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**
**** Hearing Requested****

PLAINTIFF'S REPLY MEMORANDUM
TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

Plaintiff, M.A.B. ("M") by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 65 and Local Rule 105.2(a) hereby submits this Reply Memorandum to Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, and in support thereof states as follows:

I. PRELIMINARY STATEMENT

Defendants' Opposition rests on the alleged constitutional privacy and safety rights of its non-transgender students. The illusory nature of the defendants' proffered rights was soundly addressed in M's Motion for Preliminary Injunction. However, there are a few points which warrant brief reply. First, apparently preoccupied with a handful of parent (not student) complaints, defendants attempt to have this Court disregard the privacy features available in the St. Michaels Middle-High School's ("School") locker room and for the first time, assert that M's presence in the boy's locker room presents "safety" concerns. And second, although it is undisputed that M is required to take physical education, defendants nevertheless claim that M cannot establish irreparable injury because he is not taking physical education this upcoming

school year. For the reasons that follow below, defendants are incorrect. M has more than established that he is entitled to a preliminary injunction.

II. ARGUMENT

A. M has Amply Demonstrated that Irreparable Injury is Likely in the Absence of an Injunction.

Defendants claim that M has not established "imminent" irreparable injury and that M's constitutional and statutory injuries are "moot" because M is not registered for physical education this upcoming school year. (ECF 43 at *15, and 15, n.8.) However, the Supreme Court only requires "plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. NDRC*, 555 U.S. 7, 23 (2008) (emphasis added); *see also G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (plaintiff seeking preliminary injunction required to establish that "they will likely suffer irreparable harm absent an injunction."). Timing is not key in the analysis. As *Winter* made clear, the key inquiry into irreparable injury is probability of injury. *Id.* (rejecting mere "possibility of injury" standard as sufficient to establish irreparable injury).

Here, it is not just likely, but certain that the defendants will require M to take physical education before he graduates from high school. The defendants admit that. (ECF 43 at 3.) For this reason alone, M has more than established that injury "is likely." *See Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.").

Moreover, the constitutional and statutory issues are hardly "moot." In contrast to any other student at the School, M cannot access the locker rooms in line with his gender identity. As detailed in M's Motion for Preliminary Injunction, he is certainly not receiving the "full benefits of education" required by Title IX or the equal treatment required by the Equal Protection clause of the Fourteenth Amendment. (*See* ECF 41-1 at 2-29.) M's affidavits attest to having to use the

unisex bathroom as locker rooms as a source of "stress" in his life and the "stigma" he experienced as a result of having to use the unisex rooms during soccer season last year. (ECF 7-3 at ¶¶ 23-29; Ex 1. at ¶¶ F and H.) Dr. Eastin has fully explained the impact of exclusion from the locker rooms on M's gender dysphoria.[1]

Is it any wonder this soccer player is uncertain about whether he wants to play again in the fall? Like any other young student, M deserves the right to consider the extracurricular options offered by the School without having to be subjected to stigma, being forcibly "outed," and suffering through increased dysphoria. Under *Ezell* and its progeny, M has suffered irreparable injury and is entitled to injunctive relief. *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").

That the exigency here may not be as marked as it was when M filed his initial motion for preliminary injunction last summer does not mean that hearing the issue now, as opposed to staying a ruling on the matter, would not have value. M respectfully submits that given the certainty of harm to him and the defendants' claims that they intend to alter the School locker

[1] Defendants attempt to dismiss as "speculative," Dr. Eastin's expert opinion because she did not examine M. There is nothing unusual or improper in retaining expert medical providers to present testimony in litigation: "Expert witnesses, including doctors retained to evaluate physical and mental injuries, are routinely retained in anticipation of litigation." *Graham v. City of New York*, 128 F.Supp.3d 681 (E.D.N.Y. 2015). Moreover, defendants have not offered any factual evidence of their own countering Dr. Eastin's conclusions. For purposes of a preliminary injunction, uncontested factual testimony presented in affidavits is usually "taken as true." *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976).;11A Wright & Miller, et al., Fed. Prac. & Proc. Civ. § 2949 (3d ed. 2015) ("[W]ritten evidence is presumed true if it is not contradicted.").

room, ruling now would give the Court more flexibility in tailoring the injunction. Indeed, defendants have already claimed "that it would be a significant hardship—both financially and logistically—to provide students additional privacy by immediately installing partitions."[2] (ECF 43 at * 18.) Defendants want to place M in a Catch-22: they would have this Court deny M's motion for a preliminary injunction because he is not taking physical education this year, and then, when M is forced to refile his motion next summer (because he will certainly have to take physical education), they will again raise the immediacy issue as an impermissible "hardship." Issuing an injunction now eliminates any hardship for the defendants as it allows them to operate under a more flexible timetable.

B. Barring M from the Boys' Locker Room is Impermissible Discrimination under Title IX and Equal Protection. Defendants have not Demonstrated that Allowing M Access to the Boys' Locker Room Violates the Privacy and Safety Interests of any of the Other Students at the School.

In essence conceding that the prohibition against discrimination based on "sex" both under Title IX and Equal Protection unquestionably includes discrimination against transgender people, defendants focus the crux of the remainder of their opposition bolstering the alleged privacy, and for the first time, safety interests of non-transgender students.[3]

[2] Defendants do not deny that they operate under a budget exceeding fifty million dollars. Even assuming arguendo that the Court orders the defendants to install safeguards and curtains in the School that the defendants incorrectly allege are necessary, the amount would constitute less than point .01% of their budget as a whole. (*See* ECF 20-3 *with* ECF 41-3.) Additionally, defendants' inclusion of other schools for purposes of the logistical and financial hardship they would allegedly suffer is irrelevant and "odd" as M only attends St. Michaels Middle-High School. Any other students would be "totally unaffected" by the injunction. *See Whitaker*, 2017 WL 2331751 at * 12, n.6.

[3] For "brevity," defendants attempt to incorporate the entirety of their Motion to Dismiss (ECF 36-1 at 14-15) and their reply in support thereof (ECF 42) as reasons why they are likely to succeed on the merits. The papers total approximately 52 pages of additional argument—well beyond the 35-page page limit set forth in Local Rule 105. *See Crowley v. L.L. Bean, Inc.*, 361 F.3d 22, 28 (1st Cir. 2004) ("Within wide limits, it is for courts, not litigants, to decide what rules are desirable and how rigorously to enforce them.") (internal quotation marks omitted). Notably, defendants sought no leave to extend the page limits. Accordingly, this Court should disregard

Indeed the Seventh Circuit in *Whitaker v. Kenosha Unified Sch. Dist.*, --- F.3d ---, 2017 WL 2331751 at * 11 (7th Cir. May 31, 2017), has now held that barring transgender students from sex-segregated facilities such as restrooms, that align with their gender identity **"punishes that individual for his or her gender non-conformance, which in turn violates Title IX."** (emphasis added).[4] The Seventh Circuit had no trouble recognizing that discriminating against transgender students constituted impermissible sex stereotyping, emphasizing, "by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id.* at 10. *Whitaker* also recognized that discrimination against transgender people warrants heightened scrutiny under the Equal Protection clause of the Fourteenth Amendment:

> **Here, the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate.** This policy is inherently based upon a sex-classification and heightened review applies. Further, the School District argues that since it treats all boys and girls the same, it does not violate the Equal Protection Clause. This is untrue. **Rather, the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently**. . . . **This places the burden on the School District to demonstrate that its justification for its bathroom policy is not only genuine, but also "exceedingly**

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the arguments set forth therein, and only consider those points actually briefed in their opposition. *See, e.g., Gogreve v. Downtown Dev. Dist.*, 426 F.Supp.2d 383, 388, n.2 (E.D. La 2006) (rejecting defendants' attempt to incorporate previous arguments into briefs because it would "would permit them to sidestep page limits set forth in the local rules"); *Prescott v. Northlake Christian Sch.*, 141 F. App'x. 263, 275 (5th Cir. 2005) (refusing to consider argument by incorporation of earlier papers as party "must include the substance of its arguments in the body of its brief: we will not consider arguments presented only in earlier filings.")

[4] Though the defendants attempt to dismiss sex stereotyping as a mere evidentiary inquiry (ECF 42 at 5) to the extent the Court would consider this argument, they are incorrect. The Fourth Circuit has recognized "imposing unique burdens or stereotypical expectations on an individual based on her membership in a protected group is illicit discrimination, even though the defendant may not discriminate consistently against *every* woman or minority under *all* conditions." *Woods v. City of Greensboro*, 855 F.3d 639, 651 (4th Cir. 2017) (emphasis in original.)

persuasive."

Id. at * 12.

In fact, defendants basically concede that "sex" must include transgender people. They do not attempt to grapple with *Whitaker's* holding—that sex-based discrimination under Title IX and Equal Protection includes discrimination against transgender people.[5] Rather, they hope that this Court will ignore *Whitaker* and all of the other authority cited in M's opening brief simply based on their theory that M's presence in the locker room violates the alleged privacy (and now safety) rights of non-transgender students. (ECF 43 at *16-17, 19.)

For instance, defendants attempt to brush away the wave of precedent recognizing the rights of transgender students to equal access to sex segregated facilities by claiming that locker rooms are materially different than restrooms because "there are partitions in all of the [School's] restrooms while its locker rooms do not contain such partitions" and that they are a place where

[5] In their reply, defendants, for the first time, assert that because Title IX is Spending Clause legislation, the doctrine of constitutional avoidance mandates that sex be construed to exclude transgender people. (ECF 42 at 2.) To the extent the Court would consider this, the argument is meritless. As an initial matter, here the Spending Clause argument provides no defense to M's claim for injunctive relief. Rather, the "central concern . . . is with ensuring that the receiving entity of federal funds has notice that it will be liable *for a monetary award*." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (emphasis added) (internal quotation marks and brackets omitted). Moreover, any Spending Clause concerns affect only the available remedy for violations of Title IX, not "the scope of the behavior Title IX proscribes." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639 (1992); *see Gebser*, 524 U.S. at 284 (distinguishing between "the scope of the implied right" and "the scope of the available remedies"). The Supreme Court has—in an unbroken line of cases—applied Spending Clause concerns to Title IX by restricting liability for damages to acts of intentional discrimination, as opposed to negligence or vicarious liability. It has never restricted the scope of the statutory text. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005); *Davis*, 526 U.S. at 639; *Gebser*, 524 U.S. at 287. As the Court has reaffirmed multiple times: "The *Pennhurst* notice problem does not arise in a case . . . in which intentional discrimination is alleged." *Jackson*, 544 U.S. at 182-83 (alterations incorporated). Because the discrimination here is indisputably intentional and violates the statute's plain terms, the Spending Clause poses no barrier.

students "typically disrobe in front of others."[6] (ECF 43 at 2.) Nevermind that the locker room here has two fully enclosed stalls where students seeking greater privacy can disrobe and that the showers are now curtained (ECF 43-1), there are unisex alternatives available for students who actually seek greater privacy, and that no student has complained of M's use of the boys' facilities. (*See* ECF 41-2 *with* ECF 17 and ECF 18.)

M's simple request to use the boys' locker room "does not mean that . . . that those . . . facility uses would or would not lead to a different result[,]"than if M only requested access to the boys' restroom. *Evancho v. Pine-Richland Sch. Dist.*, --- F.Supp.3d ---- 2017 WL 770619, *14 n.34. (W.D. Pa. Feb. 27, 2017). For example, both the Maryland State Department of Education and the U.S. Department of Education have firmly rejected the proposition that transgender students should be barred from locker rooms that conform to their gender identity. The Maryland Department of Education has emphasized that "respectful and careful review of all relevant factors and concerns is essential when considering the locker room issue" and issued the following non-discrimination guidelines for Maryland school districts:

> **Provide access to the locker room that corresponds to the student's gender identity.**
>
> Provide the option to use a safe and non-stigmatizing private alternative space for any student who is uncomfortable using shared facilities.
>
> **Provide reasonable alternative arrangements for any student who expresses a need or desire for increased privacy. Alternative arrangements should be provided in a way that protects the transgender student's ability to keep his or her transgender status confidential.**
>
> Based on availability and appropriateness to address privacy concerns, such arrangements could include, but are not limited to:

[6] Defendants again invoke "the constitutional right of privacy" of its non-transgender students as the key hardship and irreparable harm to them that should prevent the issuance of an injunction. (ECF 43 at 2-3, 19.) As explained in M's Motion for Preliminary Injunction, however, no such right exists and any privacy rights in a locker room is certainly not invoked on these facts. (ECF 41-1 at 25-32.)

> Assignment of a student locker in near proximity to the coaches' office or a supportive peer group.
>
> **Use of a private area within the public area of the locker room facility (e.g. nearby restroom stall with a door or an area separated by a curtain).**
>
> Use of a nearby private area (e.g. nearby restroom or a health office restroom).
>
> A separate changing schedule (either utilizing the locker room before or after the other students)

Maryland State Department of Education, *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* at 13-14 (Oct. 2015) (emphasis added and bullets removed) *available at* http://marylandpublicschools.org/about/Documents/DSFSS/SSSP/ProvidingSafeSpacesTransgenderNonConformingYouth012016.pdf*; see also* Example of Policies and Emerging Pratices for Supporting Transgender Students, U.S. Dep't of Ed, Office of Elementary and Secondary Education (May 2016) (offering examples of policies with requests for accommodation for increased privacy including providing access to "nearby restroom").

Indeed, where as here, the locker rooms have privacy features and there are alternatives for students who desire privacy (namely the team room and the unisex bathrooms), "[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) (report and recommendation) (rejecting alleged privacy interests of students in response to transgender girl changing in locker room when locker room had privacy features). The words of the Northern

District for Illinois 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" bears repeating here:

> **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).

And as pointed out in M's Motion for Preliminary Injunction, the sky has not fallen by allowing transgender kids access to the locker rooms that match their gender identity. *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"]; *see also Whitaker*, 2017 WL 2331751 at * 15 (considering amicus brief of school administrators as relevant in whether or not injunction properly served public interest). Defendants' refusal to acknowledge that reality is not a "good faith interpretation of Title IX" or a genuine attempt to "accommodate" M. (ECF 43 at * 18, 20.) Rather it is willful blindness based on myths of predation, invidious stereotypes, moral disapproval, and unfounded fears about people who are different. This is exemplified in defendants' newly asserted "safety rights" of its students, which have no factual support in the record and improperly recall the transphobic myth of transgender people as predators or voyeurs. (ECF 43 at *18-19.) Again, the actual experiences of school administrators reveals, "that protection of the transgender students themselves is usually their most pressing concern, because those students, already accustomed to being stigmatized and in some cases harassed, are not

interested in walking around the locker rooms and checking out anatomy. They're just trying to get through [physical education class] safely." *Highland Local School Dist. v. DOE*, 208 F.Supp.3d 850, 875 (S.D. Oh. 2016); *see also Whitaker*, 2017 WL 2331751 at * 12 (noting that over 75% of transgender students have suffered harassment at school and emphasizing "There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.") (citing Jaime M. Grant *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, at 33 (2011), *available at* http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

Nor do the defendants' allegations of a handful of parent complaints and speculation that parents may choose to withdraw their students from the School carry any legal weight. (ECF 43 at 20) 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' 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 43 at 18-19), 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.

III. CONCLUSION

For the foregoing reasons and for those stated in M's Motion for Preliminary Injunction, M has established all four prongs of the *Winter* test. Thus, the Court should issue a preliminary injunction allowing M to access the boys' locker room at St. Michaels Middle High School.

Date: June 19, 2017

Respectfully Submitted,

_____/s/_____
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