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

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

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

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants, the Board of Education of Talbot County ("the Board"), Kelly L. Griffith (Superintendent of Schools), and Tracy Elzey (Principal of St. Michael's Middle-High School) (collectively, "Defendants"), by their undersigned counsel, file this Opposition to Plaintiff's Motion for Preliminary Injunction. For the reasons set forth below, this Court should deny Plaintiff's motion.

I. INTRODUCTION.

Plaintiff, a ninth-grade transgender boy, has brought his Motion for Preliminary Injunction seeking an order requiring the Board to permit him to use the boys' locker room at St. Michaels Middle-High School ("SMMHS") based on his gender identity, which is male. Plaintiff argues that the Board's policy of requiring students to use either sex-segregated locker rooms based on their birth sex as opposed to their gender identity or to change clothes in one of the unisex restrooms violates Title IX of the Education Amendments of 1972 ("Title IX") and

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The plain language of Title IX, however, only prohibits discrimination on the basis of sex; it does not prohibit federal funding recipients such as the Board from making distinctions based on gender identity. And regardless of the level of scrutiny applied to Plaintiff's Equal Protection claim, the constitutional right to privacy to which other students at SMMHS are entitled is more than sufficient to satisfy constitutional muster.

It is highly notable that the cases upon which Plaintiff relies are those involving only restroom access by transgender students. The Defendants respectfully submit that there are material differences between the use of restrooms and the use of locker rooms. Most notably, and contrary to Plaintiff's allegations, there are partitions in all of the Board's restrooms while its locker rooms do not contain such partitions. Moreover, locker rooms, unlike restrooms, are places where students typically disrobe in view of others—indeed, that is the primary purpose of locker rooms, where students remove their clothing and put on their gym attire or sports uniforms in a setting described by the Supreme Court as places of "communal undress" which "are not notable for the privacy they afford." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

Students are provided a significantly lesser degree of privacy in locker rooms as compared to restrooms, and courts have routinely held not only that the bodily privacy of *all* students is a constitutional right, but that the need for privacy is even more pronounced in the elementary and secondary school environment. To be sure, although the Court in *Vernonia* held that students' legitimate expectation of privacy is lessened by the nature of locker rooms, that reasoning was in the context of a traditional locker room setting where children of the same biological sex were "suiting up" together. Moreover, to the extent that there is any diminished

expectation of privacy inherent in the voluntary participation of children in interscholastic sports, there is no comparable diminished expectation with regard to students, as in this case, who are required to use the locker room in preparation for required physical education classes.[1]

Plaintiff's request for a preliminary injunction fails pursuant to the well-established test for determining the availability of such extraordinary relief. First, Plaintiff is not likely to succeed on the merits with regard to his Title IX claim because the plain language of Title IX and its implementing regulations do not prohibit distinctions made upon a student's transgender status, and in fact those regulations expressly permit the separation of locker rooms based upon students' birth sex. Moreover, the constitutional right to privacy of other students renders the Board's policy constitutional regardless of the level of scrutiny applied. Second, Plaintiff has only offered speculative reasons why he would suffer irreparable harm if he is not granted access to the boys' locker room before the resolution of this action, and more importantly, even according to Plaintiff's own allegations he has no need for locker room access because he is not enrolled in physical education class for the 2017-2018 school year and he does not intend to participate in interscholastic athletics in the fall. Third, the balance of hardships tilts strongly in the Board's favor because, among other things, forcing the Board to grant Plaintiff immediate access to the boys' locker room would be to force the Board to violate the constitutional rights of its non-transgender students. Lastly, the public interest is best served by maintaining the status quo pending the resolution of this action, especially given the ease with which Plaintiff may be accommodated by way of unisex facilities.

[1] *See* COMAR 13A.04.13.01A (requiring physical education for all children in grades pre-K through 8 and in grades 9-12); COMAR 13A.03.02.03B (requiring high school students to have a minimum of one-half credit of physical education in order to obtain a Maryland high school diploma).

II. FACTUAL BACKGROUND.[2]

Plaintiff is a ninth grade student at SMMHS, a public school operated by the Board. *See* ECF 1 at 2. SMMHS is a combined middle and high school located in St. Michaels, Maryland serving approximately 550 students in grades six through twelve with ages ranging from as young as ten to as old as nineteen. *See* ECF 20-1 at ¶ 3.

Approximately midway through the 2014-2015 school year, Plaintiff's guidance counselor approached Dr. Helga Einhorn, then Principal of SMMHS, to indicate that Plaintiff was going to begin identifying as male. *Id.* at ¶ 6. In response, Dr. Einhorn held a meeting with Plaintiff's parents, which was very amicable, during which Dr. Einhorn indicated that she would seek guidance from the Board's Department of Student Services on how she could best support Plaintiff. *Id.* Dr. Einhorn contacted Dr. Lynne Mueller of the Maryland State Department of Education, who put Dr. Einhorn in touch with the Howard County chapter of the organization known as Parents, Families & Friends of Lesbians & Gays ("PFLAG"). *Id.* at ¶ 7. Dr. Einhorn agreed to have PFLAG give a presentation to SMMHS staff entitled "Creating a Safe Environment for Transgender and Gender Non-Conforming Students." *Id.*

In the spring of 2015, Plaintiff's parents informed Dr. Einhorn of the new name he had chosen for himself, and Dr. Einhorn and the SMMHS staff agreed to call Plaintiff by that name and to use male pronouns in reference to him. *Id.* at ¶ 8. Plaintiff, his parents, and Dr. Einhorn

[2] Defendants at times refer to the affidavits attached the Defendants' Opposition to Motion for Preliminary Injunction filed in August 2016. *See* ECF 20-1 (Affidavit of Helga Einhorn); ECF 20-2 (Affidavit of Kelly Griffith); ECF 20-3 (Affidavit of Kevin Shafer); ECF 20-4 (Affidavit of Patrick Hambleton); and ECF 20-5 (Affidavit of Brian Femi). Defendants incorporate by reference all of the testimony contained in those affidavits, as well as the affidavits attached hereto. The facts contained in Section II are highlights from those affidavits.

agreed that Plaintiff could use the school nurse's restroom,[3] which Plaintiff did without incident until the end of the 2014-2015 school year. *Id.* at ¶ 9.

During the summer of 2015, Plaintiff's mother contacted Dr. Einhorn indicating that she wanted Plaintiff to have access to the boys' restrooms and locker rooms. *Id.* at ¶ 10. Dr. Einhorn contacted Board offices, but ultimately informed Plaintiff's mother that M.A.B. would not be permitted to use the boys' restrooms or locker rooms. *Id.* at ¶ 10. Dr. Einhorn informed Plaintiff's mother that although she had a personal desire to support Plaintiff, the Board had an obligation to consider the rights of all of its students. *Id.*

In an effort to accommodate Plaintiff, Dr. Einhorn asked Superintendent Griffith whether she could convert two single-occupant, unisex restrooms which had previously been locked and inaccessible to students but accessible to staff, into single-occupant, unisex restrooms for student use. *Id.* at ¶ 11. Dr. Griffith agreed, and Dr. Einhorn informed Plaintiff and his parents that Plaintiff, like all other students, could use either of these unisex restrooms for toilet use and to change his clothes for physical education class. *Id.* After deliberation, Plaintiff's parents indicated that Plaintiff would use the unisex restrooms but that they were not his preference. *Id.*

SMMHS is a relatively small school in terms of square footage and in terms of student enrollment: its square footage is 79,602; its student enrollment for the 2016-2017 school year is 450 students (compared to 1,140 students at Easton High School and 779 students at Easton Middle School); and its state-rated capacity is 641. *Id.* at ¶12. The two unisex restrooms are located next to each other and are approximately 150 feet from the gymnasium and locker rooms. *Id.* The furthest distance from the unisex restrooms to any high school classroom is approximately 500 feet. *Id.*

[3] Plaintiff's parents were friends with the school nurse since Plaintiff had been close friends with the school nurse's son. *See* ECF 20-1 at ¶ 9.

In September 2015, Andrea Walters, Assistant Principal of SMMHS, informed Dr. Einhorn that a parent had approached her during back-to-school night to express her concerns about the accommodation of transgender students at SMMHS at the expense of the other students. *Id.* at ¶ 13. Dr. Einhorn received three other similar complaints from parents of SMMHS students, one of whom demanded that her daughter be accompanied by an adult escort into the girls' restrooms or that she be permitted to use the restroom in the main office. *Id.*

SMMHS has two sex-segregated locker rooms—*i.e.*, one for boys and one for girls—which are used by students for physical education classes and voluntary participation in athletics. *See* ECF 20-1 at ¶ 4.[4] The locker rooms each contain two shower stalls but neither stall in either locker room contains a door. *Id.* The shower stalls are located directly adjacent to and within direct view of the restrooms in each respective locker room, thus students using the showers are visible to those students walking into the restrooms from the general locker area. *Id.* The restroom in the boys' SMMHS locker room contains two open urinals and two toilets which are both located in a stall with doors. *Id.* at ¶ 5. The restroom in the girls' SMMHS locker room contains four toilets, each located in a stall with doors. *Id.* There are no benches in either of the restrooms in the SMMHS locker rooms. *Id.* Other than the stalls in the locker room restrooms, there are no partitions in the SMMHS locker rooms. *Id.* at ¶ 6.

Both the boys' and girls' locker rooms at SMMHS have an office for the gym teacher. *Id.* at ¶ 8. Each office has a single-occupant restroom, but those restrooms are only accessible by going through the offices, and those offices are only accessible from the main locker room area.

[4] Although Superintendent Griffith's affidavit contains exhibits of floor plans and photos of the SMMHS locker rooms, *see* ECF 20-2, a video of the SMMHS locker rooms is attached to the courtesy copy of this Opposition being mailed to chambers in order to provide the Court a better understanding of the layout of the SMMHS locker rooms. *See* AFFIDAVIT OF KEVIN SHAFER, attached as **Exhibit 1** (authenticating video).

Id. Thus, a student could not use the gym teacher's office restroom without walking through the general locker room area where other children are changing. *Id.*

Both the boys' and girls' locker rooms at SMMHS have a "team room" which contains only a bench along one wall. *Id.* at ¶ 9. The team rooms are accessible through a door both from their respective general locker room areas, and they are also directly accessible through a door from the gymnasium. *Id.* The team rooms at SMMHS could be physically modified to provide partitions in order to provide individual privacy to students changing for gym class, but those partitions would need to be curtains or some similar material hung by a track on the ceiling so that they could be moved to permit athletic teams to use the team rooms during athletic competitions. *Id.* at ¶ 10. The only way for students to change in the team room without having to access the main locker room area would be for lockers to be permanently installed in the team room. *Id.* There would be significant logistical issues in determining who is permitted to use the team room to change for gym class, and there would almost surely be more demand than supply in that many students, especially middle school students, prefer to use facilities with greater privacy. *Id.*

Easton High School ("EHS") has two locker rooms segregated by sex, and each contain open shower areas without partitions. *Id.* at ¶ 11.[5] The restroom in the boys' locker room at EHS contains a single-occupant restroom. *Id.* The restroom in the girls' locker room at EHS contains two toilets, and each toilet is located in a stall with doors. *Id.* at ¶ 12. There are no benches in either of the restrooms in the EHS locker rooms, and neither restroom is accessible except through the main locker area. *Id.*

[5] Aside from SMMHS, EHS is the only other high school within the Talbot County Public Schools, and, along with Easton Middle School, discussed *infra*, the only other school that contains locker rooms.

Both the boys' and girls' locker rooms at EHS have an office for the gym teacher. *Id.* at ¶ 14. Each office has a single-occupant restroom, but those restrooms are only accessible by going through the offices, and those offices are only accessible from the main locker room area. *Id.* Thus, a student could not use the gym teacher's office restroom without walking through the general locker room area where other children are changing. *Id.* Both the boys' and girls' locker rooms at EHS have a "team room" which contains open stalled lockers along the wall. *Id.* The team rooms are accessible both from their respective general locker room areas, and they are also directly accessible to a corridor which goes to the gymnasium. *Id.* The team rooms at EHS could be physically modified to provide partitions in order to provide individual privacy to students changing for gym class, but those partitions would need to be curtains or some similar material hung by a track on the ceiling so that they could be moved to permit athletic teams to use the team rooms during athletic competitions. *Id.* at ¶ 16. The only way for students to change in the team room without having to access the main locker room area would be for lockers to be permanently installed in the team room. *Id.* There would be significant logistical issues in determining who is permitted to use the team room to change for gym class, and there would almost surely be more demand than supply in that many students, especially middle school students, prefer to use facilities with greater privacy. *Id.*

Easton Middle School ("EMS") has two locker rooms segregated by sex, but neither contains showers. *Id.* at ¶ 17. The restroom in the boys' locker room at EMS contains one toilet with a stall with a door, but the stall is not separated from the general locker room area and is thus visible to students changing in the general locker room area. *Id.* at ¶ 18. The restroom in the girls' locker room at EMS contains two toilets in stalls with doors, but the stalls are not separated from the general locker room area and are thus visible to students changing in the

general locker room area. *Id.* Other than the stalls in the locker room restrooms, there are no partitions in the EMS locker rooms. *Id.*

Both the boys' and girls' locker rooms at EMS have an office for the gym teacher. *Id.* at ¶ 21. Each office has a single-occupant restroom, and those restrooms are accessible both by going through the main locker room area and from the hallway outside of the locker rooms. *Id.*

The general locker room areas in the boys' and girls' locker rooms at SMMHS, EHS, and EMS contain several "rows" of lockers with benches in between. *Id.* at ¶ 7, 13, 20. Each student is assigned a locker which they must use to store their gym clothing, and when in gym class, their school clothes. *Id.* Although a curtain or other temporary partition could be installed at the end of one or more of the rows in order to provide additional privacy, students whose lockers were located in that given row would still not have any privacy with respect to other students whose lockers were located in that same row. *Id.* Placing partitions at the end of rows of lockers would make it difficult if not impossible for gym teachers to supervise students located behind those partitions. *Id.*

The physical layout of the locker rooms at SMMHS, EHS, and EMS is such that it is impossible to enter the locker room to go to a private changing area without passing by undressed students, with the exception that a student may enter the gym teacher offices at EMS and change in the gym teacher office restroom without going in the main locker room area. *Id.* at ¶ 22.

The approximate cost for the purchase and installation of curtains in the locker rooms of EHS, SMMHS, and EMS is as follows: $6,880 for EHS; $6,665 for SMMHS; and $2,150 for Easton Middle School EMS. *See* ECF 20-3 at ¶ 3. Curtains provide very limited privacy, and staff supervision of the curtained areas would be difficult due to reduced visibility. *Id.* at ¶ 4.

The approximate cost for the purchase and installation of twenty (20) permanent changing stations is as follows: $19,300 for EHS and $19,225 for SMMHS. *Id.* at ¶ 5. There is not adequate space to install permanent changing stations at EMS. *Id.* Permanent changing stations provide greater privacy but still present challenges in terms of staff supervision. *Id.* Installation of permanent changing stations would use essentially all of the square footage of the team rooms, and thus interscholastic athletics teams would have to use the other, more general space in the locker room. *Id.*

Design, purchase, and installation of either curtains or permanent changing stations by the start of the next school year will be very difficult in light of the other demands on the Board's physical plant employees in preparing for the start of a new school year. *Id.* at ¶ 7.

SMMHS has Varsity and Junior Varsity soccer teams, both of which are coeducational due to the small number of students who participate each year. *See* ECF 20-2 at ¶ 23. Given the limited student participation, students are very rarely cut from the team. *Id.*

Physical education is a required course for middle school students attending the Talbot County Public Schools ("TCPS"), and students are required to change their clothes prior to and at the end of physical education class. *Id.* at ¶ 24. One year of physical education is required for high school students in the TCPS, and students are required to change their clothes prior to and at the end of physical education class. *Id.* Students enrolled in the TCPS are not permitted to opt out of the physical education course requirement. *Id.*

Students do not shower at SMMHS, EHS, or EMS after physical education class. *Id.* at ¶ 25. Students at SMMHS, EHS, or EMS do not generally shower after interscholastic athletic competitions or practices. *Id.*

In April 2016, in response to the decision of the United States Court of Appeals for the Fourth Circuit in *G.G. v. Gloucester County Board of Education*, 822 F.3d 709 (4th Cir. 2016), the Board changed its policy so as to permit students to use TCPS' sex-segregated restrooms based on their gender identity as opposed to their birth sex. *See* ECF 20-2 at ¶ 27. That policy change was announced at the Board's regularly scheduled meeting on May 18, 2016. *Id.*

On May 23, 2016, the *Star Democrat* ran an article entitled "Talbot Schools Adopt Court Ruling on Bathroom Use." *Id.* at ¶ 28. In response, the Board received three calls from individuals concerned with the safety of students in the restrooms, one of whom indicated he believed Dr. Griffith should resign in light of the Board's change in policy. *Id.*

On May 24, 2016, Dr. Griffith distributed a letter to all TCPS staff and parents informing them of the Board's change in policy as it relates to restroom use. *Id.* at ¶ 29. In response, the Board received several complaints. *Id.* Specifically, two individuals called protesting the change in policy, one individual wrote an email protesting the change in policy, two individuals wrote a joint letter protesting the change in policy, and three individuals spoke at the Board's June 15, 2016 regularly scheduled meeting in opposition to the Board's change in policy. *Id.*

Plaintiff played on the SMMHS junior varsity soccer team during the fall of 2016, which was coached by Pierre Bernasse. *See* AFFIDAVIT OF PIERRE BERNASSE, attached as **Exhibit 2**, at ¶¶ 2 and 5. Prior to the beginning of the 2016 season, Mr. Bernasse informed all of his players that some players would play more than others based on their abilities. *Id.* at ¶ 3. Although Mr. Bernasse played each player, he played some more than others based on their abilities. *Id.* Mr. Bernasse's decision to play or not play players was based solely on each player's individual soccer abilities. *Id.*

Mr. Bernasse did not hold team meetings in the SMMHS boys' locker room or in the boys' locker room of any of the schools where the SMMHS JV soccer team played during the Fall of 2016. *Id.* at ¶ 4.

Plaintiff suffered a knee/foot injury during the preseason of the Fall 2016 soccer season, which limited his ability to run and perform other soccer movements. *Id.* at ¶ 6. Plaintiff's mother also informed Mr. Bernasse that Plaintiff was experiencing growing pains which affected his mobility. *Id.* Plaintiff played in every game with perhaps the exception of one. *Id.* at ¶ 7.

Plaintiff's soccer skills were among the poorest on the team. *Id.* at ¶8. Plaintiff's soccer ball handling skills were not very good but they did improve over the course of the year, albeit not as much as Mr. Bernasse expected or hoped. *Id.* Plaintiff consistently finished amongst the worst players on the team when doing laps, sprints, juggling, long kicks, turns and change of direction tests. *Id.*

Plaintiff approached Mr. Bernasse one time during the Fall 2016 season regarding his desire to have more playing time during games. *Id.* at ¶ 9. Mr. Bernasse explained to Plaintiff that his limited mobility was resulting in him not having more playing time, and that when his health improved he would likely get more playing time. *Id.* Mr. Bernasse believes that he was more than fair in the amount of playing time he gave Plaintiff; in fact, he could have chosen not to play Plaintiff at all based on his skills, but he did not think it would be sensitive to do so. *Id.*

All of Mr. Bernasse's decisions as coach of the team were based upon merit and his perceived ability of the players. *Id.* at ¶ 10. The fact that Plaintiff is a transgender boy had no role in his coaching decisions. *Id.*

Plaintiff is not scheduled to take a physical education course during the 2017-2018 school year, nor is he scheduled to take any other course which would require him to use the SMMHS locker rooms. *See* AFFIDAVIT OF TRACY ELZEY, attached as **Exhibit 3**.

III. ARGUMENT.

A. Preliminary Injunction Standard.

Plaintiff's motion is conspicuous in that it makes no mention of the extraordinarily high burden placed on litigants who seek preliminary injunctive relief. Indeed, the Fourth Circuit has stated that "preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001). Moreover, plaintiffs who seek preliminary injunctive relief must satisfy each of the applicable four factors. As the Fourth Circuit recently explained:

> The Supreme Court established the standard for imposing a preliminary injunction in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). That case requires parties seeking preliminary injunctions to demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest. *Id.* at 20. Before the Supreme Court issued its ruling in *Winter*, this Court used a "balance-of-hardship test" that allowed it to disregard some of the preliminary injunction factors if it found that the facts satisfied other factors. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977). However, in light of *Winter*, this Court recalibrated that test, requiring that each preliminary injunction factor be "satisfied as articulated." *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010), *aff'd, The Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355 (4th Cir. 2010) (per curiam). Accordingly, courts considering whether to impose preliminary injunctions must separately consider each *Winter* factor.

Pashby v. Delia, 709 F.3d 307, 320-21 (4th Cir. 2013) (parallel citations omitted).

"Furthermore, when the preliminary injunction is mandatory rather than prohibitory in nature, this Court's application of this exacting standard of review is even more searching." *Id.*

at 319 (internal quotation marks omitted). "Whereas mandatory injunctions alter the status quo, prohibitory injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 235-36 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). "Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994). Although Plaintiff's failure to satisfy any one of the four aforementioned factors would be fatal to his request, Plaintiff cannot satisfy any of the factors.

B. <u>Plaintiff is Not Entitled to Preliminary Injunctive Relief.</u>

1. Plaintiff Has Not Established that He Will Suffer Irreparable Harm if He is Denied Preliminary Injunctive Relief.

A party seeking a preliminary injunction is required to demonstrate that he is likely to suffer irreparable harm. *See Winter*, 555 U.S. at 20. It is well settled that "[t]he 'irreparable harm' to be suffered must be 'neither remote nor speculative, but actual and imminent.'" *De Simone v. VSL Pharm., Inc.*, 2015 WL 5675542, at *19 (D. Md. Sept. 23, 2015) (citing *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)). Thus, Plaintiff must show more than a "mere possibility of harm." *Id*. Such a heightened showing of irreparable harm is required because "[i]ssuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (emphasis added).

It is undisputed that Plaintiff is not enrolled in a physical education course for the upcoming 2017-2018 school year, nor is he scheduled to take any other course which would require him to use the SMMHS locker rooms. *See* **Exhibit 3**. It is also undisputed—*by*

Plaintiff's own admission—that he is not likely to participate in interscholastic athletics in the fall of 2017. *See* ECF 41-2 (wherein Plaintiff testifies in his affidavit that "I do not think I am going to continue playing soccer for [SMMHS]").[6] Thus, there is no way Plaintiff can establish that he will be irreparably harmed in the imminent future by not being provided access to the boys' locker room at SMMHS. Plaintiff's request for a preliminary injunction must be denied for this reason alone. *See Pashby*, 709 F.3d at 320-21 (stating that a plaintiff seeking preliminary injunctive relief must satisfy each of the four *Winter* factors).[7, 8]

2. Plaintiff is Unlikely to Succeed on the Merits.

For the sake of brevity, and in light of the fact that Plaintiff's argument as to his likelihood to succeed on the merits is virtually identical to the argument made in his Opposition to the Defendants' Motion to Dismiss, *see* ECF 40, the Defendants hereby incorporate by reference the argument contained within their Motion to Dismiss, *see* ECF 36 and 36-1, as well as their Memorandum in Reply to Plaintiff's Opposition to the Defendants' Motion to Dismiss,

[6] Although Plaintiff goes on to state that "I did not have the best experience last fall, and there are other fall activities that are interesting to me," Plaintiff does not identify which "other fall activities" he is interested in, he does not state whether he absolutely intends to participate in those activities, and he does not state whether participation in any of those activities would require locker room access. *See* ECF 40-2.

[7] Although Plaintiff cannot satisfy the "irreparable harm" standard for the reasons set forth above, it is nevertheless worth noting that Plaintiff relies heavily on the affidavit of Dr. Julie Eastin, who testifies generally that "[a]ccess to the locker rooms available to other boys is a necessity for transgender boys and adolescent males." *See* ECF 41-1 at 11-12 (quoting Eastin affidavit (ECF 7-6)). Even a cursory review of Dr. Eastin's affidavit, however, reveals that she has never examined or even met Plaintiff, and thus her opinion testimony is insufficiently speculative. *Cf. Whitaker v. Kenosha Unified School District*, ___ F.3d ___, 2017 WL 2331751 (7th Cir. May 30, 2017) (finding that the transgender plaintiff/appellee was likely to suffer irreparable harm based on testimony of psychologist who met with the plaintiff and who concluded that plaintiff's depression and suicidal ideation worsened as a result of the bathroom access issue). *Whitaker* is also distinguishable in that the unisex restrooms at SMMHS are not far from the gymnasium or any classrooms, and Plaintiff does not allege that his use of the unisex restrooms has a direct (or even indirect) effect on a specific health condition.

[8] Although courts have held that there may be a presumption of irreparable harm when certain (but not all) of a plaintiff's constitutional or civil rights have been violated, *see, e.g., Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011), that point is moot where, as here, the plaintiff, by his own admission, will not have any need for the relief (in this case, locker room access) that he seeks. Moreover, Plaintiff's claim of irreparable harm is undermined by the fact that he withdrew his Motion for Preliminary Injunction last summer in light of the Supreme Court's stay of the Fourth Circuit's decision in *G.G.* pending the Supreme Court's decision whether to grant *certiorari*.

see ECF 42, and address herein only those arguments not made in Plaintiff's Opposition to the Defendants' Motion to Dismiss.

Plaintiff argues that although the cases he cites in support of his position only involve restroom access as opposed to locker room access (and by logical extension, shower access), the analysis should be no different. *See* ECF 41-1 at 16 n.4. But as discussed in the Defendants' Motion to Dismiss and in Defendants' Reply to Plaintiff's Opposition to the Defendants' Motion to Dismiss, there are significant differences between the purposes and privacy available in restrooms and locker rooms. *See* ECF 36-1 and 42. Citing his own affidavit, Plaintiff argues that "[n]o improper or unusual incidents have occurred as a result of [his] restroom usage," and that "[i]t's not a big deal to anyone." *See* ECF 41-1 at 17 n.4. Setting aside the self-serving and speculative nature of those assertions, even assuming *arguendo* their truth, the absence of any "incidents" in SMMHS' restrooms is irrelevant to whether any such "incidents" may occur in its locker rooms. Moreover, the Defendants are not arguing that Plaintiff should not be permitted to use the boys' locker room because of the inappropriate reactions of other students. Indeed, Plaintiff himself testifies that on the singular occasion another student "tried to bully [him] by referring to [him] by his birth name and pronouns on purpose, school staff addressed this issue with her." *See* ECF 41-2 at 6, ¶ 15. The issue has always been and remains the protection of the rights of all students.

The Seventh Circuit's recent decision in *Whitaker v. Kenosha Unified School District*, ___ F.3d ___, 2017 WL 2331751 (7th Cir. May 30, 2017) is distinguishable for the same reason. There, the Court affirmed the trial court's grant of a preliminary injunction permitting a transgender student to use the boys' restrooms, but it did so, *inter alia*, based on the "common sense" that "the communal restroom is a place where individuals act in a discreet manner to

protect their privacy and those who have true privacy concerns are able to utilize a stall." *Id.* at *13. The Court further noted that "[n]othing in the record suggests that the bathrooms at [the high school at issue] are particularly susceptible to an intrusion upon an individual's privacy." *Id.* Here, by contrast, the record is clear that there are no such stalls in the locker rooms at issue to accommodate students who desire privacy, and the locker room, as contrasted to the restrooms in *Whitaker*, literally exist in order for students to change their clothes.

Plaintiff further argues that "[s]tudents *generally* do not fully strip and change their underwear in the locker room." *See* ECF 41-1 at 17 n.4 (emphasis added) (citing ECF 41-2 at ¶ 33[9] wherein Plaintiff testifies "*[m]ost* students do not change their underwear before or after gym and are never fully naked in view of other students in the locker room") (emphasis added). Thus, by his own testimony, Plaintiff concedes that some students *do* change their underwear and appear fully naked in view of other students while changing in the locker room. Plaintiff also argues that "even if some students do not wish to change clothes in the locker room in close proximity to [Plaintiff], the extent to which they have to be [sic] so, or for it to be possible for [Plaintiff] to inadvertently observe them, is entirely within their control" insofar as "[t]hey can avail themselves of the privacy features of the locker room or, at worst, they may use the single-occupancy restrooms if they prefer." *See* ECF 41-1 at 17 n.4. This argument is again entirely speculative. Aside from the incorrect factual assertion that there are "privacy features" in the locker room, common sense dictates that there is simply no way to absolutely prevent students from observing each other in various stages of undress when one considers the number of students coming and going and dressing and undressing in the locker room.

With respect to matters of law, Plaintiff argues that, unlike in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), "[Plaintiff's] use of the boys' locker room will not

[9] This is a typographical error; the relevant testimony appears in Paragraph 31 of Plaintiff's affidavit.

present the specter of 'constitutional abuses' of students being forced to disrobe while being viewed against their will by a person with different anatomy." *See* ECF 41-1 at 26 (citing *G.G.* majority opinion at 822 F.3d at 723 n.10). That argument is flawed, however, because the majority opinion in *G.G.* expressly limited its holding and discussion to restrooms, where there were stalls with doors and where there were no allegations that students ever disrobed in the restrooms, much less every single day. Moreover, this argument is factually flawed in that the evidence is that some students do indeed fully disrobe and shower.

3. <u>The Balance of Hardships Tips in the Board's Favor.</u>

Enjoining the Board from enforcing its locker room policy essentially strips the Board of its most basic authority to enact policies that accommodate the need for privacy and safety of all students. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (noting public schools' "custodial and tutelary responsibility for children"); *Bethel v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children"). This is a particularly acute harm given that the Board has tried to accommodate Plaintiff by providing access to unisex facilities, and by the fact that it would be a significant hardship—both financially and logistically—to provide students additional privacy by immediately installing partitions.

Moreover, depriving parents of any say over whether their children should be exposed to members of the opposite biological sex in intimate settings deprives parents of their right to direct the education and upbringing of their children. *See generally Troxel v. Granville*, 530 U.S. 57, 66 (2000) (observing that, "[i]n light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions regarding the care, custody, and control of their children"). Indeed,

parents may decide to remove their children from the school system if they (rightfully) believe the school system will not protect their children's constitutionally guaranteed rights of bodily privacy. *See, e.g., Doe v. Luzerne County*, 660 F.3d 169, 176-77 (concluding that a person has a constitutionally protected privacy interest in "his or her partially clothed body" and "particularly while in the presence of members of the opposite sex"). The resulting dilemma—to the school system and parents alike—constitutes irreparable harm.

Furthermore, enjoining the Board from acting on its good-faith interpretation of Title IX in an unsettled area of that statute (*i.e.*, locker room access based on gender identity) constitutes irreparable harm to the Board, especially in light of the fact that an injunction would give the Board little time to make changes to school facilities or to develop new policies to safeguard the privacy and safety rights of its students. *See Maryland v. King*, 133 S. Ct. 1, 3, (2012) (observing that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury").

4. <u>The Public Interest Favors the Denial of Preliminary Injunctive Relief.</u>

"The public interest is best served by preserving the status quo ante litem until the merits are considered." *O'Brien v. Appomattox County*, 2002 U.S. Dist. LEXIS 22554, at *4-5 (W.D. Va. Nov. 15, 2002) (citing *Maryland Undercoating Co. v. Payne*, 603 F.2d 477 (4th Cir. 1979)); *see also Whiteside v. UAW Local 3520*, 576 F. Supp. 2d 739, 743 (M.D.N.C. 2008) (explaining that "the court should consider wherein lies the public interest, sometimes described as the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court").

Here, the public interest favors preserving the Board's ability to continue its policy of requiring students to use sex-segregated locker rooms based on their birth sex, and to permit all

students—transgender or otherwise—to use unisex facilities if they wish. This will minimize disruption to the school environment, especially given the public's expression of concern to date.

IV. CONCLUSION.

For the reasons set forth above, the Defendants respectfully request that the Court deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

s/ (filed electronically)

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

s/ (filed electronically)

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

s/ (filed electronically)

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

COUNSEL FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 5th day of June, 2017, a copy of the foregoing Opposition to Plaintiff's Motion for Preliminary Injunction was filed in the United States District Court for the District of Maryland (Northern Division), and electronically served upon all counsel of record through the Court's CM/ECF system.

s/ (filed electronically)

Andrew G. Scott

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

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

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

AFFIDAVIT OF KEVIN SHAFER

I, Kevin Shafer, under the penalties of perjury, declare and affirm as follows:

1. I am over eighteen (18) years of age, I am competent to testify and, I have personal knowledge of the facts stated in this Affidavit.

2. I am currently employed by the Board of Education of Talbot County (the "Board") as the Plant Operations and Transportation Manager. As such, I have responsibility for all of the physical plant owned by the Board.

3. The video attached hereto as **Exhibit A** is a correct and true representation of the locker rooms at St. Michael's Middle-High School and Easton High School.

The foregoing Affidavit, consisting of three (3) paragraphs, is true and correct and is made upon personal knowledge.

6/1/17
Date

Kevin Shafer

1936350-1

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

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

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

AFFIDAVIT OF PIERRE BERNASSE

I, Pierre Bernasse, under the penalties of perjury, declare and affirm as follows:

1. I am over eighteen (18) years of age, I am competent to testify and, I have personal knowledge of the facts stated in this Affidavit.

2. I served as the head coach of the St. Michael's Middle-High School ("SMMHS") junior varsity ("JV") soccer team during the fall of 2016.

3. Prior to the beginning of the 2016 season, I informed all of my players that some players would play more than others based on their abilities. Although I played each player, I played some more than others based on their abilities. My decision to play or not play players was based solely on each player's individual soccer abilities.

4. I did not hold team meetings in the SMMHS boys' locker room or in the boys' locker room of any of the schools where the SMMHS JV soccer team played during the Fall of 2016.

5. M.A.B. was a member of the Fall 2016 SMMHS JV soccer team.

6. M.A.B. suffered a knee/foot injury during the preseason of the Fall 2016 soccer season, which limited his ability to run and perform other soccer movements. M.A.B.' mother also informed me that M.A.B. was experiencing growing pains which affected his mobility.

7. M.A.B. played in every game with perhaps the exception of one.

8. M.A.B.'s soccer skills were among the poorest on the team. His ball handling skills were not very good, but they did improve over the course of the year, albeit not as much as I expected or hoped. His ability to run was also relatively poor. He consistently finished amongst the worst players on the team when doing laps, sprints, juggling, long kicks, turns and change of direction tests.

9. M.A.B. approached me one time during the Fall 2016 season regarding his desire to have more playing time during games. I explained to M.A.B. that his limited mobility was resulting in him not having more playing time, and that when his health improved he would likely get more playing time. I believe that I was more than fair in the amount of playing time I gave M.A.B.; in fact, I could have chosen not to play him at all based on his skills, but did not think it would be sensitive to do so.

10. All of my decisions as coach of the team were based upon merit and my perceived ability of the players. The fact that M.A.B. is a transgender boy had no role in my coaching decisions.

The foregoing Affidavit, consisting of ten (10) paragraphs, is true and correct and is made upon personal knowledge.

___6/5/2017_____ ____

Date Pierre Bernasse 1931724-1

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

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

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

AFFIDAVIT OF TRACY ELZEY

I, Tracy Elzey, under the penalties of perjury, declare and affirm as follows:

1. I am over eighteen (18) years of age, I am competent to testify and, I have personal knowledge of the facts stated in this Affidavit.

2. At all times relevant to the above-captioned action, I have been an employee of the Board of Education of Talbot County (the "Board"). I am currently the Principal of St. Michael's Middle-High School ("SMMHS").

3. M.A.B is not scheduled to take a physical education course during the 2017-2018 school year, nor is he scheduled to take any other course which would require him to use the SMMHS locker rooms.

The foregoing Affidavit, consisting of three (3) paragraphs, is true and correct and is made upon personal knowledge.

06/08/17
Date

Tracy Elzey
Tracy Elzey