prior to any loss of federal funds.” *Id.* at 9 (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir.1975)).

\*16 Plaintiffs counter that “Defendants' actions cause irreparable harm by forcing policy changes, imposing drastic financial consequences, and usurping [Plaintiffs'] legitimate authority.” Mot. Injunction 21, ECF No. 11. According to Plaintiffs, Defendants' actions present “a Hobson's choice between violating federal rules (labeled as regulations, guidance, and interpretations) on the one hand, and transgressing longstanding policies and practices, on the other.” *Id.* Thus, Plaintiffs characterize Defendants' administrative letters and notices as “mandates” which effectively carry the force of law. *Id.* Plaintiffs also allege that Defendants' rules are “irreconcilable with countless polices regarding restrooms, showers, and intimate facilities,” while threatening to override the practices of “countless schools,” which had previously been allowed to differentiate intimate facilities on the basis of biological sex consistent with Title IX, federal regulations, and laws protecting privacy and dignity. *Id.* (citing Mot. Injunction, Ex. P. (Thweatt Dec.) 5–7, ECF No. 11-2).

Defendants' appear to concede the Guidelines conflict with Plaintiffs' policies and practices, *see* Defs.' Resp. 8–9; ECF No. 40 (“[P]laintiffs *do* identify a small number of specific ‘policies and practices’ ....”); however, they argue that additional threats of enforcement are required before irreparable harm exists. Case law does not support this contention. Instead the authorities hold, “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.” *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir.1997) (stating,

whenever an enactment of a state's people is enjoined, the state suffers irreparable injury); accord *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir.2013) (“When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.”); *Maryland v. King*, — U.S. —, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., *in chambers*) (“[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.”)).

As Defendants have conceded the conflict between the Guidelines and Plaintiffs' policies, and Plaintiffs have identified a number of statutes that conflict, the Court concludes Plaintiffs have sufficiently demonstrated a threat of irreparable harm.<sup>20</sup>

### 3. Balance of Hardships and Public Interest<sup>21</sup>

[36] The Court next considers whether the threatened injury to the Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants and its impact on the public interest. *Nichols*, 532 F.3d at 372. Plaintiffs risk either running afoul of Defendants' Guidelines or complying and violating various state statutes and, in some cases, their state constitutions. Mot. Injunction 21, ECF No. 11. Plaintiffs also state that they likely risk legal action from parents, students, and other members of their respective communities should they actually comply with Defendants' Guidelines. Defendants argue these harms do not outweigh the damage that granting the injunction will cause because it will impede their ability to eliminate discrimination in the workplace and educational settings, prevent them from definitively explaining to the public the rights and obligations under these statutes, and it would have a deleterious effect on the transgendered.

\*17 The Court concludes Plaintiffs have established that the failure to grant an injunction will place them in the position of either maintaining their current policies in the face of the federal government's view that they are violating the law, or changing them to comply with the Guidelines and cede their authority over this issue. See DOJ/DOE Letter, ECF No. 6-10 (“This 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.”). Plaintiffs' harms in this regard outweigh those identified by Defendants, particularly since the Supreme Court stayed the Fourth Circuit's decision supporting Defendants' position, and a decision from the Supreme Court in the near future may obviate the issues in this lawsuit. As a result, Plaintiffs interests outweigh those identified by Defendants. Further, Defendants have not offered evidence that Plaintiffs are not accommodating students who request an alternative arrangement. Indeed, the school district at issue in *G.G.* provided its student an accommodation.

Accordingly, the Court finds that Plaintiffs have met their burden and these factors weigh in favor of granting the preliminary injunction.

### C. Scope of the Injunction

Finally, the Court must determine the scope of the injunction. Plaintiffs seek to apply the injunction nationwide. Mot. Injunction 3, ECF No. 11; Pls.' Reply 13, ECF No. 52. Defendants counter that the injunction should be narrowly tailored to Plaintiffs in the Fifth Circuit. Defs.' Resp. 28, ECF No. 40.

[37] [38] “Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.” *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). “[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” *Id.* at 702, 99 S.Ct. 2545 (permitting a nationwide injunction because the class action was proper and finding that a nationwide injunction was not more burdensome than necessary to redress plaintiffs' complaints).

The Court concludes this injunction should apply nationwide. As the separate facilities provision in § 106.33 is permissive, states that authorize schools to define sex to include gender identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by it. Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation. However, an injunction should not unnecessarily interfere with litigation currently pending

before other federal courts on this subject regardless of the state law. As such, the parties should file a pleading describing those cases so the Court can appropriately narrow the scope if appropriate.

#### IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' application for a preliminary injunction (ECF No. 11) should be and is hereby **GRANTED**. *See* Fed. R. Civ. P. 65. It is **FURTHER ORDERED** that bond is set in the amount of one hundred dollars.<sup>22</sup> *See* Fed. R. Civ. P. 65(c). Defendants are enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition

against discrimination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals. This preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).

**\*18 SO ORDERED** on this **21st day of August, 2016**.

#### All Citations

--- F.Supp.3d ----, 2016 WL 4426495

#### Footnotes

- 1 The Court also considers various amicus briefs filed by interested parties. *See* ECF Nos. 16, 28, 34, 36-1, 38-1.
- 2 Plaintiffs include: (1) the State of Texas; (2) Harrold Independent School District (TX); (3) the State of Alabama; (4) the State of Wisconsin; (5) the State of West Virginia; (6) the State of Tennessee; (7) Arizona Department of Education; (8) Heber-Overgaard Unified School District (Arizona); (9) Paul LePage, Governor of the State of Maine; (10) the State of Oklahoma; (11) the State of Louisiana; (12) the State of Utah; (13) the state of Georgia; (14) the State of Mississippi, by and through Governor Phil Bryant; (15) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.
- 3 Plaintiffs refer to a person's "biological sex" when discussing the differences between males and females, while Defendants refer to a person's sex based on the sex assigned to them at birth and reflected on their birth certificate or based on "gender identity" which is "an individual's internal sense of gender." *See* Am. Compl. 12, ECF No. 6; Mot. Injunction 1, ECF No. 11; Am. Compl. Ex. C (Holder Transgender Title VII Memo) ("Holder Memo 2014") App. 1 n.1, ECF No. 6-3 (" [G]ender identity' [is defined] as an individual's internal senses of being male or female."); *Id.* at Ex. J. (DOJ/DOE Letter) 2, ECF No. 6-10. When referring to a transgendered person, Defendants' Guidelines state "transgender individuals are people with a gender identity that is different from the sex assigned to them at birth ...." Am. Compl., Ex. C (Holder Memo 2014), App. 1 n.1, ECF No. 6-3. "For example, a transgender man may have been assigned female at birth and raised as a girl, but identify as a man." *Id.* at Ex. D (OSHA Best Practices Guide to Restroom Access for Transgender Employees) ("OSHA Best Practice Guide"), App. 1, ECF No. 6-4. The Court attempts to use the parties' descriptions throughout this Order for the sake of clarity.
- 4 The Guidelines refer to the documents attached to Plaintiffs' Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) ("DOE Q&A Memo"), ECF No. 6-2; (3) Ex. C ("Holder Memo 2014"), ECF No. 6-3, (4) Ex. D (OSHA Best Practice Guide), ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet), ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.
- 5 Defendants cited to U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance, <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> (last visited August 5, 2016) (discussing the purpose of guidance documents and providing links to guidance documents).
- 6 Agency action is defined in 5 U.S.C. § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (quoting 5 U.S.C. § 551(13)). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: 'an agency statement of ... future effect designed to implement, interpret,

or prescribe law or policy' (rule); 'a final disposition ... in a matter other than rule making' (order); a 'permit ... or other form of permission' (license); a 'prohibition ... or ... taking [of] other compulsory or restrictive action' (sanction); or a 'grant of money, assistance, license, authority,' etc., or 'recognition of a claim, right, immunity,' etc., or 'taking of other action on the application or petition of, and beneficial to, a person' (relief)." *Id.* (quoting § 551(4), (6), (8), (10), (11)).

7 The parties have requested that the Court provide expedited consideration of the preliminary injunction. The briefing on this request was completed on August 3, 2016, and the matter was not ripe until after the hearing was completed on August 12, 2016. Because further legal issues concerning the basis for Plaintiffs' Spending Clause claim were raised at the hearing and require further briefing, the Court will not await that briefing at this time. See Hr'g Tr. 35, 44, 52–53 (discussing new program requirements and whether a new program is the same as annual grants). Therefore, the Spending Clause issue is not addressed in this Order. See ECF Nos. 11–12. Finally, where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX because the two statutes are commonly linked. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 546, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982).

8 Plaintiffs' motion provides the following citations to their state laws which give them legal control over the management of the safety and security policies of educational buildings in their states and which the Guidelines will compel them to disregard. Texas cites to Tex. Const. art. 7 § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); Tex. Educ. Code §§ 4.001(b) (stating the objectives of public education, including Objective 8: "School campuses will maintain a safe and disciplined environment conducive to student learning."); 11.051 ("An independent school district is governed by a board of trustees who, as a corporate body, shall: (1) oversee the management of the district; and (2) ensure the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations."); 11.201 (listing the duties of the superintendent including "assuming administrative responsibility and leadership for planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district ..."); and 46.008 ("The commissioner shall establish standards for adequacy of school facilities. The standards must include requirements related to space, educational adequacy, and construction quality."); Pls.' Reply Ex. (Belew Decl.) 4, ECF No. 52-1 (stating the Texas Education Agency ("TEA") is responsible for "[t]he regulation and administration of physical buildings and facilities within Texas public schools" among other duties). Plaintiffs also provided an exhaustive list of similar state constitution citations, statutes, codes, and regulations that grant each Plaintiff the power to control the regulations that govern the administration of public education and public education facilities. See Mot. Injunction 9–11 n. 9-22, ECF No. 11 (quoting Ala. Code §§ 16–3–11, 16–3–12, 16–8–8–16–8–12 ("Alabama law authorizes state, county, and city boards of education to control school buildings and property."); Wis. stat. chs. 115, 118 ("In Wisconsin, local school boards and officials govern public school operations and facilities ... with the Legislature providing additional supervisory powers to a Department of Public Instruction."); Wis. Stat. § 120.12(1) ("School boards and local officials are vested with the 'possession, care, control and management of the property and affairs of the school district, and must regulate the use of school property and facilities."); Wis. Stat. § 120.13(17) ("Wisconsin law also requires school boards to '[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes.' "); W. Va. Const. art. XII, § 2; W. Va. code § 18–5–1, 18–5–9(4) ("West Virginia law establishes state and local boards of education ... and charges the latter to ensure the good order of the school grounds, buildings, and equipment."); Tenn. Code Ann. §§ 49–12, 1–302, 49–1–201 ("In Tennessee, the state board of education sets statewide academic policies, ... and the department of education is responsible for implementing those policies[, while] [e]ach local board of education has the duty to "[m]anage and control all public schools established or that may be established under its jurisdiction."); Tenn. Code Ann. §§ 49–1–201(a)–(c)(5), 49–2–203(a)(2) ("The State Board is also responsible for "implementation of law" established by the General Assembly, ... and ensuring that the 'regulations of the state board of education are faithfully executed.' "); Ariz. Rev. Stat. §§ 15–203(A)(1), 15–341(A)(1), 15–341(A)(3) ("Arizona law establishes state and local boards of education, ... and empowers local school districts to '[m]anage and control the school property within its district.' "); Me. Rev. Stat. tit. 20–A, §§ 201–406, 1001(2), 6501 ("Maine provides for state and local control over public education. While state education authorities supervise the public education system, control over management of all school property, including care of school buildings[,] ... [a]nd Maine law provides requirements related to school restrooms."); Okla. Const. art. XIII, §§ 5, 5–117 ("Oklahoma law establishes a state board of education to supervise public schools. Local school boards are authorized by the board to operate and maintain school facilities and buildings."); La. Const. art. VIII, § 3, LSA–R. Stat. § 17:100.6 ("In Louisiana, a state board of education oversees public schools, ...while local school boards are charged with the management, administration, and control of buildings and facilities within their jurisdiction."); Utah Code §§ 53A–1–101, 53A–3–402(3) ("Utah law provides for state and local board of educations, ... and authorizes the local boards to exercise control over school buildings and

- facilities.”); Ga. Code § 20–2–59, 520 (“Georgia places public schools under the control of a board of education, ... and delegates control over local schools, including the management of school property, to county school boards govern local schools.”); Miss. Code Ann. § 37–7–301 (“In Mississippi, the state board of education oversees local school boards, which exercise control over local school property.”); Ky. Rev. Stat. §§ 156.070, 160.290 (“In Kentucky, the state board of education governs the state’s public school system, ... while local boards of education control “all public school property” within their jurisdictions,.. and can make and adopt rules applicable to such property.”).
- 9 *Id.* at 14 (“[T]he government respectfully disagrees with that decision for many of the reasons stated in Judge Higginbotham’s dissenting opinion, and ... EEOC is distinguishable from this case in important respects.”); Hr’g Tr. 53 (“Let me say at the outset ... the Government disagrees with that decision.”).
- 10 The Court addresses Defendants’ claim that Plaintiffs have an adequate alternate remedy in Section III.A.4.
- 11 For example, Plaintiffs list Wisconsin’s state statutes regarding this matter, which state that school boards are required to “[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes.” Mot. Injunction 10 n.9, ECF No. 11 (citing Wis. Stat. s. 120.12(12)). Plaintiffs interpret this to mean that Wisconsin has the authority to maintain separate intimate facilities that correspond to a person’s biological sex. *Id.*
- 12 The Court further addresses this issue in section III.A.3.
- 13 The Holder Memorandum concludes, “For these reasons, the [DOJ] will no longer assert that Title VII’s prohibition of discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination).” Holder Memo 2, ECF No. 6-3. Other guidance from Defendants take similar actions. *See also* DOJ/DOE Letter 4–5, ECF No. 6-10.
- 14 Defendants also assert *NAACP v. Meese* supports this argument but the Court disagrees. In that case, the plaintiffs sought to enjoin the Attorney General from reopening or agreeing to reopen any consent decree in any civil rights action pending in any other court. The district court denied this request, holding such actions would violate principles of separation of powers and comity. 615 F.Supp. 200, 201–02 (D.D.C.1985) (“Plaintiffs’ action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States.”). The *Meese* court also concluded there was no final agency action to enjoin and, by definition, there would be an alternative legal remedy related to those cases where a consent decree existed because those decrees were already subject to a presiding judge. *Id.* at 203 n. 9. Additionally, Defendants’ reliance on *Dist. Adult Prob. Dep’t v. Dole*, 948 F.2d 953 (5th Cir.1991) does not apply because there was no final agency action in that case.
- 15 Defendants argue the Court should be guided in this decision by the Fourth Circuit’s decision in *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.2016) (“G.G.”). Defendants contend the Fourth Circuit’s majority opinion in *G.G.* should be followed as it provides the proper analysis. The Supreme Court recalled the Fourth Circuit’s mandate and stayed the preliminary injunction entered by the district court in that case. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, — U.S. —, 136 S.Ct. 2442, 2442, — L.Ed.2d — (2016) (Breyer, J. concurring) (“In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy.”). The Supreme Court takes such actions only on the rarest of occasions. *Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) (“On such an application, since the Court of Appeals refused the stay \* \* \* this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari.”); *Russo v. Byrne*, 409 U.S. 1219, 1221, 93 S.Ct. 21, 34 L.Ed.2d 30 (1972) (“If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted.”). Because it is impossible to know the precise issue (s) that prompted the Supreme Court to grant the stay, it is difficult to conclude that *G.G.* would control the outcome here. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers) (declaring it is very difficult to predict anticipated Supreme Court decision). Nevertheless, the Court has reviewed the opinion and considers the well-expressed views of each member of the panel in reaching the decision in this case.
- 16 Defendants characterize their Guidelines as, “supply[ing] ‘crisper and more detailed lines’ than the statutes and regulations that they interpret,” without “alter[ing] the legal obligations of regulated entities.” *Id.* at 20 (citing *Am. Mining Cong. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C.Cir.1993)).

- 17 Defendants' counsel stated at the hearing that Defendants would not be entitled to *Chevron* deference for the Guidelines. See Hr'g Tr. 72. Thus, the Court addresses only Defendants' claim that they are entitled to *Auer* deference when interpreting § 106.33.
- 18 *Catawba Cty.* provides: "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.")
- 19 In *Appalachian Power*, the D.C. Circuit held that an EPA guidance was a legislative rule despite the guidance document's statement that it was advisory. The Court analyzed the document as a whole and found that "the entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates." 208 F.3d at 1022–23. Similarly, the DOJ/DOE Letter uses the words "must," and various forms of the word "require" numerous times throughout the document. Am. Compl. Ex. J (DOJ/DOE Letter), ECF No. 6-10.
- 20 Defendants also contend the injunction should be denied because Plaintiffs delayed in seeking this relief. The DOJ/DOE Letter is dated May 13, 2016. This case was filed very soon after on May 25, 2016, and the parties reached an agreement on a briefing schedule to consider this request. The Court concludes Plaintiffs did not fail to act timely.
- 21 The Parties address the third and fourth Canal factors together, therefore they are treated together in this Order as well.
- 22 Neither party addressed the appropriate bond amount should an injunction be entered.

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United States District Court,  
M.D. North Carolina.

Joaquín Carcaño, et al., Plaintiffs,

v.

Patrick McCrory, in his official capacity as  
Governor of North Carolina, et al., Defendants,  
and

Phil Berger, in his official capacity as President  
Pro Tempore of the North Carolina Senate;  
and Tim Moore, in his official capacity as  
Speaker of the North Carolina House of  
Representatives, Intervenor-Defendants.

1:16cv236

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August 26, 2016

#### Synopsis

**Background:** Civil liberties organization, transgender students and employee of state university brought action against North Carolina governor, university, and university officials alleging that North Carolina law requiring that multiple occupancy bathrooms and changing facilities must be designated for and only used by persons based on their biological sex, and setting statewide nondiscrimination standards, discriminated against transgender, gay, lesbian, and bisexual individuals on basis of sex, sexual orientation, and transgender status in violation of Title IX, equal protection, and due process. After two North Carolina legislators were allowed to intervene as defendants, 315 F.R.D. 176, organization and university students and employee moved for preliminary injunction enjoining enforcement of so-called “bathroom bill” portion of the law, requiring public agencies to ensure that multiple occupancy bathrooms, showers, and other similar facilities were designated for and only used by persons based on their biological sex, defined as the sex listed on their birth certificate.

**Holdings:** The District Court, Thomas D. Schroeder, J., held that:

[1] individual plaintiffs’ Title IX claims presented a justiciable case or controversy;

[2] Title IX claims were prudentially ripe;

[3] individual plaintiffs were likely to succeed on merits of their claim that the law violated Title IX by discriminating against them on basis of sex;

[4] plaintiffs were not likely to succeed on merits of their claim that the law violated Equal Protection Clause by discriminating on basis of sex;

[5] individual plaintiffs would likely to suffer irreparable harm in the absence of preliminary injunction;

[6] balance of equities favored granting preliminary injunction; and

[7] it was in the public interest to grant preliminary injunction.

Motion granted in part and denied in part.

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**MEMORANDUM OPINION, ORDER  
AND PRELIMINARY INJUNCTION**

THOMAS D. SCHROEDER, District Judge

\*1 This case is one of three related actions in this court concerning North Carolina's Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known as House Bill 2 ("HB2"). Although Plaintiffs challenge multiple portions of HB2, they presently seek preliminary relief only as to Part I, the so-called "bathroom bill" portion of the law, which requires public agencies to ensure that multiple occupancy bathrooms, showers, and other similar facilities are "designated for and only used by" persons based on their "biological sex," defined as the sex listed on their birth certificate. 2016 N.C. Sess. Laws 3 §§ 1.2–1.3. Plaintiffs include two transgender<sup>1</sup> students and one employee (collectively, the "individual transgender Plaintiffs") of the University of North Carolina ("UNC"), as well as the American Civil Liberties Union of North Carolina ("ACLU-NC"), which sues on behalf of its transgender members. (Doc. 9 ¶¶ 5–7, 10.) The individual transgender Plaintiffs (in their individual capacities) claim that Part I violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). (Doc. 9 ¶¶ 235–43.) In addition, the individual transgender Plaintiffs and ACLU-NC claim that Part I violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.<sup>2</sup> (*Id.* ¶¶ 186–200, 220–34.)

It is important to note what is (and is not) in dispute. All parties agree that sex-segregated bathrooms, showers, and changing facilities promote important State privacy interests, and neither Plaintiffs nor the United States contests the convention. Further, no party has indicated that the pre-HB2 legal regime posed a significant privacy or safety threat to anyone in North Carolina, transgender or otherwise. The parties do have different conceptions, of how North Carolina law generally operated before

March 2016, however, and whether "sex" includes gender identity.

\*2 Plaintiffs contend that time is of the essence, as HB2's impact will be most felt as educational institutions across the State begin a new academic year. As a result, the court has endeavored to resolve Plaintiffs' motion for preliminary relief as quickly as possible.

Ultimately, the record reflects what counsel for Governor McCrory candidly speculates was the status quo ante in North Carolina in recent years: some transgender individuals have been quietly using bathrooms and other facilities that match their gender identity, without public awareness or incident. (*See* Doc. 103 at 70 (speculating that, even if Part I remains in force, "some transgender individuals will continue to use the bathroom that they always used and nobody will know.")) This appears to have occurred in part because of two factors. First, the record suggests that, for obvious reasons, transgender individuals generally seek to avoid having their nude or partially nude bodies exposed in bathrooms, showers, and other similar facilities. (*See* Doc. 103 at 140.) Second, North Carolina's decades-old laws against indecent exposure, peeping, and trespass protected the legitimate and significant State interests of privacy and safety.

After careful consideration of the limited record presented thus far,<sup>3</sup> the court concludes that the individual transgender Plaintiffs have made a clear showing that (1) they are likely to succeed on their claim that Part I violates Title IX, as interpreted by the United States Department of Education ("DOE") under the standard articulated by the Fourth Circuit; (2) they will suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in favor of an injunction; and (4) an injunction is in the public interest. Accordingly, the court will enjoin UNC from enforcing Part I against the individual transgender Plaintiffs until the court reaches a final decision on the merits in this case. Plaintiffs have not made a clear showing they are likely to succeed on their Equal Protection claim, and the court will reserve ruling on their Due Process claims pending additional briefing from the parties.

It is important to emphasize that this injunction returns the parties to the status quo ante as it existed in Title IX facilities prior to Part I's passage in March 2016. On the current record, there is no reason to believe that a return

to the status quo ante pending a trial on the merits will compromise the important State interests asserted.

### I. BACKGROUND

\*3 Based on the record thus far, the court makes the following findings for the limited purpose of evaluating Plaintiffs' motion for preliminary injunction.

#### A. North Carolina Law Before 2016

Like most States, North Carolina has long enforced a variety of public decency laws designed to protect citizens from exposing their nude or partially nude bodies in the presence of members of the opposite sex, as well as from being exposed to the nude or partially nude bodies of members of the opposite sex. With regard to the former, North Carolina's peeping statute, enacted in 1957, makes it unlawful for any person to "peep secretly into any room occupied by another person," N.C. Gen. Stat. § 14-202(a), including a bathroom or shower, and penalties are enhanced if the offender does so for the purpose of sexual gratification, *id.* § 14-202(d). With regard to the latter, North Carolina's indecent exposure statute, enacted in 1971, makes it unlawful for any person to "willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons." *Id.* § 14-190.9(a). Traditionally, the indecent exposure statute applied only to individuals who exposed themselves to members of the opposite sex. See *State v. Fusco*, 136 N.C.App. 268, 270, 523 S.E.2d 741, 742 (1999) (interpreting an earlier version of § 14-190.9(a)). In 2005, North Carolina removed the language that had previously limited the statute's application to situations in which individuals exposed themselves in the presence of members of the opposite sex. 2005 N.C. Sess. Laws 226 § 1 (modifying N.C. Gen. Stat. § 14-190.9). That same amendment, however, created an exception for situations in which "same sex exposure" occurs in a "place[ ] designated for a public purpose" and is "incidental to a permitted activity." *Id.*

In addition to these statutes, public agencies in North Carolina have also traditionally protected privacy through the use of sex-segregated bathrooms, locker rooms, showers, and similar facilities. Although this form of sex discrimination has a long history in the State and elsewhere, the parties offer differing ideas of the justification for the practice. Plaintiffs acknowledge, as Defendants contend, that such segregation promotes

privacy and serves important government interests, particularly with regard to minors. (See, e.g., Doc. 103 at 15-21.) Arguably, segregating such facilities on the basis of sex fills gaps not addressed by the peeping and indecent exposure statutes—for example, a situation in which a man might inadvertently expose himself to another while using a facility that is not partitioned. It is also possible that sex-segregated facilities protect against embarrassment from engaging in intimate bodily functions in the immediate vicinity of the opposite sex, regardless of whether one's body is subject to view.

Whatever the justification, the segregation of these facilities has traditionally been enforced through voluntary compliance, social mores, and, when necessary, criminal trespassing law. See *In re S.M.S.*, 196 N.C.App. 170, 675 S.E.2d 44 (2009). For example, in *S.M.S.*, a fifteen year old boy was adjudicated delinquent of second degree trespass after he was caught in the girls' locker room at his high school. *Id.* at 170-71, 675 S.E.2d at 44-45. Pursuant to N.C. Gen. Stat. § 14-159.13, it is a second degree trespass to enter the premises of another when reasonably conspicuous signs are posted to give the intruder "notice not to enter the premises." In upholding the boy's conviction, the North Carolina Court of Appeals concluded, "The sign marked 'Girl's Locker Room' was reasonably likely to give respondent notice that he was not authorized to go into the girls' locker room." *S.M.S.*, 196 N.C.App. at 173, 675 S.E.2d at 46.

\*4 For most, the application of the peeping, indecent exposure, and trespass laws to sex-segregated bathrooms and showers is straightforward and uncontroversial. For transgender users, however, it is not clearly so. While there are no reported cases involving transgender users, at the preliminary injunction hearing Governor McCrory, Senator Berger, and Representative Moore indicated their assumption that this was so because transgender users have traditionally been excluded (or excluded themselves) from facilities that correspond with their gender identity. The evidence in the current record, however, suggests the opposite. At least in more recent years, transgender individuals who dress and otherwise present themselves in accordance with their gender identity have generally been accommodated on a case-by-case basis, with educational institutions generally permitting them to use bathrooms and other facilities that correspond with their gender identity unless particular circumstances weigh in favor of some other form of accommodation.

For example, Plaintiffs submitted an affidavit from Monica Walker, the Diversity Officer for public schools in Guilford County, North Carolina, the State's third largest school district, with over 72,000 students in 127 school campuses. (Doc. 22-19 ¶¶ 2–3.) Over the last five years, Ms. Walker has developed a protocol for accommodating transgender students as they undergo the social transition from male to female, or vice versa. (*Id.* ¶¶ 8–11.) This protocol emphasizes the importance of developing a “tailored” plan that addresses the unique needs and circumstances of each case. (*See id.* ¶ 11.) Based on her experience with four transgender students, Ms. Walker indicates that these students typically use bathrooms that correspond with their gender identity. (*Id.*) Ms. Walker has not received any complaints about this arrangement from students or parents, and although every school in Guilford County has single occupancy bathrooms available for any student with privacy concerns, no student has ever requested such an accommodation. (*Id.* ¶¶ 13–16.) This may be because all multiple occupancy bathrooms in Guilford County schools have separate stalls or privacy partitions, such that students are not exposed to nudity in bathrooms. (*See id.*) Although Ms. Walker has yet to deal with questions concerning access to locker rooms, she is confident that the privacy interests of transgender and non-transgender students alike could be accommodated through the same means used to accommodate any student with body image or shyness issues. (*See id.*) In sum, Ms. Walker reports that the practice of tailoring specific accommodations for transgender students on a case-by-case basis in Guilford County has been “seamless.” (*Id.* ¶ 12.) And according to an amicus brief filed by school administrators from nineteen States plus the District of Columbia—including Durham County Schools in North Carolina, another large school district—Guilford County's experience is typical of many school districts from across the country. (*See Doc. 71.*)

This conclusion is also consistent with the experiences of the individual transgender Plaintiffs in this action. All three submitted declarations stating that they used bathrooms, locker rooms, and even dormitory facilities corresponding with their gender identity beginning as early as 2014. (Doc. 22-4 ¶ 15; Doc. 22-8 ¶ 19; Doc. 22-9 ¶¶ 15, 19–20.) No one has reported any incident or complaint from their classmates or the general public. (*See Doc. 22-4* ¶ 30; Doc. 22-8 ¶ 25; Doc. 22-9 ¶ 20.)

This evidence is admittedly anecdotal. It is possible that before Part I, some transgender individuals in North Carolina were denied accommodations and completely excluded from facilities that correspond with their gender identity due to privacy or safety concerns. Also, minors may have received different types of accommodations than adults, and practical considerations may have led to different arrangements for bathrooms as opposed to showers and other facilities. And, it may be that the practice of case-by-case accommodation is a more recent phenomenon, such that other norms prevailed for most of North Carolina's history until the last few years. But Defendants have not offered any evidence whatsoever on these points, despite having four months between the filing of this lawsuit and the hearing on this motion to do so. Indeed, the court does not even have a legislative record supporting the law to consider.<sup>4</sup>

\*5 As a result, the court cannot say that the practices described by Ms. Walker, the school administrators, and the individual transgender Plaintiffs represent an aberration rather than the prevailing norm in North Carolina, at least for the five or more year period leading up to 2016. Rather, on the current record, it appears that some transgender individuals have been quietly using facilities corresponding with their gender identity and that, in recent years, State educational institutions have been accommodating such students where possible.

#### **B. The Charlotte Ordinance and the State's Response**

In November 2014, the Charlotte City Council began considering a proposal to modify that city's non-discrimination ordinances to prohibit discrimination on the basis of marital status, familial status, sexual orientation, gender identity, and gender expression.<sup>5</sup> (Doc. 23-3 at 2.)<sup>6</sup> On March 2, 2015, the proposed ordinance was amended to include the following language: “Notwithstanding the forgoing [sic], this section shall not, with regard to sex, sexual orientation, gender identity, and gender expression, apply to rest rooms, locker rooms, showers, and changing facilities.” (*Id.*) Shortly thereafter, the proposed ordinance failed by a vote of six to five. (*Id.*)

On February 22, 2016, the Charlotte City Council considered a new proposal to revise its non-discrimination ordinances. (Doc. 23-5 at 2–3.) Like the prior proposal, the new proposal added “marital status, familial

status, sexual orientation, gender identity, [and] gender expression” to the list of protected characteristics. (Doc. 23-2 at 1.) Unlike the prior proposal, however, the new proposal did not contain any exceptions for bathrooms, showers, or other similar facilities. (See *id.* at 1–6.) In addition, the new proposal repealed prior rules that exempted “[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private” from Charlotte’s prohibitions against sex discrimination. (*Id.* at 5.) The new proposal, which regulated places of public accommodation and businesses seeking to contract with Charlotte (*id.* at 2–6), passed by a vote of seven to four (Doc. 23-5 at 3)<sup>7</sup> and set an effective date of April 1, 2016 (Doc. 23-2 at 6).

The Charlotte ordinance provoked a swift response from the State. Governor McCrory and several members of the General Assembly strongly condemned the ordinance, which they generally characterized as an affront to both privacy and public safety, and they indicated their desire to see a legislative response to Charlotte’s actions. (See, e.g., Doc. 23-7 at 2; Doc. 23-8 at 2.) The General Assembly was not scheduled to reconvene until April 25, 2016, however, and despite his opposition to the Charlotte ordinance, Governor McCrory declined to exercise his authority to call a special legislative session. (See Doc. 23-16 at 2–3; Doc. 23-18 at 4.) As a result, the General Assembly only reconvened after three-fifths of the members of the House of Representatives requested a special session. (Docs. 23-17 at 2.)<sup>8</sup>

\*6 On March 23, 2016, the General Assembly convened for the special session and moved quickly. (See Doc. 23-19 at 2.) The parties have offered little information on the legislative process, but it appears that members of the House Judiciary Committee were given only a few minutes to read HB2 before voting on whether to send the bill back to the House for a full debate. (See *id.*) That afternoon, the House passed HB2 by a vote of eighty-four to twenty-five after three hours of debate. (Doc. 23-21 at 3.) All Republicans and eleven of the thirty-six Democrats present voted for the bill, while twenty-five Democrats voted against it. (*Id.*) HB2 then passed with unanimous support in the Senate after Democrats walked out in protest. (*Id.*) Governor McCrory signed the bill into law later that day. (*Id.*) The law became effective immediately. HB2 § 5.

### C. HB2’s Effect on North Carolina Law

Despite sweeping rhetoric from both supporters and opponents, a few basic contours of HB2 are apparent.

#### 1. Nondiscrimination Standards Under State Law

First, HB2 modified the State’s nondiscrimination laws. Previously, the State had prohibited discrimination on the basis of race, religion, color, national origin, age, sex, and handicap. See *id.* §§ 3.1. Part III of HB2 modified this language to prohibit discrimination on the basis of “biological sex,” rather than simply “sex.” *Id.* (modifying N.C. Gen. Stat. § 143–422.2). It also extended these nondiscrimination protections, which had previously applied only to the State, to cover private employers and places of public accommodation. See *id.* §§ 3.1-3.3.

Part III also eliminated State common-law causes of action for violations of non-discrimination laws. See *id.* § 3.2 (modifying N.C. Gen. Stat. 143–422.3). This appeared to eliminate the State cause of action for wrongful termination in violation of public policy, although it did not prevent North Carolinians from filing actions under federal non-discrimination laws, whether in State or federal court. This provision has since been repealed. 2016 N.C. Sess. Laws 99 § 1(a).

#### 2. Preemption of Local Ordinances

Parts II and III of HB2 preempt all local ordinances that conflict with the new Statewide nondiscrimination standards, including the Charlotte ordinance that prompted HB2’s passage.<sup>9</sup> Specifically, Part II preempts local non-discrimination requirements for public contractors to the extent that such requirements conflict with State law. HB2 §§ 2.1–2.3. Similarly, Part III preempts local nondiscrimination ordinances for places of public accommodation to the extent that such ordinances conflict with State law. *Id.* §§ 3.3. Collectively, Parts II and III effectively nullified the prohibitions in Charlotte’s ordinance against discrimination on the basis of marital status, familial status, sexual orientation, gender identity, and gender expression.<sup>10</sup>

### 3. Public Bathrooms and Changing Facilities

As discussed above, Parts II and III effectively nullified the controversial portions of the Charlotte ordinance, including its regulation of bathrooms, showers, and other similar facilities among contractors and in places of public accommodation. Part I goes a step further, however, explicitly setting rules for the use of similar facilities operated by State agencies.

Part I provides that all public agencies, including local boards of public education, shall “require” that every “multiple occupancy bathroom or changing facility”<sup>11</sup> be “designated for and only used by persons based on their biological sex.”<sup>12</sup> *Id.* §§ 1.2–1.3. Part I defines “biological sex” as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate.”<sup>13</sup> *Id.* Although Part I allows public agencies to provide separate, single occupancy facilities as an accommodation for individuals who are uncomfortable with their assigned facility, the law does not require the option. *See id.* (stating that public agencies may provide “accommodations such as single occupancy bathroom or changing facilities upon a person’s request due to special circumstances” (emphasis added)). In addition, Part I prohibits agencies from accommodating individuals by permitting them to access multiple occupancy facilities that do not match the sex listed on their birth certificates. *Id.* (“[I]n no event shall [any] accommodation result in the public agency allowing a person to use a multiple occupancy bathroom or changing facility designated ... for a sex other than the person’s biological sex.”). Because the law is limited to State agencies, there is no dispute that private businesses, places of public accommodation, and other persons throughout the State remain free to define “sex” and regulate bathroom and other facility usage as they please, subject to other applicable law.

\*7 At the hearing for this motion, the parties offered differing interpretations of how Part I affects North Carolina law. As discussed below, UNC argues that, at least on its campuses, Part I means only that public authorities must maintain signs on their multiple occupancy bathrooms designated “men” or “women.” Senator Berger and Representative Moore suggested that Part I functions as “a directive” to public agencies that they must “implement policies” on bathroom use. (Doc.

103 at 112.) Ultimately, the United States, Senator Berger, and Representative Moore all agree that, at a minimum, Part I dictates how the trespassing statute applies to transgender individuals’ use of bathrooms.

Before Part I became law, North Carolina had no prohibition against public agencies determining on a case-by-case basis how best to accommodate transgender individuals who wished to use particular bathrooms, showers, or other similar facilities. In addition, transgender individuals who used facilities that did not match the sex listed on their birth certificate could presumably argue that they believed they had permission to enter facilities that matched their gender identity; indeed, as discussed above, a number of transgender students had actual permission from the agencies with authority over the facilities in question.

Part I forecloses these possibilities. Now, public agencies may not provide any accommodation to transgender individuals other than the provision of a separate, single-user facility—though they are not required to do so. Thus, unless the agency that controls the facility in question openly defies the law, any person who uses a covered facility that does not align with his or her birth certificate commits a misdemeanor trespass. Similarly, unless school administrators like Ms. Walker wish to openly defy the law, they cannot give students permission to enter facilities that do not correspond with the sex on their birth certificates and presumably must discipline or punish students who disobey this directive.

#### D. Procedural History

Almost immediately, HB2 sparked multiple overlapping federal lawsuits. On March 28, 2016, ACLU-NC, Equality North Carolina, and the individual transgender Plaintiffs filed this action against Governor McCrory (in his official capacity), UNC,<sup>14</sup> and Attorney General Roy Cooper, alleging that various parts of HB2 discriminate against transgender, gay, lesbian, and bisexual individuals on the basis of sex, sexual orientation, and transgender status in violation of Title IX and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. (Doc. 1.)<sup>15</sup>

On May 9, 2016, the United States filed a separate action against the State, Governor McCrory (in his official capacity), the North Carolina Department of Public

Safety (“NCDPS”), and UNC, seeking a declaration that compliance with Part I constitutes sex discrimination in violation of Title IX, the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13) (“VAWA”), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”). (Doc. 1 in case no. 1:16cv425 (the “425 case”).)

That same day, State officials filed two separate declaratory judgment actions in the United States District Court for the Eastern District of North Carolina. Governor McCrory and Frank Perry, Secretary of NCDPS, filed an action in their official capacities against the United States and the United States Department of Justice (“DOJ”), seeking a declaration that HB2 does not violate Title VII or VAWA (case no. 5:16cv238 (the “238 case”). Meanwhile, Senator Berger and Representative Moore filed a separate lawsuit against DOJ on behalf of the General Assembly, seeking a declaration that HB2 does not violate Title VII, Title IX, or VAWA, as well as declarations that DOJ had violated both the Administrative Procedure Act and various constitutional provisions (case no. 5:16cv240 (the “240 case”). Finally, on May 10, 2016, an organization called North Carolinians for Privacy filed its own action in support of HB2 in the Eastern District, seeking declaratory and injunctive relief against DOJ and DOE related to Title IX, VAWA, the Administrative Procedure Act, and the Religious Freedom Restoration Act (case no. 5:16cv245 (the “245 case”).

\*8 The 240 and 245 cases were subsequently transferred to this court and renumbered 1:16cv844 and 1:16cv845, respectively. This court also granted Senator Berger and Representative Moore’s motion to intervene permissively in both this action (Doc. 44) and the 425 case (Doc. 64 in the 425 case). As a result, Senator Berger and Representative Moore dismissed their separate declaratory action as duplicative of the claims and defenses presented in the 236 and 425 cases, (Doc. 33 in case no. 1:16cv844), leaving three HB2 cases pending before this court. The 238 case remains pending in the Eastern District.

In the midst of all of this procedural fencing, Plaintiffs filed the instant motion for preliminary injunction on May 16, 2016. (Doc. 21.) The motion was fully briefed as of June 27, 2016 (see Doc. 73), and the court began discussions with the parties regarding an appropriate

schedule for a hearing on and consideration of this motion. However, on July 5, 2016—two months after filing its complaint and over three months after the passage of HB2<sup>16</sup>—the United States filed its own motion for preliminary injunction in the 425 case. (Doc. 73 in the 425 case.) The United States’ motion would not be fully briefed until mid-August 2016, and in light of the Defendants’ request for preliminary discovery, consolidation of United States’ motion with Plaintiffs’ motion would likely delay a hearing on the present motion until at least September 2016.

As a result, despite the court’s strong preference to avoid piecemeal litigation of the HB2 cases, the court held a hearing on Plaintiffs’ motion on August 1, 2016, and the court permitted the United States to participate in light of the fact that the 425 case also contains a Title IX claim.<sup>17</sup> The motion is now ready for determination.

## II. ANALYSIS

Plaintiffs ask this court to enjoin Defendants from enforcing Part I until the court issues a final ruling on the merits. (Doc. 22 at 44–45.) Before reaching the merits of Plaintiffs’ motion, however, the court must first address threshold defenses raised by UNC.<sup>18</sup>

### A. Justiciability and Ripeness

[I] As UNC Board of Governors Chairman Louis Bissette has noted, “[UNC] is in a difficult position,” in this case, “caught in the middle between state and federal law.” (Doc. 23-28 at 2.) Neither embracing nor repudiating Part I, UNC argues that while it intends to comply with the law, it does not intend to enforce the law because Part I contains no mechanism to do so. UNC argues that Part I therefore has essentially no effect on its campuses and that this court should not consider the individual transgender Plaintiffs’ Title IX claim for jurisdictional and prudential reasons.<sup>19</sup> For the reasons that follow, the court disagrees.

\*9 [2] [3] [4] “Federal courts are principally deciders of disputes, not oracular authorities. We address particular cases or controversies and may not arbitrate abstract differences of opinion.” *Doe v. Duling*, 782 F.2d 1202, 1205 (4th Cir.1986) (citations and internal quotation marks omitted). This requirement stems from Article III, Section 2 of the United States Constitution and presents

both jurisdictional and prudential limits on the exercise of federal judicial power. Warth v. Seldin, 422 U.S. 490, 498–99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). As a jurisdictional matter, a plaintiff complaining about State conduct must show “some threatened or actual injury resulting from the putatively illegal action.” Id. at 499, 95 S.Ct. 2197 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). For example, where the dispute concerns the validity of a criminal statute, the challenger must show a credible threat of prosecution in order to establish a live case or controversy. Duling, 782 F.2d at 1205–06.

[5] [6] Similarly, the prudential ripeness requirement is designed to prevent courts from “entangling themselves in abstract disagreements over administrative policies” until “an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732–33, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). A case is ripe and fit for judicial decision when the “rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings.” Franks v. Ross, 313 F.3d 184, 195 (4th Cir.2002). In determining whether a case is ripe, the court must consider both “the fitness of the issues for judicial decision” and the “hardship to the parties of withholding court consideration.” Ohio Forestry Ass'n, 523 U.S. at 733, 118 S.Ct. 1665 (quoting Abbott Labs., 387 U.S. at 149, 87 S.Ct. 1507).

Here, UNC points to numerous statements from UNC President Margaret Spellings, including a guidance memorandum sent to the chancellors of all UNC constituent institutions, that Part I “does not contain provisions concerning enforcement” and that the university’s non-discrimination policies, which generally prohibit discrimination on the basis of gender identity, “remain in effect.” (See, e.g., Doc. 38-5 at 1–2.) The guidance memorandum also notes, however, that UNC must “fulfill its obligations under the law unless or until the court directs otherwise.” (Id. at 2.) UNC therefore acknowledges that “University institutions must require every multiple occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.” (Id. at 1 (emphasis added).) President Spellings directed constituent institutions to take three

specific actions under the law: (1) maintain existing single-sex signage on multiple occupancy bathrooms and other similar facilities, (2) provide notice of HB2 to campus constituencies as appropriate, and (3) share information about the locations of single occupancy bathrooms on campus. (See id. at 1–2.)

Despite the assertion that UNC does not intend to “enforce” Part I, UNC’s pronouncements are sufficient to establish a justiciable case or controversy. The university has repeatedly indicated that it will—indeed, it must—comply with State law. (Id. at 1–2.) Although UNC has not changed the words and symbols on its sex-segregated facilities, the meaning of those words and symbols has changed as a result of Part I, and UNC has no legal authority to tell its students or employees otherwise. In light of Part I, the sex-segregated signs deny permission to those whose birth certificates fail to identify them as a match. UNC can avoid this result only by either (1) openly defying the law, which it has no legal authority to do, or (2) ordering that all bathrooms, showers, and other similar facilities on its campuses be designated as single occupancy, gender-neutral facilities. Understandably, UNC has chosen to do neither.

\*10 As a result, although President Spellings promises to “investigate” instances in which individuals are excluded from bathrooms “to determine whether there has been a violation of the University nondiscrimination policy and applicable law” (Doc. 38-1 ¶ 15), this does not help UNC because it has not expressly given any student or employee permission to the use bathrooms, showers, and other facilities consistent with his or her gender identity. To the contrary, UNC has explicitly acknowledged that Part I “remains the law of the State” and that neither UNC nor its non-discrimination policies has “independent power to change that legal reality.” (Doc. 23-27 at 2–3.) Unless and until UNC openly defies the law, the signs that UNC posts on its bathrooms, showers, and other similar facilities render transgender individuals who use facilities that match their gender identities trespassers, thus exposing them to potential punishment (certainly by other authorities, if not by UNC). In addition, if the trespasser is a student, he or she is subject to discipline under one of UNC’s student codes of conduct, which generally prohibit students from violating federal, State, or local laws. (See, e.g., Doc. 67-8 at 3.)

Thus, contrary to UNC's characterizations, this is not a case in which an arcane criminal law lingers on the books for decades with no threat of enforcement. *See, e.g., Duling*, 782 F.2d at 1206 (finding no justiciable case or controversy surrounding a fornication and cohabitation statute when there had been no arrests or prosecutions pursuant to the law for several decades). Nor is this a case in which public agencies do nothing more than "stand ready to perform their general duty to enforce laws." *See id.* Instead, UNC currently instructs the individual transgender plaintiffs that Part I is in effect on UNC's campuses. (*See, e.g., Doc. 67-5 at 3* (memorandum from UNC Chancellor Carol Folt stating, "The memo from UNC General Administration also confirms that the law relating to public restrooms and changing facilities does apply to the University.") ) That UNC has not articulated plans for administering a specific punishment for transgender individuals who violate its policy does not undermine the existence of a justiciable case or controversy. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716–17 (4th Cir.2016) (evaluating the merits of a Title IX claim involving transgender bathroom use without discussing whether the school board had threatened the student with any specific punishment for disobeying the policy), stay and recall of mandate granted, — U.S. —, 136 S.Ct. 2442, — L.Ed.2d —.

[7] These considerations also dictate the ripeness analysis. President Spellings has indicated that she does not intend to take any further action, including promulgating any further guidelines or regulations with regard to Part I, until after this lawsuit concludes. (*Doc. 38-1 at ¶ 16.*) As a result, a delay will not render this case more fit for judicial review. *See Ohio Forestry Ass'n*, 523 U.S. at 733, 118 S.Ct. 1665. In addition, for reasons discussed below, UNC's exclusion of the individual transgender Plaintiffs from sex-segregated facilities that match their gender identity causes them substantial hardship each day the policy is in effect. *See infra* Section II.B.2. As a result, this case is prudentially ripe.

### B. Preliminary Relief

[8] [9] [10] In order to obtain a preliminary injunction, a party must make a "clear showing" that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council,*

*Inc.*, 555 U.S. 7, 21, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). All four requirements must be satisfied in order for relief to be granted. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir.2009), vacated on other grounds, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010). A preliminary injunction is "an extraordinary remedy involving the 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.1991) (citations and internal quotation marks omitted). Plaintiffs must show more than a grave or serious question for litigation; they must "clearly" demonstrate that they are "likely" to succeed on the merits. *Real Truth About Obama*, 575 F.3d at 346–47.

## 1. Likelihood of Success on the Merits

### a. Title IX

\*11 [11] [12] To establish a claim under Title IX, the individual transgender Plaintiffs must show that (1) they were excluded from participation in an education program because of their sex; (2) the educational institution was receiving federal financial assistance at the time of their exclusion; and (3) the improper discrimination caused them harm. *G.G.*, 822 F.3d at 718. UNC and its constituent institutions receive federal financial assistance under Title IX. (*See Doc. 23-27 at 2.*) In addition, for the reasons explained below, UNC's enforcement of Part I has caused medical and other harms to the individual transgender Plaintiffs. *See infra* Section II.B.2. Thus, the primary question for the court is whether the individual transgender Plaintiffs are likely to show that Part I unlawfully excludes them from certain bathrooms, showers, and other facilities on the basis of sex.

[13] Title IX provides: "No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This prohibition against sex discrimination protects employees as well as students. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). As a result, covered institutions may not "limit any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31(b)(7); *see also id.* §

106.31(b)(2) (prohibiting discrimination in the provision of “aid, benefits, or services”). Access to bathrooms, showers, and other similar facilities qualifies as a “right, privilege, advantage, or opportunity” for the purposes of Title IX. G.G., 822 F.3d at 718 n. 4.

[14] “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, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). Thus, “[n]ot all distinctions on the basis of sex are impermissible under Title IX.” G.G., 822 F.3d at 718. For example, the statute itself contains an exception that permits covered institutions to “maintain [ ] separate living facilities for the different sexes.” 20 U.S.C. § 1686. In addition, a DOE regulation states that covered institutions “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.

Until very recently, little to no explicit authority existed regarding the application of Title IX and its related regulations to transgender students and employees. Around 2013, however, DOE began taking the position that covered institutions must treat transgender individuals consistent with their gender identity. (See Doc. 23-29 at 3 (citing Letter from Anurima Bhargava, Chief, U.S. Dep’t of Justice, and Arthur Zeidman, Director, U.S. Dep’t of Educ. Office of Civil Rights, to Dr. Joel Shawn, Superintendent, Arcadia Unified Sch. Dist. (July 24, 2013), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>).

On April 19, 2016, the Fourth Circuit concluded that courts must defer to DOE’s relatively recent position in the context of sex-segregated bathrooms. G.G., 822 F.3d at 723. In G.G., a high school sophomore in eastern Virginia transitioned from female to male, living as a boy in all aspects of life. Id. at 715. School officials initially supported G.G.’s transition and took steps to ensure that teachers and staff treated the student as a boy. Id. School officials also gave G.G. permission to use the boys’ bathrooms, although they made no decision with regard to locker rooms or showers because G.G. did not participate in physical education. Id. & n. 2. G.G. used the boys’ bathrooms without incident for several weeks. Id. at 715–16. At

some point, however, parents and community members began contacting the local school board to complain about G.G.’s use of the boys’ bathrooms. Id. at 716. In response, the school board implemented a policy limiting access to sex-segregated bathrooms and locker rooms based on “biological gender” and requiring its schools to provide “an alternative appropriate private facility” to accommodate students with “gender identity issues.” Id. The school board also mandated a series of steps designed to improve privacy for all students, including adding partitions and privacy strips in bathrooms and constructing additional single occupancy bathrooms. Id.

\*12 Shortly after the school board adopted its new policy, G.G. requested an opinion letter from DOE regarding the application of Title IX to transgender students. See id. at 732 (Niemeyer, J., dissenting in part). On January 7, 2015, DOE responded with an opinion letter that states,

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.

(Doc. 23-29 (the “DOE opinion letter”).) On June 11, 2015, G.G. sued the school board, claiming that the policy of excluding students from bathrooms on the basis of “biological gender” violated Title IX. G.G., 822 F.3d at 717.

[15] The district court dismissed G.G.’s Title IX claim, concluding that the DOE opinion letter is not entitled to deference under the doctrine announced in Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). See G.G., 822 F.3d at 717.<sup>20</sup> The district court concluded that 34 C.F.R. § 106.33, which permits schools to “provide separate toilet, locker room, and shower facilities on the basis of sex,” unambiguously refers to a student’s “birth or biological sex.” 822 F.3d at 719. The district court also reasoned that, even if the meaning of the phrase “on the basis of sex” were ambiguous in this

regulation, then DOE's interpretation would be clearly erroneous and inconsistent with the regulation because " 'on the basis of sex' means, at most, on the basis of sex and gender together, [so] it cannot mean on the basis of gender alone." *Id.*

The Fourth Circuit reversed. *Id.* at 727. The court first concluded that the phrase "on the basis of sex" in § 106.33 is ambiguous because the regulation "is silent as to how a school should determine whether a transgender individual is a male or female." *Id.* at 720. The court then determined that DOE's interpretation, while "novel" and "perhaps not the intuitive one," is not clearly erroneous because a dictionary from 1971 defined the word "sex" as encompassing "morphological, physiological, and behavioral" characteristics. *Id.* at 721–22.<sup>21</sup> Finally, the court concluded that the DOE opinion letter reflects the agency's fair and considered judgment on policy formulation, rather than a convenient litigating position. *Id.* at 722–23. As a result, the court remanded with instructions for the district court to give the DOE opinion letter "controlling weight" with regard to the meaning of § 106.33. *Id.* at 723, 727.

**[16]** On remand, the district court entered a preliminary injunction requiring the school board to allow G.G. to use the boys' bathrooms. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2016 WL 3581852, at \*1 (E.D.Va. June 23, 2016). The Fourth Circuit denied the school board's request to stay that injunction pending appeal. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 16–1733, — Fed.Appx. —, —, 2016 WL 3743189, at \*2 (4th Cir. July 12, 2016). However, on August 3, 2016—two days after the hearing on Plaintiffs' motion in the present case—the Supreme Court stayed the Fourth Circuit's mandate and the district court's preliminary injunction until it could rule on the school board's forthcoming petition for a writ of certiorari. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, — U.S. —, 136 S.Ct. 2442, — L.Ed.2d — (2016). Such intervention is granted where a lower court "tenders a ruling out of harmony with [the Supreme Court's] prior decisions, or [raises] questions of transcending public importance, or [presents] issues which would likely induce [the] Court to grant certiorari." See *Russo v. Byrne*, 409 U.S. 1219, 1221, 93 S.Ct. 21, 34 L.Ed.2d 30 (1972) (Douglas, J.).

**\*13** In light of the foregoing, the fate of *G.G.* is uncertain. But, despite the stay and recall of the mandate, the Supreme Court did not vacate or reverse the Fourth Circuit's decision. See *G.G.*, 136 S.Ct. at 2442. Thus, while other courts may reach contrary decisions, see *Texas v. United States*, No. 7:16cv54, — F.Supp.3d —, — —, 2016 WL 4426495, at \*14–15, (N.D.Tex. Aug. 21, 2016) (adopting the view advanced in Judge Niemeyer's dissenting opinion from *G.G.*),<sup>22</sup> at present *G.G.* remains the law in this circuit. See *United States v. Collins*, 415 F.3d 304, 311 (4th Cir.2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court."); *Friel Prosthetics, Inc. v. Bank of America*, No. CIV.A.DKC 2004–3481, 2005 WL 348263, at \*1 & n. 4 (D.Md. Feb. 9, 2005) (noting that a stay of a Fourth Circuit mandate in a separate case would not "prevent the Fourth Circuit decision from having precedential value and binding authority" in the present case); see also *Abukar v. Ashcroft*, No. 01–242, 2004 WL 741759, at \*2–3 (D.Minn. Mar. 17, 2004) (assuming that an Eighth Circuit opinion in a separate case retained its precedential value despite the Eighth Circuit's subsequent decision to recall and stay its own mandate in light of impending Supreme Court review).

Consequently, to evaluate the individual transgender Plaintiffs' Title IX claim, the court must undertake a two-part analysis. First, the court must determine whether Part I violates Title IX's general prohibition against sex discrimination. See 20 U.S.C. § 1681(a). Second, if Part I violates Title IX's general prohibition against sex discrimination, the court must then determine whether an exception to that general prohibition applies. See *Jackson*, 544 U.S. at 175, 125 S.Ct. 1497 ("Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition."). The only potentially applicable exception cited by the parties comes from a DOE regulation that allows schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. However, in light of *G.G.*, this court must give controlling weight to the DOE opinion letter, which states that schools "generally must treat transgender students consistent with their gender identity" (Doc. 23-29 at 3), when considering the scope of this exception during the second stage of the analysis.

Under this framework, the Title IX analysis in this case is relatively straightforward. Part I requires schools to segregate multiple occupancy bathrooms, showers, and other similar facilities on the basis of sex. HB2 § 1.2–1.3. Because the provision of sex-segregated facilities necessarily requires schools to treat individuals differently depending on their sex, Part I falls within Title IX's general prohibition against sex discrimination. The only potentially applicable exception comes from § 106.33, which permits sex-segregated bathrooms and other facilities. But G.G. and the DOE opinion letter teach that, for the purposes of this regulation, a school generally must treat students consistent with their gender identity. (See 822 F.3d at 723; Doc. 23-29 at 3.) Part I, by contrast, requires schools to treat students consistent with their birth certificates, regardless of gender identity. HB2 §§ 1.2–1.3. Thus, although Part I is consistent with the DOE opinion letter when applied to most students, it is inconsistent with the DOE opinion letter as applied to the individual transgender Plaintiffs, whose birth certificates do not align with their gender identity. As a result, Part I does not qualify for the regulatory exception—as interpreted by DOE—and therefore appears to violate Title IX when applied to the individual transgender Plaintiffs.

\*14 Defendants raise a number of objections to the application of G.G. in this case, but none is sufficient at this time.

Defendants first argue that the Fourth Circuit's holding in G.G. is limited to bathrooms and does not extend to showers or other similar facilities. True, G.G. concluded that “the [DOE'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.” 822 F.3d at 723. Further, the court noted that because G.G. did not seek access to other facilities, “[o]nly restroom use is at issue in this case.” Id. at 715 n. 2. And as to the objections raised, the court commented, “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.” Id. at 723 n. 10. Consequently, the district court only ordered the school board to allow G.G. to use boys' bathrooms. G.G., 2016 WL 3581852, at \*1.

But the indispensable foundation of G.G.'s holding is that DOE's interpretation of “sex” in § 106.33, as outlined

in the DOE opinion letter, is entitled to controlling weight. 822 F.3d at 723. As the dissent in G.G. aptly noted, “acceptance of [G.G.'s] 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.” Id. at 734 (Niemeyer, J., dissenting in part). In fact, the majority also agreed with this point. Id. at 723 (“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.”). Moreover, the passage of the DOE opinion letter—which G.G. requires be accorded controlling weight—explicitly includes “locker rooms” and “shower facilities” among the “situations” in which students must be treated consistent with their gender identity. (Doc. 23-29 at 3.)<sup>23</sup>

To be sure, the G.G. court did note that the bathrooms at the Virginia school were separately partitioned. 822 F.3d at 716. But it is difficult to find any articulation of how that fact was important to the court's reasoning. Although showers and changing rooms clearly present obvious practical concerns that differ from bathrooms, both the logic and holding of G.G. make no distinction between facilities. The court made this point clear by noting that in applying its analytical framework it would not weigh “privacy interests or safety concerns—fundamentally questions of policy” which it said was “a task committed to the agency, not the courts.” Id. at 723–24.<sup>24</sup>

\*15 [17] While district courts are often said to be the “front line experimenters in the laboratories of difficult legal questions,” Hively v. Ivy Tech Comm. Coll., South Bend, — F.3d —, —, 2016 WL 4039703, at \*4 (7th Cir.2016), they are bound to follow circuit precedent. To accept Defendants' argument—which is more an attack on G.G.'s reasoning than a legal distinction—would violate that obligation. Therefore, at this early stage on a motion for preliminary relief pending trial, it is enough to say that G.G. requires Title IX institutions in this circuit to generally treat transgender students consistent with their gender identity, including in showers and changing rooms. (Doc. 23-29 at 3.) Defendants do not deny that Part I bars Title IX institutions from attempting to accommodate such students in any fashion, except in the limited form of a separate facility that is optional

in the State's discretion. See HB2 §§ 1.2–1.3. Thus, G.G. indicates that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim.

Even Plaintiffs accept that the State's interests are legitimate and seem to acknowledge that there may be practical limits to the application of DOE's guidance, especially where minors are involved. (See Doc. 103 at 15–21.)<sup>25</sup> At the hearing, counsel for the amici school administrators represented that public school showers and changing rooms—facilities in which students are likely to be partially or fully nude—today often contain partitions, dividers, and other mechanisms to protect privacy similar to bathrooms. (See Doc. 103 at 137–38.) This suggests that, as in G.G., other forms of accommodation might be available to protect privacy and safety concerns. See G.G., 822 F.3d at 723 (agreeing 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” and concluding that “[i]t is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach” to grant DOE's interpretation of its regulations controlling weight).<sup>26</sup> Ultimately, the question of determining the full scope of transgender users' rights to these more intimate facilities under DOE's interpretation—as to which the State has significant legitimate interests—is not before the court. For now, it suffices to say that Part I's blanket ban that forecloses any form of accommodation for transgender students other than separate facilities likely violates Title IX under G.G.

Defendants also note that the school board policy in G.G. did not include any criteria for determining the “biological gender” of particular students. See 822 F.3d at 721–22. By contrast, Part I includes a simple, objective criterion—the sex listed on the individual's birth certificate—for determining an individual's “biological sex.” HB2 §§ 1.2–1.3. Defendants are correct on this point. But the holding of G.G. did not turn on any supposed ambiguity in the school board's policy. Instead, G.G. rested on the Fourth Circuit's determination that the DOE opinion letter is entitled to controlling weight under Auer. 822 F.3d at 723. The DOE opinion letter does not even remotely suggest that schools may treat students inconsistent with their gender identity so long as the school has clear criteria for determining an individual's “biological sex.”

Defendants next argue that G.G. did not involve any constitutional challenges to DOE regulations or the DOE opinion letter. True, the Fourth Circuit noted the absence of such challenges in G.G., see id. at 723–24, whereas Defendants did raise such issues in their answer and counterclaims (see Doc. 54 ¶¶ 120–25). But Defendants have not raised any constitutional defenses in their responses to the individual transgender Plaintiffs' motion for preliminary injunction, and Plaintiffs therefore have not yet responded to these issues.<sup>27</sup> The court cannot ignore G.G. and simply assume that Defendants will prevail on constitutional defenses that they may or may not develop at some point in the future. See Native Ecosystems Council & All. for the Wild Rockies v. U.S. Forest Serv., No. 4:11-cv-212, 2011 WL 4015662, at \*10 n. 10 (D.Idaho Sept. 9, 2011) (declining to consider claims not raised in a party's brief for the purposes of a preliminary injunction but preserving those claims for the remainder of the case); see also Carter v. Lee, 283 F.3d 240, 252 n. 11 (4th Cir.2002) (contentions not raised in a party's opening brief are generally considered to be waived). Of course, Defendants may ultimately develop successful constitutional defenses at a later stage of the proceedings.

\*16 Finally, Defendants argue that this case differs from G.G. because that case involved no major complaints or safety concerns from students. Defendants are correct, though community members certainly raised these kinds of objections. See G.G., 822 F.3d at 715–16. But on this record, Defendants have not offered sufficient evidence to distinguish Plaintiffs' factual circumstances, or those pertaining to anyone else in North Carolina for that matter, from those in G.G.<sup>28</sup> To the contrary, the current record indicates that the individual transgender Plaintiffs used bathrooms and locker rooms corresponding with their gender identity without complaint for far longer than G.G. used the boys' bathrooms at his school. (Compare Doc. 22-4 ¶¶ 15, 30 (approximately five months), and Doc. 22-8 ¶¶ 19, 25 (approximately eighteen months), and Doc. 22-9 ¶¶ 15, 19–20 (same), with G.G., 822 F.3d at 715–16 (seven weeks). Moreover, as noted above and like the situation in G.G., bathroom, shower, and other facilities are often separately partitioned to preserve privacy and safety concerns. (See Doc. 103 at 138; Doc. 22-19 ¶ 14.) Finally, the Fourth Circuit's analysis in G.G. did not rest on the specific circumstances of that case or the wisdom of DOE's position, but rather on the deference owed to the DOE opinion letter. Id. at 723–24 (“[T]he weighing

of privacy interests or safety concerns — fundamentally questions of policy—is a task committed to the agency, not the courts. ... 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.”).

\* \* \*

G.G. compels the conclusion that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim. Part I's wholesale ban on access to facilities is inconsistent with DOE's guidance on Title IX compliance under G.G. and precludes educational institutions from attempting to accommodate particular transgender individuals who wish such accommodation in bathrooms and other facilities.<sup>29</sup>

#### b. Constitutional Claims

In addition to their Title IX claim, Plaintiffs also seek access to sex-segregated facilities at public rest stops and other entities not covered by Title IX. As a result, despite granting relief under Title IX, the court must also consider Plaintiffs' constitutional claims. The constitutional claims in this case raise novel and difficult questions in a context underdeveloped in the law. As a practical matter, therefore, Plaintiffs' task of presenting the kind of “clear showing” necessary to justify preliminary relief, Winter, 555 U.S. at 22, 129 S.Ct. 365, is even more difficult in this case. Thus, this court is more cautious to act where the application of existing principles of law to new areas is uncertain and novel, particularly in the context of a preliminary injunction. See Capital Associated Indus. v. Cooper, 129 F.Supp.3d 281, 288–89 (M.D.N.C.2015) (“Where, as in this case, ‘substantial issues of constitutional dimensions’ are before the court, those issues ‘should be fully developed at trial in order to [e]nsure a proper and just resolution.’ ” (quoting Wetzel v. Edwards, 635 F.2d 283, 291 (4th Cir.1980))); see also Gantt v. Clemson Agr. Coll. of S.C., 208 F.Supp. 416, 418 (W.D.S.C.1962) (“On an application for preliminary injunction, the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.”).

#### i. Equal Protection

\*17 [18] [19] [20] The Fourteenth Amendment provides that no State may “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. However, this broad principle “must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). As a result, the Supreme Court has “attempted to reconcile the principle with the reality” by prescribing different levels of scrutiny depending on whether a law “targets a suspect class.” Id. Laws that do not target a suspect class are subject to rational basis review, and courts should “uphold the legislative classification so long as it bears a rational relation to some legitimate end.” Id. By contrast, laws that target a suspect class, such as race, are subject to strict scrutiny. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

[21] [22] [23] [24] It is well settled that classifications based on sex are subject to intermediate scrutiny. See United States v. Virginia, 518 U.S. 515, 532–33, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Under intermediate scrutiny, the State must demonstrate that the challenged law serves “ ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’ ” Id. at 533, 116 S.Ct. 2264 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)). Unlike strict scrutiny, the government is not required to show that the law is the “least intrusive means of achieving the relevant government objective.” United States v. Staten, 666 F.3d 154, 159 (4th Cir.2011) (citations and internal quotation marks omitted). “In other words, the fit needs to be reasonable; a perfect fit is not required.” Id. at 162. Nevertheless, “[t]he burden of justification is demanding and it rests entirely on the State.” Virginia, 518 U.S. at 533, 116 S.Ct. 2264. In addition, the justification must be “genuine, not hypothesized or invented post hoc in response to litigation.” Id. Finally, the justification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” Id.

[25] Here, Part I classifies citizens on the basis of “biological sex” and requires that each sex use separate multiple occupancy bathrooms, showers, and other similar facilities. HB2 §§ 1.2–1.3. Because Part I facially classifies and discriminates among citizens on the basis of sex, intermediate scrutiny applies.<sup>30</sup> See *Virginia*, 518 U.S. at 532–33, 116 S.Ct. 2264.

[26] There is no question that the protection of bodily privacy is an important government interest and that the State may promote this interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions. See, e.g., *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993) (“The point is illustrated by society’s undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.”); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir.1989) (“Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.”); see also *Doe v. Luzerne Cty.*, 660 F.3d 169, 176–77 (3d Cir.2011) (observing that several circuits have recognized “a constitutionally protected privacy interest in [one’s] partially clothed body”); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir.1992) (stating that “[t]he right to bodily privacy is fundamental” and noting that “common sense” and “decency” protect a parolee’s right not to be observed by an officer of the opposite sex while producing a urine sample); *York v. Story*, 324 F.2d 450, 455 (9th Cir.1963) (“The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”). This interest is particularly strong with regard to minors. See, e.g., *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.”); *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir.1980) (stating that it “does not take a constitutional scholar” to conclude that a strip search invades a student’s privacy rights). At the hearing on this motion, Plaintiffs acknowledged that the practice of segregating bathrooms and other similar facilities on the basis of sex promotes this government interest. (See Doc. 103 at 15–19.)

\*18 All parties agree that bodily privacy qualifies as an important State interest and that sex-segregated facilities are substantially related to that interest.<sup>31</sup> But the relevant authorities do not define “sex” or explicitly explain which differences between men and women give rise to the State’s interest in separating the sexes for privacy purposes; generally, these cases simply observe that individuals of one sex have a privacy interest in being separated from “the other sex.” See, e.g., *Lee*, 641 F.2d at 1119. Not surprisingly, then, the parties disagree about which definition of “sex” promotes the State’s interest in bodily privacy. Defendants contend that bodily privacy interests arise from physiological differences between men and women, and that sex should therefore be defined in terms of physiology for the purposes of bathrooms, showers, and other similar facilities. Plaintiffs, by contrast, implicitly contend that bodily privacy interests arise from differences in gender identity, and that sex should therefore be defined in terms of gender identity for the purposes of these facilities.

To support their position, Plaintiffs submitted expert declarations stating that, from a “medical perspective,” gender identity is the only “appropriate” characteristic for distinguishing between males and females. (See, e.g., Doc. 22-1 ¶ 23.) Defendants have indicated their strong disagreement with this position, though they have not yet offered any evidence on this point in this case.<sup>32</sup> But regardless of the characteristics that distinguish men and women for “medical” purposes, Supreme Court and Fourth Circuit precedent supports Defendants’ position that physiological characteristics distinguish men and women for the purposes of bodily privacy.

Although the Supreme Court has never had an occasion to explicitly explain which differences between men and women justify the decision to provide sex-segregated facilities, the Court has generally assumed that the sexes are primarily defined by their differing physiologies. In *Virginia*, for example, the Court rejected the notion that women were not suited for education at the Virginia Military Institute (“VMI”). See 518 U.S. at 540–46, 116 S.Ct. 2264; see also *id.* at 533, 116 S.Ct. 2264 (stating that laws “must not rely on overbroad generalizations about the different talent, capacities, or preferences of males and females.”). Even while rejecting stereotypical assumptions about supposed “inherent differences” between men and women, the Court acknowledged, “Physical differences between men and women ... are enduring,” adding that the

“two sexes are not fungible.” *Id.* The Court then linked these physiological differences to privacy considerations, adding, “Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.” *Id.* at 550 n. 19, 116 S.Ct. 2264.

*Virginia* is not the only Equal Protection case to distinguish between the sexes on the basis of physiology. In *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001), the Court upheld an Immigration and Naturalization Service (“INS”) policy that imposed “a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother.” *Id.* 59–60, 121 S.Ct. 2053. The Court held that the government’s “use of gender specific terms” is constitutionally permissible when the relevant law “takes into account a biological difference” between men and women. *Id.* at 64, 121 S.Ct. 2053. The Court rejected the argument that the INS policy reflected stereotypes about the roles and capacities of mothers and fathers, stating that “the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis.” *Id.* at 68, 121 S.Ct. 2053. Instead, the Court found, “There is nothing irrational or improper in the recognition that at the moment of birth ... the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.” *Id.* Finally, the Court concluded:

\*19 To fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a

real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

*Id.* at 73, 121 S.Ct. 2053.

The Court’s decisions in *Virginia* (1996) and *Nguyen* (2001) are not merely relics of an earlier, less enlightened time when courts did not have the benefit of modern medical science. Rather, as recently as January 2016, the Fourth Circuit cited *Virginia* approvingly while concluding that physiological differences justified treating men and women differently in some contexts. See *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir.2016). In *Bauer*, a male applicant “flunked out of the FBI Academy after falling a single push-up short of the thirty required of male Trainees.” *Id.* at 342. The applicant sued, noting that his performance would have qualified him under the different physical fitness standards applied to female applicants. *Id.* The Fourth Circuit found that different standards for men and women arose from the FBI’s efforts to “normalize testing standards between men and women in order to account for their innate physiological differences,” such that an approximately equal number of men and women would pass the tests. *Id.* at 343. In light of this, the Fourth Circuit concluded that the FBI’s policy was permissible because “equally fit men and women demonstrate their fitness differently.” *Id.* at 351. In concluding that the FBI could distinguish between men and women on the basis of physiology, the court explained:

Men and women simply are not physiologically the same for the purposes of physical fitness programs. ... The Court recognized [in *Virginia*] that, although Virginia’s use of ‘generalizations about women’ could not be used to exclude them from VMI, some differences between the sexes were real, not perceived, and therefore could require accommodations.

*Id.* at 350.<sup>33</sup>

In light of the foregoing, it appears that the privacy interests that justify the State’s provision of sex-segregated bathrooms, showers, and other similar facilities arise from physiological differences between men and women, rather

than differences in gender identity. See *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264; *Nguyen*, 533 U.S. at 73, 121 S.Ct. 2053; *Bauer*, 812 F.3d at 350. The Fourth Circuit has implicitly stated as much, albeit in dicta, noting:

When ... a gender classification is justified by acknowledged differences [between men and women], identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender.

The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each that is different. Therefore, any analysis of the nature of a specific facility provided in response to a justified purpose, must take into account the nature of the difference on which the separation is based ....

\*20 *Faulkner*, 10 F.3d at 232. In fact, even Plaintiffs' counsel acknowledged the State's interest in, for example, ensuring that "12-year-old girls who are not familiar with male anatomy" are not exposed to male genitalia by "somebody older who's showing that to them, a mature adult." (Doc. 103 at 24–25.) As a result, it appears that the constitutionality of Part I depends on whether the law's use of birth certificates as a proxy for sex is substantially related to the State's privacy interest in separating individuals with different physiologies.

There is little doubt that Part I is substantially related to the State's interest in segregating bathrooms, showers, and other similar facilities on the basis of physiology. By Plaintiffs' own allegations, "The gender marker on a birth certificate is designated at the time of birth generally based upon the appearance of external genitalia." (Doc. 9 ¶ 26; see also Doc. 22-1 ¶ 14.) Plaintiffs contend that birth certificates are an "inaccurate proxy for an individual's anatomy" because some transgender individuals have birth certificates that do not reflect their external physiology, either because (1) they were born in a State that permits them to change the sex on their birth certificates without undergoing sex reassignment surgery, or (2) they were born in a State that does not permit them to change the sex on their birth certificates, regardless of whether they undergo sex reassignment surgery. (Doc. 22 at 32-33.) But even if the court assumes (contrary to the evidence in the record) that no transgender person

possesses a birth certificate that accurately reflects his or her external physiology, Part I would still be substantially related to the State's interest because, by Plaintiffs' own estimate, only 0.3% of the national population is transgender. (Doc. 23-37 at 2.) For the remaining 99.7% of the population, there is no evidence that the sex listed on an individual's birth certificate reflects anything other than that person's external genitalia. Without reducing the "reasonable fit" requirement to a numerical comparison, it seems unlikely that a law that classifies individuals with 99.7% accuracy is insufficient to survive intermediate scrutiny. See *Staten*, 666 F.3d at 162 ("In other words, the fit needs to be reasonable; a perfect fit is not required.").

Finally, the privacy interests discussed above do not appear to represent a post hoc rationalization for Part I. See *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264 (requiring that a justification be "genuine, not hypothesized or invented post hoc in response to litigation"). Plaintiffs contend that Part I "effectively seeks to define transgender individuals out of existence and shut them out from public life."<sup>34</sup> (Doc. 22 at 35.) As a preliminary matter, it is hard to infer legislative intent based on the current record which, as noted above, contains little information about the legislative process leading to HB2's passage. The preliminary record does contain a few examples of objectionable statements by some legislators in media outlets, though these statements generally express hostility toward "the liberal agenda" and the "homosexual community" rather than transgender individuals. (See, e.g., Doc. 23-7 at 2; Doc. 23-15 at 2.) But the record also contains many statements, some by these same legislators and others by legislative leaders and Governor McCrory, reflecting an apparently genuine concern for the privacy and safety of North Carolina's citizens. (See, e.g., Doc. 23-7 at 2 (stating that the Charlotte ordinance "has created a major public safety issue"); Doc. 23-15 at 2 ("The Charlotte ordinance just violates, to me, all basic human principles of privacy and it just has so many unintended consequences."); Doc. 23-16 at 2 ("While special sessions are costly, we cannot put a price tag on the safety of women and children."); *id.* at 3 ("We need to respect the privacy of women and children and men in a very private place, and that's our restrooms and locker rooms.")) In light of the many contemporaneous statements by State leaders regarding privacy and the substantial relationship between Part I and the State's privacy interests, Plaintiffs have not clearly shown that privacy was an afterthought or a pretext invented after the fact solely for litigation

purposes. Nor does the court infer improper motive simply from the fact that Part I negatively impacts some transgender individuals.<sup>35</sup> See Romer, 517 U.S. at 631, 116 S.Ct. 1620 (“[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”).

\*21 In sum, Supreme Court and Fourth Circuit precedent support the conclusion that physiological differences between men and women give rise to the privacy interests that justify segregating bathrooms, showers, and other similar facilities on the basis of sex. In addition, Plaintiffs admit that the vast majority of birth certificates accurately reflect an individual’s external genitalia. Although the correlation between genitalia and the sex listed on a person’s birth certificate is not perfect in every case, there is certainly a reasonable fit between these characteristics, which is what the law requires. See Staten, 666 F.3d at 162 (“In other words, the fit needs to be reasonable; a perfect fit is not required.”). At this preliminary stage, and in light of existing case law, Plaintiffs have not made a clear showing that they are likely to succeed on their Equal Protection claim.

## ii. Due Process

[27] [28] The Fourteenth Amendment provides that no State may “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The Supreme Court has long held that, in addition to requiring the government to follow fair procedures when taking certain actions, the Due Process Clause also “bar[s] certain government actions regardless of the fairness of the procedures used to implement them.” Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). As a result, a law that burdens a fundamental right is subject to strict scrutiny and cannot be upheld unless the State demonstrates that it is narrowly tailored to serve a compelling interest. See Carey v. Population Servs. Int’l, 431 U.S. 678, 686, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir.1990). By contrast a law that does not burden a fundamental right is subject only to rational basis review, and a court must uphold such a law “so long as it bears a rational relation to some legitimate end.” Romer, 517 U.S. at 631, 116 S.Ct. 1620.

For the reasons explained above, the court concludes that Part I is substantially related to an important government interest. Because Part I passes intermediate scrutiny, the law necessarily clears the lower hurdle of rational basis review. See Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 907 (9th Cir.2007); Contest Promotions, LLC v. City and Cty. of San Francisco, 100 F.Supp.3d 835, 849 (N.D.Cal.2015). As a result, in order to warrant preliminary relief, Plaintiffs must make a clear showing that Part I burdens a fundamental right and therefore triggers strict scrutiny.

Plaintiffs argue that Part I burdens two separate fundamental rights. First, they argue that Part I burdens a fundamental right to informational privacy by forcing transgender individuals to use bathrooms in which they will appear out of place, thereby disclosing their transgender status to third parties. Second, they argue that Part I violates a right to refuse unwanted medical treatment because many States, including North Carolina, require transgender individuals to undergo sex reassignment surgery before changing the sex on their birth certificates. Each argument will be addressed in turn.

## (a) Informational Privacy

[29] [30] The constitutional right to privacy protects, among other things, an individual’s “interest in avoiding disclosure of personal matters.” Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). “The right to privacy, however, is not absolute.” Walls, 895 F.2d at 192. Instead, the constitutional right to privacy is only implicated when State action compels disclosure of information of a “fundamental” nature. Id. “The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.” Id. The Fourth Circuit has held that, as a “first step” in determining whether a particular category of information is entitled to constitutional protection, courts should examine whether the information “is within an individual’s reasonable expectations of confidentiality.” Id.

\*22 Plaintiffs contend that a person’s transgender status constitutes sensitive medical information and that this type of information is subject to constitutional protection. They cite various cases in which courts held that information qualifies for constitutional protection when

it is of a sexual, personal, or humiliating nature, or when the release of the information could subject the person to a risk of bodily harm. See Powell v. Schriver, 175 F.3d 107, 111 (2d Cir.1999) (“[T]he right to confidentiality includes the right to protection regarding information about the state of one’s health.”) (quoting Doe v. City of New York, 15 F.3d 264, 267 (2d Cir.1994)); Love v. Johnson, 146 F.Supp.3d 848, 853 (E.D.Mich.2015). These courts concluded that an individual’s transgender status qualifies for constitutional protection because such information is of a private, sexual nature and disclosure of this information could subject a transgender person to ridicule, harassment, or even bodily harm. See Powell, 175 F.3d at 111 (“Like HIV status ... transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others.”); Love, 146 F.Supp.3d at 856; see also K.L. v. Alaska, Dep’t of Admin., Div. of Motor Vehicles, No. 3AN–11–05341, 2012 WL 2685183, at \*6 (Alaska Super.Ct. Mar. 12, 2012) (concluding that an individual’s transgender status qualifies for privacy protection under Alaska law). In Love, for example, the court considered a Michigan law that prevented individuals from changing the sex on their driver’s license.<sup>36</sup> 146 F.Supp.3d at 856–57. The court concluded that this policy burdened Due Process privacy interests because it forced transgender individuals to tacitly reveal their transgender status whenever they displayed their driver’s licenses to others. Id.; see also K.L., 2012 WL 2685183 at \*4–7 (same).

None of these cases applied Fourth Circuit law, however, and the Fourth Circuit’s decision in Walls casts doubt on the validity of these cases in this circuit. In Walls, a public employee was fired after refusing to complete a background check that included questions about her prior marriages, divorces, debts, criminal history, and sexual relationships with same-sex partners. 895 F.2d at 190. The employee brought an action under 42 U.S.C. § 1983 against her employer, claiming that the questionnaire violated her right to privacy. Walls, 895 F.2d at 189–92. The Fourth Circuit explained that the “right to privacy protects only information with respect to which the individual has a reasonable expectation of privacy.” Id. at 193. The court therefore concluded that the right to privacy did not protect the information sought in the agency’s questionnaire, including questions about prior marriages, divorces, and children, “to the extent that this information is freely available in public records.” Id.

[31] Walls suggests that Part I does not burden a fundamental privacy interest, at least under current Fourth Circuit law. Plaintiffs argue that Part I discloses an individual’s transgender status to third parties by revealing the sex on their birth certificates through their choice of bathroom; when a stereotypically-feminine appearing individual uses a men’s bathroom, Plaintiffs argue, third parties will know that the individual has a male birth certificate and infer that the person is transgender. (See Doc. 9 at ¶¶ 223–24.) But pursuant to Walls, individuals have no constitutionally-protected privacy interest in information that is freely available in public records. 895 F.2d at 193. And although the parties have not addressed this issue, the sex listed on an individual’s birth certificate appears to be freely available in public records, at least if the individual was born in North Carolina. See N.C. Gen. Stat. § 130A–93(b) (providing that all birth data collected by the State qualifies as public records except for the names, addresses, and social security numbers of children and parents); see also id. § 132-1(b) (providing that all public records “are the property of the people” and requiring that the public be given access to such information “free or at minimal cost unless otherwise specifically provided by law”).

\*23 As a result, regardless of whether the court finds the reasoning in Love and K.L. persuasive, the sex listed on a person’s birth certificate does not appear to qualify for constitutional protection under Walls. Plaintiffs cite general statements about privacy from Walls, but they overlook the obvious question of why the rule the court actually applied in that case should not govern this case as well. (See Doc. 22 at 36–38; Doc. 73 at 36–37.) It is possible that, with further development, Plaintiffs may be able to sufficiently distinguish Walls and demonstrate that the rule from that case should not apply outside of the employment context. For example, the policies at issue in Love and K.L. arguably have more in common with Part I than Walls, which dealt with an employment background check—a situation in which a third party can reasonably be expected to know the individual’s name, address, and other identifying information that would make a public records search more practicable. Walls, 895 F.2d at 193–95.

On the other hand, there are also significant distinctions between this case and the cases cited by Plaintiffs. Unlike Part I, most of Plaintiffs’ cases involved State actors

who intentionally revealed or threatened to reveal private information. *See, e.g., Powell*, 175 F.3d at 109–11 (prison guard openly discussed an inmate's transgender status in the presence of other inmates); *Sterling v. Borough of Minersville*, 232 F.3d 190, 192, 196 (3d Cir.2000) (police officer threatened to tell an arrestee's family that the arrestee was gay). Even *Love* and *K.L.*, Plaintiffs' most factually-analogous cases, challenged policies governing the modification of State documents rather than the circumstances in which a State may rely on those documents. *Love* 146 F.Supp.3d at 856; *K.L.*, 2012 WL 2685183 at \*4–8. *Love* held that Michigan must allow transgender individuals to change the sex on their driver's license so that they would not have to reveal their transgender status during traffic stops; plaintiffs did not argue, and the court did not hold, that the State should be enjoined from asking drivers for identification during traffic stops. *See* 146 F.Supp.3d at 856; *see also K.L.*, 2012 WL 2685183 at \*4–8 (same).

Unlike the plaintiffs in *Love* and *K.L.*, Plaintiffs challenge North Carolina's ability to use birth certificates as an identifying document in the context of bathrooms, showers, and other facilities, rather than its rules for altering the information contained in the birth certificate itself. This highlights a potential conceptual difficulty with Plaintiffs' Due Process theories. Even under Part I, an individual's choice of bathroom does not directly or necessarily disclose whether that person is transgender; it merely discloses the sex listed on the person's birth certificate. Part I does not disclose medical information about any persons whose gender identity aligns with their birth certificate, either because they are not transgender or because they have successfully changed their birth certificate to match their gender identity (with or without sex reassignment surgery). Nor does Part I disclose medical information about transgender individuals whose name, appearance, or other characteristics do not readily identify their gender identity. Part I could only disclose an individual's transgender status inasmuch as third parties are able to infer as much in light of the person's birth certificate and appearance. Thus, it is not readily apparent to what extent any Due Process concerns are attributable to Part I as opposed to the laws that govern the modification of birth certificates.

In light of the foregoing, Plaintiffs have not clearly shown that they are likely to succeed on the merits of their informational privacy claim. *See Winter*, 555

U.S. at 20–22, 129 S.Ct. 365 (stating that a preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief” (emphasis added)). The law in this area is substantially underdeveloped, however, and the parties devoted relatively little attention to this claim both in their briefs and at the hearing on this matter. Although Plaintiffs have not demonstrated that they are entitled to preliminary relief on this claim, their arguments and authorities raise substantial questions that merit additional consideration. As a result, the court will reserve ruling on Plaintiffs' informational privacy claim at this time so that the parties may submit additional briefing according to the schedule outlined in Section III below.

### (b) Unwanted Medical Treatment

\*24 Plaintiffs also contend that Part I violates transgender individuals' constitutional right to refuse unwanted medical treatment because North Carolina and many other States require sex reassignment surgery before the sex on a person's birth certificate may be changed. (Doc. 9 ¶¶ 228–34; Doc. 22 at 39.)

The parties' arguments on this issue are even less developed than those pertaining to informational privacy, with just three paragraphs devoted to the issue in the parties' principal briefs combined. (*See* Doc. 22 at 38–39; Doc. 55 at 18.) Plaintiffs rely almost exclusively on *United States v. Charters*, 829 F.2d 479 (4th Cir.1987). In *Charters*, the Fourth Circuit held that a mentally ill prisoner had a Due Process interest in refusing the State's efforts to medicate him with antipsychotic drugs against his will. *Id.* at 490–500. In reaching this decision, the court applied principles derived from the “rights to freedom from physical invasion and freedom of thought as well as the right to privacy protected by the Constitution and the common law.” *Id.* at 490. From these principles, the court observed, “The right to refuse medical treatment has been specifically recognized as a subject of constitutional protection.” *Id.* at 491.

[32] Governments assuredly must meet heightened scrutiny before forcibly medicating prisoners, or any citizens for that matter, against their will. But Plaintiffs have not shown how this holding applies to Part I, which does not address medical treatment at all. True, Part I may require some transgender individuals (who

otherwise do not benefit from the court's injunction as to Title IX facilities) to undergo potentially unwanted medical treatment if they wish to access public bathrooms, showers, and other similar facilities that align with their gender identity. But they are free to use facilities that align with their biological sex, and they may have access to single-user facilities. As much as one sympathizes with the plight of these transgender individuals, this degree of "compulsion" is far removed from the situation in Charters, where a captive prisoner was strapped down and forced to submit to medication against his will. See Charters, 829 F.2d at 482–84. If the Due Process Clause were implicated any time an individual must undergo medical treatment in order to access a desired benefit or service, it would cast serious doubts on a wide variety of laws. See, e.g., N.C. Gen. Stat. § 130A–155 (requiring schools and child care facilities to ensure that children have received appropriate vaccines before accepting them as students); 19A N.C. Admin. Code § 3B.0201(a)(3) (requiring some individuals to wear corrective lenses in order to obtain a driver's license).<sup>37</sup>

At a minimum, further development of Plaintiffs' argument is necessary before the court can determine whether Charters prevents the State from enforcing Part I. As with Plaintiffs' informational privacy claim, the court will reserve ruling to give the parties an opportunity to submit additional briefing on this claim in accordance with the schedule outlined in Section III below.

## 2. Irreparable Harm

\*25 [33] A party seeking a preliminary injunction must also show that it is likely to suffer irreparable harm in the absence of preliminary relief. Winter, 555 U.S. at 20, 129 S.Ct. 365. Irreparable injury must be both imminent and likely; speculation about potential future injuries is insufficient. See id. at 22, 129 S.Ct. 365.

[34] On the current record, the individual transgender Plaintiffs have clearly shown that they will suffer irreparable harm in the absence of preliminary relief. All three transgender Plaintiffs submitted declarations stating that single occupancy bathrooms and other similar facilities are generally unavailable at UNC and other public agencies. (See Doc. 22-4 ¶¶ 18–20; Doc. 22-8 ¶ 27; Doc. 22-9 ¶¶ 24–25.) In fact, two of the individual transgender Plaintiffs indicate that they are not aware of

any single occupancy facilities in the buildings in which their classes are held. (Doc. 22-8 ¶ 27; Doc. 22-9 ¶¶ 24–25.) Part I therefore interferes with these individuals' ability to participate in their work and educational activities. (See Doc. 22-4 ¶ 21; Doc. 22-8 ¶ 27; Doc. 22-9 ¶ 24.) As a result, some of these Plaintiffs limit their fluid intake and resist the urge to use a bathroom whenever possible. (Doc. 22-4 ¶ 21; Doc. 22-8 ¶ 32.) Such behavior can lead to serious medical consequences, such as urinary tract infections, constipation, and kidney disease. (Doc. 22-16 at 3–4.) This concern is not merely speculative; there is evidence that one of the individual transgender Plaintiffs has already begun to suffer medical consequences from behavioral changes prompted by Part I. (Doc. 73-1 at 1–2.)

In their response to Plaintiffs' motion, Defendants suggest that the individual transgender Plaintiffs' claims of irreparable harm are speculative and exaggerated, but Defendants have not presented any evidence to contradict Plaintiffs' evidence. (See Doc. 61 at 22–26.) Therefore, on this record, the court has no basis for doubting Plaintiffs' assertions that they cannot use multiple occupancy facilities that match their birth certificates for fear of harassment and violence, that single occupancy facilities are not reasonably available to them, and that they are at a serious risk of suffering negative health consequences as a result.

[35] Defendants also argue that Plaintiffs delayed in filing their motion for preliminary injunction seven weeks after the passage of HB2. (Doc. 61 at 23.) In some circumstances, a delay in requesting preliminary relief can be relevant to the irreparable harm inquiry. See, e.g., Static Control Components, Inc. v. Future Graphics, LLC, No. 1:06cv730, 2007 WL 1447695, \*2–3, 2007 U.S. Dist. LEXIS 36474, at \*7–9 (M.D.N.C. May 11, 2007) (finding that an employer's eight-week delay in seeking to prevent a former employee from working for a competitor weighed against a finding of irreparable harm); Fairbanks Capital Corp. v. Kenney, 303 F.Supp.2d 583, 590–91 (D.Md.2003) (finding an eleven-month delay in bringing a trademark infringement suit to be reasonable under the circumstances). Here, however, HB2 was passed on an expedited schedule, and Plaintiffs doubtlessly needed some time to compile the more than sixty documents they submitted to support their motion, including exhibits, declarations from fact witnesses, and the opinions of expert witnesses. In addition, the legal landscape regarding HB2's enforcement

remained in flux immediately after the laws' passage. (See, e.g., Doc. 23-24; Doc. 23-28.) Under these circumstances, Plaintiffs' minimal delay in seeking preliminary relief does not undermine their claims regarding irreparable harm.

\*26 Finally, the court notes that similar facts were deemed sufficient to support a finding of irreparable harm in *G.G.* See *G.G.*, 2016 WL 3581852 at \*1; *G.G.*, 822 F.3d at 727–29 (Davis, J., concurring). The court therefore concludes that the individual transgender Plaintiffs have made a clear showing that they are likely to suffer irreparable harm in the absence of preliminary relief.

### 3. Balance of Equities and the Public Interest

In addition to likelihood of success on the merits and irreparable harm, those seeking preliminary relief must also demonstrate that the balance of equities tips in their favor and that an injunction is in the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. 365. On the current record, both favor entry of an injunction.

[36] The balance of equities favors the entry of an injunction. One noteworthy feature of this case is that all parties claim that they want to preserve North Carolina law as it existed before the law was enacted; they simply disagree about the contours of that pre-HB2 legal regime. (See Doc. 103 at 6, 15–21, 65–71, 74–90, 96–102; Doc. 9 ¶¶ 166–68.) For the reasons discussed above, the court concludes that Part I does not accurately restore the status quo ante in North Carolina, at least as it existed in the years immediately preceding 2016. While Part I reiterates the male/female distinction for the vast majority of persons, it imposes a new restriction that effectively prohibits State agencies from providing flexible, case-by-case accommodations regarding the use of bathrooms, showers, and other similar facilities for transgender individuals where feasible.<sup>38</sup> See HB 2 §§ 1.2–1.3. Because Defendants do not claim to have had any problems with the pre-2016 regime (Doc. 103 at 65–71, 74–90, 96–102), the entry of an injunction should not work any hardship on them. By contrast, the failure to enjoin Part I would cause substantial hardship to the individual transgender Plaintiffs, disrupting their lives.

[37] For similar reasons, the court concludes that an injunction is in the public interest. Of course, every individual has “a legitimate and important interest in

[ensuring] that his or her nude or partially nude body, genitalia, and other private parts are not involuntarily exposed.” *G.G.*, 822 F.3d at 723 (citations and internal quotation marks omitted). The dispute in this case centers on facilities of the most intimate nature, and the State clearly has an important interest in protecting the privacy rights of all citizens in such facilities. See, e.g., *Virginia*, 518 U.S. at 550 n. 19, 116 S.Ct. 2264 (stating that separate facilities in coeducational institutions are “necessary to afford members of each sex privacy from the other sex”); *Faulkner*, 10 F.3d at 232 (noting “society's undisputed approval of separate public restrooms for men and women based on privacy concerns”). The privacy and safety concerns raised by Defendants are significant, and this is particularly so as they pertain to the protection of minors. See, e.g., *Beard*, 402 F.3d at 604 (“Students of course have a significant privacy interest in their unclothed bodies.”). At the hearing on the present motion, Plaintiffs acknowledged that the State has a legitimate interest in protecting the privacy of its citizens, particularly minors and students, and that sex-segregated bathrooms, showers, and other similar facilities serve this interest. (See Doc. 103 at 15–19.)

\*27 But transgender individuals are not exempted from such privacy and safety rights. The current record indicates that many public agencies have become increasingly open to accommodating the interests of transgender individuals as society has evolved over time. (See, e.g., Doc. 22-19 ¶¶ 8–9.) This practice of case-by-case accommodation, while developing, appears to have gained acceptance in many places across North Carolina over the last few years. (See, e.g., Doc. 22-4 ¶ 15; Doc. 22-8 ¶ 19; Doc. 22-9 ¶¶ 15, 19–20.) And the preliminary record contains uncontested evidence that these practices allowed the individual transgender Plaintiffs to use bathrooms and other facilities consistent with their gender identity for an extended period of time without causing any known infringement on the privacy rights of others. (See Doc. 22-4 ¶ 30; Doc. 22-8 ¶ 25; Doc. 22-9 ¶ 20.)

In fact, rather than protect privacy, it appears at least equally likely that denying an injunction will create privacy problems, as it would require the individual transgender Plaintiffs, who outwardly appear as the sex with which they identify, to enter facilities designated for the opposite sex (e.g., requiring stereotypically-masculine appearing transgender individuals to use women's bathrooms), thus prompting unnecessary alarm

and suspicion. (See, e.g., Doc. 22-9 ¶ 28 (describing one student's experiences being "screamed at, shoved, slapped, and told to get out" when using bathrooms that did not match the student's gender identity.) As counsel for Governor McCrory candidly acknowledged, even if Part I remains in effect, "some transgender individuals will continue to use the bathroom that they always used and nobody will know." (Doc. 103 at 70.)

Finally, the argument for safety and privacy concerns proffered by the State as to transgender users are somewhat undermined here by the structure of Part I itself. Unlike the policy in G.G., which contained no exceptions, Part I permits some transgender individuals to use bathrooms, showers, and other facilities that do not correspond with their external genitalia. This is so because some States do not permit transgender individuals to change their birth certificates even after having sex reassignment surgery, see, e.g., Tenn. Code Ann. § 68-3-203(d), while others allow modification of birth certificates without such surgery, see, e.g., Md. Code, Health-Gen § 4-211. In this regard, Part I's emphasis on birth certificates elevates form over substance to some degree as to some transgender users.

As for safety, Defendants argue that separating facility users by biological sex serves prophylactically to avoid the opportunity for sexual predators to prey on persons in vulnerable places. However, the individual transgender Plaintiffs have used facilities corresponding with their gender identity for over a year without posing a safety threat to anyone. (See Doc. 22-4 ¶¶ 15, 30; Doc. 22-8 ¶¶ 19, 25; Doc. 22-9 ¶¶ 15, 19-20.) Moreover, on the current record, there is no evidence that transgender individuals overall are any more likely to engage in predatory behaviors than other segments of the population. In light of this, there is little reason to believe that allowing the individual transgender Plaintiffs to use partitioned, multiple occupancy bathrooms corresponding with their gender identities, as well as UNC to seek to accommodate use of similar showers and changing facilities, will pose any threat to public safety, which will continue to be protected by the sustained validity of peeping, indecent exposure, and trespass laws. And although Defendants argue that a preliminary injunction will thwart enforcement of such safety laws by allowing non-transgender predators to exploit the opportunity to cross-dress and prey on others (Doc. 55 at 4-5), the unrefuted evidence in the current record suggests that jurisdictions

that have adopted accommodating bathroom access policies have not observed subsequent increases in crime, (see Doc. 22-10 at 6-10; Doc. 22-13).

\*28 [38] Finally, the court acknowledges 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." New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers). In this case, however, this concern lessened by the continued validity of Parts II and III of HB2, which serve the State's ostensible goal of preempting the Charlotte ordinance and maintaining the law as it existed before March 2016. The State acknowledges that it had no problems with that pre-2016 legal regime. (Doc. 103 at 65-71, 74-90, 96-102.)

In sum, the court has no reason to believe that an injunction returning to the state of affairs as it existed before March 2016 would pose a privacy or safety risk for North Carolinians, transgender or otherwise. It is in the public interest to enforce federal anti-discrimination laws in a fashion that also maintains long-standing State laws designed to protect privacy and safety. On this record, allowing UNC to permit the transgender Plaintiffs to use multiple occupancy, partitioned restrooms corresponding to their gender identity, and to seek flexible accommodation for changing rooms and other facilities, therefore serves the public interest.

### III. CONCLUSION

Plaintiffs' motion seeks to preliminarily enjoin Defendants "from enforcing Part I of House Bill 2." (Doc. 21 at 3; see also Doc. 22 at 44-45.) As a result, the issue currently before the court is whether Title IX or the Constitution prohibits Defendants from enforcing HB2's exclusion of transgender individuals from multiple-occupancy bathrooms, showers, and other similar facilities under all circumstances based solely on the designation of "male" or "female" on their birth certificate.

For the reasons stated, applicable Fourth Circuit law requires that DOE's guidance defining "sex" to mean gender identity be accorded controlling weight when interpreting DOE's Title IX regulations. Because Part I of HB2 prevents transgender individuals from using multiple-occupancy bathrooms and similar facilities based solely on the gender listed on their birth certificate,

it necessarily violates DOE's guidance and cannot be enforced. As for Plaintiffs' constitutional claims, Plaintiffs have not made a clear showing they are likely to succeed on their Equal Protection claim, and the court reserves ruling on the Due Process claims pending further briefing from the parties.

The Title IX claim currently before the court is brought by the individual transgender Plaintiffs on their own behalf; the current complaint asserts no claim for class relief or any Title IX claim by ACLU-NC on behalf of its members. (Doc. 9 ¶¶ 235–243.)<sup>39</sup> Consequently, the relief granted now is as to the individual transgender Plaintiffs.

The individual transgender Plaintiffs have not sought an order guaranteeing them access to any specific facility. The court's order will return the parties to the status quo ante existing immediately before the passage of Part I of HB2, wherein public agencies accommodated the individual transgender Plaintiffs on a case-by-case basis, rather than applying a blanket rule to all people in all facilities under all circumstances. Plaintiffs have no complaint with UNC's pre-HB2 policy; Defendants, in turn, do not contend that it caused any significant privacy or safety concerns. Such an order is also consistent with the DOE opinion letter, which states that schools “generally” must treat students consistent with their gender identity. (Doc. 23-29 at 3.) As a result, the court does not decide how Defendants should apply DOE's guidance in all situations and circumstances. Suffice it to say that for the time being, UNC is not constrained from accommodating the individual transgender Plaintiffs through appropriate means that accord with DOE guidance and recognize the unique circumstances of each case, just as it apparently did for several years prior to HB2. In doing so, UNC should be mindful of North Carolina's trespass, peeping, and indecent exposure laws, which protect the privacy and safety of all citizens, regardless of gender identity. In short, UNC may not apply HB2's one-size-fits-all approach to what must be a case-by-case inquiry.<sup>40</sup>

**\*29** IT IS THEREFORE ORDERED that Plaintiffs' motion for preliminary injunction (Doc. 21) is

GRANTED IN PART and DENIED IN PART, as follows:

- (1) The individual transgender Plaintiffs' motion for preliminary injunction on their Title IX claim is GRANTED. The University of North Carolina, its officers, agents, servants, employees, and attorneys, and all other persons acting in concert or participation with them are hereby ENJOINED from enforcing Part I of HB2 against the individual transgender Plaintiffs until further order of the court.
- (2) Plaintiffs' motion for preliminary injunction on their Equal Protection claim is DENIED without prejudice to a final determination on the merits.
- (3) The court reserves ruling on Plaintiffs' motion for preliminary injunction on their Due Process claims. If Plaintiffs wish to submit additional briefing on these claims, they must do so no later than September 9, 2016. Any response briefs must be filed no later than September 23, 2016, and any reply briefs must be filed no later than October 7, 2016. Although the parties may address any matter relevant to the Due Process claims in their briefs, the court is particularly interested in the following questions: (1) whether the sex on an individual's birth certificate is freely available in public records in North Carolina and other States and, if so, whether individuals have a Due Process privacy interest in such information; and (2) the degree to which a law in general, and Part I in particular, must burden a fundamental right in order to warrant strict scrutiny. Plaintiffs' initial brief and any response briefs may not exceed twenty pages per side, and Plaintiffs' reply may not exceed ten pages. If the parties desire additional oral argument regarding Plaintiffs' Due Process claims, any hearing will be combined with the consolidated preliminary injunction hearing and trial on the merits in the 425 case.

#### All Citations

--- F.Supp.3d ----, 2016 WL 4508192

#### Footnotes

- 1 Transgender individuals are persons who do not identify with their birth sex, which is typically determined on the basis of external genitalia. (Doc. 22-1 ¶¶ 12, 14; see also Doc. 9 ¶ 26.) According to the latest edition of the American Psychiatric

Association's Diagnostic and Statistical Manual of Mental Disorders, some transgender individuals suffer from a condition called gender dysphoria, which occurs when the "marked incongruence between one's experienced/expressed gender and assigned gender" is associated with "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (Doc. 22-5 ¶¶ 12–13.) In other words, gender dysphoria occurs when transgender individuals experience emotional, psychological, or social distress because "their deeply felt, core identification and self-image as a particular gender does not align" with their birth sex. (See Doc. 22-1 ¶ 19.) For purposes of the present motion, the court accepts Plaintiffs' unrebutted evidence that some transgender individuals form their gender identity misalignment at a young age and exhibit distinct "brain structure, connectivity, and function" that does not match their birth sex. (*Id.* ¶¶ 18, 22.)

2 After the preliminary injunction hearing, ACLU-NC moved to file a second amended complaint to allege a Title IX representational claim. (Doc. 116.) Briefing on that motion is incomplete, so the court only considers Title IX relief for the individual transgender Plaintiffs at this time.

3 In response to Plaintiffs' motion for preliminary injunction, Governor McCrory, Senator Burger, and Representative Moore requested a several-month delay. (Doc. 53 at 9–11; Doc. 61 at 27–29.) These Defendants claimed the need for extensive factual discovery to adequately address the issues presented in Plaintiffs' motion. (*Id.*) They collectively submitted only six exhibits, however, each of which consists of a short news article or editorial. (See Docs. 55-1 through 55-6.) Moreover, during a scheduling conference held on July 1, 2016, they indicated that they did not intend to offer additional exhibits or live testimony and that any preliminary injunction hearing could be limited to oral argument. As a result, nearly the entire factual record in this case is derived from materials submitted by Plaintiffs.

4 Defendants have since filed transcripts of the legislative record in a separate case. (Docs. 149-5 through 149-8 in case no. 1:16cv425.)

5 Charlotte's existing non-discrimination ordinances prohibited discrimination on the basis of race, gender, religion, national origin, ethnicity, age, disability, and sex. (See Doc. 23-2 at 1, 6.)

6 Not all of the exhibits in the record contain internal page numbers, and many include cover pages that were not part of the original documents. For clarity, all record citations in this opinion refer to the pagination in the CM/ECF version of the document.

7 All seven votes in favor of the ordinance were cast by Democrats, while two Democrats and two Republicans voted against the ordinance. (See Doc. 23-5 at 4–8.)

8 The Governor may call special sessions of the General Assembly in response to unexpected or emergency situations. (See Doc. 23-18 at 4.)

9 Part II also preempted local minimum wage standards. HB2 §§ 2.1–2.3. This portion of HB2 has not been challenged in these cases.

10 These are apart from the law's effect, if any, on the Charlotte ordinance's protections against discrimination on the basis of "gender," "ethnicity," and "handicap."

11 The statute defines a "multiple occupancy bathroom or changing facility" as a "facility designed or designated to be used by more than one person at a time where [persons] may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a [restroom], locker room, changing room, or shower room." *Id.* §§ 1.2-1.3.

12 This rule is subject to various exceptions that are not pertinent here. For example, Part I does not apply when individuals enter bathrooms for custodial or maintenance purposes, or to assist other individuals in using the facility. See *id.* §§ 1.2–1.3.

13 Notwithstanding the reference to "the physical condition of being male or female," all parties agree that the law defines "biological sex" as the sex listed on the individuals' current birth certificate. (See Doc. 22 at 6 (Plaintiffs, stating that Part I restricts access to facilities "based on the gender marker on one's birth certificate"); Doc. 50 at 15 (UNC, stating that Part I requires individuals to use bathrooms corresponding with their "biological sex, as listed on their birth certificates"); Doc. 55 at 1 (Governor McCrory, stating that Part I "notes that ['biological sex'] is 'stated on a person's birth certificate' "); Doc. 61 at 6 (Senator Berger and Representative Moore: "HB2 determines biological sex based on the person's current birth certificate.")) Notably, the law's reliance on birth certificates necessarily contemplates that transgender individuals may use facilities consistent with their gender identity—notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery—as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States.

- 14 Plaintiffs named UNC, the UNC Board of Governors, and W. Louis Bissette, Jr., in his official capacity as Chairman of the UNC Board of Governors, as Defendants. For convenience and clarity, the court refers to these and other related entities collectively as "UNC," except where otherwise indicated.
- 15 Plaintiffs dropped Equality North Carolina and Attorney General Cooper in their first amended complaint on April 21, 2016. (Doc. 9.)
- 16 The United States also announced that it would not cut off Title IX funding during the pendency of its lawsuit and asked this court for relief from a provision in VAWA that requires it to suspend funding forty-five days after filing suit. (See Doc. 53 in the 425 case.)
- 17 Defendants sought leave to conduct up to six months of discovery before responding to the United States' motion for preliminary injunction. (See Docs. 53, 61.) In response to these and other concerns, the court exercised its authority under Federal Rule of Civil Procedure 65(a)(2) to advance the trial in the United States' action and consolidate it with the hearing on the United States' motion for preliminary injunction, which is scheduled to begin November 14, 2016. (Doc. 104.)
- 18 UNC has also filed a motion to dismiss the claims against it. (Doc. 89.) The motion to dismiss raises similar issues, as well as additional issues not addressed in the briefing on the present motion. (See Doc. 90.) The court will issue a separate ruling on the motion to dismiss at a later date.
- 19 UNC also argues that it is immune from the individual transgender Plaintiff's constitutional claims and that Chairman Bissette is not a proper party under *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Because Plaintiffs have since moved to amend their complaint to drop Chairman Bissette and substitute UNC President Margaret Spellings as a Defendant (see Doc. 116-1 ¶¶ 11–12), and because the court will not grant relief on their constitutional claims at this time, see *infra* Section II.B.1.b, the court does not reach these issues.
- 20 Under *Auer*, an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461, 117 S.Ct. 905 (citations and internal quotation marks omitted).
- 21 The court noted that another dictionary defined "sex" as "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished." *Id.* at 721. Neither of the dictionaries cited by the majority included gender identity as a component of "sex." See *id.* at 721–22.
- 22 The court also concluded that DOE's guidance violated the Administrative Procedure Act, and the court preliminarily enjoined DOJ from using or asserting DOE's position on gender identity in any litigation initiated after the entry of its order. *Id.* at ———, ———, 2016 WL 4426495 at \*11–\*14, 17. Because *Texas* is a district court opinion from outside the Fourth Circuit, however, and because the court's order was issued after the initiation of this case, this court remains bound by *G.G.* and the *Texas* order has no direct effect on this litigation.
- 23 Indeed, DOE has continued to issue expanded guidance well after the filing of this lawsuit and the 425 case against the State. DOE's newest guidance explicitly mandates transgender access to all facilities that are consistent with their gender identity. (E.g., Doc. 23-30 at 4 ("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.")). This guidance does not include the qualifier "generally," which was included in the DOE opinion letter. (*Id.*) Plaintiffs contend that this document, which was not available at the time of *G.G.*, is also entitled to *Auer* deference. (See Doc. 22 at 14.) The *Texas* court, which was not bound by *G.G.*, concluded that this guidance is not entitled to *Auer* deference. 2016 WL 4426495, at \*15.
- 24 Nor does it appear that the court or DOE considered the potentially significant costs associated with retrofitting some facilities to ensure privacy.
- 25 DOJ, however, argues that DOE's guidance makes no such allowance and that *G.G.*'s holding requires controlling weight across all facilities. (Doc. 103 at 54-57.)
- 26 For example, Part I excludes some transgender users from showers and changing rooms that match their gender identity even if such facilities are fully partitioned or otherwise unoccupied.
- 27 In fact, although Senator Berger and Representative Moore's brief incorporates some portions of their answer by reference, it does not incorporate the constitutional claims or defenses to the Title IX claim. (See Doc. 61 at 13 (referencing defenses to Plaintiffs' Equal Protection and Due Process claims).) At the hearing on Plaintiffs' motion, the legislators first raised the argument that enforcing DOE's interpretation of "sex" would constitute a Spending Clause violation under *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15–16, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). (Doc. 103 at 81-85.) As Defendants have yet to develop this defense, it does not rise to the level of undermining the individual transgender Plaintiffs' showing of a likelihood of success on the merits.
- 28 Defendants did present two news articles describing men in Seattle and Virginia who entered women's bathrooms or showers. (Docs. 55-1, 55-52.) Neither man claimed to be transgender; one was apparently protesting a local ordinance,

- while the other was arrested for peeping. (See id.) North Carolina's peeping and indecent exposure statutes continue to protect the privacy of citizens regardless of Part I, and there is no indication that a sexual predator could successfully claim transgender status as a defense against prosecution under these statutes.
- 29 Plaintiffs argue in supplemental briefing that "broad relief" equivalent to a facial ban of HB2 is necessary to ensure protection of the individual transgender Plaintiffs' rights. (Doc. at 13.) But there is no class-wide claim presently pending, and ACLU-NC did not allege a Title IX claim. In light of UNC's insistence that it will not take any further action in response to Part I, broader relief is not necessary to ensure that the individual transgender Plaintiffs receive effective preliminary relief. Cf. Nat'l Org. for Reform of Marijuana Laws (NORML) v. Mullen, 608 F.Supp. 945, 964 (N.D.Cal.1985) (ordering broad relief on individual claims where the individual plaintiffs were at "significant risk for repeated rights violations" because government actors could not effectively "distinguish the parties from the nonparties").
- 30 The parties have devoted substantial time and energy to arguments regarding (1) whether transgender individuals qualify as a suspect class for Equal Protection purposes, and (2) whether Plaintiffs have established a sex stereotyping claim under the line of cases beginning with Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (construing Title VII). As Plaintiffs acknowledge, however, success on either of these theories in the context of their Equal Protection claim would result in the court applying the same intermediate level of scrutiny applied to laws that facially classify citizens on the basis of sex. (Doc. 103 at 35–36.) Thus, the court declines to consider these issues at this stage because Part I facially classifies individuals on the basis of sex.
- 31 Despite this concession, many of Plaintiffs' arguments in this case would, if accepted and taken to their logical conclusion, suggest that the time-honored practice of sex-segregated bathrooms and showers is unconstitutional. At the hearing on this motion, counsel speculated that sex-segregated bathrooms are justified, if at all, (1) by virtue of the long history of providing such facilities, (2) to express society's belief that "the two sexes, the two genders ... should be separated except in marriage," and (3) because no one has bothered to challenge the practice of providing sex-segregated facilities which, while separate, tend to be roughly equal in quality. (See id. at 16–21.)
- 32 As with legislative history, however, Defendants recently offered medical evidence in the 425 case. (See Docs. 149-9 through 149-12 in the 425 case.)
- 33 Bauer involved Title VII rather than the Equal Protection Clause. Id. Nevertheless, the Fourth Circuit stated that the same principles "inform [its] analysis" of both types of claims. Id.
- 34 It should go without saying that Part I, which regulates access to public bathrooms, showers, and other similar facilities, neither defines transgender individuals "out of existence" nor prevents them from participating in public life.
- 35 Of course, not all transgender individuals are negatively impacted by Part I because some may be able to change the sex on their birth certificates, with or without sex reassignment surgery, and others may choose to use bathrooms or other facilities that accord with their biological sex, whether or not they suffer dysphoria as a result.
- 36 Notably, the policy in Love only applied to individuals who sought to change the sex on an existing driver's license; Michigan apparently did not require individuals to present a birth certificate to support their claimed sex when initially obtaining a license. Id. at 851–52 & n. 2.
- 37 Here, too, as with the informational privacy claim, Plaintiffs' real problem appears to be various States' inflexible rules for changing one's sex on a birth certificate, in so far as Part I permits transgender users who did not have any surgery to use facilities matching their gender identity as long as their birth certificate has been changed—an issue the parties have not adequately addressed.
- 38 For this reason, the preliminary injunction in this case is a prohibitory injunction and is not subject to the heightened standard that applies to mandatory injunctions. See Pashby v. Delia, 709 F.3d 307, 319 (4th Cir.2013) ("Prohibitory preliminary injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.").
- 39 Although Plaintiffs moved to amend their complaint after the hearing on the present motion (Doc. 116), the motion to amend has not been resolved.
- 40 To the extent the individual transgender Plaintiffs assert an unqualified right to use all multiple occupancy bathrooms, showers, and changing rooms under all circumstances (see Doc. 9 at 56), that issue is not currently before the court. Whether it will be at a later stage in this case, or as part of the United States' motion for preliminary injunction in the 425 case, remains for later determination.

2009 WL 35237  
United States District Court,  
N.D. Indiana,  
South Bend Division.

Amber CREED a/k/a Christopher Creed, Plaintiff  
v.  
FAMILY EXPRESS CORPORATION, Defendant.

No. 3:06-CV-465RM.

|  
Jan. 5, 2009.

**Attorneys and Law Firms**

Dale M. Schowengerdt, Kevin Theriot, Alliance Defense Fund, Leawood, KS, for Defendant.

*OPINION and ORDER*

ROBERT L. MILLER, JR., Chief Judge.

\*1 This cause is before the court on the motion of Family Express Corporation for summary judgment on Amber Creed's claims against it. Ms. Creed claims that while she was employed by Family Express, she was discriminated against based on her sex when Family Express terminated her for failing to conform with male stereotypes in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq* and Indiana Code § 22-9-1-3. For the reasons that follow, the court grants Family Express's summary judgment motion.

**FACTUAL BACKGROUND**

The following facts are taken from the summary judgment record and are viewed in the light most favorable to Ms. Creed, the nonmoving party. Ms. Creed suffers from gender identity disorder, a condition in which one exhibits a strong and persistent cross-gender identification (either the desire to be or insistence that one is of the other sex) and a persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-IV-TR)* 576 (4th ed.2000). At birth, Ms. Creed's sex was classified as male. Over time though, she

determined that her gender designation didn't correspond with her gender identity, which is female.

Before being hired by Family Express, Ms. Creed started her gender transition. In researching gender identity disorder, Ms. Creed learned that the standards of care for the treatment of the disorder include a therapeutic protocol called the real-life experience, which involves living full time as a member of the sex with which the person identifies. *See* Creed Dec. ¶ 13. After real-life experience in the desired role, the next phases of treatment include hormones of the desired gender and, finally, surgery to change the genitalia and other characteristics. *Id.* On April 26, 2005, Ms. Creed sought counseling relating to her gender transition and was diagnosed with gender identity disorder. Ms. Creed continued counseling for three sessions or so but stopped going because she couldn't afford the cost.

*Employment History*

Ms. Creed began working as a sales associate at Family Express Store # 51 in LaPorte, Indiana on February 14, 2005. When she applied for the position, Ms. Creed had a masculine demeanor and appearance and presented herself as Christopher Creed. Over the course of her employment, Ms. Creed continued to come to terms with her gender identity and gradually changed her appearance to look more feminine. Ms. Creed began wearing clear nail polish, trimming her eyebrows, and sometimes wore black mascara. In the fall of 2005, Ms. Creed started growing her hair out and began wearing it in a more feminine style. During this time, Ms. Creed also increasingly used the name "Amber." At all times during her employment, Ms. Creed wore Family Express's required unisex uniform consisting of a polo shirt and slacks.

\*2 Ms. Creed says her store manager, Dan Arthur, knew she identified as a female, and he spoke with her on several occasions about her gender transition. Ms. Creed says Mr. Arthur was supportive and urged her to continue her employment as a female. Co-workers Janice Dankert and Justin Mosely also knew Ms. Creed identified as a female, and they discussed her gender transition on several occasions.

Ms. Creed says that she met or exceeded Family Express's legitimate performance expectations and received positive

feedback about her job performance throughout her employment. Ninety days after being hired, Ms. Creed received a raise and a rating of "very good" on her first professional development review. On her next review, Ms. Creed received another raise and a rating of "effective." Ms. Creed also received several positive customer comment cards and earned the "Greeter of the Month" award three times.

#### *Family Express's Grooming Policy.*

Family Express agrees that Ms. Creed performed her duties in a satisfactory manner, but maintains that she didn't fulfill the conditions of her employment adequately because she refused to follow the company's sex-specific dress code and grooming policy. Family Express requires all of its employees to "maintain a conservative, socially acceptable general appearance, conceal all tattoos, take out all body piercing[s], and wear uniforms neatly, with shirts tucked in and belts worn." The policy's sex-specific portion requires males to maintain neat and conservative hair that is kept above the collar and prohibits earrings or any other jewelry that accompanies body piercing. Females also must maintain neat and conservative hair, which needn't be above the collar, and may wear makeup and jewelry so long as it is conservative and business-like. The Human Resources Department oversees all final decisions about whether an employee's appearance conforms with the policy.

Family Express places great importance on its dress code and grooming policy, claiming that it is vital to the company's competitive advantage in the market. To impress this point upon employees, the Director of Operations explains during the two-day orientation for new sales associates that the policy is a non-negotiable part of employment. Family Express claims that the policy is strictly enforced and evenly applied, with no exceptions allowed, and it submits documentary evidence of employee discipline to support this argument.

On December 2, 2005, Ms. Creed received a copy of the Family Express employee handbook, which sets forth the conduct policy for retail employees. The conduct policy provides that all employees must wear an approved uniform with name tag, and the employee's general appearance must be clean, neat, and socially acceptable. The handbook references Family Express's dress code and

grooming policy, which is kept in the operations manual maintained by the company. According to Ms. Creed, sales associates do not receive a copy of the operations manual or the dress code and grooming policy.

#### *Customer Complaints About Ms. Creed's Appearance*

\*3 Ms. Creed never received any complaints from customers about her feminine appearance. Indeed, many customers were extremely supportive of her gender transition and pleased with her performance, even going so far as to fill out positive comment cards and tell her that they only felt comfortable while she was working. Ms. Creed also maintains that Mr. Arthur never told her to change her appearance or that she was in violation of the dress code and grooming policy. Likewise, Mr. Arthur never expressed any concern that Ms. Creed would be terminated because of her appearance.

Family Express, on the other hand, asserts that Mr. Arthur received more than fifty complaints about Ms. Creed's appearance, and so contacted Director of Human Resources Cynthia Carlson to tell her that Ms. Creed wasn't in compliance with the dress code and grooming policy. Mr. Arthur testified that he believed Ms. Creed was a good employee, but her failure to conform to the policy was affecting her ability to do her job and was alienating customers.

Director of Operations Mike Berrier testified that Family Express received a customer complaint about Ms. Creed's appearance on December 13, 2005. Mr. Berrier said the customer told him that she thought Ms. Creed was a wonderful employee, but that she felt uncomfortable with Ms. Creed's wearing makeup, nail polish, and a more feminine hairstyle. Mr. Berrier claimed that he received another complaint through the company website on either December 12 or 13, which stated that a store employee was dressing in a way that was a "male person, but female in appearance." Mr. Berrier also received an email from Ms. Carlson about her phone call from Mr. Arthur about Ms. Creed. Mr. Berrier noted that store employees never complained to him about Ms. Creed's appearance.

#### *Ms. Creed's Termination*

LeAnn McKinney, a district store manager, came to Store # 51 on or around December 13. Ms. McKinney observed Ms. Creed's feminine appearance and told her that her hairstyle looked good. Shortly thereafter, Mr. Arthur told Ms. Creed that she had been called into a meeting with Mr. Berrier. On December 14, Ms. Creed met with Mr. Berrier and Ms. Carlson. Mr. Berrier and Ms. Carlson told her that they had received a complaint about her feminine appearance and that she could no longer present herself in a feminine manner at work. Ms. Creed told them that she was transgender and going through the process of gender transition. In response, Ms. Carlson asked her whether "it would kill her" to appear masculine for eight hours a day and asked her why she applied for a job if she knew she was undergoing gender transition. At that point, Mr. Berrier and Ms. Carlson told her that if she didn't report to work "as a male" she would be terminated and that she had twenty-four hours to decide if she would present herself in a more masculine manner. When Ms. Creed told them she couldn't do so, they terminated her employment.

Ms. Creed contends that, during the meeting, neither Mr. Berrier nor Ms. Carlson told her that she was required to conform to the dress code and grooming policy. She alleges that the only statement made in reference to the policy was when Ms. Carlson said that she noticed Ms. Creed's hair was slightly below her collar. In response to this comment, Ms. Creed asked if it would be appropriate for Family Express to apply the female appearance standard to her and inquired about a possible relocation. Ms. Creed claims that Ms. Berrier and Mr. Carlson declined her requests.

\*4 As Family Express sees it, Mr. Berrier and Ms. Carlson explained to Ms. Creed that she would have to cut her hair and not wear nail polish and makeup or resign from her position as a sales associate. Mr. Berrier testified that neither he nor Ms. Carlson told Ms. Creed that she couldn't present herself in a feminine manner at work and denied hearing Ms. Carlson ask Ms. Creed whether it would kill her to appear as a man at work. Mr. Berrier alleges that Ms. Creed said that she wouldn't be able to conform with the dress code and grooming policy but didn't explain why; at which point, Family Express considered Ms. Creed's actions a "voluntary termination."

At his deposition, Mr. Berrier testified about the kind of characteristics he considered to be more female, including hairstyle, body, physique, and voice. Mr. Berrier

commented that he doesn't consider wearing makeup or painting fingernails to be masculine characteristics. Mr. Berrier also stated that Ms. Creed looked more female to him than usual at the termination meeting because of her makeup, hairstyle, and nail polish.

Following her termination, Ms. Creed posted the following blog entry, explaining that she had been fired earlier that day:

"[t]hey told it was because I wasn't conforming to the dress-code policy of the company (which clearly is designed to separate gender associations and to maintain that the employees are 'socially acceptable by the majority of society' or in other words, politically correct.) ... I was given a choice: Either conform to the policy, which would mean that I would have to cut my hair and stop wearing makup [sic] (specifically stated in the meeting several times) and conform my gender to my birth sex ... or be terminated."

#### *Procedural History*

On March 10, 2006, Ms. Creed filed a charge of discrimination with the EEOC, complaining that she was treated in a discriminatory manner because of her sex. The EEOC issued a dismissal and notice of rights to Ms. Creed, and she filed her complaint seeking reinstatement to her former position or front pay in lieu of reinstatement, lost wages and employment-related benefits, compensatory damages, punitive damages, attorneys fees, costs, and pre-judgment interest on all sums recoverable.

Family Express moved to dismiss Ms. Creed's complaint for failure to state a claim upon which relief can be granted. The court granted the motion in part and dismissed Counts II and IV, in which Ms. Creed claimed that she was discriminated against on the basis of her transgender status, holding that discrimination against transsexuals because they are transsexuals isn't discrimination "because of sex" as prohibited by Title VII. The court denied the motion as to Counts I and III, in which Ms. Creed contends that she was discriminated against because Family Express perceived her "to be a man who did not conform with gender stereotypes associated with men in our society, or because it perceived Plaintiff to be a woman who did not conform with gender stereotypes associated with women in our society." Family

Express moved for summary judgment on the remaining counts, arguing that it didn't discriminate against Ms. Creed based on her sex but terminated her because she refused to comply with its sex-specific dress code and grooming policy.

## DISCUSSION

\*5 Summary judgment is appropriate when “the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). In deciding whether a genuine issue of material fact exists, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine issue of material fact exists when a rational trier of fact could not find for the nonmoving party even when the record as a whole is viewed in the light most favorable to the nonmoving party. *O'Neal v. City of Chicago*, 392 F.3d 909, 910–911 (7th Cir.2004). A nonmoving party cannot rest on mere allegations or denials to overcome a motion for summary judgment; “instead, the nonmovant must present definite, competent evidence in rebuttal.” *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 924 (7th Cir.2004). Specifically, the nonmoving party must point to enough evidence to show the existence of each element of its case on which it will bear the burden at trial. *Celotex v. Catrett*, 477 U.S. 317, 322–323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Lawrence v. Kenosha Cty.*, 391 F.3d 837, 842 (7th Cir.2004).

Ms. Creed alleges that Family Express discriminated against her based on her sex by terminating her for failure to comply with male stereotypes in violation of Title VII as well as the Indiana Civil Rights Act. As noted in the order on Family Express's motion to dismiss, because Indiana's definition of discrimination is similar to 42 U.S.C.A. § 2000e–2(a), Indiana courts construe this provision consistent with Title VII. *Indiana Civil Rights Com'n v. Marion Cty. Sheriff's Dept.*, 644 N.E.2d 913, 915 (Ind.Ct.App.1994). Accordingly, the court applies the standard applicable in Title VII actions to Ms. Creed's claims under Indiana Code § 22–9–1–3.

Title VII prohibits an employer from harassing an employee “because of the employee's sex.” *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir.2000) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)); 42 U.S.C. § 2000e–2(a)(1). Title VII doesn't allow an employer to treat employees adversely because their appearance or conduct doesn't conform to stereotypical gender roles. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (holding that the plaintiff's employer discriminated against her by acting on the basis of a belief that she wasn't conforming to the stereotypes associated with her gender); *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 581 (7th Cir.1997) (“[A] man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed ‘because of his sex.’”), vacated and remanded on other grounds, *City of Belleville v. Doe*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

\*6 Although discrimination because one's behavior doesn't conform to stereotypical ideas of one's gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not. See *Spearman v. Ford Motor Co.*, 231 F.3d at 1085; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir.1984). To sustain a claim based on sex stereotyping, then, a plaintiff must show that the employer actually relied on his or her gender in making an adverse employment decision. See *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1064 (7th Cir.2003) (recognizing sex stereotyping claim under Title VII but holding that evidence didn't support the claim); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir.2004) (“Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender nonconformity.”).

### *Family Express's Dress Code and Grooming Policy*

Family Express maintains that it didn't discriminate against Ms. Creed based on her gender because it relied on a uniformly applied, sex-specific dress code

and grooming policy. In support, Family Express cites a line of cases finding that gender-specific dress and grooming codes don't violate Title VII so long as the codes don't disparately impact one sex or impose an unequal burden. *See e.g., Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir.2004); *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir.1998); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2nd Cir.1996).

In *Austin v. Wal-Mart Stores, Inc.*, this court denied the plaintiff's sex discrimination claim, holding that Wal-Mart's policy requiring male employees to have short hair didn't violate Title VII. 20 F.Supp.2d 1254, 1256–1257 (N.D.Ind.1998); *see also Carroll v. Talman Fed. Sav. and Loan Ass'n of Chicago*, 604 F.2d 1028, 1031 (7th Cir.1979) (holding that dress code policy which required women to wear uniforms but only required men to require customary business attire discriminated against women in violation of Title VII). Similarly, in *Jespersen v. Harrah's Operating Company, Inc.*, the Ninth Circuit ruled that Harrah's Casino's grooming standards requiring women to wear makeup and styled hair and men to dress conservatively wasn't discriminatory because the policy didn't impose an unequal burden on either sex. 392 F.3d at 1078.

Family Express analogizes to *Jespersen*, claiming that its policy also applies to all employees, requires a unisex uniform, and doesn't single out males or females. Moreover, Family Express argues that its policy is justified in commonly accepted social norms and is reasonably related to its business needs. Like the policy in *Jespersen*, the dress code and grooming policy in this case doesn't take male or female mannerisms into account or appear to have a disparate impact on either sex. Likewise, the policy only applies to physical appearance and doesn't require an employee to behave in a certain manner. Accordingly, Family Express's requirement that male and female employees adhere to grooming standards matching their gender doesn't discriminate on the basis of sex. *Cf. Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 n. 7 (9th Cir.2001) (explaining that reasonable regulations that require male and female employees to conform to different dress and grooming standards do not necessarily constitute actionable discrimination under Title VII).

\*7 Regardless of whether Family Express's policy is valid under Title VII, however, Ms. Creed may succeed on her sex stereotyping claim if she can present sufficient evidence from which a rational jury could infer intentional discrimination. *Rogers v. City of Chicago*, 320 F.3d at 753; *see also Doe by Doe v. City of Belleville, Ill.*, 119 F.3d at 594 (“The fact that one motive was permissible does not exonerate the employer from liability under Title VII; the employee can still prevail so long as she shows that her sex played a motivating role in the employer's decision.”). Family Express can't shield such discrimination behind a valid dress code and grooming policy. *See e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224–1227 (10th Cir.2007) (finding that employer's requirement that employees use restrooms matching their biological sex didn't discriminate on the basis of sex but that plaintiff may demonstrate employer's alleged concern regarding restroom usage was pretext for discrimination based on the plaintiff's failure to conform to gender stereotypes). Even if the policy itself is non-discriminatory, Ms. Creed may prove that Family Express discriminated against her if she can show that her gender, not grooming policy violations, actually motivated her termination. *See e.g., Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir.1997) (an employee can prevail under Title VII so long as an illicit criterion played a motivating role in her discharge, even if another, legitimate criterion also played a role).

#### *Ms. Creed's Proof of Sex Stereotyping*

Ms. Creed doesn't challenge Family Express's right to maintain a fair and reasonable appearance code, but rather, she claims that Family Express terminated her because she failed to conform to stereotypes about how a man should appear. Ms. Creed may establish her sex stereotyping claim under Title VII by either the “indirect method” or the “direct method” of proof. *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860 (7th Cir.2007); *see also Kampmier v. Emeritus Corp.*, 472 F.3d 930, 939 (7th Cir.2007).

#### *Indirect Method of Proof*

Under the indirect method, Ms. Creed may establish a prima facie case of discrimination by demonstrating that: (1) she belongs to a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment

action; and (4) Family Express treated similarly situated female employees more favorably. *See Spearman v. Ford Motor Co.*, 231 F.3d at 1087 (citing *Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 863 (7th Cir.1997)). Upon such a showing, the burden shifts to Family Express to articulate a legitimate nondiscriminatory reason for terminating Ms. Creed. *Hossack v. Floor Covering Assocs.*, 492 F.3d at 860. If Family Express meets that burden, Ms. Creed bears the ultimate burden to show that Family Express's proffered reason is a pretext for sex discrimination. *Id.* (citing *Barricks v. Eli Lilly and Co.*, 481 F.3d 556, 559 (7th Cir.2007)).

\*8 Although the court has referred to Ms. Creed as female in this opinion in deference to her self-identification, she must be considered male for the purposes of Title VII. *See Spearman v. Ford Motor Co.*, 231 F.3d at 1084 (“Congress intended the term ‘sex’ to mean ‘biological male or biological female.’”) (citation omitted). The parties don't dispute that Ms. Creed is a member of a protected class based on her gender or that her termination was an adverse employment action. Similarly, both sides agree that Ms. Creed performed her job satisfactorily, apart from her violation of the dress code and grooming policy. Ms. Creed hasn't produced evidence of a similarly situated female in violation of the dress code and grooming policy whose treatment could be compared to hers. Accordingly, Ms. Creed must rely on the direct method of proof. *See Hossack v. Floor Covering Assocs.*, 492 F.3d at 860.

#### *Direct Method of Proof*

To establish a prima facie case of sex stereotyping under the direct method, Ms. Creed must present evidence, either direct or circumstantial, that she wouldn't have been terminated but for her failure to conform to male stereotypes. *See Steinhauer v. DeGolier*, 359 F.3d 481, 485 (7th Cir.2004). Direct evidence essentially requires an admission by the decisionmaker that the adverse employment action was “based on the prohibited animus.” *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994); *see also Rudin v. Lincoln Land Comm. College*, 420 F.3d 712, 720 (7th Cir.2005); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 576 (7th Cir.2001) (noting that admissions of discriminatory intent are rarely encountered).

In addition to direct evidence, Ms. Creed may also proceed under the direct method by presenting a “convincing mosaic” of circumstantial evidence that points to a discriminatory reason for her termination. *Ptasznik v. St. Joseph's Hosp.*, 464 F.3d 691, 695 (7th Cir.2006); *see also Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir.2003). Unlike direct evidence, circumstantial evidence “need not directly demonstrate discriminatory intent, but rather it ‘allows a jury to infer intentional discrimination by the decisionmaker’ from suspicious words or actions.” *Hossack v. Floor Covering Assocs.*, 492 F.3d at 860 (citing *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir.2003)). There are three types of circumstantial evidence of particular relevance when establishing an inference of intentional discrimination: (1) dubious coincidences such as suspicious timing, ambiguous statements, and comments or behavior directed at employees in the protected group; (2) evidence that the employer systematically treated similarly situated employees outside the protected group better; and (3) evidence that the plaintiff was qualified for the job and the employer's reason for treating her differently was a mere pretext for discrimination. *See Hassan v. Foley & Lardner LLP*, 2008 WL 5205818 at \*8 (7th Cir. Dec.15, 2008) (citing *Troupe v. May Dep't Stores Co.*, 20 F.3d at 736).

\*9 Ms. Creed offers a variety of facts that purportedly create an inference of discrimination. She relies heavily on the comments made by Mr. Berrier and Ms. Carlson during the termination meeting. Ms. Creed alleges that after she informed Mr. Berrier and Ms. Carlson that she was going through a gender transition, Ms. Carlson asked her whether “it would kill [her] to appear masculine for eight hours a day” and why she applied for the job if she knew she would be undergoing a gender transition. Ms. Creed says she was told that she had to report to work “as a male.” Ms. Creed also points to Mr. Berrier's deposition testimony in which he admitted that he thought Ms. Creed didn't look like the same person because of her feminine appearance, and he didn't consider wearing makeup or having long hair to be masculine characteristics.

These statements, Ms. Creed argues, reveal that Family Express terminated her because her mannerisms didn't conform with its expectations of how a man should look. Family Express claims Mr. Berrier and Ms. Carlson simply were articulating the fact that Ms. Creed was in violation of its dress code and grooming policy.<sup>1</sup>

Construing the parties' contradictory statements in Ms. Creed's favor, this evidence alone can't establish that Family Express wouldn't have terminated Ms. Creed but for her gender. While Ms. Carlson's comments, in particular, were insensitive of Ms. Creed being in the process of coming to terms with her gender identity, these comments in and of themselves don't establish that Family Express fired Ms. Creed because she wasn't "male" enough.

The statements simply do not allow a trier of fact to decide that Family Express acted on the basis of a prohibited purpose—Ms. Creed's failure to embody sexual stereotypes—as opposed to a legitimate non-discriminatory purpose—breach of the grooming policy—or even for what is, under today's law, a legitimate discriminatory purpose—because Ms. Creed was transgender. Remarks with such ambiguity do not amount to proof under the direct method sufficient to create a genuine issue of material fact. See, e.g., *Petts v. Rockledge Furniture*, 534 F.3d 715, 720–722 (7th Cir.2008) (reference to plaintiff as “mother of the store” not proof of gender bias); *Tubergen v. St. Vincent Hosp. and Health Care Ctr. , Inc.*, 517 F.3d 470, 475 (7th Cir.2008) (“old guard” not necessarily reference to chronological age).

Ms. Creed also relies on the timing of her termination as evidence of discriminatory animus, pointing out that she was fired shortly after her co-workers and store manager began to notice changes in her appearance. Family Express claims it received numerous complaints about her appearance, but Ms. Creed wasn't notified of these complaints, or that she was in violation of the company's policy, until the day of her termination. Mr. Berrier and Ms. Carlson fired Ms. Creed on the spot after she informed them that she couldn't conform her appearance to the male standard. Mere temporal proximity alone, however, is insufficient to establish a genuine issue of material fact. See *Tubergen v. St. Vincent Hosp. & Heath Care Ctr., Inc.*, 517 F.3d 470, 473–474 (7th Cir.2008); see also *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 981 (7th Cir.2004). As a result, Ms. Creed must rely on evidence in addition to the timing of her termination in order to proceed under the direct method of proof.

**\*10** To meet this burden, Ms. Creed alleges that Family Express's explanation for her termination was merely a pretext for discrimination. First, she claims that

Family Express gave shifting reasons for her termination. According to Ms. Creed, Family Express initially told her that it called the termination meeting because it received customer complaints about her appearance. In support, Family Express submitted affidavits from Ms. Creed's co-workers claiming that her appearance was affecting her performance. Despite these representations, Family Express ultimately told Ms. Creed that she was being fired for violating the dress code and grooming policy. Ms. Creed disputes the inference that her performance was unsatisfactory, noting that she received positive reviews and the greeter of the month on numerous occasions. Family Express agrees that it didn't fire Ms. Creed based on her performance: the complaints merely alerted Family Express to Ms. Creed's violation of its policy, which is strictly enforced regardless of whether the company receives complaints about an employee.

Second, Ms. Creed argues that a negative inference should be drawn from Family Express's inability to produce copies of the alleged customer complaints during discovery. Family Express couldn't produce copies of the complaint Ms. Carlson received via the internet because the claims website had been deleted, and Mr. Berrier couldn't locate the notes which documented the customer complaint received via telephone. There is no evidence of bad faith destruction of documents, and the complaints themselves weren't relevant to Family Express's decision to enforce its dress code and grooming policy.

To prove pretext, Ms. Creed must establish that Family Express gave a dishonest explanation for its actions. See *Grube v. Lau Indust., Inc.*, 257 F.3d 723, 730 (7th Cir.2001) (pretext “means something worse than a business error; pretext means deceit used to cover one's tracks.”); *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 684 (7th Cir.2000). If Family Express acted in good faith, the court can't second-guess its actions regardless of whether those actions constitute a prudent business decision. *Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir.2000); see also *Green v. Nat'l Steel Corp.*, 197 F.3d 894, 899 (7th Cir.1999).

Ms. Creed hasn't shown that Family Express's decision to terminate her was a lie or had no basis in fact. See *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 458 (7th Cir.1999). Family Express presented evidence that it applies its dress code and grooming policy uniformly to all employees; in fact, Family Express terminated several other employees

for policy violations. Ms. Creed might argue that real-life experience as a member of the female gender is an inherent part of her non-conforming gender behavior, such that Family Express's dress code and grooming policy discriminates on the basis of her transgender status, but rightly or wrongly, Title VII's prohibition on sex discrimination doesn't extend so far. *See Etsitty v. Utah Transit Auth.*, 502 F.3d at 1224. As already explained, Ms. Creed's Title VII claim must rest entirely on the theory of protection as a man who fails to conform to sex stereotypes. While the court may disagree with Family Express that a male-to-female transsexual's intent to present herself according to her gender identity should be considered a violation of its dress code and grooming policy, that is not the issue the law places before the court. The summary judgment record contains too little evidence to permit an inference that Family Express didn't actually terminate Ms. Creed for this legally permissible reason. The totality of Ms. Creed's evidence creates no genuine issue of material fact that Family Express terminated her based on her gender.

\*11 Ms. Creed hasn't presented sufficient evidence of discriminatory motivation which would allow a jury to reasonably infer that Family Express terminated her for failing to meet its masculine stereotypes. Ms. Creed hasn't carried her burden on her sex discrimination claim, and Family Express is entitled to summary judgment.

#### CONCLUSION

For the foregoing reasons, the court GRANTS the defendant's motion for summary judgment [Doc. No. 34]. The clerk shall enter judgment accordingly.

SO ORDERED.

#### All Citations

Not Reported in F.Supp.2d, 2009 WL 35237, 105 Fair Empl.Prac.Cas. (BNA) 329, 91 Empl. Prac. Dec. P 43,422

#### Footnotes

- 1 Family Express rebuts Ms. Creed's claim that Mr. Berrier and Ms. Carlson never explicitly told her that she in violation of the dress code by evidence of her blog post from the day she was terminated. In that post, Ms. Creed stated that she lost her job, and "[t]hey told me it was because I wasn't conforming to the dress-code policy of the company ...." Ms. Creed further acknowledged that she was given a choice to either conform to the policy or be terminated.

2003 WL 21525058

Only the Westlaw citation is currently available.

United States District Court,  
S.D. Indiana,  
Indianapolis Division.

John A. SWEET, Plaintiff,

v.

MULBERRY LUTHERAN HOME, Defendant.

No. IP02-0320-C-H/K.

June 17, 2003.

#### Attorneys and Law Firms

John A. Sweet, West Lafayette, IN, for Plaintiff.

Gregory W. Moore, Hall, Render, Killian, Heath & Lyman, Indianapolis, IN, for Defendant.

#### ENTRY ON MOTION FOR SUMMARY JUDGMENT

DAVID F. HAMILTON, District Judge.

\*1 Plaintiff John Sweet was fired from his job as a licensed practical nurse for defendant Mulberry Lutheran Home. Sweet contends that Mulberry violated Title VII of the Civil Rights Act of 1964 in two ways: (1) by firing him because he intended to change his sex from male to female, and (2) by filing a complaint with state nursing authorities to retaliate against him for complaining to the EEOC about his firing. Mulberry has moved for summary judgment, which the court grants. First, controlling precedent of the Seventh Circuit holds that Title VII does not prohibit discrimination on the basis of a person's intention to change sex. Second, the undisputed evidence shows that Mulberry fired him because its believed he had abused patients, not because of his intentions regarding his sex or his complaints. Third, the undisputed evidence shows that the person who filed the complaint against Sweet did not know of his EEOC charge and therefore could not have been motivated by a desire to retaliate against him for that conduct. The court also dismisses Sweet's state law claims without prejudice because all federal claims are being dismissed before trial.

Summary judgment is warranted only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To defeat a properly supported motion for summary judgment, the party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324, quoting Fed.R.Civ.P. 56(e). The court considers the record evidence in the light reasonably most favorable to the non-moving party, in this case plaintiff Sweet.

#### I. Undisputed Facts

Mulberry is a long-term health care facility located in Mulberry, Indiana. At the times relevant to Sweet's claims, Annette Galvin was employed as Director of Nursing. As part of her duties, Galvin supervised Sweet, who was employed as a licensed practical nurse at Mulberry.

In September 2001, Galvin became aware of three incidents that formed the basis of the decision to terminate Sweet's employment. All three incidents occurred during Sweet's shifts on September 11 and 12, 2001. Sweet worked his regularly scheduled second shift on September 11, 2001. At Galvin's request, Sweet agreed to stay on for the night shift as a supervisor to fill in for an unexpected absence. In the first incident, a Mulberry resident was left outside until approximately 2:45 a.m. on the morning of September 12, 2001. In the second incident, Sweet violated Mulberry policy by failing to assess a resident who had fallen from bed. In the third incident, Sweet refused to change a resident's portable oxygen tank. These incidents each reflected substandard practice and poor judgment. Mulberry has always contended that these incidents were the reason it fired Sweet.

\*2 After Sweet was fired, Galvin prepared and filed a complaint against Sweet with the Indiana Health Professions Bureau. Galvin took this step because of her obligation as a Registered Nurse to report instances of potential patient abuse and neglect based on the three incidents described in the preceding paragraph. At the time Galvin filed that complaint with the state agency, Galvin was unaware that Sweet had filed a Charge of Discrimination with the Equal Employment Opportunity Commission.

Sweet filed two complaints with the EEOC. The first complaint was filed on October 12, 2001 alleging that his firing amounted to discrimination on the basis of sex because Mulberry learned of his planned sex change. The second complaint was filed on November 13, 2001, alleging that Mulberry had retaliated against Sweet for filing the first EEOC complaint by filing Galvin's complaint with the state nursing agency.

## II. Title VII Claim Based on Intent to Change Sex

Title VII makes it an unlawful employment practice to discriminate against an individual on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). As Sweet testified in his deposition, his claim of discrimination is that he was terminated because of his intent to change his sex. The Seventh Circuit has rejected similar claims, and its decisions require summary judgment in favor of Mulberry on this claim.

In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.1984), a male airline pilot was fired when, following sex reassignment surgery, she attempted to return to work as a woman. The district court had found in favor of the plaintiff, but the Seventh Circuit reversed. The Seventh Circuit considered whether the word "sex" in Title VII meant not only biological sex, *i.e.*, male or female, but also "sexual preference" and "sexual identity." The Seventh Circuit concluded that sex meant "biological sex." The *Ulane* court stated:

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

or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that the section means nothing more than the plain language implies.

742 F.2d at 1085. Under *Ulane*, therefore, discrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not sexual orientation or sexual identity, including an intention to change sex.

\*3 In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that discrimination on the basis of sex or gender stereotyping was discrimination because of "sex" within the meaning of Title VII. It could be argued, therefore, that the narrow approach of *Ulane*—that "sex" as used in Title VII meant biological sex and nothing more—is no longer viable. But this is not the case:

Long after *Price Waterhouse* was decided, courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person's "sex."

*Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541, \*5 n. 59 (E.D.La. Sept. 16, 2002) (collecting cases). In *Oiler*, for example, the plaintiff was terminated because he was a man with a sexual or gender identity disorder who publicly disguised himself as a woman, and was held outside a protected class under Title VII.

One of the decisions cited in *Oiler* was *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir.2000), which was also decided after *Price Waterhouse*. In *Spearman*, the Seventh Circuit affirmed summary judgment for an employer where a male homosexual employee alleged he had been sexually harassed by other male workers who taunted his feminine behavior. The Seventh Circuit adhered to the reasoning of *Ulane*:

Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation. [citing *Ulane*]. Therefore, harassment based solely upon a person's sexual preference

or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.

231 F.3d at 1084. *Spearman* thus shows the continuing vitality of the rule in *Ulane* in the Seventh Circuit, and though *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes, that was not the nature of Sweet's claim in this case.<sup>1</sup>

Accordingly, Sweet's intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex.

Mulberry would still be entitled to summary judgment on this claim even if Sweet's theory were legally actionable. Sweet could prove his discrimination claim under Title VII either by presenting direct evidence of prohibited discrimination or by relying on the indirect, "burden-shifting" method of proof outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon presumption or inference. *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir.1997). The direct evidence must show that the defendant said or did something indicating discriminatory animus with regard to the specific employment decision in question. *Id.* Sweet has not offered direct evidence of discrimination based on his intent to change his sex.

\*4 Under the indirect method of proof in *McDonnell Douglas*, the Supreme Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory treatment cases." *St. Mary's Honor Ctr.*, 509 U.S. at 506. The test consists of three steps. First, the plaintiff must come forward with evidence of a *prima facie* case of discrimination, meaning facts which, if not otherwise explained, would support an inference of discrimination. Second, the defendant may respond by stating a legitimate, non-discriminatory reason for the adverse employment action. Finally, if a legitimate, non-discriminatory reason is offered, the plaintiff must come

forward with evidence that would allow a reasonable trier of fact to find that the stated reason is not the true one, but only a pretext for discrimination. See *McDonnell Douglas*, 411 U.S. at 802-04; *DeLoach v. Infinity Broadcasting*, 164 F.3d 398, 401 (7th Cir.1999).

To establish a *prima facie* case of sex discrimination under *McDonnell Douglas*, Sweet must come forward with evidence that: (1) he was a member of a protected group, (2) he was doing the job well enough to meet his employer's legitimate expectations, (3) despite his adequate job performance, he was subjected to an adverse employment action, and (4) he was treated less favorably than similarly situated employees who were not planning to change their gender. See *Markel v. Bd. of Regents of Univ. of Wisconsin System*, 276 F.3d 906, 911 (7th Cir.2002); *Bragg v. Navistar Intern. Transp. Corp.*, 164 F.3d 373, 376 (7th Cir.1998).

Even if the court assumes that Sweet was a member of a protected group and has otherwise met the elements of a *prima facie* case, Mulberry has offered a legitimate, non-discriminatory reason for firing him: abuse of patients. Sweet has no evidence that this reason was pretext for discrimination. This mode of analysis is occasionally undertaken because the issue of satisfactory job performance, which lies at the heart of many employment cases, must be analyzed in detail at both stages of the *McDonnell Douglas* test and "it is therefore simpler to run through that analysis only once." *Simmons v. Chicago Bd. of Education*, 289 F.3d 488, 492 (7th Cir.2002), citing *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 886 (7th Cir.2001).

To avoid summary judgment on the issue of pretext, Sweet must come forward with evidence that would allow a reasonable trier of fact to find that Mulberry's proffered reason for firing him was a lie. *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir.2000); *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1145 (7th Cir.1994). Evidence that an employer made an erroneous decision or used poor business judgment is not sufficient to establish pretext; the issue is the honesty of the employer's stated reason. See *Richter v. Hook SuperRx, Inc.*, 142 F.3d 1024, 1031-32 (7th Cir.1998).

Mulberry contends that it terminated Sweet's employment because of the three instances of abusive and inadequate care described above. Such actions are obviously a

legitimate and non-discriminatory reason for firing a licensed practical nurse. Sweet disagrees with Mulberry's view of the facts, but he has not presented actual evidence disputing those incidents. Sweet's response to Mulberry's argument on this point suffers from two deficiencies. First, his response is not presented in the form of evidence, even though Sweet was notified of that requirement of Rule 56(e) of the Federal Rules of Civil Procedure and even though the court gave him an extra opportunity to meet that requirement. See *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1255 n. 13 (7th Cir.1990) (explaining that statements that are "neither notarized nor made under penalty of perjury [do] not comply with Rule 56(e) ... As such, we can simply ignore them."); *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir.1985) ("When a party seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence."). Second, the content of his response (even if it had been presented as evidence) is nothing more than Sweet's own assessment of his job performance. Such assessments are not sufficient to establish a genuine issue of fact as to the *honesty* of Mulberry's stated reason for firing him. *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1114 (7th Cir.1998) ("even if [a plaintiff's] personal appraisal contains true statements about his accomplishments, [an employer is] entitled to determine that the deficiencies in his performance outweighed such accomplishments").

\*5 In sum, therefore, Sweet's claim of discrimination is not cognizable here. Even if it were, he has not shown direct evidence of discrimination or that Mulberry's stated reason for firing him was only a pretext for discrimination.

### III. Claim of Retaliation

In addition to prohibiting certain forms of discrimination in the workplace, Title VII provides that an employer may not take an adverse employment action or discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Sweet alleges that Mulberry engaged in unlawful retaliation when, after he filed his EEOC charge of discriminatory firing, Mulberry reported the incidents of patient abuse to the state licensing agency.

Mulberry argues first that it is entitled to summary judgment because Sweet did not oppose conduct prohibited by Title VII. Mulberry relies on *Hammer v. St. Vincent Hospital and Health Care Center*, 224 F.3d 701, 706-07 (7th Cir.2000), which held that a homosexual employee's complaints to management about harassment by male co-workers did not cover any practice prohibited by Title VII, so that his complaints had not "opposed any practice made an unlawful employment practice by this subchapter." His complaints therefore could not support a retaliation claim, the Seventh Circuit concluded, and affirmed summary judgment for the employer.

By its plain terms, however, the retaliation provision of Title VII also outlaws retaliation against a person for simply filing a charge of discrimination with the EEOC. *Hammer* did not involve an EEOC charge. Sweet's action of filing an EEOC charge about what he honestly believed was unlawful discrimination falls squarely within the terms of 42 U.S.C. § 2000e-3(a). See *Clark County School Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (distinguishing between two prongs of retaliation statute, and rejecting claim based on filing of EEOC charge on grounds of causation, not because charge was actually unreasonable); see also *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir.2002) (employee need not prevail on underlying claim to prove retaliation; all that is required is reasonable, good faith belief that practice violated Title VII).

Nevertheless, Mulberry is entitled to summary judgment on the retaliation claim because a reasonable trier of fact could not find that Galvin filed the complaint in retaliation for Sweet's filing of his EEOC charge. Sweet has produced no direct evidence that Galvin filed the licensing complaint for retaliatory reasons. Sweet also has not produced circumstantial evidence that would support an inference of retaliatory intent. Sweet has not provided any evidence that he, and not any similarly-situated employee who did not file an EEOC complaint, was subjected to adverse action. What's more, Mulberry has shown without contradiction from Sweet that Galvin had a legitimate reason for filing the licensing complaint, and that Galvin was not even aware of the first EEOC filing when she presented the licensing complaint. If Galvin did not know about the EEOC charge, then it could not have motivated her decision. *Alexander v. Wisconsin Dept. of Health and Family Services*, 263 F.3d 673, 86 (7th Cir.2001) (plaintiff's inability to provide evidence that any of the actors involved in his suspension had

any knowledge of his complaint before his suspension, prevents an inference of pretext to be drawn from the timing of his suspension and eventual termination); see generally *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640, 644 (7th Cir.2002) (explaining standard for summary judgment as applied to retaliation claims). Accordingly, Mulberry's motion for summary judgment must be granted as to Sweet's claim of retaliation.

#### IV. Pendent State Law Claims

\*6 Sweet's complaint includes claims under Indiana state law for defamation and wrongful termination. This court has jurisdiction over such claims by virtue of 28 U.S.C. § 1367(a), which provides that, in any action in which the district courts "have original jurisdiction," they may exercise supplemental jurisdiction over state law claims related to the federal claim. Pursuant to 28 U.S.C. § 1367(a), "judicial power to hear both state and federal claims exists where the federal claim has sufficient substance to confer subject matter jurisdiction on the court, and the state and federal claims derive from a common nucleus of operative facts." *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir.1995), citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). When a district court dismisses the claims over which it had original jurisdiction, it has discretion either to retain jurisdiction over the supplemental claims or to dismiss them. *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 717 (7th Cir.1998).

Discretion notwithstanding, its "well established that if federal claims are dismissed before trial, the federal district courts should generally dismiss the state law claims as well." *Vukadinovich v. Board of Sch. Trustees of the Michigan City Area Schs.*, 978 F.2d 403, 415 (7th Cir.1992). There is no reason in this action why the general rule should not be followed. The court will relinquish jurisdiction over the supplemental claims under Indiana law pursuant to § 1367(c).

#### V. Request to Amend Complaint to Add Claims

Sweet stated in his response to Mulberry's motion for summary judgment that, if Mulberry persists in its motion for summary judgment, he would like to amend his complaint by adding a claim for wrongful endangerment, presumably asserted under Indiana state law.

This sort of conditional request to amend pleadings only in the event of an adverse ruling on a motion is not appropriate. It disrupts the orderly development of the action and is untimely in any event. See *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir.1995). Apart from the question of timing, the content of the proposed additional claim shows it to be based on asserted violations of Indiana state law. As with the state law claims already pled, the court has no reason to exercise jurisdiction over the proposed new claim. Leave to amend the complaint is therefore denied.

#### VI. Conclusion

The undisputed evidence in this case shows that Sweet's behavior did not place him within the protection of Title VII, that Mulberry terminated Sweet's employment for a legitimate, non-discriminatory reason (poor quality of nursing care and/or supervision), and that there was no retaliation against Sweet through the subsequent filing of a licensing complaint with State authorities. Because the burden at this point rests with Sweet to "inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered," *Liberles v. County of Cook*, 709 F.3d 1122, 1126 (7th Cir.1983), and because Sweet has not met his burden in these circumstances, Mulberry's motion for summary judgment must be granted. The dismissal of the federal claims shall be with prejudice, while the dismissal of the pendent state law claims shall be without prejudice, and Sweet's contingent request to amend his complaint by adding certain claims under state law is denied.

\*7 Final judgment shall be entered accordingly.

So ordered.

#### JUDGMENT

The court, having this day granted defendant's motion for summary judgment, it is hereby ORDERED, ADJUDGED, AND DECREED plaintiff John A. Sweet's claims under federal law against defendant Mulberry Lutheran Home are DISMISSED WITH PREJUDICE, and plaintiff John A. Sweet's claims arising under state law against defendant Mulberry Lutheran Home are DISMISSED WITHOUT PREJUDICE as the

court relinquishes jurisdiction. The costs of this action are assessed against the plaintiff.

**All Citations**

Not Reported in F.Supp.2d, 2003 WL 21525058

**Footnotes**

- 1 For purposes of its motion for summary judgment, Mulberry does not concede that Sweet's cross-dressing or intended sex change played any part in its decision to fire him. Sweet argues otherwise but has offered no evidence to support his claim.

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2002 WL 31098541

United States District Court, E.D. Louisiana.

Peter OILER

v.

WINN-DIXIE LOUISIANA, INC.

No. Civ.A. 00-3114.

Sept. 16, 2002.

*ORDER AND REASONS*

AFRICK, J.

\*1 Plaintiff, Peter Oiler (“Oiler”), filed this employment discrimination action to recover damages from his former employer, Winn-Dixie Louisiana, Inc. (“Winn-Dixie”), pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and the Louisiana antidiscrimination statute, La. R.S. 23:332(A)(1) (West 2002).<sup>1</sup> Plaintiff has filed a motion for summary judgment with respect to liability issues.<sup>2</sup> Defendant has filed a cross motion for summary judgment.<sup>3</sup> Both motions are opposed and both parties have filed reply memoranda.<sup>4</sup>

At issue is whether discharging an employee because he is transgendered and a crossdresser is discrimination on the basis of “sex” in violation of Title VII. For the following reasons, the motion of defendant for summary judgment is GRANTED and the motion of plaintiff for summary judgment is DENIED.

*Facts*

In 1979, plaintiff, Peter Oiler, was hired by defendant, Winn-Dixie, as a loader.<sup>5</sup> In 1981, he was promoted to yard truck driver and he later became a road truck driver.<sup>6</sup> As a road truck driver, plaintiff delivered groceries from Winn-Dixie's grocery warehouse in Harahan, Louisiana, to grocery stores in southern and central Louisiana and Mississippi.<sup>7</sup>

Plaintiff is a heterosexual man who has been married since 1977.<sup>8</sup> The plaintiff is transgendered.<sup>9</sup> He is not a transsexual and he does not intend to become a woman.<sup>10</sup> Plaintiff has been diagnosed as having transvestic fetishism with gender dysphoria<sup>11</sup> and a gender identity disorder.<sup>12</sup> He is a male crossdresser.<sup>13</sup> The term crossdresser is used interchangeably with transvestite.<sup>14</sup>

When he is not at work, plaintiff appears in public approximately one to three times per month<sup>15</sup> wearing female clothing and accessories.<sup>16</sup> In order to resemble a woman, plaintiff wears wigs and makeup, including concealer, eye shadow, foundation, and lipstick.<sup>17</sup> Plaintiff also wears skirts, women's blouses, women's flat shoes, and nail polish.<sup>18</sup> He shaves his face, arms, hands, and legs.<sup>19</sup> He wears women's underwear and bras and he uses silicone prostheses to enlarge his breasts.<sup>20</sup> When he is crossdressed as a woman, he adopts a female persona and he uses the name “Donna”.<sup>21</sup>

Prior to 1996, plaintiff only crossdressed at home. After 1996, assuming the identity of “Donna”, plaintiff crossdressed as a woman in public.<sup>22</sup> While crossdressed, he attended support group meetings, dined at a variety of restaurants in Kenner and Metairie, visited night clubs, went to shopping malls, and occasionally attended church services.<sup>23</sup> He was often accompanied by his wife and other friends, some of whom were also crossdressed.<sup>24</sup>

On October 29, 1999, plaintiff told Gregg Miles, a Winn-Dixie supervisor, that he was transgendered.<sup>25</sup> He explained that he was not a transsexual and that he did not intend to become a woman.<sup>26</sup> However, he told Miles that for a number of years he had been appearing in public at restaurants and clubs while crossdressed.<sup>27</sup> He told Miles that while he was crossdressed, he assumed the female role of “Donna”.<sup>28</sup> He asked whether he would be terminated if Michael Istre, the president of Winn Dixie Louisiana, Inc., ever saw plaintiff crossdressed as a woman.<sup>29</sup>

\*2 On the same day, Miles had a private meeting with Istre.<sup>30</sup> Miles told Istre that plaintiff was transgendered.

Miles explained that for several years the plaintiff had been appearing in public crossdressed as a woman.<sup>31</sup> Istre contacted Winn-Dixie's counsel for legal advice.<sup>32</sup>

Istre and Miles made the decision to terminate the plaintiff's employment with Winn-Dixie.<sup>33</sup> On November 1, 1999, Istre and Miles asked Oiler to resign.<sup>34</sup> Several times after he was initially asked to resign, plaintiff met with Winn-Dixie managers who gave him a deadline by which he would have to resign.<sup>35</sup> The deadline was extended a number of times.<sup>36</sup> On January 5, 2000, when plaintiff did not resign voluntarily, Winn-Dixie discharged him.<sup>37</sup> The reason plaintiff was terminated was because he publicly adopted a female persona and publicly crossdressed as a woman. Specifically, Istre and Miles, acting for Winn-Dixie, terminated Oiler because of his lifestyle, i.e., plaintiff publicly crossdressed for several years by going to restaurants and clubs where he presented himself as "Donna", a woman.<sup>38</sup> Istre and Miles believed that if plaintiff were recognized by Winn-Dixie customers as a crossdresser, the customers, particularly those in Jefferson Parish where plaintiff worked, would disapprove of the plaintiff's lifestyle.<sup>39</sup> Istre and Miles thought that if Winn-Dixie's customers learned of plaintiff's lifestyle, i.e., that he regularly crossdressed and impersonated a woman in public, they would shop elsewhere and Winn-Dixie would lose business.<sup>40</sup> Plaintiff did not crossdress at work and he was not terminated because he violated any Winn-Dixie on-duty dress code.<sup>41</sup> He was never told by any Winn-Dixie manager that he was being terminated for appearing or acting effeminate at work, i.e., for having effeminate mannerisms or a high voice.<sup>42</sup> Nor did any Winn-Dixie manager ever tell plaintiff that he did not fit a male stereotype or assign him work that stereotypically would be performed by a female.<sup>43</sup>

Plaintiff received a "Dismissal and Notice of Rights" issued by the United States Equal Employment Opportunity Commission.<sup>44</sup> Plaintiff subsequently filed this lawsuit.<sup>45</sup>

#### *Summary Judgment Standard*

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material fact.*" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).<sup>46</sup> "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). To defeat a properly supported motion for summary judgment, the party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2552, quoting F.R.Civ.P. 56(e); *Auguster v. Vermilion Parish School Board*, 249 F.3d 400, 402 (5<sup>th</sup> Cir.2001).

#### *Issues Presented*

\*3 Plaintiff alleges two grounds in support of his motion for summary judgment. First, plaintiff argues that Title VII prohibits employment discrimination on the basis of sexual stereotyping and that defendant's termination of him for his off-duty acts of crossdressing and impersonating a woman is a form of forbidden sexual stereotyping.<sup>47</sup> Second, plaintiff contends that he is a victim of disparate treatment in violation of Title VII. He alleges that he was terminated because he crossdressed while off-duty, although other similarly situated female employees were not discharged.<sup>48</sup>

Defendant denies that plaintiff was fired for failing to conform to a male stereotype. It asserts that plaintiff's activities as a male who publicly pretended to be a female do not fall within Title VII's protection. As to plaintiff's

disparate treatment claim, defendant contends that there is no evidence in the record that any female employee of Winn-Dixie ever crossdressed and impersonated a male.<sup>49</sup>

### *Title VII*

Title VII, 42 U.S.C. § 2000e-2(a) provides in part that “[i]t shall be an unlawful employment practice for an employer (1) to ... discharge any individual ... because of such individual's ... sex.”<sup>50</sup> The threshold determination with respect to plaintiff's first claim is whether a transgendered individual who is discharged because he publicly crossdresses and impersonates a person of the opposite sex has an actionable claim under Title VII.

In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.1984), cert. denied, 471 U.S. 1017, 105 S.Ct. 2023, 85 L.Ed.2d 304 (1985), a male airline pilot was fired when, following sex reassignment surgery, she attempted to return to work as a woman. The court considered whether the word “sex” in Title VII meant not only biological sex, i.e., male or female, but also “sexual preference” and “sexual identity.” The Seventh Circuit concluded, based upon the plain meaning of the word “sex” and the legislative history of Title VII, that sex meant “biological sex”. The court recognized that it is a “maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning.” 742 F.2d at 1085. The *Ulane* court stated that:

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

with a prohibition based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that the section means nothing more than the plain language implies.

#### *\*4 Id.*

Following *Ulane*, several courts have held that persons with gender identity disorders, including those discharged because they were transsexuals, did not have claims cognizable under Title VII.<sup>51</sup> Like the *Ulane* court, these courts have held that discrimination on the basis of *sex* means discrimination on the basis of the plaintiff's biological sex.

In 1964, when Title VII was adopted, there was no debate on the meaning of the phrase “sex”.<sup>52</sup> In the social climate of the early sixties, sexual identity and sexual orientation related issues remained shrouded in secrecy and individuals having such issues generally remained closeted. Thirty-eight years later, however, sexual identity and sexual orientation issues are no longer buried and they are discussed in the mainstream. Many individuals having such issues have opened wide the closet doors.

Despite the fact that the number of persons publicly acknowledging sexual orientation or gender or sexual identity issues has increased exponentially since the passage of Title VII, the meaning of the word “sex” in Title VII has never been clarified legislatively. From 1981 through 2001, thirty-one proposed bills have been introduced in the United States Senate and the House of Representatives which have attempted to amend Title VII and prohibit employment discrimination on the basis of affectional or sexual orientation. None have passed.<sup>53</sup>

In contrast to the numerous failed attempts by Congress to include affectional or sexual orientation within Title VII's ambit, neither plaintiff nor defendant can point to any attempts by Congress to amend Title VII in order to clarify that discrimination on the basis of gender or sexual identity disorders is prohibited.<sup>54</sup> Neither party has identified any specific legislative history evidencing Congressional intent to ban discrimination based upon sexual or gender identity disorders.

Plaintiff argues that his termination by Winn-Dixie was not due to his crossdressing as a result of his gender identity disorder, but because he did not conform to a gender stereotype. In support of his argument, plaintiff relies on the United States Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse*, the United States Supreme Court held that discrimination on the basis of sex or gender stereotyping was discrimination because of "sex" within the meaning of Title VII. In that case, the partnership candidacy of the plaintiff, a senior manager who was the only woman of eighty-eight candidates considered for partnership, was placed on hold for a year.<sup>55</sup> The Supreme Court noted that the evidence suggested that "[t]here were clear signs ... that some of the partners reacted negatively to Hopkins' personality because she was a woman."<sup>56</sup> (*italics added*). Partners at the firm criticized her because she was "macho", "overcompensated for being a woman", and suggested that she needed "a course at charm school".<sup>57</sup> The most damning evidence of sex discrimination was the advice Ms. Hopkins was given to improve her partnership chances. She was told she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."<sup>58</sup>

\*5 The Supreme Court found that the plaintiff was discriminated against because of her gender, i.e., because she was a woman, in violation of Title VII. The Court explained:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, 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 gender....

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[in] 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." *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7<sup>th</sup> Cir.1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

490 U.S. at 250-251; 109 S.Ct. at 1790-1791.

In analyzing plaintiff's Title VII claim post *Price Waterhouse*, the Court notes that courts have long held that discrimination on the basis of sexual orientation is not actionable under Title VII. In *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir.2000), the court found that, "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation." 232 F.3d at 36. While the *Simonton* court did not decide whether the plaintiff was being discriminated against because of a sexual stereotype in violation of *Price Waterhouse*, it did observe:

The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes.

*Id.* at 38.<sup>59</sup>

After much thought and consideration of the undisputed facts of this case, the Court finds that this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits

normally valued in a female employee, but disparaged in a male employee.<sup>60</sup> Rather, the plaintiff disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity. The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named "Donna."

\*6 Plaintiff's actions are not akin to the behavior of plaintiff in *Price Waterhouse*. The plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona.<sup>61</sup>

This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. After a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with *Ulane* and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase "sex" has not been interpreted to include sexual identity or gender identity disorders.

In holding that defendant's actions are not proscribed by Title VII, the Court recognizes that many would disagree with the defendant's decision and its rationale. The plaintiff was a long-standing employee of the defendant. He never crossdressed at work and his crossdressing was not criminal or a threat to public safety.

Defendant's rationale for plaintiff's discharge may strike many as morally wrong. However, the function of this Court is not to raise the social conscience of defendant's upper level management, but to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress and it cannot, therefore, afford the luxury of making a moral judgment. As the *Ulane* court observed:

Congress has a right to deliberate on whether it wants such a broad

sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court.... If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

742 F.2d at 1086.

By virtue of the many courts which have struggled for two decades with the issue of whether Title VII, in prohibiting discrimination on the basis of "sex", also proscribes discrimination on the basis of sexual identity disorders, sexual preference, orientation, or status, Congress has had an open invitation to clarify its intentions. The repeated failure of Congress to amend Title VII supports the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder. In reaching this decision, this Court defers to Congress who, as the author of Title VII, has defined the scope of its protection. Neither Title VII nor the United States Supreme Court's decision in *Price Waterhouse* affords plaintiff the protection that he seeks.

#### *Disparate Treatment*

\*7 Plaintiff's second claim is that he, as a male crossdresser, was treated differently than three women employees whom he observed wearing male clothing and who were not fired for being crossdressers.<sup>62</sup> As explained in *Portis v. First National Bank of New Albany, MS*, 34 F.3d 325 (5<sup>th</sup> Cir.1994):

A Title VII plaintiff carries 'the initial burden of offering evidence adequate to create an inference that

an employment decision was based on a discriminatory criterion illegal under the Act.’ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977)....

A plaintiff may use either direct or circumstantial evidence to prove a case of intentional discrimination. [*United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714, n. 3, 103 S.Ct. 1478, 1481, n. 3, 75 L.Ed.2d 403 (1983) ]. Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in *McDonnell Douglas*.<sup>63</sup> This test establishes a prima facie case by inference, but it is not the exclusive method for proving intentional discrimination. “[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621–22, 83 L.Ed.2d 523 (1984).

‘Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption.’ *Brown v. East Miss. Elec. Power Ass’n*, 989 F.2d 858, 861 (5<sup>th</sup> Cir.1993). In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face. [citations omitted].  
34 F.3d at 328–329.

With respect to the proof necessary to establish a disparate treatment claim pursuant to Title VII, the Fifth Circuit has stated:

We have held that in order for a plaintiff to show disparate treatment, she must demonstrate “that the misconduct for which she was discharged was nearly identical to that engaged in by a[n] employee [not within her protected class] whom [the company] retained.” *Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (5<sup>th</sup> Cir.1990) (per curiam) (first and second alterations ours, third alteration in original) (quoting *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5<sup>th</sup> Cir. Unit B 1982)) [other citations omitted]. Or put another way, the conduct at issue is not nearly identical when the difference between the plaintiff’s conduct and

that of those alleged to be similarly situated accounts for the difference in treatment received from the employer. See *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304–05 (5<sup>th</sup> Cir.2000) (requiring the plaintiff to show that the company treated others differently in “nearly identical circumstances” and finding that “the striking differences between the two men’s situations more than account for the different treatment they received.”) (other citations omitted).

\*8 *Wallace*, 271 F.3d at 221.

There is no evidence in the record establishing that any woman who worked for the defendant was a crossdresser, i.e., a woman who adorned herself as a man in order to impersonate a man and who used a man’s name.<sup>64</sup> While there were women working for the defendant who wore jeans, plaid shirts, and work shoes while working in the warehouse or in refrigerated compartments, there is no evidence that they were transgendered or that they were crossdressers, i.e., that they impersonated men and adopted masculine personas or that they had gender identity disorders.<sup>65</sup> Plaintiff’s claim for disparate treatment fails because he has not demonstrated a genuine issue of material fact with respect to this claim and the defendant is entitled to judgment as a matter of law.<sup>66</sup>

#### Conclusion

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of defendant, Winn-Dixie, Louisiana, Inc., for summary judgment is GRANTED.

IT IS FURTHER ORDERED that the motion of plaintiff, Peter Oiler, for summary judgment is DENIED.

#### All Citations

Not Reported in F.Supp.2d, 2002 WL 31098541, 89 Fair Empl.Prac.Cas. (BNA) 1832, 83 Empl. Prac. Dec. P 41,258

#### Footnotes

1 In footnote one of plaintiff's memorandum in support of his motion for summary judgment, plaintiff states: "For the sake of convenience, because the Louisiana state law counterpart to Title VII is 'similar in scope' to Title VII, Mr. Oiler discussed only Title VII in this memorandum. See *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1274 (5<sup>th</sup> Cir.1989) (quotation omitted). That said, because Title VII does not necessarily limit the scope of Louisiana state law, Louisiana state law may afford greater protection than Title VII."

In an April 15, 2002, status conference, held after the cross motions for summary judgment were filed, plaintiff's counsel agreed that the remedy afforded by the Louisiana employment discrimination statute is coextensive with the remedy provided by Title VII, the federal employment discrimination statute. Rec. Doc. No. 55. Plaintiff's counsel also agreed that plaintiff would waive any argument that state law provided broader protection or greater remedies than Title VII. Rec. Doc. No. 55.

2 Rec. Doc. No. 37.

3 Rec. Doc. No. 42.

4 Rec. Doc. No. 40 (Defendant's memorandum in opposition to plaintiff's motion for summary judgment), Rec. Doc. No. 51 (Plaintiff's consolidated memorandum in opposition to defendant's motion for summary judgment and in reply to defendant's opposition to plaintiff's motion for summary judgment), and Rec. Doc. No. 54 (Defendant's reply memorandum to plaintiff's opposition).

5 Rec. Doc. No. 37, Declaration of Peter Oiler ("Oiler Dec."), para. 5.

6 Rec. Doc. No. 37, Oiler Dec., para. 5.

7 Rec. Doc. No. 37, Oiler Dec., para. 5.

8 Rec. Doc. No. 37, Oiler Dec., paras. 2 and 4.

9 Rec. Doc. No. 37, Oiler Dec., para. 3. Plaintiff defines transgendered as meaning that his gender identity, i.e., his sense of whether he is a male or female, is not consistently male. *Id.*

Walter Bockting, Ph.D., a psychologist who describes himself as an expert on transgender issues, defines the term "transgendered" as:

[A]n umbrella term used to refer to a diverse group of individuals who cross or transcend culturally-defined categories of gender. They include crossdressers or transvestites (who desire to wear clothing associated with another sex), male-to-female and female-to-male transsexuals (who pursue or have undergone hormone therapy or sex reassignment surgery), transgenderists (who live in the gender role associated with another sex without desiring sex reassignment surgery), bigender persons (who identify as both man and woman), drag queens and kings (usually gay men and lesbian women who do 'drag' and dress up in, respectively, women's and men's clothes), and female and male impersonators (males who impersonate women and females who impersonate men, usually for entertainment).

Rec. Doc. No. 37, Bockting Dec., attached report, p. 7.

10 Rec. Doc. No. 37, Oiler Dec., para. 3.

11 Dr. Bockting reports that:

Mr. Oiler's transgender identity can best be described as a male heterosexual crossdresser. While Mr. Oiler does report a history of some gender dysphoria (discomfort with the male sex assigned at birth), he is not transsexual; he does not want to take feminizing hormones or undergo sex reassignment surgery.... His motivation to crossdress appears two-fold: (1) to express a feminine side and (2) to relieve stress. In addition, he sometimes experiences sexual excitement in response to crossdressing. Associated distress includes emotional turmoil, agitation, and marital conflict. Therefore, a DSM-IV diagnosis of Transvestic Fetishism with gender dysphoria is warranted.

Rec. Doc. No. 37, Bockting Dec., attached report, p. 6.

12 Dennis P. Sugrue, Ph.D., is also a psychologist who describes himself as an expert on transgendered issues. Dr. Sugrue does not agree with Dr. Bockting's diagnosis of transvestic fetishism, but he instead opines that plaintiff is transgendered with a gender identity disorder. He states in his report:

Mr. Oiler's cross-dressing behavior suggests that he is *transgendered*, a non-clinical term frequently used in recent years for individuals whose behavior falls outside commonly accepted norms for the person's biological gender. In clinical terms, *Gender Identity Disorder NOS (Not Otherwise Specified)* is the most appropriate diagnosis.

The (DSM-IV) provides three diagnostic options for individuals with gender disturbances: *Transvestic Fetishism*, *Gender Identity Disorder*, and *Gender Identity Disorder NOS*. Although cross-dressing can at times have an erotic quality for Mr. Oiler, his behavior does not meet the DSM-IV transvestic fetishism criteria....

Mr. Oiler displays evidence suggestive of a *gender identity disorder* as defined by DSM-IV. For example, he frequently wishes to pass as the other sex, desires to be treated as the other sex, and is convinced that he has the

typical feelings and reactions of the other sex. He does not, however, display a preoccupation with ridding himself of primary and secondary sex characteristics or the conviction that he was born the wrong sex—features necessary for the diagnosis of a *Gender Identity Disorder* (often referred to as *transsexualism*). Hence the diagnosis of *Gender Identity Disorder NOS*.

Rec. Doc. No. 37, Segrue Dec., attached report, p. 6.

13 Rec. Doc. No. 37, Oiler Dec., para. 3.

14 Rec. Doc. No. 37, Bockting Dec., attached report, pp. 7 and 9.

15 Rec. Doc. No. 37, Bockting Dec., attached report, p. 3.

16 Rec. Doc. No. 37, Oiler Dec., para. 3.

17 Rec. Doc. No. 40, Exh. A, Deposition of Peter Oiler ("Oiler Dep."), p. 94.

18 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 94–95.

19 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 94–95.

20 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 95.

21 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 96.

22 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 92.

23 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 92–93, 115.

24 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 93–94.

25 Rec. Doc. No. 37, Oiler Dec., para. 9.

26 Rec. Doc. No. 37, Oiler Dec., para. 9.

27 Rec. Doc. No. 40, Exh. C, Deposition I of Greg Miles ("Miles Dep. I"), pp. 110–111, 237.

28 Rec. Doc. No. 40, Exh. C, Miles Dep. I, pp. 237–238.

29 Rec. Doc. No. 40, Exh. C, Miles Dep. I, p. 111.

30 Rec. Doc. No. 42, Exh. A, Deposition of Michael Istre ("Istre Dep."), p. 67; Exh. I, Declaration of Michael Istre ("Istre Dec."), para. 2.

31 Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 69–70.

32 Rec. Doc. No. 42, Exh. A, Istre Dep., p. 71; Exh. B, Miles Dep., p. 112.

33 Rec. Doc. No. 42, Exh. I, Istre Dec., para. 3.

34 Rec. Doc. No. 37, Oiler Dec., para. 10; Rec. Doc. No. 43, Exh. C, Miles Dep., pp. 236–238; Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91–100.

35 Rec. Doc. No. 37, Oiler Dec., para. 11.

36 Rec. Doc. No. 37, Oiler Dec., para. 11.

37 Rec. Doc. No. 37, Oiler Dec., para. 13.

38 Rec. Doc. No. 42, Exh. B, Miles Dep. I, pp. 236–238. Miles explained that by "lifestyle" he meant that the plaintiff "told me that he had been doing this for several years. He knew he was different from childhood. He ... described what he did away from work. It wasn't that he did it at home. He went out into the public. He went out into the night life. He went out to dinner in a female persona and that was something he chose to do." Miles Dep. I, p. 237. In his deposition, Miles testified:

Q: And so it was his off-the-job behavior over this period of time that you've referenced, is that what caused you to terminate him?

A: You say behavior; I say life-style.

Q: What do you mean by "life-style"?

A: Mr. Oiler told me that he had been doing this for several years.... It wasn't that he did it at home. He went out into the public. He went out into the night life. He went to dinner in a female persona and that was something he chose to do.  
\* \* \* \*

Q: So, what made it problematic for you such that you terminated him was the fact that he was taking this life-style out of his home into the public; is that correct?

A: Yes, sir.

Q: And, specifically, he was dressing in a certain way in full view of the public, going out to restaurants and clubs and things like that. Is that what made this something that you wanted to terminate him for?

A: There's more to it than just that statement.

Q: So what more? Just clarify for me.

- A: He had adopted a female persona. He called himself Donna when he went out. It wasn't just one or two things. It was the entire picture that he told."  
Miles Dep. I, p. 236–238.
- 39 Istre was concerned that plaintiff was “going out in public impersonating a woman, wearing the wig and the makeup and the jewelry and the dress and the shoes and the underwear and calling himself by name repeatedly.” According to Istre, that “could have some effect on my business.” Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91–92.  
Istre explained that, “I think with him doing all of these things, and when he is at work driving one of my trucks with a 45 or 50 foot trailer, whatever he is driving with Winn–Dixie, and walking through my stores and people recognizing him coming up to the front of the store or driving up in the front of our stores, with the truck parked in the front of the parking lot or in the front of the building, walking in, going to the office and going through the back of the store, I think if my customers recognized him ... I'd lose business.” Istre Dep., pp. 95–96.  
Istre also considered the fact that plaintiff regularly worked in Jefferson Parish, stating that, “Well, Peter said ... [cross-dressing] was unacceptable in Jefferson Parish, and when I looked at Jefferson Parish and the amount of stores that I have in Jefferson Parish, which is approximately 18 or so stores and I've got a large customer base there that have various beliefs, be it religion or a morality or family values or people that just don't want to associate with that type of behavior, those are the things that I took into consideration.” Istre Dep., p. 99.
- 40 Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91–100; Rec. Doc. No. 42, Exh. B, Miles Dep., pp. 125–127.
- 41 Rec. Doc. No. 37, Exh. A, Istre Dep., p. 118.
- 42 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214. Prior to October 29, 1999, plaintiff had complained to Miles that there were rumors in his workplace that he was gay and he asked Miles to discourage the rumors. Rec. Doc. No. 37, Oiler Dec., para. 8. On October 29, 1999, Miles asked Oiler if the rumors had stopped and Oiler stated that they had. Rec. Doc. No. 37, Oiler Dec., para. 9.  
Plaintiff is not making a Title VII claim for sexual harassment based upon rumors in his workplace that he was gay or that co-employees referred to him using demeaning terms, such as “sissy”, or any other inappropriate term used by some to refer to a male who does not fit a masculine sexual stereotype. There is no evidence in the summary judgment record that any such name-calling occurred or that the plaintiff was harassed because of his gender identity disorder. Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214. Until plaintiff voluntarily told his supervisor at Winn–Dixie that he was transgendered, there is no indication in the record that any person employed at Winn–Dixie knew that plaintiff was transgendered.
- 43 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214.
- 44 Rec. Doc. No. 42, Exh. C, Oiler Dep., Dep. Exh. 11. The EEOC Notice of Suit Rights states that, “[t]he EEOC is closing its file on this charge for the following reason: The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.”
- 45 Rec. Doc. No. 1.
- 46 Whether a fact is material depends upon the substantive law. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510, *citing generally* 10A C. Wright, A. Miller, and M. Kane, *Federal Practice & Procedure* § 2725, pp. 93–95 (1983). A dispute about a material fact is genuine if, construing the evidence in the light most favorable to the nonmoving party, “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*
- 47 Plaintiff does not claim that because of his gender identity disorder, he has a disability under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et seq.*, or that his discharge is a violation of ADA. Congress specifically excluded gender identity disorders from coverage under the ADA. *See*, 42 U.S.C. § 12211(b), which states in relevant part: “Under this chapter, the term “disability” shall not include—(1) transvestism, transsexualism, ... gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”
- 48 Plaintiff alleges that the defendant “does not fire female employees who regularly wear masculine clothing and accessories in public off the job.” Rec. Doc. No. 37, p. 15.
- 49 Rec. Doc. No. 42, p. 15.
- 50 La. R.S. 23:332, the Louisiana counterpart to Title VII, provides in pertinent part that “A. It shall be unlawful discrimination in employment for an employer to engage in any of the following practices: (1) Intentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's ... sex.”

51 *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9<sup>th</sup> Cir.1977) (Transsexual's Title VII claim rejected on the basis that Congressional intent was that the word "sex" in the statute was to be given its plain meaning as indicated by the failure of several bills to amend Title VII to prohibit discrimination on the basis of "sexual preference"); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8<sup>th</sup> Cir.1982) (The court held that the discharge of plaintiff, who "misrepresented himself 'herself' as an anatomical female when she applied for the job", was not actionable under Title VII. Plaintiff alleged that he was a "female with the anatomical body of a male." The court stated that, "we are in agreement with the district court that for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII."); *Dobre v. National R.R. Passenger Corp.*, 850 F.Supp. 284, 286–287 (E.D.Pa.1993) ("[A]n employer may not discriminate against a female because she is female. [citations omitted]. However, neither the plaintiff's memorandum of law nor the Court's independent research has disclosed any case broadening Title VII so as to prohibit an employer from discriminating against a male because he wants to become a female. Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism."); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 370 (E.D.Md.1977) (Court dismissed Title VII claim of a transsexual, holding that to construe Title VII "to cover plaintiff's grievance would be impermissibly contrived and inconsistent with the plain meaning of the words.... The gravamen of the Complaint is discrimination against a transsexual and that is precisely what is not reached by Title VII."); *Voyles v. Ralph K. Davies Medical Center*, 402 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd*, 570 F.2d 354 (9<sup>th</sup> Cir.1978) (Table, No. 75–3808) ("It is this Court's opinion, however, that employment discrimination based on one's transsexualism is not, nor was intended by Congress to be, proscribed by Title VII of the Civil Rights Act of 1964, of which 42 U.S.C. § 2000e–2(a)(1) is part. Section 2000e–2(a)(1) speaks of discrimination on the basis of one's 'sex.' No mention is made of change of sex or of sexual preference. The legislative history of as well as the case law interpreting Title VII nowhere indicate that 'sex' discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof."); *Doe v. United States Postal Service*, 1985 WL 9446 at \*2 (D.D.C.1985) (Court held that plaintiff, a male transsexual whose offer of employment was rescinded after employer learned that he was planning to undergo sex reassignment surgery and wanted to begin work as a woman, failed to state a claim under Title VII. The court agreed with *Ulane*, noting that a "prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they are born", *quoting Ulane*, 742 F.2d at 1085); *Emanuelle v. United States Tobacco Co., Inc.*, 1987 WL 19165 at \*1 (D.Ill.1987), *aff'd*, 886 F.2d 332 (7<sup>th</sup> Cir.1989) (Table, No. 87–2785) (Court held that the Title VII claims of plaintiff, a transsexual, must be dismissed as not within the jurisdiction of Title VII); *James v. Ranch Mart Hardware, Inc.*, 1994 WL 731517 at \*1 (D.Kan.1994) ("Plaintiff cannot state a claim for discrimination based upon transsexualism because employment discrimination based upon transsexualism is not prohibited by Title VII", *citing Voyles*, 403 F.Supp. at 457. "Even if plaintiff is psychologically female, Congress did not intend 'to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual.'" *Id.* at \*1, *quoting Sommers*, 667 F.2d at 748); *Rentos v. Oce-Office Systems*, 1996 WL 737215 at \*6 (S.D.N.Y.1996) ("Every federal court that has considered the question has rejected the application of the Civil Rights Act of 1964, 42 U.S.C.2000e–2 (1982) ["Title VII"] to a transsexual claiming employment discrimination [citations omitted].... Plaintiff's counsel recognizes the uniformity of the federal courts' position in his Affidavit in Opposition, in which he states that he is 'aware that Federal Law, under Title VII, precludes protection of transsexuals with respect to discrimination in the workplace.' [Affidavit in Opposition, para. 4]. Plaintiff's Amended Complaint therefore cannot hope to, and does not purport to, state a claim under Title VII.").

52 *Ulane*, 742 F.2d at 1085. As observed in *Ulane*, "When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. 'Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.' [citations omitted]. This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. [citation omitted]." *Id.*

"The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation." *Id.*

- 53 H.R. 1454 Civil Rights Amendments Act of 1981 (Jan. 28, 1981—1<sup>st</sup> Session), rejected; H.R. 3371, Civil Rights Act of 1981 (May 1, 1981—1<sup>st</sup> Session), rejected; S. 1708, Civil Rights Amendments Act of 1981 (Sept. 9, 1981—1<sup>st</sup> Session), rejected; S. 430, Civil Rights Amendments Act of 1983 (Jan. 24, 1983—1<sup>st</sup> Session), rejected; H.R. 427, Civil Rights Amendments Act of 1983 (Jan. 3, 1983—1<sup>st</sup> Session), rejected; H.R. 2624, Civil Rights Amendments Act of 1983 (April 19, 1983—1<sup>st</sup> Session), rejected; S. 1432, Civil Rights Amendments Act of 1985 (July 15, 1985—1<sup>st</sup> Session), rejected; H.R. 230, Civil Rights Amendments Act of 1985 (Jan. 3, 1985—1<sup>st</sup> Session), rejected; S. 464, Civil Rights Amendments Act of 1987 (Feb. 4, 1987—1<sup>st</sup> Session), rejected; H.R. 709, Civil Rights Amendments Act of 1987 (Jan. 21, 1987—1<sup>st</sup> Session), rejected; S. 47, Civil Rights Amendments Act of 1989 (Jan. 3, 1989—1<sup>st</sup> Session), rejected; H.R. 655, Civil Rights Amendments Act of 1989 (Jan. 24, 1989—1<sup>st</sup> Session), rejected; S. 574, Civil Rights Amendments Act of 1991 (Feb. 6, 1991—1<sup>st</sup> Session), rejected; H.R. 1430, Civil Rights Amendments Act of 1991 (Mar. 13, 1991—1<sup>st</sup> Session), rejected; H.R. 423, Civil Rights Amendments Act of 1993 (Jan. 5, 1993—1<sup>st</sup> Session), rejected; S. 2238, Employment Non-Discrimination Act of 1994 (June 7, 1994—2<sup>nd</sup> Session), rejected; H.R. 431, Civil Rights Act of 1993 (Jan. 5, 1993—1<sup>st</sup> Session), rejected; H.R. 4636 Employment Non-Discrimination Act of 1994 (June 23, 1994—2<sup>nd</sup> Session), rejected; H.R. 382, Civil Rights Amendments Act of 1995 (Jan. 4, 1995—1<sup>st</sup> Session), rejected; S. 932, Employment Non-Discrimination Act of 1995 (June 5, 1995—1<sup>st</sup> Session), rejected; H.R. 1863, Employment Non-Discrimination Act of 1995 (June 15, 1995—1<sup>st</sup> Session), rejected; H.R. 365, Civil Rights Amendments Act of 1998 (Jan. 7, 1997—1<sup>st</sup> Session), rejected; S. 869, Employment Non-Discrimination Act of 1997 (June 10, 1997—1<sup>st</sup> Session), rejected; H.R. 1858, Employment Non-Discrimination Act of 1997 (June 10, 1997—1<sup>st</sup> Session), rejected; H.R. 311, Civil Rights Amendments Act of 1999 (Jan. 9, 1999—1<sup>st</sup> Session), rejected; S. 1276, Employment Non-Discrimination Act of 1999 (June 24, 1999—1<sup>st</sup> Session), rejected; H.R. 2355, Employment Non-Discrimination Act of 1999 (June 24, 1999—1<sup>st</sup> Session), rejected; H.R. 217, Civil Rights Amendments Act of 2001 (Jan. 3, 2001—1<sup>st</sup> Session), pending; S. 1284, Employment Non-Discrimination Act of 2001 (July 31, 2001—1<sup>st</sup> Session), pending; H.R. 2692, Employment Non-Discrimination Act of 2001 (July 31, 2001—1<sup>st</sup> Session), pending; Protecting Civil Rights for All Americans Act (Jan. 22, 2001—1<sup>st</sup> Session), pending.
- 54 The Court directed the parties to file supplemental briefs addressing whether, from 1982 to the present, Congress had made any attempts to amend Title VII to expressly include affectional or sexual orientation, preference or identity within the meaning of discrimination on the basis of “sex”. Rec. Doc. No. 59. While the defendant identified numerous attempts to amend Title VII to specifically prohibit employment discrimination on the basis of “affectional or sexual orientation”, neither party identified any proposed bill by either the House or the Senate to amend Title VII to specifically prohibit discrimination on the basis of gender or sexual identity.
- 55 490 U.S. at 231–232; 109 S.Ct. at 1780–1781.
- 56 490 U.S. at 235; 109 S.Ct. at 1782.
- 57 *Id.*
- 58 490 U.S. at 235; 109 S.Ct. at 1782.
- 59 Long after *Price Waterhouse* was decided, courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person’s “sex.” *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1<sup>st</sup> Cir.1999) (“We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.”); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084–1085 (7<sup>th</sup> Cir.2000), *cert. denied*, 532 U.S. 995, 121 S.Ct. 1656, 149 L.Ed.2d 638 (2001) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation. [citation omitted]. Therefore, harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”); *Mimms v. Carrier Corp.*, 88 F.Supp.2d 706, 713–714 (E.D.Tex.2000) (Citing *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5<sup>th</sup> Cir.1978), the court agreed with the defendant that discrimination on the basis of sexual orientation is not actionable under Title VII, stating

that “[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act. Therefore, lacking membership in a protected class, the plaintiff’s claim must fail as a matter of law.”); *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257, at \*4, n. 2 (W.D.Mo.2000) (In a Title VII suit brought by a transsexual, the court rejected plaintiff’s suggestion that harassment because of homophobia was protected by Title VII, stating that “Title VII’s protections do not extend to discrimination on the basis of sexual orientation or sexual preference.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3<sup>rd</sup> Cir.2001), *cert. denied*, 122 S.Ct. 1126, 151 L.Ed.2d 1018 (2002) (“Harassment on the basis of sexual orientation has no place in our society [citations omitted]. Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by Bibby—and, indeed, his very claim—indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.”).

60 There is no evidence that plaintiff was discriminated against because he was perceived as being insufficiently masculine, i.e., that he suffered adverse employment actions because he appeared to be effeminate or had mannerisms which were stereotypically feminine. This is distinguishable from *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9<sup>th</sup> Cir.2001). In *Nichols*, the male plaintiff sued under Title VII alleging that he was verbally harassed “because he was effeminate and did not meet [his co-employees’] views of a male stereotype.” *Id.* at 869. The *Nichols* court recognized that this was a *Price Waterhouse* claim alleging discrimination on the basis of sexual stereotypes, stating that “[a]t its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray ‘like a woman’—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez’s male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as ‘she’ and ‘her.’ And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender. *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here.” *Id.* at 874–875.

61 See also, *Bellaver v. Quanax Corp.*, 200 F.3d 485, 495 (7<sup>th</sup> Cir.2000). In a Title VII case filed by a woman claiming that she was discriminated against on the basis of sexual stereotypes, the court found that the evidence presented a genuine issue whether male employees were treated better than she was. *Id.* at 495. The court observed:

As in *Price Waterhouse*, the evidence suggests that the employer here may have relied on impermissible stereotypes of how women should behave. Bellaver’s evaluations are marred only by the repeated references to her interpersonal skills, but these same types of deficiencies seemed to be tolerated in male employees. Penny knew of the sexist double-standard, knew that men resented working with Bellaver because she was a woman and knew that the company had a reputation as a ‘good ol’ boy’ network. Penny sought Bellaver’s firing in late 1996 or early 1997 because of her social skills, or lack thereof. The human resources manager ... reviewed Bellaver’s file and told Penny that he did not have cause to fire her based on her interpersonal skills.... Penny and Gulliford decided to fire Bellaver and have Penny, Hucker and others absorb her duties. A jury reasonably could find that this decision was motivated at least in part by the double-standard applied to men and women because only Bellaver [a woman employee] and not Breen, Arbizzani or Gulliford [all male employees], was criticized for being hard to get along with.

*Id.* at 492–493.

62 Rec. Doc. No. 37, p. 15

63 “To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. [Citation omitted]. Once the employer articulates a legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions ‘simply drops out of the picture,’ and the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved ‘that the defendant intentionally discriminated against [her] because of [her sex].’” *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).” *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5<sup>th</sup> Cir.1998), *cert. denied* 525 U.S. 1000, 119 S.Ct. 509, 142 L.Ed.2d 422 (1998), *reh’g denied*, 525 U.S. 1117, 119 S.Ct. 894, 142 L.Ed.2d 792 (1999). “The plaintiff bears the ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against her because of her protected status.” *Wallace v. Methodist Hospital System*, 271 F.3d 212, 220–221 (5<sup>th</sup> Cir.2001), *reh’g denied*, \_\_\_ F.3d \_\_\_, 2001 WL 1748326 (5<sup>th</sup> Cir.2001) (Table, No. 00–20255), *cert. denied*, 122 S.Ct. 1961, 152 L.Ed.2d 1022 (2002), *citing Tex.*

*Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) and *St. Mary's*, 509 U.S. at 511–12, 113 S.Ct. at 2749–50.

64 Rec. Doc. No. 42, Exh. A, Istre Dep., p. 131, and Exh. I, Istre Dec., para. 4 and 6; Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 235–236, 238, 243–244, and 247.

65 Plaintiff acknowledged in his deposition that he did not know if the three female employees whom he alleged were similarly situated were crossdressers or transgendered. Nor did he know whether Winn–Dixie management perceived these female employees to be crossdressers or transgendered. Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 248–253.

66 F.R.Civ.P. 56(c).

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EEOC DOC 0120133080 (E.E.O.C.), 2015 WL 4397641

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

Office of Federal Operations

DAVID BALDWIN

v.

ANTHONY FOXX, SECRETARY, DEPARTMENT OF TRANSPORTATION  
(FEDERAL AVIATION ADMINISTRATION), AGENCY.

Appeal No. 0120133080

Agency No. 2012-24738-FAA-03

July 15, 2015

DECISION

\*1 Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e-2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency's final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant's initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission's jurisdiction.<sup>1</sup>

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency's Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida.

On August 28, 2012, Complainant contacted an EEO Counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

The Agency accepted the complaint for investigation. When the investigation was completed, Complainant was given his notice of right to request a hearing before an EEOC Administrative Judge or an immediate final decision by the Agency based on the investigative report. On May 21, 2013, Complainant requested an immediate final decision from the Agency. The Agency issued its Final Agency Decision (FAD) on July 12, 2013.

The evidence developed during the investigation shows that in October 2010, Complainant was selected for and accepted a temporary FLM position at the Miami facility. The record further reflects that the Agency issued a vacancy announcement for a permanent FLM position in June 2012.

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as well as his familiarity with the Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

\*2 The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor, who was involved in the selection process for the permanent position, made several negative comments about Complainant's sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner had attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on a number of occasions that he was "a distraction in the radar room" when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant's claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO Counselor, as required by EEOC regulations. The Agency reasoned that the 45-day limitation period in which Complainant should have contacted an EEO Counselor started to run in October 2010, the date on which the Complainant was aware that his temporary FLM position would expire after two years and he would be returned to his previous position. Therefore, the Agency found, Complainant's EEO Counselor contact in August 2012 was made well beyond the 45-day limitation period.

The FAD also notified Complainant that, pursuant to the "Secretary's Policy on Sexual Orientation" and the "Departmental Office of Civil Rights' March 7, 1998 Procedures for Complaints of Discrimination based on Sexual Orientation," the "sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)]."

Complainant appealed the Agency's decision to the Commission.

### ANALYSIS AND FINDINGS

#### *Timeliness of EEO Counselor Contact*

EEOC's regulations require that complaints of discrimination be brought to the attention of an Equal Employment Opportunity Counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). The Commission has long applied a "reasonable suspicion" standard, viewed from the perspective of the complainant, to determine when the 45-day limitation period is triggered. *See, e.g., Complainant v. U.S. Postal Serv.*, EEOC Appeal No. 0120093169, 2014 WL 2999934 (EEOC June 27, 2014) (citing *Howard v. Dep't of the Navy*, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999), citing *Ball v. U.S. Postal Serv.*, EEOC Appeal No. 01871261, 1988 WL 921053 (EEOC July 6, 1988), *req. for recon. den.*, EEOC Request No. 05980247 (July 15, 1988)). Thus, the time limitation is not triggered until a complainant should reasonably suspect discrimination, even if all the facts that might support the charge of discrimination have not yet become apparent.

\*3 Further, it is well-settled that when, as here, there is an issue of timeliness, "fa[n] agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." *Williams v. Dep't of Def.*, EEOC Request No. 05920506, 1992 WL 1374923, \*3 (EEOC Aug. 25, 1992). We conclude the Agency has not met this burden and erred in dismissing the complaint for untimely EEO counseling.

In its FAD, the Agency stated that it considered the date of the alleged adverse action to be October 2010, when Complainant assumed his temporary FLM position and, according to the Agency, knew that he would be returned to his former position at the expiration of the appointment. However, the Agency acknowledged in its FAD that “the date of the incident for the instant complaint is in dispute.” It is clear that a permanent FLM vacancy was posted in June 2012 and a selection was made in July 2012, although the selectee later declined the position and the certificate of eligibles expired without any further selection being made. The Agency argued that Complainant did not apply for the position,<sup>2</sup> but Complainant claims that he did not formally apply because of his understanding that all temporary FLMs were automatically considered for vacant, permanent FLM positions. Further, Complainant stated that his desire for promotion was well known in the Miami facility.

According to the affidavits of Complainant's first-level supervisor (S1) and second-level supervisor (S2), individuals, including Complainant, competed for the temporary FLM appointments. In February 2012, an announcement was made that a temporary FLM (Employee 1) had been converted to permanent status. Employee 1 did not compete for the permanent position. Subsequently, a second temporary FLM (Employee 2) was converted to permanent status without competing for the position.<sup>3</sup> Neither S1 nor S2 explained the process by which temporary FLMs were converted to permanent status, although S2 stated that it was a matter of managerial discretion.

It is not reasonable for the Agency to argue that Complainant knew or should have known that he was being discriminated against with regard to conversion to a permanent position at the time he was appointed to a temporary FLM position. Complainant had no reason to know or to suspect at the time of his temporary appointment that he subsequently would not be selected for a permanent FLM position, let alone for discriminatory reasons. As the elevation of the two temporary FLMs demonstrates, conversion to a permanent FLM position was a realistic possibility for Complainant if a vacancy arose during his tenure. The Agency's position might have merit if Complainant's claim were that, when he was given a temporary appointment, other individuals outside of his protected group were given permanent appointments. But that is not the claim at bar. Rather, the claim is whether Complainant was treated disparately when he was not converted to permanent status nearly two years after his appointment.

\*4 The standard we apply to determine timeliness is when Complainant *reasonably* should have first suspected discrimination. Here, we find that Complainant could only reasonably have suspected that discrimination occurred after he learned he was not selected for conversion to the permanent FLM position on July 26, 2012, near the end of his two-year temporary assignment. See Howard, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999). Complainant's contact with an EEO Counselor on August 28, 2012, therefore, fell within the 45-day limitation period and was timely. Accordingly, we remand the complaint for further processing by the Agency consistent with the ruling below.

#### *EEOC Jurisdiction over Complainant's Sex Discrimination Claim*

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that “[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex.” 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for a covered employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex”).

Title VII's prohibition of sex discrimination means that employers may not “rel[y] upon sex-based considerations” or take gender into account when making employment decisions. See Price Waterhouse v. Hopkins, 490 U.S. 228, 239,

241-42 (1989); Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*5 (EEOC Apr. 20, 2012) (quoting Price Waterhouse, 490 U.S. at 239).<sup>4</sup> This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.<sup>5</sup>

\*5 In the case before us, we conclude that Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> ("*Sexual orientation* refers to the *sex* of those to whom one is sexually and romantically attracted" (second emphasis added)). It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

\*6 The court in Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he "experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." Id. at \*2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. See also Heller v. Columbia Edgewater Country

Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (“One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller’s manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.”) (internal citations omitted).<sup>6</sup>

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer’s discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII’s prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee’s association with a person of another race, such as an interracial marriage or friendship. See, e.g., Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009) (“This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race.”); Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008) (“We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race.”).<sup>7</sup> This is because an employment action based on an employee’s relationship with a person of another race necessarily involves considerations of the employee’s race, and thus constitutes discrimination because of the employee’s race.

\*7 This analysis is not limited to the context of race discrimination. Title VII “on its face treats each of the enumerated categories” -- race, color, religion, sex, and national origin -- “exactly the same.” Price Waterhouse, 490 U.S. at 243 n.9 (“[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.”); see also Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 n.6 (2d Cir. 2000) (“[T]he same standards apply to both race-based and sex-based hostile environment claims.”); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir. 1982) (“[T]he standard for proving sex discrimination and race discrimination is the same.”); Horace v. City of Pontiac, 624 F.2d 765, 768 (6th Cir. 1980) (“Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination.”).

Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, “by definition,” discrimination because of the employee or applicant’s sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race [in violation of Title VII].”); Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) (“Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII’s prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.”).

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” 490 U.S. at 251 (quoting Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if

such individuals demonstrate that they were treated adversely because they were viewed--based on their appearance, mannerisms, or conduct--as insufficiently ““masculine” or “feminine.”<sup>8</sup> But as the Commission<sup>9</sup> and a number of federal courts<sup>10</sup> have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

\*8 Sexual orientation discrimination and harassment “[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.” Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The Centola court continued:

In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, “real” men should date women, and not other men.

Id.

Those deeper assumptions and stereotypes about “real” men and “real” women were similarly noted by the court in Terveer v. Library of Congress in rejecting the government's motion to dismiss:

Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”). Here, Plaintiff has alleged that he is “a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles,” that his “status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor's] supervision or at the LOC,” and that “his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male.” As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”

Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (citations omitted) (first quoting Pl.'s Am. Compl.; then quoting Fed. R. Civ. P. 8(a)).

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above.<sup>11</sup> Indeed, many courts have gone to great lengths to distinguish adverse employment actions based on “sex” from adverse employment actions based on “sexual orientation.” The stated justification for such intricate parsing of language has been the bare conclusion that “Title VII does not prohibit . . . discrimination because of sexual orientation.” Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the “borders [between the two classes] are . . . imprecise.” Id. (alteration in original).<sup>12</sup>

\*9 Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) (“Congress had only the traditional notions of ‘sex’ in mind” when it passed Title VII and those “traditional notions” did not include sexual orientation or sexual preference.) abrogated by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001).<sup>13</sup>

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in Oncale v. Sundowner Offshore Services, Inc., “statutory prohibitions often go beyond the principal evil [they were passed to combat] 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.” 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.<sup>14</sup> Nothing in the text of Title VII “suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone.” Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.”).<sup>15</sup> But the Supreme Court has ruled that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of “people in interracial relationships.” See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998), reinstated in relevant part, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of “masculine women.” See Price Waterhouse, 490 U.S. at 239-40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of “non-believers.” See, e.g., EEOC v. Townley Eng’g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word “mothers” in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

\*10 Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant's allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.<sup>16</sup> Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process.

We recognize that many agencies also have separate complaint processes in place for claims of sexual orientation discrimination. Agencies may maintain, and employees may still utilize, these procedures if they wish. But the 1614 process is the most appropriate method for resolving these claims. Agencies should make applicants and employees

aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.

### CONCLUSION

Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII. Furthermore, we conclude that Complainant's initial EEO Counselor contact was timely. We remand the Complainant's claim of discrimination to the Agency for further processing for a determination on the merits.

ORDER The Agency is ORDERED to continue processing the remanded claims. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall reissue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within thirty (30) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision on the merits of his discrimination claims **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

**\*11** Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington,

DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

**\*12** Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you instead wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

#### FOR THE COMMISSION:

Bernadette B. Wilson  
Acting Executive Officer  
Executive Secretariat

#### Footnotes

- 1 This decision addresses only the timeliness and jurisdiction questions raised on appeal. We take no position on the merits of Complainant's claim of discrimination. That is for the Agency to determine upon remand.
- 2 Complainant did not submit an application for the vacant permanent FLM position. Whether, under the facts of this case, Complainant was or was not required to submit an application in order to be considered for the vacant permanent position goes to the merits of his complaint. At this stage of the proceedings, the inquiry is limited to whether Complainant has met the procedural requisites to maintain his EEO complaint. See, e.g., Complainant v. U.S. Equal Employment Opp. Commn., EEOC Appeal No. 0120120403, 2013 WL 6145999 (EEOC Nov. 13, 2013) (citing Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642, 1991 WL 1189594 (EEOC Aug. 15, 1991)). We find that he has done so.

- 3 While Employee 2 was converted to permanent status to resolve an EEO complaint he had filed, there is no indication that the reason for his conversion to permanent status was common knowledge. S1 averred that Employee 2 would have qualified for conversion to permanent status in any event.
- 4 As used in Title VII, the term “sex” “encompasses both sex - that is, the biological differences between men and women - and gender.” See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred “not just discrimination because of biological sex, but also gender stereotyping - failing to act and appear according to expectations defined by gender.” As such, the terms “gender” and “sex” are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) (“Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”) (plurality opinion). We do the same in this decision.
- 5 As we observed in Macy, 2012 WL 1435995 at \*6:  
“Title VII . . . identifies] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a ‘bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.” Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, “the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). “The only plausible inference to draw from this provision is that, in all other circumstances, a person’s gender may not be considered in making decisions that affect her.” Price Waterhouse, 490 U.S. at 242.
- 6 Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See Videckis v. Pepperdine Univ., \_\_\_ F. Supp. 3d \_\_\_, No. 15-298, 2015 WL 1735191 (C.D. Cal., 2015) (“[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.”); Lawson v. Kelly, \_\_\_ F. Supp. 3d \_\_\_, No. 14-522, 2014 WL 5810215, at \*8 (W.D. Mo. Nov. 7, 2014) (“The State’s permission to marry depends on the genders of the participants, so the restriction is a gender-based classification,” and it violates the Equal Protection Clause); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (“Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry’s choice of marital partner because of her sex.”), aff’d sub nom., Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom., Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
- 7 See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) (“A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . .”); Hancock v. Dep’t of Transp., EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), req. for recon. den., EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) (“[A]n individual may be entitled to protection by virtue of association with a member of a protected class . . . .”); Robertson v. U.S. Postal Serv., EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n. 1 (association discrimination may be established where evidence permits the inference that an agency’s act or omission would not have occurred if the complainant and associate were of the same race).
- 8 See Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) (“It follows [from Price Waterhouse] that employers who discriminate against men because they . . . act femininely[ ] are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”); EEOC v. Boh Brothers, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) (“[A] jury could view Wolfe’s behavior as an attempt to denigrate Woods because -- at least in Wolfe’s view -- Woods fell outside of Wolfe’s manly-man stereotype” and that would constitute sex discrimination in violation of Title VII).
- 9 See Veretto v. United States Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); Baker v. Social Security Administration, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC January 11, 2013) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-conforming behavior); Dupras v. Dep’t of Commerce, EEOC Request No. 0520110648, 2013 WL 1182329

- (EEOC March 15, 2013) (complainant's allegation that she was subjected to stereotyping on the basis of sex because of her sexual orientation is sufficient to state a claim of sex discrimination under Title VII); Culp v. Dep't of Homeland Security, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC May 7, 2013) (complainant's allegation of sexual orientation discrimination states a claim of sex discrimination because it was an allegation that her supervisor was motivated by stereotypes that women should only have relationships with men); Brooker v. U.S. Postal Service, EEOC Request No. 0520110680, 2013 WL 4041270 (EEOC May 20, 2013), (complainant's allegation that coworkers were spreading allegations about his sexual orientation was properly framed as a claim of sex discrimination); Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0120110576, 2014 WL 4407457 (EEOC August 19, 2014) (reaffirming the analysis in the cases cited above).
- 10 See Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Heller, 195 F. Supp. 2d at 1224 (D. Or. 2002) (“[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”); Koren v. Ohio Bell, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (“And here, Koren chose to take his spouse's surname--a “traditionally” feminine practice--and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name.”); Terveer v. Billington, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he “alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, and that his orientation as homosexual had removed him from Mech's preconceived definition of male.”) (internal citations and quotes omitted); Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. 2014) (denying an employer's motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); Deneffe v. SkyWest, Inc., 2015 WL 2265373, at \*6 (D. Colo. May 11, 2015) (denying employer's motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male “braggadocio” about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights) Cf. Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014), *petition for cert. filed*, (U.S. Dec. 31, 2014) (No. 14-765) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that “the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory.”; Id. at 495 (Berzon, J. concurring) (“[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.”).
- 11 A review of cases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. For example, in a brief to the Seventh Circuit Court of Appeals requesting rehearing based on various broad declaratory statements that Title VII does not cover sexual orientation, the EEOC pointed out that only one previous Seventh Circuit case had analyzed the question of coverage of sexual orientation discrimination under Title VII and that case, decided in 1984, had not been reviewed in light of subsequent decisions such as Price Waterhouse. Instead, a string of Seventh Circuit panel decisions had simply reiterated the holding in the first case without any further discussion. Br. EEOC Supp. Reh'g 8-9, Muhammad v. Caterpillar Inc., ECF No. 49, No. 12-1723 (7th Cir. Oct. 7, 2014). The Seventh Circuit denied the request for rehearing but reissued its decision without the statements that sexual orientation discrimination is not covered under Title VII. See Muhammad v. Caterpillar, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7<sup>th</sup> Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, .Oct. 16, 2014).
- 12 We do not view the borders between sex discrimination and sexual orientation as “imprecise.” As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.
- 13 Indeed, the Equal Employment Opportunity Commission's own understanding of Title VII's application to sexual orientation discrimination has developed over time. Compare Johnson v. U.S. Postal Serv., EEOC Appeal No. 01911827, 1991 WL 1189760, at \*3 (EEOC Dec. 19, 1991) (holding that Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and Morrison v. Dep't of the Navy, EEOC Appeal No. 01930778, 1994 WL 746296, at \*3 (EEOC June 16, 1994) (affirming that Title VII's discrimination prohibition does not include sexual preference or orientation as a basis), with Morris v. U.S. Postal Serv., EEOC Appeal No. 01974524, 2000 WL 226001, at \*1-2 (EEOC Feb. 9, 2000) (distinguishing Johnson and Morrison and holding that complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex). Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections extended to LGBT employees and explained that federal decisions have been inconsistent in this area. See Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H.

Comm. on Educ. & Labor, 111th Cong. (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission).

- 14 Title VII prohibits discrimination on the basis of “sex” without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, “[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress’s province.” EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. \_\_\_ (2015), 135 S.Ct. 2028, 2033, 2015 WL 2464053, \*4 (2015).
- 15 See also Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing Bibby and Simonton (see *infra*) with approval); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) (“Title VII has not been amended to prohibit discrimination based on sexual orientation.”); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (“Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent.”).
- 16 There may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.

EEOC DOC 0120133080 (E.E.O.C.), 2015 WL 4397641

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United States District Court,  
N.D. Illinois,  
Eastern Division.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS  
AND TRAINMEN, General Committee  
of Adjustment, Central Region, Plaintiff,  
v.  
UNION PACIFIC RAILROAD  
COMPANY, Defendant.

No. 10 C 8296.

Jan. 24, 2011.

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**MEMORANDUM OPINION AND ORDER**

JAMES B. ZAGEL, District Judge.

**I. INTRODUCTION**

\*1 This dispute surrounds changes made to the vacation planning methods implemented by Union Pacific Railroad Company (“UP” or “Carrier”). The Brotherhood of Locomotive Engineers and Trainmen (“BLET” or “Union”) opposes the changes and asks that I issue a preliminary injunction requiring UP to return all vacation planning to the status quo as it existed in 2010 until the dispute is resolved through arbitration. In the alternative, BLET asks that I order the parties to arbitrate the issues on an expedited 60-day basis and require UP to make the engineers whole if its unilateral forcing of vacations is not approved in the arbitration. For the following reasons, BLET's motion for a preliminary injunction is denied.

**II. STATEMENT OF RELEVANT FACTS**

UP requires that all engineers be “full time” employees “marked up” and available for work on a seven-day, 24-hour basis. When called, engineers must present themselves at the terminal within one and a half and two hours. Because of the engineers' unpredictable schedules, planned vacation time is very important to the engineers and their families.

The parties have a National Agreement which addresses vacation and scheduling. Pursuant to the National Agreement, “due regard” shall be given to the preference of employees in the seniority order in the class of service in which engaged. The representatives of the carriers and the employers further agree to cooperate in arranging vacation periods.

In 1990, an award by Arbitrator La Rocco stated that “the Carrier should oblige the employee in fixing vacation dates in accordance with his desires or preferences, unless by doing so would result in a serious impairment in the efficiency of operations which could not be avoided by the employment of relief workers at that particular time or by the making of some other reasonable adjustment .” A second award by La Rocco in 1993 provided that UP could not require vacations to be “flat lined” or spread out evenly or inflexibly over a 52 week period, without regard to service needs and engineers' preferences. The 1993 award also states that if a Carrier wishes to place an inflexible or absolute cap on the number of engineers who can take vacation during any single week, the Carrier must justify the cap by needs of service.

Traditionally, the process of setting vacations proceeded as follows. First, engineers submit their preferred vacation dates to their BLET Local Chairman. The Local Chairman then reviewed all requests, accounted for seniority, and then passed to the Carrier the BLET vacation requests. Following the submission, negotiations might take place as to the maximum numbers of engineers who are allowed to take vacations at one time, though usually an agreement was reached that was acceptable to both the BLET and the Carrier.

In 2009, BLET opposed UP's 2010 vacation scheduling efforts. In particular, the Kansas City and St. Louis vacation groups were unable to reach an agreement with UP until February, 2010. At the heart of these disagreements were cut backs in the number of engineers

who were allowed to take vacation on any particular week. In some areas, the Carrier cut back the number of vacation slots available per week from fifteen to seven or eight. The Carrier also required a minimum number of engineers to be off every week of the year. BLET argued that these changes resulted in an impermissible denial of their preferences. They further contended that the Carriers had not shown that its service needs require such vacation scheduling. Pursuant to the Agreement, a Carrier is entitled to unilaterally rearrange vacations when required by the service needs of the company.

\*2 The prolonged talks in 2009 and early 2010 led to vacations being scheduled on a compressed 46-week year. To ensure that the 2011 schedule was prepared by the start of the year, work began on the 2011 vacation schedule in August 2010. Patrick Kenny, UP's Director of Crew Utilization, presented a proposed 2011 vacation schedule on November 9, 2010 which was rejected. Again, the rejection focused on a cut back in available vacation slots, and perceived "flat lining." Between November 16, 2010 and December 4, 2010 over 200 letters were sent to each Local Chairman regarding the 2011 vacation schedule. The correspondence informed the union representatives that the deadline to input their members' vacations was December 15, 2010. According to UP, "it became evident, based on BLET-GCA's failure to return calls or otherwise respond," that there would not be cooperation. An extension for inputting vacation was granted until December 21.

On December 16, 2010, UP sent a broadcast to all employees inviting them to enter their own vacation bids prior to December 21, 2010. This was a departure from previous protocol whereby engineers' vacation bids went through the Local Chairmen. On December 20, 2010 95% of employee's vacations had been scheduled. The remaining 5% were almost exclusively in the Kansas City or St. Louis service units. These units demanded up to 15 vacation slots per week with no minimums. On December 22, 2010, the Kansas City and St. Louis vacation groupings had still not been scheduled. UP extended the deadline for scheduling to December 27, 2010. Schedules were still not completed, and finally, on December 29, 2010, UP scheduled the vacations for Kansas City and St. Louis based on the offer made on December 22, 2010.

### III. DISCUSSION

The parties argue this motion assuming that the dispute at hand is 'minor' in nature. Minor disputes are those "involving the interpretation of application of existing labor agreements." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Major disputes relate to the formation of collective bargaining agreements or efforts to secure them. *Id.* at 253. Though BLET argues that this Court has jurisdiction to enter an injunction in minor disputes, it does not concede that this cannot be considered a major dispute.<sup>1</sup> For purposes of this motion, I consider this a minor dispute.

UP opposes the injunction on two grounds. First, UP disputes that this Court has jurisdiction to issue an injunction, contending that this matter must go directly to arbitration. Next, UP argues that even if this Court does have jurisdiction to issue an injunction, the injunction should be denied on the merits.

Before I begin my analysis, I note that each party has a valid reason for standing their ground and applying their given leverage. From UP's perspective, unilaterally implementing vacation changes applies pressure on the Union to simply accept its modifications. Disputing any change is a costly process involving extensive negotiations and even arbitration. Furthermore, the Union runs the risk of losing at arbitration. From the Union's perspective, by not accepting the new policy, the Union can successfully delay a resolution of the process. This in turn causes the Carrier uncertainty and disrupts some of its ability to manage its employees. Though taking such positions has led to a stand off, a resolution will ultimately be reached through arbitration.

\*3 At the hearing held on January 21, 2011, I heard testimony from representatives of each side, as well as extensive legal and factual argument. I have considered both the written briefs and oral argument in reaching my decision. However, BLET's testimony and argument regarding incorrect grouping for purposes of seniority plays no part in my decision. The processes that underlie employee grouping are separate and distinct from those at issue here. It is not uncommon for erroneous grouping to occur. Here, though an improper grouping in one or two cases may have damaged a vacation schedule, it was the grouping, and not the policy at issue in this dispute, that was the cause. Additionally, though UP puts forth an argument of unclean hands, given the timing of the Carrier's implementation of the 2010 schedule in late

December 2010, I am unwilling to tax the union alone for causing a delay.

*A. This Court Does Have Jurisdiction  
To Issue A Preliminary Injunction.*

In the case of minor disputes, a federal court has only limited power to order an injunction to maintain the status quo. *National Ry. Labor Conference v. International Ass'n of Machinists and Aerospace Workers*, 830 F.2d 741, 749 (7th Cir.1987). As a general rule, a railroad may “continue to apply its interpretation of the agreement during the pendency of a minor dispute.” *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 799 (1st Cir.1986), cert. denied, — U.S. —, 107 S.Ct. 111, 93 L.Ed.2d 59 (1986). Because the dispute itself lies within the exclusive jurisdiction of the railway adjustment board, the federal courts may issue an injunction against strikes arising out of minor disputes in order to effect the purpose of the Railway Labor Act to provide for compulsory arbitration in such disputes. *Brotherhood of Railroad Trainmen v. Chicago River & Indian Railway Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); see also *Brotherhood of Locomotive Engineers v. Missouri–Kansas–Texas Railway Co.*, 363 U.S. 528, 531, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960) (“M–K–T”).

The status quo requirement is important because it discourages strikes while disputes are being resolved. *Shore Line R. Co. v. Transportation Union*, 396 U.S. 142, 150, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969). BLET seeks a preliminary injunction under Section 6 of the Railway Labor Act which provides that “rates of pay, rules, or working conditions shall not be altered” during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board. 45 U.S.C. § 156. Under this section, a court may order an injunction when there is a major dispute, and a carrier attempts to, ignores or repudiates or changes the terms of an existing collective bargaining agreement. *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 303, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989).

Though BLET cites *Brotherhood of Locomotive Engineers v. Missouri–Kansas–Texas Railroad* (“M–K–T”), 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960), for the proposition that this Court has jurisdiction to enjoin UP from altering the status quo to preserve the interest in arbitration—even in the case of a minor dispute—

they overstate the application of that case. *Brotherhood of Locomotive Engineers* states that an injunction of minor disputes is proper to prevent strikes. It does not discuss injunctions outside the context of a strike. Another case relied upon by BLET is *International Brotherhood of Teamsters Airline Division v. Frontier Airlines, Inc.*, — F.3d —, 2010 WL 5060260 (7th Cir.2010). There, the Seventh Circuit stated that “preliminary injunctions may be issued in minor disputes despite the exclusive jurisdiction of disputes of the NLRB or its counterpart in the airline industry.” The cases cited by the Seventh Circuit in support of that statement, are *M–K–T*, and *National Railway Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 749–50 (7th Cir.1987). In both of these cases, the Courts' discussions surrounding the issuance of an injunction in minor disputes revolved around preventing strikes or other self help.

\*4 The Seventh Circuit however, has also held that a district court may issue an injunction to prevent irreparable harm. *Bhd. of Railway Engineers v. Atchison*, 847 F.2d 403, 405 n. 1 (7th Cir.1988). Specifically, the Seventh Circuit notes that “a court may enjoin employer actions that engender only minor disputes if the delay in obtaining an NRAB decision will result in irreparable harm to employees.” BLET asserts irreparable harm, contending that a “long-delayed decision” would impose hardship and irreparable injury that arbitration cannot remedy. Given the precedent set by the Supreme Court and the Seventh Circuit, I find that I do have the authority to issue an injunction.

*B. BLET's Request For A  
Preliminary Injunction Is Denied.*

A plaintiff is entitled to a preliminary injunction only when it meets three requirements: (1) showing a likelihood of success on the merits; (2) an inadequate remedy at law; and (3) irreparable harm. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir.2001). In addition to these three requirements, the court must also balance the harm the moving party would endure without the injunction, with the harm the non-movant would suffer if the injunction is granted. *Id.* Finally, the court must consider “the wild card that is the public interest.” *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir.1986).

1. Likelihood of success on the merits

UP argues that BLET has no chance of success on the merits. To meet this requirement, the Seventh Circuit requires only a “better than negligible chance of success.” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.*, 549 F.3d 1079, 1096 (7th Cir.2008) (internal citation omitted). This is a very low threshold. Furthermore, when determining whether to grant injunctive relief against an employer when arbitration is pending, the Seventh Circuit has recognized that determinations on the merits “would intrude significantly on the arbitrator’s function.” *Local Lodge No. 1266, Int’l Ass’n of Machinists and Aerospace Workers, AFL–CIO v. Panoramic Corp.*, 668 F.2d 276, 284 (7th Cir.1981). Accordingly, a plaintiff need only establish that he advocates a sound position. *Id.* Though UP engages in a lengthy explanation of how its new policy complies with the La Rocco Awards, I find that BLET has met its burden.

## 2. Adequate remedy at law

To satisfy this requirement, BLET must show that absent court intervention, any remedy would be “seriously deficient as compared to the harm suffered.” *Foodcomm Intern. v. Barry*, 328 F.3d 300, 304 (7th Cir.2003). UP argues that BLET has an obvious remedy at law: arbitration through the RLA. BLET disagrees. Practically speaking, BLET contends that the arbitration process, even assuming a victory, will not be able to compensate engineers who are forced to take vacation, or who are denied their vacation preferences.

I am unpersuaded by BLET’s arguments. The Union’s harm is almost certainly capable of monetary compensation; disappointment is not irreparable in the classic sense of the word, and emotional suffering is commonly compensated by cash. UP has agreed to an expedited arbitration of this dispute, and the arbitrator is capable of offering full relief. Whatever harm that would be done to individuals by an arbitration that consumes more than sixty days can be adequately compensated by cash, days off, or similar pecuniary remedies. Accordingly, I find that BLET has an adequate remedy available at law.

## 3. Irreparable Harm

\*5 The Seventh Circuit has recognized, in the context of a suit over Family and Medical Leave Act rights, that “working conditions pose problems for the workers. For instance, some workers are “on call”, meaning they

have no regularly set days off and may be called to duty at any time consistent with federal laws.” *Brotherhood of Maint. of Way Employees, et al., v. CSX Transp., et al.*, 478 F.3d 814, 819 (7th Cir.2007). Likewise, the Court recognized that “workers cherish their vacations” and noted that “vacation agreements are the subject of apparently hard bargaining. Their right to time one’s vacation and, to perhaps a slightly lesser degree, personal leave days, is a hard-won right of railroad workers.” *Id.* Accordingly, BLET argues that depriving workers of their vacation preferences would inflict irreparable injury on many engineers. “There is no way to give a person back time spent with a toddler as they begin to walk or talk, with family members enjoying time together, and countless other events which engineers plan for their vacations.”

UP states that BLET cannot show irreparable harm because “at worst, a UP employee may be instructed to take a paid vacation when the needs of service allow for it, rather than on the week of the employee’s preference.” This, argues UP, does not amount to irreparable harm. I agree. As noted above, any harm done to individual union members can be compensated through cash awards or additional days off. Though there will be the inevitable disappointment of an unplanned forced vacation, or cancelled plans, this is not irreparable in the classic sense of the word; emotional suffering is commonly compensated by monetary awards. I further note that even by the actual terms of the Agreement, harm is not irreparable. The Carrier has always retained the power to rearrange vacations at any time if the service needs of the railroad so dictate.

Finally, BLET argues that the Carrier is rewarding those engineers who have acquiesced to the Carrier’s invitation to deal directly as to vacation slots. “The message is all too clear: If you acquiesce to the Carrier’s requests to change working conditions and attempt to ice out the Union from its statutory and contractual role, you will be rewarded; if instead you insist on the Carrier respecting agreements and practices and through your lot with the Union, you will be punished.” As discussed below, any loss in stature or authority that the Union faces in the absence of an injunction is not irreparable.

## 4. Balance of Harms and Public Interest

The balance of harms in this case results in a tie. There are two aspects to the harm UP will suffer. The first is monetary cost. UP states that cost of retraining engineers,

and recalling and retraining furloughed employees is great; in 2010, UP incurred retraining costs for the Kansas City Service Unit in excess of 1.8 million dollars, and for the St. Louis Service Unit in excess of 1.5 million dollars. Though these costs are substantial, they are typical. Each year requires a certain amount of retraining to accommodate vacation schedules, and UP does not contend that 2010 was unique. It is the 'cost of doing business.' A second harm to UP, if an injunction is issued, is seen in its inability to manage personnel effectively. Though disruptive, the situation will be temporary as the arbitrator's award will confirm the proper procedures to be followed and vacation scheduling will resume a normal pattern. This is the same injury that the Union faces in the absence of an injunction. Without a return to the status quo, the Union leadership faces damage to its stature and authority. If the Union goes on to win at arbitration, its strong stance will be vindicated and its stature will be restored. Conversely, if it loses, it will be placed in a position where it can assure its members that it 'fought to the death' for its members.

\*6 Similarly, when the public interest is considered, the result is a tie.

#### V. CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction is denied. Pursuant to this order there will be no further broadcasts from UP to its employees encouraging direct scheduling. I further deny Plaintiff's request to order the arbitrator to make BLET's employees whole in the event they are successful at arbitration. The arbitrator is entitled to award an entire remedy. As he has not declined to issue such relief, it is not ripe for me to rule on this issue.

#### All Citations

Not Reported in F.Supp.2d, 2011 WL 221823, 160 Lab.Cas. P 10,339

#### Footnotes

- 1 In a supplemental filing, BLET argues that the dispute at hand can be considered a major dispute because it constitutes a unilateral imposition of work rule changes which are to be sought through collective bargaining. The parties' briefs assume that this is a minor dispute, and the parties did not argue orally over this issue at the preliminary injunction hearing.

2016 WL 6134121

Only the Westlaw citation is currently available.  
United States District Court,  
N.D. Illinois, Eastern Division.

Students and Parents for Privacy, a voluntary unincorporated association; C.A., a minor, by and through her parent and guardian, N.A.; A.M., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A.T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W., Plaintiffs,  
v.

United States Department of Education; John B. King, Jr., in his official capacity as United States Secretary of Education; United States Department of Justice; Loretta E. Lynch, in her official capacity as United States Attorney General; and School Directors of Township High School District 211, County of Cook and State of Illinois, Defendants,  
and

Students A, B, and C, by and through their parents and guardians, Parents A, B, and C; and the Illinois Safe Schools Alliance, Intervenor-Defendants.

No. 16-cv-4945

|  
Signed 10/18/2016

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#### REPORT AND RECOMMENDATION

Jeffrey T. Gilbert, United States Magistrate Judge

#### I. EXECUTIVE SUMMARY

\*1 Plaintiffs Students and Parents for Privacy, an unincorporated association, and five current or prospective high school students who live in suburban Cook County, Illinois, by and through their parents and legal guardians, (collectively, "Plaintiffs") have filed a Motion for Preliminary Injunction that, if granted, would require Defendant School Directors of Township High School District 211 ("District 211" or "the District") to segregate restrooms and locker rooms on the basis of students' biological sex (which Plaintiffs consider to be sex assigned at birth). Plaintiffs also seek to enjoin a rule, adopted by Defendant United States Department of Education ("DOE") and enforced in conjunction with Defendant United States Department of Justice ("DOJ") (together with the Secretary of Education and the Attorney General, collectively "the Federal Defendants"), that requires all schools in the United States to allow students to use restrooms and locker rooms consistent with their gender identity. Last, Plaintiffs seek to enjoin the District's policy, implemented in August 2013, allowing transgender students to use restrooms consistent with their gender identity, and an agreement DOE entered into with District 211 in December 2015 in which the District agreed to allow Student A, a transgender girl, to use the girls' locker rooms at William Fremd High School ("Fremd High School"), a public high school in Palatine, Illinois.

District Judge Jorge Alonso referred Plaintiffs' Motion for Preliminary Injunction to this Magistrate Judge for a Report and Recommendation as to whether it should be granted or denied. A preliminary injunction is an extraordinary remedy. Granting a preliminary injunction

in this case would change the status quo before a full determination on the merits of the claims and defenses raised in the lawsuit. Preliminary injunctive relief is granted only when the moving parties—here, Plaintiffs—make a clear showing that they have a likelihood of success on the merits of their claims, they likely will suffer irreparable harm if an injunction is not issued pending a final determination of the matters at issue, and they lack an adequate remedy at law. If the moving parties make these three threshold showings, then they still must show, on balance, that they will suffer more harm if an injunction is not issued than the non-moving parties will suffer if it is issued, and that the public interest would be served by the issuance of an injunction.

The Court finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that DOE violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 500 *et seq.*, by promulgating a rule that interprets Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 *et seq.*, to require that schools permit transgender students to use restrooms and locker rooms consistent with their gender identity, and by entering into an agreement informed by that rule with District 211 under which the District is required to allow Student A to use the girls' locker rooms at Fremd High School. The law in the Seventh Circuit concerning the meaning of the term “sex” as used in Title IX may be in flux. Just last week, the Seventh Circuit vacated a decision by a panel of that court that adhered to a longstanding interpretation of the word “sex” in the almost identically worded Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.*, as very narrow, traditional and biological. Plaintiffs relied heavily on the now vacated panel decision. The full court of appeals agreed to rehear that case next month. Recent rulings by courts around the country including a district court in the Seventh Circuit evince a trend toward a more expansive understanding of sex in Title IX as inclusive of gender identity. Therefore, the Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that DOE's interpretation of Title IX is not in accordance with law or entitled to deference.

\*2 The Court also finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that District 211 or the Federal Defendants are violating their right to privacy under the United States Constitution or that District 211 is violating

Title IX because transgender students are permitted to use restrooms consistent with their gender identity and Student A is allowed to use the girls' locker rooms at Fremd High School. High school students do not have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs. In addition, sharing a restroom or locker room with a transgender student does not create a severe, pervasive, or objectively offensive hostile environment under Title IX given the privacy protections District 211 has put in place in those facilities and the alternative facilities available to students who do not want to share a restroom or locker room with a transgender student. Further, the facilities District 211 provides for its male and female students are comparable as is required by Title IX.

In addition, even if Plaintiffs were able to show they have a likelihood of success on the merits of their claims, they still would not be entitled to the injunctive relief they seek. Plaintiffs have not shown they are likely to suffer irreparable harm if the District's or the Federal Defendants' actions are not enjoined. Plaintiffs also have not shown they lack an adequate remedy at law against either District 211 or the Federal Defendants if they ultimately succeed on their claims. Therefore, Plaintiffs have not made the three required threshold showings at this early stage of the case that the law requires to change the status quo before a final decision on the parties' claims and defenses.

For all of these reasons, there is no legal reason why District 211 cannot continue to permit all students to use restrooms and Student A to use locker rooms consistent with their gender identity while this case proceeds. As discussed more fully below, District 211 balanced the interests of all its students when it decided to permit transgender students to use restrooms consistent with their gender identity and to allow Student A to use the girls' locker rooms at her high school. Although the District decided to allow Student A to use the girls' locker rooms under threat of an enforcement action by DOE, it nevertheless agreed to resolve that action rather than litigate the issue, and it defends its decision to do so in this case. District 211 now offers all students reasonable accommodations to ensure their privacy is protected in restrooms and locker rooms. In addition, the District has made clear that any cisgender high school student who

does not want to use a restroom or a locker room with a transgender student is not required to do so.

Accordingly, this Court respectfully recommends to Judge Alonso that Plaintiffs' Motion for Preliminary Injunction be denied.

## II. BACKGROUND

### A. Events That Preceded This Lawsuit

In August 2013, District 211 began allowing transgender students to use restrooms consistent with their gender identity (“the Restroom Policy”). Verified Complaint for Injunctive and Declaratory Relief (“Complaint”), [ECF No. 1, at ¶¶ 214-217].<sup>1</sup> But it did not allow transgender students to use locker rooms consistent with their gender identity. In December 2013, Student A, a transgender girl now in her senior year at Fremd High School, filed a complaint with DOE's Office of Civil Rights (“OCR”), alleging that District 211 was violating Title IX by denying her access to the girls' locker rooms. *Id.* at ¶¶ 71-75, 80.<sup>2</sup>

\*3 Title IX prohibits recipients of “Federal financial assistance” from discriminating on the basis of sex in education programs and activities. 20 U.S.C. § 1681(a). DOE and DOJ share responsibility for enforcing Title IX. *See id.* at § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this grant of authority, OCR investigates complaints, conducts compliance reviews, promulgates regulations, and issues guidance. DOE's regulations implementing Title IX provide, in relevant part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any ... education program or activity operated by a recipient which receives Federal financial assistance.” 34 C.F.R. § 106.31(a). The regulations permit recipients to provide sex-segregated “toilet, locker room, and shower facilities,” so long as “facilities provided for students of one sex [are] comparable to such facilities for students of the other sex.” *Id.* at § 106.33. As a recipient of “Federal financial assistance” from DOE, District 211 is subject to Title IX. *See* 20 U.S.C. § 1681(a).

In a series of guidance documents issued in 2014 and 2015 (collectively, “Guidance Documents” or “Guidance”), DOE explained how schools that receive “Federal financial assistance” should comply with Title IX and its implementing regulations with respect to transgender

students. In April 2014, in response to requests for clarification from various funding recipients, DOE, through OCR, issued guidance stating that “Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity.” Questions and Answers on Title IX and Sexual Violence (“Q&A on Sexual Violence”), [ECF No. 21-9, at 5]. In December 2014, DOE also said that “[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.” Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (“Q&A on Single-Sex Classes and Extracurricular Activities”), [ECF No. 21-8, at 25]. In April 2015, DOE reiterated this interpretation, stating that recipients must “help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes.” Title IX Resource Guide, [ECF No. 21-7, at 21-22].<sup>3</sup>

The Guidance Documents were issued after Student A filed her complaint with OCR concerning locker room access but during the time that OCR was reviewing that complaint. After investigating Student A's complaint, OCR notified District 211 by a letter dated November 2, 2015—the “Letter of Findings” for short—that excluding Student A from the girls' locker rooms violated Title IX's implementing regulations. Letter of Findings, [ECF No. 21-10, at 13]. The Letter of Findings further explained that if OCR and District 211 were not able to negotiate an agreement to bring the District into compliance with its obligations, OCR would issue a Letter of Impending Enforcement Action. *Id.*

On December 2, 2015, OCR and District 211 entered into an Agreement to Resolve, which will be referred to as the “Locker Room Agreement.” Locker Room Agreement, [ECF No. 21-3]. The Locker Room Agreement provides, among other things:

\*4 Based on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room facilities designated for female students at school and to take steps to protect the

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

*Id.* at 2. The Locker Room Agreement further provides:

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

*Id.*

#### **B. Plaintiffs' Complaint In This Case**

On May 4, 2016, a little more than five months after the Locker Room Agreement was signed, Plaintiffs filed this lawsuit against the Federal Defendants and District 211, challenging the Restroom Policy, the Locker Room Agreement, and the Guidance Documents. Complaint, [ECF No. 1].<sup>4</sup> In Count I of their Complaint, Plaintiffs allege that DOE violated the APA by entering into the Locker Room Agreement with District 211 and by promulgating a rule, embodied in the Guidance Documents, requiring schools to treat students consistent with their gender identity. In Counts II and IV respectively, Plaintiffs allege that the Federal Defendants and District 211 are violating Plaintiffs' constitutional right to privacy, and that the District is violating their rights under Title IX, by allowing transgender students to use restrooms consistent with their gender identity and by allowing Student A, who Plaintiffs consider to be a biological male, to use the girls' locker rooms.

In addition, Plaintiffs assert claims for violations of their parental right to direct the education and upbringing of their children (Count III); the Illinois and Federal Religious Freedom Restoration Acts (Counts V and VI); and the Free Exercise Clause of the First Amendment (Count VII). Counts I and VI are against the Federal Defendants only; Counts IV and V are against District 211 only. The remaining counts are against all Defendants.

\*5 Plaintiffs are an unincorporated association and five individually named minor plaintiffs (four females and one male), identified only by their initials. Plaintiffs use the term "Girl Plaintiffs" to refer to "all girl students who attend Fremd, or will attend Fremd in fall 2016, and are part of the Students and Parents for Privacy [including the four female minor named plaintiffs]." *Id.* at ¶ 36. They use the term "Student Plaintiffs" to refer to "all students who are part of Students and Parents for Privacy [including the five individual minor named plaintiffs]." *Id.*<sup>5</sup> The only individual minor plaintiff who is male is identified as B.W. in paragraph 35 of the Complaint. Plaintiffs allege B.W. is subject to the Restroom Policy but he is not referenced anywhere else in the Complaint. Student Plaintiffs allege they are affected by the Restroom Policy, but only Girl Plaintiffs allege they are affected by the Locker Room Agreement. The only transgender student who is alleged to have used a restroom or locker room at Fremd High School is Student A.

Plaintiffs allege, among other things, the Restroom Policy and the Locker Room Agreement cause Girl Plaintiffs to experience "embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity" because they use, and anticipate having to use, restrooms and locker rooms with Student A, who they label as a "biological male." *Id.* at ¶¶ 7, 11; *see also id.* at ¶ 226 (adding the word "intimidation" to the list of emotions Girl Plaintiffs allege they are experiencing). Plaintiffs allege Girl Plaintiffs are afraid, worried, and embarrassed about the possibility of seeing or being seen by Student A when either Girl Plaintiffs or Student A are in a state of undress. *Id.* at ¶¶ 8, 9, 114, 126, 127, 186, 187. Plaintiffs assert Girl Plaintiffs' distress is "ever-present" and "constant." *Id.* at ¶¶ 114, 115, 125, 237. Plaintiffs also say Girl Plaintiffs are fearful of having to attend to personal needs in restrooms and locker rooms when Student A is present. *Id.* at ¶¶ 8, 10. All Student Plaintiffs allege they "experience embarrassment, humiliation, anxiety, intimidation, fear, apprehension,

stress, degradation, and loss of dignity” because of the Restroom Policy. *Id.* at ¶ 226.

Plaintiffs generally allege the Restroom Policy and the Locker Room Agreement have a negative effect on Girl Plaintiffs' access to educational opportunities, benefits, programs, and activities at their schools. *Id.* at ¶¶ 12-13. Plaintiffs allege some Girl Plaintiffs risk tardiness by running to the opposite end of the school, during short passing periods, to find a restroom or locker room that Student A is not likely to be using, and change clothes as quickly as possible while experiencing stress and anxiety and avoiding eye contact and conversation. *Id.* at ¶ 12.

Plaintiffs allege the privacy protections District 211 provides in restrooms and locker rooms do not do enough to ameliorate Student Plaintiffs' concerns about sharing those facilities with a transgender student assigned a different sex than theirs at birth, or the risk that they may see or be seen by a transgender student when either is in an unclothed or partially clothed state. Plaintiffs allege there are “large gaps” above and below the doors on the stalls in both the boys' and girls' restrooms, *id.* ¶ 158, and “gaps along the sides of the door[ ] that another student could see through even inadvertently,” *id.* at ¶ 228. Plaintiffs allege this “mean[s] that the Student Plaintiffs, both boys and girls, must risk exposing themselves to the opposite sex every time they use the restroom.” *Id.* at ¶ 229. Plaintiffs allege the privacy stalls provided in the physical education locker room for changing clothes or showering are not adequate to address Girl Plaintiffs' fundamental concern with using the same facility as Student A. *Id.* at ¶¶ 259-260. Plaintiffs also allege Girl Plaintiffs are ridiculed and harassed by their classmates when they use the privacy stalls. *Id.* at ¶¶ 140-146. Plaintiffs allege there are no private stalls in the girls' swim locker room and the girls' gymnastics locker room for changing clothes or showering. *Id.* at ¶¶ 161, 172-174, 196-197. Plaintiffs allege the completely separate, private facilities District 211 provides for students who do not want to use the common facilities “are inadequate and inferior” to the common facilities and “unworkable in terms of the practical locker room needs of Girl Plaintiffs.” *Id.* at ¶ 245; *see also id.* at ¶¶ 242-244.

### C. Plaintiffs' Motion For Preliminary Injunction

\*6 On May 23, 2016, Plaintiffs moved for a preliminary injunction on Counts I, II, and IV of their Complaint. Plaintiffs' Motion for Preliminary Injunction (“Plaintiffs'

Motion”), [ECF No. 21]. As noted above, Count I is a claim against the Federal Defendants for violating the APA. Count II is a claim against both the Federal Defendants and District 211 for violating Plaintiffs' constitutional right to privacy. Count IV is a claim against District 211 for violating Title IX. Judge Alonso referred Plaintiffs' Motion for Preliminary Injunction to this Magistrate Judge for a Report and Recommendation. [ECF Nos. 24, 26].

In their Complaint, Plaintiffs ask the Court to “set aside” or enjoin DOE's “new rule that redefines ‘sex’ in Title IX” and to enjoin the Federal Defendants from taking “any action” based on this interpretation of Title IX and its implementing regulations as requiring schools to treat a student's gender identity as the student's sex. Complaint, [ECF No. 1, Prayer for Relief, at ¶¶ B and C]. During oral argument on their Motion for Preliminary Injunction, however, Plaintiffs' counsel clarified that Plaintiffs are asking the Court only to enter a preliminary injunction restraining the Federal Defendants from “further application of the rule to force District 211 to comply with it in the operation of its facilities.” Oral Argument Transcript, [ECF No. 127, at 155]; *see also id.* at 155-58. In other words, Plaintiffs are not now asking the Court broadly to “set aside” a rule or prevent the Federal Defendants from taking “any action” based on DOE's interpretation of Title IX other than with respect to District 211. *Id.* Plaintiffs will seek broader relief if they prevail on the merits of their claims at the conclusion of this case. *Id.* Plaintiffs further seek to enjoin District 211 from enforcing the Restroom Policy and complying with the Locker Room Agreement. Complaint, [ECF No. 1, Prayer for Relief, at ¶ A].<sup>6</sup>

### D. District 211's Request For Early Discovery And The June 9, 2016 Hearing

Shortly after Plaintiffs moved for a preliminary injunction, District 211 requested leave to conduct discovery before responding to Plaintiffs' Motion. Plaintiffs opposed the District's request for early discovery. They wanted a relatively quick (as the litigation timeline goes) decision on their request for injunctive relief and to avoid getting bogged down in fact-intensive, drawn-out discovery that potentially could delay a decision on their Motion. On June 3, 2016, at the Court's direction, District 211 served the interrogatories it wanted Plaintiffs to answer and a short memorandum explaining

why the District felt the discovery was necessary for a ruling on Plaintiffs' Motion. [ECF No. 44]. Five days later, on June 8, 2016, Plaintiffs filed a Motion for Protective Order opposing the requested discovery. [ECF No. 48].

\*7 On June 9, 2016, the Court held a hearing and granted Plaintiffs' Motion for Protective Order. The Court found that responses to the interrogatories District 211 sought to serve were not necessary at this preliminary stage for the Court to make its recommendation on Plaintiffs' Motion. [ECF No. 52]. The Court's ruling was based on Plaintiffs' representation that the thrust of their case in support of their Motion rests on facial challenges to the Restroom Policy and the Locker Room Agreement which, as Plaintiffs allege, is the result of DOE's interpretation of Title IX in the Guidance Documents. In Plaintiffs' words:

Plaintiffs' preliminary injunction motion places before this Court two questions of law related to the activities of the District. First, does letting a biological male use the girls' locker rooms and restrooms, and so subjecting the Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate the Girl Plaintiffs' constitutional right to privacy? Second, does letting a biological male use these private female facilities create a hostile environment for the Girl Plaintiffs, in violation of Title IX, and does offering the Girl Plaintiffs incomparable facilities as compared to boy students violate Title IX?

Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Protective Order ("Plaintiffs' Protective Order Brief"), [ECF No. 50, at 3].

At the June 9 hearing, Plaintiffs' counsel elaborated on what Plaintiffs were and were not arguing in support of their Motion for Preliminary Injunction:

What you need to know, Your Honor, is that the policy exists, nobody disputes that, that the policy allows a biological [male] student into a locker room and restroom,

and that, of course, results in interactions in the locker room on a daily basis between girls and boys.... Inserting the biological male into those facilities is sufficient to show the violation.

Transcript of June 9, 2016 Hearing ("June 9 Hearing Transcript") [ECF No. 128, at 18].

District 211's proposed interrogatories (and depositions of certain Plaintiffs and others that might have followed) were focused on discovering the "who, what, where, when, etc."—in other words, the facts—underlying Plaintiffs' anonymous, general, and relatively conclusory allegations in their Complaint. *See* District 211's Proposed Interrogatories, [ECF No. 44-1]. Plaintiffs argued none of that discovery was necessary at this stage because they are not relying on the specifics of any interactions in either restrooms or locker rooms between any Plaintiff and Student A or anyone else in support of their Motion for Preliminary Injunction. According to Plaintiffs' counsel, "who saw who in the state of undress or naked ... is not relevant ... at the preliminary injunction stage. We don't need to prove that. We didn't allege that in the complaint, nor do we rely on it at the preliminary injunction stage." June 9 Hearing Transcript, [ECF No. 128, at 18]. Rather, Plaintiffs argued the simple fact that Student A, in Plaintiffs' words a biological boy, is or can be present in the girls' restrooms and locker rooms is what entitles them to the relief they seek:

The District's policies allow Student A access to the girls' private facilities.... Student A has used the girls' facilities while some Girl Plaintiffs were present. Girl Plaintiffs know that any time they use the restroom or locker room, Student A has the right to be present with them. They also know that, even if he is not present, he could walk in at any time. As a result, Girl Plaintiffs are suffering stress, anxiety, embarrassment, and intimidation.

\*8 Plaintiffs' Protective Order Brief, [ECF No. 50, at 3].<sup>7</sup>

The Court agreed Plaintiffs are entitled to frame the issues as they want in support of their Motion for Preliminary Injunction. The Court also recognized that, if it allowed District 211 to proceed with the discovery it wanted to take, that materially could delay a decision on Plaintiffs' Motion. In addition, District 211's counsel agreed that if Plaintiffs were resting their case in favor of a preliminary injunction on "the risk of exposure ... in front of a biological male whose gender identity is female ... [a] fact that I don't think anybody disputes[,] ... as opposed to looking at what plaintiffs allege has actually happened in locker rooms and restrooms," then the District's proposed discovery could be deferred. June 9 Hearing Transcript, [ECF No. 128, at 15].

On May 25, 2016, Students A, B, and C, by and through their parents and legal guardians, and the Illinois Safe Schools Alliance (collectively, "Intervenor-Defendants") filed a Motion to Intervene in this case. [ECF No. 30]. As discussed above, Student A is the subject of the Locker Room Agreement entered into by DOE and District 211. Locker Room Agreement, [ECF No. 21-3]. Student C is a transgender boy who recently entered his freshman year at a high school in District 211 and wants to use the boys' restrooms and locker rooms at his school. Declaration of Parent C ("Parent C's Declaration"), [ECF No. 32-3, at ¶¶ 2, 10]. Student B is a transgender boy who soon will attend a high school in District 211 and wants to use the boys' restrooms and locker rooms at his high school. Declaration of Parent B ("Parent B's Declaration"), [ECF No. 32-2, at ¶¶ 2, 19]. The Illinois Safe Schools Alliance is an organization that supports lesbian, gay, bisexual, and transgender students in Illinois through advocacy and training, including in District 211. Declaration of Owen Daniel-McCarter, [ECF No. 32-4, at ¶¶ 2-15]. On June 15, 2016, Judge Alonso granted Intervenor-Defendants' Motion to Intervene. [ECF No. 56]. Intervenor-Defendants oppose Plaintiffs' Motion for Preliminary Injunction.

Plaintiffs' Motion for Preliminary Injunction is fully briefed, and this Court held oral argument on August 15, 2016. The record before the Court on Plaintiffs' Motion consists of Plaintiffs' Complaint and the attached exhibits, the parties' respective briefs filed in support of and in opposition to Plaintiffs' Motion, the various declarations and other materials submitted with those briefs, and counsels' oral arguments during the hearing on Plaintiffs' Motion. For all of the reasons set forth below, the

Court respectfully recommends that Judge Alonso deny Plaintiffs' Motion for Preliminary Injunction.

### III. LEGAL STANDARD

\*9 A preliminary injunction " 'is an extraordinary and drastic remedy.' " *Goodman v. Ill. Dep't of Fin.*, 430 F.3d 432, 437 (7th Cir. 2005) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). In the Seventh Circuit, the court analyzes a request for such relief in two distinct phases: a threshold phase and a balancing phase. *Girl Scouts of Manitou Council Inc. v. Girl Scouts of USA, Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008). During both phases, movants—here, Plaintiffs—bear the burden of proving " 'by a clear showing' " that a preliminary injunction should be granted. *Goodman*, 430 F.3d at 437 (quoting *Mazurek*, 520 U.S. at 972) (emphasis in the original).

During the first phase, Plaintiffs must make three threshold showings. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661-62 (7th Cir. 2015). Plaintiffs must show they have a likelihood of success on the merits. *Id.* at 662. They must show, "absent preliminary injunctive relief, [they] will suffer irreparable harm in the interim prior to a final resolution." *Id.* And Plaintiffs must show there is no adequate remedy at law. *Id.* If Plaintiffs fail to make any of these showings, the court must deny injunctive relief. *Girl Scouts*, 549 F.3d at 1086.

If Plaintiffs carry their burden in the threshold phase, the court then proceeds to the balancing phase. During this stage of the analysis, the court first "weighs the irreparable harm that the moving part[ies] would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving part[ies] would suffer if the court were to grant the requested relief." *Id.* Then the court considers how granting or denying the injunction would affect the interests of non-parties—commonly called the "public interest." *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). During the balancing phase, the court "weighs the balance of potential harms on a 'sliding scale' against the movant[s]' likelihood of success." *Turnell*, 796 F.3d at 662.

### IV. ANALYSIS

#### A. Likelihood Of Success On The Merits

To satisfy the first threshold requirement for a preliminary injunction, Plaintiffs must show they have a likelihood of success on the merits. *D. U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). “This ‘likelihood’ standard requires more than a ‘mere possibility of relief’ and more than a ‘better than negligible’ showing.” *Truth Foundation Ministries, NFP v. Village of Romeoville*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 757982, at \*8 (N.D. Ill. Feb. 26, 2016).

### 1. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their APA Claim Against The Federal Defendants

#### a. The Locker Room Agreement And The Federal Defendants' Interpretation Of The Word “Sex” In Title IX Are Subject To Judicial Review

The APA vests “the courts with the power to ‘interpret ... statutory provisions’ and overturn agency action inconsistent with those interpretations.” *Gutierrez-Brizuela v. Lynch*, \_\_\_ F.3d \_\_\_, 2016 WL 4436309, at \*7 (10th Cir. Aug. 23, 2016) (Gorsuch, J., concurring) (quoting 5 U.S.C. § 706). But the APA limits judicial review to “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704; *see also Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016). Therefore, “[w]hether there has been ‘agency action’ or ‘final agency action’ within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable.” *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006).

\*10 The APA defines “agency action” to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Only two of these types of actions—sanction and rule—are relevant to this case. A sanction is, in pertinent part, “the whole or a part of an agency ... prohibition, requirement, limitation, or other condition affecting the freedom of a person.” *Id.* at § 551(10). And a “rule” is, again in pertinent part, “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” *Id.* at § 551(4).

This case involves a sanction and a rule. Plaintiffs argue and the Federal Defendants agree the Locker Room Agreement is a sanction because it imposes “concrete

consequences” on District 211. *See* Oral Argument Transcript, [ECF No. 127, at 48, 141, 143, 151]. The rule is the Federal Defendants’ “interpretation of Title IX,” stated in the Guidance, “as requiring schools to treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.” Federal Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Preliminary Injunction (“Federal Defendants’ Response Brief”), [ECF No. 80, at 1]. The Federal Defendants agree with Plaintiffs that this “interpretation,” which the Court will refer to as “the Rule,” is a rule. *See id.* at 15 (“Here, the Guidance has all the indicia of an interpretive rule.”).

Generally, an agency action is final when the action marks the consummation of the agency’s decision-making process, and has legal consequences or, phrased another way, directly affects a party. *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 800, 806 (D.C. Cir. 2006); *Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003). Under this standard, an agency’s behavior may indicate that an action is final even when the agency has not observed “ ‘the conventional procedural accoutrements of finality.’ ” *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 479 (2001)). In the end, the finality requirement must be interpreted pragmatically. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016).

The Federal Defendants do “not contest[ ]” that the Locker Room Agreement constitutes final agency action. Oral Argument Transcript, [ECF No. 127, at 48, 139]; *see also id.* at 141, 143. The Locker Room Agreement marked the conclusion of DOE’s administrative action against District 211, and DOE did not contemplate any further proceedings. The Locker Room Agreement imposes on District 211 concrete obligations that, according to the Federal Defendants, are legally enforceable. *See id.* at 48, 141, 143, 151. At least some of these legal obligations exceed what Title IX and its implementing regulations would require the District to do if the Locker Room Agreement did not exist. The Court thus is satisfied that the Locker Room Agreement constitutes final agency action because it represents the culmination of

DOE's decision-making process and has concrete legal consequences that bind District 211 and impact Plaintiffs.

The Federal Defendants argue the Rule is not final agency action and, thus, not subject to judicial review. They do not dispute that the Rule is the culmination of DOE's decision-making process with respect to the issue of whether "sex" as used in Title IX includes gender identity. Instead, they assert in a footnote that the Rule "is not final agency action ... because it does not determine rights or obligations and no 'legal consequences' flow from it." Federal Defendants' Response Brief, [ECF No. 80, at 16 n.9]. The Federal Defendants do not say why the Rule does not determine rights or obligations and has no legal consequences. Instead, the footnote references the corresponding text in the body of the brief, which explains why, in the Federal Defendants' view, the Rule is interpretive, not legislative. In essence, then, the Federal Defendants seem to be arguing the Rule is not a final agency action because it is an interpretive rule.

\*11 This argument is contrary to clear precedent holding that interpretive rules and guidance documents may be subject to judicial review. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014); *Oregon v. Ashcroft*, 368 F.3d 1118, 1147 (9th Cir. 2004), *aff'd sub nom.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006). " 'An agency may not avoid judicial review merely by choosing the form of ' a guidance document " 'to express its definitive position on a general question of statutory interpretation.' " *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986)). "Once [an] agency publicly articulates an unequivocal position ... and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy*, 801 F.2d at 436; *see also Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (" '[A]n interpretative rule is subject to review when it is relied upon or applied to support an agency action in a particular case.' ") (quoting Edwards, Elliott, & Levy, *Federal Standards of Review* 161 (2d ed. 2013)).<sup>8</sup>

For all practical purposes, the Rule gives schools across the country "marching orders" as to what DOE expects them to do. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). It does not

describe what DOE thinks Title IX might mean or propose how schools possibly could interpret Title IX. The Guidance Documents state definitively that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity," Q&A on Sexual Violence, [ECF No. 21-9, at 5], and tell schools what they "must" do to comply with Title IX, *see, e.g.*, Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 25]; Title IX Resource Guide, [ECF No. 21-7, at 21-22]. DOE has not expressed any uncertainty about the binding nature of its interpretation. To the contrary, even since the filing of this lawsuit, DOE has continued to maintain and advance its interpretation as binding on schools in the United States. On May 23, 2016, for example, DOE issued a Dear Colleague Letter saying that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Dear Colleague Letter, [ECF No. 21-6, at 3]. There is no indication in the record that, within DOE, agency officials consider the Rule to be a suggestion or an interim position. Rather, it guides DOE's review of complaints and pursuit of enforcement actions.

In this particular case, the Rule "informed" DOE's "review" of Student A's complaint against District 211. Federal Defendants' Response Brief, [ECF No. 80, at 1-2]. After its review, DOE sent a Letter of Findings to District 211, saying the agency found the District to be in violation of Title IX, and that, if DOE and the District did not agree to resolve the matter, the agency would issue a Letter of Impending Enforcement Action within 30 days, initiating a process that ultimately could result in District 211 losing its federal funding. Letter of Findings, [ECF No. 21-10, at 13]. District 211 and DOE then entered into the Locker Room Agreement, a resolution that the Federal Defendants concede was "informed" by the Rule. Federal Defendants' Response Brief, [ECF No. 80, at 1-2]. The Federal Defendants concede the Locker Room Agreement has a direct and consequential effect on District 211 and, thus, in turn on Plaintiffs. *See Oral Argument Transcript*, [ECF No. 127, at 48, 141, 143, 151].

\*12 DOE says it issued the Rule in response to questions it was receiving from schools around the country confronted with how they should address transgender students' use of facilities denominated as single-sex. *See Federal Defendants' Response Brief*, [ECF No. 80, at 16];

Q&A on Sexual Violence, [ECF No. 21-9, at ii]; Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 1]. As a practical matter, the Rule represents and has been treated by DOE as its definitive statement that “sex” as used in Title IX and its implementing regulations includes gender identity. This has led some schools, such as District 211, to acquiesce to DOE’s view. For all of these reasons, the Rule constitutes final agency action. See *Nat’l Envtl. Dev. Assoc.’s Clean Air Project v. EPA*, 752 F.3d 999, 1006-07 (D.C. Cir. 2014); *CSI*, 637 F.3d at 411-14; *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d, 215 F.3d 45, 47-50 (D.C. Cir. 2000); *Appalachian Power*, 208 F.3d at 1020-23; *Philip Morris USA Inc. v. United States Food & Drug Admin.*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 4378970, at \*10-12 (D.D.C. Aug. 16, 2016); *Pharm. Research & Manufacturers of Am. v. United States Dep’t of Health & Human Servs.*, 138 F. Supp. 3d 31, 39-47 (D.D.C. 2015).<sup>9</sup>

Moreover, even if the Rule were not a final agency action, it still would be reviewable in this case because it would be at least a preliminary or intermediate agency action that led to the Locker Room Agreement, which is a final agency action. The APA provides that a court may review preliminary and intermediate agency actions “on the review of the final agency action.” 5 U.S.C. § 704. That means when a court is reviewing a final agency action, such as the Locker Room Agreement, it also can review any preliminary or intermediate agency actions that led to the final agency action. See *Benzman v. Whitman*, 523 F.3d 119, 132 (2d Cir. 2008); *Oliver v. U.S. Dep’t of the Army*, 2015 WL 4561157, at \*3 (D.N.J. July 28, 2015); *Souza v. California Dep’t of Transp.*, 2014 WL 793644, at \*4 (N.D. Cal. Feb. 26, 2014); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep’t of Homeland Sec.*, 801 F. Supp. 2d 383, 404 (D. Md. 2011), *aff’d*, 698 F.3d 171 (4th Cir. 2012); *cf. Com. of Mass. v. U.S. Nuclear Regulatory Comm’n*, 924 F.2d 311, 322 (D.C. Cir. 1991) (“Section 704 authorizes us to review only those preliminary, intermediate, or procedural rulings that relate to the final agency action presently before the court.”).

For all of these reasons, the Rule is subject to judicial review in this case.

**b. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their**

**Argument That “Sex” As Used In Title IX Unambiguously Excludes Gender Identity**

Plaintiffs argue DOE violated the APA by promulgating the Rule and entering into the Locker Room Agreement which, according to Plaintiffs, conflict with the unambiguous meaning of the term “sex” in Title IX. Plaintiffs contend the statute and its implementing regulations unambiguously mean that one’s “sex” is determined by his or her “chromosomes, anatomy, gametes, and reproductive system.” Plaintiffs’ Reply Memorandum in Support of Their Preliminary Injunction Motion (“Plaintiffs’ Reply Brief”), [ECF No. 94, at 1]. Sex does not and cannot, Plaintiffs assert, include gender identity. Plaintiffs look to Seventh Circuit decisions interpreting Congress’s intent when it used the word “sex” in the almost identically worded Title VII to support their position under Title IX.

\*13 The Federal Defendants argue the word “sex” as used in Title IX is ambiguous as to whether one’s sex is determined “‘with reference exclusively to genitalia’” or “‘with reference to gender identity.’” Federal Defendants’ Response Brief, [ECF No. 80, at 19] (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016)). They claim that, because of this ambiguity, courts should defer to DOE’s interpretation of the term “sex” under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Chevron U.S.A. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Intervenor-Defendants go a step further and argue that whenever there is not complete alignment among a student’s sex-related characteristics, the unambiguous meaning of the term “sex” in Title IX requires that schools determine a student’s sex based upon his or her gender identity because gender identity in those circumstances is the only way to determine sex. Intervenor-Defendants’ Brief in Response to Plaintiffs’ Motion for Preliminary Injunction (“Intervenor-Defendants’ Response Brief”), [ECF No. 79, at 2-7].

The Seventh Circuit first addressed, to the extent relevant here, the meaning of “sex” as used in Title VII in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). In that case, which involved a transsexual plaintiff alleging employment discrimination under Title VII, the court of appeals held Congress intended the term “sex” in Title VII to have a “narrow, traditional interpretation.” *Id.* at 1086. *Ulane* was decided in 1984, more than 32 years ago, and a number of courts around the country since

then have declined to follow its reasoning in light of more recent developments in the law including, among others, the Supreme Court's recognition in 1989 that discrimination claims based upon gender stereotypes and gender non-conformity are cognizable under Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 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. Harford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Roberts v. Clark Cty. Sch. Dist.*, 2016 WL 5843046, at \*6 (D. Nev. Oct. 4, 2016).<sup>10</sup>

On July 28, 2016, in *Hively v. Ivy Tech Community College, South Bend*, a panel of the Seventh Circuit had an opportunity to overrule *Ulane* but declined to do so. 830 F.3d 698 (7th Cir. 2016). Instead, it concluded *Ulane's* holding that Congress intended a very narrow and traditional interpretation of the term “sex” in Title VII “so far, appears to be correct.” *Id.* at 702. On October 11, 2016, however, the full Seventh Circuit vacated the panel's decision in *Hively* and granted a rehearing en banc in that case, with oral argument scheduled for November 30, 2016. Order Granting Rehearing En Banc and Vacating the Panel Opinion, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, Dkt. No. 60 (7th Cir. Oct. 11, 2016); Notice of En Banc Oral Argument, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, Dkt. No. 61 (7th Cir. Oct. 11, 2016).

As a result of these recent developments, it appears the law in the Seventh Circuit concerning the interpretation of the term “sex” in Title VII, as relevant to the almost identically worded Title IX, may be in flux. When the Seventh Circuit rules after its en banc review of *Hively*, whether with one voice or otherwise, it very well could shed important new light on the question of whether the term “sex” as used in Title VII, and by implication in Title IX, encompasses gender identity.

\*14 To understand the parties' respective arguments as to the meaning of the term “sex” under Title VII and Title IX and the current state of the law in that respect in this Circuit and around the country, it is important to understand the Seventh Circuit's decisions in *Ulane* and its progeny through and including the recent panel decision, now vacated, in *Hively*.

i. *Ulane v. Eastern Airlines, Inc.* and its progeny

The plaintiff in *Ulane*, Karen Frances Ulane, was an Army veteran who earned the Air Medal with eight clusters for her service in Vietnam. *Ulane*, 742 F.2d at 1082. When Ulane returned home, Eastern Airlines, Inc. hired her as a pilot, and she eventually reached the position of First Officer. *Id.* When it discovered that Ulane was transsexual, though, Eastern fired her. *Id.* at 1082-83. Ulane then filed suit, alleging that Eastern discriminated against her because of her sex in violation of Title VII. *Id.* at 1082. The district court, after a bench trial, found that “sex” “comprehend[s] ‘sexual identity’ ” because “‘sex is not a cut-and-dried matter of chromosomes,’ but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.” *Id.* at 1084 (quoting *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 823-24 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984)). The district court ruled in Ulane's favor, holding Title VII prohibits discrimination on the basis of transsexualism. *Id.* The court also ruled Eastern had discriminated against Ulane as a female. *Id.* at 1087.

The Seventh Circuit disagreed with the district court's analysis and held Title VII does not prohibit discrimination on the basis of transsexualism. *Id.* at 1084. In doing so, the court of appeals attempted to discern Congress's intent when it enacted Title VII, and the court identified three adjectives that describe Congress's thinking about the plain meaning of “sex.” *See id.* at 1085, 1086 (discussing the “plain” and “common” meaning of Title VII). The first adjective is “traditional.” *Id.* at 1085 (recognizing “Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex”); *id.* at 1085-86 (saying Congress's failure to amend Title VII “strongly indicates ... sex should be given a ... traditional interpretation”); *id.* at 1086 (determining only Congress can decide whether “sex” should encompass “the untraditional”); *id.* (declining “to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation”). The second is “narrow.” *Id.* at 1085-86 (concluding Congress's failure to amend Title VII “strongly indicates ... sex should be given a narrow ... interpretation”); *id.* at 1086 (explaining “Congress had a narrow view of sex in mind when it passed

the Civil Rights Act”). And the third is “biological.” *Id.* at 1087 (agreeing “with the Eighth and Ninth Circuits that if the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress”).<sup>11</sup>

\*15 Based on its understanding of congressional intent, the Seventh Circuit in *Ulane* overruled the district court’s conclusion that “sex” “comprehend[s] ‘sexual identity.’ ” *Id.* at 1084. The court of appeals said that “even though some may define ‘sex’ in such a way as to mean an individual’s ‘sexual identity,’ our responsibility is to ... determine what Congress intended when it decided to outlaw discrimination based on sex.” *Id.* In this context, the Seventh Circuit held discrimination because of “sex” does not encompass discrimination based on “a sexual identity disorder or discontent with the sex into which [one was] born.” *Id.* at 1085.<sup>12</sup>

Between 1984 and 2015, the Seventh Circuit referenced *Ulane*’s holding that the word “sex” in Title VII is to be interpreted in a narrow, traditional, and biological sense in three opinions. In *Doe by Doe v. City of Belleville, Illinois*, a 1997 decision, the court of appeals said “Congress had nothing more than the traditional notion of ‘sex’ in mind when it voted to outlaw sex discrimination.” 119 F.3d 563, 572 (7th Cir. 1997), *judgment vacated sub nom. City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998), and *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).<sup>13</sup> Then, in a pair of opinions—*Hamner* and *Spearman*—released just two months apart in 2000, the Seventh Circuit, again relying on *Ulane*, reaffirmed that “Congress intended the term ‘sex’ to mean ‘biological male or biological female.’ ” *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084-85 (7th Cir. 2000) (quoting *Ulane*, 742 F.2d at 1087); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (quoting *Ulane*, 742 F.2d at 1087). Between 2001 and 2015, though, *Ulane* almost entirely faded from Seventh Circuit opinions.<sup>14</sup>

ii. *Hively* and the Seventh Circuit’s decision to vacate the panel’s ruling and rehear that case en banc

As noted above, on July 28, 2016, *Ulane* re-emerged in the Seventh Circuit. In *Hively*, a panel of the court of appeals said *Ulane* remained good law. The plaintiff-appellant in

that case, Kimberly Hively, was a former teacher who alleged Ivy Tech Community College denied her full-time employment and promotions on the basis of her sexual orientation. *Hively*, 830 F.3d at 699. On appeal, Hively argued, among other things, that *Ulane* and *Hamner* were wrong and should be reversed. Appellant’s Brief at 4-17, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016) (No. 15-1720), Dkt. No. 10. The panel in *Hively* rejected this argument. Instead, the panel said the “understanding in *Ulane* that Congress intended a very narrow reading of the term ‘sex’ when it passed Title VII of the Civil Rights Act, so far, appears to be correct.” *Hively*, 830 F.3d at 702.

\*16 Plaintiffs, the Federal Defendants, and Intervenor-Defendants (District 211 did not brief the APA issue) submitted supplemental briefs after the panel’s decision in *Hively*. Plaintiffs argued *Ulane* and *Hively* were case dispositive in their favor: “[u]nder the law of *Hively* and *Ulane*, Plaintiffs should prevail on the merits of their APA claim, as well as their Title IX and privacy claims, and so Plaintiffs’ Motion for Preliminary Injunction should be granted.” Plaintiffs’ Supplemental Brief Addressing *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016) (“Plaintiffs’ Supplemental Brief”), [ECF No. 118, at 1]. The Federal Defendants and Intervenor-Defendants argued, on the other hand, that *Hively* should be limited to its facts, and only to Title VII and sexual orientation claims. *See generally* Federal Defendants’ Supplemental Brief, [ECF No. 116]; Federal Defendants’ Responsive Supplemental Brief, [ECF No. 121]; Intervenor-Defendants’ Opening Brief on *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. 2016) (“Intervenor-Defendants’ *Hively* Brief”), [ECF No. 117]; Intervenor-Defendants’ Response Brief on *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. 2016) (“Intervenor-Defendants’ Responsive Supplemental Brief”), [ECF No. 120].

The Federal Defendants also argued *Ulane* and *Hively*, both of which interpreted Title VII, are not relevant to, much less controlling of any resolution of the question presented in this case under Title IX. Title VII and Title IX are different statutes enacted at different times to address different discriminatory conduct. And while the court of appeals in *Ulane* found that Congress included the term “sex” in Title VII at the last minute as the result of an effort intended to kill the bill, *Ulane*, 742

F.2d at 1085, the entire purpose behind Title IX was to address discrimination on the basis of sex broadly in educational institutions, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Still, courts routinely rely on Title VII jurisprudence to determine the meaning of similar provisions in Title IX. *Carmichael v. Galbraith*, 574 Fed.Appx. 286, 293 (5th Cir. 2014); *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 695 (4th Cir. 2007); *Doe v. Claiborne Cty., Tenn. By & Through Claiborne Cty. Bd. of Educ.*, 103 F.3d 495, 514 (6th Cir. 1996). Moreover, in this case, all parties rely on Title VII cases in support of their respective legal positions, and they effectively equate the meaning of “sex” in Title VII and Title IX. See, e.g., Plaintiffs' Supplemental Brief, [ECF No. 118, at 3]; Federal Defendants' Responsive Supplemental Brief, [ECF No. 121, at 2]; Intervenor-Defendants' *Hively* Brief, [ECF No. 117, at 9]; Intervenor-Defendants' Responsive Supplemental Brief, [ECF No. 120, at 7].

Therefore, had the Seventh Circuit not vacated *Hively*, the panel's decision certainly would have been relevant to this Court's analysis of the issues raised by Plaintiffs under Title IX. When the Seventh Circuit vacated the panel's decision, however, it called into serious question whether the narrow, traditional, and biological interpretation of the term “sex” announced in *Ulane* remains good law in this Circuit with respect to Title VII and Title IX. Moreover, although the panel in *Hively* relied on *Ulane*'s reading of congressional intent underlying Title VII, courts throughout the country for years have questioned and discounted the continued vitality of *Ulane*, particularly since the Supreme Court's decision in *Price Waterhouse*. See *Smith*, 378 F.3d at 573 (“[T]he approach in ... *Ulane* ... has been eviscerated by *Price Waterhouse*.”). As the Sixth Circuit noted in *Smith*, “the Supreme Court established that Title VII's reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.” *Id.*

In addition, two of the three judges on the *Hively* panel said the distinction between discrimination claims based on gender stereotypes or gender non-conformity, which are cognizable under Title VII but only if a person does not conform to the stereotypes associated with his or her gender assigned at birth, and sexual orientation claims, which are not cognizable under Title VII, “seems illogical,” and “[p]erhaps the writing is on the wall” that this legal paradox should be corrected. *Hively*, 730 F.3d at

718.<sup>15</sup> In this Circuit, the distinction between these two kinds of claims flows in no small part from the narrow, traditional, and biological interpretation of the term “sex” announced in *Ulane*. The same two judges on the *Hively* panel also recognized that “precedent can be overturned when principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine ... or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” *Id.* at 718 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 33, 854-55 (1992)).<sup>16</sup>

\*17 In language that seems to invite the kind of re-examination that will now take place in the form of an en banc rehearing, two of the three judges on the *Hively* panel also said:

[W]e can see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms. We allow two women or two men to marry, but allow employers to terminate them for doing so. Perchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our precedent.

*Id.*<sup>17</sup>

In this Court's view, the Seventh Circuit's en banc review of *Hively* also may delve into the underlying basis for the *Hively* decision, which is whether *Ulane* correctly divined that Congress intended a very narrow, traditional, and biological interpretation of the term “sex” in Title VII. See *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (per curiam) (explaining that the Seventh Circuit usually only hears cases en banc to address an intra-circuit split, not involved here, or a question of exceptional importance). Whether or not the court of appeals does so, however, its en banc decision could have an important impact on Plaintiffs' argument about the meaning of the term “sex” in Title VII and, by implication, in Title IX. In this respect,

that decision could affect materially Plaintiffs' likelihood of success on the merits of their APA claim as this case proceeds.

In light of this uncertainty in the Seventh Circuit, it is useful to look to decisions by other courts concerning the issues raised in this case. To date, only one court of appeals has addressed whether "sex" in Title IX can or must include gender identity. In a case known as *G.G.*, a district court in Virginia found one of Title IX's implementing regulations allowed a local school board "to limit bathroom access 'on the basis of sex,' including birth or biological sex." *G.G.*, 822 F.3d at 719 (quoting *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 745-46 (E.D. Va. Sept. 17, 2015)). The Fourth Circuit disagreed. *See id.* at 727. In its decision reversing the district court, the court of appeals explained that "sex" is ambiguous as it "is susceptible to more than one plausible reading because it permits ... determining maleness or femaleness with reference exclusively to genitalia ... [and] determining maleness or femaleness with reference to gender identity." *Id.* at 720. The court of appeals concluded DOE's interpretation of the term "sex" at issue in that case, which is the same interpretation challenged in this case, is not plainly erroneous or inconsistent with Title IX because various dictionaries from the time when the statute was enacted and its implementing regulations were promulgated "suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive." *Id.* at 721. The Fourth Circuit therefore found DOE's interpretation of "sex" as used in Title IX must be given deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *G.G.*, 822 F.3d at 723; *see also Carcano v. McCrory Berger*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 4508192, at \*13-17 (M.D.N.C. Aug. 26, 2016) (recognizing *G.G.* cannot be limited to its facts and deferring to DOE's interpretation of "sex").<sup>18</sup>

<sup>\*18</sup> In *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, a district court in the Seventh Circuit reached the same conclusion under Title IX notwithstanding *Ulane* or *Hively*. Court Minutes from the Oral Argument Hearing on 9/6/2016 ("*Whitaker* Court Minutes"), *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 16-cv-00943-PP, Dkt. No. 26 (Sept. 6, 2016). The court recognized none of the relevant dictionary definitions "are helpful" in determining one's sex "when ... genes, or chromosomes, or character, or attributes ... point toward male identity, and others toward female." *Id.* at

3. Then it identified some of the problems with a narrow definition of "sex." *Id.* at 3-4. Finally, the court found *Ulane* did not control the issue because it was a Title VII case decided before *Price Waterhouse*. *Id.* at 4-5. For these reasons, the court held the term "sex" as used in Title IX is ambiguous and it deferred to DOE's interpretation under *Auer*. *Id.* at 6-7.

A district court in Ohio also recently decided "sex" as used in Title IX is ambiguous and, therefore, DOE's interpretation should be given deference under *Auer*. *Highland*, 2016 WL 5372349, at \*15. The court recognized dictionaries at the time Title IX was enacted "defined 'sex' in a myriad of ways." *Id.* at \*11. Relying in part on *G.G.*, the court concluded that "neither Title IX nor the implementing regulations define the term 'sex' or mandate how to determine who is male and who is female when a school provides sex-segregated facilities." *Id.* The court also acknowledged Title IX allows transgender people to bring claims when they are discriminated against because of their gender non-conformity. *Id.* at \*12-13. The court concluded Title IX is ambiguous and then found DOE's interpretation is not plainly erroneous or inconsistent with Title IX. *Id.* at \*13-14. Based on these determinations, the court gave *Auer* deference to DOE's rule. *Id.* at \*14.

These decisions holding "sex" is ambiguous in the context of Title IX and, therefore, that it can encompass gender identity are well-reasoned and persuasive.<sup>19</sup> They provide another basis for questioning whether *Ulane*, a Title VII case, has continued validity and should be applied in the context of Title IX. While the Seventh Circuit's decision to vacate the panel's decision in *Hively* and to rehear that case en banc technically leaves *Ulane* in place as the law in this Circuit, it does so only barely, in this Court's view, particularly with respect to the interpretation of Title IX. Unconstrained by *Hively*'s recent affirmation of *Ulane*, and with the continued vitality of the narrow, traditional, and biological view of the term "sex" articulated in *Ulane* subject to question, this Court believes the better reasoned recent decisions hold that the term "sex" in Title IX can be interpreted to encompass gender identity as DOE has interpreted it.

Under the APA, a court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA also says a court must "hold unlawful and set aside" agency action

that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *Id.* at § 706(2) (C). Plaintiffs argue that the Rule and the Locker Room Agreement violate the APA because they are based on an interpretation of Title IX that is “not accordance with” Congress’s intent regarding the unambiguous meaning of “sex” and because they likely are “in excess of” DOE’s jurisdiction and authority because DOE is not empowered to interpret Title IX contrary to congressional intent.

\*19 The foundation for each of Plaintiffs’ arguments, in the Seventh Circuit, is *Ulane* and *Hively*. Plaintiffs’ rely heavily on these two cases for the premise that Congress intended a very narrow and traditional interpretation of the term “sex” in Title VII and, by implication, in Title IX. Given the discussion above, the Court cannot say that Plaintiffs have a likelihood of success on the merits of these arguments. It is far from clear that the narrow interpretation of the term “sex” articulated 32 years ago in *Ulane* will continue to inform the Seventh Circuit’s jurisprudence generally after its en banc review of *Hively* or, in particular, with respect to whether that term as used in Title IX includes gender identity.

Accordingly, against this legal backdrop and at this early stage of this case, the Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that the Federal Defendants violated the APA by promulgating the Rule or entering into the Locker Room Agreement based on an interpretation of Title IX that includes gender identity within the term “sex.”

c. Plaintiffs Have Not Shown A Likelihood Of Success On The Merits Of Their Other APA Claims

Plaintiffs argue the Rule is legislative in nature and, thus, DOE was required to observe the notice-and-comment process. Plaintiffs’ Opening Brief, [ECF No. 23, at 11-12]; Plaintiffs’ Reply Brief, [ECF No. 94, at 4-9]. This argument relies in large part on Plaintiffs’ contention that “sex” in Title IX means biological sex. Because they have not shown this premise is sound, that flaw significantly undermines the assertion that the Rule is legislative.

Plaintiffs also contend the Rule is legislative because it “contradicts four decades of unbroken authority.” Plaintiffs’ Opening Brief, [ECF No. 23, at 11]. A rule is not legislative, though, simply because it reflects a

new position of the agency. *Twp., Marion Cty., Ind. v. Davila*, 969 F.2d 485, 492 (7th Cir. 1992). Rather, “the APA ‘permit[s] agencies to promulgate freely [interpretive] rules—whether or not they are consistent with earlier interpretations’ of the agency’s regulations.” *Ass’n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 719 (D.C. Cir. 2015) (quoting *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1207 (2015)); see also *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 681 (6th Cir. 2005).

Plaintiffs also argue the Rule must be legislative because it impacts legal rights and obligations. An interpretive rule, though, may have a substantial impact on the rights of individuals because “[t]he impact of a rule has no bearing on whether it is legislative or interpretive; interpretive rules may have a substantial impact on the rights of individuals.” *Davila*, 969 F.2d at 493 (quoting *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983)). If a rule “cannot be independently legally enforced [because] there must be some external legal basis supporting its implementation,” than it is interpretive. *Iowa League of Cities v. EPA*, 711 F.3d 844, 874 (8th Cir. 2013). The “critical feature of interpretive rules is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’” *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

It is undisputed that DOE issued the Guidance that contains the Rule in response to questions from school administrators, teachers, and parents. See Federal Defendants’ Response Brief, [ECF No. 80, at 16]; Q&A on Sexual Violence, [ECF No. 21-9, at ii]; Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 1]. The Guidance details what DOE thinks Title IX means. It does not provide an independent basis for an enforcement action. Instead, any action would have to be grounded in Title IX itself. Moreover, the specific facts of this case demonstrate DOE does not treat the Guidance as giving rise to the legal obligation to treat transgender students consistent with their gender identity. DOE began its review of Student A’s complaint before any of the challenged Guidance Documents were issued. And its Letter of Findings does not reference or cite the Guidance. Therefore, the record shows the Guidance was issued in response to questions received by DOE to inform

schools and the public in general as to what schools must do to comply with DOE's understanding of Title IX.

\*20 For these reasons, the Rule is interpretive and need not have been promulgated through the notice-and-comment process.<sup>20</sup>

In addition, Plaintiffs contend the Rule conflicts with Title IX and Plaintiffs' constitutional right to privacy. Plaintiffs' Opening Brief, [ECF No. 23, at 10]. As discussed in the subsequent sections of this Report and Recommendation, the Court finds Plaintiffs do not have a likelihood of success on either of these claims. This, in turn, undermines that aspect of Plaintiffs' APA claim.<sup>21</sup>

Plaintiffs assert the Rule violates the Spending Clause of the Constitution because it permits the Federal Defendants to pull federal funds for discrimination based on a student's gender identity. Plaintiffs' Opening Brief, [ECF No. 23, at 10-11]; Plaintiffs' Reply Brief, [ECF No. 94, at 17-18]. Plaintiffs do not dispute that Congress has provided adequate notice that federal funds may be withheld from a school that discriminates in violation of Title IX. Instead, Plaintiffs argue Title IX only prohibits discrimination based on biological sex and, therefore, that Title IX does not provide notice that funding may be withheld for discrimination based on gender identity. As with many of Plaintiffs arguments, this one rests on the meaning of "sex" in Title IX. And, as the Court already has explained, Plaintiffs have not carried their burden, at this stage, to establish clearly they have a probability of success on the merits of that claim.

Title IX does not explicitly state that a school may lose its federal funding if it does not take adequate steps to stop discrimination against transgender students. But a spending condition is not unconstitutional simply because its application may be unclear in certain contexts. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 665-66 (1985). Moreover, Congress need not "specifically" identify and prescribe "each condition in the legislation." *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 921 (7th Cir. 2012). Simply put, "it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

\*21 Finally, Plaintiffs argue DOE acted arbitrarily and capriciously by promulgating the Rule because the agency did not provide a rational explanation for its action.

Plaintiffs' Opening Brief, [ECF No. 23, at 9-10]; Plaintiffs' Reply Brief, [ECF No. 94, at 16-17]. In the Guidance and the Letter of Findings, however, DOE extensively cited the provisions of Title IX, its regulations, and relevant court decisions. In the Letter of Findings, DOE also acknowledged the privacy concerns of the various parties; described in detail the layout of the various restrooms and locker rooms, with a particular emphasis on the resulting privacy risks; and laid out the alternative privacy options. Letter of Findings, [ECF No. 21-10, at 3-13]. In the "Conclusion" section of the Letter of Findings, DOE dedicated a lengthy paragraph solely to explaining how a privacy curtain, coupled with Student A's stated intention to use the curtain, could adequately protect all "potential or actual student privacy interests." *Id.* at 13. Plaintiffs have not done enough to overcome the "highly deferential" standard of review for arbitrary and capricious claims, under which agency actions are presumed valid. *See Am. Trucking Associations, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 245 (D.C. Cir. 2013); *see also Judulang v. Holder*, 132 S. Ct. 476, 483 (2011) (noting that a court must not "substitute its judgment for that of the agency") (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

For all of these reasons, Plaintiffs do not have a likelihood of success on the merits of their claim that the Rule and the Locker Room Agreement violate the APA.

## **2. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their Constitutional Claim Against Either The Federal Defendants Or District 211**

Plaintiffs allege a violation of their right to substantive due process. There is a "basic framework" for evaluating substantive due process claims. *Christensen v. Cty. of Boone, Ill.*, 483 F.3d 454, 461 (7th Cir. 2007). The analysis begins with "a 'careful description' of the [right] said to have been violated." *Id.* at 462 (quoting *Doe v. City of Lafayette*, 377 F.3d 757, 768 (7th Cir. 2004)); *see also Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 763 (N.D. Ill. 2015). Then the inquiry turns to whether that right is "fundamental." *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763. If it is, the question becomes whether there is a "direct" and "substantial" interference with a fundamental right. *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763. Even if there is such an interference, the challenged action still must "shock[ ]

the conscience” for there to be a constitutional violation. *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763.

a. There Is No General Constitutional Right To Privacy

Plaintiffs assert a claim against the Federal Defendants and District 211 for violating their “fundamental right to privacy.” Complaint, [ECF No. 1, at p.53].<sup>22</sup> In *Griswold v. Connecticut*, the Supreme Court acknowledged for the first time that the “penumbras” of the “specific guarantees in the Bill of Rights” protect certain privacy interests. 381 U.S. 479, 484 (1965). But the Supreme Court never has recognized “a generalized right” to privacy in the substantive due process context. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178 (3d Cir. 2005); see also *Katz v. United States*, 389 U.S. 347, 350 (1967) (explaining that the Fourth Amendment also does not encompass a “general constitutional ‘right to privacy’”). Instead, it has extended substantive due process protection to privacy interests only in limited circumstances. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing that “individual decisions ... concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment”) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986)); *Whalen v. Roe*, 429 U.S. 558, 578 (1977) (holding that a New York law, which established a database of names and addresses of persons who received prescriptions for certain drugs sold on the black market, did not pose an unconstitutional invasion of privacy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that the right to privacy “found[ ] in the Fourteenth Amendment’s concept of personal liberty ... is broad enough to encompass a woman’s decision” to terminate a pregnancy); *Griswold*, 381 U.S. at 485-86 (holding that the Fourteenth Amendment confers a right to privacy in one’s marital relations and use of contraceptives).

\*22 The Supreme Court “always [has] been reluctant to expand the concept of substantive due process because guide posts for responsible decision making in this area are scarce and open-ended.” *Glucksberg*, 521 U.S. at 720. “The doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). Accordingly, the “Supreme Court

of the United States has made clear, and [the Seventh Circuit] similarly cautioned, that the scope of substantive due process is very limited.” *Belcher v. Norton*, 497 F.3d 742, 753 (7th Cir. 2007).

b. Plaintiffs Too Broadly Define The Right At Issue In This Case

The first step in the substantive due process analysis is to define carefully the right (or rights) at issue in this case. As the Seventh Circuit has observed, the definition of a substantive due process right is “constrained by the factual record before [the court], which sets the boundaries of the liberty interests truly at issue in the case.” *Lafayette*, 377 F.3d at 769 (emphasis in original); see also *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1240 (11th Cir. 2004). The definition must be “specific and concrete,” avoiding “sweeping abstractions and generalities.” *Lafayette*, 377 F.3d at 769. Crafting a narrow, focused definition ensures that courts “do not stray into broader ‘constitutional vistas than are called for by the facts of the case at hand.’” *Doe v. Moore*, 410 F.3d 1337, 1344 (11th Cir. 2005) (quoting *Williams*, 378 F.3d at 1240). This in turn “tends to rein in the subjective elements that are necessarily present in due-process judicial review.” *Glucksberg*, 521 U.S. at 722.

An example is helpful. In *Washington v. Glucksberg*, the plaintiff asserted as a fundamental right the “liberty to choose how to die,” “a right to control of one’s final days,” and “the liberty to shape death.” *Id.* The court of appeals framed the right at issue as “a liberty interest in determining the time and manner of one’s death” and “a right to die.” *Id.* The Supreme Court, however, rejected all of these formulations as not specific enough. Instead, the Supreme Court asked whether there was a “right to commit suicide which itself includes a right to assistance in doing so.” *Id.* at 723; see also *Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008) (expressing doubt that the definition of a right “to engage in a private act of consensual sex” is narrow enough).

Plaintiffs assert generally that the Restroom Policy and the Locker Room Agreement violate their constitutional “right to privacy.”<sup>23</sup> They identify two broad privacy interests they contend are protected by substantive due process. The first is the “right to privacy in one’s fully or partially unclothed body.” Complaint, [ECF No. 1, at ¶

362]; *see also id.* at ¶ 393. The second is “the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex.” *Id.* at ¶ 363; *see also id.* at ¶ 393. Plaintiffs' framing of these rights is not tied to the facts of the case and, therefore, is inconsistent with the Seventh Circuit's admonition to avoid “sweeping abstractions and generalities” in the context of substantive due process analysis. *Lafayette*, 377 F.3d at 769.

\*23 For this reason, the Federal Defendants argue Plaintiffs' articulation of the fundamental rights at issue in this case “grossly overstates the interest that they actually seek to vindicate, which is an alleged right to change [clothes] in a locker room from which transgender students are excluded.” Federal Defendants' Response Brief, [ECF No. 80, at 3]. When opposing District 211's request for discovery, Plaintiffs also framed their constitutional argument more narrowly than they do in their Motion for Preliminary Injunction. In their brief in support of their Motion for Protective Order, Plaintiffs identified the issue to be decided as: “does letting a biological male use the girls' locker room and restrooms, and so subjecting Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate Girl Plaintiffs' constitutional right to privacy?” Plaintiffs' Protective Order Brief, [ECF No. 50, at 3]. This is a better attempt at framing the issue, and it encompasses Plaintiffs' main claim in this case which revolves around Student A's access to restrooms and locker rooms also used by Girl Plaintiffs, but it does not account for Plaintiffs' claim that allowing transgender students to use restrooms consistent with their gender identity violates the privacy rights of both male and female Student Plaintiffs.

Essentially, in the Court's view, Plaintiffs' constitutional claim posits this question: do high school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs? The Court will analyze Plaintiffs' constitutional claims in this context. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1087 (9th Cir. 2015) (refining the definition of the right at issue to account for the fact that the challenged conduct applied “only to persons in specific circumstances,” not “generally to the population as a whole”).

c. High School Students Do Not Have A Constitutional Right Not To Share Restrooms Or Locker

Rooms With Transgender Students Whose Sex Assigned At Birth Is Different Than Theirs

Initially, it is important to note that, for purposes of the constitutional analysis, the Court is not bound by the narrow, traditional, and biological understanding of “sex” that the Seventh Circuit held in *Ulane* that Congress codified in Title VII. Congress's intent in enacting that statute is irrelevant to the analysis of Plaintiffs' asserted constitutional right to privacy. Further, in the Court's view, sex assigned at birth is not the only data point relevant to the question of whether the Constitution precludes a school from choosing to allow transgender students to use restrooms or locker rooms consistent with their gender identity. Rather, as the Federal Defendants and Intervenor-Defendants point out, a transgender person's gender identity is an important factor to be considered in determining whether his or her needs, as well as those of cisgender people, can be accommodated in the course of allocating or regulating the use of restrooms and locker rooms. So, to frame the constitutional question in the sense of sex assigned at birth while ignoring gender identity frames it too narrowly for the constitutional analysis.

In addition, it also is important to note Plaintiffs are not required—“compelled” in their words, Plaintiffs' Opening Brief, [ECF No. 23, at 15]—by any state actor to use restrooms or locker rooms with Student A or any other transgender student. The District's Restroom Policy allows transgender students to use restrooms consistent with their gender identity. No cisgender student is compelled to use a restroom with a transgender student if he or she does not want to do so. In addition, District 211 does not require any cisgender girl student to use a locker room with Student A if she does not want to do so. As discussed more fully below, District 211 has made clear that any cisgender high school student who does not want to use a restroom or a locker room with a transgender student is not required to do so.

If the privacy stalls and protections the District provides in restrooms and locker rooms are not sufficient for the comfort of any student, whether cisgender, transgender, or otherwise, he or she can use an alternative facility that satisfies his or her privacy needs. *See* Declaration of Mark Kovack (“Kovack's Declaration”), [ECF No. 78-1, at ¶¶ 15-17] (explaining available privacy alternatives include separate, single-use facilities). In addition, District 211 notified all parents that “[s]tudents who seek additional

levels of privacy [other than the stalls provided in the communal locker rooms] may request the use of an alternate changing area by contacting their school counselor.” *Id.* at ¶ 15(b). The absence of any compulsion distinguishes this case from others Plaintiffs cite which, as discussed below, involve involuntary invasions of someone’s privacy.

\*24 Generally speaking, the penumbral rights of privacy the Supreme Court has recognized in other contexts protect certain aspects of a person’s private space and decision-making from governmental intrusion. Even in the context of the right to privacy in one’s own body, the cases deal with compelled intrusion into or with respect to a person’s intimate space or exposed body. No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.

Again, courts are very careful in extending constitutional protection in the area of personal privacy. “Although the Supreme Court has recognized fundamental rights in regard to some special ... privacy interests, it has not created a broad category where any alleged infringement on privacy ... will be subject to substantive due process protection.” *Moore*, 410 F.3d at 1343-44. In other words, “privacy” is not a magic term that automatically triggers constitutional protection. Instead, the same rules that govern every other substantive due process analysis apply in the privacy context. *See Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 591 (6th Cir. 2008). That means an asserted privacy right is not fundamental unless it is “‘deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.’” *Khan v. Bland*, 630 F.3d 519, 535 (7th Cir. 2010) (quoting *Glucksberg*, 521 U.S. at 720-21). The list of rights that rise to this level is “a short one.” *Sung Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012). This list “‘for the most part’” has been limited to “‘matters relating to marriage, family, procreation, and the right to bodily integrity.’” *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 615 (7th Cir. 2014) (quoting *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion)); *see*

*also Kraushaar v. Flanigan*, 45 F.3d 1040, 1047 (7th Cir. 1995).

In assessing the nature and scope of Plaintiffs’ constitutional rights, and whether those rights have been infringed, the Court also must consider the need to preserve the discretion of schools to craft individualized approaches to difficult issues that are appropriate for their respective communities. Schools “have the difficult task of teaching ‘the shared values of a civilized social order.’” *Doninger v. Niehoff*, 527 F.3d 41, 54 (2d Cir. 2008) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 683 (1986)). Our public education system “has evolved” to rely “necessarily upon the discretion and judgment of school administrators and school board members.” *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *see also Jeffrey v. Bd. of Trustees of Bells ISD*, 261 F. Supp. 2d 719, 728 (E.D. Tex. 2003), *aff’d*, 96 Fed.Appx. 248 (5th Cir. 2004) (“Local school boards have broad discretion in the management of school affairs.”). The Supreme Court “has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Even when confronting segregation, perhaps the most intractable problem ever to afflict our public schools, the Supreme Court emphasized that schools “have the primary responsibility for elucidating, assessing, and solving” problems that arise during desegregation. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299 (1955); *see also Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2214 (2016) (“Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”). Therefore, our Nation’s deeply rooted history and tradition of protecting school administrators’ discretion require that this Court not “unduly constrain[ ] [schools] from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him [or her] for later professional training, and in helping him [or her] to adjust normally to his [or her] environment.” *Bannon v. Sch. Dist. of Palm Beach Cty.*, 387 F.3d 1208, 1220 (11th Cir. 2004) (Black, J., specially concurring) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 287 (1988)).

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\*25 It also is important to remember that constitutional privacy rights, whether rooted in the Fourth Amendment or the Fourteenth Amendment, “are different in public schools than elsewhere.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). “[I]t is well established that public school students enjoy a reduced expectation of privacy in comparison to the public at large.” *Dominic J. v. Wyoming Valley W. High Sch.*, 362 F. Supp. 2d 560, 570 (M.D. Pa. 2005). Of particular relevance to this case, public school locker rooms in this country traditionally have been and remain “not notable for the privacy they afford.” *Vernonia*, 515 U.S. at 657.

Contemporary notions of liberty and justice are inconsistent with the existence of the right to privacy asserted by Plaintiffs and properly framed by this Court. A transgender boy or girl, man or woman, does not live his or her life in conformance with his or her sex assigned at birth. The record in this case provides ample evidence of this point. Intervenor-Defendants Students A, B, and C live, for all intents and purposes, consistent with their gender identity. Student A “live[s] her life full-time as a girl.” Declaration of Parent A (“Parent A’s Declaration”), [ECF No. 32-1, at ¶ 5]. She dresses in girls’ clothes. *Id.* She maintains “a traditionally female hair style ... and overall appearance.” Kovack’s Declaration, [ECF No. 78-1, at ¶ 7]. She plays on girls’ athletic teams. Parent A’s Declaration, [ECF No. 32-1, at ¶ 7]. Her legal name is female, and she uses female pronouns to refer to herself. *Id.* at ¶ 5. Her passport lists her gender as female. *Id.* Likewise, Student B “live[s] his life full-time as a boy.” Parent B’s Declaration, [ECF No. 32-2, at ¶ 5]. He dresses in boys’ clothing and cuts his hair short. *Id.* His legal name is a “traditionally male name,” and he uses male pronouns to refer to himself. *Id.* Student C also lives “life as a boy.” Parent C’s Declaration, [ECF No. 32-3, at ¶ 5]. He uses male restrooms in public. *Id.* at ¶ 10. His legal name is a “traditionally male name,” and he uses male pronouns to refer to himself. *Id.* at ¶ 5. His state identification card lists his gender as male, and his Social Security records do the same. *Id.*

Further, people who interact with Students A, B, and C largely treat them consistent with their gender identity. In fact, many people who interact with Students A, B, and C on a daily basis may have no idea, and may not care, what sex they were assigned at birth. Even before OCR got involved, District 211 “honored Student A’s request to be treated as female” in every respect other than locker room

access. Letter of Findings, [ECF No. 21-10, at 2]. The District allowed her to use the girls’ restrooms. Kovack’s Declaration, [ECF No. 78-1, at ¶ 9]. All of Student B’s friends and most of his family use male pronouns to refer to him. Parent B’s Declaration, [ECF No. 32-2, at ¶ 5]. The teachers, administrators, and staff at Student B’s school “have made an effort to treat” him “consistent with his gender identity.” *Id.* at ¶ 8. The school employees and Student B’s friends support his use of the boys’ restrooms. *Id.* at ¶ 13. Similarly, the administrators, teachers, and staff at Student C’s school “treat him as they would treat any other boy at the school.” Parent C’s Declaration, [ECF No. 32-3, at ¶ 6]. That includes using his legal, male name and male pronouns to refer to him. *Id.* Other students at Student C’s school also “are supportive of” Student C. *Id.* at ¶ 7.

\*26 In addition, the military, which historically has served a vital role as a melting pot in our society, allows transgender personnel to serve openly and fully integrated in all military services. Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. Times, July 1, 2016, at A3, available at <http://www.nytimes.com/2016/07/01/us/transgender-military.html>; see also Rand Corporation, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* 44 (2016), available at [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1500/RR1530/RAND\\_RR1530.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf) (citing as precedent the successful integration of transgender service members in the armed forces of Australia, Canada, Israel, and the United Kingdom); Palm Center, *Report of the Planning Commission on Transgender Military Service* (2014), available at [http://www.palmcenter.org/wpcontent/uploads/2014/08/Report-of-Planning-Commission-on-Transgender-Military-Service\\_0-2.pdf](http://www.palmcenter.org/wpcontent/uploads/2014/08/Report-of-Planning-Commission-on-Transgender-Military-Service_0-2.pdf) (finding publically-available data indicates that allowing transgender service members to serve openly does not have a significant effect on unit cohesion, operational effectiveness, or readiness). The National Collegiate Athletic Association includes transgender student-athletes in collegiate sports consistent with their gender identity. Nat’l Collegiate Athletic Ass’n, *NCAA Inclusion of Transgender Student-Athletes* (2011), available at [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

More directly relevant to this case, the General Services Administration (“GSA”) has issued a federal management regulation requiring that “[f]ederal agencies occupying space under the jurisdiction, custody, or control of GSA must allow individuals to use restroom facilities and related areas consistent with their gender identity.” 81 Fed. Reg. 55148-01, 2016 WL 4377076. Cities across the country have implemented various requirements for gender-neutral bathrooms. *See* Office of the New York City Comptroller, *Restrooms for All: A Plan to Expand Gender Neutral Restrooms in NYC* 2-3 (2015), available at [https://comptroller.nyc.gov/wp-content/uploads/documents/Gender\\_Neutral\\_Bathrooms.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Gender_Neutral_Bathrooms.pdf) (discussing such laws in Washington, D.C., Philadelphia, and Delaware); The Associated Press, *California Governor Approves Gender-Neutral Restrooms*, N.Y. Times (Sept. 29, 2016), [http://www.nytimes.com/aponline/2016/09/29/us/ap-us-xgr-gender-neutral-restrooms-.html?\\_r=0](http://www.nytimes.com/aponline/2016/09/29/us/ap-us-xgr-gender-neutral-restrooms-.html?_r=0) (describing a California law requiring all single-stall toilets in California be designated gender-neutral). Likewise, major retailers allow employees and customers to use restrooms that correspond to their gender identity. *See, e.g.*, Abrams Rachel, *Target Steps Out in Front of Bathroom Choice Debate*, N.Y. Times, Apr. 28, 2016, at B1, available at [http://www.nytimes.com/2016/04/28/business/target-steps-out-in-front-of-bathrchoice-debate.html?\\_r=0](http://www.nytimes.com/2016/04/28/business/target-steps-out-in-front-of-bathrchoice-debate.html?_r=0).

Finally, although Plaintiffs raise the specter that all cisgender boys will be able to use the girls' restrooms and locker rooms at-will if District 211 continues to allow transgender students to use restrooms consistent with their gender identity and Student A to use the girls' locker rooms, Plaintiffs' Opening Brief, [ECF No. 23, at 20], District 211 does not permit all boys to enter the girls' restrooms and locker rooms or all girls to enter the boys' restrooms and locker rooms. The Restroom Policy permits all students to use restrooms consistent with their gender identity, and the Locker Room Agreement allows only Student A, who identifies and presents as a female, to use the girls' locker rooms. This is not the same as allowing all cisgender boys to use the girls' facilities or all cisgender girls to use the boys' facilities. District 211 has no such policy, and there is no indication it plans to institute such a policy. Further, speculation that someone will abuse or violate a school policy, and presumably be subject to discipline for doing so, is not a reason to invalidate policies that do not, by their terms, condone such conduct.<sup>24</sup>

\*27 For all these reasons, high school students do not have a fundamental constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs.

d. Plaintiffs Also Have Not Shown The Broad Constitutional Rights They Allege Exist Have Been Infringed By The Actions Of District 211 Or The Federal Defendants

Even if the Court were to accept that the broad rights to privacy asserted by Plaintiffs—the right to privacy in their fully or partially unclothed bodies and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex—are fundamental, Plaintiffs still have not shown those rights have been “directly” and “substantially” infringed in this case. *See Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763; *Presley v. Bd. of Sch. Directors of Rankin Sch. Dist. No. 98*, 2014 WL 1468087, at \*2 (C.D. Ill. Apr. 15, 2014). The cases upon which Plaintiffs rely to establish that the facts in this case rise to the level of a constitutional violation involve starkly different operative facts, law, and analysis. None of the cases stand for the proposition that the risk of bodily exposure to a transgender student in a high school restroom or locker room, particularly given the privacy protections put in place by District 211, infringes upon a fundamental right and thereby violates the Constitution.

For instance, Plaintiffs cite *Doe v. Luzerne County*, 660 F.3d 169 (3d Cir. 2011), for the proposition that Defendants are violating Plaintiffs' right to privacy in their unclothed and partially clothed bodies. Plaintiffs' Opening Brief, [ECF No. 23, at 13]. In that case, the plaintiff, a female deputy sheriff went to a local hospital to use a decontamination shower. *Luzerne*, 660 F.3d at 172. She took every possible precaution to make sure that no one saw her naked by using a showering room in which no one else was present and closing the door completely before undressing. *Id.* at 172-73. When she got out of the shower, she realized that there were no towels in the room and wrapped herself in some paper that normally was used to cover doctors' examination tables. *Id.* at 173. Then, while wrapped in the paper, she allowed another female deputy to inspect her to see if any fleas survived the decontamination process. *Id.* Unbeknownst to either

female deputy, two of their male colleagues opened the closed door and surreptitiously recorded the plaintiff. *Id.* These men later showed the video to other people in their department and saved the images to a public work computer. *Id.* at 173-74.

On appeal, the Third Circuit did not find the plaintiff's constitutional rights were violated. Instead, the court of appeals explained that “[p]rivacy claims under the Fourteenth Amendment necessarily require fact-intensive and context-specific analyses.” *Id.* at 176. The Third Circuit explicitly recognized there is no “rule that a nonconsensual exposure of certain anatomical areas constitutes a *per se* violation.” *Id.* The court of appeals then said that, even in light of the egregious facts in *Doe*, it still was not clear whether the plaintiff had suffered a constitutional violation. Instead, the Third Circuit determined a material question of fact remained as to whether certain sensitive parts of the plaintiff's body were exposed, which could have affected her claim, and it reversed and remanded for further proceedings consistent with its opinion. *Id.* at 178.

\*28 Plaintiffs also rely heavily on *Norwood v. Dale Maintenance System, Incorporated*, 590 F. Supp. 1410 (N.D. Ill. 1984), for the proposition that “compelled cross-sex restroom and locker room use violates” the Constitution. Plaintiffs' Opening Brief, [ECF No. 23, at 15-16.] In *Norwood*, the female plaintiff, who worked as a restroom attendant on the night shift, sought a job working in a men's restroom during the day shift. *Norwood*, 590 F. Supp. at 1413-14. Based solely on her gender, she was denied that position. *Id.* at 1414-15. In challenging that decision, she argued she was subjected to sex discrimination in violation of Title VII. *Id.* at 1414. *Norwood* did not raise any constitutional issue. Instead, the case turned solely on whether sex was a “bona fide occupational qualification” (“BFOQ”) under Title VII for the sought-after restroom attendant job. *Id.* at 1415. While the court's inquiry regarding this issue involved privacy issues in a vernacular sense, the relevant standard required only a “showing that the clients or guests of a particular business would not consent to service by a member of the opposite sex, and that the clients or guests would stop patronizing the business if members of the opposite sex were allowed to perform the service.” *Id.* at 1416. The burden on an employer to establish a BFOQ defense based on the level of privacy it wants to afford to its clientele is different, and substantially less demanding,

than the burden on Plaintiffs here to establish the existence of a constitutionally protected right. Therefore, *Norwood* simply does not shed any light on Plaintiffs' constitutional rights.

This Court also is not persuaded by Plaintiffs' reliance on *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692 (N.D. Ohio 2005). Plaintiffs' Reply Brief, [ECF No. 94, at 21.] In *Kohler*, the plaintiff, a police dispatcher, was shown a pornographic picture by a colleague who later became the Chief of Police and found another pornographic image anonymously left on her computer. *Kohler*, 381 F. Supp. 2d at 697. The future Chief of Police also told the plaintiff that she could buy used women's underwear online, sent her multiple offensive emails, hid a tape recorder in a toilet stall in the women's restroom, and circulated an old photo of the plaintiff to numerous people. *Id.* After being victimized by this misconduct, the plaintiff filed a lawsuit asserting, in part, that she suffered a violation of her substantive due process right to privacy. *Id.* at 698. The court, however, never addressed the merits of this claim. Instead, the court discussed various procedural grounds related to Plaintiffs' constitutional privacy claim. *Id.* at 710-13. And, in the end, the court actually granted summary judgment in favor of all the defendants on that claim. *Id.* at 713.

Plaintiffs further cite cases that involve unwarranted aggressive touching of unclothed body parts by members of the opposite sex. Plaintiffs' Opening Brief [ECF No. 23, at 13] (citing *Safford Unified Sch. District No. 1 v. Redding*, 557 U.S. 364 (2009) (search of a student's bra and underpants); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (forceful removal of a student's underwear)). They also rely upon cases holding that governmentally-compelled exposure of one's body to members of the opposite sex, such as school administrators and prison guards, may violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Plaintiffs' Opening Brief, [ECF No. 23, at 13-14] (citing *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (strip search by members of the opposite sex); *Cornfield v. Consolidated High School District 230*, 991 F.3d 1316, 1320 (7th Cir. 1993) (same)).

The Fourth Amendment cases cited by Plaintiffs simply are not relevant to this case. Plaintiffs do not allege, nor can they, that the Restroom Policy or the Locker Room Agreement results in any search or seizure that implicates Fourth Amendment privacy interests. Rather, Plaintiffs'

constitutional claim is premised solely on the substantive due process clauses. While the Fourth Amendment generally requires that a government's intrusion on privacy through a search or a seizure must be reasonable, substantive due process does not impose a similar restriction. Instead, substantive due process applies in very limited circumstances when fundamental rights are implicated.

This case, moreover, does not involve the extreme invasions of privacy that the courts confronted in the cases cited by Plaintiffs. Plaintiffs have not alleged any students, whether Student A, any other transgender student, or any Student Plaintiff, ever were in each other's presence in an unclothed state. In fact, Plaintiffs' counsel disclaimed that is central or even relevant to Plaintiffs' case: "who saw who in the state of undress or naked ... is not relevant ... at the preliminary injunction stage. We don't need to prove that. We didn't allege that in the complaint, nor do we rely on it at the preliminary injunction stage." June 9 Hearing Transcript, [ECF No. 128, at 18]. Plaintiffs also do not allege that any transgender student, including Student A, and any Student Plaintiff ever saw an intimate part of the other's body. The underlying facts of this case are entirely unlike the surreptitious recordings, strip searches, and aggressive body touchings that courts have found unconstitutional in certain circumstances.<sup>25</sup>

\*29 This case also does not involve the type of forced invasion of privacy that animated the cases cited by Plaintiffs. The restrooms and the physical education locker room at Fremd High School have traditional privacy stalls that can be used when toileting, changing clothes, and showering. Kovack's Declaration, [ECF No. 78-1, at ¶¶ 8, 15]. There is no reason why a student who does not want to do so would have to take off clothing or reveal an intimate part of his or her body outside of the private stalls. Inside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another person. Therefore, these protections almost entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff.

Further, District 211 has informed parents and students that additional privacy alternatives, beyond the stalls, are available upon request. *Id.* at ¶ 15(b). These include separate, single-use facilities for male and female students who do not want to use the common locker rooms or restrooms. *Id.* at ¶ 17. Any Student Plaintiff who uses

the alternative facilities has no meaningful risk of either seeing or being seen by a student in a state of undress or seeing an intimate part of his or her body. In light of these privacy protections and alternatives, any Student Plaintiff who does not want to risk exposure of his or her body to a transgender student has the ability to change clothes and shower in a private space. Put simply, this case does not involve any forced or involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth.

For all of these reasons, the Court finds that Plaintiffs are not suffering a "direct" and "substantial" infringement on any substantive due process right.

#### e. Defendants' Actions Do Not Shock The Conscience

Even if the Restroom Policy and the Locker Room Agreement did directly and substantially infringe upon a fundamental right, that alone would not render them unconstitutional under the Fifth or Fourteenth Amendments. The Restroom Policy and the Locker Room Agreement would not be unconstitutional unless they require something that "shock[s] the conscience." *Christensen*, 483 F.3d at 462 n.2. "[T]he meaning of this standard varies depending on the factual context." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 400 (3d Cir. 2003). Courts variously have described conscience-shocking conduct as that which "violates the decencies of civilized conduct; ... is so brutal and offensive that it does not comport with traditional ideas of fair play and decency; ... interferes with rights implicit in the concept of ordered liberty; [or] ... is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 867 (5th Cir. 2012) (quoting *City of Sacramento*, 523 U.S. at 846-47 & n. 8) (internal quotation marks omitted). Under all of these formulations, the conduct must go "beyond merely 'offending some fastidious squeamishness or private sentimentalism.'" *Smith ex rel. Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 173 (2d Cir. 2002) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 n.6 (2d Cir. 1973), partially abrogated on other grounds by *Graham v. Connor*, 490 U.S. 386 (1989)). "Only 'the most egregious official conduct' will satisfy this stringent inquiry." *Jackson v. Indian Prairie Sch. Dist.* 204, 653 F.3d 647, 654 (7th Cir. 2011) (quoting *Cty. of Sacramento*, 523

U.S. at 846); *see also Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005) (“Cases abound in which the government action—though thoroughly disapproved of—was found not to shock the conscience.”).

Plaintiffs never address whether the Restroom Policy and the Locker Room Agreement shock the conscience. Instead, Plaintiffs argue those policies cannot pass muster under a strict scrutiny test. As noted above, that standard applies to legislative enactments. *Christensen*, 483 F.3d at 462 n.2. The executive actions at issue in this case must shock the conscience to violate substantive due process. *Id.* And the Fourth Amendment cases cited throughout Plaintiffs’ briefs, and upon which they rely, simply are not relevant to this issue because “the Fourth Amendment invokes the less stringent reasonableness standard.” *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 171 (3d Cir. 2001).

\*30 Neither the Restroom Policy nor the Locker Room Agreement shocks the conscience. District 211 is legally responsible for providing an effective learning environment for over 12,000 students. *See* Defendant Board of Education of Township High School District No. 211’s Response to Plaintiffs’ Motion for Preliminary Injunction (“District 211’s Response Brief”), [ECF No. 78, at 1, 10] It determined that allowing all students to use restrooms consistent with their gender identity would improve the educational environment of its students. In reaching this conclusion, District 211 recognized isolating transgender students in separate facilities against their will could, and did, at least in the case of Student A, negatively impact their experience in school. The District decided that remedying this harm by offering appropriate restroom access would not infringe on the privacy of other students because the privacy protections and alternatives sufficiently protected all students’ privacy in the restrooms. Kovack’s Declaration, [ECF No. 78-1, at ¶ 9].

After District 211 instituted the Restroom Policy, roughly three years elapsed before Plaintiffs challenged it. If Student Plaintiffs did not know they were using restrooms with transgender students during this three-year period, it is hard to say this is a conscience shocking policy. Alternatively, if some Student Plaintiffs were aware transgender students were using restrooms consistent with their gender identity during that time and did not

complain about it, then it also is hard to say that state of affairs shocks the conscience.<sup>26</sup>

The Locker Room Agreement represents the same balancing of interests as the Restroom Policy. Before District 211 and DOE entered into the Agreement, DOE conducted a lengthy factual investigation. The resulting Letter of Findings describes in great detail what harm Student A was suffering because of her lack of access to the girls’ locker rooms. *See generally* Letter of Findings, [ECF No. 21-10]. The Letter also discusses what facilities are available at Fremd High School, when and how students use those facilities, and what can be done to protect their privacy. *Id.* The Locker Room Agreement requires District 211 to provide significant privacy protections, and District 211 has promised to provide alternative facilities already mentioned upon request. Ultimately, District 211 and DOE, both of which are tasked with advancing and protecting the health, safety and educational environment of all students, at a time when they were potential litigation adversaries, decided that the Locker Room Agreement served the students at Fremd High School well enough to justify entering into it. Therefore, the Court finds that neither the Restroom Policy nor the Locker Room Agreement shocks the conscience because they represent a careful and sensitive balancing of the interests of all the students in District 211.

For all of these reasons, Plaintiffs have not shown they have a likelihood of success on the merits of their claim that the Restroom Policy and the Locker Room Agreement violate their constitutional right to privacy.

### 3. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their Title IX Claims

Plaintiffs’ argument for preliminary injunctive relief under Title IX focuses on two issues: (1) whether the Restroom Policy and the Locker Room Agreement create a hostile environment for Student Plaintiffs in violation of Title IX; and (2) whether District 211’s decision to allow Student A to use the girls’ locker rooms when boys do not have to share access to the boys’ locker rooms with a transgender student, even with the alternative facilities the District offers for girls seeking additional privacy, violates a regulation promulgated to implement Title IX that provides that sex-segregated facilities must be comparable. *See* Plaintiffs’ Opening Brief, [ECF No. 23, at 18]; Plaintiffs’ Protective Order Brief, [ECF No. 50, at

3]. As discussed below, Plaintiffs have not shown they are likely to prevail on either of these arguments.

**a. Plaintiffs Have Not Shown They Are Suffering Discrimination On The Basis Of Sex**

\*31 There is a threshold question under Title IX—whether the harassment Plaintiffs allege they are suffering properly can be characterized as *sexual* harassment, or discrimination on the basis of sex. See *Burwell v. Pekin Community High Sch. Dist.* 303, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002); see also *C.R.K. v. U.S.D.*, 176 F. Supp. 2d 1145, 1163 (D. Kan. 2001); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 453-56 (S.D.N.Y. 2000). To be actionable under Title IX, the offensive behavior must be “on the basis of sex.” See *Frazier v. Fairhaven School Community*, 276 F.3d 52, 66 (1st Cir. 2002); *Benjamin v. Metropolitan Sch. Dist. of Lawrence Township*, 2002 WL 977661, at \*3 (S.D. Ind. 2002).

Here, Plaintiffs complain that the Restroom Policy and the Locker Room Agreement create a hostile environment. But Girl Plaintiffs are not being targeted or singled out by District 211 on the basis of their sex, nor are they being treated any different than boys who attend school within District 211. The Restroom Policy applies to all restrooms. That means cisgender boys use the boys' restrooms with transgender boys just like cisgender girls use the girls' restrooms with transgender girls. District 211 also has made clear that it will allow transgender boys to use the boys' locker rooms and will provide the same privacy protections in the boys' locker rooms as exist in the girls' locker rooms, if requested. See District 211's Response Brief, [ECF No. 78, at 22 n.9]. Therefore, the alleged discrimination and hostile environment that Girl Plaintiffs claim to experience is not on the basis of their sex, and any discomfort Girl Plaintiffs allege they feel is not the result of conduct that is directed at them because they are female. All of Plaintiffs' Title IX claims suffer from this threshold problem.

**b. Plaintiffs Have Not Shown The Alleged Harassment Is Severe, Pervasive Or Objectively Offensive**

In addition, to establish a hostile environment under Title IX, “a plaintiff must establish sexual harassment ... that is so severe, pervasive, and objectively offensive,

and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.” *Davis, Next Friend LaShona D. v. Monroe County Board of Education*, 526 U.S. 629, 651-52 (1999); *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014). Plaintiffs argue that the presence of and risk of exposure to transgender students in restrooms and Student A's presence, and the risk of exposure to or by Student A, in the girls' locker rooms, is severe, pervasive, and objectively offensive conduct that subjects them to a hostile environment in violation of Title IX. The facts of record do not support these propositions, and Plaintiffs do not cite any persuasive authority for this legal conclusion.

Plaintiffs' Complaint is long on conclusory statements but sparse on specific facts. As noted above, Plaintiffs allege generally and repeatedly that District 211's Restroom Policy and the Locker Room Agreement cause Student Plaintiffs “embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity.” Complaint, [ECF No. 1, at ¶¶ 11, 124, 129, 136, 191, 205, 208, 210, 226]. Girl Plaintiffs say they are fearful of sharing facilities with and attending to personal needs in the presence of transgender students. *Id.* at ¶¶ 8, 10. Girl Plaintiffs also say they are afraid, worried and embarrassed about the possibility of seeing or being seen by Student A while in a state of undress. *Id.* at ¶¶ 8, 9, 114, 126, 127, 186, 187. They assert that their distress is “ever-present” and “constant.” *Id.* at ¶¶ 114, 115, 125, 237. Nowhere, however, do Plaintiffs allege they ever have seen Student A undressed or that Student A has seen any Girl Plaintiff undressed if that Student Plaintiff wanted not to be seen in that state. Moreover, the risk of that occurring is very low given the privacy protections put in place by District 211, the alternative facilities available for any student who does not want to use the common restrooms or locker rooms, and Student A's undertakings in the locker room agreement concerning her use of the girls' locker room.

\*32 Generalized statements of fear and humiliation are not enough to establish severe, pervasive or objectively offensive conduct. General allegations have been held to be insufficient to establish a Title IX violation. See, e.g., *Trentadue v. Redmon*, 619 F.3d 648, 654 (7th Cir. 2010) (finding undeveloped allegations of student-on-student harassment cannot establish a Title IX claim); *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315

F.3d 817, 822 (7th Cir. 2003) (finding accusation that a student did “nasty stuff” is insufficient to state a Title IX).

i. The mere presence of transgender students in restrooms or locker rooms is not severe, pervasive, or objectively offensive conduct

It is important to recognize that Title IX does not say schools cannot allow males and females to use the same restrooms or locker rooms under any circumstances. “Title IX is a broadly written general prohibition on [sex] discrimination, followed by specific, narrow exceptions to that broad prohibition.” *Jackson*, 544 U.S. at 175. One of those exceptions says that a school “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. Nowhere does Title IX or its regulations say that schools must provide single-sex facilities. During oral argument on Plaintiffs’ Motion for Preliminary Injunction, Plaintiffs’ counsel conceded that Title IX is written permissively with respect to single-sex facilities. Oral Argument Transcript, [ECF No. 127, at 34]. Title IX does not require schools to provide separate facilities; it allows schools to do so as long as they provide comparable facilities for males and females. In other words, Title IX permits schools to decide whether to have sex-segregated restrooms, and gender-neutral restrooms do not *per se* violate Title IX as long as all students’ privacy interests are protected. Therefore, the foundation upon which Plaintiffs build much of their Title IX argument—that it is a violation of Title IX for a biological boy to use a restroom also used by a biological girl under any circumstances—does not hold the weight Plaintiffs place on it.

The mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases. *See, e.g., Davis*, 526 U.S. at 653 (holding that over a period of five months, a fifth-grade male student harassed the plaintiff, a fifth-grade female student, by engaging in sexually suggestive behavior, including attempting to touch the plaintiff’s breasts and genital area, rubbing against the plaintiff and making vulgar statements); *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 259-60 (6th Cir. 2000) (finding that a female student was repeatedly propositioned, groped

and threatened and was also stabbed in the hand; during one incident, two boys held her hands while other male students grabbed her hair and started yanking off her shirt); *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243-44 (10th Cir. 1999) (finding that a disabled female student was sexually assaulted by a male student on multiple occasions); *Seiwert v. Spencer-Owen Community School Corporation*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (holding that the alleged harassment suffered by a male eighth-grade student, which included being called “faggot,” being kicked by several boys during a dodge ball game, and receiving death threats, if proven, amounted to severe and pervasive conduct that was objectively offensive); *Bruning ex rel. v. Carrol County Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (finding repeated acts of touching and sexual groping were objectively offensive); *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001 WL 276975, at \*1-3 (D.N.H. 2001) (finding widespread peer harassment, both verbal and physical, which involved referring to the plaintiff as a homosexual, as well as some harassment by coaches); *see also Cruzan v. Special Sch. Dist. No. 1.*, 294 F.3d 981, 983 (8th Cir. 2002) (finding mere presence of transgender female teacher in women’s faculty restroom did not create a hostile environment for cisgender female teachers).

\*33 Plaintiffs rely on *People v. Grunau*, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009), which Plaintiffs acknowledge is an unpublished opinion that is not to be cited under the California Rules of Courts. In that case, a man with two previous convictions for sexually molesting a 5-year-old girl and a 10-year-old girl was caught staring at a teenager showering in a locker room. *Grunau* has absolutely nothing in common with this case.

In addition, Plaintiffs cite *New Jersey Division of Youth & Family Services v. M.R.*, 2014 WL 1977014 (N.J. Super. Ct. App. Div. Feb. 25, 2014), for the proposition that “allowing [a] teen girl to be unclothed and shower with a biological male risked mental and emotional injury.” Plaintiffs’ Opening Brief, [ECF No. 23, at 22]. In that case, however, the biological male who showered with the girl was her father, who also was accused of having sexual relations with his under-aged niece. *M.R.*, 2014 WL 1977014, at \*1. Again, this case is not remotely similar.

Plaintiffs’ Title VII cases similarly are inapposite and improperly equate allowing transgender students to use restrooms consistent with their gender identity and a

transgender girl to use the girls' locker rooms with sexual deviancy. Plaintiffs cite *Lewis v. Triborough Bridge and Tunnel Authority*, 31 Fed.Appx. 746 (2nd Cir. 2002), which is another decision that is unpublished and does not have any precedential effect, for the proposition that the defendant company created a hostile environment when it allowed male cleaners inside the women's locker room while female employees were changing clothes. Plaintiffs, however, omit that the cleaning service employees were leering at the female plaintiff and would crowd the entrance of the locker room, forcing her to "run the gauntlet" and physically brush up against them. *Lewis v. Triborough Bridge and Tunnel Authority*, 77 F. Supp. 2d 376, 377 (S.D.N.Y. 1999). And the supervisor used lewd and objectively offensive words when referring to the employees who complained of the conduct. *Id.* at 378. Nothing of that sort is alleged to have occurred in this case.

ii. Any risk of unwanted exposure is mitigated effectively by the privacy protections and alternatives provided by District 211

Plaintiffs maintain that the presence of a transgender student in a restroom or locker room with cisgender students violates Title IX because it creates a risk that students will see each other in an unclothed or partially clothed state by virtue of their sharing these facilities, and that is a severe, pervasive and objectively offensive hostile environment. The risk of unwanted exposure in this case, however, is substantively mitigated and reduced by the privacy protections that District 211 provides in the restrooms and locker rooms, and by the alternative facilities it provides for students who do not want to use the common facilities.

District 211 agreed in the Locker Room Agreement to install and maintain "sufficient privacy curtains (private changing stations) within the girls' locker rooms to accommodate ... any students who wish to be assured of privacy while changing." Locker Room Agreement, [ECF No. 21-3, at 3]. The District has installed 13 private stalls, a curtained shower, and privacy curtains on two pre-existing private changing and showering stalls in the girls' physical education locker room at Fremd High School. Kovack's Declaration, [ECF No. 78-1, at ¶ 15(a)].<sup>27</sup> The record shows that District 211 also has installed private changing stalls in the boys' locker

room at Fremd High School. *Id.* The District agreed to provide "reasonable alternative[s]" to female students who request "additional privacy ... beyond the private changing stations," including use of a single-use facility. Locker Room Agreement, [ECF No. 21-3, at 3]. Separate from the Locker Room Agreement, District 211 has informed parents that "an alternative changing area" will be made available upon request. Kovack's Declaration, [ECF No. 78-1, at ¶ 15(b)].

\*34 Plaintiffs allege there are no privacy stalls for changing clothes or showering in the girls' swim or gymnastics locker rooms. Complaint, [ECF No. 1, at ¶¶ 172, 174]. The District does not appear to dispute this fact. But Student A has completed her swim requirements for graduation, and she informed OCR that she did not intend to take any more physical education classes that include swimming. Letter of Findings, [ECF No. 21-10, at 6]. Therefore, the fact that there are no privacy options available in the swim locker room is not enough for Plaintiffs to satisfy their burden of showing a likelihood of success that the District's failure to provide privacy options in that locker room is severe, pervasive or objectively offensive conduct. There are no allegations, let alone evidence, that Student A is using or intends to use the swim locker room to change her clothes or that other students are forced to change their clothes in the swim locker room when Student A is or will be present. The mere risk that Student A might change clothes or shower in the girls' swim locker room when she has no reason to be there and is not enrolled in any required swim class does not create or contribute to a severe, pervasive or objectively offensive hostile environment.<sup>28</sup>

In addition, although Plaintiffs allege there are open pole showers and no privacy curtains for changing clothes in the girls' gymnastics locker room, they do not allege that any girls, or more specifically Girl Plaintiffs, use the showers, or want to use the showers but cannot do so because Student A is present. To the contrary, in the Letter of Findings, OCR said girls on the gymnastics team do not shower in the gymnastics locker room. Letter of Findings, [ECF No. 21-10, at 7]. So, the only issue in the gymnastics locker rooms appears to be that there are no privacy stalls available for students to use when changing into or out of their uniforms. Girl Plaintiffs allege Student A changed clothes in the gymnastics locker room once "while girls were present." Complaint, [ECF No. 1, at ¶ 96]. Plaintiffs, however, do not allege any Girl Plaintiff

was present on this occasion nor do they allege any Girl Plaintiff, or any other girl, saw any private part of Student A's body or even that any part of her body was visible on that occasion. This is not evidence of a severe, pervasive, or objectively offensive hostile environment. Moreover, students who do not want to change or shower in the swim or gymnastics locker rooms can use the physical education locker room, which provides privacy protections, or an alternative facility, including a single-use space.

Plaintiffs also allege a number of other girls' athletic team locker rooms in the high school "are open to a male student's use." *Id.* at ¶ 190. But there is nothing specific pled in the Complaint or anywhere in the record to indicate that District 211 would allow cisgender boy students to have access to the girls' team locker rooms or that any transgender girl wants or intends to use any of those locker rooms. A hostile environment and allegations of severe, pervasive and objectively offensive conduct have to be based on something more than speculation and conjecture.

Finally, according to Girl Plaintiffs, they are ridiculed and harassed by their classmates if they choose to change clothes in the privacy stalls provided in the girls' physical education locker room. *Id.* at ¶¶ 140-147. Plaintiffs do not allege that District 211 was aware of this inappropriate conduct before the Complaint was filed (no complaint to the administration, for example, is alleged) nor is it clear that the District's policies are responsible for this alleged conduct by Girl Plaintiffs' classmates. In any event, this isolated or sporadic conduct is not the kind of severe, pervasive, objectively offensive conduct that has been held to violate Title IX.

Plaintiffs' challenge to the Restroom Policy also is short on facts necessary to show a hostile environment. There are private toilet stalls in the restrooms. Even considering the alleged gaps in the stalls above and below the doors, and on the sides of the doors, there is nothing objectively offensive about Girl Plaintiffs having to use the restroom when Student A also is using the restroom, or about any Student Plaintiff using the same restroom as a transgender student whose sex assigned at birth is different than theirs. There is nothing to indicate that the gaps in the stalls make it likely or even possible for someone to observe anything that occurs in the stall if the person inside the stall does not want that to happen. There are no allegations that Student A, or any other transgender

student, has harassed anyone in the restroom other than by her mere presence. Moreover, there undoubtedly are remedies within the schools for situations when any student acts in a threatening, harassing, or inappropriate way in a restroom. *See also Cruzan*, 294 F.3d at 984 ("We agree with the district court that Cruzan failed to show the school district's policy allowing [a transgender female teacher] to use the women's faculty restroom created a working environment that rose to the level of [sexual harassment or a hostile environment].").

\*35 In summary, the allegations in Plaintiffs' Complaint are not comparable to the type of conduct that has been found to be severe, pervasive and objectively offensive in violation of Title IX. The Court is not persuaded that there is anything objectively offensive about a transgender student being present in a restroom or Student A being present in a locker room when at no time is his or her unclothed body exposed to any Student Plaintiff, the risk of that happening is substantially mitigated by the various privacy protection put in place by District 211 and Student A's undertakings in the Locker Room Agreement, and any Student Plaintiff who does not want to expose his or her body to a transgender student or anyone else is not compelled to do so. The risk of an unwanted exposure under these circumstances is minimal and not so severe, pervasive, or objectively offensive as to constitute a hostile environment much less a hostile environment that denies any Student Plaintiff access to any educational benefits.

iii. There is no evidence Girl Plaintiffs have been denied access to any educational opportunities or benefits

Finally, Plaintiffs assert in a conclusory and generalized manner that the Locker Room Agreement and the Restroom Policy "have had and continue to have a profoundly negative effect of the girls' access to educational opportunities, benefits, programs, and activities at their schools." Complaint, [ECF No. 1, at ¶ 12]. Plaintiffs give five examples: (1) some girls avoid the locker rooms; (2) one girl wears her gym clothes underneath her regular clothes; (3) other girls change quickly in the locker rooms and avoiding all conversation and eye contact; (4) some girls avoid the restrooms as long as possible; and (5) other girls spend time trying to find an empty restroom and therefore risk being tardy to class. *Id.* There are, however, no specific allegations that Plaintiffs have been excluded from "participation in" or "denied the

benefits of” any education opportunity, class or program as required by Title IX. *See* 20 U.S.C. § 1681(a).

An action under Title IX lies only when the behavior at issue denies a victim equal access to education. *Davis*, 526 U.S. at 652. The harassment must have a “concrete, negative effect” on the victim’s education. *Id.* at 654. Examples of a negative impact on access to education may include dropping grades, *id.* at 634, becoming homebound or hospitalized due to harassment, *see Murrell*, 186 F.3d at 1248-49, and suffering physical violence, *see Vance*, 231 F.3d at 259.

Here, there is no evidence Girl Plaintiffs have been denied access to any educational opportunity or benefit. Plaintiffs do not allege, for instance, they have stopped going to gym class, quit an extracurricular activity, started getting lower grades, or struggled to focus during class. Instead, the only effect on their educational opportunities they identify is the risk of running late to class when using more remote restrooms and locker rooms they think will not be used by a transgender student. Complaint, [ECF No. 1, at ¶¶ 12(e), 236]. There is no indication Plaintiffs actually have missed meaningful class time and that this in turn has negatively impacted their education. Therefore, they have not shown they have been denied equal access to any educational activities or programs.

Accordingly, for all of these reasons, the Court is not persuaded Plaintiffs have a likelihood of success in establishing a hostile environment in violation of Title IX based on transgender students use of the same high school restrooms as Student Plaintiffs, or Student A’s use of the girls’ locker rooms.

**c. Plaintiffs Have Not Shown The Facilities Are Not Comparable**

By allowing Student A to use the girls’ locker rooms at Fremd High School, Plaintiffs argue the locker room facilities for the girls provided by District 211 are inferior to the facilities provided for the boys in violation of Title IX. Plaintiffs argue that the girls’ locker rooms are inferior to the boys’ locker rooms for two reasons: (1) the girls have to share a locker room with a biological boy while the boys do not have to share a locker room with a biological girl; and (2) the alternate private single-use facilities for girls to use if they do not want to use the common locker room

are inferior to the boys’ locker room. Plaintiffs’ Opening Brief, [ECF No. 23, at 18-19].

\*36 Plaintiffs do not dispute that the physical facilities provided for the boys’ and girls’ restrooms and locker rooms are comparable. Plaintiffs’ argument is based on the fact the Locker Room Agreement allegedly creates inferior facilities for girls because of who is permitted to use the girls’ locker rooms, *i.e.*, the girls have to share a locker room with a transgender student and the boys do not. However, even though Plaintiffs allege the boys do not have to share a locker room with a transgender student, District 211 has represented it will provide similar access for a transgender boy wanting to use the boys’ locker room with the same privacy accommodations. *See* District 211’s Response Brief, [ECF No. 78, at 22 n.9].

When Plaintiffs filed their Motion for Preliminary Injunction, Student A was the only transgender student who had asked District 211 to allow her to use locker rooms consistent with her gender identity. At oral argument on Plaintiffs’ Motion, Intervenor-Defendants’ counsel stated that Student C, a transgender boy, recently began his freshman year at a District 211 high school. Based on District 211’s representation that it would provide similar access to the boys’ locker rooms for transgender boys, the Court is not persuaded Plaintiffs have a likelihood of success in establishing that District 211 is violating Title IX by not providing comparable facilities for all students. District 211’s Response Brief, [ECF No. 78, at 22 n.9].

The Court also is not persuaded that the alternate single-use facilities District 211 provides for students who do not want to use common restrooms or locker rooms have to be comparable to the common facilities. Plaintiffs do not cite any case to support that proposition. District 211 provides comparable locker room facilities for boys and girls, and the fact that District 211 provides alternate single-use facilities that offer greater privacy options for students who want additional privacy does not change the fact that the District offers comparable common facilities for all students. As far as the Court can tell on this record, the boys’ and girls’ locker rooms at Fremd High School are comparable in all respects. Student Plaintiffs who choose to use the alternate single-use facilities with additional privacy protections cannot complain that the alternate facilities are not “comparable” to the main facilities offered to boys and girls, which they have chosen not to

use. There is no allegation that the alternative facilities made available for boys and girls are not comparable.

Accordingly, for all of these reasons, the Court finds Plaintiffs do not have a likelihood of success on the merits of their claims that District 211 is violating Title IX.

### B. Irreparable Harm

To satisfy the second threshold requirement for a preliminary injunction, Plaintiffs must show there is a likelihood—more than a mere possibility—they will suffer irreparable harm. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011). Harm “is ‘irreparable’ where it ‘cannot be prevented or fully rectified by the final judgment after trial.’ ” *Girl Scouts*, 549 F.3d at 1089 (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). Phrased another way, harm is irreparable when it is “difficult—if not impossible—to reverse.” *Michigan*, 667 F.3d at 788.

Plaintiffs devote scant space—just three short paragraphs out of 50-plus pages of briefing in support of their Motion for Preliminary Injunction—to irreparable harm. Plaintiffs raise two undeveloped arguments. They contend that irreparable harm is presumed when a party establishes a likely constitutional violation. Plaintiffs' Reply Brief, [EFC No. 94], at 24. And they assert that Student Plaintiffs are being forced to endure a “per se hostile educational environment.” *Id.* Both of these arguments rely on the premise that Plaintiffs' underlying constitutional and Title IX claims have merit. As already explained, however, Plaintiffs have not shown they are likely to prevail on either their constitutional claim or their Title IX claims.

\*37 Plaintiffs also assert in a conclusory and generalized manner that Girl Plaintiffs are suffering from an impaired “access to educational opportunities, benefits, programs, and activities.” Complaint, [ECF No. 1, at ¶ 13]. “[L]ack of access to classes and related programs, services, and activities can constitute irreparable injury for purposes of a preliminary injunction.” *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126, 1148 (C.D. Cal. 2015). Even when access is denied, though, movants may be required to show more to establish irreparable harm. *Sellers v. Univ. of Rio Grande*, 838 F. Supp. 2d 677, 687 (S.D. Ohio 2012) (noting that there is “some authority for the proposition that an interruption in an educational

program is not, of itself, an irreparable injury” and also “contrary case law” that finds irreparable harm “especially when the denial of an educational opportunity is coupled with other types of harm”).

As discussed above, Plaintiffs do not allege that Girls Plaintiffs have stopped going to physical education class, quit an extracurricular activity, received lower grades, or struggled to focus during class. Instead, the only effect on Girl Plaintiffs' educational opportunities that Plaintiffs identify is the risk of running late to class if they use more remote restrooms and locker rooms in the school to avoid using a restroom or locker room with a transgender student. Complaint, [ECF No. 1, at ¶¶ 12(e), 236]. There is no indication that anything has negatively impacted Girl Plaintiffs' education. Therefore, Plaintiffs have not shown this speculative harm is irreparable.

Student Plaintiffs' main irreparable harm argument boils down to their contention that they are suffering “embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity,” which the Court will refer to as “emotional distress” for short, when they use restrooms in the presence of a transgender student or locker rooms in the presence of Student A who they label a biological boy. *Id.* at ¶ 11 123, 124, 220, 226, 237. Sometimes, emotional harm can be serious enough to rise to the level of irreparable harm. *Moore v. Consol. Edison Co. of New York*, 409 F.3d 506, 511 (2d Cir. 2005); *Kennedy v. Sec'y of Army*, 191 F.3d 460, 460 n.5 (9th Cir. 1999); *Caspar v. Snyder*, 77 F. Supp. 3d 616, 640 (E.D. Mich. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015). But “emotional suffering is commonly compensated by monetary awards” in our legal system. *Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, 2011 WL 221823, at \*5 (N.D. Ill. Jan. 24, 2011); *see also The Great Tennessee Pizza Co. Inc. v. Bellsouth Commc'ns*, 2010 WL 3806145, at \*2 (E.D. Tenn. Sept. 23, 2010). It is the “extraordinary circumstance[ ]” when emotional harm, standing alone, is so severe that money damages cannot rectify the harm after a final judgment. *Lore v. City of Syracuse*, 2001 WL 263051, at \*5 (N.D.N.Y. Mar. 9, 2001); *see also Colorado Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 220 (D.D.C. 2015) (“Therefore, Plaintiffs' observation or contemplation of the stress and small risk of physical harm that the horses might suffer while being

gathered—sincere as it might be—does not rise to the level of a cognizable, irreparable injury.”).

In this case, Plaintiffs' allegations of emotional distress do not show Student Plaintiffs are suffering from distress that is so severe it is incapable of being rectified by money damages after a final judgment. Plaintiffs' general and conclusory claims to the contrary are insufficient to carry their burden. See *Lane v. Buckley*, \_\_\_ Fed.Appx. \_\_\_, 2016 WL 1055840, at \*3 (10th Cir. Mar. 17, 2016) (“As a general rule, ... a district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff.”) (quoting *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990)); *Gatsinaris v. ART Corp. Sols., Inc.*, 2015 WL 3453454, at \*8 (C.D. Cal. May 29, 2015); *McDavid Knee Guard, Inc. v. Nike USA, Inc.*, 683 F. Supp. 2d 740, 749 (N.D. Ill. 2010). In addition, Plaintiffs' conclusory allegations of discomfort and distress, unsupported by the “who, what, where, when, why, and how” of what Student Plaintiffs are experiencing, are too speculative to justify injunctive relief. See *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1204 (7th Cir. 1996) (recognizing that it is an abuse of discretion to grant an injunction “based on nothing but speculation and conjecture”); see also *Moore*, 409 F.3d at 511 (“We affirm the district court's conclusion[ ] ... that the claim of psychological harm was too speculative to warrant preliminary relief.”); *Holcomb v. California Bd. of Psychology*, 2015 WL 7430625, at \*4 (E.D. Cal. Nov. 23, 2015) (“Plaintiff likewise provides no factual support showing she is likely to suffer irreparable reputational or emotional harm.”); *Aune v. Ludeman*, 2009 WL 1586739, at \*5 (D. Minn. June 3, 2009) (“Plaintiff argues that excessive stress ‘may’ induce or aggravate physical illness and mental or emotional disturbance, without a showing of any real threat of irreparable harm to himself.”).

\*38 The fact that District 211 provides significant privacy protections and alternate facilities for students who, like Student Plaintiffs, are uncomfortable at the risk of encountering a transgender student in a state of undress also undermines Plaintiffs' ability to establish irreparable injury. In the context of a request for preliminary injunctive relief, the movants' failure to investigate potentially mitigating alternatives undermines any claim of irreparable harm. *Orth v. Wisconsin State Employees Union Council 24*, 2007 WL 1029220, at \*2 (E.D. Wis. Mar. 29, 2007). Further, harm is not irreparable if the moving parties fail to take advantage of readily available

alternatives and thereby effectively inflict the harm on themselves. *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012); see also *Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013) (“[I]rreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary.”) (quoting *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995)).

Plaintiffs contend Student Plaintiffs are not using the privacy stalls because they are inadequate. Plaintiffs assert the stalls do not guarantee that Student Plaintiffs will not see or be seen by a transgender student in a state of undress. Complaint, [ECF No. 1, at ¶¶ 162-168, 228-230]. Plaintiffs also point out that even if Student Plaintiffs use the stalls, they still will be sharing an intimate environment with a student who they perceive to be of the opposite sex. *Id.* at ¶¶ 155-161, 227, 259-261. None of these assertions is accurate with respect to the single-use alternatives that are available to both female and male students. Moreover, even if Plaintiffs were correct, that would not change the fact that the privacy stalls substantially reduce the risk Student Plaintiffs will see or be seen by a transgender student in a state of undress in the restrooms or locker rooms.

In addition, there is no evidence that the risk of being late to class and extracurricular activities, *id.* at ¶¶ 250-251, 254-257, will have a meaningful negative impact on Student Plaintiffs' education. Moreover, the mere inconvenience of walking to a facility that is farther away does not constitute irreparable harm. See *McClean v. Aurora Loan Servicing*, 2011 WL 4635027, at \*1 (S.D. Cal. Oct. 5, 2011); *Corbett v. United States*, 2011 WL 1226074, at \*5 (S.D. Fla. Mar. 2, 2011) (both stating that mere inconveniences are not irreparable harms).

Plaintiffs further contend all of the privacy protections and alternatives available to them to mitigate the risk of exposure to or by a transgender student are inadequate because of pressure from District 211 and other students. Plaintiffs assert the District has “conveyed to the Student Plaintiffs the message that any objection to the Locker Room Agreement (or the Restroom Policy) will be viewed by the District administration as intolerance and bigotry.” Complaint, [ECF No. 1, at ¶ 148]; see also *id.* at ¶¶ 149-154. There also are very general allegations District 211 has conveyed the message that “differing views will not be tolerated.” *Id.* at ¶ 153. Plaintiffs say this message

has deterred Student Plaintiffs from requesting privacy options. *Id.* Even assuming this is true, the discomfort Plaintiffs (both parents and students) feel at the District's perceived disapproval of their position does not constitute irreparable injury.

As discussed above, Girl Plaintiffs also say students who take advantage of the privacy options in the main physical education locker room are “ridicule [d]” by their classmates. *Id.* at ¶ 140; *see also id.* at ¶¶ 141-146. Plaintiffs allege that, in the locker room and in the hallways, male and female students called one Girl Plaintiff names, yelled derogatory slang words for female body parts at her, and accused her of being transphobic and homophobic. *Id.* at ¶ 145. There is no justification for that kind of conduct by other students. But the pain and pressure these other students have brought upon a Girl Plaintiff is not necessarily the District's fault, and there is no allegation that District 211 was aware of any such conduct and willfully ignored or disregarded it. And, again, Plaintiffs stymied District 211's attempt to discover the specifics underlying these allegations, including whether the District was informed of this misconduct. Also, importantly, there is no indication in the record that any student was bullied or risks being bullied if she were to use a single-use facility to change clothes or shower.

\*39 Finally, the Restroom Policy, in particular, is neither causing nor likely to cause Plaintiffs irreparable harm. District 211 implemented the Restroom Policy during August 2013. *See id.* at ¶¶ 211, 214-217; Federal Defendants' Response Brief, [ECF No. 80, at 13]. Plaintiffs did not file this lawsuit until May 2016, almost three years later. Either Student Plaintiffs did not notice that transgender students were using restrooms consistent with their gender identity, or they knew about the Restroom Policy and tolerated it for years. Further, Plaintiffs acknowledge they were aware of the Restroom Policy at least as of October 2015 when it was announced publicly by District 211, and they waited almost seven months after that before filing this lawsuit.

Under these circumstances, it is likely that the impetus for this lawsuit was the Locker Room Agreement signed in December 2015, not the Restroom Policy standing alone. For all of these reasons, Plaintiffs' delay in challenging the Restroom Policy strongly indicates that the Restroom Policy is not causing them irreparable harm. *See Tap Pharm. Products, Inc. v. Atrix Labs., Inc.*, 2004 WL

2034073, at \*1 (N.D. Ill. Aug. 26, 2004) (recognizing that an unjustified delay in seeking relief “can be fatal to claims of irreparable harm”); *see also Traffic Tech, Inc. v. Kreiter*, 2015 WL 9259544, at \*22 (N.D. Ill. Dec. 18, 2015); *Ixmation, Inc. v. Switch Bulb Co., Inc.*, 2014 WL 5420273, at \*7 (N.D. Ill. Oct. 23, 2014); *Celebration Int'l, Inc. v. Chosun Int'l, Inc.*, 234 F. Supp. 2d 905, 920 (S.D. Ind. 2002).

Accordingly, the Court finds Plaintiffs have not shown they are likely to suffer irreparable harm that cannot be rectified after a final judgment, even if they prevail on the merits of their claims.

### C. Adequate Remedy At Law

To satisfy the third and final threshold showing, Plaintiffs must show they do not have an adequate remedy at law. *Girl Scouts*, 549 F.3d at 1095. In other words, Plaintiffs must show money damages would be inadequate compensation for the harm they have suffered if they win this lawsuit. *Id.* Plaintiffs need not show traditional legal remedies would be “wholly ineffectual,” but, rather, that they would be “seriously deficient as compared to the harm suffered.” *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). “[S]howing irreparable harm is ‘[p]robably the most common method of demonstrating that there is no adequate legal remedy.’ ” *Campbell v. Miller*, 373 F.3d 834, 840 (7th Cir. 2004) (Williams, J., dissenting) (quoting 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2944 (2d ed. 1995)); *see also Fleet Wholesale Supply Co. v. Remington Arms Co.*, 846 F.2d 1095, 1098 (7th Cir. 1988); *Wil-Kar, Inc. v. Vill. of Germantown*, 153 F. Supp. 2d 982, 987 (E.D. Wis. 2001).

Plaintiffs do not address or even touch on this threshold requirement for the issuance of a preliminary injunction. As previously stated, “emotional suffering is commonly compensated by monetary awards” in our legal system. *Bhd. of Locomotive Engineers & Trainmen*, 2011 WL 221823, at \*5; *see also The Great Tennessee Pizza Co.*, 2010 WL 3806145, at \*2. In this case, Plaintiffs seek nominal and compensatory money damages as a remedy. Complaint, [ECF No. 1, Prayer for Relief, at ¶ E]. They have not shown why these damages would be a seriously deficient or inadequate remedy. Therefore, Plaintiffs have not carried their burden to show they lack an adequate remedy at law.

**D. The Court Need Not Engage In A Balancing  
Analysis In Light Of Its Recommendation  
Concerning The First Three Threshold  
Showings For Preliminary Injunctive Relief**

When the parties seeking a preliminary injunction have not made “any one of” the three threshold showings—likelihood of success on the merits, likelihood of irreparable harm, and inadequate remedy at law—the court “must deny the injunction.” *Girl Scouts*, 549 F.3d at 1086. In this case, Plaintiffs have not made any of the required three showings with respect to either the Federal Defendants or District 211. Because of these failures, the Court need not address the balancing phase of the preliminary injunction analysis. *See id.* (explaining that only after the court finds that the movants have “passed this initial threshold” does the court “then proceed[ ] to the balancing phase”); *see also Ctr. For Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) (“Plaintiff has failed to establish some likelihood of succeeding on the merits. Therefore, it is unnecessary to also consider the balance of harms.”).

**V. CONCLUSION**

\*40 For all of the reasons discussed in this Report and Recommendation, the Court respectfully recommends that Judge Alonso deny Plaintiffs’ Motion for Preliminary Injunction [ECF No. 21]. Written objections to this Report and Recommendation may be served and filed within 14 days from the date of this Report and Recommendation. FED. R. CIV. P. 72(b). Failure to file objections with the district court within the specified time will result in a waiver of the right to appeal all findings, factual and legal, made in this Report and Recommendation. *Tumminaro v. Astrue*, 671 F.3d 629, 633 (7th Cir. 2011).

Dated: October 18, 2016.

**All Citations**

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**Footnotes**

- 1 At oral argument, District 211’s counsel pointed out that the District allows transgender students to use restrooms consistent with their gender identity as a matter of practice but the District 211 Board never adopted a formal policy on that subject. Transcript of August 15, 2016 Preliminary Injunction Hearing (“Oral Argument Transcript”), [ECF No. 127, at 68]. According to the District’s counsel, a “policy” is a term of art the District uses when it takes action in an open session and adopts a formal policy. *Id.* Plaintiffs characterize District 211’s practice as “the Restroom Policy” in their Complaint. *See, e.g.,* Complaint, [ECF No. 1, at ¶¶ 211-237]. Although the Court uses the term “Restroom Policy” in this Report and Recommendation to mean District 211’s practice of allowing transgender students to use restrooms consistent with their gender identity, it accepts District 211’s position that the practice is not a formal policy adopted by the District’s Board. It does not matter to the Court’s analysis whether the undisputed fact that District 211 allows transgender students to use restrooms consistent with their gender identity is characterized as a practice or a policy.
- 2 Student A, who was assigned the sex of male at birth, has identified as female from a young age. Letter of Findings, [ECF No. 21-10, at 2]. During her middle school years, Student A began living full-time as a female. *Id.* Since then, she has presented a female appearance and taken hormone therapy. *Id.* Student A also has changed her legal name and passport to reflect her gender identity. *Id.* Plaintiffs refer to Student A as a biological male throughout their written filings and consistently use the masculine pronouns “he” and “him” when referring to Student A. The Federal Defendants, District 211, and Intervenor-Defendants use the feminine pronouns “she” and “her” when referring to Student A. In this Report and Recommendation, the Court will identify Student A as a transgender girl and use female pronouns when referring to her, which is consistent with Student A’s gender identity and the way she refers to herself.
- 3 Less than one week after Plaintiffs filed their Complaint in this case, DOE and DOJ issued a joint guidance dated May 13, 2016, in the form of a “Dear Colleague Letter,” explaining that “[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.” Dear Colleague Letter on Transgender Students (“Dear Colleague Letter”), [ECF No. 21-6, at 3]. Although the statements in and rationale for this Dear Colleague Letter are consistent with the Guidance Documents, the May 13 Dear Colleague Letter is not among the Guidance Documents directly at issue in this case because it was issued after this lawsuit was filed.

- 4 Plaintiffs filed a "Verified Complaint" in this case. There is no requirement in the Federal Rules of Civil Procedure that a complaint must be verified "[u]nless a rule or statute specifically states otherwise," FED. R. CIV. P. 11(a). The Court is unaware of any rule or statute that requires verification of a complaint seeking an injunction. Although a verified complaint may be treated as an affidavit when filed in support of a motion seeking an injunction, *Myers v. Thompson*, 2016 WL 3610431, at \*5 (D. Mont. June 28, 2016), "a party's verification of a pleading that need not have been verified does not give the pleading any added weight or importance in the eyes of the district court," 5A Charles Alan Wright et al., *Federal Practice and Procedure* § 1339 (3d ed. 2004) (hereinafter "Wright"). Therefore, the allegations in Plaintiffs' Complaint are not entitled to any greater weight nor are they insulated from being characterized as speculative, vague, general, or overbroad, or from being contradicted by evidence submitted by Defendants. *Id.*
- 5 The Court will use the terms "Student Plaintiffs" and "Girl Plaintiffs" as Plaintiffs have defined them. In addition, Plaintiffs refer to male and female students as boys and girls, and to the facilities at issue in this case as boys' and girls' restrooms and locker rooms. For the most part, the Court has adopted Plaintiffs' convention of referring to male and female high school students as "boys" and "girls."
- 6 After Plaintiffs filed their Motion, a federal district court in Texas issued a "nationwide" injunction against several federal agencies and various officials, including the Federal Defendants in this case, enjoining them from: (1) "enforcing" certain guidelines against the plaintiffs in that case and "their respective schools, school boards, and other public, educationally-based institutions"; (2) "initiating, continuing, or concluding any investigation based on [their] interpretation that the definition of sex includes gender identity"; and (3) "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of [its] Order." *Texas v. United States*, 2016 WL 4426495, at \*17 (N.D. Tex. Aug. 21, 2016). The court said that its injunction was not intended to interfere with litigation before other courts involving the same issues. *Id.* For this and other reasons, the Texas injunction does not impact this case. *See Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't. of Educ.*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 5372349, at \*20 (S.D. Ohio Sept. 26, 2016).
- 7 Plaintiffs also opposed the District's discovery because they intimated that if certain individual plaintiffs or members of the association plaintiff were forced to disclose their identities, as the District asked them to do in its interrogatories, they might drop out of the lawsuit, which was something Plaintiffs wanted to avoid. Plaintiffs' Protective Order Brief, [ECF No. 50, at 5].
- 8 "If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" *Appalachian Power*, 208 F.3d at 1021.
- 9 In *Texas v. United States*, the court reviewed a different, but slightly overlapping, set of DOE guidance documents containing the same rule, and also concluded DOE's promulgation of the rule constituted a final agency action. 2016 WL 4426495, at \*2 & n.4, 8-9.
- 10 Although not all of these cases are Title VII cases, they do evidence broad support for the proposition that the term "sex" in the context of statutes similarly designed to attack discrimination on the basis of sex should not be construed narrowly.
- 11 It is hard to reconcile the court of appeals' holding that "sex" under Title VII has a narrow, traditional, and biological meaning, and does not encompass sexual identity, with its statement in dicta that "[i]f Eastern had considered Ulane to be female and had discriminated against her because she was female ... then the argument might be made that Title VII applied." *Ulane*, 742 F.2d at 1087. The court reversed the district court's finding that Eastern had discriminated against Ulane as a female because that finding was not supported by sufficient factual evidence in the record. *Id.* But the court's apparent willingness to consider a claim that Ulane was the victim of discrimination as a woman implies that the court would be considering her gender identity as relevant and potentially dispositive in the context of a Title VII claim.
- 12 The court's use of language in *Ulane* and its reference to medical sources is somewhat dated today. For example, the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* recognizes that gender non-conformity is not a mental disorder; this is a change from prior editions of the DSM, including the Third Edition, which was in effect when *Ulane* was decided. American Psychiatric Association, *Gender Dysphoria* 1 (2013), available at <http://www.dsm5.org/documents/gender%20dysphoria#acts#heet.pdf> (discussing changes made in the Fifth Edition of the *DSM*).
- 13 *But see Price Waterhouse*, 490 U.S. at 251 ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

- 14 From 2001 through 2015, the Seventh Circuit cited *Ulane* in just one case. *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 819 (7th Cir. 2001) (citing *Ulane* for the proposition that Title VII does not prohibit discrimination on the basis of transsexualism).
- 15 See also *Hively*, 730 F.3d at 715 (“As things stand now ... our understanding of Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing makeup—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman.... It seems likely that neither the proponents nor the opponents of protecting employees from sexual orientation discrimination would be satisfied with a body of case law that protects ‘flamboyant’ gay men and ‘butch’ lesbians but not the lesbian or gay employees who act and appear straight.”).
- 16 Ironically, Karen Ulane likely could prevail today on a claim against her employer based on a gender non-conformity theory. In other words, if Karen Ulane alleged today that she was fired not because she was a transsexual or because she was a woman, but because she failed to conform to Eastern’s stereotype of how a man should look or act, she might prevail even if the term “sex” in Title VII is defined in a narrow, traditional, and biological way. Under the same law, however, if Ulane alleged that she was fired because she did not conform to Eastern’s stereotype of how a woman should look or act, or because she was a woman, Ulane would not have a claim.
- 17 As Intervenor-Defendants argue, “[t]ransgender persons *by definition* violate ‘gender norms.’ ” Intervenor-Defendants’ *Hively* Brief, [ECF No. 117, at 4] (emphasis in original).
- 18 Although the Supreme Court stayed the mandate of the Fourth Circuit and the preliminary injunction issued by the district court in *G.G.*, pending a petition for a writ of certiorari, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016), *G.G.*, unlike *Hively*, has not been vacated and still remains good law, *Highland*, 2016 WL 5372349, at \*11 n.5.
- 19 Only two district courts have held that one’s “sex” must be determined biologically under Title IX. *Texas*, 2016 WL 4426495; *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016). In *Johnson*, however, the court did not consider whether DOE’s interpretation was entitled to deference and, therefore, that decision is of limited persuasive value in this case. See *Highland*, 2016 WL 5372349, at \*13 n.9. In *Texas*, the court decided DOE’s interpretation should not be given deference based on a relatively conclusory analysis that this Court finds unpersuasive. See *Texas*, 2016 WL 4426495, at \*14-15.
- 20 Plaintiffs note at one point in their briefs that “20 U.S.C. § 1682 provides in part that any ‘rule, regulation, or order’ issued by a federal agency to effectuate Title IX must be approved by the President in order to become effective.” *Equity In Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 106 (4th Cir. 2011). Although this argument was not developed and supported, the Court notes that, “[a]s with the APA’s notice and comment requirements, courts have held that the requirement of presidential approval does not apply to the issuance of interpretive guidelines.” *Id.*
- 21 Plaintiffs also assert that DOE’s actions violate the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb *et seq.*, and various additional constitutional rights, including the parental right to direct a child’s upbringing and the right to free exercise of religion. Plaintiffs’ Opening Brief, [ECF No. 23, at 10]. They never develop or support these arguments. Instead, Plaintiffs raise them in a conclusory sentence or two. That is not enough. See *United States v. Hook*, 471 F.3d 766, 775 (7th Cir. 2006) (“We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).”) (quoting *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000)).
- 22 Plaintiffs describe the “fundamental right to privacy” they seek to vindicate in this case as “grounded in the Fourteenth Amendment’s Due Process Clause. Complaint, [ECF No. 1, at ¶ 359]. But the Fourteenth Amendment does not apply to the federal government. The Federal Defendants, therefore, couch their response to Plaintiffs’ claim in the context of the Fifth Amendment’s Due Process Clause. Federal Defendants’ Response Brief, [ECF No. 80, at 26]. The Court will read the Complaint as asserting a claim under both the Fifth and Fourteenth Amendments. Both due process clauses “ ‘guarantee more than fair process’ ” and “cover a substantive sphere as well, ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’ ” *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). They also protect the same fundamental rights and are governed by the same legal standards. See *United States v. Al-Hamdi*, 356 F.3d 564, 575 n.11 (4th Cir. 2004); *Molina-Aviles v. D.C.*, 824 F. Supp. 2d 4, 9 n.8 (D.D.C. 2011).
- 23 Count II of Plaintiffs’ Complaint, which asserts Plaintiffs’ claim that the Federal Defendants and District 211 are violating Plaintiffs’ constitutional rights, does not mention DOE’s Rule. Complaint, [ECF No. 1, at ¶¶ 358-396]. In Count I of the Complaint against the Federal Defendants, Plaintiffs do allege the Rule violates Plaintiffs’ constitutional right to privacy, *id.* at ¶ 332, and Plaintiffs’ incorporate by reference all of their prior allegations into Count II. In their Motion for Preliminary

Injunction, Plaintiffs seek to enjoin the Restroom Policy and the Locker Room Agreement. They acknowledged at oral argument on that Motion that they are only seeking at this time to enjoin the Federal Defendants "from further application of the rule to force District 211 to comply with it in the operation of its facilities." Oral Argument Transcript, [ECF No. 127, at 155]. The Rule, however, only impacts District 211 in the context of the Locker Room Agreement. District 211 put its Restroom Policy into place years before it heard from OCR in connection with Student A's complaint about locker room access. Plaintiffs' written arguments in support of their constitutional claims focus on the Restroom Policy and the Locker Room Agreement, and do not reference the Rule at all. Therefore, the Court need not address in this Report and Recommendation whether the Rule, standing alone, violates Plaintiffs' constitutional rights.

- 24 In a similar vein is Plaintiffs' allegation in their Complaint that one out of eight high school girls reports being a victim of rape according to the Centers for Disease Control. Complaint, [ECF No. 1, at ¶¶ 270-271]. There is absolutely no evidence in this record that allowing transgender high school students to use restrooms or locker rooms consistent with their gender identity increases the risk of sexual assault. Further, there are no allegations that during the more than three years transgender students have been using District 211 restrooms consistent with their gender identity, and the portions of two academic years during which Student A has been using the girls' locker room, there have been any actual or threatened sexual assaults as a result of District 211's policies. Again, the entirely speculative risk that someone will commit a criminal act is not a reason to invalidate otherwise valid policies.
- 25 The only allegations in Plaintiffs' Complaint that even remotely touch on the risk of actual exposure of any body part are the vague references to Student A lifting up her shirt one time in a common area of the girls' locker rooms and her changing clothes in the gymnastics locker room when one or more girls (not necessarily Girl Plaintiffs, which is not alleged) "were present." Complaint, [ECF No. 1, at ¶¶ 96, 135]. No details are provided about what part of Student A's body, if any, was revealed on either of these occasions. And, when District 211 sought discovery into these incidents, Plaintiffs successfully opposed it, arguing that for purposes of their preliminary injunction motion, actual locker room or restroom interactions were irrelevant.
- 26 Girl Plaintiffs allege they "frequently run into Student A when they use the schools' restrooms." Complaint, [ECF No. 1, at ¶ 231]; [see also *id.* at ¶¶ 232-234]. It is not clear from the Complaint whether this occurred before or only after District 211 publicly announced in October 2015 that transgender students had been using restrooms consistent with their gender identity since 2013. In any event, the seven-month delay between the District's announcement that transgender students were being permitted to use restrooms consistent with their gender identity and the filing of this lawsuit in May 2016, also militates against a finding that this state of affairs shocks the conscience.
- 27 Plaintiffs allege that there are five privacy stalls in the physical education locker room for students to change their clothes. Complaint, [ECF No. 1, at ¶ 138]. The conflict appears to be that the District's reference is to privacy stalls for changing clothes and showering while Plaintiffs' reference only is to privacy stalls for changing clothes.
- 28 There is no allegation, evidence or argument that any other transgender girl student uses or intends to use the swimming locker room.

2011 WL 4635027

Only the Westlaw citation is currently available.  
United States District Court,  
S.D. California.

Angela MCLEAN, Plaintiff,

v.

AURORA LOAN SERVICING,  
etc., et al., Defendants.

No. 11cv0455--LAB (NLS).

|  
Oct. 5, 2011.

#### Attorneys and Law Firms

David Lawrence Skilling, Gaston & Gaston, A  
Professional Law Corporation, San Diego, CA, for  
Plaintiff.

Macey Amy Chan, Green & Hall APC, Santa Ana, CA,  
for Defendant.

### ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

LARRY ALAN BURNS, District Judge.

\*1 Plaintiff Angela Mclean moves for a preliminary injunction to grant access to her online mortgage account and to return her monthly mortgage payment to its pre-suit amount. Mclean alleges that Defendant Aurora Loan Servicing raised her monthly mortgage payment and locked her out of her online account in retaliation for filing of this suit, which contests the assignment of her mortgage to Aurora and its alleged refusal to engage in a fair loan modification process. (Compl. at ¶¶ 12–20.) Mclean has failed to demonstrate that she will likely suffer irreparable harm absent the granting of her motion for a preliminary injunction.

#### I. DISCUSSION

A preliminary injunction is “an extraordinary and drastic remedy” that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Munaf v. Green*, 553 U.S. 674, 689–90, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008) (quoting 11A Wright & Miller, *Federal Practice & Procedure* § 2948 (2d ed.1995)). There are four elements

a plaintiff must clearly demonstrate in order to obtain a preliminary injunction: (1) likelihood of success on the merits; (2) likelihood of irreparable harm absent the preliminary injunction; (3) the balance of equities favors the plaintiff; and (4) the injunction is in the public interest. See *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). However, if a plaintiff cannot demonstrate the likelihood of irreparable harm absent the preliminary relief, the Court does not need to address the other three elements. See *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1174 (9th Cir.2011).

The harm the plaintiff seeks to prevent with the preliminary injunction must be both *likely* and *irreparable*. “Under *Winter*, plaintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011). “The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) (emphasis added) (citation and internal quotation marks omitted).

The first harm that Mclean alleges will befall her without preliminary relief is her continued inability to access her online mortgage account. Mclean claims to have been “locked” out of her account since March 2011. However, Mclean has not alleged facts showing that her inability to access her account online has or will injure her irreparably. Mclean has been informed of her mortgage payments in advance of their due dates and has paid them in full each time. (Mot. for Prelim. Inj. at 6 (“Ms. Mclean continues to make her payments on time, despite the fact that she has no access to her account ....”)) Out of distrust for Aurora, she has declined to make payments by mail, and instead has used Western Union. (Decl. of Mclean, ¶ 7.) While having access to a mortgage account online would be more convenient than having to make payments by mail (or some alternative such as the one Mclean is using), denial of this convenience does not constitute irreparable harm.

\*2 The second harm that Mclean alleges is the “financial harm of an unexplained increase in her monthly mortgage payment,” a purely economic harm. However, economic injury, by itself, does not constitute irreparable harm. See *Rent-A-Center, Inc. v. Canyon TV. & Appliance Rental*,

*Inc.*, 944 F.2d 597, 603 (9th Cir.1991). Except in unusual circumstances, *see Wright & Miller, supra*, when a plaintiff can be made whole through pecuniary damages there is no *irreparable* harm. The increased mortgage payments do not justify the extraordinary measure of a preliminary injunction.

Mclean alleges her property may be foreclosed on, and her credit rating damaged. This harm, however, is too speculative to merit the granting of the preliminary injunction. Mclean mistakenly relies on *Simula v. Autoliv*, 175 F.3d 716, 724 (9th Cir.1999), for the proposition that she must demonstrate a “significant threat of irreparable injury.” (Mot. for Prelim. Inj. at 6.) But the standard is that irreparable harm must be *likely*. *See Cottrell*, 632 F.3d at 1131. Though Mclean has been able to pay the increased mortgage payments, she says that because her husband's pay was cut and because they are expecting a child, she cannot afford her current mortgage obligations. (Dec. of Mclean at ¶ 16.) While the loss of real property through foreclosure may constitute irreparable harm in some cases,<sup>1</sup> Mclean has not shown the likelihood of foreclosure. Nor has she shown it is likely Aurora will damage her credit rating by reporting her non-payment of disputed amounts to credit bureaus.

Mclean in passing also mentions Aurora's failure to modify her loan, despite repeated requests and extensive

correspondence, as giving rise to irreparable harm. (Mot. for Prelim. Inj. at 5:3–5.) But the complaint does not seek loan modification, and Mclean has no statutory right to loan modification. *Mabry v. Superior Ct.*, 185 Cal.App.4th 208, 231, 110 Cal.Rptr.3d 201 (Cal.App. 4 Dist.2010).

None of the Court's discussion of these issues is intended as a ruling or comment on the merits. It may be that Mclean is being treated unfairly by Aurora. But the fact remains, she has not shown that she will likely suffer irreparable harm absent preliminary relief. The Court does not reach the other *Winter* factors *See Ctr. for Food Safety*, 636 F.3d at 1174.

## II. CONCLUSION

For these reasons, the Court holds that Mclean has not alleged and cannot show a likelihood of irreparable harm. Mclean's motion for a preliminary injunction is therefore **DENIED**.

**IT IS SO ORDERED.**

### All Citations

Not Reported in F.Supp.2d, 2011 WL 4635027

### Footnotes

<sup>1</sup> Mclean cites *Sundance Land Corp. v. Cmty. First Fed'l Sav. & Loan Ass'n*, 840 F.2d 653 (9th Cir.1988) for the proposition that loss of real property may constitute a threat of irreparable injury. But this does not address the problem here, that foreclosure is only speculative at this point.

2011 WL 1226074

Only the Westlaw citation is currently available.

United States District Court,  
S.D. Florida.

Jonathan CORBETT, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. 10-24106-CIV.

|  
March 2, 2011.

**Attorneys and Law Firms**

Jonathan Corbett, Miami Beach, FL, pro se.

**REPORT AND RECOMMENDATION**

TED E. BANDSTRA, United States Magistrate Judge.

\*1 THIS CAUSE is before the Court on Plaintiff's Motion for Temporary Restraining Order (D.E.8) filed on November 17, 2010. On December 10, 2010, this motion was referred to the undersigned for a report and recommendation by the Honorable Marcia G. Cooke pursuant to 28 U.S.C. § 636(b). Having reviewed this motion, the response and reply thereto, the court file and applicable law, the undersigned respectfully recommends that Plaintiff's Motion for Temporary Restraining Order be DENIED for reasons explained below.

**INTRODUCTION**

On November 16, 2010, Jonathan Corbett ("plaintiff"), proceeding *pro se*, filed a Complaint alleging violations of the Fourth Amendment to the United States Constitution with respect to the screening procedures recently implemented by the Transportation Security Administration ("TSA") and its parent agency, the Department of Homeland Security ("DHS"). Specifically, plaintiff alleges that the TSA's utilization of Advanced Imaging Technology ("AIT") machines and enhanced pat-down procedures on travelers at airport security checkpoints constitutes a violation of the Fourth Amendment protections against unreasonable search and seizures. Plaintiff further alleges that he is experiencing

emotional distress at the thought of being subjected to these screening procedures. In plaintiff's view, the use of these procedures which create nude images of passengers as well as the manual inspection of a traveler's genital and buttock areas is an invasion of privacy and unreasonable. Based on these and other allegations, plaintiff seeks, *inter alia*, declaratory and injunctive relief against the United States ("defendant" or "the government").

On November 16, 2010, plaintiff filed an Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction seeking to prohibit defendant from screening him at TSA security checkpoints through the use of AIT machines and/or by the manual pat-down of his genital and buttock areas and from denying him access to his flights for the failure to submit thereto. This motion was denied *without prejudice* by the Honorable K. Michael Moore, the Court finding that the requested relief was not a true emergency.

As a result, plaintiff filed the instant Motion for Temporary Restraining Order and/or Preliminary Injunction on November 17, 2010, continuing to seek an injunction precluding TSA from utilizing AIT machines and the revised pat-down procedures on him. Essentially, plaintiff seeks an injunction authorizing him to opt-out of these security procedures which he expects to encounter at the airport because such procedures would subject him to "extreme emotional distress" and constitute an "incurable invasion of privacy." *See* Plaintiff's Motion (D.E.8), pg.2.

The government opposes plaintiff's motion for injunctive relief arguing that plaintiff cannot establish any of the four prerequisites for obtaining a preliminary injunction.

**STANDARD OF REVIEW**

\*2 It is undisputed in this Circuit that under federal law plaintiff must establish four elements to obtain a temporary restraining order or preliminary injunction. Rule 65 of the Federal Rule of Civil Procedure authorizes the district court to grant preliminary injunctive relief at its discretion. *See United States v. Lambert*, 695 F.2d 536, 539 (11th Cir.1983); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir.1981). In exercising its discretion, the court must consider and balance the following four recognized prerequisites to injunctive relief: (1) a substantial likelihood that the

movant will prevail on the underlying merits of the case, (2) a substantial threat that the moving party will suffer irreparable damage if relief is denied, (3) a finding that the threatened injury to the movant outweighs the harm the injunction may cause defendant, and (4) a finding illustrating the extent to which granting the preliminary injunction will disserve the public interest. *See Tally–Ho, Inc. v. Coast Community College District*, 889 F.2d 1018, 1022 (11th Cir.1989).

Moreover, because an injunction “is an extraordinary remedy, it is available not simply when the legal right asserted has been infringed, but only when that legal right has been infringed by an injury for which there is no adequate legal remedy ....” *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127 (11th Cir.2005) (emphasis added) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506, 79 S.Ct. 948, 79 S.Ct. 948 (1959)). The plaintiff has the burden of persuasion on *all* of the preliminary injunction factors. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir.1983) (emphasis added).

## ANALYSIS

### 1. Substantial Likelihood of Success on the Merits

#### A. Jurisdiction

Plaintiff seeks to preliminarily enjoin the TSA from using either AIT machines or its revised “pat downs” against him as a screening method on the basis that these procedures constitute a violation of the Fourth Amendment protections against unreasonable searches. In response, the government first argues that plaintiff cannot show a likelihood of success on the merits because under 49 U.S.C. § 46110 exclusive jurisdiction lies with the Court of Appeals over challenges to an aviation-related security order of the TSA. Consequently, the government maintains that this Court lacks subject matter jurisdiction.

The relevant portion of 49 U.S.C. § 46110 provides:

[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security ... or the Administrator of the Federal Aviation Administration ...) in whole or in part under this part, part B, or subsection (1) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District

of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

\*3 ... When the petition is sent to the Secretary, Under Secretary, or Administrator, the court [of appeals] has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Undersecretary, or Administrator to conduct further proceedings.

49 U.S.C. § 46110(a), (c) (2005). Consequently, if the TSA Security Directive at issue is an “order” within the meaning of Section 46110(a), a court of appeals would have exclusive jurisdiction to review that order.

Addressing this jurisdictional issue, the Eleventh Circuit in construing Section 46110(a)'s predecessor statute found at § 1486(a), found that the term “order” is to be interpreted expansively. *See Green v. Brantley*, 981 F.2d 514, 519 (11th Cir.1993). The *Green* court further found that the exclusive jurisdiction of the courts of appeals is restricted to encompass only final orders. In addition, the Court found that the agency record must be adequate enough to support judicial review. In *Green*, the plaintiff was a Designated Pilot Examiner who held a FAA certificate. When the FAA cancelled Green's certificate, he filed suit in the federal district court seeking recovery for constitutional torts he alleged were committed in conjunction with the certificate termination. The Eleventh Circuit found that the merits of Green's constitutional arguments were “inescapably intertwined with a review of the procedures and merits surrounding the FAA's order.” *Green*, 981 F.2d at 521. Because the statute that authorized the FAA action on Green's certificate (the predecessor to the statute at issue in this case) provided for NTSB review of the FAA's order with a right to appeal to a federal court of appeals, Green's suit in federal district court was held to be an impermissible collateral challenge to the agency's action. Therefore, the district court lacked subject-matter jurisdiction over Green's suit. *Id.*

The same is true here. Plaintiff's constitutional claim that the TSA has infringed upon his Fourth Amendment rights by subjecting him to the new screening procedures necessarily require a review of the procedures. At a minimum, plaintiff's constitutional argument are “inescapably intertwined” with a review of TSA protocol and the merits of the subject TSA Security Directive. Most significantly, courts have held that Security

Directives issued by the TSA are “orders” within the meaning of § 46110. *See Green v. Transportation Security Administration*, 351 F.Supp.2d 1119, 115 (W.D.Wash.2005) (holding that TSA security directives establishing a no-fly list or selectee list for enhanced screening were “orders” over which court of appeals has exclusive jurisdiction); *Thompson v. Stone*, 2006 WL 770449 (E.D.Mich.2006) (Fourth Amendment challenge to TSA screening procedures is “inescapably intertwined” with a review of the procedures and merits surrounding TSA’s procedures governing screening procedures with disabilities and screening persons in general so that jurisdiction is solely with the courts of appeals).

\*4 The regulations governing the TSA are set forth in 40 C.F.R. §§ 1500 *et seq.* The regulations provide that an individual may enter a “sterile area” which is controlled by TSA or board an aircraft without submitting to the screening and inspection of his or her person in accordance with the screening procedures being applied to control access to the area or aircraft under this subchapter. *See* 40 C.F.R. § 1540.107. The TSA procedures concerning the use of AIT machines and the revised pat-down were recently implemented on October 29, 2010. *See* Pistole Dec. ¶ 25 (D.E.10, Exh. A).

Based on the foregoing, the undersigned finds that these screening procedures constitute a final order of the TSA. The undersigned further finds that these procedures combined with other TSA documents constitute a sufficient administrative record for review by the courts of appeals. As a result, the undersigned concludes that this Court does not have jurisdiction to adjudicate plaintiff’s claim so that he is unlikely to succeed on the merits.<sup>1</sup>

#### B. Constitutional challenges

The government further argues that even if this Court has jurisdiction, plaintiff is not likely to prevail since the TSA screening procedures are not in violation of the Fourth Amendment.

The Fourth Amendment to the United States Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures....” *See U.S. Const. Amend. IV.* It protects individuals from government searches of their person because the Fourth Amendment vests individuals with the right to be free from “unreasonable government

intrusions into their legitimate expectations of privacy.” *United States v. Chadwick*, 433 U.S. 1, 7, 97 S.Ct. 2476 (1977). “[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’, for example, searches now routine at airports and at entrances to courts and other official buildings.” *Chandler v. Miller*, 520 U.S. 305, 323, 117 S.Ct. 1295 (1997); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48, 121 S.Ct. 4447 (2000) (noting that the need for such measures to keep airports and government buildings safe can be acute). Thus, “where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66, 109 S.Ct. 1384 (1989)

Airport check points advance the public interest inasmuch as “absent a search, there is no effective means of detecting which airline passengers are reasonably likely to hijack an airplane.” *Singleton v. Comm’r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir.1979). “It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destruction from air terrorism is horrifically enormous.” *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir.2005). However, even with the grave threat posed by airborne terrorist attacks, the vital and hallowed strictures of the Fourth Amendment still apply: these searches must be reasonable to comport with the Constitution. *Id.*

\*5 Balancing the intrusion on plaintiff’s privacy against the government’s interest in the safety of the passengers and the public at large, the undersigned finds that the subject TSA screening procedures are reasonable and not in violation of the Fourth Amendment. Following the tragic events of September 11, 2001, Congress tasked TSA with protecting the public from violence and piracy aboard aircrafts. *See* 49 U.S.C. § 44903(b). It is evident that the security conducted by TSA is in furtherance of a legitimate governmental interest to deter and prevent terrorist attacks against this country’s airline industry.

To that end, TSA subjects plaintiff and other passengers to additional screening in its efforts to protect the public from terrorist attacks. The government has demonstrated that the use of AIT machine and revised pat-down procedures is not more extensive than necessary and not as intrusive as plaintiff suggests in view of the increased threat of non-metallic explosives. Specifically, the AIT machines do not produce photographs. See Pistle Dec. ¶ 37 (D.E.10, Exh. A). Rather, the AIT's applies a filter that displays body contours and outlines rather than a detailed image of a person's anatomy. *Id.* Further, the security officer viewing the image does not see the passenger as the images are viewed in separate location. *Id.*, ¶ 38.

In addition, TSA provides notice to the public of the use of the AIT machines and advises the passenger that they may decline AIT screening and, instead, undergo a pat-down. *Id.* ¶ 39. These pat-downs are necessary to detect explosives, chemical weapons or other dangerous items that could be secreted in the body. *Id.* ¶¶ 43, 46 & 49. To ensure that pat-downs are minimally invasive, they are conducted by the same gender security officers and passengers have the right to request a private screening with a witness. *Id.* ¶ 51.

While plaintiff contends that the challenged procedures are unreasonably invasive, the undersigned finds that they do not violate the Fourth Amendment. Thus, plaintiff has failed to establish a likelihood of success on the merits on his constitutional claim.

### 2. Irreparable Harm

Plaintiff argues that he will experience "extreme emotional distress and an incurable invasion of privacy" if the challenged TSA screening procedures are applied to him. See D.E. 8, pg. 2. Plaintiff further argues that his business will suffer irreparable harm in that alternative forms of transportation such as trains are not convenient or practical.

Even assuming these allegations to be true, the undersigned finds that they do not rise to the level of irreparable harm. Plaintiff is free to avoid additional screening by electing not to travel by air and by taking other means of transportation to reach his destinations. Plaintiff does not have a constitutional right to fly by commercial aircraft because the Constitution does not guarantee the right to travel by any particular form of transportation. *Miller v. Reed*, 176 F.3d 1202, 1205 (9th

Cir1999) ("burdens of a single mode of transportation does not implicate the right to interstate travel."); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir.2007) ("[T]ravelers do not have a constitutional right to the most convenient form of travel ....") Indeed, irreparable harm is not demonstrated when there are available alternatives even when the alternatives are less convenient. See *Molloy v. Metro Transp. Autho.*, 94 F.3d 808, 813 (2d. Cir.1996) (citing *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir.1995) (noting injuries such as expenditures of money, time, and energy, are not enough to warrant preliminary injunction)).

\*6 Accordingly, the undersigned finds that plaintiff cannot establish he is irreparably harmed due the security screening process.

### 3. Potential Harm to the Government and the Public Interest

Plaintiff contends that the issuance of a preliminary injunction allowing him to board an aircraft without being subjected to the TSA screening procedures would result in no harm to the public whatsoever. The undersigned strongly disagrees. Contrary to plaintiff's contention, the relief he seeks would cause substantial harm to the public as it would compromise TSA airport screening procedures and undermine TSA's statutorily mandated efforts to prevent terrorist attacks. Plaintiff cannot be allowed to bypass additional screening based solely on his assertion that he "has no criminal record", "is a law-abiding citizen and poses no threat to the public". See Plaintiff's Motion (D.E.8), pg. 3. Indeed, under plaintiff's theory the vast majority of air travelers would not be required to submit to AIT machine security screening. TSA cannot treat plaintiff differently than any other traveler.

Protecting the public from terrorist attacks clearly outweighs the minimal intrusion upon plaintiff. The fact that plaintiff seeks to exempt only himself from the screening does not mitigate the potential harm to national security in that the success of the screening process depends on its universal application. The government has shown the utility of the challenged screening methods to neutralize threats of air transportation related terrorism. Simply stated, the interests of national security and the safety of the public would be compromised if an injunction were issued.

**RECOMMENDATION**

For all the foregoing reasons, the undersigned recommends that Plaintiff's Motion for Temporary Restraining Order be DENIED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Marcia G. Cooke, United States District Judge, within ten (10) days of the date this Report and Recommendation. *See* 28

U.S.C. sec. 636(b)(1)(c); *United States v. Warren*, 687 F.2d 347 (11th Cir.1982). *cert. denied*, 460 U.S. 1087 (1983); *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. Unit B 1982); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

Respectfully submitted at Miami, Florida this 15 day of March, 2011.

**All Citations**

Not Reported in F.Supp.2d, 2011 WL 1226074

**Footnotes**

- 1 Although not presently before this Court, the undersigned would be inclined to recommend the granting of Defendant's Motion to Dismiss for lack of subject matter jurisdiction based on the above findings.

2008 WL 4372872

Only the Westlaw citation is currently available.  
United States District Court,  
D. Nevada.

John and Jane DOE, individually and on behalf  
of their minor daughter Mary Doe, Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT, Mary Beth  
Scow, Larry Mason, Terri Janison, Shirley Barber,  
Sheila Moulton, Ruth Johnson, Susan Brager-  
Wellman as the Board of Trustees for the Clark  
County School District and their successors in  
office, Jeffrey Horn, as the principal of Green  
Valley High School, and their successors in  
office and Does I-XX, inclusive, Defendants.

No. 2:06-CV-1074-JCM (RJJ).

Sept. 17, 2008.

**Attorneys and Law Firms**

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C.W. Hoffman, Jr., Floyd Travis Buchanan, Legal  
Department, Clark County School District, Las Vegas,  
NV, for Defendants.

**ORDER**

(Granting Defendants' Renewed  
Motion for Summary Judgment, # 64)

JAMES C. MAHAN, District Judge.

\*1 Plaintiffs JOHN AND JANE DOE, individually  
and on behalf of their minor daughter MARY DOE,  
filed this action in the United States District Court,  
District of Nevada on August 31, 2006 (Complaint # 1).  
Plaintiffs contend that the alleged actions of Defendants,  
i.e., barring Mary Doe, a preoperative male-to-female  
transgendered student from using the communal ladies'  
room, violates Defendants' obligations pursuant to 20  
U.S.C., § 1681, 42 U.S.C. § 1983, and the Fourteenth  
Amendment to the U.S. Constitution. Currently before

the Court is Defendants' Renewed Motion For Summary  
Judgment (# 64), filed June 6, 2008. The Court also  
considered Plaintiffs' Opposition (# 65), filed June 6,  
2008, and Defendants' Reply (# 67), filed June 25, 2008.  
For the reasons set forth below, Defendants' motion is  
GRANTED.

**DISCUSSION**

**1. Summary Judgment Standard**

Summary Judgment is appropriate when “the pleadings,  
depositions, answers to interrogatories, and admissions on  
file, together with the affidavits, if any, show that there  
is no genuine issue as to any material facts and that the  
moving party is entitled to judgment as a matter of law.”  
Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of  
demonstrating the absence of a genuine issue of material  
fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, at 323, 106  
S.Ct. 2548, 91 L.Ed.2d 265 (1986). When the nonmoving  
party bears the burden of proving the claim or defense,  
the moving party can meet its burden by pointing out the  
absence of evidence submitted by the non-moving party.  
The moving party need not disprove the other party's case.  
*Celotex, Id.*, at 325.

If the moving party meets its initial burden, the “adverse  
party may not rest upon mere allegations or denials of the  
adverse party's pleadings, but the adverse party's response,  
by affidavits or as otherwise provided in this rule, must set  
forth specific facts showing that there is a genuine issue for  
trial.” Fed.R.Civ.P. 56(e).

**A. Plaintiffs Have Failed To Establish Standing**

“In every federal case, the party bringing the suit must  
establish standing to prosecute the action.” *Elk Grove  
Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 118 S.Ct.  
1772, 141 L.Ed.2d 1 (2004). The question of standing is  
“whether the litigant is entitled to have the court decide  
the merits of the dispute or of particular issues.” *Id.*  
quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197,  
45 L.Ed.2d 343 (1975).

As stated recently by the Supreme Court in *Elk Grove  
Unified Sch. Dist. v. Newdow*, standing jurisprudence  
contains two strands: “Article III standing, which enforces

the Constitution's case or controversy requirement, and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.' " *Newdow, Id.*, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) and quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

To satisfy Article III's standing requirement, a plaintiff must demonstrate three elements. First, there must be an "injury in fact" which is an invasion of a "legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan, Id.*, at 560 (citations and quotations omitted). Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision." *Id.*, at 560-61 (citations and quotations omitted). The elements of standing are an indispensable part of a plaintiff's case, and each element must be proven. *Id.* at 561.

\*2 Here, Plaintiffs lack standing to assert any claims for declaratory or injunctive relief since they have failed to establish an "injury in fact." Without establishing an injury in fact, Plaintiffs cannot possibly establish that their alleged injury will be redressed by a favorable decision. The undisputed evidence establishes that Plaintiffs never actually enrolled Mary Doe at Green Valley High School (GVHS), or any other CCSD high school during the past two school years (2006-2007 and/or 2007-2008). In fact, during the past two school years, Mary Doe attended Odyssey Charter High School, a school outside of the CCSD. See Def's Exhibit 1, p. 43, lines 9-11; p. 58, lines 10-24 and Def's Exhibit 8, p. 29, lines 7-9. Moreover, no one employed by the CCSD ever told Plaintiffs that Mary Doe could not enroll at GVHS, or any other CCSD high school, nor were Plaintiffs under the impression that Mary Doe could not enroll in any CCSD high school. Def's Exhibit 1, p. 58, line 25; and p. 59, lines 1-18.

Although the evidence established that Mary Doe would not enroll at GVHS or any other CCSD high school prior to the time she would graduate, See Def's Exhibit 1, p. 50, lines 16-25; and p. 53, lines 1-2; See also, Def's Exhibit 8, p. 31, lines 9-25; p. 32, lines 1-20; and p. 57, lines 15-17, Plaintiffs' counsel represented during oral argument that Mary Doe had in fact enrolled in a CCSD high school at the commencement of the current school year (2008-2009).

This additional information does not change the fact that Plaintiffs have failed to establish the invasion of a legally protected interest<sup>1</sup> which is required to establish standing.

Since Plaintiffs have failed to establish standing, summary judgment is warranted.

#### **B. Plaintiffs' Section 1983 and Equal Protection Claims Are Subsumed By Title IX**

Plaintiffs have also advanced a claim against Defendants under 42 U.S.C. § 1983. Section 1983 does not by itself create substantive rights. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). Rather, it provides the procedural framework for a plaintiff to bring suit for violations of federal rights. 42 U.S.C. § 1983. "Section 1983 supplies a cause of action to a plaintiff whenever a person acting under color of law deprives that plaintiff of any 'rights, privileges, or immunities secured by the Constitution and laws of the United States.'" *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, at 756 (2d Cir.1998) (citing 42 U.S.C. § 1983). However, Section 1983 does not provide a remedy for violations of all federal statutes. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under Section 1983." *Middlesex County Sewer Auth. v. Nat'l. Sea Clammers Ass'n.*, 453 U.S. 1, 20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

In determining if 20 U.S.C. § 1681 ("Title IX") precludes resort to Section 1983, courts consider (1) whether plaintiffs' Title IX claims are "virtually identical" to their constitutional claims, and (2) whether the remedies provided by Title IX indicate that Congress intended to preclude reliance on Section 1983. *Smith v. Robinson*, 486 U.S. 992, 1009 (1984). While the Ninth Circuit has not decided the specific issue of whether Section 1983 claims are subsumed by Title IX, it has recognized that federal statutes may preclude a Section 1983 remedy if they are sufficiently comprehensive. See *Dittman v. California*, 191 F.3d 1020, 1028 (9th Cir.1999); *Dept. of Educ. v. Katherine D.*, 727 F.2d 809, 820 (9th Cir.1983). Moreover, the Supreme Court has determined that whenever the underlying statute, *here Title IX*, contains a private right of action (express or implied), such fact is deemed to be strong evidence of congressional intent to preclude

parallel actions under Section 1983. *See Sea Clammers, Id.*, at 20-21. Several years ago, the Supreme Court conducted a thorough review of the legislative history of Title IX and determined that Congress intended to create a private right of action under Title IX. *See Cannon v. University of Chicago*, 441 U.S. 677, 694-703, 99 S.Ct. 1946, 60 L.Ed.2d 560. This is important because in all of the cases in which the Supreme Court has found that Section 1983 is available to redress the deprivation of a federal statutory right, it has emphasized that the underlying statute *did not* allow for a private right of action (express or implied). *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005). By contrast, whenever the underlying statute contained a private right of action (express or implied), the Court has deemed that fact to be strong evidence of congressional intent to preclude parallel actions under Section 1983. *See Clammers, Id.*, at 20-21.

\*3 In the case at bar, Plaintiffs seek to use Section 1983 to redress alleged deprivations of both a federal statutory right (implicating Title IX) and a federal constitutional right (implicating the Equal Protection Clause). It is beyond dispute that the underlying factual allegations supporting Plaintiffs' Title IX and Section 1983 claims are "virtually identical," i.e., Principal Horn's alleged act of barring and/or saying he would bar Mary Doe from using the ladies' restroom at GVHS.

Accordingly, Summary Judgment is warranted as to Plaintiffs' Section 1983 claim as such claim is subsumed by Title IX.

**C. Plaintiffs' Equal Protection  
Claim Is Also Subsumed By Title IX**

Like their Section 1983 claim, the underlying factual allegations supporting Plaintiffs' Equal Protection claim are "virtually identical" to those set forth in their Title IX claim. As such, this claim, like Plaintiffs' Section 1983 claim would be precluded. *See Smith, Id.*, at 1013. (Where the Supreme Court determined that in addition to precluding section 1983 claims, "virtually identical" constitutional claims, i.e., equal protection claims may also be precluded).

**D. Plaintiffs Cannot Establish a Prima Facie  
Case of Sex Discrimination Under Title IX**

The two key elements for a cause of action under Title IX are: (1) that a person must be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program; and (2) that such action was taken on the basis of the person's sex. 20 U.S.C. § 1681(a). The scope of Title IX protection applies only to "educational programs" that receive direct federal financial assistance. Congress enacted Title IX with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices in *education programs*, and to provide individual citizens effective protection against those practices. *See Cannon v. University of Chicago*, 441 U.S. 677, 704, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

In the case at bar, the evidence establishes that Mary Doe has not been excluded from participation in, denied the benefits of, or discriminated against *under any education program*, on the basis of sex. No one employed by the CCSD ever told Plaintiffs that Mary Doe could not enroll at GVHS, or any other CCSD high School, nor were Plaintiffs under the impression that Mary Doe could not enroll at GVHS or any other CCSD high school. Def's Exhibit 1, p. 58, line 25; and p. 59, lines 1-18. Plaintiffs, on their own accord, chose to enroll Mary Doe at Odyssey instead of GVHS (or any other CCSD high school), because they did not like Principal Horn's tentative position that the unisex nurse's restroom, as opposed to the ladies' restroom, was the best accommodation for Mary Doe.

Even if the Court were to determine that Principal Horn did prohibit Mary Doe from using the ladies' restroom, such prohibition would not constitute discrimination "under any education program and/or activity," based on Mary Doe's "sex," under Title IX. In *Jadness v. Pearce*, 30 F.3d 1220 (9th Cir.1994), the Court determined that what constitutes a *covered* "education program" for purposes of Title IX requires a factual determination as to whether the relevant portions of a recipient's program is educational in nature. Even applying this linguistically broad definition of what constitutes an "education program," under Title IX, it would be a stretch to conclude that a "restroom," in and of itself, is educational in nature and thus an education program.

\*4 Assuming arguendo that a "restroom" is an *education program*, Plaintiffs' Title IX claim still fails as Plaintiffs via their own deposition testimony acknowledge that

the District would have given Mary Doe access to “a restroom,” had she enrolled at GVHS. *See* Def’s Exhibit 1, p. 62, lines 11-22. *Also See* Def’s Exhibit 8, p. 39, lines 18-25; and p. 40, lines 1-8. Since Mary Doe would have had access to a restroom had she actually enrolled at GVHS, Plaintiffs cannot possibly establish the first key element required for a Title IX Claim.

In analyzing the second element of a Title IX cause of action, i.e., “that a plaintiff is discriminated against on the basis of their sex,” courts have relied on cases interpreting parallel language in Title VII. Title VII prohibits discrimination by an employer “because of [an] individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(2000). Although much of Title VII case law can be applied to Title IX actions, the analogy is not perfect as Title VII legal precedent arises exclusively out of the employment context, while Title IX was enacted solely to address instances of discrimination in *educational programs* that receive direct federal financial assistance. 20 U.S.C. § 1681(a). In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1998), the Supreme Court held that Title VII’s “sex” discrimination prohibition barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination

based on the fact that she failed ‘to act like a woman’-that is, to conform to socially-constructed gender expectations.

In the case at bar, the excerpts from the deposition testimony of both Mary and Jane Doe (at pp. 22-25 of Def’s Motion-# 64) establish that Defendants have not discriminated against Mary Doe under any education program (as that term is defined), *because of her “sex,”* i.e., because she is a “male,” “female,” and/or because she failed to act like a “male” or “female” (applying the expanded *Price Waterhouse v. Hopkins* definition).

Accordingly, Plaintiffs’ Title IX claim must fail.

## 2. Conclusion

For the above-stated reasons, Defendants’ Motion for Summary Judgment is Granted.

IT IS SO ORDERED:

## All Citations

Not Reported in F.Supp.2d, 2008 WL 4372872

## Footnotes

- 1 As discussed in greater detail below, Defendants’ Motion for Summary Judgment is also warranted on the grounds that Plaintiffs’ Section 1983 and Equal Protection Claims are Subsumed by Title IX, and Plaintiffs have failed to establish a *Prima Facie* Case of Sex Discrimination Under Title IX.

2012 WL 2450805

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Michigan,  
Northern Division.

Valerie HOFFMAN, Plaintiff,

v.

SAGINAW PUBLIC SCHOOLS, Defendant.

No. 12-10354.

|  
June 27, 2012.

**Attorneys and Law Firms**

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**OPINION AND ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS AND DISMISSING  
COMPLAINT WITHOUT PREJUDICE**

THOMAS L. LUDINGTON, District Judge.

\*1 In this student-on-student harassment case, the defendant's motion to dismiss raises a dispositive question that the complaint does not answer: Why did one young man allegedly bully the plaintiff's son? Was it based on the victim's disability? Was it based on the victim's sex? Or was it based on some other reason, such as personal animus?

The mother of the alleged victim, Plaintiff Valerie Hoffman, brings suit against the school district, Defendant Saginaw Public Schools. Plaintiff alleges that her son, M.M., was bullied by a fellow classmate, D.K., as well as other students. The alleged harassment included wishing M.M. happy birthday when it was not his birthday, teasing him when he said he did not plan on attending a school dance, ignoring him on a school field trip, throwing food at him, mocking his posture, and referring to him "as a lesbian, gay, or a hermaphrodite." Plaintiff further alleges that Defendant was deliberately indifferent to this conduct, violating Title II of the

Americans with Disabilities Act, the Rehabilitation Act, Title IX of the Education Amendments of 1972, and associated state law claims.

Defendant now moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 7. The facts alleged in the complaint, Defendant correctly observes, do not suggest that the reason why M.M. was harassed was either his sex or his disability. "[T]he conduct of jerks, bullies, and persecutors is simply not actionable," the Sixth Circuit instructs in a related context, "unless they are acting because of the victim's gender" (or, in this case, because of the victim's gender or disability). *Wasek v. Arrow Energy Servs.*, — F.3d —, 2012 WL 2330824, at \*3 (June 20, 2012) (discussing same-sex harassment under Title VII); see *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) (noting that the Court looks "to its Title VII interpretations of discrimination in illuminating Title IX").

Accordingly, the Court will grant Defendant's motion and dismiss Plaintiff's complaint without prejudice.

**I**

Because Defendant moves to dismiss pursuant to Rule 12(b)(6), in evaluating whether Plaintiff has stated claims on which relief may be granted the following facts from the complaint must be assumed to be true.

M.M. is a young man with hereditary multiple exostoses. As its name suggests, the condition is hereditary and involves multiple benign bone tumors and growths called "exostoses."

M.M. attended two schools operated by Defendant. The first is the Handley School Program for Creative and Academically Talented, which serves children from kindergarten through fifth grade. M.M. began second grade in the fall of 2005. Sometime during the school year, M.M. "became the target of bullying ... by various classmates and more specifically another minor, D.K." Compl. ¶ 8. (No further details regarding bullying during second grade are provided by the complaint.)

\*2 Two years passed. Sometime during the 2007-2008 school year, Plaintiff informed the school principal that M.M. was being bullied by fellow fourth graders.

*Id.* ¶ 11. (Again, the complaint does not provide any details regarding how M.M. was bullied.) The principal responded by convening a meeting with the school psychologist, social worker, teacher, and Plaintiff. *Id.* ¶ 15. The meeting was unproductive, however, as “the participants in the meeting repeatedly focused on [M.M.] and blamed him for the bullying.” *Id.* ¶ 16.

About this time, M.M. began seeing a pediatric psychologist. The psychologist later spoke to the school principal, who asserted “there was no bully problem at Handley.” *Id.* ¶ 14.

M.M. began fifth grade in the fall of 2008, and the bullying persisted. *Id.* ¶ 17. (Once again, the particulars of the bullying are not specified in the complaint.) Plaintiff brought the problem to the school board president's attention. *Id.* ¶ 18. He instructed Plaintiff to email the school's safety director. *Id.* ¶ 19. Plaintiff did so, but received no response. *Id.* ¶¶ 20–21.

As fifth grade came to an end in June 2009, Plaintiff accompanied M.M. on a school field trip. *Id.* ¶ 22. On the trip, “various children refused to sit next to M.M., made him the target of jokes, and effectively ostracized him.” *Id.* ¶ 23.

When M.M. began sixth grade in the fall of 2009, he moved from primary to middle school, where he attended another school operated by Defendant, the Saginaw Arts and Sciences Academy. *Id.* ¶ 24. As the school year began, Plaintiff met with the middle school principal to “explain the previous incidents of bullying experienced by [M.M.] at Handley.” *Id.* ¶ 25. The principal told Plaintiff that bullying was not tolerated at the middle school and “agreed to alter [M.M.'s] schedule to eliminate any shared classes with D.K.” *Id.* ¶ 26. Despite the principal's promises, however, M.M. and D.K. did share classes. *Id.* ¶ 28.

Three times during the first week of school, “D.K. verbally and physically abused [M.M.]” *Id.* ¶ 29. (No further details regarding these incidents are provided by the complaint.) In the following months, other students harassed M.M. as well. *Id.* ¶ 31. Specifically, on one occasion fellow students asked M.M. if he planned to attend a school dance. *Id.* ¶ 40. When he said that he did not plan to, “the various students began mocking [M.M.]” *Id.* ¶ 41. Likewise, in the spring of 2010 “classmates began repeatedly wishing

[M.M.] ‘Happy Birthday,’ even though his actual birth date is in the month of September.” *Id.* ¶ 36.

To address the students' treatment of M.M., Plaintiff met with the school social worker. *Id.* ¶ 33. Raising concerns regarding the bullying, Plaintiff informed the social worker that M.M. “had made several comments that no one liked him and that he contemplated suicide.” *Id.* ¶ 34. The social worker, however, “failed to address Plaintiff's concerns; instead, she discussed [M.M.'s] difficulty making friends.” *Id.* ¶ 35.

\*3 As sixth grade was coming to an end, Plaintiff attended “a pupil service team meeting” with the school social worker, members of administration, and M.M.'s teachers. *Id.* ¶ 44. At the meeting, Plaintiff voiced her concerns regarding the bullying. *Id.* ¶ 45. Once again, the meeting proved unproductive. The group did not discuss “how to end the harassing and bullying treatment towards [M.M.], but instead focused on [M.M.'s] behavior.” *Id.* ¶ 46.

When M.M. entered seventh grade in the fall of 2010, the bullying continued. *Id.* ¶ 47. In February 2011, the school social worker informed Plaintiff that D.K. and others had set into motion a plan that prevented M.M. from using the restroom. *Id.* ¶ 49. Specifically, observing that M.M. “frequently used the restroom at a particular time of day,” D.K. and other students ensured “that the hall pass, which was needed to use the restroom, was always in use [during that particular time of day].” *Id.* ¶ 49. Defendant addressed this conduct by allowing M.M. “to sign out to use the restroom at the teacher's desk instead of using a hall pass.” *Id.* ¶ 75.

On February 25, 2011, the school social worker, Plaintiff, and D.K.'s mother met to discuss the bathroom issue. *Id.* ¶ 50. Although the ladies “discussed the recent incident of harassment, [they] did not alter the School District's handling of the harassment.” *Id.* ¶ 51. Afterwards, “D.K. began referring to [M.M.] as a lesbian, gay, or a hermaphrodite.” *Id.* ¶ 52. Moreover, D.K. “repeatedly told other students ... that [M.M.] was gay.”<sup>1</sup> *Id.* ¶ 53. (Although not spelled out in the complaint, it appears this conduct occurred in the school locker room. *See id.* ¶ 55.) Plaintiff brought D.K.'s conduct to the social worker's attention. *Id.* ¶ 54. Defendant responded by permitting M.M. “to leave a physical education class early so that he could avoid the bullying and harassment in the locker

room.” *Id.* ¶ 55. Defendant did not, however, punish D.K. *Id.* ¶ 56.

On May 5, 2011, “D.K. made an obscene gesture during a physical education class where he indicated that [M.M.] had male genitalia in his mouth.” *Id.* ¶ 59. The next day in physical education, “a physical altercation ensued between [M.M.] and D.K.” *Id.* ¶ 61. (The particulars of the altercation are not specified in the complaint.)

As seventh grade was coming to an end, Plaintiff attended another pupil service team meeting. *Id.* ¶ 62. At the meeting on May 9, 2011, the social worker “identified Defendant’s concerns related to conflicts between [M.M.] and D.K. and [M.M.’s] lack of friends. Plaintiff had to correct [the social worker] stating that D.K. was bullying her son and that her son had many friends.” *Id.* ¶¶ 63–64.

Also on May 9, M.M. complained to the school social worker that D.K. had “mocked [M.M.’s] stance and posture affected by [multiple hereditary exostoses] and poked his arm out of his sleeve to mimic the shape of his bone disorder.” *Id.* ¶ 68.

\*4 Defendant responded by scheduling a meeting with the school principal, assistant principal, social worker, and the parents of the two boys “to address what Defendant characterized as the mutual conflict between the two boys.” *Id.* ¶ 69. At the meeting on May 13, Plaintiff objected that the boys were not in “mutual conflict”—rather, Plaintiff explained, D.K. was bullying M.M. *Id.* ¶ 70.

As the meeting ended, Plaintiff was asked to sign a document listing the topics discussed at the meeting. *Id.* ¶ 72. Plaintiff refused to sign because the document “did not refer to the ongoing harassment and bullying as an issue.” *Id.* ¶ 73. The document did not mention bullying, Defendant’s agents explained to Plaintiff, because if it did “an official investigation by the Director of Safety would be mandated.” *Id.* ¶ 78. Although Plaintiff requested that an official investigation be conducted, Defendant did not do so. *Id.* ¶ 80. Instead, M.M. and D.K. were merely “instructed to keep out of each other’s personal space.” *Id.* ¶ 81.

On three separate occasions over the next several days,<sup>2</sup> D.K. “proceeded to use ‘personal space’ as another method to harass and bully [M.M.]” *Id.* ¶ 83. (The

particulars of this harassment are not specified in the complaint.) Plaintiff complained to the school social worker, who responded by “downplaying the seriousness of the continued harassment.” *Id.* ¶ 85.

A short time later, Plaintiff enrolled her son in a different school district for the following school year. *Id.* ¶ 86.

As seventh grade was coming to an end in June 2011, Plaintiff accompanied M.M. on a school “Field Day event.” *Id.* ¶ 87. At the event, held on June 2, “D.K. and other students threw pizza crusts and potato chip bags at [M.M.]” *Id.* The next day, the social worker “approached Plaintiff and asked if her son could provide a statement regarding the incident that occurred the day before.” *Id.* ¶ 89. When Plaintiff agreed, the social worker “proceeded to ask [M.M.] questions in such a manner as to suggest that he was in the wrong for attempting to meet his friends at a location near D.K.” *Id.* ¶ 90.

### C

On June 3, 2011, Plaintiff filed a complaint with the United States Department of Education Office for Civil Rights alleging that M.M. was being harassed. *Id.* ¶ 91. Four days later, Plaintiff withdrew M.M. from school for the remainder of the year. *Id.* ¶ 92. In November 2011, “Defendant signed a Resolution Agreement regarding Plaintiff’s complaint to the Office for Civil Rights requiring that Defendant issue a letter to Plaintiff by certified mail inviting her son to return to the School District.” *Id.* ¶ 105. No letter has been sent. *Id.* ¶ 106.

In January 2012, Plaintiff filed suit in this Court alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12132; the Rehabilitation Act, 29 U.S.C. § 794; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; and related state law claims.

\*5 Defendant now moves to dismiss for failure to state a claim on which relief can be granted. ECF No. 7. Defendant argues that the claims should be dismissed because the alleged bullying was not based on M.M.’s sex or disability, the alleged bullying did not create an abusive educational environment, and Defendant was not deliberately indifferent to the alleged bullying. For the reasons that follow the Court will grant

Defendant's motion and dismiss Plaintiff's complaint without prejudice.

## II

To survive a Rule 12(b)(6) motion to dismiss, the pleading “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, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). “A claim has facial plausibility when the [party] pleads factual content that allows the court to draw the reasonable inference that the [opposing party] is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555–56). A court must accept all factual content in the pleading as true, however, a court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). “In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.... When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 129 S.Ct. at 1950.

## III

### A

Defendant first moves to dismiss the sex discrimination claim brought pursuant to Title IX of the Education Amendments of 1972 (codified as amended at 20 U.S.C. §§ 1681–85). In pertinent part, the statute 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).

The purpose of Title IX, as originally conceived, was “banning discrimination against women in the field of education.” *N. Haven Bd. of Educ. v. Bell*, 456

U.S. 512, 523, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). Summarizing the bill that would become Title IX, Senator Birch Bayh explained: “Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs .... [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment.” *Id.* at 524 (emphasis omitted) (quoting 118 Cong. Rec. 5803 (1972)). Responding to a fellow senator's question regarding the scope of the proposed protections, Senator Bayh elaborated: “[W]e are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution.” *N. Haven Bd. of Educ.*, 456 U.S. at 526 (emphasis omitted) (quoting 118 Cong. Rec. 5812); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) (discussing purpose of Title IX); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (same).<sup>3</sup>

\*6 While not immediately obvious from the text or the legislative history, in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999), the Court held that Title IX creates a private cause of action for a student against a school based on student-on-student sexual harassment “in certain limited circumstances.”<sup>4</sup> *Id.* at 643. Specifically, “funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Id.* at 650.

To establish a prima facie case of student-on-student sexual harassment under Title IX, a plaintiff must establish three elements:

- (1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,

(2) the funding recipient had actual knowledge of the sexual harassment, and

(3) the funding recipient was deliberately indifferent to the harassment.

*Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir.2012) (citing *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir.1999)).

Here, Defendant acknowledges that it is a recipient of federal funds and therefore subject to the requirements of Title IX. Conceding that the complaint alleges that Defendant had actual knowledge of the conduct at issue, Defendant challenges the remaining two elements.

### 1

Being a child, the Supreme Court cautions, “is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior.” *J.D.B. v. North Carolina*, — U.S. —, —, 131 S.Ct. 2394, 2403, 180 L.Ed.2d 310 (2011) (internal quotation marks omitted) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (Breyer, J., dissenting), and *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); citing *Gall v. United States*, 552 U.S. 38, 58, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); and *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)).

Consequently, while “severe and pervasive conduct” is a familiar phrase—one borrowed from the “hostile work environment” jurisprudence of Title VII—it has a distinct application in Title IX. *Davis*, 526 U.S. at 651; cf. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). That is, although the Supreme Court has imported “hostile environment” principles from Title VII to Title IX, the Court has warned that trial courts “must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults.” *Davis*, 526 U.S. at 651; cf. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (establishing same-sex hostile work environment claims are actionable under Title VII). Thus, to evaluate student-on-student hostile environment claims under Title

IX a court must consider the same basic criteria as in Title VII—the “constellation of surrounding circumstances, expectations, and relationships.” *Davis*, 526 U.S. at 651 (quoting *Oncale*, 523 U.S. at 82). Yet the court must also account for basic differences between children and adults.

\*7 Among the particular circumstances unique to student-on-student claims are certain truths that “are self-evident to anyone who was a child once himself.” *J.D.B.*, 131 S.Ct. at 2403. For example, “at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.” *Davis*, 526 U.S. at 651. Standing alone, however, this conduct does not give rise to liability. Title IX, like Title VII, does not create a federal code of manners. *Davis*, 526 U.S. at 652; see *Oncale*, 523 U.S. at 81.

“Damages are not available for simple acts of teasing and name-calling among school children,” the Supreme Court instructs, “even where these comments target differences in gender.” *Davis*, 526 U.S. at 652. Rather, to be actionable, the conduct must be both: (1) so severe and pervasive that it effectively renders the victimized student “excluded from participation in” or “denied the benefits of” the education that Title IX is designed to protect;<sup>5</sup> and (2) “based on sex.” 20 U.S.C. § 1681(a); see *Davis*, 526 U.S. at 650–52.

In *Davis*, for example, a young lady in fifth grade was repeatedly harassed by a fellow fifth grader who “attempted to touch [the young lady’s] breasts and genital area and made vulgar statements such as ‘I want to get in bed with you’ and ‘I want to feel your boobs.’” 526 U.S. at 634 (internal quotation marks omitted). Despite the young lady’s reports of these incidents to the school, the young man was not disciplined. The vulgar conduct continued. In the following months, the young man “placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward [the young lady]” and later “rubbed his body against [the young lady] in the school hallway in what [the young lady] considered a sexually suggestive manner.” *Id.* The young lady’s grades dropped. After five months, she composed a suicide note. After six months, criminal charges were brought against the young man, who pled guilty to sexual battery for his assaults on the young lady.

The young lady's mother brought suit alleging a violation of Title IX. The school moved to dismiss the case pursuant to Rule 12(b)(6). The district court granted the motion. Sitting en banc, the Eleventh Circuit affirmed the judgment of the district court. The Supreme Court reversed. Concluding that the conduct was sufficiently severe and pervasive to survive the school's 12(b)(6) motion, the Court wrote: "The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, [the boy] ultimately pleaded guilty to criminal sexual misconduct.... On this complaint, we cannot say beyond doubt that petitioner can prove no set of facts in support of her claim which would entitle her to relief." *Id.* at 653–54 (internal alterations and quotation marks omitted) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

\*8 Two leading Sixth Circuit decisions regarding student-on-student harassment similarly involve young men sexually assaulting young women. In *Soper v. Hoben*, 195 F.3d 845 (6th Cir.1999), a plaintiff alleged that her middle school daughter was raped and otherwise sexually abused by several male students. *Id.* at 854. "This obviously qualifies as being severe, pervasive, and objectively offensive sexual harassment that could deprive [the young woman] of access to the educational opportunities provided by her school," the Sixth Circuit observed. *Id.* at 855. Likewise, in *Vance v. Spencer County Public School District*, 231 F.3d 253 (2000), the court held that a plaintiff had submitted sufficient evidence of severe and pervasive harassment when her daughter was subjected to repeated "verbal propositioning and name calling" and then physically assaulted; "two male students held [the daughter] while others yanked off her shirt, pulled her hair, and attempted to disrobe." *Id.* at 259.

As noted, each of these cases involved male students harassing female students, ostensibly because of sexual desire. The basis of the conduct was indisputably sex. This case, however, involves one male student harassing another—ostensibly not because of sexual desire.<sup>6</sup> *Cf. Wasek v. Arrow Energy Servs.*, — F.3d —, 2012 WL 2330824, at \*3 (June 20, 2012) (noting the "key evidentiary differences between mixed-gender and same-gender sexual harassment").

Although not expressly intended by the drafters of Title IX, courts have extended the protections of Title IX to

student-on-student harassment involving students of the same sex. *See, e.g., Sanches v. Carrollton–Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir.2011); *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 865 (8th Cir.2011); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir.2002).

In these cases, the basis of the conduct is often not sexual desire, but sexual stereotypes (for example, one male student bullying another because victim's effeminateness). *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality) (holding that Title VII prohibits discrimination against women on the basis that they do not act sufficiently feminine). As the Court explained in *Hopkins*, a "sex stereotyping" case brought under Title VII, "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 gender." *Id.*; *see Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) (noting that the Court looks "to its Title VII interpretations of discrimination in illuminating Title IX").

Complicating the inquiry, however, while discrimination based on noncompliance with sexual stereotypes may be actionable under federal law, discrimination based on sexual orientation is not. *E.g., Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir.2000) (holding the employer was not liable because "the record ... shows that Spearman's co-workers maligned him because of his apparent homosexuality, and not because of his sex"); *see generally Hamm v. Wyauewega Milk Prods., Inc.*, 332 F.3d 1058, 1066–68 (7th Cir.2003) (Posner, J., concurring); *but see generally Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L.Rev. 1, 77–80 (1995) (challenging the notion that "courts, or anyone for that matter, can, or should, distinguish in any principled manner between impermissible cultural stereotypes and permissible commonly accepted social norms").

\*9 Notwithstanding this analytical complication, the law is settled that a Title IX claim is only cognizable if there is evidence that the offender acted because of the victim's sex. "Discrimination on the basis of sex is the sine qua non of a Title IX sexual harassment case," the First Circuit explains, "and a failure to plead that element is fatal." *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52,

66 (1st Cir.2002). In accord, the Fifth Circuit writes: "Same-sex sexual harassment is actionable under title IX. The offensive behavior must, however, be based on sex, per the words of title IX, and not merely tinged with offensive sexual connotations." *Sanches*, 647 F.3d at 165 (internal quotation marks omitted) (quoting *Frazier*, 276 F.3d at 66; and citing *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir.1998)). Putting the point more forcefully, the Eighth Circuit emphasizes: "Title IX imposes liability on a school district for discrimination only if the discrimination is 'on the basis of sex.' We glean from this language of the statute a requirement of underlying intent, and therefore motivation, on the part of the actor to discriminate because of one's sex or gender." *Wolfe*, 648 F.3d at 865.

Neither the Supreme Court nor the Sixth Circuit has yet addressed the standards for evaluating same-sex student-on-student harassment under Title IX. Both have, however, provided guidance by evaluating same-sex harassment under Title VII. *Oncale*, 523 U.S. at 80–82; *Wasek*, 2012 WL 2330824, at \*3–4. "The critical issue," the Supreme Court explains, "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring)). The Court cautions that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale*, 523 U.S. at 80. For example, a claim may be stated "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Id.* But, crucially, the harassing conduct must be motivated by the victim's sex: "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *discrimination* because of sex." *Id.* at 81 (internal quotation marks and alterations omitted) (emphasis in original).

Other circuit courts have addressed standards for evaluating same-sex student-on-student harassment under Title IX. In *Sanches v. Carrollton–Farmers Branch Independent School District*, 647 F.3d 156 (5th Cir.2011), for example, one high school girl harassed another by

starting rumors that she was pregnant and calling her a "ho." *Id.* at 165. Concluding that the school was entitled to summary judgment, the Fifth Circuit explained: "J.H. was upset with Sanches because Sanches was dating J.H.'s ex-boyfriend .... There is nothing in the record to suggest that J.H. was motivated by anything other than personal animus. Her conduct ... is more properly described as teasing or bullying than as sexual harassment." *Id.* at 165–66.

\*10 Similarly, in *Seamons v. Snow*, 84 F.3d 1226 (10th Cir.1996), a male high school student did not state a claim under Title IX because he did not allege facts showing that the harassment was "based on sex." After teammates on the high school football team humiliated the young man,<sup>7</sup> he complained to school authorities. *Id.* at 1230. The authorities responded by suggesting he "should have taken it like a man" and that "boys will be boys." *Id.* The young man brought suit asserting that the schools response violated Title IX because it "expected him to conform to a macho male stereotype." *Id.* The district court granted the school's motion to dismiss. The Tenth Circuit affirmed the judgment, explaining that although the statements had sexual connotations, the plaintiff did not allege that he was discriminated against because he was male:

Brian points to comments made by school officials such as "boys will be boys" and "he should take it like a man" to support his argument that he was subjected to a sexually hostile school environment. These statements, however, fall short of showing sex discrimination. The qualities Defendants were promoting, team loyalty and toughness, are not uniquely male. The fact that the coach, and perhaps others, described these qualities as they pertain to his situation in terms of the masculine gender does not convert this into sexual harassment. Brian has not alleged that Defendants would have acted differently if a similar event had occurred in the women's athletic program. To the contrary, Brian's complaint alleges that such hazing has also occurred to women at Sky View High School and that it has similarly gone unaddressed by school officials.

*Id.* at 1233; see generally *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762–66 (6th Cir.2006) (discussing "sex stereotyping" claims under Title VII).

In this case, assuming without deciding that the conduct alleged was sufficiently severe and pervasive to state a

claim under Title IX, the complaint must nevertheless be dismissed because it does not offer any facts suggesting that D.K. (or any other person, for that matter) harassed M.M. “on the basis of sex.”

The harassment began, the complaint alleges, when M.M. was in primary school. Specifically, it began during the 2005–2006 school year, when M.M. “became the target of bullying in the second grade by various classmates and more specifically another minor, D.K.” Comp. ¶ 8. As the complaint does not elaborate the form or content of this harassment, no inference of sex-based discrimination can be drawn from this allegation.

The next allegation of harassment concerns the 2007–2008 school year, when Plaintiff informed the school principal that M.M. was being bullied by fellow fourth graders. *Id.* ¶ 11. Again, the complaint does not elaborate on the particulars of the bullying, and so no inference of sex-based discrimination can be drawn from this allegation.

\*11 In fifth grade, the complaint identifies one incident of bullying—on a school field trip “various children refused to sit next to M.M., made him the target of jokes, and effectively ostracized him.” *Id.* ¶ 23. Again, no facts suggest that this conduct was because of M.M.’s sex.

The factual allegations regarding the harassment in middle school are more concrete. Again, however, none suggest that the harassment was sex-based. Specifically, as M.M. began sixth grade, “D.K. verbally and physically abused [M.M.]” three times during the first week of school. *Id.* ¶ 29. The specifics of this abuse (such as what was said) are not identified, and so once again it cannot be inferred that this conduct was because of M.M.’s sex.

The following semester other students also harassed M.M. *Id.* ¶ 31. In the spring of 2010, “classmates began repeatedly wishing [M.M.] ‘Happy Birthday,’ even though his actual birth date is in the month of September.” *Id.* ¶ 36. Likewise, fellow students asked M.M. if he planned to attend a school dance. *Id.* ¶ 40. When he said that he did not plan to, “the various students began mocking [M.M.]” *Id.* ¶ 41. Again, the complaint contains no facts suggesting that the basis of either of these incidents was M.M.’s sex.

The next allegation of harassment concerns seventh grade, when D.K. and others set into motion a plan that

prevented M.M. from using the restroom. *Id.* ¶ 49. Specifically, observing that M.M. “frequently used the restroom at a particular time of day,” D.K. and other students ensured “that the hall pass, which was needed to use the restroom, was always in use [during that particular time of day].” *Id.* ¶ 49. Again, no facts suggest that this conduct was because of M.M.’s sex.

After the social worker, Plaintiff, and D.K.’s mother met to discuss this incident, “D.K. began referring to [M.M.] as a lesbian, gay, or a hermaphrodite.” *Id.* ¶ 52. Additionally, D.K. “repeatedly told other students ... that [M.M.] was gay.” *Id.* ¶ 53. About two months later, “D.K. made an obscene gesture during a physical education class where he indicated that [M.M.] had male genitalia in his mouth.” *Id.* ¶ 59. During physical education the following day, “a physical altercation ensued between [M.M.] and D.K.” *Id.* ¶ 61.

Although this conduct indisputably has sexual connotations, the complaint offers no facts suggesting that D.K. acted because of M.M.’s sex. The complaint does not allege facts suggesting that M.M. behaved effeminately or effutely.<sup>8</sup> The complaint does not allege that D.K. (or any other person, for that matter) indicated a belief that M.M. exhibited effeminate or effete characteristics. Rather, as in *Sanchez*, after drawing all reasonable inferences in Plaintiff’s favor, when viewed under the totality of the circumstances the conduct “is more properly described as teasing or bullying than as sexual harassment.” 647 F.3d at 165–66.

\*12 The final two incidents of harassment similarly do not suggest harassment on the basis of sex. First, after M.M. and D.K. were “instructed to keep out of each other’s personal space,” Compl. ¶ 81, D.K. “proceeded to use ‘personal space’ as another method to harass and bully [M.M.]” *Id.* ¶ 83. (The particulars of this harassment are not specified in the complaint.) Second, at a field day event, “D.K. and other students threw pizza crusts and potato chip bags at [M.M.]” *Id.* ¶ 87. Once again, neither of these instances suggests that the conduct “was motivated by anything other than personal animus.” *Sanchez*, 647 F.3d at 165.

In sum, as presently pled the complaint does not allege facts suggesting the conduct complained of was based on M.M.’s sex. While the conduct alleged should not be condoned, the complaint does not state a Title IX claim.

Against this conclusion, Plaintiff argues that the complaint does state a claim for sexual harassment because, at its core, the harassment was “challenging [M.M.’s] masculinity.” Pl.’s Resp. to Def.’s Mot. to Dismiss 13. Plaintiff notes that “plaintiffs may avail themselves of evidence that the harassment is based on a perception that the individual ‘is not masculine enough or feminine enough—that is, he or she fails ‘to conform to [gender] stereotypes.’” *Id.* 11 (quoting *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 767 (6th Cir.2006) (Lawson, D.J., dissenting)). In support, Plaintiff cites *Montgomery v. Independent School District No. 709*, 109 F.Supp.2d 1081 (D.Minn.2000), asserting: “The facts of the instant case are analogous to *Montgomery*.” Pl.’s Resp. 11.

In *Montgomery*, a young man named Jessie “experienced frequent and continual teasing by other students beginning in kindergarten and recurring on an almost daily basis until the end of the tenth grade.” 109 F.Supp.2d at 1084. In addition to repeated physical assaults, the young man was taunted by being called “Jessica,” “faggott,” “fag,” “gay,” “girl,” “princess,” “fairy,” “homo,” “freak,” “lesbian,” “gay boy,” “bitch,” “queer,” “pansy,” “queen,” and “femme boy.” *Id.* Bringing a Title IX claim, the plaintiff alleged that “the students engaged in the offensive conduct at issue not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity.” *Id.* at 1090.

Addressing the plaintiff’s sexual orientation claim, the court explained that “to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, these claims are not actionable and must be dismissed.” *Id.* (citing *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir.1989)). Continuing, the court explained that defendant was not entitled to judgment because the plaintiff specifically alleged that he was harassed because of his “feminine characteristics”:

\*13 Plaintiff contends that the students engaged in the offensive conduct at issue not only because they believed him to be gay, but

also because he did not meet their stereotyped expectations of masculinity. The facts alleged in plaintiff’s complaint support this characterization of the students’ misconduct. He specifically alleges that some of the students called him “Jessica,” a girl’s name, indicating a belief that he exhibited feminine characteristics. Moreover, the Court finds important the fact that plaintiff’s peers began harassing him as early as kindergarten.... The likelihood that he openly identified himself as gay or that he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.

109 F.Supp.2d at 1090.

In this case, unlike in *Montgomery*, the complaint does not allege that M.M. exhibited feminine characteristics or that he engaged in behaviors more typical of a young lady than a young gentleman. As noted, the complaint does not allege that D.K. (or any other person, for that matter) indicated a belief that M.M. exhibited effeminate characteristics. Likewise, the complaint does not allege facts suggesting that M.M. behaved effeminately or effately. As presently pled, the complaint does not state a Title IX claim on which relief can be granted.

This is not to suggest, however, that Plaintiff cannot state a Title IX claim. Simply that she has not done so. Accordingly, Plaintiff’s Title IX claim will be dismissed without prejudice.

## B

Defendant next moves to dismiss the disability claims brought pursuant to the Americans with Disability Act and the Rehabilitation Act.

Title II of the ADA provides in pertinent part that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. With substantially similar language, § 504 of the Rehabilitation Act provides that no qualified individual with a disability “shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a).

“Apart from § 504’s limitation to denials of benefits ‘solely’ by reason of disability and its reach of only federally funded—as opposed to ‘public’—entities,” the Sixth Circuit observes, “the reach and requirements of both statutes are precisely the same.” *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453 (6th Cir.2008) (internal alteration omitted) (quoting *Weixel v. Bd. of Educ. of N. Y.*, 287 F.3d 138, 146 n. 6 (2d Cir.2002)).

The Sixth Circuit therefore instructs that the elements of a disability discrimination claim alleging a school is liable for student-on-student harassment are essentially the same under the two statutes. Courts are to apply the same fundamental principles, regardless of whether the harassment is allegedly based on sex or disability, and “evaluate that claim under the analytical framework set forth in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999).” *S.S.*, 532 F.3d at 453. To state a claim, the complaint must allege facts plausibly suggesting that:

\*14 (1) the plaintiff is an individual with a disability, (2) he or she was harassed based on that disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment.

*Id.* at 454 (quoting *Werth v. Bd. of Dirs. of the Pub. Sch. of Milwaukee*, 472 F.Supp.2d 1113, 1127 (E.D.Wis.2007)).

As noted, Defendant acknowledges that it is a recipient of federal funds; thus, it subject to the requirements of the ADA and the Rehabilitation Act. Defendant further acknowledges Plaintiff is an individual with a disability and that that the complaint alleges that Defendant had actual knowledge of the conduct at issue. Defendant challenges the remaining elements.

As with the Title IX claim, Defendant is once again correct that the complaint does not contain sufficient factual allegations suggesting that M.M. was harassed because of his disability.

Two cases illustrate why. In the first, *Werth v. Board of Directors of the Public Schools of Milwaukee*, 472 F.Supp.2d 1113 (E.D.Wis.2007), a young man suffered from a congenital bone development disorder “characterized by absent or incompletely-formed collar bones, an abnormally shaped skull, characteristic facial appearance, short stature, and dental abnormalities.” *Id.* at 1116–17. During woodshop class in ninth grade, several students threw blocks of wood at the young man, resulting in numbness in the legs, swelling in the spine, and an extended period of recuperation that caused the him to miss three months of school. When he returned, another student teased him and hit him with safety goggles. The young man brought suit against the school alleging disability discrimination. Granting judgment to the school, the court explained:

Although Mary Werth averred that Werth was subjected to verbal attacks and mockery by fellow students because of his disability, Werth has presented no evidence showing that these incidents were related to his disability. He has offered no proof that Larry W. or Joe F. teased or otherwise harassed him on October 16, 2001, or any day before that, because of his disability. Also, there is nothing in the record showing that Roberto S. teased Werth due to his disability or that Roberto S. teased or otherwise harassed him on any day because of his disability.

*Id.* at 1128. Thus, the complaint’s conclusory allegations that the harassment was because of the young man’s

disability were deemed insufficient. Facts are necessary to state a claim. See *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Illustrative of such facts are the second case, *Doe v. Big Walnut Local School District Board of Education*, — F.Supp.2d —, 2011 WL 3204686 (S.D. Ohio July 27, 2011). There, a young man was diagnosed with cognitive disorder, which created difficulties with social interactions and learning as quickly as other students, and so was placed in individualized education plan classes. Alleging extensive bullying by other students, he brought a number of claims against the school, including an ADA violation. The school moved for summary judgment. The district court concluded that the young gentleman had introduced sufficient facts to demonstrate a triable issue of fact about whether he was discriminated because of his disability. A fellow student testified that the young man “was bullied because he was known to be in [individualized education plan] classes.” *Id.* at 14. The plaintiff’s expert also testified regarding the motivation for the bullying. “This evidence,” the court wrote, “is weak at best,” but sufficient to create a question of fact regarding the reason for the bullying. *Id.*

\*15 In this case, the complaint does not plead facts plausibly suggesting that M.M. was harassed because of his disability. The sole factual allegation of harassment regarding M.M.’s disability is the young man’s complaint to the school social worker in the spring of seventh grade that D.K. had “mocked [M.M.’s] stance and posture affected by [multiple hereditary exostoses] and poked his arm out of his sleeve to mimic the shape of his bone disorder.” Compl. ¶ 68.

Although the complaint alleges that on this one instance M.M. was teased about his disability—about five years after the alleged bullying began—the complaint does not suggest that M.M. was harassed because of his disability. Of course, it is possible that the harassment was based on M.M.’s disability. That is, it is possible that from second grade onward D.K. harassed M.M. because D.K. harbored discriminatory animus regarding M.M.’s disability, and that this discriminatory animus eventually manifested itself in seventh grade on this one occasion. But no facts suggest that this explanation for D.K.’s behavior is more plausible than any other.

Two counterfactuals illustrate why. For example, the complaint alleges that D.K. threw pizza crusts and potato chip bags at M.M. on another occasion. This does not suggest, however, that D.K. harbored discriminatory animus regarding M.M.’s dietary habits. Likewise, the complaint alleges that D.K. interfered with M.M.’s ability to check out the hall pass to use the bathroom. This does not suggest that D.K. harbored discriminatory animus regarding M.M. using the bathroom. Likewise, when the constellation of the surrounding circumstances are considered, the allegation that on one occasion D.K. mocked M.M.’s posture and mimicked the shape of his bone disorder does not suggest D.K. harassed M.M. because of the young gentleman’s disability.

As presently pled, the complaint does not state facts which plausibly suggesting that M.M. was discriminated against because of his disability. The Court will dismiss the ADA and Rehabilitation Act claims without prejudice.

### C

Having dismissed the federal claims, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(a) provides, “The district courts may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction.” Indeed, “a federal court that has dismissed a plaintiff’s federal-law claims should not ordinarily reach the plaintiff’s state-law claims.” *Moon v. Harrison Piping Supply*, 465 F.3d 719 (6th Cir.2006) (citation omitted), *quoted in Scott v. Hemlock Semiconductor Corp.*, No. 06-14903-BC, 2007 U.S. Dist. LEXIS 88012, at \*8, 2007 WL 4239439 (E.D.Mich. Nov. 30, 2007). *See also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (“Certainly, if the federal claims are dismissed before trial ... the state claims should be dismissed as well.”); *Perry v. Se. Boll Weevil Eradication Found.*, 154 F. App’x 467, 478 (6th Cir.2005) (noting that dismissal is the “clear rule of this circuit”). As the Court has emphasized, “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *Gibbs*, 383 U.S. at 726.

## IV

\*16 Accordingly, it is **ORDERED** that Defendant's motion to dismiss (ECF No. 7) is **GRANTED**.

It is further **ORDERED** that the complaint is dismissed without prejudice.

It is further **ORDERED** that Plaintiff is granted leave to file an amended complaint on or before **July 17, 2012**. If no complaint is filed on or before this date, a judgment shall be entered dismissing Plaintiff's case with prejudice.

## All Citations

Not Reported in F.Supp.2d, 2012 WL 2450805

## Footnotes

- 1 Paragraph 53 of the complaint implies that this conduct occurred while the two young men were in sixth grade, not seventh grade, alleging that "following the meeting [on February 25, 2011], D.K. repeatedly told other students in sixth grade that Plaintiff's minor was gay." Compl. ¶ 53. This reference to sixth grade appears to be a scrivener's error, however, as the complaint makes plain that M.M. was in sixth grade during the 2009–2010 school year and in seventh grade during the 2010–2011 school year. See *id.* ¶¶ 24–47.
- 2 The meeting occurred on Friday, May 13, 2011. Compl. ¶ 69. The harassment allegedly occurred from Monday, May 16 through Wednesday, May 18, 2011. *Id.* ¶ 83.
- 3 "Although the statements of one legislator made during debate may not be controlling," the Court has since observed of the legislative history of Title IX, "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *N. Haven Bd. of Educ.*, 456 U.S. at 526–27 (citation omitted) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976); *NLRB v. Fruit Packers*, 377 U.S. 58, 66, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964); and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95, 71 S.Ct. 745, 95 L.Ed. 1035 (1951)).
- 4 The holding is not immediately obvious from the text of the statute, for example, as the text does not expressly create private cause of action or impose liability on covered entities, such as schools, for the acts of third parties, such as students. These have been judicially implied. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (creating private cause of action); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (creating third party liability). Likewise, as Justice Kennedy noted in a fourjustice dissent in *Davis*, "When Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis*, 526 U.S. at 658 (Kennedy, J., dissenting) (citation omitted) (citing Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 59–72 (1979)).
- 5 "Examples of a negative impact on access to education," the Seventh Circuit observes, "may include dropping grades, becoming homebound or hospitalized due to harassment, or physical violence." *Gabrielle M. v. Park Forest–Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 823 (7th Cir.2003) (internal citations omitted) (citing *Davis*, 526 U.S. at 634, *Vance v. Spencer Cnty. Public Sch. Dist.*, 231 F.3d 253, 259 (6th Cir.2000); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248–49 (10th Cir.1999)).
- 6 See generally Laura Sullivan, *An Evolutionary Perspective of Peer Sexual Harassment in American Schools: Premising Liability on Sexual, Rather than Power Dynamics*, 3 Wm. & Mary J. Women & L. 329, 334–45 (1997) (discussing evolutionary theories on what motivates peer sexual harassment); but see generally Michel Foucault, *The History of Sexuality: Volume I: An Introduction* 78 (1990) ("Sex, the explanation for everything.").
- 7 Specifically, the young man, Brian, was "grabbed as he came out of the shower, forcibly restrained and bound to a towel rack with adhesive tape. Brian's genital area was also taped. After Brian was restrained, one of his teammates brought a girl that Brian had dated into the locker room to view him. All of this took place while other members of the team looked on." *Seamons v. Snow*, 84 F.3d 1226, 1230 (10th Cir.1996).
- 8 On the contrary, rather than behaving effately, the complaint alleges after "D.K. made an obscene gesture during a physical education class where he indicated that [M.M.] had male genitalia in his mouth," M.M. engaged in "a physical altercation" with the harasser. Compl. ¶¶ 59, 61.

2012 WL 3911910

Only the Westlaw citation is currently available.

United States District Court,  
E.D. California.

Troyce BRANINBURG, Plaintiff,

v.

COALINGA STATE HOSPITAL, et al., Defendants.

No. 1:08-CV-01457-MHM.

|  
Sept. 7, 2012.

**Attorneys and Law Firms**

Troyce Braninburg, Coalinga, CA, pro se.

Jesse M. Rivera, Rivera & Associates, Sacramento, CA,  
for Defendants.

**ORDER**

MARY H. MURGUIA, District Judge.

\*1 Currently before the Court is Defendants' Motion for Summary Judgment. (Doc. 31). After reviewing the motions, the responses and replies thereto, as well as the applicable law, the Court issues the following order.

**MOTION FOR SUMMARY JUDGMENT**

Plaintiff Troyce "Tabitha" Braninburg is a transgender female patient in the custody of Coalinga State Hospital ("CSH"). Plaintiff, proceeding *pro se*, filed the present civil rights complaint pursuant to 42 U.S.C. § 1983 for acts that she<sup>1</sup> alleged took place at CSH. In Counts One and Two, Plaintiff claims that Defendants were deliberately indifferent to Plaintiff's safety and security needs by taking no remedial action to stop other patients from sexually and verbally harassing her. Plaintiff further alleges, in Count Four, that two California Department of Corrections and Rehabilitation ("CDCR") officers fondled her breasts outside CSH before transporting her for medical treatment and placed metal restraints on her legs so tightly that they cut her skin. Finally, in Count Six, Plaintiff alleges that Defendants have segregated her and discriminated against her in her housing placement.

Defendants Avila, Adams, Singh, Reed, and Meek seek summary judgment on all of Plaintiff's claims.

**I. PROCEDURAL HISTORY**

In a February 13, 2009 Order, the Court dismissed Plaintiff's Complaint for failure to state a claim, and gave Plaintiff 30 days to file an amended complaint. (Doc. 8). On March 10, 2009, Plaintiff filed a Motion for 30 Days Expansion of Time, which the Court granted in a March 19, 2009 Order. (Doc. 9),

On April 24, 2009, Plaintiff filed a First Amended Complaint. (Doc.11), In a May 14, 2009 Order, the Court dismissed Plaintiff's First Amended Complaint, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, because Plaintiff failed to comply with the Court's Order requiring Plaintiff to submit her First Amended Complaint on the form provided with the February 13, 2009 Order. (Doc. 12). The Court granted Plaintiff's motion, giving her 30 days to file a second amended complaint on the form provided with the Order. (Doc. 12),

On June 15, 2009, Plaintiff filed a Second Amended Complaint, (Doc. 13), and on July 8, 2009, Plaintiff filed a motion for leave to amend the Second Amended Complaint. (Doc. 14), In an August 17, 2009 Order, the Court granted Plaintiff 30 days to file a third amended complaint, (Doc. 15).

On September 14, 2009, Plaintiff filed a seven-count Third Amended Complaint. (Doc. 16). In an October 20, 2009 Order, the Court dismissed Counts Three, Five, and Seven, and dismissed Defendants Jova, Walters, Pachardo, Woods, Taylor, Fletcher, and Does 1-99, (Doc. 17). The Court concluded that, liberally construed, Plaintiff stated a claim in Count One against Defendant Avila, for deliberate indifference by failing to stop a CSH patient from sexually harassing Plaintiff; a claim in Count Two against Defendant Reed, for deliberate indifference in not pressing the emergency alarm when a CSH patient attacked Plaintiff; a claim in Count Four against Defendants Two Unidentified CDCR Officers, for fondling Plaintiff's breasts before transporting her for medical treatment and placing excessively tight metal restraints on Plaintiff's legs, causing her legs to bleed; and a claim in Count Six against Defendants Adams, Singh, and Meek, for refusing to assign her to different housing after a patient threatened to kill or hurt her. (*Id.*). The

Court did not direct that service be made on Defendants Two Unidentified CDCR Officers, as the Court was unable to identify them. (*Id.*). The Court, however, did not dismiss the claims against those Defendants and stated that Plaintiff could use the discovery process to obtain their names and amend her Third Amended Complaint to name them, (*Id.*).

\*2 On December 28, 2009, Plaintiff sent a letter to the Clerk of Court requesting to make corrections and changes to the Third Amended Complaint. (Doc. 20). On February 25, 2010, the Court denied Plaintiff's request to file a Fourth Amended Complaint, stating that Plaintiff improperly communicated directly with court personnel, and that Plaintiff had ample opportunities to include such changes in her prior amended complaints. (Doc. 21).

On May 7, 2010, Defendants filed a motion requesting a 45-day extension to file responsive pleadings to Plaintiff's complaint, (Doc. 23), and the Court granted the extension in a May 19, 2010 Order. (Doc. 24). On June 21, 2010, Defendants filed an answer to Plaintiff's Third Amended Complaint. (Doc. 25). On March 21, 2011, the Court issued a Rule 16 Scheduling and Discovery Order. (Doc. 26). On January 13, 2012, Defendants filed a motion requesting a 90-day extension on the deadline to file dispositive motions. (Doc. 27). The Court granted in part and denied in part Defendants' motion, ordering that dispositive motions be filed by February 20, 2012, and stating that no further extensions would be granted. (Doc. 28).

On February 17, 2012, Defendants filed a motion requesting a one-week extension to file dispositive motions, (Doc. 29), which the Court granted for good cause on February 21, 2012. (Doc. 30). On February 27, 2012, Defendants filed the instant motion for Summary Judgment. (Doc. 31). On March 12, 2012, the Court issued an Order alerting Plaintiff to Defendant's motion. (Doc. 32). On March 15, 2012, Plaintiff filed a motion requesting a 90-day extension to respond to Defendant's summary judgment motion. (Doc. 33). The Court granted this motion on March 19, 2012. (Doc. 34).

On May 17, 2012, Plaintiff filed a motion objecting to summary judgment. (Doc. 35). Defendants filed a reply to Plaintiff's opposition on June 18, 2012. (Doc. 36).

## II. FACTUAL BACKGROUND

CSH is a maximum security psychiatric facility in Coalinga, California, offering therapeutic treatment for sex offenders and individuals with mental illnesses. (Defendants Statement of Facts ("DSOF"), p. 3, ¶ 7). Plaintiff is civilly committed at CSH as a sexually violent predator, (*Id.* at 110), and is a self-described "male-to-female pre-op transgendered female." (*Id.* at ¶ 13). She alleges that Defendants, employees of CSH, acted with deliberate indifference as she was sexually and verbally harassed by other patients on several occasions. (*Id.* at ¶ 15). She further alleges that she has been segregated and discriminated against in her housing placement.

### A. Facts relevant to Defendants Avila

Plaintiff alleges in Count I that Defendant Avila was deliberately indifferent to her safety and security needs by failing to stop CHS patients from sexually harassing her. In 2007, Defendant Avila was the Unit Supervisor for Unit 5, the unit in which Plaintiff was housed. (*Id.*, p. 4, ¶ 1). The duties of a Unit Supervisor include overseeing the functions of the unit, giving directions to staff, consulting with clinicians, and supervising the needs of patients. (*Id.* at ¶ 5). Plaintiff resided in a single room in Unit 5, where Defendant Avila observed Plaintiff generally socializing well with her peers without any significant behavior problems. (*Id.* at ¶ 17). If patients at CSH have conflicts with each other, staff will consult with each patient and may separate their room locations by placing the individuals in different hallways. (*Id.* at ¶ 13). If the conflict continues, staff will relocate a patient to a different unit in CSH. (*Id.* at ¶ 15).

\*3 On one occasion, Plaintiff alerted Defendant Avila to a non-threatening note left in Plaintiff's room and a suggestive cartoon placed on her window anonymously.<sup>2</sup> (*Id.* at ¶ 21). In her Third Amended Complaint, Plaintiff contends that she informed Defendant Avila that patient Mr. M was sexually harassing her, and that Defendant Avila took no remedial action to stop the harassment. (Doc. 16, p. 3). Conversely, Defendant Avila contends that, apart from the incident involving the anonymous note, she never spoke with Plaintiff regarding harassment by Mr. M, never witnessed patients threaten Plaintiff, and never refused to intervene if Plaintiff was under a threat of harm. (DSOF, p. 5, ¶ 17).

### B. Facts Relevant to Defendant Reed

In Count II, Plaintiff asserts that Defendant Reed was deliberately indifferent to Plaintiff's safety and security by standing idly by while a CSH patient physically attacked her. Defendant Reed was a Senior Psychiatric Technician at CSH from January 2008 to December 2010. (DSOF, p. 5, ¶ 19). Defendant Reed asserts that he never witnessed Plaintiff in a physical altercation with another patient, and that he was not working on July 4, 2008, one of the days on which Plaintiff alleges she was physically attacked. (*Id.* at ¶ 21). CSH administration and Hospital Police conducted an investigation of the alleged attacks, but hospital records indicate staff could not complete the investigation due to Plaintiff's failure to cooperate. (*Id.*, p. 6, ¶ 1).

On one occasion, Defendant Reed physically intervened between Plaintiff and another patient, Mr. R., as they exchanged verbal insults. (*Id.* at ¶ 6). Defendant Reed quieted Plaintiff and Mr. R., and physically intervened between them to avoid any escalation. (*Id.*). Defendant Reed did not feel the situation required activation of the emergency alarm, which he is trained to use when someone is in physical danger. (*Id.* at ¶ 9). In her complaint, Plaintiff asserts that Defendant Reed witnessed a patient attack her and "merely stood by, doing nothing." (Doc. 16, p. 4).<sup>3</sup>

### C. Facts Relevant to Defendants Singh, Meek, and Adams

In Count Six, Plaintiff contends that Defendants Singh, Meek, and Adams did not promptly reassign her housing placement after Plaintiff was housed with a patient who threatened to kill her. She additionally alleges that, while CSH staff ultimately moved her to a different dorm, she has been "segregated and discriminated" against by Defendant Meek. (Doc. 16, p. 5c).

During the time of Plaintiff's complaints in 2009, Defendant Singh was the Medical Director at CSH, where his duties included: acting as the primary physician of the hospital, developing policies for clinical practice, and directing treatment programs. (DSOF, p. 6–7). He neither made the patient housing placements in 2009, nor made any decisions regarding moving a patient from one room to another based upon their preferences. (*Id.* at 7, ¶ 34). Defendant Meek was the acting Program Director at CSH in 2009. (*Id.*, ¶ 15).<sup>4</sup>

\*4 In February of 2009, Plaintiff was at court and thus out of the facility for several days. (DSOF, p. 8, ¶

10). After she returned, Plaintiff complained that other residents in her dorm, particularly Mr. P, did not want her there and harassed her. (*Id.* at ¶ 12). The first report to staff about Mr. P was on February 17, 2009, regarding a verbal threat, and staff prepared an Incident Report according to hospital protocol. (*Id.* at ¶ 18). Following this complaint, staff increased their supervision of Plaintiff. (*Id.* at ¶ 14). Defendant Meek contends that he never saw patients harass or assault Plaintiff, but that he nevertheless conducted an investigation into Plaintiff's complaints of harassment from dormmates in February 2009. (*Id.*, p. 8, ¶ 17). On or about March 5, 2009, Plaintiff was transferred from unit 8 to unit 11 and into a single room, (*Id.* at ¶ 16). Plaintiff does not deny that CSH staff ultimately rehoused her, but alleges that Defendant Meek has segregated her and discriminated against her in the new housing placement.

### III. STANDARD OF REVIEW

A motion for summary judgment may be granted only if the moving party shows "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of establishing the absence of any genuine issue of material fact; the moving party must present the basis for its summary judgment motion and identify those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Chelates Corp. v. Citrate*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001).

A material fact is one that might affect the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In addition, in order to preclude summary judgment, a dispute about a material fact must also be "genuine," such that a reasonable jury could find in favor of the non-moving party. *Id.* In determining whether the moving party has met its burden, the Court views the evidence in the light most favorable to the nonmovant. *Allen v. City of L.A.*, 66 F.3d 1052, 1056 (9th Cir.1995). The Court may not make credibility determinations or weigh conflicting evidence. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir.1990). Further, the Court must draw all reasonable inferences in favor of the nonmovant. *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1180 (9th Cir.2002).

If the moving party meets its burden with a properly supported motion for summary judgment, then the burden shifts to the nonmoving party to present specific facts that show there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To defeat a motion, the non-moving party must show that there are genuine factual issues “that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party,” *Anderson*, 477 U.S. at 250. The party opposing summary judgment “may not rest upon mere allegations or denials of [the party's] pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e); see also *Matsushita Elec.*, 475 U.S. at 586–87. Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989).

\*5 The question on motion for summary judgment is thus whether the evidence “presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 447 U.S. at 251–52. A court is not required to probe the record in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.1996). The nonmovant has the burden of identifying with reasonable particularity the evidence that precludes summary judgment. See *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028–29 (9th Cir.2001) (holding that even if there is evidence in the record that creates a genuine issue of material fact, a district court may grant summary judgment if the opposing party's papers do not include or conveniently refer to that evidence). The mere existence of a scintilla of evidence supporting the nonmovant's petition is insufficient; there must be evidence from which a trier of fact could reasonably find for the nonmovant. *Anderson*, 447 U.S. at 252; see *Matsushita Elec.*, 475 U.S. at 586 (holding that nonmovant's showing of “some metaphysical doubt” as to material facts is insufficient to defeat summary judgment).

#### IV. DISCUSSION

##### A. Alleged Due Process Violations

Throughout her Third Amended Complaint and opposition motion, Plaintiff characterizes Defendants' conduct as “deliberately indifferent” to her safety and

security needs.<sup>5</sup> However, in Paragraph 1 of each count, Plaintiff states that Defendants violated her Due Process rights, not her Eighth Amendment rights. Her claims will thus be analyzed under the 14th Amendment Due Process Clause. Moreover, this is the proper standard in light of the fact that Plaintiff does not allege a denial of medical treatment, but instead challenges her conditions of confinement,

The Due Process Clause of the 14th Amendment protects a civil detainee's right to adequate conditions of confinement, including the right to “adequate food, shelter, clothing, and medical care” as well as “reasonably safe conditions of confinement.” See *Youngberg v. Romeo*, 457 U.S. 307, 314–16, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). In determining whether the state has met its Constitutional duty of providing reasonably safe conditions, “decisions made by the appropriate professional are entitled to a presumption of correctness.” *Id.* at 324. To incur liability, a professional must make a decision that “is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment,” *Id.* at 323; *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir.1992). The Court's inquiry is thus limited to “two questions: (1) whether the decisionmaker is a qualified professional entitled to deference, and (2) whether the decision reflects a conscious indifference amounting to gross negligence, so as to demonstrate that the decision was not based upon professional judgment.” *Id.* at 1535.

\*6 After careful consideration of Plaintiff's Third Amended Complaint and the instant motion, the Court finds that Plaintiff has failed to marshal enough evidence to create a triable issue of material fact with respect to her allegations against Defendants Avila, Reed, Singh, Meek, and Adams.

##### 1. Defendant Avila

Defendants contend that Plaintiff fails to raise an issue of material fact regarding Defendant Avila, because Defendant Avila neither witnessed Plaintiff being threatened, nor spoke with Plaintiff regarding the alleged harassment by patient Mr. M. At most, Defendant Avila states that she knew of a non-threatening note and cartoon placed in Plaintiff's room. (Doc. 31, p. 2, ¶ 7).

Defendant Avila's conduct did not violate Plaintiff's Due Process rights, as it does not come close to being a substantial departure from accepted professional judgment. *Youngberg*, 457 U.S. at 323. In one case of failed professional judgment, a hospital superintendent received multiple complaints that a male staff member had sexually assaulted female patients, and nevertheless allowed that staff member to continue working in seclusion with a female patient until he ultimately molested her. *Neely v. Feinstein*, 50 F.3d 1502 (9th Cir.1995). In another instance, a detainee was repeatedly raped by his cellmate, and challenged prison policies which integrated sexually violent prisoners into the general population. *Redman v. Cnty. of San Diego*, 942 F.2d 1435 (9th Cir.1991). The 9th Circuit held that these policies exposed inmates to known dangers, jeopardized their personal security, and thus the defendants' "conduct was so reckless as to be tantamount to a desire to inflict harm." *Id.* at 1447-48.

In contrast, Plaintiff puts forth no evidence that Defendant Avila failed to exhibit professional judgment. She does not state with any specificity when the alleged incidences of threats and sexual harassment occurred while residing in Unit 5, or put forth any evidence suggesting Defendant Avila knew about the alleged harassment. She also fails to show that Defendant Avila's conduct led to any ensuing harm. In short, even when viewed in the light most favorable to Plaintiff, Defendant Avila's conduct does not create a triable issue of material fact regarding her professional judgment. Accordingly, her conduct is presumed valid and summary judgment must be granted. *Youngberg*, 457 U.S. at 324.

## 2. Defendant Reed

Defendant Reed similarly contends that there is no question of material fact as to the adequacy of his professional judgment in maintaining Plaintiff's safety. He contends that his decision not to activate an emergency alarm during one particular incident does not represent a "substantial departure" from professional standards of hospital psychiatric technicians, who are trained to use the alarm only in the event of physical danger. (Doc. 31, p. 19, ¶ 11).

Defendant Reed's conduct did not violate Plaintiff's Due Process rights. *Youngberg*, 457 U.S. at 321 ("[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of

several professionally acceptable choices should have been made"). During the July, 2008 incident at issue, Defendant Reed witnessed a verbal altercation between Plaintiff and patient Mr. R, and physically intervened to prevent Mr. R, from grabbing or touching Plaintiff. (Doc. 31, ex. A, p. 29-32). As a result of Defendant Reed's intervention, Plaintiff exited the altercation and avoided physical harm. (*Id.*). Plaintiff presents no evidence indicating that Defendant Reed's decision to physically intervene is a departure from accepted professional standards. Moreover, Plaintiff was not harmed during this encounter. (*Id.*). Accordingly, even when viewed in the light most favorable to Plaintiff, no question of material fact exists as to whether Defendant Reed's decision to diffuse the altercation through physical intervention, instead of activating the personal alarm, was a substantial departure from accepted professional judgment. *Youngberg*, 457 U.S. at 314.

## 3. Defendants Singh, Meek, and Adams

\*7 With regard to Defendants Singh, Meek and Adams, Plaintiff claims that Defendants refused to change her housing placement after her cellmate threatened, intimidated, and taunted Plaintiff in February 2009. Plaintiff was ultimately rehoused, where she asserts that she is now "segregated and discriminated" against by Defendant Meek.

Defendants contend that they are entitled to summary judgment because Plaintiff's complaint that she was not rehoused quickly enough simply does not rise to the level of a constitutional violation. Defendants contend that CSH responded appropriately and comprehensively to Plaintiff's complaints of verbal threats by increasing supervision of Plaintiff and removing Plaintiff from that unit. (Doc. 31, p. 20).

Defendants did not violate Plaintiff's Due Process rights in their handling of Plaintiff's housing complaints. First, while Plaintiff's right to be protected and confined in a safe institution is clearly established, *see Youngberg*, 457 U.S. at 319-22, "[v]erbal harassment or abuse ... is not sufficient to state a constitutional deprivation under 42 U.S.C. § 1983." *Oltarzewski v. Rugeiero*, 830 F.2d 136 (9th Cir.1987) (internal citation omitted). Second, Plaintiff puts forth no evidence persuasive or authority that Defendants' failure to rehouse Plaintiff more expeditiously constitutes a substantial departure from professional standards. She additionally provides no explanation or support for her claim that Defendant

Meek has segregated her in her new housing placement. In contrast, Defendants submit records and internal memos indicating that CSH indeed documented Plaintiff's complaints of threats in February 2009, subsequently increased supervision of her, investigated the alleged harassment, and ultimately rehoused her in March 2009.

In the absence of any apparent errors in professional judgment or evidence of discriminatory treatment in handling Plaintiff's housing complaints, Plaintiff has failed to raise a genuine issue of material fact as to unconstitutional living conditions.<sup>6</sup>

### B. Alleged Equal Protection Violations

Plaintiff alleges in paragraph 1 of each Count that she was denied Equal Protection when Defendants failed or refused to protect her from the harm of other inmates as a result of Plaintiff's status as an HIV positive, pre-operative transgender female. (Doc. 35, p. 23, ¶ 6).

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (internal quotations omitted). An equal protection claim may be established in two ways. The first requires a plaintiff to "show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class," *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.1998), *cert. denied*, 525 U.S. 1154, 119 S.Ct. 1058, 143 L.Ed.2d 63 (1999).

\*8 Plaintiff has not put forth any evidence of discrimination, or discriminatory intent, based on Plaintiff's status as an HIV positive, transgender female, beyond merely pointing out that she has HIV and is a transgender female. Moreover, it is not apparent that transgender individuals constitute a "suspect" class. See *Jamison v. Davue*, No. CIVS-11-2056 WBS DAD P., 2012 WL 996383, at \*3 (E.D.Cal. Mar.21, 2012) ("transgender individuals do not constitute a 'suspect' class").

If the action in question does not involve a suspect classification, a plaintiff may establish an equal protection claim by showing that similarly situated individuals

were intentionally treated differently without a rational relationship to a legitimate state purpose. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). To state an equal protection claim under this theory, a plaintiff must allege that: (1) she is a member of an identifiable class; (2) she was intentionally treated differently from others similarly situated; and (3) there is no rational basis for the difference in treatment. *Id.* at 564.

Plaintiff has not alleged facts to satisfy any of these three factors. Her conclusory statements of discriminatory treatment are insufficient to demonstrate a material issue of fact as to the denial of Equal Protection. *Matsushita Elec.*, 475 U.S. at 586-87,

### C. Plaintiff's State Law Claims

In her opposition to Defendant's motion for summary judgment, Plaintiff alleges for the first time that, in addition to violations of the federal Constitution, Defendants violated mandatory reporting provisions under California Welfare and Institution Code § 15600. (Doc. 35, p. 2).

FRCP Rule 15(a)(2) enables a party to supplement pleadings and thereby introduce a new cause of action not alleged in the original complaint, "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2) (emphasis added). In the Court's February 25, 2010 Order, the Court specifically informed Plaintiff of this fact. Because Plaintiff has not provided a proper motion and notice to add a state law claim, any new claim not raised in the Third Amended Complaint is considered waived,

### D. Claims Against Two Unidentified CDCR Officers

In Count Four, Plaintiff alleges that Defendants Two Unidentified CDCR Officers fondled her breasts before transporting Plaintiff for medical treatment outside CSH and placed excessively tight metal restraints on Plaintiff's legs, causing her legs to bleed, (Doc. 16, p. 5a). To enable Plaintiff to utilize discovery to identify the unknown defendants, the Court did not previously dismiss these claims. Because Plaintiff has not served these defendants, the claim is dismissed for failure to prosecute.

### E. Qualified Immunity

Because the Court finds that summary judgment should be granted in favor of Defendants, the Court does not reach Defendants' arguments regarding qualified immunity.

#### IV. CONCLUSION

\*9 Plaintiff's Opposition does not place any material fact in dispute.

Accordingly,

**IT IS HEREBY ORDERED** granting Defendants Avila, Adams, Singh, Reed, and Meek's Motion for Summary Judgment.

**IT IS FURTHER ORDERED** that all remaining Defendants are dismissed for Plaintiff's failure to serve pursuant to Rule 4 of the Federal Rules of Civil Procedure.

**IT IS FURTHER ORDERED** directing the Clerk to enter judgment accordingly.

Dated this 6th day of September, 2012.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3911910

#### Footnotes

- 1 Plaintiff is referenced as "he" by Defendants and in a prior Court order. However, Plaintiff asks to be referred to as "she." (Doc. 35, p. 2, ¶ 4).
- 2 Neither party specifically describes the substance of the cartoon or the note, Plaintiff disputes Defendant Avila's characterization of the note as non-threatening, (Doc. 35, p. 5, ¶ 20), but has not put forth any evidence in support of this assertion.
- 3 In her opposition motion, Plaintiff objects to various points in DSOF, asserting that: (1) CSH Administration did not conduct a meaningful investigation into her complaints of assault; and (2) Plaintiff never failed to cooperate in any investigation of her complaints. Plaintiff again presents no evidence in support of these contentions.
- 4 Neither party provides any information as to Defendant Adams' identity, occupation, or involvement in the matter. Plaintiff does not make any specific allegations against Defendant Adams, aside from broadly alleging that "Drs, Adams and Singh, and Daniel [Meek] refused to assign [her] to other housing." (Doc. 16, p. 5c).
- 5 A claim of "deliberate indifference" alleges that prison officials have violated an inmate's Eighth Amendment rights to adequate medical care. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment is applicable to the states through the Due Process Clause of the Fourteenth Amendment, and mandates that states provide adequate medical care to all of their prisoners.).
- 6 Although neither party mentioned Defendant. Adams, *see supra* n. 4, Plaintiff alleges that he engaged in the same conduct as Defendants Meek and Singh. Since this Court has concluded that Plaintiff has failed to adduce a disputed issue of material fact with respect to the actions of Defendants Meek and Singh, the Court will grant summary judgment in favor of Defendant Adams as well.

2012 WL 996383

Only the Westlaw citation is currently available.

United States District Court,  
E.D. California.

Jeremy JAMISON, Plaintiff,

v.

Officer DAVUE et al., Defendants.

No. CIV S-11-2056 WBS DAD P.

|  
March 23, 2012.

**Attorneys and Law Firms**

Jeremy Jamison, Woodland, CA, pro se.

**ORDER**

DALE A. DROZD, United States Magistrate Judge.

\*1 Plaintiff is a county jail inmate proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. This proceeding was referred to the undersigned magistrate judge in accordance with Local Rule 302 and 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the court will grant plaintiff's request for leave to proceed in forma pauperis.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

**SCREENING REQUIREMENT**

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1) & (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir.1989); *Franklin*, 745 F.2d at 1227.

Rule 8(a) (2) of the Federal Rules of Civil Procedure "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must contain more than "a formulaic recitation of the elements of a cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atlantic*, 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969).

\*2 The Civil Rights Act under which this action was filed provides as follows:

Every person who, under color of [state law] ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution ... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another’s affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978).

Moreover, supervisory personnel are generally not liable under § 1983 for the actions of their employees under a theory of *respondeat superior* and, therefore, when a named defendant holds a supervisory position, the causal link between him and the claimed constitutional violation must be specifically alleged. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir.1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.1978). Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient. *See Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir.1982).

### PLAINTIFF'S COMPLAINT

In the present case, plaintiff has identified as defendants Officer Davue, Lieutenant Day, Lieutenant Rademaker, Sergeant Chow, Officer Chand, and Dr. Zil.<sup>1</sup> All of the defendants are employed at the Yolo County Jail in Woodland, California. According to the complaint, plaintiff adheres to the Jewish faith and follows a kosher diet. Plaintiff is also transgender, with breasts, and takes female hormones. Plaintiff complains that he has had difficulty getting kosher meals and has experienced

harassment as a result of his transgender status. In terms of relief, plaintiff requests monetary damages.

### DISCUSSION

The allegations in plaintiff’s complaint are so vague and conclusory that the court is unable to determine whether the current action is frivolous or fails to state a claim for relief. The complaint does not contain a short and plain statement as required by Fed.R.Civ.P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice to the defendants and must allege facts that support the elements of the claim plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir.1984). Plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that support his claims. *Id.* Because plaintiff has failed to comply with the requirements of Fed.R.Civ.P. 8(a)(2), the complaint must be dismissed. The court will, however, grant leave to file an amended complaint.

\*3 In any amended complaint, plaintiff must allege facts demonstrating how the conditions complained of resulted in a deprivation of plaintiff’s federal constitutional or statutory rights. *See Ellis v. Cassidy*, 625 F.2d 227 (9th Cir.1980). Plaintiff must also allege in specific terms how each named defendant was involved in the deprivation of his rights. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant’s actions and the claimed deprivation. *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir.1980); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978).

If plaintiff elects to pursue this action by filing an amended complaint, he must clarify what constitutional or federal statutory right he believes each defendant has violated and support each claim with factual allegations about each defendant’s actions. To the extent that plaintiff wishes to raise a claim against any of the defendants for interfering with his ability to freely exercise his religion with respect to receiving a kosher diet, he is advised that he may bring his claim under the First Amendment and/or the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). Under the First Amendment, free exercise rights are “necessarily limited by the fact

of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security.” *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir.1987). The constitutional right to free exercise of religion must be balanced against the state’s right to limit First Amendment freedoms in order to attain valid penological objectives such as rehabilitation, deterrence of crime, and preservation of institutional security. *See O’Lone v. Shabazz*, 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987); *Pell v. Procunier*, 417 U.S. 817, 822–23, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). These competing interests are balanced by applying a “reasonableness test.” *McElyea*, 833 F.2d at 197. Under RLUIPA, the government is prohibited from imposing “a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000cc–1(a). Plaintiff bears the initial burden of demonstrating that an institution’s actions have placed a substantial burden on plaintiff’s free exercise of religion. To state a cognizable claim under the First Amendment or RLUIPA, plaintiff must specify in any amended complaint which defendants have denied him access to a kosher diet and link his claim together with specific defendant(s) and his or her specific conduct.

To the extent that plaintiff wishes to raise a claim against any of the defendants for harassing him or discriminating against him based on his transgender status, he is advised that verbal harassment or abuse alone does not violate the Constitution and thus does not give rise to a claim for relief under 42 U.S.C. § 1983. *Austin v. Terhune*, 367 F.3d 1167, 1171–72 (9th Cir.2004); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir.1987) (vulgar language and verbal harassment do not state a constitutional deprivation under § 1983). However, to the extent that plaintiff seeks to bring an equal protection claim against defendants for discriminating against him, he is advised that the Fourteenth Amendment Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To state a cognizable claim under the Equal Protection Clause, plaintiff “must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent.” *Byrd v. Maricopa County Sheriff’s Dep’t*, 565 F.3d 1205, 1212 (9th Cir.2009) (quoting *Monteiro v. Tempe Union High School District*, 158 F.3d 1022, 1026 (9th Cir.1998)).

“Intentional discrimination means that a defendant acted at least in part *because of* a plaintiff’s protected status.” *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir.2003) (emphasis in original) (quoting *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir.1994)). Plaintiff is cautioned, however, that transgender individuals do not constitute a “suspect” class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review. In this regard, any regulation, policy, or practice will be upheld if it is “reasonably related to legitimate penological interests.” *See Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

\*4 Plaintiff is informed that the court cannot refer to a prior pleading in order to make plaintiff’s amended complaint complete. Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleading. This is because, as a general rule, an amended complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.1967). Once plaintiff files an amended complaint, the original pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must be sufficiently alleged.

## OTHER MATTERS

Also pending before the court are plaintiff’s motion for preliminary injunctive relief and motion for appointment of counsel. In plaintiff’s motion for preliminary injunctive relief, plaintiff seeks a court order requiring defendants to obtain his breakfast, lunch, and dinner from a local establishment that provides kosher meals prepared in a kosher kitchen. As an initial matter, plaintiff’s motion is defective because it does not comply with the Local Rules of Court. The court will not entertain any future request or motion for injunctive relief that is not supported by (1) a declaration under penalty of perjury on the question of irreparable injury, (2) a memorandum of points and authorities addressing all legal issues raised by the motion, and (3) evidence of notice to all persons who would be affected by the order sought. *See Local Rule 231*. In addition, plaintiff’s motion for injunctive relief is premature. No defendants have been served at this time and thus have not been provided an opportunity to respond to plaintiff’s allegations. *See Zepeda v. United*

*States Immigration Service*, 753 F.2d 719, 727 (9th Cir.1985) (“A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court.”). Finally, for the same reasons discussed above, plaintiff’s motion fails to state a cognizable claim for relief and does not demonstrate that plaintiff is entitled to the requested court order. See *Stormans v. Selecky*, 571 F.3d 960, 978 (9th Cir.2009) (“The proper legal standard for preliminary injunctive relief requires a party to demonstrate ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.’ ”) (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). Accordingly, plaintiff’s motion for preliminary injunctive relief will be denied without prejudice.

As to plaintiff’s motion for appointment of counsel, the United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. *Mallard v. United States Dist. Court*, 490 U.S. 296, 298, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). In certain exceptional circumstances, the district court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir.1991); *Wood v. Housewright*, 900 F.2d 1332, 1335–36 (9th Cir.1990).

\*5 The test for exceptional circumstances requires the court to evaluate the plaintiff’s likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. See *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir.1986); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.1983). Circumstances common to most prisoners, such as lack of legal education and limited law library access, do not establish exceptional circumstances that would warrant a request for voluntary assistance of counsel. In the present case, the court does not find the required exceptional circumstances.

## CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff’s application to proceed in forma pauperis (Doc. No. 12) is granted.
2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the Sheriff of Yolo County filed concurrently herewith.
3. Plaintiff’s complaint is dismissed.
4. Plaintiff is granted thirty days from the date of service of this order to file an amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number assigned to this case and must be labeled “Amended Complaint”; failure to file an amended complaint in accordance with this order will result in a recommendation that this action be dismissed without prejudice.
5. Plaintiff’s motion to correct the spelling of defendant Davue and defendant Radamaker’s names (Doc. No. 11) is granted.
6. Plaintiff’s motion for preliminary injunctive relief (Doc. No. 11) is denied without prejudice.
7. Plaintiff’s motion for appointment of counsel (Doc. No. 11) is denied.
8. The Clerk of the Court is directed to amend the docket to reflect the correct spelling of defendant Davue and defendant Radamaker’s names and to send plaintiff the court’s form for filing a civil rights action.

## All Citations

Not Reported in F.Supp.2d, 2012 WL 996383

## Footnotes

1 In his complaint, plaintiff spelled defendant Davue's name "Dauve" and spelled defendant Rademaker's name "Ratliff." Plaintiff has filed a motion to correct the spelling of the defendants' names. Good cause appearing, the court will grant plaintiff's motion and direct the Clerk of the Court to amend the docket to reflect the correct spelling of defendants' names.

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Only the Westlaw citation is currently available.  
United States District Court, D. Hawai'i.

Dion'e KAEO-TOMASELLI, Plaintiff,

v.

Jennifer BUTTS, Iwalani Souza, Defendants.

Civ. No. 11-00670 LEK/BMK.

Jan. 31, 2013.

#### Attorneys and Law Firms

Dion'e Kaeo-Tomaselli, Kailua, HI, pro se.

Iwalani Souza, Honolulu, HI, pro se.

#### **ORDER DENYING MOTION FOR SUMMARY JUDGMENT**

LESLIE E. KOBAYASHI, District Judge.

\*1 Before the court is *pro se* Plaintiff Dion'e Kaeo-Tomaselli's Motion for Summary Judgment.<sup>1</sup> ECF # 60. Plaintiff alleges that Defendants Jennifer Butts and Iwalani Souza, respectively the owner and manager of the Pi'ikoi Clean and Sober House for Women ("Pi'ikoi House"), violated the Fair Housing Act ("FHA") of 1968,<sup>2</sup> the Equal Protection Clause of the Fourteenth Amendment, and state law when they allegedly refused her request for accommodation at Pi'ikoi House on August 10, 2010. Plaintiff seeks summary judgment on the allegations in her pleadings and documents she has filed showing that she is a hermaphrodite, is treated as a female by the State, and inquired about residing at Pi'ikoi House in 2010. The court elects to decide this matter without a hearing. *See* LR7.2(d). For the following reasons, Plaintiff's Motion is DENIED.

#### **I. BACKGROUND**

This action is proceeding on Plaintiff's claims against Defendant Butts and Souza in the Second Amended Complaint ("SAC"). *See* ECF # 27. Plaintiff alleges that, on August 10, 2010, the WCCC Librarian, Harry Fuchigami, telephoned Souza to inquire whether Plaintiff

could reside at Pi'ikoi House upon her release from prison. Plaintiff alleges that Souza told Fuchigami that she would not accept Plaintiff as a resident "because former inmates who currently live in the house told [Souza] that [Plaintiff] was a sex change." *Id.* at PageID # 148. Plaintiff claims that Butts failed to properly train Souza and protect her from Souza's alleged discrimination. Plaintiff seeks damages, continuing psychological treatment, and reformation of policies and procedures at the Pi'ikoi House.

#### **II. LEGAL STANDARD**

"[T]he moving party always bears the initial responsibility of informing the district court of the basis for its motion [for summary judgment], and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001). "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir.2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir.1992)).

Put another way, "[her] showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.1986) (quoting W. Schwarzer, Summary Judgment Under the Federal Rules: Defining Issues of Material Fact, 99 F.R.D. 465, 487 (1984)); *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Chanel, Inc. v. Italian Activewear of Florida, Inc.*, 931 F.2d 1472, 1477 (11th Cir.1991) ("But—particularly where, as here, the moving party is also the party with the burden of proof on the issue—it is important to remember the non-moving party must produce its significant, probative evidence *only after* the movant has satisfied its burden of demonstrating there is no genuine dispute on any material fact.") (emphasis added).

\*2 Thus, on a summary judgment motion, the moving party bearing the ultimate burden of proof at trial must demonstrate that there is no triable issue as to the matters alleged in its own pleadings. *Calderone*, 799 F.2d at 259. This requires the moving party to establish beyond controversy every essential element of its claim or defense. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986). The moving party's evidence is judged by the same standard of proof applicable at trial. *Anderson*, 477 U.S. at 252.

If the moving party fails to meet this burden, “the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir.2000). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255; *see also Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir.2008).

### III. DISCUSSION

In support of her Motion, Plaintiff provides:

(1) a verified letter from WCCC librarian, Harry Fuchigami, stating that Souza told him that: (a) Plaintiff must contact her personally to apply for residency at Pi‘ikoi House; (b) current residents vote on new candidates for residence; (c) some current residents had informed Souza that they were uncomfortable accepting Plaintiff because they believed she had undergone a sex change operation; and (d) Souza believed that Plaintiff's request would likely be denied by the other residents. *See* Pl.'s Mot., Fuchigami Letter, ECF # 60–4; Fuchigami Aff., ECF # 64–1.

(2) a letter from her attorney, Deputy Public Defender E. Edward Aquino, Esq., stating that Plaintiff was born a hermaphrodite and this has caused problems for Plaintiff during her incarceration. *Id.*, Aquino Letter, ECF # 60–5, ECF # 60–6.

(3) a copy of her Hawaii Identification Certificate, listing her as female. *Id.* ECF # 60–1; ECF # 60–2.

(4) psychiatric and medical progress notes from the Hawaii Department of Public Safety, stating that Plaintiff's penis is “so atrophied [it] is more like an enlarged clitoris.” Based on this, Plaintiff was assigned to the Women's Community Correctional Center, as a female inmate. *Id.* ECF # 60–3.

(5) various documents showing that Plaintiff wrote Souza on July 18, 2010, detailing her desire to reside at Pi‘ikoi House, filed a complaint with the Hawaii Civil Rights Commission and contacted the U.S. Department of Justice regarding her housing discrimination claims. ECF # 60–4, # 62–2, # 62–3, # 62–5.

#### A. Genuine Issues of Fact Remain Under the FHA

The FHA “protects against discrimination ‘in the terms, conditions, or privileges of sale or rental of a dwelling ... because of race, color, religion, sex, familial status, or national origin[.]’” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1063 (9th Cir.2004); 42 U.S.C. § 3604(b). To have standing to sue under the FHA, a party must be an “aggrieved person,” which is defined as one who “(1) claims to have been injured by a discriminatory housing practice; or (2) believes that [he or she] will be injured by a discriminatory practice *that is about to occur.*” 42 U.S.C. § 3602(i) (emphasis added).

#### 1. Standing to Sue

\*3 Although the Supreme Court recognizes a liberal standing requirement for actions brought under the FHA, a plaintiff must still show an actual injury traceable to a defendant's conduct; only then is she entitled to seek redress for that harm. *See Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n. 9, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir.1998). Thus, to establish that she is an “aggrieved person,” Plaintiff must demonstrate that she suffered a concrete injury in fact or one that is actual and imminent; that such injury is fairly traceable to Defendants' allegedly illegal actions; and that it is likely that such injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiff fails to demonstrate by a preponderance of the evidence that she suffered any actual injury traceable to Souza's alleged statements to Fuchigami. That is, Plaintiff

submits no evidence showing that she was eligible to reside at Pi'ikoi House and was denied residence on the basis of her sex or perceived gender, and thus, was subjected to an actual injury by an *imminent* discriminatory housing practice.

Fuchigami's conversation with Souza does not prove that Plaintiff actually applied for residence at Pi'ikoi house, or personally spoke with Souza as required by Pi'ikoi House's rules, and was refused. Fuchigami's letter shows only that Souza allegedly told him that Plaintiff must contact her personally, Pi'ikoi House's residents vote on who is accepted, and Souza believed the current residents would not accept Plaintiff based on their belief that she had a sex change operation. Souza may deny Fuchigami's account, or produce evidence that Pi'ikoi House management can overrule resident votes that are deemed illegal or against policy. Either possibility would create a genuine issue of fact.

More importantly, Plaintiff's documents show that Plaintiff was incarcerated in July–August 2010, when she wrote Souza and when Fuchigami contacted Souza, was incarcerated while she pursued her claims with the Hawaii Civil Rights Commission and others, and remains incarcerated now.<sup>3</sup> If Plaintiff was incarcerated when she and Fuchigami contacted Souza, and was not eligible for imminent release, then even accepting her claims as true, Plaintiff was not eligible for residence at Pi'ikoi House during the past three years. Plaintiff does not show any actual injury based on an illegal housing decision that occurred or was “about to occur,” thus, that there is *no* genuine issue of material fact regarding her standing to sue.<sup>4</sup> See 42 U.S.C. § 3602(i).

## 2. The Roommate Exception to Liability Under the FHA

It appears that Pi'ikoi House is a group home, that is, a shared living accommodation where residents share rooms and/or living quarters and vote on accepting new residents. See Pl.'s Exh., “Women's Clean & Sober House Listing,” ECF # 62–1 (listing Pi'ikoi House and advising those seeking “a clean and sober house,” to inquire about the “the cost [and] meet your possible room mates (how many live there?, how many in a room?”); Fuchigami Letter, ECF # 64–2 (stating, “[Souza] was very cordial and explained to me that the residents of her clean and sober house take a vote to see if a candidate should be accepted into the house.”).

\*4 The Ninth Circuit Court of Appeals has recently held that, under the FHA, a “ ‘dwelling’ does not include shared living units ... [and] excludes roommate selection from the reach of the FHA.” *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1222 (9th Cir.2012). In so holding, the Ninth Circuit stated, “choosing a roommate implicates significant privacy and safety considerations,” and should not be subject to government regulation. *Id.* at 1221 (stating that a woman may consider modesty or security concerns when seeking a roommate, just as “[a]n orthodox Jew may want a roommate with similar beliefs and dietary restrictions,” and should have the unfettered ability to do so). The court explained that, “[b]ecause we find that the FHA doesn't apply to the sharing of living units, it follows that it's not unlawful to discriminate in selecting a roommate.” *Id.* at 1222.

While this court held that Plaintiff *states a claim* under the FHA, that determination does not equate to a finding that Plaintiff has *proved* her claim. The record is inadequate for the court to make a determination on whether Plaintiff has standing to sue, or whether Pi'ikoi House is a shared living accommodation, or on the overall merits of Plaintiff's claims under the FHA at this time. Nonetheless, Plaintiff fails to meet her burden of showing that there is no genuine issue of material facts regarding her FHA claims. Consequently, the burden does not shift to Defendants, the non-moving parties, to produce contrary evidence. Plaintiff's Motion for Summary Judgment is DENIED on her FHA claims.

## B. Plaintiff's § 1983 Claims

Plaintiff seeks relief under 42 U.S.C. § 1983, alleging that Defendants violated her rights to equal protection under the law. To succeed on her § 1983 claim, Plaintiff must show that the conduct at issue “was committed by a person acting under the color of state law” and that the “conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.” *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Hydrick v. Hunter*, 500 F.3d 978, 987 (9th Cir.2007) (citation omitted), *vacated and remanded on other grounds*, 556 U.S. 1256, 129 S.Ct. 2431, 174 L.Ed.2d 226 (2009).

“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to

any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (internal quotations omitted).

### ***1. No Evidence That Defendants Acted Under Color of State Law***

A person acts under color of state law if he or she “exercise[s] power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’ “ *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368(1941)). “Private parties are not generally acting under state law.” *Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir.1991).

\*5 Plaintiff submits no evidence that Butts and Souza, the owner and resident manager of an apparently privately owned and operated group home, were acting under color of state law. Thus, a genuine issue of material facts exists regarding Defendants' status as state actors.

### ***2. No Similarly Situated Individuals Named***

An equal protection claim may be established in two ways; the first requires a plaintiff to “show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.1998). Plaintiff puts forth no evidence that her status as a hermaphrodite, or transgender female, qualifies her as a member of a protected class. Nor has this court discovered any cases in which transgendered individuals constitute a “suspect” class. *See, e.g., Braninburg v. Coalinga State Hosp*, 2012 WL 391190, \*8 (E.D.Cal., Sep. 7, 2012); *Jamison v. Davue*, 2012 WL 996383, \*3 (E.D.Cal. Mar.21, 2012) (holding that transgender individuals do not constitute a suspect class).

Alternatively, if the claims do not involve a suspect classification, a plaintiff can establish an equal protection “class of one” claim by alleging that she “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000);

*Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir.2004). To prevail under this theory, a plaintiff must show that: (1) she is a member of an identifiable class; (2) she was intentionally treated differently from others similarly situated; and (3) there is no rational basis for the difference in treatment. *Vill. of Willowbrook*, 528 U.S. at 564. Plaintiff sets forth no evidence supporting a finding that other similarly situated individuals were treated differently from her and that there is no rational basis for such differential treatment. Thus, Plaintiff fails to show that there is no genuine issue of material fact regarding her equal protection claims. Plaintiff's Motion is DENIED on her equal protection claims and Defendants need not respond.

### ***3. Defendant Butts is Dismissed***

“Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case *at any time* if the court determines that ... the action or appeal ... fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added). Thus, the court retains a continuing duty to screen a prisoner's complaint and must dismiss a complaint or portion thereof if it determines that a claim is frivolous, malicious, or fails to state a claim. *Id.; c.f., Lopez v. Smith*, 203 F.3d 1122, 1126 n. 6 (9th Cir.2000) (*en banc*) (holding that a court is not relieved of its duty to screen a complaint under the Prison Litigation Reform Act of 1996 (“PLRA”), even after a motion to dismiss is brought).

\*6 Plaintiff alleges that Butts “failed to protect [her] from” Souza's discriminatory acts by failing to train Souza, but provides no other facts linking Butts to Souza's alleged comments and supposed denial of housing. *See* SAC, ECF # 27 PageID # 147. That is, Plaintiff makes no allegations that Butts, knew of, directed, or played any role in Souza's alleged decision to deny Plaintiff housing at Pi'ikoi House. Plaintiff appears to name Butts solely because of her position as owner of Pi'ikoi House.

There is no *respondeat superior* liability under § 1983, i.e., there is no liability under the theory that one is responsible for the actions or omissions of an employee. Liability under § 1983 arises only upon a showing of personal participation by the defendant, *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989), and may be imposed only if a plaintiff can show that the defendant proximately caused a deprivation of a federally protected right and links that

defendant to the claim, *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir.1988).

In *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Court explained that purposeful discrimination, as alleged here, requires a plaintiff to “plead and prove that the defendant acted with discriminatory purpose.” *Id.* at 676; *see also Starr v. Baca*, 652 F.3d 1202, 1206 (9th Cir.2011). “Proving purposeful discrimination requires showing ‘more than intent as volition or intent as awareness of consequences’; the plaintiff must show that the decisionmaker acted because of his action’s adverse effects, not merely in spite of them.” *Starr*, 652 F.3d at 1206 (quoting *Iqbal*, 556 U.S. at 676) (internal quotation marks omitted). Holding a supervisor liable for unconstitutional discrimination if he or she did not have a discriminatory purpose “would be equivalent to finding them vicariously liable for their subordinates’ violation,” which is not allowed under § 1983. *Starr*, 652 F.3d at 1206. Even alleging a supervisor’s “awareness of the discriminatory effects of his or her actions or inaction does not state a claim of unconstitutional discrimination,” and Plaintiff does not so allege. *Id.* Nothing within the SAC shows that Butts was aware of, directed, participated in, or acquiesced in Souza’s alleged statements or actions.

Plaintiff fails to allege sufficient facts against Butts to state a claim for purposeful discrimination and claims against her are DISMISSED. Plaintiff may seek to amend only if she can allege sufficient, plausible facts showing that Butts participated in, knew of, or directed Souza’s allegedly discriminatory actions.

#### 4. State Law Claims

Because Plaintiff’s state law claims are before the court on discretionary, supplemental jurisdiction, the court will

not consider them until jurisdiction for Plaintiff’s federal claims has been conclusively determined. *See Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 556 U.S. 635, 639–540, —S.Ct. —, — — —, — L.Ed.2d —, — — — (2009) (“With respect to supplemental jurisdiction in particular, a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise. A district courts decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary.”) (citations omitted).

#### IV. CONCLUSION

\*7 Plaintiff provides no evidence establishing beyond doubt the elements of her claim that Defendants discriminated against her on the basis of her sex and/or gender. Plaintiff neither directs the court to evidence entitling her to a directed verdict if that evidence went uncontroverted at trial, nor establishes beyond controversy every essential element in her claims.

Summary judgment is inappropriate, and Defendants are not required to oppose this Motion or to produce any evidence controverting Plaintiff’s arguments. Plaintiff’s Motion for Summary Judgment is DENIED. Claims against Defendant Butts are DISMISSED, as discussed above.

IT IS SO ORDERED.

#### All Citations

Not Reported in F.Supp.2d, 2013 WL 399184

#### Footnotes

- 1 Plaintiff is incarcerated at the Women’s Community Correctional Center (“WCCC”), and is proceeding in forma pauperis.
- 2 Also known as Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq.
- 3 Publicly available incarceration records show that Plaintiff’s maximum term does not expire until November 25, 2018. *See* Hawaii SAVIN <https://www.vinelink.com>.
- 4 Plaintiff’s other exhibits support her contention that she is a hermaphrodite and is considered a female by the State. They do not, however, conclusively show that Plaintiff was actually eligible to reside at Pi’ikoi House within the past three years, and was improperly denied such residence.

2009 WL 229956

Only the Westlaw citation is currently available.

United States District Court,

S.D. New York.

Mariah LOPEZ f/k/a Brian Lopez, Plaintiff,

v.

The CITY OF NEW YORK, et al., Defendants.

No. 05 Civ. 10321(NRB).

|

Jan. 30, 2009.

### MEMORANDUM & ORDER

NAOMI REICE BUCHWALD, District Judge.

\*1 Plaintiff brings this action pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988 alleging violations of her civil rights under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and also seeking redress under New York State Executive Law § 296 *et. seq.* (the “NYS Human Rights Law”) and the Administrative Code of the City of New York § 8-107 *et. seq.* (the “NYC Human Rights Law”). At the times relevant to the allegations in the complaint, plaintiff was a pre operative transgender individual who was receiving hormones as part of her effort to transition from Brian Lopez to Mariah Lopez. Plaintiff alleges that during a number of short periods of incarceration at Rikers Island defendants violated her rights by (1) housing her with male inmates; (2) not permitting her to wear female clothes and undergarments; (3) not permitting her to take female hormones; (4) subjecting her to verbal harassment and threatening behavior by defendant correction officers; (5) physically assaulting her; (6) observing verbal harassment, threatening behavior, and physical assaults and failing to intervene; (7) improperly placing her in a classroom for inmates who have disciplinary problems; and (8) allowing classmates to verbally abuse and physically assault her.

Defendants Commissioner Martin Horn, Warden Patrick Walsh, Warden Peter Curcio, Kaw Aung, M.D., Capt. Kevin Buck, CO. Ronald Flemming<sup>1</sup>, Principal Delores Jefferson, C.O. Theresa John, C.O. George Johnson, Capt. Ellen Patterson, Jane San Jose, M.D., and Capt.

Robin Walker<sup>2</sup> now move for summary judgment on twelve grounds: (1) failure to exhaust administrative remedies; (2) vagueness of claims; (3) the absence of evidence of excessive force; (4) the absence of personal involvement by defendant Flemming; (5) the absence of evidence of deliberate indifference to plaintiff's medical need; (6) the absence of evidence of failure to protect plaintiff; (7) the absence of evidence of personal involvement by defendants Horn, Walsh, or Curcio; (8) the absence of evidence of municipal liability; (9) the failure of emotional injury claims due to lack of physical injury; (10) the legal unrecognizability of a denial of gay or female housing claim; (11) qualified immunity; and (12) the inappropriateness of continuing to hear the state and city law claims which pend to the dismissed federal claims.

For the reasons set forth below, defendants' motion is granted.

### *Background*

#### **I. Plaintiff's Allegations**

Plaintiff was incarcerated at Rikers Island fourteen times between August 17, 2001, and July 7, 2008.<sup>3</sup>

Plaintiff's complaint contains a host of claims. Broadly, defendant claims that each time she was incarcerated, she was required to be housed with male inmates, not allowed to wear female clothing, not given or given improper dosages of female hormones or testosterone blockers, subjected to verbal harassment and physical assault by defendant correction officers, and not protected from other inmates. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (“Opposition”) at 2-3.) She also claims to have suffered Post-Traumatic Stress Disorder and offers this as an explanation for failing to provide dates and details about the incidents she alleges in her deposition testimony. (*Id.*)

\*2 Plaintiff fails to provide specific dates for many of these assaults and oftentimes makes accusations against unnamed defendants or officers who were not served in this case.

Specifically, despite her allegations of assaults and failures to provide medical care, plaintiff did not identify many of the corrections officers and doctors who allegedly

committed the alleged wrongs. In an effort to assist plaintiff in remedying this glaring deficiency, the Court ordered the city to gather photographs of corrections officers and medical personnel whose paths plaintiff might have crossed. Thereafter, the City proceeded to take plaintiff's deposition and presented her with an array of photographs of corrections officers and medical staff to assist her in identifying the officers and doctors she intended to sue. This deposition occurred on August 28, 2006. Following this lengthy process, which included at least four time extensions from the Court, plaintiff identified some of the defendant corrections officers, for whom the city then accepted service. Others, including Defendant Flemming, were served on the basis that they were the only officer with that particular name who worked in a facility where plaintiff was housed. Another two depositions occurred on July 10, 2007, November 16, 2007. After plaintiff's depositions were concluded, plaintiff did not depose any defendants, despite numerous extensions of the discovery period. In total, this process lasted approximately one and a half years. Thus, the pretrial record is limited to plaintiff's complaint, her deposition, and the document discovery, including some of plaintiff's medical records.

On March 21, 2008, defendants moved for summary judgment.

### Discussion

#### I. Legal Standard

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "Summary judgment is proper if, viewing all the facts of the record in a light most favorable to the non-moving party, no genuine issue of material fact remains for adjudication." *Samuels v. Mockry*, 77 F.3d 34, 35 (2d Cir.1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

The movant has the burden of demonstrating that no genuine issue of material fact exists. *Adams v. Department of Juvenile Justice of the city of New York*, 143 F.3d 61, 65 (2d Cir.1998). Such disputes exist "if the evidence is such

that a reasonable jury could return a verdict for the non-moving party." *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1535 (2d Cir.1997) (quoting *Anderson*, 477 U.S. at 248). If the movant meets this burden, the non-moving party must "adduce 'significant probative supporting evidence' demonstrating that a factual dispute exists." *Yearwood v. LoPiccolo*, No. 95 Civ. 2544(DC), 1998 WL 474073 \*3 (S.D.N.Y. Aug.10, 1998) (citing *Dzaba v. Haythe & Curley*, No. 84 Civ. 1767(JFK), 1996 WL 31156 \*2 (S.D.N.Y. Jan.26, 1996) (quoting *Anderson*, 477 U.S. at 249). Additionally, "a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Hayes v. New York City Department of Corrections*, 84 F.3d 614, 619 (2d Cir.1996).

## II. Analysis

### A. Failure to Exhaust Administrative Remedies

\*3 Defendants initial position is that plaintiff failed to exhaust her administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), which provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

To satisfy the PLRA in this jurisdiction, an inmate must exhaust all steps of the New York City Department of Corrections' ("DOC") well-established five-step administrative Inmate Grievance Resolution Program ("IGRP") prior to filing his or her complaint. At Rikers, this process requires an aggrieved inmate to (1) file a complaint with the Inmate Grievance Review Committee ("IGRC"), (2) request a formal hearing before the IGRC, (3) appeal to the facility warden, (4) appeal to the DOC Central Officer Review Committee ("CORC"), and (5) appeal to the Board of Correction ("BOC"). See 7 NYCRR § 701.

The inmate must file his or her complaint within twenty-one days of the alleged grievance. See 7 NYCRR § 701.5(a)(1) ("An inmate must submit a complaint to the clerk within twenty-one (21) calendar days of an alleged occurrence on an Inmate Grievance Complaint Form (Form # 2131). If this form is not readily available, a complaint may be submitted on plain paper.") Courts

have held that complaints submitted after the appropriate date are time-barred. *Wright v. Morris*, 111 F.3d 414, 417 n. 3 (6th Cir.1997) (“It would be contrary to Congress's intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available.”).

Here, plaintiff never spent more than fourteen days in prison during the five times relevant to this complaint. Once she left prison, plaintiff was not required to exhaust her administrative remedies under the PLRA because she was not a prisoner under the language of the Act. *Greig v. Goord*, 169 F.3d 165 (2d Cir.1999) (holding that litigants who file prison condition actions after release from confinement are no longer prisoners for purposes of 42 U.S.C. § 1997e(a) and thus do not need to satisfy its exhaustion requirements). *See also Mabry v. Freeman*, 489 F.Supp.2d 782, 784 (E.D.Mich.2007) (holding that “the PLRA's exhaustion requirement [does not] appl[y] to a former prisoner whose claim arose while he was incarcerated”).

Defendants rely on *Berry v. Kerik*, 366 F.3d 85 (2d Cir.2003), for the proposition that plaintiff was required to file grievances while at Rikers and that plaintiff's failure to file grievances warrants the case's dismissal with prejudice. However, the *Berry* case is inapposite for two fundamental reasons. First, unlike the plaintiff here, *Berry* was in jail at the time he filed his complaint. Second, plaintiff was never in jail for a period greater than the length of time that an inmate has to file a grievance, i.e. for twenty-one days after any of the alleged incidents. Often, plaintiff was incarcerated for just a few days and never more than fourteen. In contrast, *Berry* remained in jail for more than twenty-one days after the relevant incidents alleged in his case and oftentimes for months afterward. Therefore, *Berry* could have filed his grievances while in jail within twenty-one days.

\*4 Thus, we hold that plaintiff did not need to exhaust her administrative remedies under the grievance procedure because (1) she was released from jail before the 21-day time limit had elapsed and (2) once she was released from jail, she was not a “prisoner” subject to the PLRA. Summary judgment on the issue of exhaustion is therefore denied.

## B. Vagueness

Defendants argue that plaintiff's claims of excessive force and deliberate indifference to her medical needs are vague since plaintiff failed to provide sufficient evidence or testimony specifying the names of defendants involved in the alleged conduct, dates and times of the events, and factual details. Whatever might have been the merits of this argument at the initial pleading stage, the vagueness issues-or the lack thereof-in the original complaint are subsumed by the more rigorous standard of summary judgment. The degree of specificity of plaintiff's complaint will be one factor we consider as we address the sufficiency of her claim to withstand defendant's summary judgment motion.

## C. Plaintiff's Substantive Claims

Plaintiff does not specify in her pleading or otherwise precisely which claims she is bringing against which named defendants. Thus, we have searched plaintiff's complaint and deposition to extract the allegations against each defendant. We have found it helpful to group plaintiff's claims according to the occupation of defendants. We also set out the relevant legal standard before addressing the claims defendant by defendant.

### i. Claims against Officer Defendants

The bulk of the claims alleged against the correctional officers named in this action involve claims of excessive force. The Eighth Amendment, applied to the States through the Fourteenth Amendment, prohibits the infliction of cruel and unusual punishment. *Sims v. Artuz*, 230 F.3d 14, 20 (2d Cir.2000).<sup>4</sup> “The core judicial inquiry” for claims of excessive force is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Jean-Laurent v. Wilkinson*, 540 F.Supp.2d 501, 508 (quoting *Hudson v. McMillian*, 503 U.S. 1, 7-8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)). There is an objective and subjective component to this inquiry. *Id.* The objective component is met if it is “shown that the deprivation alleged is objectively sufficiently serious or harmful enough.” *Jean-Laurent*, 540 F.Supp.2d at 509 (citing *United States v. Walsh*, 194 F.3d 37, 50 (2d Cir.1999)). “[T]he victim does not [have to] suffer serious or significant injury provided that the amount of force used is more than de minimis, or involves force that is repugnant to the conscience of mankind.” *Id.* The

subjective component requires that a defendant has a “sufficiently culpable state of mind ... shown by actions characterized by wantonness.” *Walsh*, 194 F.3d at 49 (citing *Hudson*, 503 U.S. at 20). However, “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional rights.” *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.1973).

*a. Capt. Kevin Buck*

\*5 Plaintiff does not allege, in her Complaint or her Opposition, excessive force or deliberate indifference to plaintiff’s medical need or safety by defendant Buck. In fact, plaintiff does not allege anything at all against defendant Buck. One short reference to defendant Buck was found in Plaintiff’s November 16, 2007 Deposition:

Physical, there is the time in the clinic where I was instructed after Captain Buck ordered me to go to the clinic because I was having chest pains and I needed my hormones as well. That’s the time where I got-oh, shit, excuse me-well, one of the photographs I just remembered where I saw one of the women from and she was in the clinic that day.

(Pl. Nov. 16, 2007 Dep. at 42.) Nothing here provides any evidence that Capt. Buck violated any of plaintiff’s federal or constitutional rights. Consequently, we grant summary judgment in favor of defendant Buck on all grounds.

*b. CO. Theresa John*

Plaintiff does not allege, in her Complaint or her Opposition, any specific excessive force or deliberate indifference by Theresa John. She in fact does not make any specific allegations against C.O. John.

In her deposition, plaintiff states:

Q: Do you know that person’s name?

A: I do, CO. John-do you realize you have her name. Anyway, I could tell you she was the steady A officer in C-73 gay housing. Horrible to transgender inmates, absolutely positively horrible. She inflected an ex-boyfriend of mine for touching me on the shoulder when we were in Rikers Island. Threatened inmates, she

would call other C.O.’s to harm them. Just really the creme of the creme of the batch. She is really bad.

Q: Did she ever physically touch you?

A: No she did not.

Q: Did she ever witness anyone physically touch you?

A: Yes?

Q: Who did she witness physically touch you?

A: There was a search that occurred while on her shift and I was in the middle of a confrontation with one of the officers and she wasn’t one because, you know, they come with a team of them. She wasn’t in their team, she is a steady officer, but when the male officer was in front of me, he nudged my head and pushed me in the cell. She was standing right there, that’s when they closed the cell and the search was over. I had indicated to her that I wanted to speak to a captain. She has an accent and she replied just real nasty, “you are not seeing an F’in captain, I run this” and blah blah blah.

(Pl. Nov. 16. Dep. at 31-32.) She additionally makes a claim that a CO. John or Johnson was “verbally abusive.” (Pl. Aug. 28, 2006 Dep. at 11.) We will assume that these references are to the same person for the purposes of this summary judgment motion. No dates were given for either incident.

As plaintiff acknowledges that C.O. John never physically touched her, there is no basis, as a matter of law, for plaintiff to maintain an excessive force claim against her. However, some portions of plaintiff’s deposition could be construed to suggest the possibility that defendant John was deliberately indifferent to alleged excessive force by the male corrections officers. This claim fails for two reasons. First, the facts alleged by plaintiff above do not make out a cognizable excessive force claim. Second, assuming, *arguendo*, that the unidentified male corrections officer’s “nudge” and “push” was excessive force, defendant John cannot be held liable for the unidentified officer’s actions.

\*6 First, plaintiff’s recounting does not allege facts to sustain a conclusion that the male officers used force “maliciously and sadistically to cause harm,” rather than “in a good-faith effort to maintain or restore discipline.” *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995, 117

L.Ed.2d 156 (1992). Further, as plaintiff alleges no injuries resulting from the unidentified male officer's alleged force, any harm is simply not serious enough to reach a constitutional dimension. *See Roman v. Howarth*, 998 F.2d 101, 105 (2d Cir.1993); *see also Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir.1997).

Second, while as a general rule, a law enforcement official can be held liable for failing to intervene in a situation where excessive force is being used, the absence of excessive force and the circumstances as recited by plaintiff preclude such a finding here. *Jean-Laurent v. Wilkinson*, 540 F.Supp.2d 501, 512 (citing *O'Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir.1988)). "Liability may only attach when (1) the officer had a realistic opportunity to prevent the harm; (2) a reasonable person in the officer's position would know that the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene." *Id.* (citations omitted). Here, defendant John would not have had a realistic opportunity to prevent the unidentified male officer's "nudge" or "push" of plaintiff. The event, although vague, described is brief and does not approach the sort of repetitive beating that could give rise to an opportunity for defendant to intervene.

Consequently, there are no facts upon which a reasonable jury could find in favor of plaintiff for any of the claims she brings against defendant John, and, accordingly, summary judgment is granted in favor of C.O. John.

*c. Captain Robin Walker*

Plaintiff's complaint does not allege any excessive force or deliberate indifference claims against defendant Walker. Contradictory references about a Captain Walker are made in Plaintiff's depositions at various times. Defendant identified someone in a photo lineup marked D-34 as Captain Walker. (Pl. Nov. 16, 2006 Dep. at 24). Among the defendants sued is Captain Robin Walker. Plaintiff identified photo D-34 as Captain Walker during her deposition. However, plaintiff had nothing negative to say about the Captain Walker she identified. Indeed, Plaintiff's description of this individual was entirely positive. Plaintiff notes that this Captain Walker never touched her and describes this Captain Walker as "exceptionally professional." (*Id.* at 24-25). Later, she describes a Captain Walker who allegedly ignored plaintiff while her male cell-mates threw shoes at her and "jumped" her. (*Id.* at 43-45.) Plaintiff explains

this contradictory evidence by stating that "[i]t would appear that one of the ACCs [Assistant Corporation Counsels] who handled this case identified the wrong Capt. Walker." (Pl. Resp. to Defs.' Local Rule 56.1 Statement ¶ 14.) However, despite being provide the opportunity to do so, at no time does plaintiff clarify which Capt. Walker, if Robin Walker is in fact either of them, she alleges wrongdoing against. Furthermore, plaintiff fails to make clear when this incident with Captain Walker occurred. Plaintiff does state that the Captain Walker identified by the ACC's is the "wrong Capt. Walker." Thus, plaintiff acknowledges that Robin Walker is not the Walker alleged to have witnessed plaintiff's alleged injuries. On the facts present in the record, even taken in a light most favorable to plaintiff, no reasonable jury could hold Robin Walker liable for any violation of plaintiff's federal or constitutional rights.

*d. George Johnson*

\*7 Plaintiff's allegations against defendant Johnson are as follows:

Q: D11, do you recognize that person?

A: Yes, Johnson.

Q: and can you tell me whether that individual ever touched you physically?

A: Yes.

Q: And can you tell me if it was during the period relevant in the complaint that is December of or rather August of 2001 through June of 2005?

A: Yes

Q: And can you tell me how he touched you?

A: There were more than one incidents [sic]. He smacked me on the back of my head, he pulled my hair, there is more than one incident. I would not like to go over the details if possible.

Q: We need to go over the details.

A: Well, I have known CO. Johnson since my first trip Rikers Island.<sup>5</sup> He studied the school area and escorted the prisoners that were in gay housing. The first time I-well, the first time he ever put his hands on me was on my way back from school at 3:00 in the afternoon. I

don't recall the date of the incident or the month, but I remember there was a group of us ... someone made a comment about another male C.O. being attractive and he started from the back of the line and hit everybody on the back of the head with an open hand.

Q: Did you suffer physical injury from that incident?

A: Pain to the back of my head.

Q: Any other physical injury?

A: No.

Q: And then the next incident you can recall? ...

A: [ ... ] me and this officer ended up getting into an argument after the principal placed me in a classroom with derelict inmates.

They jumped me and I brought this to the officer's attention when they did jump me, I brought up the fight-physically he slapped me to the ground, he slammed me on the back of the head. After this incident they were told to bring me to medical for a post injury report and on the way to medical, as I was explaining to this officer that they just failed to protect me and they had placed me in an unsafe situation, he proceed to punch me in the back of the head, to pull my hair. He struck me more physically, but the actual specifics I can't recall right now and the injuries I sustained were a lot of pains [sic] in the back of the head and whiplash to the neck.

Q: any other injuries you can recall at that second incident you described?

A: No.

Q: Is there a third incident involving this particular officer?

A: Yes.... I was in the middle of a confrontation, a verbal dispute with an officer and he heard it and he came over to inject his two cents and I got smart with him and he smacked me.... I had pain to my mouth and I believe possibly an abrasion to the inside of my mouth, you know, mostly the guards are smart enough not to leave marks on inmates.

(Pl. Nov. 16, 2007 Dep. at 9-13.) Plaintiff alleges three physical incidents with Officer Johnson. Each of these

alleged incidents involving Officer Johnson will be examined in turn.

The first incident described appears to be outside the limitations period as plaintiff stated that she had known Officer Johnson since her first time in Riker's, a date which clearly precedes the limitations period. However, given the possible ambiguity in the questioning, we will assume, for the purposes of this summary judgment motion, that all the incidents happened within the relevant time period.

\*8 Regardless, the first incident as described fails, as a matter of law, to state facts that could support a claim of excessive force. Plaintiff alleges that defendant Johnson struck her, and a number of other inmates, in the back of the head. The only injury plaintiff claims is "pain in the back of my head." (Pl. Nov. 16, 2007 Dep. at 10.) It is settled in this district that an open-handed slap on the back of the head, with no medical evidence and no other evidentiary support of injury, does not rise to the level of a constitutional violation. *See Santiago v. CO. Campisi*, 91 F.Supp.2d 665, 674 (S.D.N.Y.2000) (holding that an open-hand slap does not rise to the level of excessive force); *Boddie*, 105 F.3d at 861; *Johnson v. Renda*, No 96 Civ. 8613, 1997 WL 576035 at \*1 (S.D.N.Y. Sep.15, 1997) (holding that a single slap to plaintiff's face does not amount to a constitutional violation). Not "every malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson*, 403 U.S. at 9. Plaintiff's third allegation, that defendant Johnson smacked her and possibly caused an abrasion to the inside of her mouth, fails for the same reason.

Plaintiff's description of the second incident initially appears more substantive, but on closer examination it still fails for lack of evidence. First, it is unclear which allegations in particular are against Officer Johnson, as it seems that two different officers were involved. Assuming, *arguendo*, that the officer who "slapped" defendant to the ground and "slammed" her head is the same officer that punched her and pulled her hair, there is still not enough evidence of physical injury to maintain an excessive force claim. Plaintiff does not point to any medical evidence attributing any of these injuries related to the officers, despite stating that she was further assaulted on her way to medical, apparently as a result of an attack by other inmates. (Pl. Nov. 16, 2007 Dep. at 11.) Nor does plaintiff provide a timeframe for any of these incidents. Further, plaintiff never made any effort to corroborate any of these assaults by deposing defendant Johnson

(or defendant Patterson, who plaintiff alleges in her Declaration witnessed these incidents). (Lopez Decl. at ¶ 20.) The absence of allegations and evidence of injury, as we have noted above, precludes a plaintiff from prevailing on such a claim.

For example, in the *Vatensever* case, the plaintiff alleged that a corrections officer slammed his head into a wall. *Vatensever v. New York City*, No. 01 Civ. 11621, 2005 WL 2396904 \*1 (S.D.N.Y. Sept.28, 2005) (WHP) (granting summary judgment when plaintiff could provide no medical evidence of injuries). Though not as serious as the assault alleged by the plaintiff in the *Vatensever* case, we would also expect to find evidence of physical injury if an assault on plaintiff, involving being slapped to the ground and slammed on the back of the head, as well as having her hair pulled and being punched in the back of the head, occurred, particularly if all of these assaults happened as plaintiff traveled to a medical evaluation. *Id.* at \*3. However, plaintiff's "voluminous" medical records are devoid of any support for these alleged incidents. *Id.*; see also *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 381 (2d Cir.1982) ("The litigant opposing summary judgment ... may not rest upon mere conclusory allegations or denials as a vehicle for obtaining a trial. Rather, he must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful.") (internal quotation and citation omitted). Consequently, summary judgment is granted in favor of defendant Johnson.

*e. Captain Ellen Patterson*

\*9 Plaintiff makes two allegations against Captain Ellen Patterson. First, she claims that Captain Patterson assaulted her by hitting her in the face with keys; and second, she claims that defendant Patterson witnessed her being attacked by defendant Johnson and failed to intervene.

The first incident is described as follows:

A: [...] It's C-74 in the school area in the morning time. Captain Paterson and the principal both struck me with keys in the facial area while I was sitting in orientation class and that left marks on my face....

Q: So when you say someone hit you with keys in your face?

A: I was sitting there, they both had keys, Captain Patterson and Principal Jefferson both had keys. Jefferson's were longer, Patterson's were on like a ring around her belt and I was sitting at my desk and they are like-first Captain Patterson and I had a problem the day before, we had gotten into an argument and I wanted to complain about something.

I don't recall what she said to me, but she slammed keys on my face, not slammed, they was [sic] provoking me to get into it with her. She nudged me and hit me with the keys and then Jefferson came out. She was actually more open about assaulting me than Patterson. They were both-again, I don't recall what they were saying, I was much younger, but they swung the keys and it hit me in the face.

Jefferson made it seem more like an accident, "oh, I'm sorry" and that's where she sent me-ordered me into a certain classroom, even though I excelled in the class.

(Pl. Nov. 16, 2007 Dep. at 40-41.) In their moving papers on their motion for summary judgment, defendants argue that plaintiff's claims against Captain Patterson were vague and that the alleged injury ("left marks on my face") was insufficient. Apparently recognizing the force of defendant's position, plaintiff countered with a declaration asserting that she also received "a bump on my head" from the incident. (Lopez Decl. at ¶ 17.) As noted above, factual issues created solely by an affidavit crafted for the purposes of opposing a summary judgment motion do not raise issues of material fact. *Neidich v. Estate of Neidich*, 222 F.Supp.2d 357, 368 (S.D.N.Y.2002) (CM).

Consequently, the issue presented is whether the incident as originally described in plaintiff's deposition is sufficient to state a claim for excessive force. We assume, *arguendo*, that there was some contact between Patterson's keys and plaintiff's face.

However, in the absence of any evidence of injury and without any supporting medical records, the incident with the keys does rise to the level of a constitutional violation. See *Santiago*, 91 F.Supp.2d at 674; *Yearwood*, 1998 WL 47 4073 at \*7; see also *Roman*, 998 F.2d at 105; *Boddie*, 105 F.3d at 862.

Plaintiff also raises for the first time in her opposition declaration that defendant Patterson witnessed the

assault, described above, by defendant Johnson. Lopez Decl. at SI 20. Curiously, there is no mention of defendant Patterson's involvement in the Johnson incident in plaintiff's deposition testimony, either as she spoke about Johnson or about Patterson. As noted *supra*, parties cannot create new factual disputes in response to a motion for summary judgment. *Hayes*, 84 F.3d at 619 (2d Cir.1996). Consequently, this claim against defendant Patterson is also dismissed and summary judgment is granted in favor of defendant Patterson.

*f. Delores Jefferson*

\*10 As defendant Jefferson's involvement in the alleged incident involving plaintiff's contact with defendant's keys is legally indistinguishable from defendant Patterson's involvement, for the reasons stated above, summary judgment is granted in favor of defendant Jefferson.

*g. Plaintiff's claim for emotional distress*

As plaintiff has not shown any issues of material fact sufficient to survive summary judgment on her excessive force claims, her claims for emotional injury are dismissed. 42 U.S.C. § 1997e(e) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."); *Cox v. Malone*, 56 Fed. Appx. 43, (2d Cir.2003) ("Cox had failed to show malicious intent on the part of Simms or anything more than *de minimis* physical injury in connection with his Eighth Amendment claim, as required by the Prison Litigation Reform Act, 42 U.S.c. § 1997e(e)").

**ii. Claims against Drs. Kaw Aung and Jane San Jose**

Plaintiff endeavors to assert claims of deliberate indifference to plaintiff's medical needs in violation of the Eighth Amendment to the Constitution against Drs. Aung and San Jose.

The two-prong test for deliberate indifference to medical need is well established. *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir.2000). First, a plaintiff must show that she has a "serious medical condition," and second, she must show that the medical condition was met with "deliberate indifference." *Id.* As the Second Circuit did in *Cuoco*, we assume, for the purposes of this summary judgment motion, that transsexualism or Gender

Identity Disorder (GID) is a serious medical condition that satisfies the first element of this analysis. *Id.*

To establish deliberate indifference, "a plaintiff must show 'something more than mere negligence.'" *Id.* at 106-107 (quoting *Weyant v. Okst*, 101 F.3d 845, 856 (quoting *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994))). However, "proof of intent is not required, for the deliberate-indifference standard 'is satisfied by something less than actions or omissions for the very purpose of causing harm or with knowledge that harm will result.'" *Id.* at 106-107. "An official acts with the requisite deliberate indifference when that official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Chance v. Amrstrong*, 143 F.3d 698, 702 (2d Cir.1998) (quoting *Farmer*, 511 U.S. at 837). Even medical malpractice is not deliberate indifference, unless it rises to the level of recklessness. *Id.* at 703.

The medical indifference claim is centered on plaintiff's claim that she was denied hormone therapy during some of her incarcerations at Rikers. To place the claim in a temporal perspective, it should be noted that plaintiff was incarcerated for four days in December 2002, six days in March 2004, six days in April 2004, fourteen days in September 2004, and thirteen days in June 2005. Consequently, any possible denial of hormones could have been at most for a period of no more than two weeks.

\*11 To further contextualize this claim, it should be noted at the onset that plaintiff acknowledges that she was given hormones "most of the time." (Pl. July 10, 2007 Dep. at 38.) Plaintiff further testified that she was provided hormones during her ARDC incarcerations that occurred prior to her eighteenth birthday. (See Pl. July 10, 2007 Dep. at 38-39.) These include the March 2004 and April 2004 incarcerations.

Moreover, the medical records submitted with defendant's summary judgment motion contain numerous references to plaintiff receiving her medication and/or treatment. Bates numbered document 301 provides evidence that plaintiff was given "Conjugated Estrogens" on December 11-12, 2002. (*See also* Bates 434-35, 446 (indicating that plaintiff was given the hormone Premarin during her December 2002 incarceration)). The plaintiff also

refused psychiatric treatment from a social worker during this visit, since the social worker was not a “psychotherapist.” (Bates 444-45, 449 .) Plaintiff also was given hormone treatment in April 2004, (Bates 00356-64) and June 2005. (Bates 305, 475.)

Thus, the only period of incarceration for which plaintiff could claim a lack of hormonal treatment is that of September 2004. While defendant points to Bates 261 as showing evidence of no treatment, this document includes the words “Shots for breast” on its face. (Bates 261.) The entry would appear to indicate hormonal treatment and plaintiff has provided no medical evidence to the contrary. Plaintiff never deposed anyone and defendant provides no evidence of whether or not this refers to treatment. Nor has plaintiff linked this document to either doctor named as a defendant.

To the extent that plaintiff’s claim is not read as asserting a total denial of hormonal treatment but as a claim that the levels of hormones prescribed to plaintiff while at Rikers were insufficient to treat her condition, we note that plaintiff has neither submitted nor adduced any medical testimony to support such a claim. Such a claim cannot proceed without medical support. Nor has plaintiff adduced any testimony or submitted any evidence that the doctors at Rikers prescribed these doses with the requisite deliberate indifference or claimed that defendant doctors knew of and disregarded “an excessive risk to inmate safety,” or that prescribing these drugs in lower doses posed a risk of substantial harm to plaintiff. *Chance*, 143 F.3d at 702 (2d Cir.1998); *see also Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 (Table), 1997 WL 34677 at \*3 (6th Cir.1997) (“However, where, as here, the prisoner is receiving treatment, the dosage levels of which are based on the considered professional judgment of a physician, we are reluctant to second-guess that judgment.”)

Further, even assuming that plaintiff had supported her claims concerning hormone therapy with evidence, it is worth noting that plaintiff does not necessarily have the right to require the prison to duplicate the private treatment she may have received, and that she was offered psychological therapy which she declined. (Bates 444-45, 449.); *see Murray*, 1997 WL 34677 at \*3-4. (“It is important to emphasize, however, that [the plaintiff] does not have a right to any particular type of treatment, such as estrogen therapy.... [G]iven the wide variety of options available for the treatment of gender dysphoria and the

highly controversial nature of some of those options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment.”). While a total denial of hormone therapy to a prisoner for an extended period of time might rise to the level of deliberate indifference, nothing in the record of this case supports an allegation.

\*12 In sum, the record of the plaintiff’s medical treatment during her numerous, short incarcerations simply does not demonstrate any denial of medical care due to deliberate indifference from doctors or that the treatment provided posed a substantial risk of serious harm. To the contrary, the documentary record provides ample evidence that plaintiff was provided with extensive treatment.

Furthermore, even if plaintiff had sustained her broad claims, she has failed to connect those broad claims to the two doctors named as defendants. For example, plaintiff points to Bates numbered document 472 to establish that she was given less than the dosage recommended by her attending physician. However, this document is signed by Marshall Tse, MD, not a named defendant. Personal involvement of defendants is required to assess damages under § 1983. *Gaston v. Coughlin*, 249 F.3d 156, 165 (2d Cir.2001). Consequently, summary judgment is granted in favor of both defendant Aung and San Jose dismissing plaintiff’s claims of medical indifference.

**iii. Claims against Commissioner Martin Horn, Warden Patrick Walsh, and Warden Peter Curcio**

Plaintiff does not allege any physical contact by defendants Commissioner Horn, Warden Walsh, or Warden Curcio (“Horn defendants”). Rather, plaintiff alleges that the Horn defendants were involved in “formulating, ratifying, adopting, and/or implementing the policies and procedures that resulted in the violation of her constitutional rights.” (Opposition at 23.)

“[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” *Moffit v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir.1991). A defendant in a supervisory position may be found to be personally involved in several ways:

The defendant may have directly participated in the infraction.... A supervisory official, after learning of

the violation through a report or appeal, may have failed to remedy the wrong... A supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue... Lastly, a supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event...

*Wright v. Smith*, 21 F.3d 496, 502 (2d Cir.1994) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986)). Additionally, supervisory liability could attach when an official shows "gross negligence" or "deliberate indifference" to the "constitutional rights of inmates by failing to act on information indicating that unconstitutional practices are taking place." *Id.* (citing *McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir.1983)).

Plaintiff claims that defendants violated the Fourteenth Amendment by: (1) refusing to allow her to wear female clothing or undergarments, (2) housing plaintiff with male inmates and denying her gay housing, and (3) placing her, without cause, in a classroom with inmates with disciplinary problems.<sup>6</sup> Plaintiff has not established which policies or customs, if any, the Horn defendants have violated. Even if we assume that there are policies in place that were being enforced here, plaintiff does not articulate any actionable violations of those policies or that those policies lack a rational basis, which both parties concede is the applicable standard of review. Thus, each of these claims fails to state a claim under the Fourteenth Amendment and consequently summary judgment is granted in favor of the Horn defendants.

*a. Refusal to allow plaintiff to wear female clothing*

\*13 As plaintiff points to no court decision that has found transgender individuals a protected class for the purposes of Fourteenth Amendment analysis, and the Court has found none, her claims that she was subjected to discrimination based on her status as transgender are subject to rational basis review.<sup>7</sup> Though plaintiff does not point to any clothing policy utilized at Rikers, we

assume for the purposes of this opinion that some policy exists.

Plaintiff also does not point to any authority that suggests that a transgender prisoner has the right to choose the clothing she wears while in prison. In fact, as a general matter, federal courts have in fact held the opposite. *Murray*, 1997 WL 34677 at \*2 (prisoner officials do not violate the Constitution by providing ill-fitting or aesthetically displeasing clothing); *Knop v. Johnson*, 667 F.Supp. 467, 475 (W.D.Mich.1987), *appeal dismissed*, 841 F.2d 1126 (6th Cir.1988). Further, several rational bases, ranging from a desire to maintain order in prisons through having uniforms to disallowing plaintiff from signaling female sexuality in a male prison readily come to mind. Thus, plaintiff has failed to establish a claim arising from any clothing policy alleged under the Fourteenth amendment.

Further, assuming, *arguendo*, that some constitutional violation was found, the Horn defendants would certainly be qualifiedly immune. In the absence of any case law upholding a claim that a transgender prisoner has the right to choose what clothing she will wear, the Horn defendants could not have violated any of plaintiff's clearly established constitutional or federal rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

*b. Housing Plaintiff with Male Inmates*

As noted by the Supreme Court, "the practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex...." *Farmer*, 511 U.S. at 829. While the Supreme Court did not take this opportunity to comment on the constitutionality of this practice, and we decline to do so here, it clearly did not state any objection to it on constitutional grounds. We note that a number of problems could arise by altering this practice and housing biologically male inmates who identify as transgender with the female population, not the least of which would be concerns for the safety of female inmates, and consequently hold this practice or policy as rational. Further, even if we held this practice unconstitutional, the Horn defendants would be qualifiedly immune for the reasons stated above.

There is another issue present that fits more squarely in the Supreme Court's decision in *Farmer*. Generally, plaintiff contends that defendant's denial of plaintiff's gay

housing amounted to deliberate indifference to plaintiff's safety. However, plaintiff cannot maintain this claim. Defendants provide evidence that plaintiff was placed in gay housing or protective custody at each of plaintiff's visits except for a period of three days when plaintiff refused to sign a form indicating she was gay. Plaintiff refutes this evidence by denying that evidence of her housing placements, which includes prison records kept in the regular course of operations marked "protective custody" or "gay/lesbian housing," (See e.g., Bates 244 and 263) supports defendants claims. (Pl. Resp. to Defs.' Local Rule 56.1 Statement at ¶44.) Plaintiff does not point the court to any evidence in her deposition or otherwise that these routine business records of her prison stays are inaccurate.

\*14 Moreover, on the days where plaintiff was placed in general population, nothing in the record indicates that defendant did this with deliberate indifference to plaintiff's safety. In *Farmer*, the Supreme Court writes, "we hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety...." *Farmer*, 511 U.S. at 837. Here, Plaintiff makes no allegations that any prison official deliberately ignored an excessive risk to her safety by placing her in general population for those three days. Consequently, summary judgment is granted in favor of defendants on plaintiff's claim.

*c. Placing Plaintiff in a Disciplinary Classroom*

Plaintiff fails to articulate any evidence supporting her argument that she was placed in a disciplinary classroom in violation of her constitutional rights. She neither articulates any policy or custom which resulted in the placement or any constitutional principle that was violated. Beyond the bald allegation that plaintiff was placed in this classroom without cause, plaintiff fails to adduce any evidence about the process by which she was placed in a disciplinary classroom or how that process was in violation of her due process rights. Consequently, summary judgment is granted for defendants on this claim.

Footnotes

- 1 Defendants filed a Suggestion of Death on July 1, 2008 for named defendant Ronald Flemming. Neither party substituted Mr. Flemming's estate pursuant to Federal Rule of Civil Procedure 25(a) (1) within the requisite 90 days. Additionally,

**iv. Claims against the City of New York**

"[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). As discussed above, plaintiff argues that unidentified and unnamed policies or customs concerning transgender inmates violate the Constitution. As we have found that these policies do not violate any of plaintiff's rights under the Constitution or federal law, plaintiff cannot sustain a *Monell* claim against the City of New York. Thus, summary judgment is granted in favor of the City.

**D. Pendant: State and City Law Claims**

As we have granted summary judgment in favor of defendants on all of plaintiff's federal claims, we decline to exercise supplemental jurisdiction over plaintiff's city and state law claims. 28 U.S.C. § 1367(c)(3) ("The district court may decline to exercise supplemental jurisdiction ... [if] the district court has dismissed all claims over which it has original jurisdiction"). Consequently, those claims are dismissed without prejudice.

*Conclusion*

For the foregoing reasons, defendants' motion for summary judgment is granted and the Clerk of the Court is respectfully requested to close this case on the Court's docket.

**\*15 SO ORDERED.**

**All Citations**

Not Reported in F.Supp.2d, 2009 WL 229956

defendants filed an affidavit by C.O. Flemming dated March 21, 2008 in which he stated that he had never seen plaintiff. Further, defendants submitted the employment records of two other corrections officers, Capt. Joseph Turner and C.O. Michele Turner, as well as C.O. Flemming's records showing that although plaintiff alleged that all three were involved in an attack of her, none of them ever worked in the same facility at the time of the alleged attack. Despite this evidentiary showing in support of defendants' summary judgment motion, plaintiff never sought any relief under Federal Rule of Civil Procedure Rule 56(f) in order to depose C.O. Flemming or the other officers in an effort to rebut this evidence. Nor had plaintiff sought to depose C.O. Flemming or any other defendant during the two years this case was pending before the defendants moved for summary judgment. C.O. Flemming was dismissed from this action in the Court's November 19, 2008 Order, well after the 90 day period for substitution had expired. Plaintiff sought to reargue Mr. Flemming's dismissal and was granted an opportunity to explain her failure to meet the ninety day deadline and how she could succeed on her claim against Flemming even if the ninety day substitution requirement was excused. Plaintiff's submission did not provide a persuasive argument supporting either excusable neglect for failing to substitute Mr. Flemming or a conclusion that plaintiff could prevail at trial against Mr. Flemming. We also had concerns about the equity of permitting plaintiff to proceed against an estate when plaintiff had not taken discovery which would have preserved the defendant's testimony. Consequently, the Court denied plaintiff's motion to seek relief from its November 19, 2008 Order in an Order dated December 3, 2008.

2 Though other individuals were named in this lawsuit by plaintiff, plaintiff either failed to serve or identify them. Since 120 days has long past since the filing of this complaint, all defendants, excluding those named in Defendants' Motion for Summary Judgment are dismissed without prejudice and claims brought against them are not addressed in this opinion. There may, of course, be statutes of limitations bars which would alone preclude such claims.

3 The dates of her incarcerations within the statute of limitations are as follows: December 10-13, 2002; March 21-26, 2004; April 17-22, 2004; September 11-24, 2004; and June 16-17, 2005. Defendant was previously incarcerated on August 17-22, 2001, January 8-22, 2002, April 11-15, 2002, and has since been incarcerated at least six times, most recently from April 17 through July 7, 2008.

4 The same standard of law applies to excessive force claims brought under the Fourteenth Amendment by pre-trial detainees and under the Eighth Amendment by sentenced prisoners. *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir.1999).

5 Defendant's first trip to Rikers Island was outside of the time period relevant for this proceeding.

6 Plaintiff also alleges "bias-based assault" but does not point to any policy or give any evidence of a custom of such assaults that would subject the Horn defendants to liability under § 1983.

7 The Ninth Circuit in *Gomez v. Maass*, 918 F.2d 181 (9th Cir.1990), held that a transsexual is not a member of a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the due process clause. The Ninth Circuit in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir.1977), explained that transsexualism is not a suspect class when plaintiff claimed "to have [been] treated discriminatorily [not] because she is male or female, but rather because she is a transsexual who chose to change her sex."

2015 WL 4138761

Only the Westlaw citation is currently available.

United States District Court,  
N.D. Ohio,  
Eastern Division.

Sherwood L. STARR, Plaintiff,  
v.  
Frank BOVA, et al., Defendants.

No. 1:15 CV 126.

|  
Signed July 8, 2015.

**Attorneys and Law Firms**

Sherwood L. Starr, Conneaut, OH, pro se.

**OPINION AND ORDER**

CHRISTOPHER A. BOYKO, District Judge.

\*1 *Pro se* Plaintiff Sherwood L. Starr filed this action under 42 U.S.C. § 1983 against Cuyahoga County Sheriff Frank Bova and Cuyahoga County Jail Warden Schobert. In the Complaint, Plaintiff asserts that the Cuyahoga County Jail maintains policies which are unfavorable to lesbian, gay, bisexual, transgender and transgender non-conforming inmates. He seeks changes in policies and monetary damages.

**I. BACKGROUND**

Plaintiff alleges the Cuyahoga County Jail housing policies discriminate against lesbian, gay, bisexual, transgender and transgender non-conforming inmates. He contends these inmates are housed only in dorms 9E and 9D and only in beds 1–12. He states dormitory rules limited one inmate per shower and one inmate per urinal at a time. He alleges anxiety disorders may be exacerbated by an open dormitory environment. He states without explanation that these inmates are denied equal rights and are victims of discrimination by unit staff. He claims they are more likely to taken to administrative segregation. He contends floor supervisors routinely ignore the needs of lesbian, gay, bisexual, transgender and transgender non-conforming inmates unless they are in administrative

segregation. He asks this Court to order the Jail to update its policies to allow equal rights and to allow them to be placed in cells, rather than dorms, to enforce a no retaliation policy, to alter the grievance policy and to order the Defendants to pay damages.

**II. LAW AND ANALYSIS**

***Standard of Review***

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), the district court is required to dismiss an *in forma pauperis* action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir.1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir.1996). An action has no arguable basis in law when the Defendant is immune from suit or when the Plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or “wholly incredible.” *Denton v. Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992); *Lawler*, 898 F.2d at 1199.

A cause of action fails to state a claim upon which relief may be granted when it lacks “plausibility in the complaint.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The factual allegations in the pleading must be sufficient to raise the right to relief above the speculative level on the assumption that all the allegations in the Complaint are true. *Bell Atl. Corp.*, 550 U.S. at 555. The Plaintiff is not required to include detailed factual allegations, but must provide more than “an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A pleading that offers legal conclusions or a simple recitation of the elements of a cause of action will not meet this pleading standard. *Id.* In reviewing a Complaint, the Court must construe the pleading in the light most favorable to the Plaintiff. *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir.1998).

### Discrimination

\*2 Assuming Plaintiff is either gay, bisexual, transgender or transgender non-conforming, he has not alleged sufficient facts to suggest the Jail's policies denied him equal protection. The Equal Protection Clause prohibits discrimination by government actors which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference. *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 681–82 (6th Cir.2011); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir.2005). The threshold element of an equal protection claim is disparate treatment. *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir.2006). When disparate treatment is shown, the equal protection analysis is determined by the classification used by government decision-makers.

To state a claim for discrimination under the Equal Protection Clause, the Plaintiff needs to allege sufficient facts to show that the Jail's policies intentionally discriminated against him because of his membership in a protected class. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 341 (6th Cir.1990). See also *Brand v. Motley*, 526 F.3d 921, 924 (6th Cir.2008) (an inmate retains the right to be free from “invidious discrimination based on race”) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). Although sexual orientation and transgender have not been identified as suspect classifications in the Sixth Circuit, they constitute an “identifiable group” for equal protection purposes. See *Davis v. Prison Health Services*, 679 F.3d 433, 441 (6th Cir.2012) (citing *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir.1997)). An equal protection claim brought on this basis is governed by rational basis review under which a “ ‘plaintiff may demonstrate that the government action lacks a rational basis ... either by negating every conceivable basis which might support the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will.’ ” *Id.* at 438 (quoting *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir.2006) (quoting *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir.2005)). To state an equal protection claim in the prison context, Plaintiff must allege he was treated differently than other similarly situated prisoners. *McCleskey v. Kemp, Supt. Ga. Diagnostic and Class. Center*, 481 U.S. 279, 292–93, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Wells*

*v. Jefferson County Sheriff Dept.*, 159 F.Supp.2d 1002, 1008 (S.D.Ohio 2001)).

Here, Plaintiff does not include sufficient allegations that show or permit an inference that the Jail's policies intentionally discriminated against him based his sexual orientation or his status as a transgender inmate or a transgender non-conforming inmate. He states gay, lesbian, bisexual, transgender and transgender non-conforming inmates are housed in dorms 9E and 9D and only in beds 1–12. By inference, the other beds in the dormitory were occupied by inmates who do not identify themselves as lesbian, gay, bisexual, transgender, or transgender nonconforming. He does not allege what classification of inmates is housed in this dormitory. Cuyahoga County Court of Common Pleas records indicate Plaintiff resided in the jail for thirty-five days awaiting trial on misdemeanor charges of disorderly conduct. There are nondiscriminatory reasons why Plaintiff may have be housed in a dormitory as opposed to a cell. He was charged with a misdemeanor, not a violent felony. He was a pretrial detainee, not someone who had yet been convicted of his offense. He could post bail and be released until trial. Plaintiff does not allege facts to suggest his assignment to a dormitory had a discriminatory purpose.

\*3 Plaintiff also alleges the jail policy for the dormitory limits one inmate at a time to a shower or urinal. While this may be inconvenient, this policy affects all inmates in the dormitory, not just those who are lesbian, gay, bisexual, transgender, or transgender nonconforming. Plaintiff fails to allege facts to suggest this had a discriminatory purpose.

Plaintiff's remaining assertions are stated solely as legal conclusions, unsupported by factual allegations. He indicates the unit staff discriminates against this group of inmates. He states they are more likely to be in administrative segregation. He contends jail staff routinely ignore the needs of this group. Although the standard of review for *pro se* pleadings is liberal, it requires more than bare assertions of legal conclusions. *Bassett v. National Collegiate Athletic Ass'n*, 528 F.3d 426, 437 (6th Cir.2008). The Complaint must give the Defendants fair notice of what the Plaintiff's claims are and the grounds upon which they rest. *Id.* Legal conclusions alone are not sufficient to meet this minimal pleading requirement to

state a claim upon which relief may be granted. *Twombly*, 550 U.S. at 555.

***Injunctive Relief***

Finally, Plaintiff seeks an Order from this Court requiring the Jail to alter its policies. He is no longer housed in the Jail and, in fact, was in the Lorain Correctional Institution at the time he filed the Complaint. A prisoner's claim for injunctive relief becomes moot when the prisoner is no longer confined at the prison where the claim allegedly arose. *See Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir.1996).

**III. CONCLUSION**

Accordingly, this action is dismissed pursuant to 28 U.S.C. § 1915(e). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.<sup>1</sup>

IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.3d, 2015 WL 4138761

**Footnotes**

<sup>1</sup> 28 U.S.C. § 1915(a)(3) provides:

An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

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United States District Court,  
C.D. California,  
Western Division.

Ramon MURILLO, Plaintiff,

v.

Ian PARKINSON, et al., Defendants.

No. CV 11-10131-JGB (VBK).

Signed June 17, 2015.

**Attorneys and Law Firms**

Ramon Murillo, Delano, CA, pro se.

Douglas C. Smith, Nathan Aaron Perea, The Smith Law  
Offices APC, Riverside, CA, for Defendants.

**ORDER (1) ACCEPTING THE FINDINGS AND  
RECOMMENDATIONS OF THE UNITED STATES  
MAGISTRATE JUDGE, AND (2) GRANTING IN  
PART AND DENYING IN PART DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

JESUS G. BERNAL, District Judge.

\*I Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint and all other papers along with the attached Report and Recommendation of the United States Magistrate Judge, and has made a *de novo* determination of the Report and Recommendation.

**IT IS THEREFORE ORDERED** that an Order be entered (1) approving the findings of the United States Magistrate Judge, (2) granting Defendants' Motion for Summary Judgment with respect to the following: (a) dismissing Plaintiff's claims against Defendants' Sheriff Parkinson and the County of San Luis Obispo; (b) dismissing Plaintiff's § 1983 claim based on alleged violations of her Fourteenth Amendment rights; (c) dismissing Plaintiff's claim regarding constitutional right of access to the law library; (d) dismissing Plaintiff's claims based on confinement in Administrative Segregation; (e) dismissing Plaintiff's claims regarding denial of meals, showers, clothing and yard time; (f) dismissing Plaintiff's 42 U.S.C.

§§ 1985 and 1986 claims; and (3) denying Defendant's Motion for Summary Judgment based on Plaintiff's excessive force claims.

**REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE**

VICTOR B. KENTON, United States Magistrate Judge.

This Report and Recommendation is submitted to the Honorable Jesus G. Bernal, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

**PROCEEDINGS**

On January 12, 2012, Ramon Murillo (hereinafter referred to as "Plaintiff") filed a "Civil Rights Complaint Pursuant to 42 U.S.C. § 1983" against Defendants Ian Parkinson—Sheriff of San Luis Obispo County; County of San Luis Obispo; Deputy Michael Ulloa; Deputy Mayes; Deputy Manpal; Deputy Adams; Sgt. Rushing; and the San Luis Obispo County Jail.

On February 3, 2012, the Court issued an Order re Dismissal with Leave to Amend.

On March 26, 2012, Plaintiff filed a verified "First Amended Complaint."

On October 11, 2012, the Court issued an Order directing the United States Marshal to serve Defendants with a Summons and First Amended Complaint.

On January 14, 2013, Defendants County of San Luis Obispo, Ian Parkinson, Emmett Rushing, Michael Ulloa, Tyler Adams and Jeremiah Mayes filed an "Answer to the First Amended Complaint."

On July 1, 2014, Defendants Ian Parkinson, County of San Luis Obispo, Michael Ulloa, Tyler Adams, Jeremiah Mayes and Emmett Rushing filed "Defendants' Notice of Motion and Motion for Summary Judgment or in the Alternative Partial Summary Judgment; and Memorandum of Points and Authorities in Support Thereof;" "Defendants' Separate Statement

of Uncontroverted Facts and Conclusions of Law;” “Defendants’ Request for Judicial Notice;” “Declaration of Emmett Rushing in Support of Defendants’ Notice of Motion for Summary Judgment or in the Alternative Partial Summary Judgment;” “Declaration of Nathan A. Perea;” “Declaration of Michael Ulloa;” “Declaration of Attorney Bradford J. Hinshaw, Esq.,” and “[Proposed] Order re Defendants’ Notice and Motion for Summary Judgment or in the Alternative Partial Summary Judgment.”

\*2 On July 3, 2014, the Court issued a Minute Order ordering Plaintiff to file an Opposition or Statement of Non–Opposition to Defendants’ Motion for Summary Judgment within 30 days and attached a *Rand*<sup>1</sup> notice discussing the requirements for opposing a motion for summary judgment.

On August 22, 2014, Plaintiff filed a document entitled “Plaintiff’s Request for Judicial Notice in Support of Opposition to Defendants’ Motion for Summary Judgment.”

On August 25, 2014, Plaintiff filed an “Opposition to Motion for Summary Judgment as to Plaintiff’s First Amended Complaint;” “Declaration of Ramon Murillo in Support of Plaintiff’s Opposition re Motion for Summary Judgment;” and “Plaintiff’s Separate Statement of Uncontroverted Facts.”

On September 12, 2014, Defendants filed “Defendants’ Reply to Plaintiff’s Opposition to Motion for Summary Judgment or in the Alternative Partial Summary Judgment.”

Having reviewed the First Amended Complaint, Defendants’ Answer, Defendants’ Motion for Summary Judgment, Plaintiff’s Opposition and Defendants’ Reply, the Court hereby recommends that Defendants’ Motion for Summary Judgment be granted in part and denied in part.

**PLAINTIFF’S CLAIMS IN HER  
FIRST AMENDED COMPLAINT**

Plaintiff contends that Defendants violated her First, Eighth and Fourteenth Amendment rights when Defendants allegedly denied Plaintiff access to a law

library, assaulted her, and withheld food, yard time, showers, clothing and hormone therapy. (See First Amended Complaint [“FAC”] at pp. 6–7, 12.) Plaintiff also alleges that Defendants have violated 42 U.S.C. § 1985 and 42 U.S.C. § 1986. (FAC at p. 2.) Plaintiff alleges that Defendants discriminated against her based on her transgender orientation. (*Id.*) Defendants denied Plaintiff law library access and retaliated against Plaintiff for exercising her First Amendment rights. (FAC at pp. 4–6, 8–12.) Defendants also denied Plaintiff her Equal Protection rights and conspired against her. (FAC at p. 2.) Plaintiff alleges that she was beaten and discriminated against for being transgender. (FAC at pp. 3, 5–6.)

**STATEMENT OF FACTS**

Based on its review and consideration of the declarations and attached exhibits filed in support of and in opposition to the pending Motion for Summary Judgment, the Court finds the following facts are undisputed unless otherwise noted:

In May of 1999, Plaintiff was tried and convicted in San Bernardino County, California for violating seven counts of California Penal Code (“PC”) § 288(b)(1), forced sex with a minor. (Defendants’ Statement of Undisputed Facts [“DSUF”] 3.) Plaintiff was sentenced to 32 years in prison. (DUFFS 4.) In 1999, Plaintiff began to identify herself as a transgender (DUFFS 5), and began to receive hormone therapy for a Gender Identity Disorder.<sup>2</sup> (DUFFS 5.) Plaintiff received the therapy on and off since 1999. (DUFFS 5.)

In 2005, Plaintiff was housed at the California Mens Colony (“CMC”) in San Luis Obispo, California. (DUFFS 6.) During her stay at CMC, Dr. Joseph Kuntz performed a circumcision on Plaintiff to which Plaintiff claimed she did not consent. (DUFFS 7.) In October 2006, Plaintiff filed a medical malpractice lawsuit against Dr. Joseph Kuntz. (DUFFS 8.) Plaintiff filed her lawsuit as a *pro per* plaintiff, in the Superior Court of California, County of San Luis Obispo, Case No. CV 060845 (“Kuntz Case”). (DUFFS 8.)

\*3 From March 19, 2011 to April 4, 2011, Plaintiff was housed at the San Luis Obispo County Jail (FAC at ¶ 22.) Plaintiff was transported to San Luis Obispo County Jail from the California Department of

Corrections and Rehabilitation (“CDCR”) for the trial on the Kuntz Case. (DUFFS 9.) Plaintiff was classified at CDCR as “Administrative Segregation, Protective Custody Classification” and consequently upon entry at the San Luis Obispo County Jail, she was also placed in Administrative Segregation. (DUFFS 9.) However, Plaintiff disputes this contention and claims she was placed in Administrative Segregation because she is transgender. (DUFFS 11.)

The Kuntz Case was strictly a civil negligence, medical malpractice lawsuit. (DUFFS 10.) The Kuntz Case did not challenge Plaintiff’s conditions of confinement at any one of the California prisons Plaintiff resided; it did not challenge Plaintiff’s criminal sentencing; and it did not allege Dr. Kuntz was working for a public entity giving rise to a civil rights claim. (DUFFS 10.) Plaintiff attended court for pretrial conferences in the Kuntz Case on March 23 and 24, 2011, and attended the four-day jury trial from March 28 through April 1, 2011. (DUFFS 11.) The Kuntz Case ended in a defense verdict. (DUFFS 11.) Plaintiff remained in custody at San Luis Obispo County Jail and awaited transport to CDCR, which occurred on April 4, 2011. (DUFFS 12.)

County Jail policy regarding access to the law library for inmates is to provide priority to *pro per* litigants in criminal proceedings, or litigants challenging the conditions of their confinement. (DUFFS 14.) County jail policy is to require litigants in actions not related to civil rights claims or criminal defense actions to obtain a court order allowing them to access the law library. (DUFFS 15.) Per the County Jail policy, Plaintiff’s medical malpractice lawsuit in the Kuntz Case required a court order. (DUFFS 16.) Defendants Officers Adams and Rushing told Plaintiff she needed to have a Court Order to access the library for legal matters. (DUFFS 17.)

On March 23, 2011, Plaintiff requested an Order from the San Luis Obispo County Superior Court judge to allow her to have access to the law library. (DUFFS 17.) The trial judge issued a Minute Order on March 23, 2011, which stated in a handwritten note, “If it can be reasonably accomplished the Sheriff shall bring to court each day with the Plaintiff a copy of Plaintiff’s legal file and Defendant’s exhibits and trial documents.” (DUFFS 18.) The March 23, 2011 Minute Order also stated, “The Plaintiff is self represented, facing trial on 3/28/11, and should be granted all reasonable access to legal

research facilities. The Plaintiff shall arrive in court each day, starting Monday, 3/28/11, attired in civilian clothing.” (DUFFS 19.) Plaintiff had civilian clothing on at the hearing and during the trial. (DUFFS 36.) According to the *Pro Per* Log, Plaintiff had access to her legal research materials after March 23, 2011. (DUFFS 23.)

\*4 Plaintiff alleges on March 23, 2011 Defendants Deputies Mayes, Adams, Manpal and Sgt. Rushing denied Plaintiff access to law research facilities and to her own legal materials and trial briefs. (FAC at ¶32.) Plaintiff alleges when returning from court on March 23, 2011 that Defendants refused to feed her and started pushing Plaintiff, calling her “faggot, queer with tits.” (FAC at ¶33.) Defendant Deputy Ulloa smacked Plaintiff in the face and head, calling her a “rat-ass-faggot.” (*Id.*) Defendant Sgt. Rushing was laughing and kicked Plaintiff, saying “we are the real thing, not no correctional officer.” (*Id.*) Plaintiff alleges Defendant Sgt. Rushing then ordered Defendants Deputies Adams and Mayes to strip Plaintiff naked in the middle of the hall. Plaintiff was then punched by Defendants. Sgt. Rushing then said, “No budget, no law library.” (*Id.*)

A pretrial conference hearing was held on March 24, 2011. (DUFFS 21.) Plaintiff alleges that she informed the Court of the alleged March 23, 2011 assault, that she was hurt in the knee and was hit in the face and given a bloody nose, and the Court responded with the March 24, 2011 Order. (DUFFS 37, 38.) The only statement noted on the March 24, 2011 Minute Order is, “The Plaintiff shall be allowed to bring to Court each day whatever legal materials he is able to carry with him.” (DUFFS 21.) There is no mention in the March 24, 2011 Minute Order that Plaintiff was refused access to the law library. (DUFFS 21.) Also, the attorney in the civil case, representing Dr. Kuntz, never saw Plaintiff displaying injuries associated with a physical assault throughout the entire trial. (DUFFS 22.)

The Custody Post Logs for March 24, 2011 and March 25, 2011, show Plaintiff had accessed the legal research room, which the jail calls the “502 room.” (DUFFS 24.) Plaintiff alleges that this room is an empty cell with a typewriter, table and chair but no other services are provided. (Plaintiff’s Opposition at 3; Plaintiff’s Statement of Undisputed Facts [“PSUF”] 6.)

Plaintiff alleges on April 1, 2011, “while returning from trial, Defendants Ulloa, Mayes, Manpal, Adams and Sgt. Rushing got Plaintiff naked in the A–Hall, and started to punch, strike, and kick Plaintiff” calling her a “rat faggot” and other names and placed her in Administrative Segregation without medical attention. (FAC at ¶ 36.) Defendants deny that this incident occurred. (DUFFS 25)

During the entire period Plaintiff stayed at the County Jail from March 19, 2011 through April 4, 2011, Defendants contend that Plaintiff was provided meals on a daily basis. (DUFFS 20.) Meal periods, such as breakfast, lunch and dinner, are served to all inmates at the same time in order to ensure order and safety among the inmates as well as the correctional staff. (*Id.*) According to Defendants Sgt. Rushing and Deputy Ulloa, Plaintiff was never denied meals (DUFFS 26); however, Plaintiff disputes this contention and alleges she was denied eight meals. Plaintiff never complained to the Trial Judge that she was not receiving meals. (DUFFS 40.) Defendants also allege that Plaintiff participated in the clothing exchanges and showers (DUFFS 27); however, Plaintiff alleges she was not provided with showers or clean clothes.

\*5 Yard time was provided to Plaintiff when weather permitted. (DUFFS 28.) An inmate housed in Administrative Segregation is granted yard access for exercise on Tuesdays, Thursday and Saturdays, when weather permits. During the period that Plaintiff was housed at the San Luis Obispo County Jail, weather did not permit yard access on March 22–27, 2011. Plaintiff was given yard access on Tuesday, March 29, 2011, Thursday, March 31, 2011 and Saturday, April 2, 2011. (DUFFS 28.) Plaintiff attended court for pretrial conferences on March 23, 2011 and March 24, 2011 and trial from March 28, 2011 to April 1, 2011. (DUFFS 11.)

Plaintiff received her hormone therapy once during week 2 of the 16–day period, and received hormone therapy three days before she was transferred to County Jail which is consistent with her prescribed therapy. (DUFFS 30, 41.)<sup>3</sup>

Plaintiff has no evidence of a policy created by Defendant Sheriff Ian Parkinson or imposed by the County of San Luis Obispo and admits to neither meeting or otherwise communicating with Defendant Sheriff Ian Parkinson. (DUFFS 42.)

**DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

Defendants seek summary judgment or in the alternative partial summary judgment as to Plaintiff's claims for alleged violations under 42 U.S.C. § 1983 (First, Eighth and Fourteenth Amendments); and allegations of conspiracy under 42 U.S.C. §§ 1985 and 1986. Specifically, Defendants contend that Plaintiff's § 1983 claim against Defendants Sheriff Ian Parkinson and the County of San Luis Obispo fail as a matter of law and that Plaintiff's § 1983 claim based on alleged violations of her Fourteenth Amendment rights also fail. Defendants also contend they are entitled to qualified immunity against each of Plaintiff's alleged constitutional violation claims on the following grounds: (1) Plaintiff did not have a constitutional right to access the law library and if she did, the right was not clearly established; (2) confinement in Administrative Segregation is not a civil rights violation; (3) Plaintiff was not denied meals, showers, clothing or yard time; and (4) Plaintiff's alleged assaults are not supported by facts and are subject to immunity. Finally, Plaintiff's 42 U.S.C. § 1985 and § 1986 claims fail as a matter of law.

**PLAINTIFF'S OPPOSITION TO THE  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff in her Opposition contends that Defendants violated her First, Eighth and Fourteenth Amendment rights and acted with deliberate indifference when (1) Defendants denied Plaintiff access to the courts by denying her access to the law library, legal materials and legal supplies; (2) used excessive force in retaliation and discrimination against Plaintiff because Plaintiff is transgender; and (3) denied Plaintiff her equal protection rights by denying Plaintiff showers, hygiene, food (at times), yard time, clothing exchange, and enacted policies that violated Plaintiff's civil rights.

**DEFENDANTS' REPLY TO  
PLAINTIFF'S OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT**

\*6 Defendants contend that Defendant Sheriff Ian Parkinson did not violate Plaintiff's rights in his official

or individual capacities; that Plaintiff was not retaliated against in violation of her due process rights; that Plaintiff fails to address whether she was constitutionally entitled to access a law library for the Kuntz Case; that Plaintiff's excessive force claim fails; and Plaintiff has failed to present facts to dispute that she received food, showers, yard time and clothing.

### STANDARD OF REVIEW

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of informing the court of the basis for the motion, and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact.<sup>4</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue of material fact warranting trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324. In resolving a motion for summary judgment, “[T]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 250.

Under this standard, the mere existence of an alleged factual dispute between the parties will not withstand summary judgment. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). A factual dispute qualifies as “material” only if it “might affect the outcome of the suit under the governing law[.]” *Anderson*, 477 U.S. at 248 (noting that “the substantive law will identify which facts are material” and that “[f]actual disputes that are irrelevant or unnecessary” in relation to the legal elements of the claims “will not be counted”); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.1982) (“A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth.”) (citation omitted). A “dispute about a material fact is ‘genuine’ ... if the evidence is such that a reasonable jury could return a verdict for the non-moving

party.” *Anderson*, 477 U.S. at 248; *see also Harris*, 550 U.S. at 380 (“Where the record taken as a whole would not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial”).

In determining whether a triable issue of material fact exists, the evidence must be considered in the light most favorable to the non-moving party. *Barlow v. Ground*, 943 F.2d 1132, 1134 (9th Cir.1991). However, summary judgment cannot be avoided by relying solely on conclusory allegations unsupported by factual data. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). More than a “metaphysical” doubt is required to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Mere reliance on the pleadings and conclusory allegations are insufficient to preclude summary judgment. *Celotex Corp.*, 477 U.S. at 324. A party opposing a properly supported motion for summary judgment “... must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 247, *citing First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

\*7 Finally, where the evidence conflicts, questions of credibility and motivation generally present an issue of material fact inappropriate for resolution on summary judgment. *See, Allen v. Scribner*, 812 F.2d 426, 435, 437 (9th Cir.1987), *amended on other grounds*, 828 F.2d 1445 (9th Cir.1987); *see also Valandingham v. Bojorquez*, 866 F.2d 1135, 1139, 1140 (9th Cir.1989) (genuine issue of material fact existed as to whether defendants committed the alleged retaliatory acts). Thus, when a plaintiff presents evidence on which the trier of fact could reasonably resolve a material factual issue in her favor, summary judgment for defendants is not appropriate. *See, Barlow v. Ground*, 943 F.2d 1132, 1136 (9th Cir.1991), *cert. denied*, 505 U.S. 1206, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992); *see also Neely v. Feinstein*, 50 F.3d 1502, 1509 (9th Cir.1995).

**A. Plaintiff and Defendants' Requests for Judicial Notice.** Defendants have requested the Court take judicial notice pursuant to Federal Rule of Evidence 201 of a number of documents contained in Exhibits 11–15, all constituting court records. The request is unopposed.

Plaintiff seeks judicial notice for the following documents: Exhibit 1: San Luis Obispo County Sheriff's Department Court Tracking Sheet; Exhibit 2: San Luis Obispo County Sheriff Operational Directive—Use of Force; Exhibit 3: San Luis Obispo County Sheriff's Operational Directive — § 306.00, *et seq.*—Searches on Inmates; Exhibit 5: Law Library Operational § 1103.00, *et seq.*; Exhibit 6: Assembly Bill No. 382; Exhibit 7: San Luis Obispo County Jail Custody Post Log; and Exhibit 8: Declaration of Custodian of Records of San Luis Obispo County Sheriff.

To be judicially noticeable, a fact must not be subject to a reasonable dispute because it must be either generally known within the territorial jurisdiction of the Court or “capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned.” Fed.R.Evid. 201. “Materials from a proceeding in another tribunal are appropriate for judicial notice.” *Biggs v. Terhune*, 334 F.3d 910, 916 n. 3 (9th Cir.2003) (taking judicial notice of the transcript of a habeas petitioner's hearing before the Board of Prison Terms); *see also United States ex. rel. Robinson Rancheria Citizens Counsel v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992) (holding that courts may take judicial notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue”); *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1388 n. 9 (9th Cir.1987) (holding that it is proper for a court to take judicial notice of the contents in court files in other lawsuits), *cert. denied*, 486 U.S. 1040, 108 S.Ct. 2031, 100 L.Ed.2d 616 (1988).

Accordingly, the Court grants Defendants' request to take judicial notice of the state court records in Plaintiff's criminal case and medical malpractice case. *See* Defendants' Exs. 11–15. However, Plaintiff's request for judicial notice of Exhibits 1 through 8 is denied. As noted, Courts may only take judicial notice of adjudicative facts that are “not subject to reasonable dispute.” Fed.R.Evid. 201(b). Plaintiff's Exs. 1 through 8 do not fit the requirements of Rule 201.

### DISCUSSION

\*8 For all of the following reasons, Defendants' Motion for Summary Judgment or Partial Summary Judgment should be granted in part and denied in part.

#### A. Section 1983 Requirements.

In order to state a claim under section 1983, a plaintiff must allege that: (1) the defendants were acting under color of state law at the time the complained of acts were committed; and (2) the defendants' conduct deprived plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Karim–Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir.1988); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir.1985) (en banc), *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986). Liability under section 1983 is predicated upon an affirmative link or connection between the defendants' actions and the claimed deprivations. *See Rizzo v. Goode*, 423 U.S. 362, 372–73, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir.1980).

Plaintiff's claims against Defendants are in their individual and official capacities. An individual defendant is not liable on a civil rights claim unless the facts establish the defendant's *personal involvement* in the constitutional deprivation or a causal connection between the defendant's wrongful conduct and the alleged constitutional deprivation. *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.1984). A plaintiff “must allege facts, not simply conclusions, that show an individual was personally involved in the deprivation of her civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.1998), *cert. denied*, 525 U.S. 1154, 119 S.Ct. 1058, 143 L.Ed.2d 63 (1999); *see Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (stating that a complaint must contain more than legal conclusions to withstand dismissal for failure to state a claim).

#### B. Plaintiff Fails to State a Claim Against Defendants Sheriff Parkinson in His Individual or Official Capacity or the County of San Luis Obispo.

Plaintiff alleges that Defendants County of San Luis Obispo and Sheriff Parkinson violated her rights under the First and Fourteenth Amendments. Plaintiff alleges she was unable to complain without retaliation from Defendants. (FAC at p. 7.) Plaintiff alleges that Defendants County of San Luis Obispo and Sheriff Parkinson make the jail policies. Specifically, Plaintiff contends that Defendant County of San Luis Obispo provided the budget to the jail, and Defendant Sheriff Parkinson made the policy and custom to eliminate the

law library. (Plaintiff's Opposition at pp. 6–8.) However, Plaintiff has provided no admissible evidence that the law library was cut from the budget. Further, Plaintiff was not a *pro per* plaintiff within the class of litigants that is constitutionally entitled to law library access. As noted in Plaintiff's First Amended Complaint, she “was denied access to [her] own legal material to prepare for her civil trial, so [she] could file motions, get ready for witness [sic], court rules.” (FAC at ¶ 27.) According to Plaintiff, her claims relate to the denial of access to her file material relating to the Kuntz Case.

\*9 A claim against a local government official in her official capacity is construed as being asserted directly against the local government entity, not the named individual defendant. See *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (“Official capacity suits ... generally represent only another way of pleading an action against an entity of which the officer is an agent”) (quoting *Monell v. Department of Social Service of the City of New York*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Where the government entity receives notice and an opportunity to respond to the official capacity suit, “[The] suit is, in all respects other than name, to be treated as a suit against the entity.” *Kentucky v. Graham*, 473 U.S. at 166 (citation omitted).

A local government entity may not be sued under § 1983 for an injury inflicted wholly by its employees or agents. *Monell*, 436 U.S. at 691. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. *Monell*, 436 U.S. at 694; see also *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1185 (9th Cir.2002) (describing “two routes” to municipal liability, where municipality's official policy, regulation or decision violated plaintiff's rights, or alternatively where a municipality failed to act under circumstances showing its deliberate indifference to plaintiff's rights) (citations omitted), *cert. denied*, 537 U.S. 1106, 123 S.Ct. 872, 154 L.Ed.2d 775 (2003).

The Court has construed the First Amended Complaint in the light most favorable to Plaintiff. Even so, Plaintiff has failed to state a plausible claim that Defendant Sheriff Parkinson could be held liable for Plaintiff's claims. Plaintiff does not allege that Defendant Sheriff Parkinson

had any direct contact with Plaintiff, but rather premises her claims against him on his actions as a supervisor of the jail. Supervisory personnel generally are not liable under 42 U.S.C. § 1983 on any theory of respondeat superior or vicarious liability in the absence of state law imposing such liability. See *Redman v. County of San Diego*, 942 F.2d 1435, 1443–44 (9th Cir.1991), *cert. denied*, 502 U.S. 1074, 112 S.Ct. 972, 117 L.Ed.2d 137 (1992). A supervisory official may be liable under § 1983 only if he or she was personally involved in the constitutional violation. See *Id.* at 1446–47. A plaintiff who wishes “[t]o premise a supervisor's alleged liability on a policy promulgated by the supervisor ... must identify a specific policy and establish a direct causal link, between that policy and the alleged constitutional deprivation.” *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Here, Plaintiff contends that several policies at the County Jail violated her constitutional rights giving rise to Defendant Sheriff Parkinson's liability individually, and in his official capacity as the creator of the budget and the policies. Plaintiff states that the rules surrounding the use of the law library and the alleged lack of a grievance process violated her constitutional rights. However, Plaintiff had no constitutional right to access the law library and the jail had a grievance process.

\*10 The Ninth Circuit has consistently held that a confined person in Plaintiff's situation could state a claim for a supervisor's liability under § 1983 against a warden, sheriff, director of corrections, or other jail administrator, for example, if he supplies sufficient specific allegations that the supervisor personally (1) set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) [committed] culpable action or inaction in training, supervision or control of subordinates; (3) ... acquiesce[d] in the constitutional deprivation by subordinates; or (4) [engaged in] conduct that shows a “reckless or callous indifference to the rights of others.” *Moss v. U.S. Secret Service*, 675 F.3d 1213, 1231 (9th Cir.2012) (quoting *Al Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir.2009) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 636 (9th Cir.1991).)

As the Supreme Court made clear in *Iqbal*, “a government official, regardless of his or her title, ‘is liable only for his

or her own misconduct.’ “ *Ashcroft v. Iqbal*, 556 U.S. at 677. Thus, “a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.” (*Id.* at 676.) The Ninth Circuit has concluded that, notwithstanding *Iqbal*, when an Eighth/Fourteenth Amendment conditions of confinement claim is governed by the “deliberate indifference” standard, “a plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.” *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir.2011), cert. denied, — U.S. —, 132 S.Ct. 2101, 182 L.Ed.2d 882 (2012).

In *Starr*, the Ninth Circuit considered a § 1983 claim brought against the Sheriff of Los Angeles County (Baca) and found the allegations of the complaint to be sufficient to state a “supervisory liability claim of deliberate indifference against Sheriff Baca.” *Starr*, 652 F.3d at 1217. More recently, in *Hydrick v. Hunter*, 669 F.3d 937 (9th Cir.2012), the Ninth Circuit explained that the complaint in *Starr* contained detailed factual allegations identifying what Baca knew or should have known and what Baca did or failed to do, as well as “sufficient facts to plausibly suggest Sheriff Baca's ‘knowledge of’ and ‘acquiescence in’ the unconstitutional conduct of his subordinates.” (*Hydrick*, 669 F.3d at 941 (citing *Starr*, 652 F.3d at 1207, 1209.)) These detailed allegations were related to, among other things, a letter and weekly reports received by Baca that discussed inmate abuse; a memorandum of understanding into which Baca entered with the Department of Justice by which Baca agreed to address constitutional violations to which inmates were subjected; a subsequent Department of Justice report, which found that Baca had failed to comply with the Memorandum of Understanding; an incident in which Baca was specifically informed about the failure to investigate a deputy's attack on an inmate that resulted in the inmate's death; another incident in which (pursuant to the approval of the settlement of a civil action) Baca was made aware of attacks on inmates by other inmates and of the failure to provide reasonable security; seven or more other incidents in which Baca was apprised, after the fact, of inmate beatings and killings that resulted from the failure of deputies to provide reasonable security; and several reports provided to Baca by a special counsel, which noted inmate abuse and problems at the jail. *Starr*, 652 F.3d at 1209–11; see also *Hydrick*, 669 F.3d at 941.

\*11 In contrast here, the allegations of the First Amended Complaint are wholly bald and conclusory and assert merely that Defendant Sheriff Parkinson knew or should have known that Plaintiff's rights would be violated by the conditions of her confinement at the jail. Plaintiff does not allege any facts that plausibly suggest Defendant Sheriff Parkinson knew of any constitutional deprivations occurring at the San Luis Obispo County Jail. The mere fact that Defendant Sheriff Parkinson is the Sheriff of San Luis Obispo, and thus is the top official with respect to the administration of the Jail, is not an adequate factual predicate for stating a § 1983 claim against him based on the subject matter of the First Amended Complaint. As in *Hydrick*, “[T]he absence of specifics is significant,” because *Iqbal* has made clear that a complaint against a government official must show that the official's own individual actions violated the Constitution. *Hydrick*, 669 F.3d at 941–42 (finding allegations of a complaint challenging the conditions of confinement, which was filed by civilly committed sexually violent predators against supervisors at a state hospital and elsewhere, to be bald and conclusory, “devoid of specifics” sufficient to plausibly suggest that defendant's knowledge of and/or acquiescence in the allegedly unconstitutional conduct (retaliation) by subordinate employees and thus inadequate to state a claim for monetary damages under § 1983).

Plaintiff's First Amended Complaint does not provide allegations describing why and how Defendant Sheriff Parkinson “reasonably should have known” that his rank and file employees were engaged in some “series of acts” (which he did not initiate, command or encourage) which would cause constitutional injury to Plaintiff if Defendant Sheriff Parkinson did not terminate that “series of acts,” *Larez*, 946 F.2d at 636. Nor does the First Amended Complaint supply specific allegations describing, in more than conclusory fashion, how Defendant Sheriff Parkinson might have “set [ ] in motion a series of acts by others” (*Larez*, 946 F.2d at 636), that he knew or reasonably should have known would cause his subordinates to inflict constitutional injury on Plaintiff. Without a factually based, non-conclusory allegation that Defendant Sheriff Parkinson actually knew of the conditions to which Plaintiff refers, as a matter of law it cannot be said that Defendant Sheriff Parkinson “acquiesced” in those conditions or that his conduct exhibited “reckless or callous indifference to the rights of”

Plaintiff. Accordingly, Defendants Sheriff Parkinson and the County of San Luis Obispo are entitled to summary judgment.

**C. Plaintiff's § 1983 Claim Based on Alleged**

**Violations of Her Fourteenth Amendment Rights Fails.**

Plaintiff was not a pretrial detainee while at the County Jail and is not a member of a protected class. Plaintiff claims, in part, that she was physically assaulted as retaliation for seeking a Court Order for access to the law library from the Judge in her medical malpractice case and that she was further assaulted due to her transgender status. Plaintiff claims that Defendants' conduct was "deliberately indifferent" to her Fourteenth Amendment due process rights. Because Plaintiff is a convicted felon, and was at the County Jail in the middle of serving a sentence, Plaintiff's due process rights arise from the Eighth Amendment, not the Fourteenth Amendment. See *Simmons v. Navajo County, Arizona*, 609 F.3d 1011, 1017 (9th Cir.2010); *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir.2010); see also *Hudson v. McMillan*, 503 U.S. 1, 4, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (Eighth Amendment due process is applied to inmates, while Fourteenth Amendment due process applies to pretrial detainees). To the extent Plaintiff is bringing her § 1983 claims for violation of her due process rights under the Fourteenth Amendment, they fail as a matter of law.

\*12 Plaintiff also alleges her equal protection rights under the Fourteenth Amendment were violated because of her transgender status. Transgender is not a protected or suspect class giving rise to equal protection. An equal protection claim may be established in two ways: the first requires a plaintiff to "show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington*, 151 F.3d 1193, 1194 (9th Cir.1998). Plaintiff has put forth no evidence that her status as a transgender qualified her as a member of a protected class. Further, there are no cases in which transgender persons constitute a "suspect class." See *Braninburg v. Coalinga State Hospital*, 2012 WL 391190 at \*8 (E.D.Cal. Sept. 7, 2012); *Jamison v. Davue*, 2012 WL 996383 at \*3 (E.D.Cal. Mar.23, 2012) (holding that transgender individuals do not constitute a suspect class).

If the claims do not involve a suspect classification, a plaintiff can establish an equal protection "class of

one" by alleging that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). To prevail under this theory, a plaintiff must show that (1) he is a member of an identifiable class; (2) he was intentionally treated differently from others similarly situated; and (3) there is no rational basis for the difference in treatment. *Village of Willowbrook*, 528 U.S. at 564. "Intentional discrimination means that a defendant acted at least in part because of a plaintiff's protected status." *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir.2003) (emphasis in original) (quoting *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir.1994)). Plaintiff has set forth no evidence supporting a finding that other similarly situated individuals were treated differently from her, and has presented no evidence establishing that there was no rational basis for such different treatment. Accordingly, Defendants are entitled to summary judgment on this claim.

**D. Defendants Are Entitled to**

**Qualified Immunity on Certain Claims.**

Defendants contend they are entitled to qualified immunity because Plaintiff's allegations are insufficient to plead constitutional claims. Specifically, Defendants contend that Plaintiff did not have a constitutional right to access the law library and if she did the right was not clearly established; that confinement in administrative segregation is not a violation of a civil right; that Plaintiff was not denied meals, showers, clothing or yard time; and that Plaintiff's alleged assaults are subject to immunity.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (citation omitted). "[Q]ualified immunity shields the arresting officer from suit when she or she 'makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances.' " *Smith v. Almada*, 640 F.3d 931, 937 (9th Cir.2011) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."

*Mallev v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

\*13 To determine whether an official is entitled to qualified immunity, the Court must decide whether the facts alleged show the official's conduct violated a constitutional right; and, if so, whether it would be clear to a reasonable officer that her conduct was unlawful in the situation she confronted. *Saucier v. Katz*, 533 U.S. 194, 201–02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *overruled in part on other grounds* by *Pearson*, 555 U.S. at 223. The prongs may be analyzed in the order selected by the court. *Pearson*, 555 U.S. at 236.

To survive a claim of qualified immunity, a plaintiff must show that the official's actions violated a constitutional right, and that the right was “clearly established” at the time of the conduct at issue. *Nelson v. City of Davis*, 685 F.3d 867, 875 (9th Cir.2012); *see also Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (“Courts are required to resolve a threshold question: taken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer's conduct violated a constitutional right?”); *Estate of Ford v. Ramirez Palmer*, 301 F.3d 1043, 1050 (9th Cir.2002) (clarifying the qualified immunity analysis for a claim under the Eighth Amendment). If no constitutional right would have been violated if the facts were as alleged, then “there is no necessity for further inquiries concerning qualified immunity.” *Saucier*, 533 U.S. at 201.

If the official's actions did not violate a constitutional right, there is no violation of § 1983 and qualified immunity is not implicated. *Lacey v. Maricopa County*, 693 F.3d 896, 915 (9th Cir.2012). If the official violates a constitutional right, but that right was not “clearly established,” then the official is protected by qualified immunity. (*Id.*) “Only when an officer's conduct violates a clearly established constitutional right—when the officer should have known she was violating the Constitution—does she forfeit qualified immunity.” (*Id.*)

The Court will discuss each of Plaintiff's claims below.

#### **1. Defendants Are Entitled to Summary Judgment on Plaintiff's First Amendment Retaliation Claim.**

Allegations of retaliation against a prisoner's First Amendment rights to speech or to petition the Government may support a § 1983 claim. *Rizzo v.*

*Dawson*, 778 F.2d 527, 532 (9th Cir.1985). *See also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir.1989); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir.1995). “Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of her First Amendment rights and (5) the action did not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir.2005). An allegation of retaliation against a prisoner's First Amendment right to file a prison grievance is sufficient to support a claim under § 1983. *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir.2003).

\*14 Adverse action is action that “would chill a person of ordinary firmness” from engaging in that activity. *Pinard v. Clatskanie School District*, 467 F.3d 755, 770 (9th Cir.2006). Both litigation in court and filing inmate grievances are protected activities and it is impermissible for prison officials to retaliate against inmates for engaging in these activities. However, not every allegedly adverse action will be sufficient to support a claim under § 1983 for retaliation. In the prison context, cases in this Circuit addressing First Amendment retaliation claims involve situations where the action taken by the defendant was clearly adverse to the plaintiff. *Rhodes v. Robinson*, 408 F.3d at 568 (arbitrary confiscation and destruction of property, initiation of a prison transfer, and assault and retaliation for filing grievances); *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir.2004) (retaliatory placement in administrative segregation for filing grievances).

A plaintiff asserting a retaliation claim must demonstrate a causal nexus between that alleged retaliation and plaintiff's protected activity (i.e., filing a legal action). *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir.1979); *see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). A plaintiff must submit evidence, either direct or circumstantial, establishing a link between the exercise of constitutional rights and the alleged retaliatory action. *Pratt*, 65 F.3d at 806. The timing of events surrounding the alleged retaliation may constitute circumstantial evidence of retaliatory intent. (*See Id.*)

There is no free standing constitutional right to law library access; however, prisoners have a constitutional

right of access to the courts. See *Lewis v. Casey*, 518 U.S. 343, 346, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). This right of access to the Courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. *Bounds*, 430 U.S. at 828. The right, however, “guarantees no particular methodology but rather the conferral of capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts ... that is the touchstone of the right of access to the courts.” *Lewis*, 518 U.S. at 356–357. Prison officials may select the best method to insure that prisoners will have the capability to file suit. See *id.* at 356.

To establish a violation of the right of access to the courts, a prisoner must establish that he or she has suffered an actual injury. See *Lewis*, 518 U.S. at 349. An “actual injury” is “actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.” *Lewis*, 518 U.S. at 348. The right of access to the courts is limited to non-frivolous legal claims such as direct criminal appeals, habeas corpus proceedings, and § 1983 actions. See *Lewis*, 518 U.S. at 353 n. 3 and 354–355; see also *Phillips v. Hust*, 588 F.3d 652, 655 (9th Cir.2009) (to succeed on denial of access claim, a plaintiff must show that official acts or omissions hindered efforts to pursue a non-frivolous legal claim). The right of access to the courts is only a right to bring complaints to the federal court and not a right to discover such claims or to litigate them effectively once filed with the Court. See *Lewis*, 518 U.S. at 354–355.

\*15 Here, Plaintiff’s allegations fail to state a First Amendment violation. Prisoners involved in civil lawsuits that do not present constitutional questions challenging conditions of confinement or attacking a conviction are not afforded mandatory access to legal research, facilities, or law libraries, as the purpose in *Bounds* was not to create litigating engines capable of filing everything from shareholders derivative actions to slip and fall claims. *Lewis*, 518 U.S. at 355–356. Decisions by prison officials to regulate the number of inmates who can access a law library and its resources does not, by itself, constitute a denial of access to the courts. See *Lewis*, 518 U.S. at 361; *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 858 (9th Cir.1985). Prison officials are afforded the

authority “in structuring when and who can access prison law libraries.” *Lindquist*, 776 F.2d at 851.

Plaintiff claims that she had a constitutional right to access a law library to prepare for the Kuntz trial. She claims this right was denied. The Kuntz Case was a medical malpractice case. It did not present a challenge to the conditions of confinement or criminal sentence. (DSUF 10 and 11.) Therefore, the Kuntz Case did not present claims giving rise to a constitutional right to access legal research and a law library and therefore no constitutional right could have been violated.

Even if Plaintiff had a constitutional right to have access to a law library relating to her medical malpractice lawsuit, the cases from the Supreme Court suggest otherwise, such that a right is not clearly established for a reasonable officer to know he was violating a right by depriving Plaintiff access to the law library. Accordingly, Defendants are entitled to qualified immunity regarding this claim.

Plaintiff also alleges Defendants violated state law regarding law library access. “To the extent that the violation of a state law amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, [s]ection 1983 offers no redress.” *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1391 (9th Cir.1997), quoting *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir.1996). Only if the events complained of rise to the level of a federal statutory or constitutional violation may Plaintiff pursue them under § 1983. *Patel v. Kent School Dist.*, 648 F.3d 965, 971 (9th Cir.2011). There is no independent cause of action for a violation of Title 15 regulations. See *Davis v. Kissinger*, 2009 WL 256574, \*12 n. 4 (E.D.Cal.2009). Thus, complaints where prison officials violated state regulations regarding law library policies or Title 15 will not support a § 1983 claim.

## **2. Plaintiff’s Claim That Confinement in Administrative Segregation Violated Her Rights Fail.**

When Plaintiff arrived from CDCR, she had a designation of Administrative Segregation Protective Custody. County Jail, complying with Plaintiff’s already established classification, placed her in Administrative Segregation. (DSUF 9, 44.) Plaintiff’s contention that she was retaliated against by being placed in Administrative Segregation fails as she was placed there upon arrival

on March 19, 2011 and remained there until April 4, 2011. (DSUF 9, 44.) Plaintiff argues that she was placed in Administrative Segregation because she is transgender and requested law library access. However, Plaintiff was placed in Administrative Segregation before she obtained the March 23, 2011 Order from the Superior Court in the Kuntz Case. Consequently, confinement in Administrative Segregation could not be retaliatory.

\*16 In general, a prisoner has no liberty interest in avoiding transfer to more restrictive conditions of confinement, such as a transfer from the general population to segregation, unless he can show an atypical and significant hardship in relation to the ordinary incidents of prison life. *Wilkinson v. Austin*, 545 U.S. 209, 221–23, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005); *Sandinv. Connor*, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). “Typically, administrative segregation in and of itself does not implicate a protected liberty interest.” *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir.2003); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir.1997) (administrative segregation falls within the terms of confinement ordinarily contemplated by a sentence). Administrative segregation may implicate due process if the confinement imposes an atypical and significant hardship. *See, e.g., Wilkinson*, 545 U.S. at 223–24 (inmates’ liberty interests were implicated by their indefinite confinement in highly restrictive “supermax” prison, where the inmates were deprived of almost all human contact and were disqualified from parole consideration); *Serrano*, 345 F.3d at 1078–79 (placing disabled inmate, without his wheelchair, in segregation unit not equipped for disabled persons gave rise to a liberty interest).

Because there was no constitutional right violated by Plaintiff’s placement in Administrative Segregation, there is no need to analyze and discuss whether the right was clearly established so that a reasonable officer would have known the conduct violated Plaintiff’s rights. It is reasonably clear that an officer would believe that placing Plaintiff in Administrative Segregation was not a constitutional violation. Accordingly, Defendants are entitled to qualified immunity on this claim.

### **3. Defendants Are Entitled to Summary Judgment on Plaintiff’s Claims Regarding Meals, Showers, Clothing and Yard Time.**

#### **a. Meals.**

Plaintiff alleges that Defendants denied her adequate meals. In Plaintiff’s FAC on p. 6, ¶ 37 she alleges she missed a total of eight meals, then on p. 11, Plaintiff alleges she “was denied dinners for 14 days out of the 34 stayed in the San Luis Obispo County Jail.” (DSUF 2.) Defendants contend that during the period of March 19, 2011 through April 4, 2011, Plaintiff was provided meals on a daily basis. (DSUF 20, 26.)

The Eighth Amendment’s prohibition against cruel and unusual punishment protects prisoners not only from inhumane methods of punishment but also from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir.2006) (citing *Farmer v. Brennan*, 511 U.S. at 847 and *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)). Prison officials must ensure that inmates receive adequate food, clothing, shelter, medical care and personal safety. *Farmer*, 511 U.S. at 832. “Adequate food is a basic human need protected by the Eighth Amendment.” *Kenman v. Hall*, 83 F.3d 1083, 1091 (9th Cir.1996) (citing *Hoptowit v. Ray*, 682 F.2d at 1246), *amended by* 135 F.3d 1318 (9th Cir.1998). “While prison food need not be tasty or esthetically pleasing it must adequate to maintain health” (*Id.*), quoting *Lamaire v. Maass*, 12 F.3d 1444, 1456 (1993); *see also Foster v. Runnels*, 554 F.3d 807, 812–13 (9th Cir.2009) (prisoner allegation that officials deprived her of 16 meals over a 23–day period, leading to weight loss and dizziness was sufficient to state a claim).

\*17 Here, Plaintiff does not allege that meals were withheld compromising her health, nor did Plaintiff mention denial of meals to the Superior Court Judge. Accordingly, Defendants are entitled to summary judgment.

#### **b. Shower Time.**

Plaintiff was at County Jail for over a two-week period of time. While the Eighth Amendment protects prisoners from cruel and unusual punishment, there is no discernable constitutional right to frequent showers. “[I]t is hardly inhuman or uncivilized to shower less commonly, as any intentional tourist can attest.” *Clark v. Williams*, 2011 WL 304585 \*2 (D.Nev.2011); *see also Baptisto v. Ryan*, 2005 WL 2416356 (D.Ariz.2005); *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir.1988) (holding

that inmate experiencing a 90-day lockdown had no right to three showers per week, with Judge Posner noting that “importance of a daily shower to the average American is cultural rather than hygienic”).

Here, even if Plaintiff can show that she was deprived of showers, any deprivation does not arise to a constitutional violation, or a violation of federal law. “Section 1983 is ‘a method for vindicating federal rights,’ not rights imparted by the state or county.” *Graham v. Connor*, 490 U.S. 386, 393–94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). As such, for the short length of time Plaintiff was at County Jail, even if she did not participate in showers, there is no constitutional violation supportive of a § 1983 claim.

#### c. Clothing.

Plaintiff’s claim that she was denied “clothing exchanges” is unsupported. On March 20, 2011, Plaintiff was issued County Jail clothing upon arrival to County Jail. (DSUF 36.) Plaintiff was only at County Jail for 16 days and she admits to receiving clothing during the trial. (DSUF 36.) “The denial of adequate clothing can inflict pain under the Eighth Amendment.” *Walker v. Sumner*, 14 F.3d 1415, 1421 (9th Cir.1994) (overruled on other grounds by *Sandin v. Conner*, 515 U.S. 472, 483–84, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)). Conditions of confinement must be more than uncomfortable, however, to violate the Eighth Amendment. *Rhodes*, 452 U.S. at 347. For there to be a constitutional violation relating to clothing, Plaintiff had to go without new clothing for weeks or months which is impossible with the facts presented; therefore, there can be no constitutional right violated. See *Rainwater v. McGinniss*, 2012 WL 3276966 (E.D.Cal. Aug.9, 2012) (citing *Toussaint v. McCarthy* (N.D.Cal.1984), 597 F.Supp. 1388, 1410–11, reversed in part on other grounds, 801 F.2d 1080 (9th Cir.1986) (holding the Eighth Amendment is violated when weeks to months pass without a clothing exchange).

#### d. Yard Time.

Plaintiff alleges she was denied yard time from March 19, 2011 to April 15, 2011. (FAC at p. 11.)<sup>5</sup> Defendants contend that Plaintiff was not held at the County Jail for a long enough period of time to give rise to a deliberate indifference claim for withholding outside exercise for extended periods of time.

\*18 Exercise is one of the basic human necessities protected by the Eighth Amendment. See *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir.1993); *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir.2005); see also *Toussaint v. Yockey*, 722 F.2d 1490, 1492–93 (9th Cir.1984). Some form of regular exercise, including outdoor exercise, “is extremely important to the psychological and physical well being of prisoners.” See *Spain v. Proconier*, 600 F.2d 189, 199 (9th Cir.1979). Determining what constitutes adequate exercise requires consideration of “the physical characteristics of the cell and jail and the average length of stay of the inmates.” *Houslev v. Dodson*, 41 F.3d 597, 599 (10th Cir.1994). Although the Ninth Circuit did not specify the “minimum amount of weekly exercise that must be afforded to detainees who spend the bulk of their time inside their cells,” the Court held that ninety minutes per week of exercise, which is the equivalent of less than thirteen minutes per day, does not comport with Eighth Amendment standards. *Pierce v. County of Orange*, 526 F.3d 1190, 1212 (9th Cir.2008). The *Pierce* court eventually required that if detainees spent 22 hours per day in their cells, that they then be provided with at least two hours of exercise per week. *Id.* at 1213.

Here, Plaintiff cannot state a constitutional violation regarding lack of yard time. The main jail exercise yard log shows that on Thursday, March 31, 2011, Saturday, April 2, 1011, Monday, April 4, 2011, Plaintiff participated in yard time. (DSUF 28.) Furthermore, Plaintiff was at a trial, in civil court, attending trial on March 23, 2011, March 24, 2011 and March 28, 2011 through April 1, 2011. Thereafter, Plaintiff was not deprived of any significant amount of outdoor exercise as she was deprived at all and there is no clearly established law surrounding a brief deprivation even for the entire duration of Plaintiff’s stay at the County Jail, which amounted to just over two weeks. Accordingly, Defendants are entitled to summary judgment on this claim.

#### 4. Defendants Are Not Entitled to Summary Judgment Concerning the Alleged Assaults on Plaintiff on March 23, 2011 and April 4, 2011.<sup>6</sup>

Plaintiff alleges she was physically assaulted by Defendants in retaliation for obtaining the March 23, 2011 Court Order regarding law library access and again on April 1, 2011. Specifically, Plaintiff alleges when returning from court on March 23, 2011 she was subjected to a

body search.<sup>7</sup> Plaintiff alleges that Defendants refused to feed her and started pushing Plaintiff, calling her “faggot, queer with tits.” (FAC at ¶ 33.) Defendant Deputy Ulloa slapped Plaintiff in the face and head, calling her a “rat-ass-faggot.” (*Id.*) Defendant Sgt. Rushing was laughing and kicked Plaintiff, saying “we are the real thing, not no correctional officer.” (*Id.*) Plaintiff alleges Defendant Sgt. Rushing then ordered Defendants Deputies Adams and Mayes to strip Plaintiff naked in the middle of the hall. Plaintiff was then punched by Defendants. Sgt. Rushing then said, “No budget, no law library.” (*Id.*)

\*19 On April 1, 2011, while Plaintiff was returning from Court Defendants Deputies Ulloa, Mayes, Manpal, Adams and Sgt. Rushing got Plaintiff naked and started to punch, strike and kick Plaintiff and called her a “rat faggot” and then denied her medical care. (FAC at ¶ 36).

Defendants contend they did not physically abuse Plaintiff or call her names at any time. (DSUF 25.)

To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison conditions must involve “the wanton and unnecessary infliction of pain.” *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). When a prison official stands accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment, the question turns on whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the purpose of causing harm. *Hudson v. McMillian*, 503 U.S. at 7 (citing *Whitley v. Albers*, 475 U.S. 312, 320–21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)). “In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the ‘threat reasonably perceived by the responsible officials’ and ‘any efforts made to temper the severity of the forceful response.’” *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321).

“When prison officials use excessive force against prisoners, they violate the inmates’ Eighth Amendment right to be free from cruel and unusual punishment.” *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir.2002). As with any Eighth Amendment violation, Plaintiff must prove the “unnecessary and wanton infliction of pain .” *Whitley*, 475 U.S. at 319–20. Neither

accident nor negligence constitutes cruel and unusual punishment, because “[i]t is obduracy and wantonness, not inadvertence or error in good faith that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.” (*Id.*)

Not “every malevolent touch by a prison guard gives rise to a federal cause of action.” *Hudson v. McMillian*, 503 U.S. at 9. “The Eighth Amendment’s prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.” (*Id.* at 9–10) (internal quotation marks and citations omitted). In a case such as this one, where the force is alleged to have resulted from a personal altercation rather than from disciplinary action, the “core judicial inquiry” is not whether a certain quantum of injury was sustained, but rather “whether force is applied ... maliciously and sadistically to cause harm.” *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010); see also *Hudson*, 503 U.S. at 7; *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir.2002) (Eighth Amendment excessive force standard “examines whether the use of physical force is more than *de minimis*”).

\*20 Thus, an Eighth Amendment excessive force claim is not foreclosed simply because an inmate suffers injury that is not serious and/or is *de minimis*. *Wilkins*, 559 U.S. at 37. The Supreme Court has made clear, however, that the absence of serious injury is not irrelevant to the Eighth Amendment inquiry, as such an absence may “provide some indication of the amount of force applied.” (*Id.*) The question under the Eighth Amendment is whether the use of physical force is more than *de minimis*, resulting in the unnecessary and wanton infliction of pain. *Oliver*, 289 F.3d at 628. If it was not, there is no constitutional violation. *Hudson*, 503 U.S. at 9–10.

Defendants seek summary judgment on the excessive force claims alleging the incidents did not occur. However, Plaintiff has set forth facts that Defendants maliciously and sadistically assaulted her on March 23, 2011 and April 1, 2011 to cause Plaintiff harm. (See FAC at 33, 36) Plaintiff further pled that the force used by Defendants was more than *de minimis*. The Court finds a genuine dispute exists as to whether Defendants used force maliciously and sadistically for the purpose of causing harm to Plaintiff. Defendants are therefore not entitled to summary judgment.

**E. Plaintiff Has Failed to State a Claim Under 42 U.S.C. § 1985.**

Section 1985 proscribes conspiracies to interfere with certain civil rights. *Karim–Panahi v. Los Angeles Police Department*, 839 F.2d 621, 626 (9th Cir.1988). To plead a claim for conspiracy under § 1985, the complaint must allege that Defendants (1) conspired (2) to deprive any person or class of persons of the equal protection of the laws, and that (3) at least one of the conspirators did any act in furtherance of the conspiracy (4a) causing injury to his person or property or (4b) depriving the person of any right or privilege of an American Citizen. *Griffin v. Breckenridge*, 403 U.S. 88, 102–03, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1970). 42 U.S.C. § 1985(2) has two parts: the first proscribes conspiracies to interfere with the administration of justice in federal courts; the second applies to conspiracies to obstruct the course of justice in state courts. *See Dooley v. Reiss*, 736 F.2d 1392, 1395 (9th Cir.1984).

The statute contains language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws. *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983). The deprivation of rights must be motivated by a racial, or otherwise class-based, discrimination animus. *Sever Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir.1992). A mere allegation of conspiracy without factual specificity is insufficient. *Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir.1984). Moreover, “bare” allegations and “rank” conjecture are insufficient to support a claim under § 1985 for a civil conspiracy. *See Mahaney v. Warren County*, 206 F.3d 770, 772 (8th Cir.2000).

Here, Plaintiff has failed to set forth any meaningful and competent facts to suggest that Defendants' purpose of denying Plaintiff access to the law library was in retaliation and discrimination of Plaintiff's transgender orientation and was done to deprive Plaintiff of equal protection. (FAC at ¶¶ 4–5.) Additionally, Plaintiff has failed to assert any allegations that Defendants acted in concert, or had a “meeting of the minds” to deprive Plaintiff of her constitutional rights. Accordingly, Plaintiff has failed to state a claim for a violation of 42 U.S.C. § 1985.

\*21 To state a claim for conspiracy, Plaintiff must allege specific facts showing two or more persons intended to

accomplish an unlawful objective of causing Plaintiff harm and took some concerted action in furtherance thereof. *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir.1999); *Burns v. County of King*, 883 F.2d 819, 822 (9th Cir.1989) (conclusory allegations of conspiracy insufficient to state a valid § 1983 claim); *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998) (to state a claim for conspiracy under § 1983, Plaintiff must allege facts showing agreement of the alleged conspirators to deprive her of her rights. A conspiracy allegation, even if established, does not give rise to a liability under § 1983 unless there is a deprivation of civil rights). Plaintiff has failed to plead facts that establish that each member of the conspiracy acted in concert and came to a mutual understanding to violate Plaintiff's civil rights and that one or more of the Defendants committed an overt act to further it. *See Hinkle v. City of Clarksburg, W. Va.*, 81 F.3d 416, 421 (9th Cir.1996). A conspiracy is not established by simply alleging that the conspiring officers knew of an intended wrongful act; rather, the plaintiff must allege that conspiring officers agreed, expressly or tacitly, to achieve it.

Plaintiff has failed to plead any facts that would suggest that Defendants acted with some sort of discriminatory animus. *See United Brotherhood of Carpenters and Joiners of America, Local 610, AFL–CIO v. Scott*, 463 U.S. 825, 834–35, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983); *see also Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir.1980) (holding that section 1985 conspiracy claim was properly dismissed because plaintiff had failed to allege facts establishing invidious discrimination). Accordingly, Defendants are entitled to summary judgment on this claim.

**F. Plaintiff Has Failed to State a Claim Pursuant to 42 U.S.C. § 1986.**

Here, Plaintiff alleges that Defendants knew of the policy that violated Plaintiff's civil rights and had the power to prevent the violations but refused and neglected to do anything. (FAC at ¶ 10 .)

42 U.S.C. § 1986 provides a cause of action against parties who fail to prevent conspiracies to violate the civil rights of other people. Specifically, any person who knows of a conspiracy to violate civil rights (as defined by 42 U.S.C. § 1985) and who has the power to prevent the violation but refuses or neglects to do so, is liable to the person injured. 42 U.S.C. § 1986. Thus, in order to state a claim under

§ 1986, a complaint must contain a valid claim under § 1985. *Karim–Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir.1988); *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir.1985).

There are no facts asserted in the First Amended Complaint to support a § 1986 claim, as there is no basis to assert that any of the alleged conduct on the part of Defendants was racially motivated or class based under the analysis of § 1985. Where the allegations pertaining to an underlying violation of 42 U.S.C. §§ 1983 and 1985 are meritless at their core, and where there are no facts to state liability for any wrongful conduct, the 42 U.S.C. § 1986 claim must be dismissed with prejudice. Accordingly Defendants are entitled to summary judgment on this claim.

### RECOMMENDATION

**\*22** For all of the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue an

Order: (1) approving the findings of the United States Magistrate Judge; (2) granting in part Defendants' Motion for Summary Judgment with respect to (a) dismissing Plaintiff's claims against Defendants' Sheriff Parkinson and the County of San Luis Obispo; (b) dismissing Plaintiff's § 1983 claim based on alleged violations of her Fourteenth Amendment rights; (c) dismissing Plaintiff's claim regarding constitutional right of access to the law library; (d) dismissing Plaintiff's claim regarding confinement in Administrative Segregation; (e) Plaintiff's claims regarding denial of meals, showers, clothing and yard time; (f) Plaintiff's 42 U.S.C. § 1985 claim; (g) Plaintiff's 42 U.S.C. § 1986 claim; and (3) denying Defendant's Motion for Summary Judgment regarding Plaintiff's excessive force claims.

DATED: March 31, 2015.

### All Citations

Not Reported in F.Supp.3d, 2015 WL 3791450

### Footnotes

- 1 *Rand v. Rowland*, 154 F.3d 952, 960 (9th Cir.1998).
- 2 In Plaintiff's FAC, she referred to herself with masculine pronouns; in Plaintiff's Opposition, Plaintiff used feminine pronouns to describe herself. Therefore, the Court in an effort to adhere to Plaintiff's preference will also use feminine pronouns for Plaintiff.
- 3 Plaintiff in her Opposition states that she, "is not alleging [d]enial of Hormone Therapy in this Complaint ..." (Plaintiff's Opposition at 3.)
- 4 Affidavits supporting (and opposing) summary judgment must be made on personal knowledge, must set forth admissible statements of fact, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Fed.R.Civ.P. 56(e). A verified complaint, to the extent it is based on a plaintiff's personal knowledge, meets the affidavit requirement. *McElyea v. Babbitt*, 833 F.2d 196, 198 n. 1 (9th Cir.1987).
- 5 As noted, Plaintiff was transferred from San Luis Obispo County Jail to CDCR on April 4, 2011.
- 6 Plaintiff in her Opposition contends that the assault occurred on April 1, 2011, not April 4, 2011.
- 7 Plaintiff alleges that she was subjected to body searches on March 23, 2011 and April 4, 2011. (FAC at p. 9.) The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated ..." The right against unreasonable searches and seizures extends to incarcerated prisoners. *Nunez v. Duncan*, 591 F.3d 1217, 1227 (9th Cir.2010); *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir.1988) (applying the *Turner* standard to prisoner allegations of Fourth Amendment violations). *Turner* provides that "when a prison regulation impinges on a prisoner's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. "So long as a prisoner is presented with the opportunity to obtain contraband and a weapon while outside of her cell, a visual strip search has a legitimate penological purpose." *Michenfelder v. Sumner*, 860 F.2d at 333. Moreover, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Bell v. Wolfish*, 441 U.S. 520, 540 n. 23, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

As in *Bell*, Defendants have presented evidence that body searches are conducted for reasons of institutional security, something that Plaintiff has not countered. This is a legitimate penological objective. *Michenfelder*, 860 F.2d at 333; see also *Bell*, 441 U.S. at 559.

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601 Fed.Appx. 632

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

Jeanne Marie DRULEY, Plaintiff–Appellant,

v.

Robert PATTON; Don Suttmiller; Michael Addison; Buddy Honaker; James Keithley; Joel B. McCurdy, in their individual and official capacities, Defendants–Appellees.

No. 14–6114.

|

Feb. 3, 2015.

#### Synopsis

**Background:** State prisoner filed § 1983 action against employees of Oklahoma Department of Corrections asserting they had violated her constitutional rights under Eighth Amendment in connection with her care as a transgendered individual. The United States District Court for the Western District of Oklahoma, 2014 WL 1875102, Timothy D. DeGiusti, J., denied prisoner temporary restraining order (TRO) and preliminary injunction. Prisoner appealed.

**Holdings:** The Court of Appeals, Jerome A. Holmes, Circuit Judge, held that:

[1] denial of TRO was not a final appealable order, and

[2] prisoner was unlikely to succeed on the merits of her Eighth Amendment claim.

Affirmed.

#### Attorneys and Law Firms

\*633 Jeanne Marie Druley, Lexington, OK, pro se.

Kari Yvonne Hawkins, Wilson D. McGarry, Office of the Attorney General for the State of Oklahoma, Oklahoma City, OK, for Defendants–Appellees.

Before GORSUCH, O'BRIEN, and HOLMES, Circuit Judges.

### ORDER AND JUDGMENT \*

JEROME A. HOLMES, Circuit Judge.

Jeanne Marie Druley, an Oklahoma state prisoner, filed a 42 U.S.C. § 1983 complaint against employees of the Oklahoma Department of Corrections (ODOC) asserting they had violated her constitutional rights in connection with her care as a transgendered individual. She filed a motion for a temporary restraining order (TRO) and preliminary injunction at the same time she filed her complaint. The district court denied injunctive relief, and Ms. Druley, proceeding pro se, appeals. We lack jurisdiction to review the denial of her TRO motion. We affirm the denial of her motion for a preliminary injunction.

### BACKGROUND

Prior to her incarceration in 1986, Ms. Druley was diagnosed with gender identity disorder (GID) and had two of three gender reassignment surgeries needed to change the gender of her body from male to female. Her name and birth certificate were changed to identify her as a female. In her § 1983 complaint, Ms. Druley alleges that the ODOC defendants violated the Eighth Amendment's prohibition on cruel and unusual punishment by stopping and starting her prescribed hormone medications and giving her inadequately low dosages of her hormone medication. She also alleges the ODOC defendants violated the Equal Protection Clause by housing her in an all-male facility.

Ms. Druley filed her TRO and preliminary injunction motion the same day as her complaint, seeking a court order directing the ODOC defendants to raise her hormone medication to the levels recommended by the Standards of Care established by the World Professional Association for Transgender Health (WPATH), allow her to wear ladies' undergarments, and move her to a non-air-

conditioned building to alleviate asthma symptoms. The matter was referred to a magistrate judge under 28 U.S.C. § 636(b)(1)(B), who issued a Report and Recommendation (R & R) to deny injunctive relief. After considering Ms. Druley's objections, the district court adopted the R & R and denied injunctive relief.

As to the TRO, the district court ruled Ms. Druley failed to give notice of her TRO request to ODOC defendants as required by Fed.R.Civ.P. 65, or to show cause in accordance with Fed.R.Civ.P. 65(b) why this notice requirement should be excused. As to the preliminary injunction, the district court ruled Ms. Druley had not shown a substantial likelihood of \*634 success of the merits of her § 1983 complaint or that she would be irreparably harmed without her requested hormone treatment. Ms. Druley filed this interlocutory appeal of that order.

### JURISDICTION

[1] We must first address our appellate jurisdiction. “Ordinarily, denial of a temporary restraining order is not appealable.” *Populist Party v. Herschler*, 746 F.2d 656, 661 n. 2 (10th Cir.1984); 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3922.1 (3d ed. 2014) (“The general rule is that orders granting, refusing, modifying, or dissolving temporary restraining orders are not appealable under [28 U.S.C.] § 1292(a)(1) as orders respecting injunctions.”). There are two exceptions: “when the order is appealable as a final order under 28 U.S.C. § 1291,” and when the order has the practical effect of denying a preliminary injunction. *Populist Party*, 746 F.2d at 661 n. 2. Neither exception is applicable here: the district court's denial of the TRO is not a final appealable order under 28 U.S.C. § 1291, and the denial did not have the “practical effect of denying an injunction,” the consequences of the denial are not irreparable, and immediate review is not the only effective means of challenging the order. *United States v. Colorado*, 937 F.2d 505, 507–08 (10th Cir.1991). We therefore dismiss the appeal of the denial of the TRO.

Orders granting or denying preliminary injunctions, however, are among the types of interlocutory orders that are immediately appealable under 28 U.S.C. § 1292(a)(1). We thus have jurisdiction to review the district

court's denial of Ms. Druley's request for a preliminary injunction.

### DISCUSSION

We construe Ms. Druley's pro se brief liberally. *See Garza v. Davis*, 596 F.3d 1198, 1201 n. 2 (10th Cir.2010). A party seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) a likelihood that the party will suffer irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities tips in the party's favor; and (4) that the injunction serves the public interest. *Little v. Jones*, 607 F.3d 1245, 1251 (10th Cir.2010). A preliminary injunction requiring the nonmoving party to take affirmative action, as Ms. Druley seeks, is an extraordinary remedy that is generally disfavored. *Id.* We review a district court's denial of a motion for a preliminary injunction for abuse of discretion. *Id.* at 1250.

Ms. Druley's injunctive-relief motion requests an order directing ODOC medical staff to raise her hormone level in accordance with levels recommended by the WPATH Standards of Care. Her complaint alleges that prison officials have started and stopped her hormone treatment numerous times over the last 27 years and currently prescribe a hormone dosage for her that is below the normal lowest dosage recommended by WPATH. Her injunctive-relief motion asserts generally that ODOC medical staff does not understand the importance of the WPATH Standards of Care, but other than stating her current hormone treatment level, neither her complaint nor her injunctive-relief motion presented any medical evidence specific to her care. Thus, she presented no evidence indicating which WPATH recommended-hormone levels are medically appropriate for her.

[2] The district court concluded Ms. Druley failed to show a likelihood of success on the merits in light of a decision from this court, *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir.1986), in which we declined to recognize a constitutional right \*635 under the Eighth Amendment to estrogen hormone therapy for inmates with GID. In *Supre*, we held that prison officials must provide treatment to address the medical needs of transsexual prisoners, but we noted the record indicated the provision of estrogen hormone medication was medically controversial, and the evidence did not demonstrate “that failing to treat plaintiff

with estrogen would constitute deliberate indifference to a serious medical need,” because the prison officials “made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff’s medical needs.” *Id.* The district court also ruled that Ms. Druley had not shown she would be irreparably harmed without the requested hormone treatment, noting that Ms. Druley conceded she had not received any hormone treatments from 1988 to 2011.

On appeal, Ms. Druley makes the conclusory assertion that she demonstrated her constitutional rights would be violated if she did not receive the hormone levels suggested by WPATH, from which she argues she has satisfied the irreparable harm, balance-of-equities, and public-interest requirements. To establish an Eighth Amendment claim, Ms. Druley must show deliberate indifference to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). She must show that the deprivation is objectively sufficiently serious and, subjectively, that the ODOC defendants were aware of a substantial risk of serious harm. *Id.* at 837, 114 S.Ct. 1970.

The WPATH “Standards of Care ‘are intended to provide flexible directions for the treatment’ of GID,” and state that ‘individual professionals and organized programs may modify’ the Standards’ requirements in response to ‘a patient’s unique situation’ or ‘an experienced professional’s evolving treatment methodology.’” *Kosilek v. Spencer*, 774 F.3d 63, 70, n. 3, 86, 88 (1st Cir.2014), *id.* at 70 n. 3 (brackets and ellipsis omitted) (quoting World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender–Nonconforming People, Version 7* (2011), at 1–2) (emphasis added). Ms. Druley presented no evidence that the ODOC defendants failed to consider the WPATH’s flexible guidelines, failed to make an informed judgment as to the hormone treatment level appropriate for her, or otherwise deliberately ignored

her serious medical needs. Thus, Ms. Druley failed to demonstrate a substantial likelihood of success on the merits. *See Supra*, 792 F.2d at 963. Further, in the absence of any medical evidence, Ms. Druley also failed to make any showing that she would be irreparably harmed if she did not receive the levels of hormone treatment she requested.

Ms. Druley also argues ODOC violated the Equal Protection Clause by denying her request to wear feminine undergarments and her request to be moved to a different building. Unequal treatment that does not involve a fundamental right or suspect classification is justified if it bears a rational relation to legitimate penal interest. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227–28 (10th Cir.2007) (denying suspect-classification equal-protection employment rights for transgendered employees); *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir.1995) (affirming the dismissal of an equal protection claim alleging the denial of estrogen treatment to a transsexual prisoner). Ms. Druley did not allege any facts suggesting the ODOC \*636 defendants’ decisions concerning her clothing or housing do not bear a rational relation to a legitimate state purpose. Thus, she has not demonstrated a likelihood of success on her Equal Protection claims.

The appeal of the district court’s denial of a TRO is dismissed for lack of jurisdiction. The district court’s denial of her motion for preliminary injunction is affirmed. The motion for *in forma pauperis* is GRANTED.

#### All Citations

601 Fed.Appx. 632

#### Footnotes

- \* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

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2008 WL 916991

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United States District Court,  
D. Oregon.

Anny May STEVENS, Plaintiff,

v.

Max WILLIAMS; Stan Czeriak; Betty Blaylock;  
Joan Palmateer; Jim Maras; Jean Hill; Bill  
Dowman; G. Stuart; and M.D. Milhorn, Defendants.

No. CV-05-1790-ST.

|  
March 27, 2008.

#### Attorneys and Law Firms

Anny May Stevens, Ontario, OR, pro se.

Hardy Myers, Attorney General, Leonard W.  
Williamson, Assistant Attorney General, Salem, OR, for  
Defendants.

#### ORDER

BROWN, District Judge.

\*1 Magistrate Judge Janice M. Stewart issued Findings and Recommendation (# 38) on February 15, 2008, in which she recommended this Court grant Defendants' Motion for Summary Judgment (# 33). The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Because no objections to the Magistrate Judge's Findings and Recommendation were timely filed, this Court is relieved of its obligation to review the record *de novo*. *Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9-thCir.1983). *See also Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1206 (8-thCir.1983). Having reviewed the legal principles *de novo*, the Court does not find any error.

#### CONCLUSION

The Court **ADOPTS** Magistrate Judge Stewart's Findings and Recommendation (# 38). Accordingly, the Court

**GRANTS** Defendants' Motion for Summary Judgment (# 33).

IT IS SO ORDERED.

#### FINDINGS AND RECOMMENDATION

STEWART, United States Magistrate Judge:

#### INTRODUCTION

Plaintiff, Anny May Stevens ("Stevens"), appearing *pro se*, is a pre-operative male-tofemale transsexual<sup>1</sup> prisoner at the Snake River Correctional Institution ("SRCI"), a correctional institution in Ontario, Oregon, which houses male inmates and is operated by the Oregon Department of Corrections ("ODOC"). The Complaint alleges three claims pursuant to 42 USC § 1983 against a number of state officials and employees who work at SRCI or ODOC:<sup>2</sup> Max Williams, ODOC Director; Stan Czeriak, ODOC Assistant Director of Operations; Joan Palmateer, ODOC Institution Division Administrator; Jean Hill, SRCI Superintendent; Bill Dowman, SRCI Supervising Executive Assistant; Betty Blaylock, ODOC (title unknown); Jim Maras, ODOC Program Manager for Transfer and Classification Unit; Steve Shelton, M.D., Medical Director for ODOC Health Services; Larry L. Herring, ODOC Health Services Administrator; Steve Franky, SRCI Assistant Superintendent; G. Stuart, SRCI Superintendent's Office; Al Hannan, SRCI Institution Security Manager; Mike Milhorn, SRCI Correctional Captain; Jennifer Bjerke, Oregon State Penitentiary ("OSP") Security Manager; Captain Peterson, SRCI Segregation Captain; Robert Real, SRCI Correctional Captain; Ricky King, SRCI Correctional Sergeant; Katrinda Reyes, SRCI Correctional Officer; T. Hicks, SRCI Rule/Procedures/Policies and Grievance/Minority Affairs; S. Hodge, RN, SRCI Health Service Manager; G. Atkins, SRCI Mental Health Manger; Mrs. Henning, SRCI Mental Health Counselor; T. Blankenbaker, SRCI Institutional Counselor; G. Sharp, SRCI Intensive Management Unit Counselor; Rebecca Rouillard, SRCI Correction Library Coordinator; Ms. Husk, SRCI Mail Room; C. Roberts, SRCI Business Office; and K. Perry, SRCI Records.

In his first claim, Stevens complains that ODOC has discriminated against him<sup>3</sup> on the basis of gender by failing to place him in a correctional facility housing female inmates and to refer to him with female titles and female pronouns (“Claim One”). Complaint, pp. 3-4. The second claim alleges that defendants have denied Stevens necessary medical treatment for his transsexualism, including failure to provide counseling for transsexualism, grant his requests for hormone therapy, and grant him sexual reassignment surgery (“Claim Two”). *Id* at 4. The third and final claim asserts that defendants have denied Stevens protective custody despite threats of violence received from inmates at SRCI (“Claim Three”). *Id* at 4-5. He believes that each of these acts violates the Eighth and Fourteenth Amendments of the United States Constitution, Article I, Sections 16 and 20 of the Oregon Constitution, and Articles 1 through 7 of the United Nations Universal Declaration of Human Rights. As a result, Stevens requests damages of \$5,000,000, and injunctive relief ordering defendants to: (1) recognize him as a female; (2) reinstate hormone therapy; (3) provide him with sexual reassignment surgery; (4) provide counseling for transsexualism; and (5) protect him from any and all future violence, rape or death. Steven also requests “if [at] all possible [,] my release from prison.” *Id* at 5.

\*2 Defendants now move for summary judgment against each of Stevens' claims (docket # 33). For the reasons that follow, defendants' motion should be granted and judgment entered in favor of defendants.

### STANDARDS

FRCP 56(c) authorizes summary judgment if “no genuine issue” exists regarding any material fact and “the moving party is entitled to judgment as a matter of law.” The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party does so, the nonmoving party must “go beyond the pleadings” and designate specific facts showing a “genuine issue for trial.” *Id* at 324, citing FRCP 56(e). The court must “not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial.” *Balint v. Carson City*, 180 F3d 1047, 1054 (9-thCir1999) (citation omitted). A “*scintilla* of evidence,’ or evidence that is ‘merely colorable’ or ‘not significantly probative,’ “ does not present a genuine issue of material fact. *United Steel*

*Workers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9-thCir), *cert denied*, 493 U.S. 809 (1989) (emphasis in original) (citation omitted).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9-thCir1987). The court must view the inferences drawn from the facts “in the light most favorable to the nonmoving party.” *Id* (citation omitted). Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id* at 631.

### FACTS

#### I. Medical Treatment

Stevens was admitted to ODOC custody on September 8, 1997, to serve a 220 month sentence for Manslaughter in the First Degree. Complaint, Exhibit Part 4, pp. 18-19. He alleges that he was sentenced as a woman to a correctional institution housing females, but ODOC placed him into an institution housing males because he remains anatomically a male.

On November 22, 1994, Stevens received a legal name change (from Edward to Anny May) and gender change (from male to female) in Multnomah County Circuit Court. *Id*, Exhibit Part 4, p. 15. Prior to entering prison, Stevens had a history of mental health problems, as well as difficulties with drugs and alcohol. Plaintiff's Exhibit 5, pp. 1-12. Medical records submitted by Stevens show that he was treated at various times for major depression, gender identity disorder, and alcohol dependence. *Id*. As part of his treatment Stevens had received hormone therapy beginning in 1994. *Id*; Defendants' Exhibit 101 (“Shelton Aff.”), Attachment No. 5, p. 4. He continued this therapy through the time he was housed at the county jail awaiting the final disposition of his criminal case. Shelton Aff., Attachment No. 2, pp. 2-6.

At his initial medical screening, Stevens told medical staff that he identifies as a female and had been taking Premarin, a female hormone replacement, before his incarceration. *Id* at 8 & Attachment 2, p. 6. Stevens was seen by mental health care professionals upon his transfer from intake to OSP. *Id* at ¶ 8 & Attachment No. 5, pp. 1-6. They noted that Stevens had suffered for years from depression, had reported multiple suicide attempts,

had been hospitalized 10 times over the prior five year period, had a history of alcohol and drug problems, and was diagnosed with major depression and borderline personality disorder. *Id.*

\*3 On October 2, 1997, Stevens saw former ODOC staff physician Robert Ingle, M.D., to discuss his transgender issues and medication concerns. *Id.* at ¶ 9 & Attachment No. 2, p. 9. Stevens agreed with Dr. Ingle that Premarin was not being used to treat a disease. *Id.* Dr. Ingle opined that neither Premarin nor sexual reassignment surgery were medically indicated and advised Stevens that Premarin would not be prescribed. *Id.* According to Dr. Ingle, “[g]ender identity disorder is a psychiatric condition which is associated with significant emotional distress; however, there is no data that castration and sexual change surgery is associated with any emotional improvement.... Patients unhappy with their biologic sex are usually just as unhappy after a sex change operation.” *Id.*

Over the next 42 months, Stevens was seen by health services professionals in both OSP and SRCI and was treated for a variety of complaints. *Id.* at ¶ 10 & Attachment No. 2, pp. 9-27. ODOC mental health care professionals frequently diagnosed Stevens with depression, borderline personality disorder, dysthymia, polysubstance abuse, and gender identity disorder. *Id.* at 7-50. During this time Stevens continued to express interest in hormone treatment and a sex change and in being identified as a female, although at times he expressed some measure of conflict between his sexual identity and religious beliefs. *Id.* at 7, 12, 17, 19, 24, 29, 34, 37, 47, 48, 50, 51.

On June 1, 2001, former SRCI staff physician Ian Duncan, D.O., met with Stevens at SRCI upon his transfer from OSP. *Id.* at ¶ 11 & Attachment No. 2, p. 28. Stevens expressed his desire to take Premarin. *Id.* Dr. Duncan met with Stevens again on June 17, 2001, to discuss the result of tests done at the first meeting. *Id.* Stevens again requested surgery and hormone treatment. *Id.* Dr. Duncan agreed to present this request to the Therapeutic Level of Care Committee (“TLCC”) in accordance with the ODOC Health Services Policy. *Id.*

ODOC Health Services Policy and Procedure # P-A-02.1 establishes four levels of medical care and treatment for inmates. *Id.* at ¶ 4 & Attachment No. 1. Mandatory care

(Level 1) is “essential to life and health, without which rapid deterioration may be an expected outcome.” *Id.* at 2. Necessary Care (Level 2) is care without which the inmate suffers “significant risk of either further serious deterioration of the condition or significant reduction of the chance of possible repair after release or [ ] significant pain or discomfort.” *Id.* at 3. Acceptable but Not Necessary Care (Level 3) is care “for non-fatal conditions where treatment may improve the quality of life for the patient.” *Id.* at 4. Any procedure falling into Level 3 is subject to individual clinical review by the TLCC, which determines whether the treatment will be provided by examining factors such as “[t]he urgency of the procedure and the length of the inmate's remaining sentence stay,” and “[a]ny relevant functional disability and the degree of functional improvement to be gained.” *Id.* at 5. Finally, care of Limited Medical Value (Level 4) is “significantly less likely to be cost-effective or to produce substantial longterm gain,” and is generally not authorized by the ODOC. *Id.* at 6.

\*4 According to Steve Shelton, M.D., ODOC's Director of Health Services, ODOC has no medical policy addressing gender reassignment as a special entity separate from all other medical conditions. *Id.* at ¶ 5. Rather, the policy categorizes gender identity disorder (“GID”) and gender reassignment as a Level 3 or 4 condition which must be assessed by the TLCC on an individual basis according to the Level 3 care provision. *Id.* The TLCC considers a number of factors when determining whether to authorize elective care in general. *Id.* When a patient requests a “continuation” of gender reassignment, consideration is given to the extent of the patient's prior evaluations and work-ups; the completeness, findings, and expertise of prior evaluations; the extent of any prior reassignment; the patient's prior and current adjustments; and expected length of stay with ODOC. *Id.* at ¶ 6. According to Dr. Shelton, a patient who has had a full evaluation and is under treatment from a GID program and has shown significant mental health or medical health improvement has a good case to present before the TLCC for continuation of treatment. *Id.* at ¶ 7. Conversely, “strong consideration will be given by ODOC to the lack of consistent evidence in controlled studies of accurate medical diagnostic criteria, lack of consistent evidence of improvement of patients with reassignment, and the lack of deterioration of health without reassignment.” *Id.* at ¶ 6.

On July 17, 2001, a TLCC comprised of Dr. Shelton and three other physicians met to discuss Stevens' request for transgender changes. *Id* at ¶ 12; Complaint, Exhibit Part 5, p. 11. According to Dr. Shelton, “[a]fter careful consideration, TLCC concluded that the requested procedure and course of treatment was not medically necessary to either preserve [Stevens'] physical health, nor as a needed adjunct to mental health treatment.” Shelton Aff., ¶ 12 & Attachment No. 4, p. 1.

Dr. Duncan informed Stevens of the TLCC's decision on August 17, 2001. *Id* at ¶ 13 & Attachment No. 2, p. 29. Dr. Duncan noted Stevens' disappointment and “clarified that neither sex-change surgery nor hormonal treatment would be likely to occur during his period of incarceration.” *Id*. He encouraged Stevens to “shift his plans to the period of time following his incarceration.” *Id*.

On July 31, 2001, prior to learning of the TLCC's decision, Stevens filed a grievance seeking reinstatement of hormone treatment, gender reassignment surgery and the provision of women's undergarments. *Id*, Attachment No. 6, pp. 1-11. C. Ryals, the Health Services Manager at SRCI, responded on August 26, 2001, that the procedure he requested was “not considered medically necessary.” *Id* at 12. Stevens appealed. *Id* at 13. Dr. Shelton responded that “the procedure that you request is not a serious medical need and is considered entirely elective. [ODOC] Health Services will not provide or support this request.” *Id* at 17.

\*5 Over the next two years after the TLCC's determination, mental health care staff continued to be available to Stevens and saw him frequently. *Id* at ¶ 16 & Attachment No. 5, pp. 51-60.

On March 7, 2002, Stevens filed a Petition for Writ of Habeas Corpus in state court. Defendants' Exhibit 103. The Petition recounts Stevens' history of transsexualism, including his diagnosis in 1994, his name/gender change, his treatment including hormone therapy through a community health care provider, and continued hormone therapy while housed in the county jail awaiting the disposition of his criminal case. *Id* at 2-3. It also recounts Stevens' continuous efforts to receive treatment for his transsexualism, including hormone therapy and surgery, while in ODOC's custody. *Id* at 3-6. Stevens complained that he has been denied treatment for transsexualism which is a “serious medical need” and that this denial

constitutes “deliberate indifference” to his serious medical needs in violation of his constitutional rights. *Id* at 6. The state court denied Stevens' Petition by entering a Judgment on September 3, 2002. Defendants' Exhibit 104.

On May 31, 2003, an SRCI security staff member contacted health services to report that Stevens had vocalized a desire to remove his own testes. Shelton Aff., ¶ 15 & Attachment No. 2, pp. 34-35. Medical staff met with Stevens, assessed him as having a low risk of immediate self harm, and referred him to Correctional Treatment Services for continued care. *Id*. After this event, Stevens expressed on several occasions his desire for treatment for his sexual identity issues and for performing surgery on himself. *Id*, Attachment No. 5, pp. 57, 61.

In an undated letter, apparently in response to a letter from Stevens to the Federal Bureau of Prisons, Dr. Shelton again denied Stevens' request for hormone treatment, gender reassignment, and female undergarments. Complaint, Exhibit Part 6, p. 21. Dr. Shelton stated that in reaching his decision, he reviewed the treatment Stevens received during the periods both before and after his incarceration, including the treatment he received from community health care providers who were providing Stevens with hormone treatment. *Id*.

On May 6, 2004, Stevens sent an Inmate Communications Form (“kite”) to “Ms. Hennen” requesting “urgent counseling” for transsexualism and gender dysphoria. Complaint, Exhibit Part 6, p. 26. Mrs. Henning responded that “we do not do counseling for this.” *Id*. One day later, Stevens sent a kite to “Ms. Atkins” asking if anyone was qualified to treat an inmate for transsexualism and whether he was or had ever received treatment for transsexualism or gender dysphoria. *Id* at 28. Mrs. Henning responded to the kite, stating that “you are not being treated for this disorder-I am unaware if you have ever been treated for this disorder.” *Id*.

On August 2, 2005, Stevens had an appointment with SRCI staff physician Garth Gulick, M.D., and reported no new issues with respect to his sexual orientation being changed. Shelton Aff., ¶ 17 & Attachment No. 2, p. 52. He expressed remorse over his past and said he felt trapped. *Id*. Dr. Gulick noted that gender reassignment would not be feasible “without mental health assessment and clearance.” *Id*.

\*6 When Dr. Gulick saw Stevens again on October 4, 2005, Stevens wanted to have his testicles removed and resume taking female hormones. *Id* at ¶ 18 & Attachment 2, p. 53. Dr. Gulick referred this request to the TLCC which concluded that neither gender reassignment surgery nor female hormone therapy was medically necessary for Stevens. *Id* at ¶ 18 & Attachment No. 4, p. 10.

A few weeks later, Stevens told a mental health care provider, T.J. Footen, that based upon his own research, he had transsexualism disorder. *Id*, Attachment No. 5, p. 75. Footen told Stevens that they do not provide treatment for that disorder. *Id*. On November 9, 2005, Stevens complained to Footen of increased depression, ineffective medications, and loss of contact with his family and issues related to his gender identity. *Id* at 76. Footen instructed Stevens that Footen's treatment of Stevens was not focused on transsexualism, "but rather on his symptoms of depression and family adjustment issues." *Id*.

A week later, Stevens tried again to turn the focus of his treatment with Footen to transsexualism, which Footen rebuffed. *Id*. Footen changed Stevens' diagnosis from dysthymia to major depression based upon his deteriorating condition. *Id*. Mental health staff at SRCI continued to see Stevens on a regular basis throughout 2005 and into 2006, the most recent records submitted. *Id* at 76-87. Notably, Stevens' depression seems to have improved in early 2006. *Id* at 86-87

In Dr. Shelton's opinion, "ODOC properly has declined to provide plaintiff with a sex-change operation and/or female hormones because neither surgery nor hormonal replacement treatment is medically indicated." *Id* at ¶ 19. He admits that "at times, there may be a difference of opinion between the patient and the physicians as to how best to treat [Stevens'] condition," but ODOC Health Services "are aware of [Stevens'] medical and mental health needs, and "will continue to monitor [Stevens'] medical mental health care needs and remain available to him" for treatment. *Id* at 20, 21. Medical and mental health services are delivered to inmates independently and without interference from ODOC security and administrative staff. *Id* at ¶ 22. Thus, "security and administrative staff have no leverage or influence as to what medical and mental health services are provided to inmates." *Id*.

Upon his initial placement into OSP, Stevens indicated that he felt "rotten" and discriminated against by being placed into a male prison. Shelton Aff., Attachment No. 5, p. 12.

On September 25 and October 22, 2003, Stevens sent kites to "Ms. Hicks" inquiring whether it was appropriate for a staff member to discriminate against an inmate because of their sexual orientation or status as a transsexual. Complaint, Exhibit Part 5, pp. 20-21. T. Hicks responded that it was not appropriate and suggested several options to Stevens for handling suspected discrimination. *Id*.

\*7 In early 2004, Stevens made multiple requests by kite and grievance to be referred to as a female using female pronouns and titles. *Id*, Exhibit Part 6, pp. 1-23. Additionally, Stevens requested that all of his paperwork and prison file be changed to reflect his proper gender and requested that he be transferred to an institution housing females. *Id* at 2-13. Several officials at ODOC responded to Stevens' requests.

On February 23, 2004, Jim Maras, Program Manager for the Classification and Transfer Unit ("Maras"), acknowledged Stevens' request to be referred to as a female and responded that according to ODOC records, Stevens was a male, and "[a]s such, being housed in a male facility, it would be inappropriate for staff to address you as a female.... Your situation and legal status, not your desire, will dictate how staff interact with you." *Id* at 15.

On March 1, 2004, Joan Palmateer, ODOC Institution Division Administrator ("Palmateer"), responded to Stevens' letter to ODOC Director, Max Williams ("Williams"). *Id* at 16. Recognizing that Stevens had received a legal name/gender change, she wrote:

I understand your personal feelings can be that of a female and that you have gone to court for a name/gender change. However, since you are still a male, anatomically, the department will continue to consider and treat you as a male inmate. As such you will be referred to as either inmate Stevens or Mr. Stevens.

*Id*.

## II. Gender Issues and Discrimination

Palmateer also denied Stevens' request to be transferred to a female institution, and indicated that if he felt unsafe from other inmates due to his "transsexual condition," he should contact security staff or his counselor and request protective custody. *Id.* She concluded:

I am denying your request to be addressed as Ms., or any other female title. I am sure you must recognize that the more you call attention to this matter, the more difficult it becomes for you to live in harmony with other male inmates. If you feel unsafe, please advise staff so they may address those issue [sic].

I consider this matter closed.

*Id.*

Stevens received a similar letter from Larry L. Herring, ODOC Health Services Administrator ("Herring"), on March 11, 2004. *Id.* at 18. Herring acknowledged receipt of the court documents concerning Stevens' gender change, but advised Stevens that this does not change how he will be referred to as an inmate:

While I understand your frustration, unfortunately, you were sentenced and incarcerated as a male. Until such time that the court makes further determination as to your gender status, you will continue to be recognized by your court assigned name and gender.

*Id.*

On March 31, 2004, Bill Dowman, writing for Superintendent Hill, denied Stevens' continued requests to be referred to as a female. *Id.* at 22.

Stevens filed a grievance against all of these officials on April 5, 2004. *Id.* at 23-24. In response, Lt. Sherbondy, Administrative Lieutenant for SRCI, again denied Stevens' request to be referred to as a female, receive gender reassignment surgery, and be transferred to a facility that would address his transsexualism. *Id.*, Exhibit Part 8, p. 21.

\*8 Stevens sent another kite to Superintendent Hill on July 31, 2005, referencing the earlier denials by Palmateer, and Dowman, and requesting again that his institutional

files be changed to refer to him as female. *Id.*, Exhibit Part 8, p. 5. Dowman again denied the request. *Id.* at 6.

Further efforts by Stevens on each of these issues have continued to be unfruitful. *See* Stevens Aff. (docket # 28).

### III. Efforts to Protect Stevens from Physical Harm

After his conviction, Stevens was initially placed into the Administrative Segregation Unit ("ASU") at OSP due to his feminine appearance. Shelton Aff., Attachment No. 5, p. 1. In June 2000, ODOC transferred Stevens to SRCI. *Id.* at 28. Stevens reported to mental health professionals at SRCI on a number of occasions that he felt harassed and threatened by other inmates. *Id.* at 28, 33, 34-35, 37, 46, 50, 66, 81, 84-87 & Attachment No. 2, p. 12.

In June 2005, while housed in the Intensive Management Unit ("IMU") at SRCI, Stevens submitted several kites indicating he had been threatened with physical harm and death. Complaint, Exhibit Part 7, pp. 4-11; Defendants' Exhibit 102 ("Cain Aff."), Attachment No. 2, p. 1. In each one, Stevens requested a transfer to OSP. On June 22, 2005, Correctional Sergeant C. Miller interviewed Stevens. Cain Aff., ¶ 10 & Attachment No. 2. Stevens gave Sergeant Miller the names of a number of inmates who allegedly were threatening him and requested a transfer to OSP or the ASU. *Id.* Sergeant Miller noted that some of the names given to him by Stevens referred to individuals who were never housed in the same unit at the same time as Stevens or no longer housed at SRCI. *Id.*

On July 1, 2005, Superintendent Hill denied Stevens' request to be housed in the ASU. Complaint, Exhibit Part 7, p. 12. This was in part due to the fact that Stevens was currently in the IMU due to an attempted assault on a staff member, and the IMU was a "considerably more restrictive and, thus, more protective" housing environment. *Id.*

On July 14, 2005, the Special Needs Inmate Evaluation Committee ("SCIEC") reviewed Stevens' concerns and his request. Cain Aff., ¶ 11 & Attachment No. 2, p. 4. The SCIEC found that Stevens could not be safely housed at OSP at that time because he had conflicts with individuals housed there. *Id.* It also concluded that Stevens did not meet the criteria for placement in the ASU and instructed him to report any threats he received upon his return to the general population after his release from the IMU. *Id.*

On February 26, 2006, Sergeant James Taylor interviewed Stevens about his continued desire to be placed in the ASU. *Id.* at ¶ 11 & Attachment No. 2, p. 5. Stevens had no additional information to add to his request and would not provide any names or the nature of any problems. *Id.* Taylor noted that Stevens had no documented conflict with inmates at SRCI. *Id.* The SCIEC again denied his request at its next meeting. *Id.* at ¶ 12.

\*9 ODOC policy on administrative segregation (*i.e.*, protective custody), codified at OAR 291-046-0005 through OAR 291-046-0091, provides the procedures for separating and segregating inmates “who constitute a continuing and/or immediate threat to the safety, security, and orderly operation of the facility; or require protective custody.” *Id.* at ¶ 3 & Attachment No. 1. According to Brad Cain, Security Manager at SRCI (“Cain”), “an inmate is placed in administrative segregation when security staff and administration decide that the inmate should not have contact with inmates in general population ... for a number of reasons.” *Id.* One reason an inmate may request commitment to the ASU is for protective custody. *Id.* at ¶ 5. However, he must reveal to ODOC officials the identity of the person or persons he claims to fear because otherwise ODOC officials may place the inmate in the same housing unit or cell with one of his predators. *Id.* at ¶ 7.

Cain states that “ODOC officials give requests for protective custody the serious attention they deserve and act swiftly to offer protection to inmates who face threats from other inmates for any valid reason.” *Id.* at ¶ 8. He also states that SRCI security staff have given Stevens ample opportunity to be separated from any aggressors that may exist. *Id.* at ¶ 13. In his opinion, “SRCI takes threats against personal safety seriously and does not hesitate to provide protective custody if it determines that threats against an inmate's personal safety are real. Mr. Stevens' personal safety has remained intact.” *Id.*

Stevens has submitted no evidence that he has ever been subjected to physical violence due to ODOC's failure to place him into protective custody.

## FINDINGS

### I. State and International Law Claims

In support of his claims, Stevens invokes 42 USC § 1983 (“§ 1983”). However, § 1983 provides a remedy only for

“the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the federal government. It provides no remedy for violations of state law. *Hydrick v. Hunter*, 500 F.3d 978, 987 (9-thCir2007), *petition for cert filed* (U.S. Jan 17, 2008) (No. 07-958); *Ybarra v. Bastian*, 647 F.2d 891, 892 (9-thCir1981), *cert denied*, 454 U.S. 857 (1981).

Stevens also relies on the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). That document “does not of its own force impose obligations as a matter of international law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). Thus, it does not create any rights secured by federal law that could give rise to an action under § 1983. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 259 (2-ndCir2003) (holding that Universal Declaration of Human Rights was not binding on the United States and, therefore, could not give rise to an environmental claim); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 133 (2-ndCir2005) (noting that Universal Declaration of Human Rights does not have the effect of domestic law and does not provide independent, privately enforceable rights).

\*10 Therefore, summary judgment should be granted to the extent that Stevens' claims are based on violations of state law or the Universal Declaration of Human Rights.

### II. Collateral Estoppel-Claim Two

Defendants assert that Claim Two alleging a lack of adequate medical care is barred by collateral estoppel due to Stevens' previously unsuccessful state habeas claim made on the same basis. Collateral estoppel, alternatively known as issue preclusion, prevents relitigation of “all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding against the party who seeks to relitigate the issues.” *Hawkins v. Risley*, 984 F.2d 321, 325 (9-thCir1993), quoting *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9-thCir1988). Federal courts generally give preclusive effect to issues decided by state courts. *Allen v. McCurry*, 449 U.S. 91, 95-96 (1980). As explained by the Supreme Court, such preclusive effect derives from the common law, policies supporting collateral estoppel and 28 USC § 1738 which provides that the “judicial proceedings [of any State] ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State....” *Id.*

Thus, the Ninth Circuit has held that a decision rendered on an issue actually litigated in state habeas proceedings may not later support a § 1983 claim where the state habeas proceeding “afforded a full and fair opportunity for the issue to be heard and determined under federal standards.” *Silverton v. Dep’t of Treasury*, 644 F.2d 1341, 1347 (9-thCir1981), *cert denied*, 454 U.S. 895 (1981). This is true even though the relief available in § 1983 cases is different than that available in habeas proceedings. *Id.* The Ninth Circuit cautioned, however, that “[t]he existence of a full and fair hearing on constitutional claims under federal standards is the keystone of the unclimbable wall protecting the finality of a prior state habeas adjudication. In its absence, that wall crumbles.” *Id.* at 1346; *see also*, *Sperl v. Deukmejian*, 642 F.2d 1154 (9-thCir1981) (holding that where claim of prosecutorial misconduct was tried and rejected in state habeas corpus proceedings, the doctrine of collateral estoppel precluded reconsideration of the issue in a federal civil rights case even where federal habeas was not available).

Because federal courts must give state court judgments the same preclusive effect as given by the state courts, state law applies to determine the preclusive effect of a state habeas judgment. *See Palomar Mobile-home Park Ass’n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir1993). In Oregon, the application of issue preclusion is determined by the use of the five so-called *Nelson* factors:

1. The issue in the two proceedings is identical.
2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.
- \*11 3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.
4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.
5. The prior proceeding was the type of proceeding to which this court will give preclusive effect.

*Nelson v. Emerald People’s Util. Dist.*, 318 Or 99, 104, 862 P.2d 1293, 1296-97 (1994) (citations omitted).

The party asserting issue preclusion bears the burden of proof on *Nelson* factors one, two and four. *Barackman v. Anderson*, 214 Or.App. 660, 666-67, 167 P3d 994, 999 (2007), citing *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 275 Or 97, 104-05, 550 P.2d 1185,

1188-89 (1976) (“*Century Home*”); *State Farm Fire and Cas. Co. v. Paget*, 123 Or.App. 558, 562-63, 860 P.2d 864 (1993), *review denied*, 319 Or 36, 876 P.2d 782 (1994). To meet that burden, the party must, “[p]lace] into evidence the prior judgment and sufficient portions of the record, including the pleading, exhibits, and reporter’s transcript of the testimony and proceedings, to enable the court to reach that conclusion [that issue preclusion applies] with the requisite degree of certainty.” *Century Home*, 275 Or at 104, 550 P.2d at 1188; *see also Shannon v. Moffett*, 43 Or.App. 723, 727 n2, 604 P.2d 407, 409 n2 (1979) (“Ordinarily the party asserting collateral estoppel must produce sufficient portions of the record of the prior proceeding to show what was actually decided ... because a judgment of a court, standing alone, rarely indicates what issues were actually decided.”), *review denied*, 288 Or 701 (1980).

By providing sufficient evidence to “establish that an identical issue was actually decided” in an earlier case, the party asserting issue preclusion has demonstrated a *prima facie* case. *Century Home*, 275 Or at 105, 604 P.2d at 1189. “The burden then shifts to the party against whom estoppel is sought to bring to the court’s attention circumstances indicating the absence of a full and fair opportunity to contest the issue in the first action or other considerations which would make the application of preclusion unfair.” *Id.*

Oregon courts have identified a number of exceptions to the doctrine of issue preclusion. For example, “the existence of newly discovered or crucial evidence that was not available to the litigant at the first trial would provide a basis for denying preclusion where it appears the evidence would have a significant effect on the outcome.” *Id.*, 275 Or at 108-09, 550 P.2d at 1191 (citations omitted). The Oregon Supreme Court has also cited the exceptions listed in Restatements (Second) of Judgments, § 28, as illustrative of other circumstances where the rule may be avoided. *Drew v. EBI Companies*, 310 Or 134, 139, 795 P.2d 531, 535 (1990).

Defendants have submitted a Petition for Writ of Habeas Corpus filed by Stevens against the SRCI Superintendent in Malheur County Circuit Court on March 7, 2002. Defendants’ Exhibit 103. They have also submitted the Judgment in that case which states that the matter came before the court on August 20, 2002, for hearing on a motion to dismiss. Defendants’ Exhibit 104. This

Judgment denies Stevens' Petition by checking the box next to the words "denied based upon the following findings and conclusions[.]" *Id* at 1. However, the Judgment contains no such findings or conclusions. The Judgment also has a checked box stating that it is given in favor of the defendant "for the reasons stated on the record." *Id* at 3. Defendants have not provided a transcript of this record. The record also fails to reveal whether Stevens appealed the Judgment.

\*12 In his state habeas Petition, Stevens alleges that he is being denied treatment for the serious medical need of transsexualism. Defendants' Exhibit 103, pp. 6-7. Stevens asserts that this denial constitutes deliberate indifference, citing *White v. Farrier*, 849 F.2d 322, 325 (8-thCir1988) and *Meriwether v. Faulkner*, 821 F.2d 408, 414 (7-thCir1987), *cert denied*, 484 U.S. 935 (1987). *Id* at 7. Both of these cases hold that an inmate's transsexualism is a serious medical need to which prison officials may not be deliberately indifferent without violating the Eighth Amendment. *White*, 849 F.2d at 325; *Meriwether*, 821 F.2d at 413. Furthermore, the Petition relates Stevens' efforts through July 31, 2001, to receive treatment for his transsexualism, including the provision of female hormone treatment and sexual reassignment surgery.

The records submitted by defendants satisfy the first, second and fourth *Nelson* factors. The issue before this court is exactly the same issue as presented to the Malheur County Circuit Court, namely whether prison officials were deliberately indifferent towards Stevens' legitimate medical needs in violation of the Eighth Amendment by failing to provide him with adequate treatment for his transsexualism. Despite the lack of findings or a transcript of the record, the Petition and Judgment reveal that this issue was actually litigated and necessary to the state court's decision whether to grant habeas relief. Indeed, Stevens' Eighth Amendment right to adequate treatment for his serious medical needs was the only issue before the state court. It is also apparent that Stevens, the party against whom preclusion is asserted in this case, was a party to that habeas proceeding.

The burden then switches to Stevens to demonstrate that he did not have a full and fair opportunity to litigate the claim, or, in the alternative, that the prior proceeding was one to which Oregon courts should not give preclusive effect. Also encompassed in this last *Nelson* factor are "other considerations which would make the application

of preclusion unfair." *Barackman*, 214 Or.App. at 668, 167 Or.App. at 999, citing *State v. Donovan*, 305 Or 332, 334-35, 751 P.2d 1109, 1110 (1988).

Stevens apparently takes issue with the third *Nelson* factor by arguing that it is questionable whether the court has fairly considered the merits of an issue when it dismisses a case with prejudice but without any opinion. However, Stevens provides no evidence that he was denied an opportunity fully and fairly to litigate his claim in state court or that the state court proceedings were faulty in any way. Absent any evidence to the contrary, this court cannot presume that the state habeas proceedings were not fully and fairly litigated.

Stevens also has failed to demonstrate that it would be unfair to give preclusive effect to the state court Judgment due to the discovery of new, material evidence or due to some other applicable exception. In his state habeas Petition, Stevens asserts essentially the same facts and law as he asserts here. The only additional facts are those which developed subsequent to filing his state habeas Petition. These facts demonstrate Stevens' continued unsuccessful efforts to receive the treatment he felt he needed. The record reveals that Stevens has received the same medical services, including treatment for dysthymia, major depression, and substance abuse, throughout the entire period relevant to this motion. Thus, this court can discern no newly discovered evidence that was not available when Stevens filed his initial state habeas Petition.<sup>4</sup>

\*13 As a result, Stevens is precluded from relitigating his Eighth Amendment claim for deliberate indifference to his serious medical needs.

## II. No Constitutional Violations

### A. Equal Protection-Claim One

Claim One challenges Stevens' placement by ODOC into a male correctional facility as a denial of his rights, privileges, protections and immunities as a female. Defendants respond that ODOC's policy of assigning anatomical males to male-only institutions and anatomical females to female-only institutions is substantially related to the achievement of prison security.

Transsexuals are not a suspect class for purposes of the equal protection clause. *Holloway v. Arthur*

*Andersen & Co.*, 566 F.2d 659, 663 (9-thCir1977), implied overruling on other grounds recognized by *Schwenk v. Hartford*, 204 F3d 1187, 1201-02 (9-thCir2000). Therefore, classifications based upon these grounds must only be “reasonably related to legitimate penological interests.” *Pruitt v. Cheney*, 963 F.2d 1160, 1164-66 (9-thCir1992) (rational basis scrutiny for classifications based upon homosexuality), *cert denied* 506 U.S. 1020 (1992); *Turner v. Safley*, 482 U.S. 78, 89 (1987). Preventing heterosexual crimes is a legitimate penological interest. Separating anatomical males and anatomical females into different institutions is reasonably related to achieving this interest.

Even if characterized as a sex based classification, Stevens' equal protection claim fails. Government actions based upon sex are governed by the equal protection clause of the Fourteenth Amendment. Accordingly, sex based classifications are justified only if substantially related to an important governmental objective, and “a party seeking to uphold government action based on sex must establish an exceedingly persuasive justification for the classification.” *U.S. v. Virginia*, 518 U.S. 515, 524 (1996). However, this standard is not as strict as that which is used to determine whether a race based classification is constitutionally permissible. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274 (1986).

Defendants argue that ODOC's policy of separating prisoners into institutions based upon their anatomical gender serves the important government objective of maintaining prison security by eliminating the possibility of heterosexual crimes. The policy is substantially related to this interest, they contend, because protection against heterosexual crimes could not be ensured if male and female inmates intermingled in the same prison. Stevens tries to bypass this argument by maintaining that, regardless of the fact that he is anatomically a male, he is nevertheless a transsexual who identifies as a female, and as such, should be placed into an institution with other females.

This court finds that the prevention of heterosexual crime in prisons is a substantial government interest. Although not directly on point, at least one Ninth Circuit case has recognized that prisons may have “*bona fide* reasons for segregation of the genders in prison.” *Jeldness v. Pearce*, 30 F3d 1220, 1226 (1994); see also *Klinger v. Dep't of Corr.*, 107 F3d 609, 615 (8-thCir1997) (“It is

beyond controversy that male and female prisoners may lawfully be segregated into separate institutions within a prison system. Gender-based prisoner segregation and segregation based upon prisoners' security levels are common and necessary practices”); *Women Prisoners of Dist. of Columbia Dept. of Corr. v. Dist. of Columbia*, 93 F3d 910, 926 (DC Cir1996) (“the segregation of inmates by sex is unquestionably constitutional”), citing *Pitts v. Thornburgh*, 866 F.2d 1450 (DC Cir1989).

\*14 The separation of sexes based upon anatomical characteristics is substantially related to this interest. Requiring that segregation be made upon a person's self-professed gender identity, rather than their anatomical gender, would impose the onerous burden on prison officials of sorting out those with genuine gender identity issues from those who would feign such a condition in order to be placed into an opposite sex facility for more nefarious reasons. This could result in increased risk of heterosexual crime. ODOC's policy passes constitutional muster.

With respect to his complaint that prison officials refuse to refer to him with female pronouns and titles, Stevens has failed to raise a legitimate constitutional or statutory basis for his claim. Prison officials have repeatedly stated that they will refer to Stevens using male pronouns because he remains anatomically a male. Stevens has presented no legitimate source of law which would require them to do otherwise. Although he has received a name/gender change from Multnomah County, this court can find no authority for the proposition that this document requires prison officials and staff to refer to Stevens using female pronouns and that their failure to do so violates federal rights cognizable under § 1983.

Even if this court were to construe this as a claim of verbal harassment in violation of the Eighth Amendment prohibition against cruel and unusual punishment, it would fail. As the Ninth Circuit has repeatedly held, verbal harassment alone does not violate the Eighth Amendment. See *Austin v. Terhune*, 367 F3d 1167, 1171 (9th Cir2004) (“the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment”), citing *Blueford v. Prunty*, 108 F3d 251, 254-55 (9th Cir1997) and *Somers v. Thurman*, 109 F3d 614, 624 (9-thCir1997); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir1987) (use of vulgar language toward prisoner not

sufficient to establish constitutional deprivation under § 1983).

### B. Failure to Protect-Claim Three

Claim Three alleges that defendants have failed to provide Stevens with protective custody despite the fact that he has been threatened by other inmates with assault, rape and death.

To state a claim under the Eighth Amendment for failure to protect, an inmate must prove that his conditions of incarceration pose a substantial risk of serious harm and that the prison official responsible had a “sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To satisfy the second requirement, prison officials must be deliberately indifferent to a substantial risk of serious harm to an inmate. *Id* at 828, 835. This is a subjective test requiring an inmate to show that a prison official actually “knows of and disregards an excessive risk to inmate health or safety.” *Id* at 839-40. Therefore,

to survive summary judgment, [a prisoner] must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.

\*15 *Id* at 846.

Claim Three falters at the first requirement listed in *Farmer*. It is undisputed that Stevens reported to Superintendent Hill that he had received threats of violence, rape and death from inmates while housed in the IMU. In response, Sergeant Miller conducted an immediate investigation. Stevens provided Sergeant Miller with a list of names, many of which were incomplete. Sergeant Miller determined that several of the named individuals were never housed with Stevens and, thus, could not have made the alleged threats. Some

of the named inmates were no longer housed at SRCI. In addition to Sergeant Miller's investigation, the SCIEC also investigated Stevens' complaint and concluded that he did not meet the criteria for placement in the ASU and that transfer to OSP was not possible given documented conflicts at that institution.

Six months later, Sergeant Taylor interviewed Stevens who continued to request placement in the ASU. However, Stevens offered no names and declined to state the nature of any problems he was having. After this investigation, the SCIEC again rejected Stevens' request for protective custody.

On this factual record, it is not reasonable to infer that Stevens was or is being exposed to an objectively intolerable risk of harm. Other than his bald assertion that he has been threatened by a list of names of questionable veracity, Stevens has presented no evidence that he was or is exposed to any risk due to the conditions of his confinement at SRCI. Stevens need not wait until he is actually assaulted to establish an Eighth Amendment claim. *See id* at 845. Nonetheless, he must provide some evidence from which a reasonable person could infer that he was or will be exposed to an objectively intolerable risk of harm. He has failed to do so.

Claim Three also fails the second requirement of the *Farmer* test. According to the record, SRCI staff were anything but deliberately indifferent towards Stevens. The uncontested evidence shows that security staff immediately investigated his complaint in compliance with ODOC regulations on two occasions. In both instances, the evidence revealed no substantial risk to Stevens' health or safety.

Finally, it must be noted that both of these complaints occurred over two years ago. Whatever fear of assault Stevens may have subjectively had in 2005, the record reveals no actual incidents of violence towards Stevens since then. Furthermore, Stevens has failed to provide any evidence that he remains exposed to an objectively intolerable risk of harm.

Because Stevens has failed to raise a material issue of fact on either prong of the *Farmer* test, defendants' motion should be granted with respect to Claim Three.

### RECOMMENDATION

Stevens has failed to raise a genuine issue of material fact from which a reasonable juror could conclude that any of the defendants have violated his constitutional rights. Furthermore, Stevens is barred by issue preclusion from relitigating his claim that defendants failed to provide him with adequate medical treatment. Therefore, defendants' Motion for Summary Judgment (docket # 33) should be GRANTED.

Recommendation will be referred to a district judge and go under advisement on that date.

If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district judge and go under advisement.

### SCHEDULING ORDER

\*16 Because plaintiff is appearing *pro se* and is incarcerated, objections to the Findings and Recommendation, if any, are extended beyond the deadline set forth in FRCP 72(b) to **March 17, 2008**. If no objections are filed, then the Findings and

### NOTICE

This Findings and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

### All Citations

Not Reported in F.Supp.2d, 2008 WL 916991

### Footnotes

- 1 A transsexual is "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex' and who typically seeks medial treatment, including hormonal therapy and surgery, to bring about a sex change." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (citations omitted).
- 2 Although the Complaint lists only the nine defendants listed in the caption, the attachments to the Complaint list many other additional defendants.
- 3 Although Stevens prefers to be referred to by female pronouns, this court will use male pronouns in order to conform to, and not create confusion with, the documents in the record.
- 4 In this respect, *Thompson v. Armenakis*, 161 Or.App. 136, 139, 984 P.2d 320, 321 (1999), can be distinguished. *Thompson* found that by alleging facts that developed during and after his initial petition for habeas relief, the prisoner's subsequent habeas petition was not precluded. As a result, "[t]he claims were not previously asserted and could not have been asserted in the first petition." *Id.* However, the court does not indicate what differences in the facts merited this result. Here, Stevens has received the same treatment after filing his state habeas Petition as he received prior to and during the time he applied for that relief. The denial of any form of treatment for his alleged gender identity disorder has remained the same. Also relevant is the fact that in *Thompson*, the State conceded that the second habeas petition was prematurely dismissed.