IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

M.A.B., a minor, by and through his parents and next friends, L.B. and L.B.,	*	
Plaintiff,	*	
v.	*	**Civil Action No.: 16-02622-GLR**
BOARD OF EDUCATION OF TALBOT COUNTY, *et al.*	*	
Defendants.	*	

* * * * * * * * * * * *

MOTION TO DISMISS

Defendants, the Board of Education of Talbot County, Kelly L. Griffith, and Tracy Elzey, by their undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(6) and Local Rule 105.1, hereby move this Honorable Court to dismiss the Complaint filed against them by Plaintiff in the above-captioned action. For the reasons set forth in the Defendants' Memorandum in Support of Motion to Dismiss, which is incorporated by reference herein, Plaintiff's Complaint fails to state any claim against the Defendants upon which relief may be granted. The Defendants therefore respectfully request that this Court dismiss the Complaint in its entirety, with prejudice, and that it award such other and further relief as the Court deems appropriate.

Respectfully submitted,

s/ (filed electronically)

Edmund J. O'Meally
Federal Bar No. 04910
Pessin Katz Law, P.A.
901 Dulaney Valley Road, Suite 400

Towson, Maryland 21204
Tele: (410) 339-6757
Fax: (410) 832-5654
eomeally@pklaw.com

s/ (filed electronically)

Rochelle E. Eisenberg
Federal Bar No. 01204
Pessin Katz Law, P.A.
10500 Little Patuxent Parkway, Suite 650
Columbia, Maryland 21044
Tele: (410) 339-6773
Fax: (410) 832-5616
reisenberg@pklaw.com

/s/ (filed electronically)

Andrew G. Scott
Federal Bar No. 29257
PESSIN KATZ LAW, P.A.
901 Dulaney Valley Road, Suite 500
Towson, Maryland 21204
Tele: (410) 339-6744
Fax: (410) 832-5627
ascott@pklaw.com
COUNSEL FOR THE DEFENDANT

1661580-1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2017, a copy of the foregoing Motion to Dismiss, along with the accompanying Memorandum of Law in Support of Motion to Dismiss, were filed in the United States District Court (Northern Division) and electronically served upon all counsel of record through the Court's CM/ECF system.

/s/ (filed electronically)

Andrew G. Scott

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

M.A.B., a minor,	*	
by and through his parents and next friends,		
L.B. and L.B.,	*	
Plaintiff,	*	
v.	*	**Civil Action No.: 16-02622-GLR**
BOARD OF EDUCATION OF	*	
TALBOT COUNTY, *et al.*		
	*	
Defendants		
	*	

****

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Edmund J. O'Meally
Federal Bar No. 04910
Pessin Katz Law, P.A.
901 Dulaney Valley Road
Towson, Maryland 21204
Tele: (410) 339-6757
eomeally@pklaw.com

Rochelle E. Eisenberg
Federal Bar No. 01204
Pessin Katz Law, P.A.
10500 Little Patuxent Parkway
Columbia, Maryland 21044
Tele: (410) 339-6773
reisenberg@pklaw.com

Andrew G. Scott
Federal Bar No. 29257
Pessin Katz Law, P.A.
901 Dulaney Valley Road
Towson, Maryland 21204
Tele: (410) 339-6744
ascott@pklaw.com
COUNSEL FOR THE DEFENDANTS

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

M.A.B., a minor, by and through his parents and next friends, L.B. and L.B.,	*	
Plaintiff,	*	
v.	*	**Civil Action No.: 16-02622-GLR**
BOARD OF EDUCATION OF TALBOT COUNTY, *et al.*	*	
Defendants.	*	

* * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants, the Board of Education of Talbot County ("the Board"), as well as Kelly L. Griffith and Tracy Elzey (the "Individual Defendants") (collectively, "Defendants"), by their undersigned counsel, file this Memorandum in Support of their Motion to Dismiss Plaintiff's Complaint. For the reasons set forth below, this Court should dismiss each Count set forth in Plaintiff's Complaint for failure to state a claim upon which relief may be granted.

I. FACTS.[1]

Plaintiff is currently enrolled as a ninth grade student at St. Michaels Middle-High School ("SMMHS"). *See* ECF 1 at ¶ 2. Plaintiff is transgender; "at birth he was given a gender designation of female," but he "arrived at his knowledge of his gender as a boy when he was in the Sixth Grade." *Id.* at ¶ 3.

[1] The Board acknowledges that, at this stage of the litigation, this Court must accept all of Plaintiff's well-pleaded allegations in the Complaint as true, *Albright v. Olive*, 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to Plaintiff, *see Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776, 783 (4th Cir. 1999).

The Board maintains separate restrooms and locker rooms at SMMHS based on sex. *Id.* at ¶ 19. The Board also offers several unisex restrooms at SMHHS, which Plaintiff and all other SMMHS students are permitted to use. *Id.* at ¶ 32. "To their credit," the Board and SMMHS "took several steps to recognize and respect M.A.B.'s gender identity, including addressing him with male gender pronouns (*e.g.*, he, him, his) and by his chosen name wherever possible even before he legally changed his name." *Id.* at ¶ 30. SMMHS "also conducted a professional development workshop for its staff in the Spring of 2015 on the topic of transgender students." *Id.* at ¶ 30. The Board, however, barred M.A.B. from using the boys' restrooms and locker rooms at SMMHS until the Fourth Circuit issued its April 19, 2016 opinion in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded, Gloucester County School Board v. G.G. ex rel Grimm,* ___ S. Ct. ___, 2017 WL 855755 (U.S. Mar. 6 2017),[2] after which time the Board permitted Plaintiff to use the boys' restrooms, as well as the unisex restrooms, but not the boys' locker rooms. *See* ECF 1 at ¶¶ 31, 44, and 45.

In response, Plaintiff has sued the Board, as well as Dr. Kelly Griffith (Superintendent of Schools) and Tracy Elzey (Principal of SMMHS),[3] asserting claims for gender identity discrimination in violation of: Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") (Count I); the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Count II); Article 24 of the Maryland Declaration of Rights (Count III); and Article 46 of the Maryland Declaration of Rights (Count IV). *See* ECF 1 at 13-16. Plaintiff seeks: (1) "a judgment declaring that Defendants' policies of refusing to allow M.A.B. to access the boys' restrooms and locker rooms at [SMMHS] to the same extent and on the same

[2] *See* Section II, *infra*, for a discussion of *G.G.*

[3] Plaintiff sues Superintendent Griffith and Principal Elzey "solely in [their] official capacit[ies]." *See* ECF 1 at ¶ 11 (Superintendent Griffith) and ¶ 12 (Principal Elzey).

terms as other male students violate his rights under Title IX, the Fourteenth Amendment, and Articles 24 and 46"; (2) preliminary and permanent injunctive relief "requiring Defendants to allow M.A.B. to access the boys' restrooms[4] and locker rooms at [SMMHS] to the same extent an on the same terms as other male students";[5] (3) "[a]s to Counts I, III and/or IV, award M.A.B. nominal and compensatory damages in amounts to be determined by the Court";[6] and attorney's fees pursuant to 42 U.S.C. § 1988. *See* ECF 1 at 17.

II. RELEVANT CASE LAW: *G.G. v. GLOUCESTER COUNTY SCHOOL BOARD*

The present litigation is similar in many, but not all, respects to the case of *G.G. v. Gloucester County School Board.* In that case, G.G., a transgender boy, sought to use the boys' restrooms at his high school. *See G.G.*, 822 F.3d at 714. The local school system, however, required that all of its students use the restrooms and locker rooms based on their "biological genders" and that "students with gender identity issues shall be provided an alternative appropriate private facilities." *Id.* at 716. Unlike the instant case, G.G. never sought use of the boys' locker room. *Id.* at 715 n.2.

G.G. sued, asserting claims for violation of Title IX and the Equal Protection Clause, and seeking a preliminary injunction. *Id.* at 717. Two weeks later, the United States Department of Justice filed a Statement of Interest, asserting that the school board's action violated Title IX.

---

[4] The Defendants respectfully submit that the issue regarding restroom access is moot since all parties agree that the Board has allowed M.A.B. the opportunity to use both the boys' restrooms as well as the unisex restrooms as he so determines. *See* ECF 32 at 2.

[5] Shortly after filing his Complaint, Plaintiff filed a Motion for Preliminary Injunction seeking immediate access to the boys' locker rooms. *See* ECF 7. Plaintiff later withdrew that motion without prejudice in light of the Supreme Court's decision to stay the mandate of the Fourth Circuit's decision in *G.G. v. Gloucester County School Board*. *See* ECF 21. Plaintiff has indicated that he intends to file a new Motion for Preliminary Injunction, but because Plaintiff is not enrolled in physical education or playing sports this semester, *see* ECF 32 at 2, he will not be filing his Motion for Preliminary Injunction until May 1, 2017. *See* ECF 34 at ¶ 3.

[6] Plaintiff indicates that he only seeks damages from the Board, not the Individual Defendants. *See* ECF 1 at 17, ¶ C.

See G.G. v. Gloucester County Sch. Bd., 132 F. Supp. 3d 736, 741 (E.D. Va. 2015). Attached to that Statement of Interest was a letter dated January 7, 2015, issued by the Acting Deputy Assistant Secretary for Policy for the United States Department of Education's Office of Civil Rights, which provided:

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

Id. at 745. As support, the letter cited a "significant guidance document" issued by the Department of Education in 2014 which provided that, "[u]nder Title IX, a recipient must generally treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." *Id.*

The school board moved to dismiss and opposed the preliminary injunction. *Id.* at 741. The district court granted the school board's motion to dismiss with regard to G.G.'s Title IX claim, and denied G.G.'s motion for preliminary injunction. *Id.* at 738. As to the dismissal of G.G.'s Title IX claim, the court concluded that it was "precluded by Department of Education regulations"—namely, 34 C.F.R. § 106.33 ("Section 106.33"), which provides that "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex[.]" *Id.* at 744. Noting that regulations promulgated by agencies authorized by Congress to do so are to be given controlling weight unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute, the court held that the aforementioned regulation "specifically allows schools to maintain separate bathrooms based on sex," and "[t]herefore, the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex." *Id.*[7]

[7] The court further reasoned that "the only way to square G.G.'s allegations with Section 106.33 is to interpret the use of the term 'sex' in Section 106.33 to mean *only* 'gender identity,'" and that, "[u]nder this interpretation, Section

In dismissing G.G.'s Title IX claim, the district court also declined to give deference to the informal guidance offered by the Department of Education because, under the test set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), an agency's interpretation of its own regulation is given controlling weight only where (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. *G.G.*, 132 F. Supp. at 746. The court ruled that "Section 106.33 is not ambiguous" insofar as "[i]t clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex," and it further reasoned that:

> [t]o defer to the Department of Education's newfound interpretation[8] would be nothing less than to allow the Department of Education to create *de facto* a new regulation though the use of a mere letter and guidance document. If the Department of Education wishes to amend its regulations, it is of course entitled to do so. However, it must go through notice and comment rulemaking, as required by the Administrative Procedure Act. It will not be permitted to disinterpret its own regulations for the purposes of litigation. . . . Allowing the Department of Education's Letter to control here would set a precedent that agencies could avoid the process of formal rulemaking by announcing regulations through simple question and answer publications. Such a precedent would be dangerous and could open the door to allow further attempts to circumvent the rule of law—further degrading our well-designed system of checks and balances.

Id. at 746-47 (internal citations omitted).

As to the preliminary injunction, the Court denied G.G.'s request on the grounds that G.G. had failed to establish that the balance of hardships weigh in his favor. *Id.* at 747.[9] More

---

106.33 would permit the use of separate bathrooms on the basis of gender identity and *not* on the basis of birth or biological sex." *See G.G.*, 132 F. Supp. 3d at 745 (emphasis in original). The court rejected that premise, however, reasoning that "under any fair reading, 'sex' in Section 106.33 clearly includes biological sex," and thus "[b]ecause the School Board's policy of providing separate bathrooms on the basis of biological sex is permissible under the regulation, the Court need not decide whether 'sex' in Section 106.33 also includes 'gender identity.'" *Id.*

[8] The Court noted that, "[d]espite the fact that Section 106.33 has been in effect since 1975, the Department of Education does not cite any documents published before 2014 to support the interpretation it now adopts." *G.G.*, 132 F. Supp. 3d at 745-46 (internal footnote omitted).

[9] Since the court granted the school board's motion to dismiss as to Plaintiff's Title IX claim it indicated it did not need to discuss the reasons for denying the motion for preliminary injunction on that claim. *G.G.*, 132 F. Supp. 3d

specifically, the court "consider[ed] G.G.'s claims of stigma and distress against the privacy interests of the other students protected by separate restrooms." *Id.* at 750. "In protecting the privacy of the others students," the court explained, "the School Board is protecting a constitutional right"—namely, "the right to bodily privacy," which, the court noted, "is even more pronounced in the state educational system." *Id.* at 750-51 (further adding that "[t]he students are almost all minors, and public school education is a protective environment"). The court concluded that G.G. had failed to show that the balance of hardships weights in his favor in light of the fact that "[t]he School Board seeks to protect an interest in bodily privacy that the Fourth Circuit has recognized as a constitutional right while G.G. seeks to overturn a long tradition of segregating bathrooms based on biological differences between the sexes." *Id.* at 753.

On appeal, the Fourth Circuit, in a 2-to-1 decision, reversed the district court's Title IX ruling and vacated and remanded its Equal Protection ruling. As to Title IX, the majority held that Section 106.33 was "ambiguous" as to "whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." *G.G.*, 822 F.3d at 720. The majority ruled that the Department of Education's guidance was entitled to *Auer* deference because, although "novel," it was not "plainly erroneous or inconsistent with the regulation or statute." *Id.* at 721-22. The majority did not, however, address the district court's reason for rejecting the agency guidance—namely, that it would make the phrase "on the basis of sex" *exclude* biological sex and refer *only* to gender identity, a construction that would absurdly mean that Title IX no longer protects men or women from discrimination on the basis of biological sex. Nor did the majority acknowledge that the agency interpretation was by implication interpreting

at 747. Thus, the court only analyzed whether G.G. was entitled to a preliminary injunction with regard to his Equal Protection claim. *Id.*

the statute and not merely the regulations. As to Plaintiff's Equal Protection claim, the majority vacated and remanded on the reasoning that the district court applied the incorrect evidentiary standard. *Id.* at 724-26.

In an impassioned dissent, Judge Paul Niemeyer stated that the majority's holding "completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes," and he further noted that, "unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the 'severe psychological distress' it would inflict on him and because female students had 'reacted negatively' to his presence in girls' restrooms." *Id.* at 730. Judge Niemeyer further stated that: (1) "[t]his unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of facilities is designed to protect"; (2) "it also misconstrues the clear language of Title IX and its regulations"; and (3) "it reaches an unworkable and illogical result." *Id.* at 731.

On the first point, Judge Niemeyer noted that "[a]cross 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," and he further noted that "[a]n individual has a legitimate and important interest in bodily privacy such that his or her nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex." *Id.* at 734 (citing cases wherein "courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind").

On the second point, Judge Niemeyer opined that the language of the Title IX regulations permitting separate restrooms, locker rooms, and shower facilities is not ambiguous, and that,

pursuant to well-settled principles of regulatory construction, "courts should not defer to an agency's interpretation of its own regulation if an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent *at the time of the regulation's promulgation*.'" *Id.* at 736 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (emphasis added by Judge Niemeyer)). Judge Niemeyer noted that, when Title IX was enacted in 1972 and its regulations promulgated in 1975 and readopted in 1980, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions," and that "[a]ny new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome." *Id.* at 736-37 (emphasis in original) (citing authorities).

On the third point, Judge Niemeyer noted that "it is not immediately apparent whether G.G., the government [as *amici*], and the majority contend that the term 'sex' as used in Title IX and its regulations refers (1) to *both* biological sex *and* gender identity; (2) to *either* biological sex *or* gender identity; or (3) to *only* 'gender identity,'" but that, "regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable." *Id.* at 737-38 (emphasis in original).

Lastly, and of critical import to the instant litigation, Judge Niemeyer noted that although the majority's holding was limited to restrooms, it nevertheless "necessarily change[s] the definition of 'sex' for purposes of assigning separate living facilities, locker rooms, and shower facilities as well [because] [a]ll are based on 'sex,' a term that must be construed uniformly

throughout Title IX and its implementing regulations." *Id.* at 734 (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) for the proposition that "the normal rule of statutory construction is that identical words used in different parts of the same act are intended to have the same meanings," and citing *Kentuckians*, 317 F.3d at 440, for the proposition that "because a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well").[10]

On remand, the district court entered a preliminary injunction without further briefing or evidence. *G.G. v. Gloucester County Sch. Bd.*, 2016 WL 3581852 (E.D. Va. June 23, 2016). The school board appealed, and after the Fourth Circuit denied a stay, the Supreme Court granted the School Board's request to recall and stay the Fourth Circuit's mandate and to stay the injunction pending a certiorari petition to be filed by the school board. *G.G. v. Gloucester County Sch. Bd.*, 136 S. Ct. 2442 (2016). The school board thereafter petitioned for certiorari, which the Supreme Court granted. *Gloucester County Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016).

On February 22, 2017, the Department of Education and Department of Justice issued a "Dear Colleague" letter "withdraw[ing] and rescind[ing]" the earlier Title IX guidance, including the January 7, 2015 letter upon which the Fourth Circuit's decision was based, on the grounds that "these guidance documents do not . . . contain extensive legal analysis or explain how the position [*i.e.*, that Title IX and its regulations "require access to sex-segregated facilities based on gender identity"] is consistent with the express language of Title IX, nor did they undergo any formal public process," thus "giv[ing] rise to significant litigation" leading to divergent outcomes. *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. As a result, the Departments indicated that they "will not rely on the views expressed within"

[10] Judge Niemeyer also dissented as to the majority's decision to vacate the district court's ruling denying a preliminary injunction. *G.G.*, 822 F.3d at 739.

those prior guidance documents. *Id.*[11]

On March 6, 2017, the Supreme Court issued the following summary disposition before oral argument could be held: "The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017." *Gloucester County Sch. Bd. v. G.G.*, 2017 WL 855755 (U.S. Mar. 6, 2017). On April 7, 2017, Fourth Circuit granted an unopposed motion to vacate the preliminary injunction previously entered on June 23, 2016 by the United States District Court for the Eastern District of Virginia. To date, the Fourth Circuit has issued a briefing schedule but argument has not been scheduled.

Despite the Supreme Court's ruling vacating the Fourth Circuit's decision in *G.G.* and the absence of any other authority requiring the Defendants in the instant case to permit Plaintiff to use the boys' restrooms, the Defendants have nevertheless agreed to continue to permit Plaintiff to use the boys' restrooms, as they had since before Plaintiff first filed suit, but not the boys' locker rooms, during the pendency of the instant litigation. *See* ECF 32 at 2.

III. STANDARD OF REVIEW.

A defendant may seek dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) where a plaintiff fails to state a claim upon which relief may be granted. The purpose of a motion to dismiss is to test the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). At this state of the litigation, a reviewing court must accept as true all well-pleaded allegations in the complaint as true, *Albright v. Olive*, 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to the plaintiff, *see Harrison*

[11] The majority in *G.G.* acknowledged the possibility of such a shift in policy. *See G.G.*, 822 F.3d at 724 (noting that "a subsequent administration [may] choose to implement a different policy"). Of course, this illustrates the problem with the doctrine of *Auer* deference in the first place.

v. Westinghouse Savannah River Co., 176 F.3d 776, 783 (4th Cir. 1999). Nevertheless, in evaluating the complaint the reviewing court need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), nor must it agree with legal conclusions couched as factual allegations, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

IV. ARGUMENT.

A. Plaintiff Has Not Asserted a Cognizable Title IX Claim.[12]

Plaintiff's claim that the Board violated Title IX by discriminating against him on the basis of his gender identity must be dismissed for the simple reason that the unambiguous text of Title IX only prohibits discrimination on the basis of sex, not gender identity.[13] In the alternative, to the extent this Court concludes that the term "sex" as it appears in the statutory text of Title IX is ambiguous, the legislative history and all other indicia the Court must consider in construing the statute point to the inescapable conclusion that the term "sex" does not include "gender identity."

Title IX prohibits discrimination in education programs and activities on the basis of sex. The statute provides, in relevant part, that "[n]o person in the United States shall, *on the basis of*

[12] Plaintiff's Complaint does not indicate which claims are asserted against which Defendants. To the extent Plaintiff asserts his Title IX claim against the Individual Defendants, that claim must be dismissed because there is no individual liability under Title IX. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

[13] The words "sex" and "gender" are not synonymous or interchangeable. *See* Black's Law Dictionary (10th ed. 2014) (including in its definition of "sex discrimination" the following statement: "Increasingly in medicine and sociology, *gender* is distinguished from *sex*. *Gender* refers to the psychological and societal aspects of being male or female; *sex* refers specifically to the physical aspects."); *id.* (defining "gender-based harassment" as "[h]arassment motivated by hostility and intended to enforce traditional heterosexual norms and roles and discourage what is seen as nontraditional behavior"); *see also Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) ("As Judge Posner has pointed out, the term "gender" is one "borrowed from grammar to designate the sexes as viewed as social rather than biological classes.") (quoting Richard A. Posner, Sex and Reason, 24–25 (1992)).

The Board is by no means arguing in favor of *invidious* distinctions or *invidious* discrimination. Indeed, Plaintiff's own Complaint acknowledges that the issue in this case is not that M.A.B. has been subjected to harassment, ridicule, or an otherwise hostile environment by the Board or its employees; rather, the sole issue is whether the Board may lawfully require students to use sex-segregated lockers rooms based on students' birth sex regardless of whether their gender identity corresponds to their birth sex.

sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (emphasis added).[14] Notably, the Title IX regulations, promulgated shortly after Title IX's enactment, explicitly provide that entities subject to Title IX, such as the Board, "may provide separate toilet, locker room, and shower facilities on the basis of sex," provided that "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. Similarly, the Title IX regulations provide that "[a] [federal funding] recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex." 34 C.F.R. § 106.61. Neither the statutory language of Title IX nor its implementing regulations (34 C.F.R. Part 106) mention gender, gender identity, gender expression, and/or gender transition.

Applying the well-established principles of statutory construction, the term "sex" must be interpreted according to "the literal and plain language of the statute." *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996). Indeed, "[a]bsent explicit legislative intent to the contrary, the statute should be construed according to its plain and ordinary meaning." *Id.* "To determine a statute's plain meaning, [courts] not only look to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a

[14] The statute goes on to list certain exceptions to that general prohibition which are not relevant here (*i.e.,* 20 U.S.C. § 1681(a)(1) – (a)(9)), and also states explicitly in Section 1686 that nothing contained in Title IX "shall be construed to prohibit any educational institution receiving funds under this Act from maintaining separate living facilities for the different sexes."

whole." *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 258 (4th Cir. 2013). "It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *see also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 (4th Cir. 1999) ("If the language is plain and the statutory scheme is coherent and consistent, we need not inquire any further."). "If the statutory language is ambiguous, [courts] look beyond the language of the statute to the legislative history for guidance." *Id.*

The foregoing plain language of the statute and its regulations compel the conclusion that Title IX only prohibits distinctions based upon one's sex, not one's gender identity (or sexual orientation for that matter). Indeed, Title IX was enacted in 1972 and its regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions.[15]

Moreover, even if one were somehow to conclude that the term "sex" as commonly understood between 1972 and 1980 is ambiguous and therefore were to look to the legislative

[15] *See, e.g., The Random House College Dictionary* 1206 (rev. ed.1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change ..."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished ..."). Indeed, although the contemporaneous meaning controls our analysis, it is notable that, *even today,* the term "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g., Webster's New World College Dictionary* 1331 (5th ed.2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam–Webster's Collegiate Dictionary* 1140 (11th ed.2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures").

history, one could come to no other conclusion that Congress intended the term "sex" to mean the binary concept of male and female as determined by physiological and/or anatomical manifestations at birth, and furthermore, that Congress intended to permit entities such as the Board to separate students based upon their sex as it related to the use of "intimate facilities" such as restrooms, locker rooms, showers, and living quarters.

For example, Section 1686, quoted above, was added to Title IX in response to concerns that Title IX would force colleges and other recipients of federal educational funding that maintained housing quarters to permit women in dormitories designated only for men, and vice versa. When Senator Birch Bayh first introduced the legislation in the Senate, Senator Peter Dominick asked about the scope of the law:

> Mr. DOMINICK: The provisions on page 1, under section 601, refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera. The words "any program or activity," in what way is the Senator thinking here? Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here? Or are we dealing with just educational requirements?
>
> I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot segregate dormitories anyway. *But suppose they want to segregate the dormitories [by sex]; can they do it?*
>
> Mr. BAYH: The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. *I do not read this as requiring integration of dormitories between the sexes*, nor do I feel it mandates the [sexual] desegregation of football fields.
>
> What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. *We are not requiring* that intercollegiate football be desegregated, nor *that the men's locker room be [sexually] desegregated*.

117 Cong. Rec. 30407 (1971) (emphasis added).

The same concerns were raised in the House, where Representative Fletcher Thompson, concerned about men and women using the same facilities, discussed an amendment:

> *I have been disturbed, however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes*. I have talked with the gentlewoman from Oregon (Mrs. Green) and discussed with the gentlewoman an amendment which she says she would accept. *The amendment simply would state that nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex*.

117 Cong. Rec. 39260 (1971) (emphasis added). This amendment was eventually introduced and passed. 117 Cong. Rec. 39263 (1971).

The following year, when Title IX was passed, Senator Bayh reiterated that Title IX's general prohibition of sex discrimination was not meant to force biological males and females to share intimate facilities where their personal privacy rights would be compromised:

> Under this amendment, each Federal agency which extends Federal financial assistance is empowered to issue implementing rules and regulations effective after approval of the President. *These regulations would allow enforcing agencies to permit differential treatment by sex only*—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities *or other instances where personal privacy must be preserved*.

118 Cong. Rec. 5807 (1972) (emphasis added).

Moreover, and as noted above, the initial regulations that were promulgated to implement Title IX not only permitted schools receiving federal funds to provide "separate housing on the basis of sex" as long as the housing is "proportionate" and "comparable," *see* 34 C.F.R. § 106.32(b), but they also expressly provided that "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex," again, with the caveat that "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. Thus, it is clear that the drafters of Title IX and its

implementing regulations intended for schools to be permitted to provide students separate restrooms and locker rooms based upon their sex.[16]

In short, in analyzing the statutory language, regulatory language, legislative history, and common understanding of the word "sex" at the time of Title IX's enactment, one can come to no conclusion other than that Congress intended the term "sex" to mean the binary concept of male and female as determined by physiological and/or anatomical manifestations at birth. Whether academia, science, or society in general have come to understand the term "sex" as meaning something different during the past four decades is irrelevant. The sole question is what the term meant at the time of the statute's enactment, and the answer is overwhelmingly clear. Simply put, the well-established principles of statutory construction demonstrate that while Title IX prohibits discrimination on the basis of sex, it does not prohibit distinctions made on the basis of gender identity.

Moreover, and perhaps even more crucial to the question of whether the word "sex" as used in Title IX includes "gender identity," recent failed legislation demonstrates that Congress did not intend for Title IX to prohibit distinctions on the basis of gender identity, and that Title IX does not in fact prohibit distinctions on that basis. In 2013 and 2015, bills proposed which sought to prohibit distinctions on the basis of gender identity in schools failed and did not become law. *See* H.R. 1652, 113th Cong. (2013); S.439, 114th Cong. (2015). During this same general time, however, Congress overtly chose to extend protections for "gender identity" in other areas of federal law. *See, e.g.*, 18 U.S.C. § 249 (hate crime legislation signed into law

[16] Legal scholars of the era—including Justice Ruth Bader Ginsburg, then a law professor—offered support for the policy of maintaining separate intimate facilities based on sex for the sake of personal privacy. *See* Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21 ("Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."); *see* United States Commission on Civil Rights, SEX BIAS IN THE U.S. CODE 216 (1977) (concluding that "the personal privacy principle permits maintenance of separate sleeping and bathroom facilities" for women and men).

which applies, *inter alia*, to crimes based on "gender identity").

The commonsense understanding that "sex" does not include "gender identity" is confirmed by the language Congress uses when it *does* legislate against gender identity discrimination. For example, the Violence Against Women Act prohibits federally funded programs and activities from discriminating "on the basis of actual or perceived race, color, religion, national origin, *sex*, *gender identity* . . . ., sexual orientation, or disability." 42 U.S.C. § 13925(b)(13)(A) (emphasis added). If Congress intends for "sex" to include "gender identity," then listing the two categories separately as it has done on numerous occasions would be needless surplusage.

Still further, state legislatures likewise distinguish between "sex" and "gender identity." For example, in 2014 the Maryland General Assembly amended Maryland's human relations anti-discrimination law to include the classification of "gender identity" to the list of protected classes in the areas of public accommodations, employment, and housing. *See* 2014 Md. Laws 474. With regard to public accommodations, the Maryland statute now reads that "[a]n owner or operator of a place of public accommodation or an agent or employee of the owner or operator may not refuse, withhold from, or deny to any person any of the accommodations, advantages, facilities, or privileges of the place of public accommodation because of the person's race, *sex*, age, color, creed, national origin, marital status, sexual orientation, *gender identity*, or disability." Md. Code Ann., State Gov't ("SG") § 20-304 (emphasis added).[17] If "sex" included "gender identity," there would have been no need for the amendment, or, at the very least, the amendment should have clarified that "gender identity" fell under the term "sex" rather than as a separate

[17] It should be noted that public schools do not fit within the definition of "public accommodations." *See* SG § 20-301.

classification.[18]

In short, for the reasons discussed above, Title IX does not prohibit discrimination or distinctions based on gender identity because the statute simply does not include "gender identity" under the term "sex" and, thus, does not prohibit educational institutions that are recipients of federal funds from separating students based upon their sex as it related to the use of "intimate facilities" such as the locker room at issue in this case. As a result, Count I of Plaintiff's Complaint must be dismissed as a matter of law.

B. Plaintiff's Fourteenth Amendment Equal Protection Claims Must Be Dismissed.

Plaintiff's Equal Protection claim against the Board fails as a matter of law and must be dismissed because the Board is not a "person" subject to suit under 42 U.S.C. § 1983. 42 U.S.C. § 1983 provides in pertinent part that "[e]very ***person*** who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party in an action at law, suit in equity, or other proper proceeding for redress . . . ." (Emphasis added.) By its very language, in order to be held liable the defendant must be a "person." In this case, however, the Board is *not* a "person" because it is a State agency, rather than a county or municipal agency, and is thus entitled to Eleventh Amendment immunity. *See, e.g., Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) (holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); *Zimmer-*

[18] Moreover, the Maryland statute as amended contains an express exception for locker rooms and other places where individuals disrobe in the presence of others: "This subtitle [*i.e.*, SG § 20-301] does not apply, with respect to gender identity, to a private facility, if the place of public accommodation in which the private facility is located makes available, for the use of persons whose gender identity is different from their assigned sex at birth, an equivalent space." SG § 20-303(b)(3); *see also* SG § 20-303(b)(1)(iii) (defining "private facility" as "a facility: (1) that is designed to accommodate only a particular sex; (2) that is used simultaneously by more than one user of the same sex; and (3) in which it is customary to disrobe in view of other users of the facilities"); SG § 20-301(b)(1)(ii) (defining "equivalent private space" as "a space that is functionally equivalent to the space made available to users of a private facility").

Rubert, 409 Md. at 206, 973 A.2d at 236 (stating that "[w]e have long considered county school boards to be State agencies rather than independent, local bodies"); *James v. Frederick County Pub. Schs.*, 441 F. Supp. 2d 755, 760 (D. Md. 2006) (dismissing 42 U.S.C. § 1983 claims against the Board of Education of Frederick County on the basis that "[t]his court has made clear, consistently and repeatedly, that the county boards of education of Maryland are state agencies").[19]

Although the Individual Defendants may, as a matter of legal possibility, be subject to a claim for prospective injunctive relief to remedy violations of the United States Constitution,[20] this Court should nevertheless dismiss Plaintiff's prospective injunctive claim because, as discussed below, even assuming the truth of Plaintiff's allegations, the Individual Defendants did not violate Plaintiff's rights under the Equal Protection Clause as a matter of law.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.

[19] Plaintiff's Equal Protection claim against the Board must be dismissed notwithstanding the fact that he seeks both damages and injunctive relief. *See Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 100-01 (1984) (explaining "that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment . . . regardless of the nature of the relief sought," and that, "[t]he Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in *Ex parte Young*, 209 U.S. 123 (1908)"); *see also Atkins v. Maryland Div. of Correction*, No. CIV.A. PWG-14-3312, 2015 WL 5124103, at *5 (D. Md. Aug. 28, 2015) (explaining that "state agencies are immune from liability under the Eleventh Amendment from a § 1983 suit in federal court without regard to the nature of the relief sought") (citing *Pennhurst, supra*); *Lewis v. Green*, No. 2:13CV00073 JLH/JTR, 2013 WL 5306662, at *2 (E.D. Ark. Sept. 20, 2013) ("State agencies, such as the ADC [*i.e.*, Arkansas Department of Corrections], are not 'persons' amenable to suit under § 1983 for damages or injunctive relief," and "[t]hus, Plaintiff's claims against Defendant ADC should be dismissed, with prejudice."); *Tyus v. Kentucky Dep't of Veterans Affairs*, No. CIVA 07-CV-162-JMH, 2007 WL 1752665, at *2 (E.D. Ky. June 18, 2007) ("Plaintiff's claims against Defendant Kentucky Department of Veterans Affairs, both for money damages and injunctive relief, must be dismissed, as a state agency is not a "person" subject to liability under Section 1983."); *Illinois Dunesland Pres. Soc'y v. Illinois Dep't of Nat. Res.*, 461 F. Supp. 2d 666, 671 (N.D. Ill. 2006) (stating that "there is no support for the proposition that claims for injunctive relief may be brought under § 1983 against state agencies").

[20] *See Will*, 491 U.S. at 71 n.10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State.").

amend. XIV, § 1. The Clause "does not take from the States all power of classification," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"). "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). "Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.*

As an initial matter, Plaintiff has not alleged that the Defendants have treated him any differently than any other similarly situated students at SMMHS, nor has he alleged that any such treatment was the result of intentional discrimination. Indeed, the Defendants—by Plaintiff's own allegations—have treated Plaintiff like every other student at SMMHS: he can use the restroom and locker room based upon his biological sex, or he can use a unisex restroom for both his personal toileting needs as well as changing for physical education and/or sports if he so chooses. Plaintiff's Equal Protection claim should be dismissed on this basis alone.

Moreover, even if Plaintiff had alleged facts sufficient to satisfy that threshold requirement, Plaintiff's claim should be dismissed because the classification "transgender" is not a suspect classification under the Equal Protection Clause, and the Board's policy therefore need only be rationally related to a legitimate governmental interest—a standard which the Board's policy clearly satisfies. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir.

2007)[21]; *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 672-73 (W.D. Pa. 2015) ("[N]either the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiff's discrimination claim is reviewed under the rational basis standard."), *appeal dismissed*, (3d Cir. 15-2022) (Mar. 30, 2016); *Braninburg v. Coalinga State Hosp.*, No. 1:08–cv–01457–MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012) ("it is not apparent that transgender individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Kaeo–Tomaselli v. Butts*, No. 11–cv–00670 LEK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013) (noting the plaintiff's status as a transgender female did not qualify her as a member of a protected class and explaining the court could find no "cases in which transgendered individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05–cv–1032–NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan. 30, 2009) (explaining that because transgender individuals are not a protected class for the purpose of Fourteenth Amendment analysis, claims that a plaintiff was subjected to discrimination based on her status as transgender are subject to rational basis review).

The obvious rational basis for the Board's refusal to permit Plaintiff to use the male locker room was to protect the privacy rights of all students at the school. *See Doe v. Luzerne County*, 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"); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the

[21] The Tenth Circuit recently reaffirmed its holding in *Etsitty*. *See Druley v. Patton*, 601 Fed. Appx. 632, 635 (10th Cir. 2015) ("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.")

constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (stating "there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. 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."). In these circuits, violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum*, 516 F.3d at 494 ("the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different sexes of defendant and plaintiff in *York*).[22]

Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the elementary and secondary school context, where middle and high school students, such as those that attend SMMHS, are compelled by law to attend school[23] and are also

[22] Notably, the majority in *G.G.* "agree[d] 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," but it did not consider that interest as a constitutional matter since that issue was not before the Court. *G.G.*, 822 F.3d at 723.

[23] *See* Md. Code Ann., Educ. § 7-301 (Maryland's compulsory attendance law).

required by law to participate in prescribed number of physical education classes[24] where they are typically required to change clothes in order to participate. These students, whose ages typically run from 11 years old in the sixth grade to 18 years old in the twelfth grade, are arguably at the peak of discomfort and vulnerability with regard to the physical, emotional, and psychological aspects of human sexuality. *See, e.g., Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 375 (2009) (noting that a teenage student's "adolescent vulnerability" is relevant in determining whether a search is constitutional); *New Jersey v. T.R.O.*, 469 U.S. 325, 342 (1985) (explaining that "the age and sex of the student" must be taken into consideration in determining whether a search for Fourth Amendment purposes was "permissible in its scope"); *Brannum*, 516 F.3d at 499 (stating that "a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room"); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 n.1 (7th Cir. 1993) ("Perhaps counterintuitively, a very young child would suffer a lesser degree of trauma from a nude search than an older child. *As children go through puberty, they become more conscious of their bodies and self-conscious about them.* Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older.") (emphasis added); *City of Philadelphia v. Pennsylvania Human Relations Comm'n*, 7 Pa. Commw. 500, 510, 300 A.2d 97, 102-03 (1973) (noting that female supervision of juvenile

[24] *See* COMAR 13A.04.13.01A (requiring each local school system to provide an instructional program in physical education in grades pre-kindergarten-8 and a physical education program in grades 9-12 "which enables students to meet graduation requirements and to select physical education electives"); COMAR 13A.02.03B(4) (requiring each student to have at least one half-credit of physical education in order to meet Maryland graduation requirements).

males during daily showers at a youth study center risked "permanent emotional impairment" at "a time in life when sex is a mysterious and often troubling force").

This is not a case in which the Defendants have made distinctions based upon sex which are subject to "heightened scrutiny." *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996). Nor is this a case of alleged discrimination against Plaintiff for non-conformity to sexual stereotypes, which would also arguably subject the Defendants' conduct to "heightened scrutiny." *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). But even if an intermediate standard of review applicable to sex-based classifications applied here (which it does not), the Board's refusal to permit Plaintiff, a biological female, to disrobe (and possibly use showers) with male students advances an important purpose which would pass muster under that standard as well.

The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible. For example, in *Virginia*, the Supreme Court rejected the notion that women were not suited for education at the Virginia Military Institute on the reasoning that that sex-based distinctions made by governmental entities "must not rely on overbroad generalizations about the different talent, capacities, or preferences of males and females." 518 U.S. at 533.[25] Even though the Court rejected stereotypical assumptions about supposed "inherent differences" between men and women, the Court explicitly acknowledged that:

[25] *See also Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (stating that although "a legislature may not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class, . . . the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same . . . [insofar as] this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances") (internal citations and quotation marks omitted); *id.* at 478 (Stewart, J., concurring) (stating that "while detrimental gender classifications by government can 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").

> [t]he heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. *See Loving v. Virginia,* 388 U.S. 1 (1967). Physical differences 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. *Ballard v. United States,* 329 U.S. 187, 193 (1946).

Virginia, 518 U.S. at 533 (parallel citations omitted). The Court then linked these "physical differences" to privacy considerations, stating that "[a]dmitting 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.

Virginia is not the only Equal Protection case in which the Supreme Court has distinguished between the sexes on the basis of physiology. In *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (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.* at 59-60. 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. 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. Instead, the Court found that "[t]here 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:

> 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.

Lastly, the General Assembly of Maryland has very recently affirmed the importance of sexual privacy in locker room settings, including those in public schools. Although the General assembly required public accommodations to permit individuals to use restrooms based upon their gender identity, the General Assembly did not include public schools within its definition of "public accommodation," and it furthermore created an express exception for "private facilities," such as locker rooms, which the General Assembly defined as "a facility: (1) that is designed to accommodate only a particular sex; (2) that is used simultaneously by more than one user of the same sex; and (3) in which it is customary to disrobe in view of other users of the facilities." *See* SG § 20-303(b)(3); *see also* SG § 20-301(b)(1)(ii) (defining "equivalent private space" as "a space that is functionally equivalent to the space made available to users of a private facility"). Thus, while expressly extending the rights of transgender individuals to access restrooms in public accommodations based upon their gender identity, the General Assembly intentionally declined to extend that right of access to public school restrooms and to "private facilities," such as locker rooms, throughout the state.

In conclusion, the sexual privacy of all students is a constitutionally protected right. Participation in physical education class is required in the public schools of Maryland, and thus to permit students to use locker rooms based upon their gender identity would mean nothing less

than governmental compulsion of students to expose their bodies and to be exposed to the bodies of students of the opposite sex in various stages of undress. The Board's requirement that students use locker rooms based on their biological sex as opposed to their gender identity so as to prevent such compulsion satisfies both rational basis scrutiny and heightened scrutiny. Consequently, Plaintiff's rights under the Equal Protection Clause have not been violated, and Count II must be dismissed.

C. Plaintiff's Claim Under Article 24 of the Maryland Declaration of Rights Must Be Dismissed.

"Although Article 24 [of the Maryland Declaration of Rights] does not contain an express equal protection clause, th[e] Court [of Appeals] has held that the concept of equal protection is embodied within the Article." *Neifert v. Dep't of Env't,* 395 Md. 486, 504 (2006). "[E]ven though the Fourteenth Amendment and Article 24 are independent of each other and capable of being interpreted differently, U.S. Supreme Court cases construing the Fourteenth Amendment are highly persuasive with regard to our interpretation of Article 24." *Conaway v. Deane*, 401 Md. 219, 272 (2007), *abrogated on other grounds by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Plaintiff has not alleged or otherwise set forth any reason why his Article 24 claim should be analyzed any differently than his Equal Protection claim. In fact, Plaintiff alleges that "[t]he Maryland Court of Appeals has held that the rights protected by Article 24 encompass a right to equal protection of the laws that is generally coextensive with the equivalent right established by the Equal Protection Clause of the Fourteenth Amendment." *See* ECF 1 at 16, ¶ 70.

Accordingly, Plaintiff's Article 24 claim should be dismissed for the same reason Plaintiff's Equal Protection claim should be dismissed.[26]

D. Plaintiff's Claim Under Article 46 of the Maryland Declaration of Rights Must Be Dismissed.

"In Maryland, because of the Equal Rights Amendment to the Maryland Constitution (Article 46 of the Maryland Declaration of Rights), classifications based on gender are suspect and subject to strict scrutiny." *Murphy v. Edmonds*, 325 Md. 342, 357 (1992). "When utilizing this most-demanding standard of constitutional review, [the Court of Appeals of Maryland] deem[s] unconstitutional a challenged legislative classification unless the distinction formed by it is 'necessary to promote a compelling governmental interest.'" *Conaway*, 401 Md. at 273 (adding that, "[i]n other words, the statute must be justified by a compelling state interest, and drawn sufficiently narrowly that it is the least restrictive means for accomplishing that end").

Of critical note, however, the Court of Appeals in *Conaway v. Deane*, a case in which the Court considered whether a statute prohibiting same-sex marriage was constitutional, explained that "extrinsic sources created at or about the time of the pendency of the proposed amendment and its promulgation . . . suggest that the intended scope of Article 46 was to prevent discrimination between men and women as classes." 401 Md. at 248; *see also id.* at 254-64 (explaining that Maryland cases interpreting Article 46 also indicate that the ERA was intended

[26] The Defendants acknowledge that, unlike Plaintiff's Equal Protection claim, there are no Eleventh Amendment implications with regard to Plaintiff's state constitutional claims, nor are there any official/individual capacity distinctions at issue, and thus both the Board and the Individual Defendants are susceptible to suit for alleged state constitutional violations. *See Ritchie*, 324 Md. at 373-74 (noting that "the particular official/individual capacity dichotomy that is part of § 1983 law does not apply to state constitutional violations," and that "the doctrine of sovereign immunity prevents the State from being held liable in damages for an unconstitutional act absent a legislative waiver"); *Beka Indus., Inc. v. Worcester Cnty. Bd. of Educ.*, 419 Md. 194, 221-22 (2011) (explaining that county boards of education in Maryland are entitled to assert the defense of sovereign immunity pursuant to Section 4-105 of the Education Article of the Maryland Annotated Code and Section 5-518 of the Courts and Judicial Proceedings Article of the Maryland Annotated code for "any claim" above $100,000 "in the context of a tort or insurable claim, such as those for personal injury, and for claims arising from alleged employment law violations"). Nevertheless, Plaintiff's state constitutional claims should be dismissed for the same reasons his Equal Protection claim should be dismissed.

to combat discrimination between men and women as classes). Thus, the Court concluded that "because we believe that Article 46 was not intended by the General Assembly and the Maryland voters who enacted and ratified, respectively, the Maryland ERA in 1972 to reach classifications based on *sexual orientation,* we conclude that Family Law § 2–201 does not draw an impermissible sex-based distinction." *Id.* at 246 (emphasis in original). Because the statute did not implicate a suspect class or a fundamental right, the Court applied rational basis scrutiny to the statute at issue, and held that the statute's prohibition against same-sex marriage was rationally related to the governmental interest of procreation and the traditional family structure. *Id.* at 325.

Surely if the ERA was enacted in 1972 with the intention of prohibiting classifications based on sex but not sexual orientation then it was also not enacted with the intention of prohibiting classifications based on gender identity or transgender status. As such, rational basis scrutiny applies, *Conaway*, 401 Md. at 325, and Plaintiff's Article 46 claim should be dismissed for the same reasons his Equal Protection claim should be dismissed.

V. CONCLUSION.

For the reasons set forth above, the Defendants respectfully request that the Court dismiss all of Plaintiff's claims against them with prejudice.

Respectfully submitted,

s/ (filed electronically)

Edmund J. O'Meally
Federal Bar No. 04910
Pessin Katz Law, P.A.
901 Dulaney Valley Road, Suite 400
Towson, Maryland 21204
Tele: (410) 339-6757
Fax: (410) 832-5654
eomeally@pklaw.com

s/ (filed electronically)

Rochelle E. Eisenberg
Federal Bar No. 01204
Pessin Katz Law, P.A.
10500 Little Patuxent Parkway, Suite 650
Columbia, Maryland 21044
Tele: (410) 339-6773
Fax: (410) 832-5616
reisenberg@pklaw.com

s/ (filed electronically)

Andrew G. Scott
Federal Bar No. 29257
Pessin Katz Law, P.A.
901 Dulaney Valley Road, Suite 400
Towson, Maryland 21204
Tele: (410) 339-6744
Fax: (410) 832-5627
ascott@pklaw.com

COUNSEL FOR THE DEFENDANTS

1896163-1