UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; **C.A.**, a minor, by and through her parent and guardian, **N.A.**; **A.M.**, a minor, by and through her parents and guardians, **S.M.** and **R.M.**; **N.G.**, a minor, by and through her parent and guardian, **R.G.**; **A.V.**, a minor, by and through her parents and guardians, **T.V.** and **A.T.V.**; and **B.W.**, a minor, by and through his parents and guardians, **D.W.** and **V.W.**,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF EDUCATION; **JOHN B. KING, JR.**, in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE**; **LORETTA E. LYNCH**, in her official capacity as United States Attorney General; and **SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS**,

Defendants,

and

STUDENTS A, **B**, and **C**, by and through their parents and legal guardians **Parents A**, **B**, and **C**, and the **ILLINOIS SAFE SCHOOLS ALLIANCE**,

Intervenor-Defendants.

Case No. 1:16-cv-04945

The Honorable Jorge L. Alonso

Plaintiffs' Reply to Intervenor-Defendants' Brief, Defendant Township High School District 211's Memorandum, and Federal Defendants' Response to Plaintiffs' Objections to Magistrate's Report and Recommendation

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I. Introduction

This case is a simple matter of statutory construction: does "sex" in Title IX and 34 C.F.R. §106.33 unambiguously refer to the two sexes of male and female which are grounded in mankind being a sexually reproducing species, or does sex mean "gender identity," which is a continuum of "genders" (or no gender) defined by an individual's self-perception and which is divorced from our reproductive design? If sex refers to male and female, then the remaining question is whether the Defendants' Rule[1] and Policies in fact protect students' privacy pursuant to 34 C.F.R. §106.33, despite the Rule and Policies placing an anatomical male into the girls' locker rooms and restrooms?

When construing a statute, courts "begin 'with the language of the statute.' If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent'—as is the case here—'[t]he inquiry ceases.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citations omitted). In prior briefing and below, Plaintiffs show that sex was grounded in sexual reproduction when Title IX was enacted and is so grounded today, and that the privacy afforded via 34 C.F.R. §106.33 is coherently and consistently protected when sex is given its plain meaning of male and female. Thus, the Court need go no further to grant Plaintiffs relief from the Defendants' Rule and Policies.

The few new points Defendants raise in their three responses to Plaintiffs' Response to Magistrate's Report and Recommendation ("Plfs.' Resp.") are rebutted below.

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[1] As before, "**Locker Room Agreement**" refers to the "Agreement To Resolve," OCR Case # 05-14-1055, Dec. 2, 2015, [ECF No. 21-3]; "**Restroom Policy**" refers to the District Defendants authorizing students to use restrooms according to self-perceived gender identity. Superintendent's Newsletter Update, *High School District 211 protects student privacy over Office of Civil Rights Mandate*, [ECF No. 21-5 at 1] (collectively, the "**Policies**"). The Policies are mandated by the Federal Defendants' rule ("**Federal Rule**" or "**Rule**") as documented in their guidance documents ("**Guidance**"): U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, May 13, 2016 ("DCL"), [ECF No. 21-6]; U.S. Dep't of Educ., Office for Civil Rights, *Title IX Resource Guide*, Apr. 2015, [ECF No. 21-7]; U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, Dec. 1, 2014, [ECF No. 21-8]; and U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, Apr. 29, 2014, [ECF No. 21-9]. Although the DCL issued after Plaintiffs' Complaint was filed, Plaintiffs cite to it as a concise, thorough summary of the Rule.

II. Reply to the Intervenor-Defendants' Brief in Opposition to Plaintiffs' Response to Magistrate Judge's Report and Recommendation, ECF No. 158 ("I-D Resp.").

Intervenor-Defendants argue that Plaintiffs have inconsistently defined "sex," which "illustrate[s]" the "impracticability of defining it narrowly to exclude consideration of gender identity...." I-D Resp. 4-5, ECF No. 158. But whether Plaintiffs have been discussing genes, chromosomes, sex at conception or birth, or genitalia, the definition of sex ineluctably centers on our human reproductive nature—unlike gender identity which claims that a person may be "something else" than male or female.

It is the differences in genitalia between males and females—our overt and covert private parts—that drove Congress and the Department of Education to protect rational sex distinctions in the context where private parts really matter: locker rooms, restrooms, and overnight accommodations. If humans reproduced asexually, 34 C.F.R. §106.33 would never have been conceived. But we do not, and private parts engender privacy issues in intimate facilities where the right to bodily privacy should be protected—but instead is violated by the Defendants' Rule and Policies that place an anatomical male inside adolescent girls' intimate facilities.

One of many flaws in Intervenor-Defendants' position is revealed when they cite Dr. Garofalo's report: "As Dr. Garofolo [sic] explained, the term 'gender identity' refers to one's sense of self as male or female or something else." I-D Resp. 5, ECF No. 158. Two points leap out from that short sentence: "one's sense of self" validates Plaintiffs' position that gender identity is subjectively perceived and not objectively discernable; and "male or female or something else" confirms that gender identity is not related to the binary male/female reproductive nature. If one can have a "gender identity" that is something other than male or female, then that "identity" has nothing to do with "sex" in the text or legislative history of Title IX.

Intervenor-Defendants allege that there is conclusive scientific proof that transgenderism is biologically mandated, yet their expert admits that research is "still ongoing" while referencing indications of an "interplay" of various influences, such as biology, environment, culture, and socialization. Garofalo Decl. 4, ECF 79-3. Unfailingly, when Defendants discuss their supporting

science, it is in terms of correlation, not causation—much less any dispositive proof of causation. And tellingly, what Dr. Garofalo says for the purpose of litigation is very different than what he says for the purpose of publicity. While Intervenor-Defendants' attorneys insist there is a scientific consensus driving the sex-change treatments, I-D Resp. 7 n.8, ECF No. 158, Dr. Garofalo recognized that there *are* other views about treating professed transgender children when he publicly criticized the competing scientific view that a gender-dysphoric child should be steered toward their natal sex (and not treated with cross-sex hormones). Elly Fishman, *The Change Agent*, Chicago Magazine, July 2015, at 13, ECF No. 94-5. And once done with his critique, Dr. Garofalo then confessed that "[t]he pushback in my own mind is my Hippocratic oath: 'Do no harm.' How can I know that I'm doing no harm in the absence of scientific data to support these interventions? *I wish we had generations of outcomes research to fall back on, but right now we don't.* We ask these families questions that they can't really know the answer to. Nobody can." *Id.*[2] (emphasis added)

Oddly, Intervenor-Defendants no sooner confirm that gender identity is a continuum of "male, female, or something else," than they flip-flop and claim that the gender continuum is "utterly irrelevant" and for proof, claim that "Students A, B, and C identify clearly and consistently as male or female." I-D Resp. 9, ECF No. 158. But that is not so: "Student C has been identifying as male for about six months. Before then, he identified as gender queer but has presented himself in a masculine manner since at least spring 2015." Decl. of Parent C 2, ECF No. 32-3. Student C's story demonstrates that students' self-professed identities are fluid across a continuum.[3]

Intervenor-Defendants return to *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) to say that several federal appellate courts have, post-*Price Waterhouse*, "reaffirmed that laws prohibiting sex discrimination include transgender people within their protections." I-D Resp. 10, ECF No.

[2] The competing scientific view is set forth in more detail in the Amended Expert Report of Dr. Allan M. Josephson, M.D. [ECF No. 123-1] which outlines the ethical, medical, and psychological shortcomings of the treatment regimens urged by the Defendants.

[3] See Plaintiffs' Resp. 11 n.12, ECF No. 146, for other authorities explaining the gender continuum.

158. But that assertion is simply not helpful to them because all that "gender nonconformity" encompasses is what happened to Ms. Hopkins: she was judged, as a woman, to be too "macho" to merit promotion to firm partnership. *Price Waterhouse*, 490 U.S. at 234-235. By acting on that perception, the firm gave evidence of discrimination based on her sex, which was female.

Nor do they gain ground by quoting *Whitaker v. Kenosha Unified School District*, to say that Whitaker, who professed to be male, was "treated . . . differently because he did not conform to the gender stereotypes associated with being a biological female." I-D Resp. 11, ECF No. 158. But what the school district did was no more than act on the fact that Whitaker was a "biological female" in granting access to intimate facilities so as to preserve the male/female privacy protected by 34 C.F.R. §106.33. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2016 WL 5239829 at *4 (E.D. Wis. Sept. 22, 2016). That had nothing to do with any opposite sex stereotypes Whitaker affected, and would have preserved the sex-specificity of the school's intimate facilities in accordance with 34 C.F.R. §106.33.

The way Intervenor-Defendants read *Whitaker* reflects their position that gender identity is the sole determinant of "sex." Thus, gender identity—not our male or female nature—becomes the primary sex characteristic. At that point, the concept of sex stereotypes (masculinity and femininity) evaporates because the primary sex characteristic of male or female becomes merely another sex "stereotype." Put another way, stereotypes tied to being male or female do not survive in a system where the sole defining sex characteristic is a non-binary gender identity continuum.

As to *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), Plaintiffs have ably supported its enduring rationale and binding authority on this Court. And there is more than a little irony that Intervenor-Defendants minimize *Ulane*'s authority in light of *Hively v. Ivy Tech Community College, South Bend*, 830 F.3d 698 (7th Cir. 2016) being granted rehearing, I-D Resp. 13, ECF No. 158, even while they rely heavily on the *G.G.* decision, *id.* at 19-20, despite *G.G.* awaiting Supreme Court review, and the lower court injunction (which favored our Defendants' position) being stayed. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.

2016), *mandate recalled and stayed, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm,* 136 S. Ct. 2442 (2016), *cert. granted,* No. 16-273 (Oct. 28, 2016).

Also, Plaintiffs point to the Supreme Court restoring the status quo in *G.G.* not to prove a privacy right, as Intervenor-Defendants claim, I-D Resp. 19, ECF No. 158, but for its application to balancing the hardships. The balance that Plaintiffs urge this court to find is exactly the balance struck in *G.G.*: everyone has their privacy protected by maintaining sex-specific communal intimate facilities, with individual facilities made available to those not wanting to use a communal facility.

And on this point, the fact that Justice Breyer stayed the "injunction 'as a courtesy' in order to 'preserve the status quo'" while the Court reviewed the petition, I-D Resp. 19, ECF No. 158, weighs heavily in Plaintiffs' favor. Much like the balancing of hardships in the preliminary injunction test, in close cases the Circuit Justice or the Court will "balance the equities" to explore the relative harms to applicant and respondent, as well as the interests of the public at large. *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Importantly, the harm claimed by G.G. is very similar to that of Student A,[4] and Justice Breyer's vote struck a balance which preserved communal facilities for boys while providing individual facilities for G.G.

Intervenor-Defendants attack Plaintiffs' privacy claims by arguing that Student A has a countervailing privacy interest, in that using individual facilities would "stigmatize" Student A and reveal him to be transgender to other students. I-D Resp. 23 n.21, ECF No. 158. Neither claim should be credited: the individual facilities are available to all students, Kovack Decl. ¶¶ 15-17, ECF No. 78-1, so any stigma (which is irrelevant to bodily privacy anyway) is minimal, and the mere act of using the facility does not perforce reveal a student's self-perceived "gender." Nor is there any "privacy" interest in *being* male or female. Rather, the interest is in having privacy from

[4]Compare I-D Resp. 21, ECF No. 158 (asserting potential harms to Student A) to Expert Decl. of Randi Ettner, Ph.D, *G.G. v Gloucester County School Board*, No. 4:15-cv-00054 (June 11, 2015), ECF No. 10 at 7 ("[E]xcluding a transgender male adolescent from the restrooms used by other boys . . . pose[s] health risks, including depression, post-traumatic stress disorder, hypertension, and self-harm." (Copy attached as Ex. 1).

the opposite sex when one changes clothes, showers, or performs personal hygiene. And even if there were an interest in "transgender privacy," it carries no weight in this case, as Student A's professed gender identity has long been evident on campus. See, e.g. Compl. 17-18, 27-28, 32, ECF No. 1.

And that brings us back to the fundamentals of this case: sex under Title IX means male or female, and adolescent self-perception does not alter the anatomy that is chromosomally determined at conception and is still extant with the Intervenor-Defendant students who have not been surgically altered. *See* Decl. of Parent A, ECF No. 32-1; Parent B, ECF No. 32-2; and Parent C, ECF No. 32-3. Certainly, Intervenors' difficult adolescence merits compassion, but the Court must nonetheless dispassionately apply the plain text and Congressional intent of Title IX to provide for male and female intimate facilities. Relief under the law for Intervenor-Defendants is the purview of Congress, not the courts.

III. Reply to Defendant Township High School District 211's Memorandum in Opposition to Plaintiffs' Response to Magistrate's Report and Recommendation, ECF No. 159 ("Dist. Resp.")

District Defendants attack minor Girl Plaintiffs' factual statements because the Complaint was verified by their parents and next friends, Dist. Resp. 3-5, ECF No. 159, to which there are several responses. First, as to Plaintiffs' prior representations to the Court regarding reliance on specific factual allegations, *id.* at 4, Plaintiffs' position is unchanged: District Defendants violate Title IX when they purport to provide female and male facilities per 34 C.F.R. §106.33, then authorize an anatomical male unhindered access to the girls' intimate facilities—and it is undisputed that a male has done so, repeatedly. Compl. 20-21, 34, ECF No. 1; Decl. of Parent A 6, ECF No. 32-1. As Plaintiffs have shown, the zone of privacy begins at the locker room or restroom door so it does not matter "who saw what." That Plaintiffs elaborated on their factual statement to oppose the Magistrate's Report is scarcely surprising—the Magistrate had raised factual issues, and Plaintiffs simply responded.

Second, to "maintain a suit in a federal court, a child or mental incompetent must be represented by a competent adult," *T.W. by Enk v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997) (citation omitted), so having the child's next friend execute the complaint is normative. *See also*, 8B Charles Alan Wright, et al., *Fed. Prac. & Proc. Civ.* § 2172 (3d ed. 2016) (In responding to discovery, when a person is "too young to make responsive answers under oath, either his next friend or his attorney may sign and swear to the answers."). Ironically, if District Defendants' position were correct, then Students A, B, and C were improvidently granted intervention (and District Defendants could not rely on their factual allegations) because their affidavits were executed by their parents. *See* Decl. of Parent A, ECF No. 32-1; Parent B, ECF No. 32-2; and Parent C, ECF No. 32-3.

Finally, even if the Court views the student Intervenors' and Girl Plaintiffs' allegations as hearsay, that only goes to the weight and not the admissibility of the evidence at the preliminary injunction stage. *Fed. Trade Comm'n v. Lifewatch Inc.*, 176 F. Supp. 3d 757, 762 (N.D. Ill. 2016).

District Defendants then go on to attack Plaintiffs' use of employment and criminal law and citation to *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) as not establishing the constitutional privacy interest that District Defendants violate in this case. But the citation to *Glucksberg* was obviously referring only to the standards to establish a fundamental right—and District Defendants have not shown that the right to bodily privacy is not rooted deeply in our history and essential to liberty. As previously pointed out, "[g]iven the novelty of the situation in this case—a school-mandated mingling of adolescent girls disrobing with a male inside their locker room, it is helpful to explore the contours of the privacy right as other government actions have impacted it." Plaintiffs' Resp. 22, ECF No. 146.

District Defendants' citation to two justices' concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985), Dist. Resp. 7-8, ECF No. 159, to say that students have a lesser expectation of privacy than the general population is utterly inapposite. *T.L.O.* dealt with searching a girl's purse for drugs, *T.L.O.*, 469 U.S. at 736, not the bodily privacy at issue in girls' intimate facilities. They

go on to cite *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), to argue that public school locker rooms "are not notable for the privacy they afford," *id.* at 657, Dist. Resp. 8, ECF No. 159, but that lack of privacy *is exactly the reason that an anatomical male should not be occupying the girls' locker room*.

District Defendants try to posture *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692 (N.D. Ohio 2005), as allowing an interest in privacy only within an individual stall, pointing out that the "tape recorder was surreptitiously hidden inside of a stall." Dist. Resp. 8 n.2, ECF No. 159. However, the defendant in *Kohler* argued that because "any occupant of the restroom would be able to hear Kohler's activities inside the stall, she had no expectation of privacy as to such sounds." *Kohler*, 381 F. Supp. 2d at 704. But the court rejected that defense, saying that Ms. Kohler's citation of cases "holding that female prison inmates have a particular expectation of privacy around guards of the opposite sex . . . indicate to the Court that it is appropriate to consider that even if Kohler did not expect privacy from other women in the women-only restroom, she reasonably expected her activities to be secluded from perception by men." *Id.* And it bears noting that if District Defendants' argument that privacy interests arise only behind a curtain or inside an individual stall, then there's no palpable reason to exclude the general student and staff population from the common areas of locker rooms and restrooms, yet the District continues to do so.

District Defendants adopt the Magistrate's stance that Girl Plaintiffs who do not want to be exposed to the male student in their midst may simply abandon the room designated for female use and seek privacy elsewhere. Dist. Resp. 9, ECF No. 159. But that only demonstrates that the District Defendants are breaching the duty they willingly assumed of providing sex-specific facilities under 34 C.F.R. §106.33, by demanding that Girl Plaintiffs rescue themselves when their privacy is violated.

Regarding Title IX claims, District Defendants argue that there is no sex discrimination under its Policies "because both males and females are being treated exactly the same." Dist. Resp. 11, ECF No. 159. But when the District acted to advance Student A's asserted interest of being

affirmed as the sex he is not, it could do so only by selecting the girls' facilities; boys' facilities would not serve to "affirm" him as a girl. *See* Decl. Parent A 5, ECF No. 32-1.[5] The consequent violation of Girl Plaintiffs' privacy is certainly not cured if the District multiplies its privacy violations by placing a girl student into a boys' locker room or restroom.

District Defendants also mistake the nature of the irreparable harm inquiry under *Hoop Culture, Inc. v. GAP Inc.*, 648 F. App'x 981 (11th Cir. 2016), which requires only that there be a "substantial parallel[] to previous cases in which irreparable harm has been found." *Id.* at 985 (citation omitted). District Defendants' Policies deny Girl Plaintiffs access to truly private female-only facilities which the District purports to provide under 34 C.F.R. §106.33, and that is "substantially parallel" to failing to provide truly voluntary access to single-sex classes, *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771(S.D.W. Va. 2012); timely access to school athletic opportunities, *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir.2004); and access to a female sports opportunity. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir.1993).

District Defendants further miss the mark by saying that Girl Plaintiffs' irreparable harm for Title IX purposes arises from emotional impacts which "are customarily and routinely compensated through money damages." Dist. Resp.14, ECF No. 159. But it is clear from Girl Plaintiffs' citation to the three foregoing cases that they rest their Title IX harm in the denial of access to facilities that the District established under 34 C.F.R. §106.33, as well as the prospective violations of their constitutional privacy rights occasioned by the District's Policies. Moreover, that emotional distress is compensable by money damages cuts hard against the Intervenor-Defendants' claim for irreparable harm, because their alleged injuries are strictly emotional in nature, and there is no constitutional right to access sex-specific intimate facilities solely for the

[5] The District also suggests that the permissive nature of 34 C.F.R. §106.33 somehow undercuts the sex discrimination claim. But District Defendants have not opened each intimate facility within the District to any and all sexes or genders as they continue to maintain that they are providing sex-designated facilities pursuant to 34 C.F.R. §106.33.

purposes of self-affirmation of a psychological condition. As Girl Plaintiffs have ongoing privacy violations, while Student A's alleged emotional injury may be redressed by damages, injunctive relief should properly issue on behalf of Girl Plaintiffs.

IV. Reply to Federal Defendants' Response to Plaintiffs' Objections to the Report and Recommendation, ECF No. 160 ("Fed. Resp.").

Federal Defendants similarly attack Plaintiffs' irreparable harm, incorrectly stating that it is addressed in a "single factually-unsupported paragraph" relating emotional and dignitary harms and the consequent interference with Plaintiffs' access to education. Fed. Resp. 6, ECF No. 160.[6] Their attack on verifying the Complaint has already been rebutted, and there is nothing "conclusory or "speculative," Fed. Resp. 6, ECF No. 160, about Student A repeatedly using the girls' sex-specific intimate facilities when he admits doing so. Decl. Parent A 3-6, ECF 32-1.

Federal Defendants then quote *Ditton v. Rusch*, 2014 WL 4435928 at *5 (N.D. Ill. Sept. 9, 2014), to say that "injury to constitutional rights does not *a priori* entitle a party to a finding of irreparable harm." But what they don't say is what the next sentence in *Ditton* does say: "What is more, in those cases where courts have found irreparable harm stemming from constitutional harm, the constitutional violations were ongoing." *Id.* And that, of course, is exactly the situation here, where Defendants have inserted a male into intimate female facilities creating an ongoing privacy violation for Girl Plaintiffs seeking privacy pursuant to 34 C.F.R. §106.33.

Like the District Defendants, the Federal Defendants also lay the burden of curing privacy violations on the girls themselves, citing *Orth v. Wisconsin State Employees Union Council*, 2007 WL 1029220 at *2 (E.D. Wis. March 29, 2007) to suggest that Girl Plaintiffs are obligated to explore alternatives, by which they apparently mean that the Girl Plaintiffs must flee the locker

[6] Federal Defendants subtly attack the few months that it took the Plaintiffs to comprehend that the District would not protect their privacy, find counsel, prepare the lawsuit, and file it. Yet the Federal Defendants spent a "over a year" to investigate one student's complaint under Title IX, which according to them has protected gender identity since at least 1989 when *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) was decided. Fed. Resp. 3, 15, ECF No. 160.

room in favor of an individual facility. But by relying on *Orth*, Federal Defendants equate a girl's right to bodily privacy with the monetary cost of *fringe benefits* to union employees. *Id.*[7] *Orth* does nothing to diminish the ongoing irreparable harm of putting a male into girls' locker rooms.

And Federal Defendants reprise the Intervenor-Defendants' error when (excepting only the theory of gender identity) they treat every primary, secondary, and stereotypical aspect of sex as an interchangeable "component," with no single component "favored" to determine what "sex" means in Title IX or 34 C.F.R. §106.33. Fed. Resp. 10-11, ECF No. 160. Instead, gender identity becomes determinative in every instance under the Defendants' view, which unhinges sex—whether one is male or female, of one sex or the other—from the very reason male and female organisms exist: to enable sexual reproduction. So long as one credits that basic scientific fact, then Title IX and 34 C.F.R. §106.33 are unambiguous, and the answer on how to determine "sex" for the purposes of 34 C.F.R. §106.33 is to look to the student's natal sex.

Rehashing their prior briefing, Federal Defendants again argue the "ambiguity" claim which the Supreme Court will soon review in *G.G.*, while at the same time hemming their claim in by quoting *Stanley v. Cottrell, Inc.*:

> As with any question of statutory interpretation, we turn first to the plain language of the statute. In ascertaining the plain meaning of a statute, we "presume that a legislature says in a statute what it means and means in a statute what it says." If the words are unambiguous, our inquiry is complete. But when a statutory provision is susceptible to more than one interpretation, we examine other authorities to determine legislative intent.

784 F.3d 454, 465–66 (8th Cir. 2015) (quotations and citations omitted). From the beginning, Plaintiffs have pointed out that sex is binary and means male and female. *See* Mem. in Supp. of Pls.' Mot. for Prelim. Inj. 5-8, ECF No. 23. In contrast, Defendants' gender identity construct is expressly non-binary and they have yet to show how it is "plausible" to read a non-binary

[7] Federal Defendants have trivialized girls' privacy from the earliest stages of this case, summarily rejecting such concerns about exposing young female students to a "biologically male individual" by saying only "OCR finds the concerns unavailing in this case." Letter of Findings 11, ECF No. 21-10.

continuum into a statute and regulation which expressly use binary terms. Sex in Title IX is expressly an "either-or" proposition (either one sex or the other), not Defendants' "either-or-or" pretense (either one sex or the other or something else), nor the reality of Defendants' true position: that *only* gender identity determines "sex," as shown in Plaintiffs' Objections 12-13, ECF No. 146.

Nor should such an implausible reading be adopted to enforce an interest so far outside the bounds of Title IX. Federal Defendants make the point that a male student who "lives as a girl, dresses and presents as a girl, and who is perceived by others[[8]] to be a girl, cannot reasonably be expected to use the boy's [sic] restroom." Fed. Resp. 14, ECF No. 160. That statement admits that Girl Plaintiffs *are* being discriminated against because of their sex—Defendants selected girls' facilities because Student A is not affirmed as a "girl" by using the boys' restroom. And it reveals that the sole interest for Student A to use communal girls' facilities is to support his psychological state, as individual facilities both provide bodily privacy for Student A and relieve him from perceived burdens incurred by using the otherwise available boys' facilities. But the purpose of Title IX is to eliminate invidious sex discrimination in the provision of educational services, not affirm psychological conditions, however trying they may be.

Federal Defendants nonetheless insist that "'sex' under Title VII encompasses *both* the anatomical differences between men and women *and* gender." Fed. Resp. 15, ECF No. 160 (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)). But again, it is what the Federal Defendants do not say[9] that is far more instructive than what they do say: the very next sentence in *Schwenk* is "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII." *Schwenk*, 204 F.3d at 1202. This shows that gender is being used in *Schwenk* as tantamount to sex stereotyping, which in turn is simply evidence that one is discriminating against the underlying sex classification of "man or woman."

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[8] Just how many "others" the Federal Defendants do not say, but Girl Plaintiffs certainly are not misperceiving Student A's sex.

[9] As manifest earlier by artfully redacting references to human reproductive nature when quoting a dictionary definition of "sex." *See* Pls.' Reply Mem. in Supp. of Prelim. Inj. Mot. 16-18, ECF No. 94.

Federal Defendants then turn to *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) to say "'sex" in the civil rights laws includes "sex as viewed as social rather than biological classes." Fed. Resp. 15, ECF No. 160 (quoting *Smith*, 378 F.3d at 572). That is a startlingly broad proposition—that Courts are to ignore the binary male/female categories clearly intended by Congress in Title IX in favor of a continuum of socially constructed, subjectively discerned "genders."[10] But *Smith* cannot be read so broadly, as the initial appellate opinion included a paragraph reading "[d]iscrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide," which is "the very essence of sex stereotyping." *Smith v. City of Salem*, 369 F.3d 912, 921-22 (6th Cir. 2004), *amended and superseded*, 378 F.3d 566. The paragraph went on to say that "to the extent that Smith . . . alleges discrimination based solely on his identification as a transsexual, he has alleged a claim of sex stereotyping . . . ." *Id.* at 922. But tellingly, the Sixth Circuit soon amended its opinion and excised the foregoing transgender-discrimination paragraph. *Smith*, 378 F.3d 566. That was a prudent amendment, for if Title IX is opened to claims based on as many "genders" as there are perceptions and social constructs, then the straightforward sex-stereotyping analysis from *Price Waterhouse* would become hopelessly muddled. How, for example, would a court know what stereotypes apply to the "gender queer" gender, as Student C claimed to be at one point? The confusion that would arise from Defendants' reading of the law is pragmatic confirmation that *Ulane*, 742 F.2d 1081, is solidly grounded, binding authority on this Court.

In sum, Federal Defendants claim that they "purpose [] to protect transgender students from unlawful discrimination." Fed. Resp. 20, ECF No. 160. But rather than accept the plain and ordinary meaning of "sex" in Title IX, the Federal Defendants supplant "sex" with "gender

[10] Much has gone astray from good intentions: Justice Ginsburg introduced "gender" as a term of art in lieu of "sex" in the 1970s so that her male colleagues would be more likely to think of sex as a noun than a verb when the word came up in nondiscrimination cases. Jeffery Toobin, *Heavyweight*, The New Yorker, March 11, 2013, http://www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg#.

identity" and turn Title IX into a vehicle to affirm a student's self-perception at the cost of violating the Girl Plaintiffs' privacy.

This is a grave misuse of the law, which should be properly enjoined during the pendency of this litigation—particularly when five Supreme Court Justices already weighed the balance of hardships in a very similar case, and acted to preserve sex-specific facilities as 34 C.F.R. §106.33 allows while the Court considers their case. Moreover, construing the law as Plaintiffs urge would enable this Court to avoid the grave constitutional issues created by the Defendants' privacy-pulverizing position. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]."). Plaintiffs thus respectfully request that this Court reject the Magistrate's Report and Recommendation and issue Plaintiffs' requested preliminary injunction forthwith.

Respectfully submitted this the 30th day of November, 2016.

By: /s/ Gary S. McCaleb

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record who are registered users of the ECF system:

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM,	)	
Plaintiffs,	)	
	)	Civil No. _____
v.	)	
GLOUCESTER COUNTY SCHOOL BOARD,	)	
Defendant.	)	

EXPERT DECLARATION OF RANDI ETTNER, Ph.D

PRELIMINARY STATEMENT

1. I have been retained by counsel for Plaintiff as an expert in connection with the above-captioned litigation. I have actual knowledge of the matters stated in this declaration.

2. My professional background, experience, and publications are detailed in my curriculum vitae, a true and accurate copy which is attached as Exhibit A to this report. I received my doctorate in psychology from Northwestern University in 1979. I am the chief psychologist at the Chicago Gender Center, a position I have held since 2005.

3. I have expertise working with children and adolescents with Gender Dysphoria. During the course of my career, I have evaluated or treated between 2,500 and 3,000 individuals with Gender Dysphoria and mental health issues relatedto gender variance. Approximately 33% of those individuals were adolescents. I have also served as a consultant to the Wisconsin and Chicago public school systems on issues related to gender identity.

4. I have published three books, including the medical text entitled “Principles of Transgender Medicine and Surgery” (co-editors Monstrey & Eyler; Routledge, 2007). I have

authored numerous articles in peer-reviewed journals regarding the provision of health care to this population. I have served as a member of the University of Chicago Gender Board, and am a member of the editorial board for the *International Journal of Transgenderism*.

5. I am a member of the Board of Directors of the World Professional Association for Transgender Health (WPATH) (formerly the Harry Benjamin International Gender Dysphoria Association), and an author of the WPATH *Standards of Care* (7th version), published in 2011. The WPATH-promulgated Standards of Care are the internationally recognized guidelines for the treatment of persons with Gender Dysphoria and serve to inform medical treatment in the United States and throughout the world.

6. In preparing this report, I reviewed the materials listed in the attached Bibliography (Exhibit B). I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this report, as additional support for my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein. The materials I have relied upon in preparing this report are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject.

7. In addition to the materials in Exhibit B, I personally met with G.G. and Deirdre Grimm on May 26, 2015, to conduct a clinical assessment of G.G. The evaluation consisted of a clinical interview with, and observation of, G.G.; a subsequent interview with his mother; the administration of psychological testing; and a review of health records from his pediatrician and endocrinologist. I am confident that the opinions I hereafter render based on that assessment are both reliable and valid.

8. In the past four years, I have testified as an expert at trial or deposition in the following matters: *Kothmann v. Rosario*, Case No. 5:13-cv-28-Oc-22PRL (M.D. Fla.); *Doe et al v. Clenchy*, Case No cv-09-201(Me. Super. Ct.)

9. I am being compensated at an hourly rate for actual time devoted, at the rate of $245 per hour for any clinical services, review of records, or report; $395 per hour for deposition and trial testimony; and $900 per day for travel time spent out of the office. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

GENDER IDENTITY AND GENDER DYSPHORIA

10. The term "gender identity" is a well-established concept in medicine, referring to one's sense of oneself as male or female. All human beings develop this elemental internal view: the conviction of belonging to one gender or the other.Gender identity is an innate and immutable aspect of personality that is firmly established by age four, although individuals vary in the age at which they come to understand and express, their gender identity.

11. Typically, people born with female anatomical features identify as girls or women, and experience themselves as female. Conversely, those persons born with male characteristics ordinarily identify as males. However, for transgender individuals, this is not the case.For transgender individuals, the sense of one's self—one's gender identity—differs from the natal, or birth-assigned sex, giving rise to a sense of being "wrongly embodied."

12. The medical diagnosis for that feeling of incongruence is Gender Dysphoria, which is codified in the Diagnostic and Statistical manual of Mental Disorders (DSM-V) (American Psychiatric Association) and the International Classification of Diseases-10 (World Health Organization). The condition is manifested by symptoms such as preoccupation with

ridding oneself of primary and secondary sex characteristics. Untreated Gender Dysphoria can result in significant clinical distress, debilitating depression, and often suicidality.

13. The criteria for establishing a diagnosis of Gender Dysphoria in adolescents and adultsare set forth in the DSM-V (302.85):

A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).

2. A strong desire to be rid of one's primary/and or secondary sex characteristics because of a marked incongruence with one's experienced/ expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

3. A strong desire for the primary and /or secondary sex characteristics of the other gender.

4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

14. The World Professional Association for Transgender Health (WPATH) has established internationally accepted Standards of Care (SOC) for the treatment of people with Gender Dysphoria. The SOC have been endorsed as the authoritative standards of care by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, and the American Psychological Association.

15. In accordance with the SOC, individuals undergo medically-recommended transition in order to live in alignment with their gender identity. Treatment of the condition is multi-dimensional and varies from individual to individual depending on their needs, but can consist of social role transition, hormone therapy, and surgery to alter primary and/or secondary sex characteristics to help the individual live congruently with his or her gender identity and eliminate the clinically significant distress caused by Gender Dysphoria.

16. Social role transition is a critical component of the treatment for Gender Dysphoria.Social role transition is living one's life fully in accordance with one's gender identity.That typically includes, for a transgender male for example, dressing and grooming as a male, adopting a male name, and presenting oneself to the community as a boy or man. Social transition is crucial to the individual's consolidation of his or her gender identity. The social transition takes place at home, at work or school, and in the broader community. It is important that the individual is able to transition in all aspects of his or her life. If any aspect of social role transition is impeded, however, it undermines the entirety of a person's transition.

17. In prior decades before Gender Dysphoria was well-studied and understood, some considered it to be a mental condition that should be treated by psychotherapy aimed at changing the patient's sense of gender identity to match assigned sex at birth. There is now a medical consensus that such treatment is not effective and can, in fact, can cause great harm to the patient.

TREATMENT OF GENDER DYSPHORIA IN ADOLESCENTS AND HARMFUL EFFECTS OF EXCLUSIONS FROM SCHOOL RESTROOMS

18. As with adults, treatment for Gender Dysphoria in adolescents frequently includes social transition and hormone therapy, but genital surgery is not permissibleunder the WPATH Standards of Care for persons who are under the legal age of majority. Hormone therapy has a

profound virilizing effect on the appearance of a transgender boy. The voice deepens, there is growth of facial and body hair, body fat is redistributed, and muscle mass increases.

19. As with adults, for teenagers with Gender Dysphoria, social transition is a critical part of treatment.And as with adults, it is important that the social transition occur in all aspects of the individual's life. For a gender dysphoric teen to be considered male in one situation, but not in another, is inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child. The integration of a consolidated identity into the daily activities of life is the aim of treatment. Thus, it is critical that the social transition is complete and unqualified—including with respect to the use of restrooms.

20. Access to a restroom available to other boys is an undeniable necessity for transgender male adolescents. Restrooms, unlike other settings (e.g. the library), categorize people according to gender. There are two, and only two, such categories: male and female. To deny a transgender boy admission to such a facility, or to insist that one use a separate restroom, communicates that such a person is "not male" but some undifferentiated "other," interferes with the person's ability to consolidate identity, and undermines the social-transition process.

21. When transgender adolescents are not permitted to use restrooms that match their appearance and gender identity, the necessity of using the restroom can become a source of anxiety. The Chicago Gender Center physicians clinically report that youngsters often avoid drinking fluids during the day and hold their urine for the entire school day, making them prone to developing urinary tract infections, dehydration, and constipation. Anxiety regarding use of the restroom also makes it difficult for students to concentrate on learning and school activities.

22. Transgender adolescents like G.G. are particularly vulnerable during middle adolescence. Middle adolescence, approximately 15-16 years, is the period of development when

a teenager becomes extremely concerned with appearance and one's own body. This stage is accompanied by dramatic physical changes, including height and weight gains, growth of pubic and underarm hair, and breast development and menstruation in girls. Boys will experience growth of testicles and penis, a deepening of the voice and facial hair growth. There is an increased effort to make new friends, and an intense emphasis on the peer group. "Fitting in" is the overarching motivation at this stage of life.

23. While peers are developing along a "normal" and predictable trajectory, however, transgender teens like G.G. feel betrayed by the body, anxious about relationships, and frustrated by the challenges of a "non-normative" existence. At the very time of life when nothing is more important than being part of a peer group, fitting in, belonging, they may conspicuously stand out. Research shows that transgender students are at far greater risk for severe health consequences – including suicide – than the rest of the student population, and more than 50% of transgender youth will have had at least one suicide attempt by age 20.

24. If school administrators amplify this discomfort by sending a message that the student is different than his peers or shameful, they stigmatize nascent identity formation, which can be devastating for the student. Studies show that external attempts to negate a person's gender identity constitute *identity threat*. Developing and integrating a positive sense of self—identity formation—is a developmental task for all adolescents. For the transgender adolescent, this is more complex, as the "self" violates society's norms and expectations. Attempts to negate a person's gender identity – such as excluding a transgender male adolescent from the restrooms used by other boys – challenge this blossoming sense of self and pose health risks, including depression, post-traumatic stress disorder, hypertension, and self-harm.

25. School administrators and other adults play a critical role in "setting the tone" for whether a student will be stigmatized and ostracized by peers. Excluding a transgender adolescent from the same restroom as his peers puts a "target on one's back" for potential victimization and bullying. When adults—authority figures—deny an adolescent access to the restroom consistent with his lived gender, they shame him—negating the legitimacy of his identity and decimating confidence. In effect, they revoke membership from the peer group.

26. In a study of transgender youth age 15 to 21, investigators found school to be the most traumatic aspect of growing up. Experiences of rejection and discrimination from teachers and school personnel led to feelings of shame and unworthiness. The stigmatization they were routinely subjected to led many to experience academic difficulties and to drop out of school

27. Until recently, it wasn't fully understood that these experiences of shame and discrimination could have serious and enduring consequences. But it is now known that stigmatization and victimization are some of the most powerful predictors of current and future mental health problems, including the development of psychiatric disorders. The social problems these transgender teens face at school actually create the blueprint for future metal health, life satisfaction, and even physical health. A recent study of 245 gender non-conforming adults found that stress and victimization at school was associated with a greater risk for post-traumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality in adulthood.

ASSESSMENT OF G.G.

28. It is my professional opinion that the Gloucester County School Board's policy of excluding G.G. from the communal restroom used by other boys and effectively banishing him to separate single-stall restroom facilities is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm.

29. As noted above, I personally met with G.G. on May 26, 2015, to conduct a clinical assessment. G.G. meets the criteria for Gender Dysphoria in adolescents and adults (302.85), in the Diagnostic and Statistical Manual of Mental Disorders, fifth edition; (F64.1) in the International Classification of Diseases. Indeed, G.G. has a *severe* degree of Gender Dysphoria. By adolescence, children with G.G.'s severe degree of Gender Dysphoria are so dysphoric they cannot even attempt to live as female. Such individualsseek hormones and, when they are old enough, surgeries that can offer them the only real hope of a normal life. As an adolescent, medically necessary treatment for G.G. currently includes testosterone therapy and social transition in all aspects of his life – including with respect to use of the restrooms. Untreated, many of these youngsters commit suicide.

30. As a result of the School Board's restroom policy, however, G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his "otherness," undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

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.

Executed on June 2, 2015.

By: _____

Randi Ettner Ph.D.