IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

M.A.B., ***a minor,*** ***by and through his parents and next friends,*** **L.A.B. and L.F.B.,** *Plaintiff,* v. **BOARD OF EDUCATION OF TALBOT COUNTY,** ***et al.,*** *Defendants.*	Civil Action No. **GLR-16-2622**

MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff, M.A.B., a minor, by and through his parents and next friends, L.A.B. and L.F.B., and by and through his counsel, Jennifer L. Kent, Esq., Laura McMahon DePalma, Esq., and FreeState Justice, Inc., pursuant to Fed. R. Civ. P. 65, seeks a preliminary injunction compelling Defendants to provide him access to the boys' locker room equal to the access provided to other male students, and in support states:

1. M.A.B. ("M") is a transgender male student in the ninth grade at St. Michaels Middle-High School (the "School"), a public school and federally funded education program and/or activity operated by Defendants.

2. M is required to take Physical Education ("P.E.") before he graduates and may again compete on the School's soccer team in fall 2017.

3. Like all other male students who take P.E. and participate in extracurricular sports at the School, M will require access to the boys' locker room.

4. In violation of Title IX, the Fourteenth Amendment, and Maryland law as cited in Plaintiff's Complaint, Defendants have barred M from using the School's boys' locker room.

5. Defendants' unlawful conduct will cause M to suffer irreparable injury if he is not granted injunctive relief preliminarily.

6. For these reasons, and for the reasons more fully explained in the accompanying Memorandum, M seeks entry of a preliminary injunction, restraining Defendants' unlawful conduct.

WHEREFORE for the these reasons, Plaintiff respectfully requests that this Court:

A. Enter a preliminary injunction requiring Defendants to allow M.A.B. to access the boys' locker rooms at the School during the pendency of this action; and

B. Grant such other and further relief as justice requires.

REQUEST FOR HEARING

Plaintiff respectfully requests a hearing on this Motion.

Respectfully submitted,

/s/

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Defendants.

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***** HEARING REQUESTED *****

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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I. PRELIMINARY STATEMENT

Defendants, who manage and govern the Talbot County Public Schools, including St. Michaels Middle-High School ("School"),[1] are denying M.A.B. ("M"), the plaintiff, access to the boys' locker rooms at his school because he is transgender. M is required to take Physical Education ("P.E.") before he graduates and may again compete on the School's soccer team in fall 2017, and to do so he will need access to the boys' locker room along with the other boys.

M is likely to prevail on the merits of his claims under Title IX and the Equal Protection guarantees of the Fourteenth Amendment because defendants have, without justification, treated him differently from other students on the basis of his sex and gender, including his gender identity and transgender status.[1] The overwhelming weight of the case law—and the federal government's uniform interpretation that Title IX and other sex discrimination laws prohibit discrimination based on gender identity and gender stereotypes—is on M 's side. Indeed, courts around the country have issued injunctive relief under both Title IX and the Equal Protection Clause of the Fourteenth Amendment to prevent public school officials from barring transgender students from traditionally sex segregated facilities that conform to their gender identity.

Unless enjoined, defendants' continuing discrimination against M will subject him to irreparable injuries. Beyond interfering with his ability to learn and to enjoy the privileges and benefits of defendants' education program and activities, the defendants' discriminatory conduct continues to cause M anxiety and distress and impedes his treatment for his gender dysphoria. Allowing M to use boys' locker room (which have their own privacy features) while

[1] M has asserted claims against the defendants under Title IX (Compl. Count I), federal and Maryland equal protection guarantees (Compl., Counts II and III) and Maryland's ERA (Count IV.) Although M is likely to prevail on all his claims, for purposes of efficiency he has limited this motion to his Title IX and federal Equal Protection Claims.

this case proceeds on the merits will harm no one, nor have the defendants ever credibly established that it would. For the reasons outlined below, the Court should grant M's Motion for Preliminary Injunction.

II. FACTS

M incorporates here by reference the allegations of his Complaint and sworn declarations, submitted as exhibits to the original Motion for Preliminary Injunction, of himself (ECF 7-3 "M Decl."); his mother, L.A.B. (ECF 7-4 "L.A.B. Decl."); his father, L.F.B. (ECF 7-5, "L.F.B. Decl."); Julie A. Eastin, PhD (ECF 7-6, "Eastin Decl.") and his soccer teammates (ECF 17 "J.F. Decl."; ECF 18 "B.F. Decl.") M also submits his own supplemental declaration detailing certain events of the 2016-2017 year. (Exhibit 1.)

M is a fifteen-year-old transgender boy, in ninth grade at St. Michael Middle-High School (the "School"). (Ex. 1 at ¶ C.). The School is a public school serving grades 6-12 and is part of the Talbot County Public Schools ("TCPS") system. (Complaint ¶¶ 9-10.) Before M graduates, he will be required to take P.E. (Ex. 1 at ¶ I.) M's extracurricular interests include soccer. He played on the School's JV soccer team in the fall of 2016. (*Id.* ¶¶ 7, 8; Ex. 1 at ¶ F.) Like all other students taking P.E. and who participate in sports, M requires access to locker room facilities.

M has known that he is a boy since at least the sixth grade. (M Decl. ¶ 10.) He has had feelings of gender dysphoria for as long as he can remember, since early childhood. (*Id.* ¶ 9.) As a young child he protested wearing dresses and other feminine clothing, preferred to play with his brothers' toys, and had more in common with male friends. (*Id.*; *see also* L.F.B. Decl. ¶ 10 ("He never wanted to wear a dress. He never wanted to wear a shirt with anything 'frilly' on it…. 'Barbies' that he received as gifts just gathered dust in the corner. He always had more fun playing with boys than girls."); L.A.B. Decl. ¶ 8.)

In about the Spring of M's sixth grade year, he became sad and depressed, frequently staying home from school feeling sick to his stomach. (L.A.B. Decl. ¶ 9; L.F.B. Decl. ¶ 8.) According to M, he "felt as if I was lying to people when I presented myself as a girl rather than a boy, and it would sometimes get to the point where I would feel sick to my stomach to think about living my life as a girl." (M Decl. ¶ 11.) M's parents began taking him to a therapist regarding these feelings, and he was clinically diagnosed with gender dysphoria (the diagnostic term referring to the clinically significant psychological and emotional distress caused by a marked incongruence between one's gender assigned at birth and one's true gender identity) in the Summer or Fall of 2014. (*Id.* ¶ 12; L.A.B. Decl. ¶ 10; L.F.B. Decl. ¶ 9.)

In consultation with personnel at the School, M and his parents developed a plan for his social transition to the male gender at school, and M "came out" as male in February 2015 (on his birthday) and began going by his chosen name (a boy's name) and male pronouns (he, him, his). (M Decl. ¶ 15; L.A.B. Decl. ¶¶ 12-14.) This process of transition, which is part of the recognized treatment for gender dysphoria, *see* Eastin Decl. ¶¶ 17-22, had a profoundly positive effect on M: "The confident, happy kid [his parents] had always known was coming back." (L.F.B. Decl. ¶ 14.) M started hormone therapy (testosterone) in February 2016, and in April of 2017 he had "top surgery" (a mastectomy). (Ex. 1 at ¶ D.) He is also working on changing the gender marker on his New Jersey birth certificate to male. (*See id.* at ¶ E.) Other students have been generally accepting and supportive of M's gender transition. (M Decl. ¶ 15; Ex. 1 at ¶ E; J.F. Decl. at ¶ 14 ("All of the students I know are cool with the fact that [M] is a boy."; B.F. Decl. at ¶ 16 ("I do not know of any student at the school who is uncomfortable with [M] being transgender, or with [M] being able to use the boys' restrooms or locker room.") Indeed, he has been using the boys' restroom for over a year and it is "not a big deal." (Ex. 1 at ¶ E.)

Though taking certain steps in response to M's gender transition (*e.g.*, a staff training and using appropriate pronouns and M's chosen name), defendants have nevertheless barred M from the School's locker rooms, and for over a year during the initial period of M's transition, from the School's restrooms. (Compl. ¶¶30-31.) This is even though the boys' locker room is equipped with "stalls that are partitioned, or are capable of being partitioned, such that any student who wishes to disrobe in greater privacy from other students could do so. In addition, the toilet facilities within the boys' locker room are partitioned into private stalls that each have a stall door." (Compl ¶ 48 *with* ECF 20-2, Defendants Opposition to Motion for Preliminary Injunction (Aug. 3, 2016) [hereinafter "Defendants' Opp."] at Affidavit of Kelly L. Griffth, Ed.D. ¶ 5 (admitting that boys' locker room have two toileting facilities each enclosed "in a stall with doors")).

Instead, defendants "designated three single-occupancy restrooms in the School as 'gender neutral,'" for M's use. (Compl ¶ 32.) All three of the single-occupancy restrooms are far away from the School's gymnasium and its associated locker rooms. They are also far away from several other areas in the School that have easy access to communal male restrooms. (Compl. ¶ 35.) Additionally, none of the single-occupancy restrooms have benches, lockers, showers, or other equipment common to a locker room. (Compl. ¶ 36.) Unlike any other boy in the School whose gender identity is male, M must use these rooms to change clothes for "physical education class and other athletic activities and, until recently, for toilet usage." (Compl. ¶ 32.) Indeed, no student who is not transgender has been required to use the single-occupancy restrooms or been prohibited from accessing the communal locker rooms or restrooms associated with their gender. (Comp. ¶ 37.)

Using the designated restrooms is stigmatizing and humiliating for M: he has received

"weird looks" from other students when using the single-occupancy restrooms, and so he has tried to use them as infrequently and inconspicuously as possible. M also has had to leave the gym to change for physical education class or extracurricular athletic activities because he is not permitted to access the communal boys' locker room—in order to change, he has to visit both his student locker (located outside the gym, inside the school building proper) and one of the single-occupancy restrooms, which are not near each other. (Compl. ¶ 40; M. Decl. ¶¶23-29.)

Given the length he has had to travel to simply change clothes for gym, at times M has been forced to explain his tardiness to substitute gym teachers by disclosing the fact that he is transgender. (Compl. ¶ 41; M. Decl. ¶¶23-29.) Because of the stigma and impracticality of changing for physical education class in the single-occupancy restrooms, on days when M did not anticipate that the physical education class would cause him to sweat profusely, he would sometimes attend physical education class without changing his clothes. On some of these occasions, M had points deducted from his physical education grade for failure to change clothes for class. (Compl. ¶ 42; M. Decl. ¶¶23-29.)

M was only granted access to the School's restrooms in April 2016, after the Fourth Circuit issued its decision in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016) [hereinafter "the *G.G.* case" or "*G.G.*"]. (Compl. ¶ 46.) The defendants continue to bar him from the School's male locker rooms. (Ex. 1 at ¶ F, I.) Using the single-occupancy restrooms is "stigmatizing" and a source of "stress and frustration" for M. (Ex. 1 at ¶ F, I.) M describes his experience playing JV soccer as the only person on the team not allowed in the locker room:

> I played Junior Varsity soccer in the fall of 2016. Although the school combined the boys and girls soccer teams, no girls tried out for the team. Even though I am a boy, I was not allowed to use the boys' locker room. Instead, I had to change into my uniform in the three single-occupancy

> restrooms at the school described in paragraphs 16 and 20 of my Declaration. **This was very stigmatizing for me because I didn't get to participate in the same team bonding experiences (joking around and conversation) that the other boys did while changing in the locker room.**

(Ex. 1 at ¶ F.) (emphasis added.)[2]

For M, like other transgender boys, denying him admission to locker rooms, restrooms, and other facilities that "divide people according to binary gender categories" communicates that he "is 'not male' but 'female' or some undifferentiated 'other,' interferes with [his] ability to consolidate identity, and undermines the social-transition process" that is part of the treatment for gender dysphoria. Eastin Decl. ¶ 23. Effectively, "every time that transgender male is turned away from the boys' locker rooms and instructed to use the girls' locker rooms, he is being told that he will never fully be perceived as male and that he can never expect to fully transition his gender." *Id.* ¶ 24. "If a transgender male is being called a male name, dressing and behaving as a male and participating in male social activities but is not allowed to use the male locker rooms, a full social transition is impossible and the gender consolidation process is interrupted." *Id.* The "sports activity that was once a source of enjoyment, health and stress release can become a source of anxiety and distress," which "may also spill over into other daily activities such as school work, learning and friendships." *Id.* ¶ 25. This continuing mental health stress of gender dysphoria has consequences for transgender teens during adolescence and even into adulthood. Transgender young people are at sharply elevated risk of depression compared to non-transgender peers (50.6% vs. 20.6%, according to a recent study),

[2] For this, and other reasons detailed in M's Supplemental Declaration, he explains, "Although I really like soccer and I like my teammates, I do not think I am going to continue playing soccer for St. Michaels Middle High School. I did not have the best experience last fall, and there are other fall activities that are interesting to me." (Ex. 1 at ¶ H.)

anxiety (26.7% vs. 10%), non-lethal self-harming behaviors (16.7% vs. 4.4%), and attempts at suicide (17.2% vs. 6.1%). *Id.* ¶ 28. For gender non-conforming adults in later life, "greater stress and victimization in elementary, middle, and high school education was associated with a greater risk for depression, post-traumatic stress disorder, lower overall life satisfaction, anxiety, and suicidality in adulthood." *Id.*

III. LEGAL STANDARD

Rule 65(a) of the Federal Rules of Civil Procedure authorizes the issuance of preliminary injunctive relief. "In order to receive a preliminary injunction, a plaintiff 'must establish 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.'" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). "'[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits,'" *G.G*, 822 F.3d at 725 (*quoting Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)), and at the preliminary injunction stage a court may "tak[e] as true the 'well-pleaded allegations of [a plaintiff's] complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction.'" *G.G.*, 822 F.3d at 725 (quoting *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976)). The court "'may rely on otherwise inadmissible evidence, including hearsay evidence.'" *G.G.*, 822 F.3d at 725 (quoting *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993)). "While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (quoting

Pashby v. Delia, 709 F.3d 307, 321 (4th Cir. 2013)).

IV. M HAS ESTABLISHED THE CONDITIONS NECESSARY FOR THIS COURT TO ISSUE A PRELIMINARY INJUNCTION.

A. M Will Suffer Irreparable Harm in the Absence of Preliminary Injunctive Relief.

Each day—each soccer game or practice, each session of physical education class—that M is barred from accessing the boys' locker room is a day of his high school experience that he can never get back. There is a presumption of irreparable harm when a plaintiff's constitutional rights or civil rights have been violated. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (constitutional rights are "intangible and unquantifiable interests" that "cannot be compensated by damages"); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) ("where a defendant has violated a civil rights statute," "irreparable injury [may be presumed] from the fact of the defendant's violation"); *Rogers v. Windmill Pointe Village Club Ass'n*, 967 F.2d 525, 528 (11th Cir. 1992) (irreparable harm "may be presumed from the fact of discrimination"). Similarly, violation of rights under Title IX constitutes irreparable harm that cannot adequately be compensated by monetary damages. *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d. 771, 777 (S.D.W.V. 2012) (so holding; citing *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 301-02 n.25 (2d Cir. 2004); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993)).

And, although the denial of M's statutory right against discrimination—the separate and unequal treatment to which M is being subjected, in the form of being required to use different facilities that are materially inferior, being "outed" as transgender, and being deprived of the camaraderie and team bonding that often occurs in locker rooms settings—constitutes irreparable harm in itself, the potential harm is more insidious here because of the potential impact on M's gender dysphoria:

> **Access to the locker rooms available to other boys is a necessity for transgender boys and adolescent males**. Locker rooms, like restrooms, divide people according to binary gender categories: male and female. **To deny a transgender boy admission to such a facility, or to insist that one use a separate space or the girls' locker room , communicates that such a person is "not male" but "female" or some undifferentiated "other," interferes with the person's ability to consolidate identity, and undermines the social-transition process.**
>
> . . . **More specifically, every time that transgender male is turned away from the boys' locker rooms and instructed to use the girls' locker rooms, he is being told that he will never fully be perceived as male and that he can never expect to fully transition his gender.**
>
> . . . At the time in their lives when "fitting in" is the most important thing to their sense of self, self-esteem and confidence, they struggle and may feel like outsiders.
>
> **If school administrators and teachers amplify this "outsider" status by refusing to allow open access to activities and facilities that match the student's gender identity such as gym locker rooms, transgender teens experience feelings of shame, embarrassment and low self-worth that can contribute to an elevated risk of being diagnosed with depression and anxiety as well as higher incidents of academic difficulties, school refusal and dropping out of school.**
>
> Indeed, research shows that transgender youth are at much greater risk for severe health consequences including depression, anxiety, suicidal thoughts and attempts, and self-harm than their non-transgender peers. . . .

(Eastin Decl. ¶¶ 23-29.) (emphasis added).

M details his sense of stigma and frustration. Not being able to access the boys' locker rooms during soccer season last season was "stigmatizing." (Ex. 1 at ¶ F.) Using the single occupancy restrooms makes him "made him feel different" and "outed." (M. Decl. ¶¶ 23-29; L.F.B. Decl. ¶ 22-23, L.A.B. ¶ 25) It is a "source of stress and frustration in [his] life." (M Decl. ¶ 29.) As in *G.G.*, "as a result of the Board's … policy, [M] experiences daily psychological harm that puts him at risk for long-term psychological harm," and he "has thus demonstrated that he will suffer irreparable harm in the absence of an injunction." *G.G.*, 822

F.3d at 728 (Davis, J., concurring).

B. M is Likely to Succeed on his Title IX and Equal Protection Claims.

1. M is Likely to Succeed on his Title IX Claim because Denying a Transgender Boy Access to the Locker Rooms that Conform to his Gender Identity is Discrimination Based on Sex Barred by Title IX.

Title IX "proscribes gender discrimination in education programs or activities receiving federal financial assistance." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 514 (1982). The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C.§ 1681(a). Although the statutory text of Title IX does not contain a expressly-stated private right of action, it is settled law that a private right of action is implied in the statute. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979) ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."). A "private right of action under Title IX provides a full spectrum of remedies to a successful plaintiff," including preliminary injunctive relief. *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 831 (4th Cir. 1994) (citing *Franklin v. Gwinnett Co. Pub. Schs.*, 503 U.S. 60, 72-73 (1992).

As discussed below, M is likely to prevail under Title IX because he has established that the defendants treat him differently from other boys on the basis of sex, including his gender identity, nonconformity to male stereotypes (*i.e.*, that he was not assigned male at birth and may have certain physical features different from other boys), and transgender status. Additionally, the defendants' differential treatment has resulted in ongoing educational, emotional, and physical harms to M, which have denied and continue to deny him the full benefits of the

education program and activities offered by the School to its students.

i. Discrimination based on a Person's Transgender Status is "discrimination on the basis of sex" Prohibited by Title IX.

It is by now well-established that the phrase "based on sex," as articulated in the federal civil rights laws, prohibits a broad range of discriminatory practices based both on sex and gender. "[B]ased on sex" does not, as older cases suggested, include only "discriminat[ion] against women because they are women and against men because they are men." *Ulane v. Eastern Airlines, Inc*., 742 F.2d 1081, 1085 (7th Cir. 1984) *overruled by Hively v. Ivy Tech Cmty. College of Ind.,* 853 F.3d 339 (7th Cir. 2017) (holding that discrimination based on "sex" in Title VII actions encompassed discrimination based on sexual orientation).

For instance, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Supreme Court held that the plaintiff, a woman denied a promotion because her colleagues perceived her to be too masculine, stated a claim under Title VII because that denial was based on gender stereotyping. *Id.* at 250-251 (plurality opinion). Writing for the plurality, Justice Brennan explained "assuming or insisting that [individual men and women] match[ ] the stereotype associated with their group" is discrimination because of sex. *Id.* at 251. And in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that male-on-male sexual harassment was a cognizable claim under Title VII. 523 U.S. 75, 79 (1998), although it was certainly not "the principal evil Congress was concerned with when it enacted Title VII."

In line with the Supreme Court cases above, "the First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." *G.G. v. Gloucester Cty. Sch. Bd.*, 654 Fed. Appx. 606, 607 (4th Cir. 2016) (Davis, J., concurring) (citing *Glenn v. Brumby*, 663 F.3d 1312,

1316-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir.2004); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 22 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000)).

A person's transgender status is an inherently sex-based characteristic. M is being treated differently because he is a boy who was identified as female at birth. The incongruence between his gender identity and his sex identified at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination "on the basis of sex." *See, e.g., Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("[D]iscrimination … on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination 'because of sex.'"); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305-06, 308 (D.D.C. 2008) (holding an employer's refusal to hire transgender employee upon learning that "she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of . . . sex'").

Additionally, discrimination against transgender people is sex discrimination because it impermissibly rests on sex stereotypes and gender-based assumptions. For instance, in the District of Maryland, we have already recognized in the context of Title VII that, "any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is … discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle v. Howard County*, 12 F. Supp. 3d 780, 788 (D. Md. 2014). As the Eleventh Circuit observed in *Glenn v. Brumby*, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . *There is*

thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." 663 F.3d at 1316. (emphasis added).

The overwhelming majority of district courts to consider the question have found that transgender individuals are protected from discrimination "on the basis of sex" under federal sex discrimination laws on one or both of these understandings of "sex." *See, e.g., Evancho.*, --- F.Supp.3d ----, 2017 WL 770619 at *19 (collecting Title IX and Title VII cases) (concluding "[i]n light of the most recent, broader readings of the term 'sex' . . . the Plaintiffs have demonstrated a reasonable likelihood of showing that Title IX's prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity.").[3] And courts across the country have recognized that excluding transgender boys and girls from sex segregated facilities that comport with their gender identity such as restrooms subjects them to discrimination on the basis of sex and have thus granted injunctive relief permitting these children to access the restrooms in line with their gender identity. [4] *See*

[3] The *Evancho* court, though granting plaintiffs' motion for a preliminary injunction on Equal Protection grounds, nevertheless denied the portion of the motion requesting that an injunction issue under Title IX. The court noted that the Department of Education ("DOE") had recently issued a Dear Colleague Letter rescinding the guidance at issue in *G.G.* (the "2017 Dear Colleague Letter") and that at that time, the case was still pending before the Supreme Court, who would presumably rule on the issue. The court explained that due to the momentary "uncertainty" on the issues, that it was "not in a position to conclude which party in this case has the likelihood of success on the merits of that statutory claim." 2017 WL 770619 at * 22. As discussed *infra*, the Supreme Court has now remanded the *G.G.* case back to the Fourth Circuit. The latest proclamation from the panel there contained a concurrence by Judges Floyd and Davis strongly in support of Gavin Grimm's right to equal treatment under Title IX. *G.G. v. Gloucester Cnty Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J. and Floyd, J. Concurring).

[4] *Evancho*, *Highland*, and *Whitaker* all involved restroom access. However, the simple request for locker room access "does not mean that . . . that those additional facility uses would or would not lead to a different result[.]" *Evancho*, 2017 WL 770619, *14 n.34. And indeed, the law as discussed herein and facts here compel the result that M is entitled to be treated like every other

Evancho, 2017 WL 770619 at *19 (equal protection); *Highland*, 208 F. Supp. 3d at 865-77 (Title IX and equal protection), *Whitaker v. Unified Sch. Dist. 1*, No. 16–CV–943–PP, 2016 WL 5239829, at *1 (E.D. Wisc. Sept. 22, 2016) (same); *But see Carcaño v. McCrory*, 203 F.Supp.3d 615 (M.D.N.C.) (denying plaintiffs' request for preliminary injunction on equal protection grounds).[5]

In other words, discrimination based on "sex," "sex stereotyping," "gender transition/change of sex," and "gender identity" are "simply different ways of stating the same claim of discrimination 'based on . . . sex.'" *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (discrimination against transgender person is discrimination based on sex under Title VII). Nor is this reality unusual or limited to sex-based discrimination. By way of comparison, Supreme Court has recognized that race-based discrimination is not limited to discrimination based skin color, but also includes discrimination

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student at his School and should be granted access to the boys' locker rooms. The boys' locker rooms has privacy features. None of M's fellow students has expressed any objection to his use of the boys' restrooms or locker rooms; to the contrary, they have supported and congratulated him in obtaining access to the boys' restrooms in the wake of *G.G. See* M Decl. ¶ 33. No improper or unusual incidents have occurred as a result of M's restroom usage. *Id.* ¶ 22. Indeed, it is "not a big deal." Ex. 1 at ¶ E. Students generally do not fully strip and change their underwear in the locker room. *Id.* ¶ 33. Even the defendants admit that showering in the nude is extremely rare: they can only tell of one student who did so over two years ago. (ECF 20-5, Affidavit of Brian Femi at ¶ 4.) Moreover, even if some students do not wish to change clothes in the locker room in close proximity to M, the extent to which they have to be so, or for it to be possible for M inadvertently to observe them, is entirely within their control. They can avail themselves of the privacy features of the locker room or, at worst, they may use the single-occupancy restrooms if they prefer.

[5] *Carcaño* involved a blanket challenge to North Carolina House Bill 1, which barred transgender people from "bathrooms, showers, and other similar facilities" across the state. By contrast, the record here is limited to one locker room with existing privacy features and whose showers can easily be curtained. Additionally, that case involved an actual policy, not the ad hoc justification here. Moreover, for the reasons stated herein, M respectfully submits that the privacy concerns articulated by the *Carcaño* court are overstated and in any event, not applicable here.

on the basis of racial affiliation and association, such as interracial friendships or intermarriage. *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 605 (1973).

Here, consistent with the weight of these decisions, M has a clear claim of discrimination "on the basis of sex." To the defendants, M cannot be treated like other boys because he was designated "female" at birth. They have thus barred him from the School's locker rooms and instead relegated him to inadequate single-stall changing rooms because he does not conform to their traditional notions of what a boy should be: one who was assigned the "male" at birth and who has certain physical characteristics, including male genitals and secondary sex characteristics. The defendants' narrow conception of boyhood does not allow for the proposition that, despite these differences, as a boy recognized by his family, doctors, friends, and others, M is entitled under Title IX to be treated fully as male at school. Whether conceptualized as based on sex stereotyping, gender nonconformity, gender identity, or transgender status, the defendants' conduct comfortably fits within the plain language of Title IX: M has been discriminated against "on the basis of sex."

ii. Reading Title IX's Regulations in a Manner Consistent with Title IX Requires that M be Granted Access to the Boys Locker Rooms.

The statutory text of Title IX does not contain any express exception allowing schools to provide such facilities on a gender-segregated basis, but the DOE's Title IX regulations have long provided that a school may provide "separate toilet, locker room, and shower facilities on the basis of sex," so long as "such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R.§ 106.33(the "Regulation"). The Regulation does not state how a school is to apply it in the case of a transgender student, and courts across the country have held that transgender students are entitled to such facilities. In *G.G.* the Fourth Circuit concluded that the Regulation was "susceptible to more than one

plausible reading" with respect to "how a school should determine 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 Court concluded that DOE's January 7, 2015 opinion letter resolved that ambiguity in a reasonable manner and was entitled to deference under *Auer*. *Id.*

A few weeks before the Supreme Court was scheduled to hold oral argument in *G.G.*, DOE, its 2017 Dear Colleague Letter, withdrew the January 7, 2015 opinion letter. The 2017 Dear Colleague Letter contrasts the *G.G.* decision deferring to the Department's guidance with a district court's refusal to defer to that guidance in *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). In light of the conflicting rulings, the letter states that the Department intends "to further and more completely consider the legal issues involved." Dear Colleague Ltr. at 2.12. Although DOE has abstained from providing any interpretation of the Regulation, it has not withdrawn its other guidance documents stating that transgender students are protected under Title IX and must generally be treated in a manner consistent with their gender identity.[6] Now that the January 7, 2015 opinion letter has been withdrawn, the Regulation should be interpreted de novo and without deference.[7]

[6] DOE has advised that transgender students are protected from sex discrimination under Title IX in a variety of contexts since 2010. *See, e.g.*, OCR, Questions & Answers on Title IX & Single-Sex Elementary & Secondary Classes & Extracurricular Activities (Dec. 1, 2014), ("Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes."); OCR, Questions & Answers on Title IX & Sexual Violence (Apr. 29, 2014) ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity."); Dep't of Educ., Dear Colleague Letter: Harassment & Bullying, Oct. 26, 2010, at 8, ("Title IX . . . protect[s] all students, including . . . transgender . . . students, from sex discrimination").

[7] According to news reports, the Secretary of the Department of Education initially refused to withdraw the January 7, 2015 letter "because of the potential harm that rescinding the protections could cause transgender students." Jeremy M. Peters, et al., Trump Rescinds Rules on Bathrooms for Transgender Students, N.Y. Times (Feb. 22, 2017), https://goo.gl/k9Zwq0. The Attorney

Properly construed within the context of the overall statutory scheme, the Regulation does not authorize schools to discriminate against boys and girls who are transgender by excluding them from the restrooms and locker rooms that other boys and girls use. *Cf. United States v. Marte*, 356 F.3d 1336, 1341 (11th Cir. 2004) ("When a regulation implements a statute, the regulation must be construed in light of the statute" it implements). The only way to provide sex-separated restrooms and locker rooms in a manner consistent with the underlying statute is to allow boys and girls who are transgender to use those same facilities that other boys and girls use.

The main provision of the statutory text, 20 U.S.C. § 1681(a), broadly prohibits all discrimination. Section 1681(a) then contains a series of subsections enumerating narrow contexts in which that prohibition on discrimination "shall not apply." Restrooms and locker rooms are not enumerated in any of those exceptions. And, unlike those statutory exceptions, the Regulation does not state that the statute's ban on sex-based discrimination "shall not apply" to restrooms and locker rooms. Indeed, the agency would lack authority to create such an exemption because a regulation cannot authorize what the statute it implements prohibits. *See Time Warner Entm't Co. v. Everest Midwest Licensee*, LLC, 381 F.3d 1039, 1050 (10th Cir. 2004) ("[A] regulation must be interpreted in such a way as to not conflict with the objective of

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General, however, wanted to rescind the documents out of concern that the Department's interpretation would be upheld as reasonable by the Supreme Court. *Id.* Ultimately, the Attorney General appealed to the President who told the Secretary that she should either rescind the guidance documents or resign. *Id.* Thus, even if DOE ultimately issues new guidance, the Court will have to interpret the regulation without deference because agencies do not receive *Auer* deference when they flip-flop from one position to another. *See Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2166 (2012). Additionally, the circumstances surrounding the Department's withdrawal of the previous guidance give "reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* (internal quotation marks omitted); *see also Evancho*, 2017 WL 770619 at *20.

its organic statute.")

When read in light of its place within the overall statutory scheme, the Regulation permits differential treatment on the basis of sex, but only so long as the differential treatment does not subject anyone to unequal discrimination in violation of the statute. As the Fourth Circuit noted in *G.G*, "the plain meaning of the regulatory language is" that "the mere act of providing separate restroom facilities for males and females does not violate Title IX." 822 F.3d at 720. The regulation is thus based on the premise that providing separate restrooms and locker rooms for boys and girls reflects a social practice that does not disadvantage or stigmatize any student. *Cf. U.S. v. Virginia*, 518 U.S. 515, 533 (1996) [hereinafter "*VMI*"] ("Physical differences between men and women" may not be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity."). That premise is reinforced by the Regulation's caveat that when schools establish sex-separated restrooms and locker rooms, they must provide access to "comparable" restrooms for all students. 34 C.F.R. § 106.33.

Moreover, allowing boys and girls who are transgender to use the same restrooms and locker rooms as other boys and girls is entirely consistent with the ordinary definition of "sex," both at the time the Regulation was enacted and today. (*See* Pl. Opp. Motion to Dismiss at pp. 12-13, incorporated by reference herein.) But even if sex were defined solely based on physiology or anatomy, that still would not mean that transgender students should be assigned to restrooms or locker rooms based on the sex designated for them at birth. Many transgender individuals have physiological and anatomical characteristics typically associated with their identity, not the sex identified for them at birth. *See* Wylie C. Hembree, et al., Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline, 94(9) J. Clinical Endocrinology & Metabolism 3132-54 (Sept. 2009) ("Endocrine Society Guidelines"),

https://goo.gl/lOroQj.

The reality is that—even without genital surgery—the bodies of many transgender boys (including M) look very different from the bodies of girls, and the bodies of many transgender girls look very different from the bodies of boys. *See id.* This is certainly true for M, who has undergone a mastectomy and hormone therapy. In any event, the "dispositive realit[y]" is that M is recognized by his family, his medical providers, his classmates, and the world at large as a boy. Allowing him to use the same locker rooms as other boys is the only way to provide access to sex-separated locker rooms without discrimination. It is, therefore, the only way to do so that is consistent with the underlying requirements of Title IX.

2. Denying Transgender Students Access to the Locker Rooms in Conformity with the Gender Identity Constitutes Impermissible Sex Discrimination under the Equal Protection Provisions of the Fourteenth Amendment of the U.S. Constitution.

M is the only student in the School who has been barred from the restrooms and continues to be denied access to the locker rooms that correspond to his gender identity. By barring M from the boys' locker room and denying him access to the boys' bathroom for over a year, defendants have repeatedly and intentionally signaled M for discriminatory treatment because of his sex (including his gender identity and gender nonconformity) and his transgender status. Whether defendants' treatment of M is viewed as based on M's gender, on transgender status, or both, it is subject to heightened scrutiny. Regardless of the level of scrutiny applied, however, defendants have no legitimate justification for their conduct, much less a persuasive one.

i. *Discrimination Against Transgender People is Cognizable Sex Discrimination Under Equal Protection*.

The Fourteenth Amendment's Equal Protection guarantee provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend.

XIV, § 1. Since the Supreme Court established that sex stereotyping is a form of sex discrimination in *Price Waterhouse*, courts have repeatedly recognized that transgender people, like everyone else, are protected against discrimination that is based on the perception they do not conform to such stereotypes. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir 2011) ("heightened scrutiny required" under equal protection for discrimination against transgender employee); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (equal protection applied to transgender employee); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) ("the Court concludes that discrimination based on transgender status independently qualifies as a suspect classification under the Equal Protection Clause because transgender persons meet the indicia of a "suspect" or "quasi-suspect classification" identified by the Supreme Court"); *cf. Finkle v. Howard County*, 12 F .Supp. 3d 780 (D. Md. 2014) (holding under *Price Waterhouse* and its progeny, including *Glenn* and *Smith*, that transgender plaintiff asserted cognizable sex discrimination claim under Title VII.)

In *Evancho*, the District Court for the Western District of Pennsylvania aptly explained why differential treatment of transgender students like M is a sex-based classification warranting heightened scrutiny:

> Moreover, as to these Plaintiffs, **gender identity is entirely akin to "sex" as that term has been customarily used in the Equal Protection analysis. It is deeply ingrained and inherent in their very beings**. **Like "sex," as to these Plaintiffs, gender identity is neither transitory nor temporary.** Further, what buttresses that conclusion is the fact that the school community as a whole treats these Plaintiffs in all other regards consistently with their stated gender identities, along with the reality that these Plaintiffs live all facets of their lives in a fashion consistent with their stated and experienced gender identities.

2017 WL 770619 at *13 (emphasis added).

Moreover, although this Court can simply apply the heightened scrutiny that is warranted

for any sex-based classification, it also may apply heightened scrutiny because discrimination against transgender people as a quasi-suspect class warrants heightened scrutiny in its own right. The Supreme Court considers whether the class has: (1) historically been "subject to discrimination," (2) "has a defining characteristic that frequently bears no relation to ability to perform or contribute to society," (3) "exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group" and (4) is a minority or politically powerless to determine whether a new classification requires heightened scrutiny *Highland,* 208 F.Supp.3d at 873 (internal quotations and citations omitted).

While the Fourth Circuit has not reached this question, it has certainly recognized transgender people as "a vulnerable group that has traditionally been *unrecognized, unrepresented, and unprotected*." *G.G. v. Gloucester Cnty Sch. Bd.*, 853 F.3d at 730 (emphasis added). Moreover, several federal courts have recently recognized that discrimination against transgender people fits these prerequisites for heightened scrutiny. *See, e.g., Evancho,* 2017 WL 770619 at * 13-14; *Highland,* 208 F.Supp.3d at 874; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 138-40 (S.D.N.Y. 2015).

ii. Discriminating Against Transgender Students to Address the Hypothetical Privacy Concerns of Other Students is not Substantially Related to an Important Government Interest.

As a sex-based classification, the defendants' ban on M's use of boys' locker rooms is subject to intermediate scrutiny. "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia,* 518 U.S. 515, 531 (1996) ("*VMI*"). To satisfy this "demanding" standard, defendants bear the burden to "show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those

objectives." *VMI*, 518 U.S. at 524 (internal quotation marks omitted). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* at 533.

Defendants' justification for their disparate treatment of M's has rested on what they have termed the "privacy rights of all students at the school," or their "sexual privacy," which they couch as a "constitutional right," the roots of which, they have not bothered to define. (*See* ECF 20 at 32; ECF 36-1 at *21-2, 26.) Citing to the dissent in *G.G.* as well as a series of cases involving compulsory strip searches and involuntary videotaping, they have also noted that the students "whose ages typically run from 11 years old in 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." (ECF 20 at * 23,31; ECF 36-1 at * 23.)

As an initial matter, defendants have offered no factual basis for their privacy claims, and nor could they. Defendants' theory of "sexual privacy" is just that—a legal theory put forth in response to one student's request to be treated as any other student.[8] (Compl. ¶ 43.) Accordingly, it is entitled to no deference. *VMI*, 528 U.S. at 518.

Additionally, Defendants cannot merely use the word "privacy" and then automatically invoke the protections of constitution. *See, e.g., Moran v. Beyer*, 734 F.2d 1245, 1246 (7th Cir. 1984) (explaining that "not every choice made in the context of marriage implicates the privacy and family interests . . . that the decision itself accedes to the status of a fundamental right"); *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (explaining that lower courts should not expand privacy rights that have not been clearly recognized by the Supreme Court). Still further, constitutional privacy rights, whether based in the Fourth Amendment or the Fourteenth

[8] Indeed, although defendants repeatedly claim that they grant access to sex segregated facilities by the sex assigned at birth, they offer no standardized criteria for how exactly the determine what "sex assigned at birth" is.

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 here, 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.

M's use of the boys' locker room will not present the specter of "constitutional abuses" of students being forced to disrobe while being viewed against their will by a person with different anatomy, *G.G.*, 822 F.3d at 723 n.10 (majority op.). The School's boys' locker room is equipped with "stalls that are partitioned, or are capable of being partitioned, such that any student who wishes to disrobe in greater privacy from other students could do so. In addition, the toilet facilities within the boys' locker room are partitioned into private stalls that each have a stall door." (Compl. ¶ 48; ECF 20 at .) Moreover, as defendants admit, the unisex changing rooms that they require M to use are open to any student in the school should they choose a greater degree of privacy. (ECF 36-1 at * 20.)

There is no evidence that M's fellow students are discomfited by his potential use of the locker room. None of M's fellow students has expressed any objection to his use of the boys' restrooms or locker rooms; to the contrary, they have supported and congratulated him in obtaining access to the boys' restrooms in the wake of *G.G. See* M Decl. ¶ 33. No improper or unusual incidents have occurred as a result of M's restroom usage. *Id.* ¶ 22. Students generally do not fully strip and change their underwear or shower in the locker room. *Id.* ¶ 33. Even the defendants admit that showering in the nude is extremely rare: they can only tell of one student who did so over two years ago. (ECF 20-5, Affidavit of Brian Femi at ¶ 4.) Moreover, even if

some students do not wish to change clothes in the locker room in close proximity to M, the extent to which they have to be so, or for it to be possible for M inadvertently to observe them, is entirely within their control. They can avail themselves of the privacy features of the locker room or, at worst, they may use the single-occupancy restrooms if they prefer. As Judge Davis observed in *G.G.*: "For other students, using the single- stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students."*G.G.*, 822 F.3d at 729 (Davis, J., concurring); *Cf. Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (employee who did not want to use same restroom as a transgender employee was free to use unisex restroom instead); *Lusardi*, 2015 WL 1607756, at *9 ("Some co-workers may be confused or uncertain about what it means to be transgender, and/or embarrassed or even afraid to share a restroom with a transgender co-worker. But supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment.").

This case is thus a far cry from the cases involving surreptitious video surveillance or strip searches in a police or correctional context, cited by the defendants and *G.G.* dissent, and this case does not present those concerns anymore that *G.G.* did. As the *G.G.* majority observed, the amorphous possibility of "'sexual responses prompted by students' exposure to the private body parts of students of the other biological sex,'" 822 F.3d at 723 n.11 (quoting dissent), is not a cognizable danger sufficient to bar M from accessing the locker room.

None of defendants' authority could be reasonably construed as a basis for "sexual privacy," here. Rather, what the defendants really assert an alleged right to change in a locker room from which transgender male students are excluded. But, "[n]o 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." *Students v. United States Department of Education*, slip op., No. 16-cv-4945 2016 WL 6134121 at * 24 (N.D. Ill. Oct. 18, 2016).[9] As the Northern District for Illinois explained in holding that "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[:]"

> **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.
>
> Further, people who interact with [transgender students] largely treat them consistent with their gender identity. In fact, many people who interact with [them] on a daily basis may have no idea, and may not care, what sex they were assigned at birth.

Id. at * 25, 27 (noting that transgender people enjoyed full integration to facilities in line with their gender identity in the military, college sports, and federal agencies).

Still further, speculations about inevitable exposure to nudity in locker rooms do not reflect the actual experience of students in many school districts. *See* Brief of Amicus Curiae of School Administrators, *Gloucester Sch. Bd. v. G.G.*, 2017 WL 930055 (U.S.) at *13-14 (U.S., 2017) [hereinafter Administrator Amicus]; *Students*, 2016 WL 6134121, at *28 (transgender students and non-transgender students used same locker rooms without ever seeing "intimate part[s]" of one another's bodies). Schools across the country already include transgender

[9] Though *Students v. United States Department of Education* is a slip opinion, its discussion of the issues therein are "so squarely on point as to be incapable of escaping notice." *Stainaker v. Gen. Motors Corp.*, 972 F. Supp. 335, 337 (D. Md. 1996).

students in locker rooms while accommodating the privacy of all students in a non-stigmatizing manner with privacy curtains and private changing areas. *See Students*, 2016 WL 6134121, at *29 (privacy accommodations prevented any risk of "involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth"). Transgender students have their own sense of modesty and often go to great lengths to prevent exposure of any anatomical differences between themselves and other students. *See* Administrator Amicus, 2017 WL 930055 at *13-14. Experience has shown that there are many ways to address privacy concerns in an even-handed manner without segregating transgender students from their peers.

Moreover, while treating M in accordance with his male sex would not harm any other students' alleged privacy interests, failing to do so has serious negative consequences for M's privacy. Compelling him to use girls' locker rooms or the unisex bathrooms will necessarily raise scrutiny and questions from other students about why he is the only boy to do so. Each of those actions potentially "outs" M as transgender to students and teachers who do not otherwise know or need to know. (Compl. ¶ 41.)

The Supreme Court has long recognized that the federal constitutional right to privacy protects an individual's right to control the release of information of a highly personal nature. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). This right to informational privacy restricts a government agency's ability to disclose information about an individual's sexual orientation or gender identity. *See, e.g.*, *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity.").

Because transgender people face such high rates of discrimination, harassment, and violence, courts have been particularly conscious of the danger of revealing a person's

transgender status to others without the person's explicit and voluntary consent. For example, the Second Circuit held that the nonconsensual disclosure to others of a prisoner's transgender status violated the prisoner's constitutional right to privacy, noting the widespread "hostility and intolerance" transgender people face, as well as the "excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, [which] is really beyond debate." *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999). Another federal court recently considered a state policy that prevented many transgender people from changing the gender marker on their driver's licenses, and thereby "outed" transgender people to others who could conclude that the person was transgender because their "lived sex" was inconsistent with the gender marker on the ID. *Love v. Johnson*, 146 F. Supp. 3d 848, 854 (E.D. Mich. 2015). The court recognized the fact that transgender people face widespread discrimination and violence, and held that "the Policy creates a very real threat to Plaintiffs' personal security and bodily integrity" and thereby implicated "their fundamental right of privacy." *Id.* at 856 (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998)).[10]

For all these reasons, defendants' justification cannot survive heightened scrutiny. There is constitutional right to "sexual privacy," and any limited right to bodily privacy is not implicated here. As discussed *supra*, not only do the locker rooms already have privacy features, but the defendants have other non-discriminatory options for protecting the privacy of all

[10] Indeed, courts have recognized in other contexts that students have the right to share or withhold information about their sexual orientation or gender identity, and it is against the law for school officials to disclose, or compel students to disclose, that information. Even when a student appears to be open about his or her sexual orientation or gender identity at school, it remains the student's right to limit the extent to which the information is further shared. *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005) ("[T]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of information.") (internal quotation marks omitted).

students equally without excluding or endangering transgender students. Thus, even if this court were to recognize defendants' alleged privacy interest as an "exceedingly persuasive justification," the "discriminatory means employed" here are not "substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 524.

iii. ***Even if the Court Applied Rational Basis Review, the Defendants' Actions Would not Survive Scrutiny.***

Even under the most deferential standard of review, defendants must show that its actions "bear[] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). That test is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The Supreme Court has made clear that review must be meaningful when the policy at issue targets a vulnerable group. *See Romer*, 517 U.S. at 634-35 (invalidating law that burdened the "politically unpopular group" of lesbian, gay, and bisexual people); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

Here, defendants' intentional policy of singling out transgender students for differential treatment serves no purpose other than to cater to imagined fears that other students or community members might be uncomfortable sharing spaces with transgender students or otherwise treating transgender students respectfully in accordance with their gender identities. Accommodating other people's potential discomfort with an unpopular group is not a legitimate basis for discriminatory treatment. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (intention to exclude a "politically unpopular group" from receiving benefits "cannot constitute a legitimate governmental interest"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear, unsubstantiated by factors which are properly

cognizable . . . are not permissible bases" for differential treatment of a vulnerable group). Those who harbor irrational fears or discriminatory biases do not get a "heckler's veto" over others' exercise of their basic civil rights. *Cf. Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting discrimination claim by employee who did not want to use same restroom as a transgender employee, noting that she was free to use unisex restroom instead); *G.G.*, 822 F.3d at 723 n.11. Instead of being tailored to address privacy interests related to nudity, the defendants rest on generalized fears and discomfort that are not a legitimate basis for imposing unequal or stigmatizing treatment under any standard of scrutiny. *See Evancho*, 2017 WL 770619, at *16 n.42; *Highland*, 208 F. Supp. 3d at 877. For all these reasons, M is likely to prevail on Count II of his Complaint.

C. The Balance of Equities Favors M

Given M's strong likelihood of success on the merits and the irreparable harm he will suffer if an injunction is not issued, the balance of equities tilts heavily in M's favor. In contrast to the irreparable harm that M faces, defendants will not suffer any harm from issuance of a narrowly tailored preliminary injunction allowing a single student, M, to access appropriate locker room facilities at his School. M will use preexisting locker room facilities, which as the defendants admit, contain privacy features--in the form of two enclosed bathroom stalls--to enable students who wish to change clothing in greater privacy from other students to do so. *See* M Decl. ¶ 31*with* ECF 20-2 at ¶ 5. Should those not be sufficient for students in M's P.E. class, there are, again as the defendants admit, unisex bathrooms available.

Defendants may again raise, as did the defendants in *G.G.*, that the Court should weigh in the balance of equities the alleged discomfort that some other students hypothetically might feel as a result of M's use of the boys' locker room. But, as already discussed, there is no

evidence that M's fellow students are discomfited, and any student who is uncomfortable can use the privacy features of the locker room to ensure that they have adequate privacy. Nor do the defendants' prior allegations of parental complaints and speculation that parents may choose to withdraw their students from the School carry any legal weight. (ECF 20 at * 36.) Rather, the defendants' "obligations to the law take precedence over responding to constituent desires." *Evancho,* 2017 WL 770619 at * 15 (rejecting parental objection as hardship sufficient to continue segregation of transgender students from restrooms). As for the defendants' prior theory that complying with their constitutional and statutory obligations would somehow infringe on the right to parent of the non-transgender students at M's School, (ECF 20 at * 35-36), there is no reason why those parents should prevail over M, his parents, and the parents who support his right to use the boys' locker room. Really, this is just the defendants' way of saying that the constituents with whom the defendants agree should have the day. And as the *Evancho* court pointed out, that is not the way "the application of Constitutional rights is to be determined." *Id.* at 15, n.40. And to the extent the defendants' may again allege "costly changes to school facilities," M points out that the defendants' prior cost estimates (even if accepted as legitimate, since they appear to have been the result of an online search conducted by the Board's division of Plant Operations and Transportation) are overbroad since they encompass schools not at issue in this motion. (ECF 20-3, Affidavit of Kevin Shaffer at ¶ 6.) Still further, the only truly open area of the boys' locker room at the School without a privacy alternative is the shower stalls in the locker room. As the defendants admit, could this could be remedied by hanging a curtain. (ECF 20 at *10.) Given that the defendants'total budget is over fifty million dollars, with over three million dollars of which is designated for Plant

Operations,[11] any cost is *de minimus* at best, and certainly should not trump M's constitutional and statutory rights. *See Beerheide v. Zavaras,* 997 F.Supp. 1405, 1412 (D. Colo. 1998) (rejecting agency's proffered cost concerns as sufficient to bar mandatory injunction requiring it to provide kosher meals to three inmates when record reflected total agency budget was over eight million dollars).

D. Entry of a Preliminary Injunction is in the Public Interest

In civil rights cases, the fourth *Winter* factor ordinarily follows ineluctably from the first three, and that is true in this case. As Judge Davis observed in *G.G.*: "Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." *G.G.*, 822 F.3d at 729 (Davis, J., concurring). So too here.

E. The Court Should Waive Imposition of a Bond or Require Only a Nominal Bond.

Rule 65(c) of the Federal Rules of Civil Procedure provides that a movant for a preliminary injunction ordinarily must "give[ ] 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," as a condition of preliminary injunctive relief. Although a court "is not free to disregard the bond requirement altogether," a court "has discretion to set the bond amount 'in such sum as the court deems proper.'" *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999) (quoting rule). "Where the district court determines that the

[11] *See* Ex 2, Excerpt, Talbot County Public Schools, FY17 Approved Budget (Jun. 1, 2016) *also available at* http://www.tcps.k12.md.us/application/files/6414/7914/4631/Approved_FY17_Budget.pdf

risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice." *Id.* at 421 n.3.

The Court should set the bond amount at zero or only a nominal amount. "Security [under Fed. R. Civ. P. 65(c)] is generally fixed in an amount covering 'the potential incidental and consequential costs' as well as either the losses the wrongly enjoined party will suffer or the amount of the complainant's unjust enrichment during the period of prohibited conduct." *Metro. Reg'l Information Sys., Inc. v. Am. Home Realty Network, Inc.*, 904 F. Supp. 2d 530, 536 (D. Md. 2012) (quoting *Hoechst*, 174 F.3d at 421), *aff'd*, 722 F.3d 591 (4th Cir. 2013). Here, compliance with an injunction allowing Plaintiff to access locker room facilities should not entail any major expenditure of funds or financial loss for defendants, or pecuniary enrichment for Plaintiff.

V. CONCLUSION

For the foregoing reasons, the Court should issue a preliminary injunction in M's favor. A proposed form of injunction is attached for the Court's consideration.

Date: May 22, 2017

Respectfully Submitted,

_____/s/_____

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EXHIBIT ONE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

M.A.B., *a minor*, ***by and through his parents and next friends*,** **L.A.B. and L.F.B.,** *Plaintiff,* v. **BOARD OF EDUCATION OF TALBOT COUNTY, *et al.*,** *Defendants.*	Civil Action No. 16-cv-2622-GLR

SUPPLEMENTAL DECLARATION OF M.A.B.

I, M.A.B., do solemnly declare:

A. I am the Plaintiff in the above-captioned case. Except as otherwise specifically stated, I have first-hand, actual knowledge of the matters stated in this Declaration.

B. I have reviewed the document attached hereto as "Exhibit A." It is a true and correct copy of my Declaration of July 18, 2016 ("my Declaration"), the statements of which I am incorporating by reference herein. Unless stated otherwise, the statements therein remain true and accurate to the best of my knowledge, information, and belief.

C. I am now fifteen-years-old and am about to complete the ninth grade at St. Michaels Middle-High School.

D. As I explained in my Declaration, I am a boy. In about February 2016, I started hormone replacement therapy (testosterone), which I have been on for a little over a year. In April 2017 I had top surgery (a mastectomy). Since I was born in New Jersey, I am now working with my parents to change the gender marker on my birth certificate with the New Jersey Department of Vital Statistics.

E. I have been using the boys' restrooms at St. Michaels Middle-High School since April 2016. Other than the initial congratulations I received, in the time that I've been using the boys' bathrooms, no one has said anything else. I've had no issues with other students or staff when I use the restrooms. It's not a big deal to anyone.

F. I played Junior Varsity Soccer in the fall of 2016. Although the school combined the boys and girls soccer teams, no girls tried out for the team. Even though I am a boy, I was not allowed to use the boys' locker room. Instead, I had to change into my uniform in the three single-occupancy restrooms at the school described in paragraphs 16 and 20 of my Declaration. This was very stigmatizing for me because I didn't get to participate in the same team bonding experiences (joking around and conversation) that the other boys did while changing in the locker room.

G. I also had difficulty getting playtime from the JV soccer coach, Coach Bernase. Coach Bernase was also the coach for the school's seventh grade "A team" (which is like varsity at the middle school level). In the fall of my seventh grade year, before I came out as a boy fully at school, Coach Bernase told me that he was refusing to put me on the A team because soccer was a very rough sport for girls.

H. During JV soccer season in the fall of 2016, Coach Bernase gave me very little playtime. For instance, in the first game of the season, I was only allowed to play for two minutes. Throughout the entire season the most amount of playtime I was ever given was about eight minutes. Nobody else on the team was given such little playtime. When I asked about it, the coach claimed it was because of knee problems in the pre-

season, but since my knee had healed, this felt like more of an excuse to me. Additionally, unless I spoke to him, the coach never spoke directly to me, which was different than the way he treated the other boys on the team. When I spoke to my guidance counselor, Mr. Burkhart, about my experience on the team, he and Mr. Femi, the school's Athletic Director had a meeting with my mom in October 2016. It was my understanding that Mr. Femi was going to speak with Coach Bernase, but nothing really changed. From what I experienced this past fall, and from my interaction with Coach Bernase in the seventh grade, I feel like the fact that I am trans played into why I was treated differently by the coach. I don't want to experience this again. Although I really like soccer and I like my teammates, I do not think I am going to continue playing soccer for St. Michaels Middle High School. I did not have the best experience last fall, and there are other fall activities that are interesting to me.

I. I have not yet received my schedule for tenth grade, so at this point I do not know if I will need to take Physical Education next year. However, I will be required to take Physical Education before I graduate, which will require that I have access to the boys' locker room to change clothes for gym. For the reasons explained in paragraphs 23 through 29 of my Declaration, changing in the three single-occupancy restrooms was an alienating experience. I do not want to experience that source of stress and frustration again.

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

Date: 5/19/17

M.A.B. (sign with initials only) MAB

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.A.B. and L.F.B.,

Plaintiff,

v.

BOARD OF EDUCATION OF TALBOT COUNTY, *et al.*,

Defendants.

Civil Action No. _____

DECLARATION OF M.A.B.

I, M.A.B., do solemnly declare:

1. I am the Plaintiff in the above-captioned case. Except as otherwise specifically stated, I have first-hand, actual knowledge of the matters stated in this Declaration.

2. My initials are M.A.B.

3. I am a boy, and I am fourteen years old.

4. I live in Talbot County, Maryland.

5. I am a student at St. Michaels Middle-High School, which is a public school in Talbot County. I have been a student at St. Michaels Middle-High School since the Seventh Grade. I will be starting the Ninth Grade at the school in the Fall of 2016.

6. I have good grades in school (mostly A's and some B's). My favorite school subjects are math and band.

7. Outside of school, I enjoy playing soccer, video games, watching Youtube videos, and hanging out with my friends.

8. Tryouts for my school's soccer team will begin on August 10, 2016. I intend to

Ex. A

try out for and compete on the soccer team. The soccer team is coeducational.

9. I was raised as a girl. However, for as long as I can remember, I have not felt like a girl. I would always protest wearing feminine clothing, specifically dresses, play with my younger brothers' toys, and always seemed to have better relationships with male friends.

10. By the Sixth Grade, I realized that I am a boy. Since then, I have learned that the term to describe someone like me—whose internal sense of their own gender does not match the gender they were designated at birth—is "transgender."

11. It felt very uncomfortable to know that I am a boy but for everyone to consider me a girl and treat me as a girl. It often felt as if I was lying to people when I presented myself as a girl rather than a boy, and it would sometimes get to the point where I would feel sick to my stomach to think about living my life as a girl. I have since learned that there is a term for this uncomfortable feeling: "gender dysphoria."

12. I began seeing a therapist in the Spring of 2014 regarding these feelings. My therapist clinically diagnosed me with gender dysphoria in the Summer or Fall of 2014.

13. In the Fall of 2014, during my Seventh Grade year, my parents and I told staff at the school about my gender identity and we developed a plan for my social transition at school.

14. Beginning on my birthday that year (in February 2015), I "came out" as male to staff and other students at the school, and began going by my chosen name at school, which matches my identity (my chosen name begins with "M." and is a boy's name, unlike my birth name, which begins with "S." and is a girl's name). Later, in the Fall of 2015, my parents helped me file a petition in court to legally change my name to my chosen name. The name change order was issued in November 2015.

15. People at the school, both teachers and staff as well as other students, have

generally been good about addressing me by my chosen name and using male pronouns (he, him, his) to refer to me. The majority of students have handled my transition well, recognizing and accepting me as male. Of course, there have been some unintentional mistakes of people referring to me by my birth name and female pronouns. There was only one occasion when another student tried to bully me by referring to me by my birth name and pronouns on purpose; school staff addressed this issue with her.

16. Through the remainder of the Seventh Grade school year (2014-2015), the school made a single-occupancy restroom available for my use in the school nurse's office

17. During the Summer of 2015, my parents and I began communicating with staff at the school about appropriate restroom access for me. We also knew that I would need appropriate locker room access, because I was scheduled to take physical education class in the second half of the upcoming Fall semester.

18. Staff at my school, including my principal, Dr. Helga Einhorn, were initially supportive of giving me access to the boys' restrooms and locker room. However, in late August 2015, Dr. Einhorn informed me and my parents that higher-level supervisors in the county school system had decided that I could not be given access to the boys' restrooms and locker room.

19. My parents and I met and/or spoke by phone on several occasions in the early Fall of 2015 with school system personnel about my access to restrooms and locker rooms, including Dr. Einhorn, Lynne Duncan (of the Talbot County Public Schools Office of Student Services), and Bill Keswick (Title IX Coordinator for Talbot County Public Schools). However, school system staff continued to insist that I could not use the boys' restrooms and boys' locker room.

20. School system staff informed us that, in addition to the single-occupancy restroom in the nurse's office, that the two single-occupancy restrooms outside the school auditorium

(which are immediately next to each other and were designated as teacher restrooms) would be redesignated as gender-neutral restrooms and that I could use any of those three restrooms (for restroom usage as well as changing clothing before and after gym class), or that I could use the girls' restrooms and locker room, but that I could not use the boys' restrooms or locker room.

21. We retained lawyers to communicate with the school system but the school system refused to change its position. Through our lawyers, we also filed a complaint against the school system with the U.S. Department of Education, Office of Civil Rights. That complaint is still being investigated and has not yet been resolved.

22. In the meantime, I primarily used the three single-occupancy restrooms at the school, although there were a handful of times when I used the boys' restroom because it was not practical to use a single-occupancy restroom given that the single-occupancy restrooms were too far away—on these occasions, no school staff noticed that I used the boys' restroom and no improper or unusual incidents occurred in the restroom.

23. Having to use the single-occupancy restrooms was very difficult for me. I received some ridicule from other students due to not being able to use the boys' restroom. My other male friends would go to the boys' restroom and I would have to go to the single-occupancy restrooms, which made it obvious that I was different from other students. Using the single-occupancy restrooms made me feel alienated from the rest of the student body. I felt like I had to sneak around to go to the restroom, since I got weird looks from other students when I went into the single-occupancy restrooms that were designated as gender-neutral. To my knowledge, no non-transgender student was required to use the single-occupancy restrooms or prohibited from using the communal restroom consistent with their gender identity.

24. There were also many points in the day when it was very impractical to have to

use the single-occupancy restrooms. For instance, in the Fall 2015 semester, my fourth-period class was in Room 314, which is in a wing of the school where none of the single-occupancy restrooms is located (although there are several boys' rooms in that wing). Unless I wanted to get in trouble for taking too long to use the restroom, I had to hold it. It was very difficult for me to use the single-occupancy restrooms in between classes without being late for class.

25. Because of all of these difficulties, I tried to use the restroom at school as little as possible.

26. Having to use the single-occupancy restrooms to change for gym class, when I started having gym class in the second half of the Fall 2015 semester, was even more difficult. The single-occupancy restrooms are not particularly close to the gym. They also do not have lockers or benches or showers. To change clothes for gym class, I would have to go get my gym clothes from my student locker (which was located just outside the gym with the other Eighth Grade lockers), go to the single-occupancy restroom, change, take my regular clothes back to my locker, and then go into the gym. This generally took three to five minutes longer than if I was able to change in the locker room. After class, I would have to leave the gym to change (again going first to my student locker, then to the restroom, then back to my locker), which made me feel like an outsider because I was the only student who did not change in the locker room.

27. Because of the extra time that changing for gym using the single-occupancy restrooms took, my regular gym teacher gave me three more minutes than the other students; however, on more than one occasion a substitute teacher taught gym class, and I had to "out" myself as transgender to the substitute teacher and explain the whole situation in order to avoid being disciplined for being late to gym class.

28. On some occasions, when I expected that gym class would not make me sweat

profusely, I just would not change into different clothes for gym. However, we are supposed to change into different clothes for gym, and so on a few occasions the gym teacher noticed that I was not properly dressed and deducted points from my grade.

29. Being required to use the single-occupancy restrooms at school has been a source of stress and frustration in my life, and I have had to discuss it with my therapist.

30. I have never used the girls' locker room at the school.

31. I also have never used the boys' locker room at the school, but other male friends have described the locker room to me. Based on this description, I know that the locker room contains private stall areas that are curtained off or could be curtained off so that any student who wanted to change in greater privacy could do so. Also, there are toilets in the boys' locker room facility, and they are partitioned into stalls with doors. Most students do not change their underwear before or after gym and are never fully naked in view of other students in the locker room.

32. Very late in the school year, in April 2016, I learned about the decision in the *G.G. v. Gloucester County School Board* case. Soon after that decision came out, the school system informed my lawyer that the school system would let me use the boys' restroom, but that I still could not use the boys' locker room (by that point in the year, I was no longer taking gym class and so did not have an immediate need to use the locker room). I began using the boys' restrooms, although it was not until several weeks later, on May 13, 2016, that Dr, Einhorn directly told me that I could.

33. Since I started using the boys' restrooms, no other male student has expressed any discomfort with me using the male facilities. In fact, the response has been quite the opposite: many other male (and female) students have congratulated me on gaining the right to use the

boys' restroom.

34. The tryouts for the school's soccer team start on August 10, 2016. I intend to try out for the soccer team.

35. I will need access to the boys' locker room to be able to change clothes before and after soccer practice.

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

Date: 7/18/16

M.A.B. (sign with initials only)

Sworn and subscribed to before me this 18 day of July, 2016.

NOTARY PUBLIC

Name of notary (print): Desiree A. Buck

SEAL:

My commission expires: Dec 3, 2017

DESIREE A. BUCK
Notary Public
Talbot County
Maryland
My Commission Expires Dec. 3, 2017

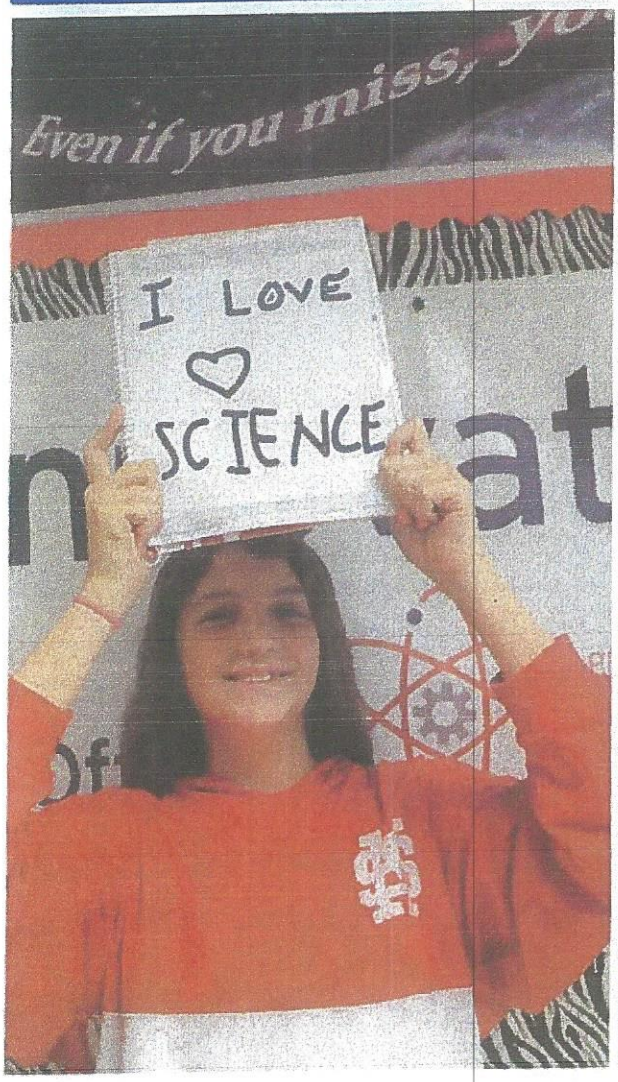
DESIREE A. BUCK
Notary Public
Talbot County
Maryland
My Commission Expires Dec. 3, 2017

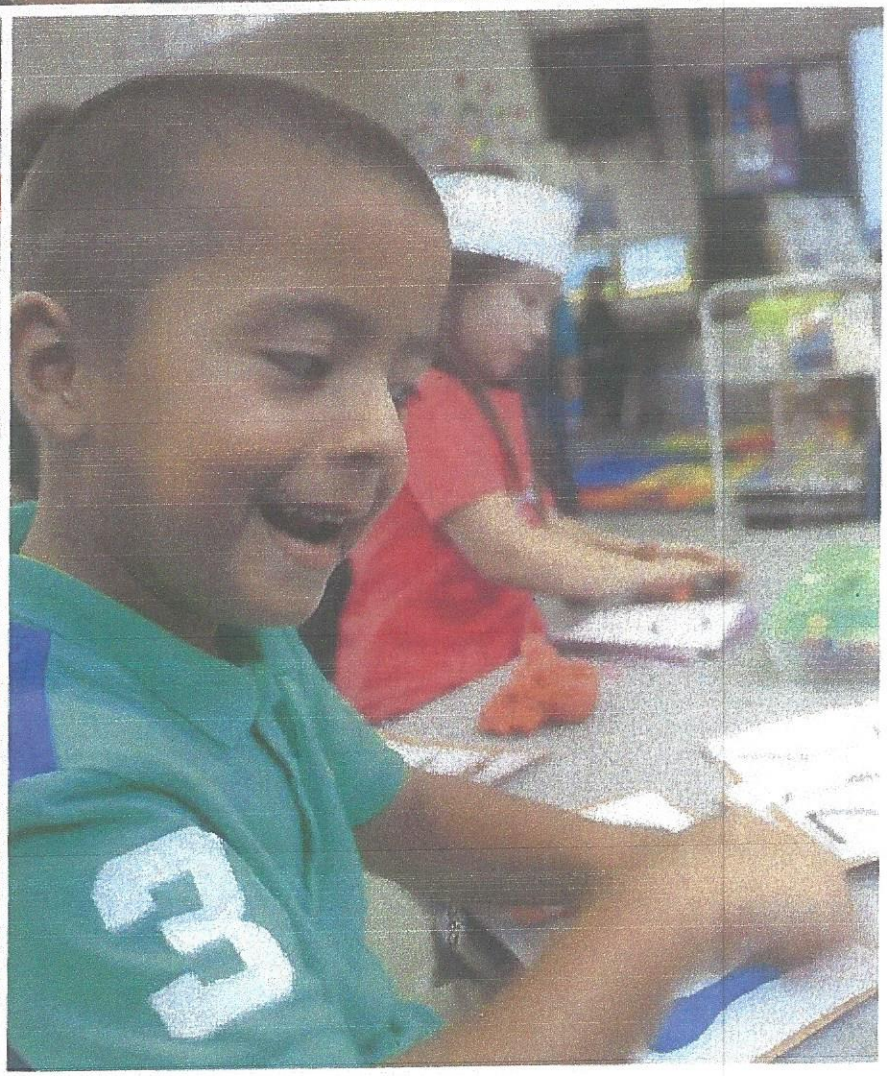
EXHIBIT TWO

Talbot County
Public Schools

FY17 Approved Budget

June 1, 2016





TALBOT COUNTY PUBLIC SCHOOLS

BUDGET

2016-2017

BOARD OF EDUCATION

Michael T. Garman, President
Sandra E. Kleppinger, Vice President
Greg Criniti, Member
Susie Hayward, Member
Juanita S. Hopkins, Esq., Member
Otis Sampson, Member
David L. Short, Member
Sequoia Chupek, Student Member

SUPERINTENDENT OF SCHOOLS

Kelly L. Griffith, Ed.D

NOTICE OF NON-DISCRIMINATION

The Board of Education of Talbot County does not discriminate in admissions, access, treatment or employment in its programs and activities on the basis of race, color, sex, age, marital status, sexual orientation, national origin, religion or disability. In addition, the Board adheres to Title VI, Title IX and section 504 provisions relative to all educational programs.

Talbot County
Public Schools
Building lives, creating futures

Talbot County Education Center
12 Magnolia St
Easton, MD 21601

Phone (410) 822.0330
Fax (410) 820.4260

www.talbotschools.org

June 9, 2016

To the Citizens of Talbot County,

On June 1, 2016, the Talbot County Board of Education approved the FY 2017 budget after having to make $491,000 cuts from the original budget request. This budget reflects our commitment to the Bridge of Excellence Master Plan, to the 2020 Vision Strategic Plan, and to the children of Talbot County.

The budget development process was both engaging and transparent as each school principal and department supervisor justified every dollar requested. This process enabled the Superintendent, the Board of Education, and the general public to closely examine priorities for all dollars requested. After a thorough evaluation of state and federal mandates, including the continued implementation for the State of Maryland's College and Career Ready Standards, the Board was able to include the required additional technology and infrastructure to support these mandates.

Overall, the operating revenues of the general unrestricted budget will increase by 1.22% or $601,911. This increase will help us to meet the needs of each student attending the Talbot County Public School system. The Board of Education would like to thank the Talbot County Council for securing additional revenue sources to be able to provide funding above maintenance of effort.

We are grateful for the community support, the educational partnerships, and the overall commitment of staff during the budget process. Together we will address the challenges for higher academic standards and create essential conditions for learning to ensure each child will graduate college and career ready!

Respectfully,

Kelly L. Griffith Ed.D.

Kelly L. Griffith, Ed.D

TABLE OF CONTENTS

CURRENT EXPENSE FUND
EXPENDITURES - STATE/LOCAL
(UNRESTRICTED)

SUMMARY BY CATEGORY

CODE	CATEGORY	ACTUAL FY 2015	AMENDED FY 2016	REQUESTED FY 2017	REVISED REQUEST	APPROVED FY2017
01	ADMINISTRATION	$ 984,210	$ 1,006,650	$ 1,045,742	$ 1,045,742	$ 1,080,921
02	MID-LEVEL ADMINISTRATION	$ 3,610,801	$ 3,592,549	$ 3,784,862	$ 3,784,862	$ 3,946,142
03	INSTRUCTIONAL SALARIES	$ 20,069,324	$ 20,481,864	$ 21,098,468	$ 21,098,468	$ 20,750,677
04	TEXTBOOKS AND INSTRUCTIONAL SUPPLIES	$ 523,404	$ 566,725	$ 560,915	$ 560,915	$ 554,615
05	OTHER INSTRUCTIONAL COSTS	$ 688,412	$ 743,167	$ 903,146	$ 893,146	$ 1,072,146
06	SPECIAL EDUCATION	$ 3,339,214	$ 3,422,183	$ 3,590,420	$ 3,590,420	$ 3,485,840
07	PUPIL PERSONNEL SERVICES	$ 209,512	$ 201,040	$ 204,722	$ 204,722	$ 197,827
09	TRANSPORTATION	$ 2,449,540	$ 2,646,886	$ 2,676,348	$ 2,676,348	$ 2,566,348
10	OPERATION OF PLANT	$ 3,319,932	$ 3,310,114	$ 3,467,271	$ 3,467,271	$ 3,438,794
11	MAINTENANCE OF PLANT	$ 1,173,427	$ 1,313,177	$ 1,288,057	$ 1,288,057	$ 1,290,069
12	FIXED CHARGES	$ 10,956,126	$ 12,132,646	$ 12,655,969	$ 11,656,233	$ 11,635,533
		$ 47,323,902	$ 49,417,001	$ 51,275,920	$ 50,266,184	$ 50,018,912

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

M.A.B., ***a minor,*** ***by and through his parents and next friends,*** **L.A.B. and L.F.B.,** *Plaintiff,*	
v.	Civil Action No. **GLR-16-2622**
BOARD OF EDUCATION OF TALBOT COUNTY, ***et al.,*** *Defendants.*	

PRELIMINARY INJUNCTION

M.A.B., Plaintiff, who is a fifteen-year-old transgender boy, has filed a four-count Complaint against the Board of Education of Talbot County, Talbot County Public Schools Superintendent Dr. Kelly L. Griffith, and St. Michaels Middle-High School Principal Tracy Elzey, and has filed a Motion for Preliminary Injunction seeking preliminary injunctive relief as to Count I and II, which allege an ongoing violation of Title IX of the Education Amendments of 1972, 20 U.SC. § 1681 *et seq.* ("Title IX") and the Equal Protection Provision of the Fourteenth Amendment of the United States Constitution, due to Defendants' denial of access for Plaintiff to the boys' locker room facilities. The Court has received written briefing on the Motion and held a hearing on _____, 2017.

For the following reasons, and for the reasons more fully stated on the record at the hearing, the Court finds that a preliminary injunction is warranted in this case because Plaintiff has demonstrated a substantial likelihood that he will prevail on the merits as to his Title IX and Equal Protection claims (Counts I and II of Plaintiff's Complaint); that, in the absence of such preliminary injunctive relief, Plaintiff will suffer irreparable injury, in the form of denial of his right to be free of discrimination on the basis of sex under Title IX and Equal Protection and

foreseeable harm to his mental health resulting from the denial of that right; that the balance of the equities favors Plaintiff; and that an injunction is in the public interest.

Accordingly, it is, this _____ day of _____, 2017, by the United States District Court for the District of Maryland, ORDERED:

1. Plaintiff's Motion for Preliminary Injunction is GRANTED;
2. Until the conclusion of this litigation, or subsequent Order of the Court, the Board of Education of Talbot County, Dr. Kelly L. Griffith in her official capacity as Superintendent of the Talbot County Public Schools, Tracy Elzey in her official capacity as Principal of St. Michaels Middle-High School, and their officers, agents, servants, employees, attorneys, and all persons acting for them or in active concert or participation, SHALL allow Plaintiff, whose initials are M.A.B. and whose identity is known to Defendants, to access boys' locker room facilities maintained and operated by Talbot County Public Schools the same extent as any other male student enrolled in the Talbot County Public Schools.
3. The Court finds that the risk of any monetary harm to Defendants from compliance with this injunction is remote and de minimus, and therefore waives the requirement of a bond for this injunction.
4. The Clerk is directed to docket this Preliminary Injunction immediately and to provide a certified copy of this Preliminary Injunction to each party as soon as practicable.

_____
George Levi Russell, III
United States District Judge