IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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, v. 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.	No. 1:16 CV 4945 The Hon. Jorge L. Alonso, *District Court Judge*

INTERVENOR-DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017)

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I. INTRODUCTION

Plaintiffs spend 11 pages of their 15-page supplemental brief arguing that *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017)—a unanimous decision of the Seventh Circuit rendered less than two months ago, in which *en banc* review was denied without a dissenting vote—lacks any "authority as an appellate decision." Pl. Br. at 4. According to Plaintiffs (*id.* at 11), "the *Whitaker* panel erred" in every aspect of its reasoning. Plaintiffs say the panel "misinterprets" the *Price Waterhouse* decision; "improperly conflates" constitutional privacy and the tort of invasion of privacy; and "illogically confuses" gender identity and sex. *Id.* at 1. They conclude that the result of all these mistakes is "an astonishingly wrong" analysis that "undercuts [*Whitaker's*] worth even as a persuasive authority." *Id.* at 12, 15. Plaintiffs concede (*id.* at 5-6) that other courts of appeals have agreed with the Seventh Circuit; but they prefer to rely on a dissenting opinion of Judge Niemeyer in the Fourth Circuit. *Id.* at 12-13; *see also id.* at 6-7 (relying on a concurring opinion of Judge Pryor in the Eleventh Circuit for the proposition that Title VII does not protect against sexual orientation discrimination—a position rejected by the *en banc* Seventh Circuit in *Hively v. Ivy Tech Community. College of Indiana*, 853 F.3d 339 (7th Cir. 2017)). Plaintiffs continue to rely on *Ulane* for the proposition that "sex" means "the categories of male and female" based on reproduction (Pl. Br. at 15, 12), even though *Whitaker* (858 F.3d at 1047) says that this narrow definition of sex, taken only in *dicta*, has been superseded by *Price Waterhouse*.

These arguments, of course, are absurd. The recent Seventh Circuit decisions in *Whitaker* and *Hively* are precedent in this circuit—authoritative statements of the law which are binding on this Court and on the Seventh Circuit itself. *See Rutan v. Republican Party of Illinois*, 848 F.2d 1396, 1405 n.3 (7th Cir. 1988), *aff'd in part, rev'd in part*, 497 U.S. 62 (1990); *Matter of Skupniewitz*, 73 F.3d 702, 705 (7th Cir. 1996). However mistaken Plaintiffs might think the

Seventh Circuit's interpretation of the law to be—and we summarize below why the Seventh Circuit got it right—this Court and the court of appeal are obliged to follow precedent. The fact that Plaintiffs find it necessary to devote so much of their brief to arguments that they know this Court *cannot* accept shows the weakness of their position. *Whitaker* and *Hively* are binding and confirm the correctness of the Magistrate Judge's decision.[1]

Plaintiffs' half-hearted assertion that *Whitaker* is factually distinguishable fares no better. The school district in *Whitaker* defended its illegal policy of discrimination, Plaintiffs concede, with *exactly* the same argument that plaintiffs urge here: that allowing transgender students to use the restrooms of the gender with which they identify "would 'infringe[] upon the privacy rights of other students with whom he or she does not share biological anatomy.'" Pl. Br. at 1 (quoting *Whitaker*, 858 F.3d at 1052). Intervenor-Defendants have shown in prior briefs and an expert affidavit that Plaintiffs' "biological" argument is scientifically spurious, but for present purposes what matters is that these same arguments were made by the school district in *Whitaker* and did not prevail. All that remains is Plaintiffs' contention that restrooms (involved in *Whitaker*) and locker rooms should be treated differently under Title IX and Equal Protection. But *Whitaker's* legal analysis of sex stereotyping applies equally to locker rooms as restrooms, and District 211 has ensured that it is as true here as it was in the Kenosha school district that students "who have true privacy concerns" are able to utilize screened changing facilities: no student concerned about privacy need ever change in an exposed area. *See Whitaker*, 858 F.3d at

[1] Plaintiffs stated in their Motion for Supplemental Briefing that "[t]he District 211 Defendants and the Intervenor-Defendants [did] not oppose [their] motion." Dkt. 176 at 4. Plaintiffs misstated Intervenor-Defendants' full position. Intervenor-Defendants do not believe supplemental briefing for *Whitaker* is necessary for this Court to evaluate and affirm the Magistrate Judge's decision, but wanted the opportunity to respond on the same timeline as District 211 if the Court allowed Plaintiffs' motion to submit supplemental briefing.

1052. *Whitaker* is on all fours and requires that this Court reject Plaintiffs' plea for a preliminary injunction.

II. REFUSING TO ALLOW TRANSGENDER STUDENTS TO USE GENDER-APPROPRIATE RESTROOMS AND LOCKER ROOMS WOULD BE SEX STEREOTYPING IN VIOLATION OF *PRICE WATERHOUSE*—AS THIS CIRCUIT NOW CONCLUSIVELY RECOGNIZES.

The Seventh Circuit in *Whitaker* correctly held that refusing to allow transgender students to use gender-appropriate facilities is sex stereotyping in violation of Title IX. As Intervenor-Defendants explained in their Brief in Opposition to Plaintiffs' Response to the Magistrate Judge's Report and Recommendation (Dkt. 158 at 9-17), the Supreme Court made clear in *Price Waterhouse* that any definition of "sex" is not limited to a person's sex assigned at birth, chromosomal make-up, or reproductive nature. *Price Waterhouse* recognized that employers discriminate "because of sex" when they make adverse employment decisions based on sex-specific stereotypes, such as the notion that "a woman cannot be aggressive, or that she must not be." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). In holding that protection from discrimination "because of . . . sex" includes sex stereotyping, *Price Waterhouse* established that the definition of "sex" extends beyond any "biological" differences among people. Rather, the "simple test" for discrimination because of "sex" is "treatment of a person in a manner which but for that person's sex would be different." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

Whitaker is therefore a straightforward application of *Price Waterhouse*. In *Whitaker*, the Seventh Circuit considered whether a transgender student was likely to succeed on the merits of his Title IX claim. The court reasoned that, under *Price Waterhouse*, discrimination against transgender individuals is by its very nature sex discrimination, since "[b]y definition, a

transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048. Thus,

> [a transgender boy] can demonstrate a likelihood of success on the merits [by] alleg[ing] that the School District has denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.

Id. at 1049. On this basis, and upon weighing the other preliminary-injunction factors, the court affirmed a preliminary injunction requiring the Kenosha Unified School District to provide the plaintiff use of the boys' restroom. *Id.* at 1055.

As *Whitaker* makes clear in the context of Title IX, the Seventh Circuit has now conclusively rejected the notion that "sex" is limited to the "traditional" concept of being male or female. Like the plaintiffs in this case, the Kenosha Unified School District relied on *Ulane* to argue that "sex" is a narrow, biological concept. *Id.* at 1047 (citing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)). As *Whitaker* points out, however, the term "biological" appears nowhere in Title IX. *Id.* at 1047. Instead, *Price Waterhouse* and a long line of federal precedent make clear that the definition of "sex" includes characteristics such as gender identity and an individual's conformity (or lack of conformity) with societal expectations regarding gender roles. *See id.* at 1048-49 (collecting cases). Most recently, in *Hively*, upon vacating the panel opinion (which had reluctantly followed *Ulane*), the Seventh Circuit rejected *en banc* *Ulane*'s reasoning that discrimination "based on sexual orientation is somehow distinct from sex discrimination." *Hively*, 853 F.3d at 341. Thus, as *Whitaker* confirmed, *Ulane* cannot "foreclose . . . transgender students from bringing sex-discrimination claims based upon a theory of sex-stereotyping as articulated [by *Price Waterhouse.*]" *Whitaker*, 858 F.3d at 1047.

Notwithstanding Plaintiffs' protestations, *Whitaker*'s interpretation of the sex discrimination statutes was undoubtedly correct. Not only were the holdings of *Whitaker* required by the controlling precedent of *Price Waterhouse* and *Hively*, every other federal appellate court that has considered sex discrimination claims brought by transgender people post-*Price Waterhouse* has reached the same conclusion as the *Whitaker* court. *See Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1199-1203 (9th Cir. 2000); *see also Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). In any event, this Court is bound by *Whitaker* regardless of its merits. *See, e.g., Villasenor v. Indus. Wire & Cable, Inc.*, 929 F. Supp. 310, 313 (N.D. Ill. 1996) ("[W]e are bound by Seventh Circuit precedent unless and until a subsequent decision by that court or the Supreme Court undermines its holding.").

III. *WHITAKER* IS FACTUALLY INDISTINGUISHABLE.

Plaintiffs half-heartedly contend that *Whitaker* is distinguishable, even though they concede that the school district in *Whitaker* argued—like Plaintiffs do in this case—that application of Title IX and the Equal Protection Clause depends on the "sex" a person is assigned at birth, not the gender with which a person identifies. Plaintiffs also assert that the school district in *Whitaker* "put on only minimal evidence of privacy complaints" (Pl. Br. at 1), even though Plaintiffs' complaints here are founded on the same conjecture and abstraction. They also say that *Whitaker* is distinguishable because locker rooms were not at issue in that case, but Plaintiffs overlook that private accommodations are available to all students in the locker rooms. None of Plaintiffs' arguments have any merit.

A. Plaintiffs' entire brief rests on the false distinction between sex and gender, which the court in *Whitaker* squarely rejected.

Plaintiffs assert sex is "grounded in the fact of humans reproducing sexually." Pl. Br. at 12. They say that "[i]f one cannot say that a male is a male as a fact of human reproductive biology, the referent for 'masculinity' has ceased to exist." *Id.* at 13 n.5. The school district in *Whitaker* defended its illegal policy of discrimination, Plaintiffs concede, with *exactly* the same argument that Plaintiffs urge here: that allowing transgender students to use the restrooms of the gender with which they identify "would 'infringe[] on the privacy rights of other students with whom he or she does not share biological anatomy.'" *Id.* at 1 (quoting *Whitaker*, 858 F.3d at 1052). In other words, the defendant school district in *Whitaker* argued that application of Title IX and the Equal Protection Clause depends on the "sex" a person is assigned at birth, not the gender with which a person identifies; and that privacy is violated when use of school restrooms crosses that "biological" line. *Whitaker* rejected that argument and requires that this Court do so here.

Furthermore, Plaintiffs' argument that "human reproductive biology" is the only marker of "sex" is wrong. As Intervenor-Defendants established in prior briefs supported by an expert affidavit from Dr. Robert Garofalo, transgender girls are girls, and transgender boys are boys. *See* Dkt. 79-3. "Gender identity" refers to one's sense of self as male or female or something else and is not unique to transgender individuals, but is a fundamental part of being human. Dkt. 79-3 ¶ 12. Medical research and clinical standards firmly establish that gender identity is a core part of each person's physical and mental makeup. Clinical standards also recognize that gender identity is innate and that in order to thrive, transgender people must live their lives in a way that is consistent with their gender identity. Many children develop a strong sense of gender identity at a young age and evidence strongly suggests that gender identity has a strong biological basis. *Id.*

¶¶ 12, 14. Research has shown that the medically appropriate criteria for assigning an individual's sex, when such assignment is necessary, is gender identity. *Id.* ¶¶ 19-22. Using chromosomes, hormones, internal reproductive organs, external genitalia, or secondary sex characteristics to override gender identity for purposes of classifying someone as male or female is not supported by current medical literature or clinical standards. *Id.* ¶ 21.

B. *Whitaker* confirms that Plaintiffs cannot succeed on the merits of their Constitutional privacy claim.

Plaintiffs' factual allegations do not implicate any fundamental right protected by the Due Process Clause. As the Government explained in its response brief to Plaintiffs' objections to Magistrate Judge Gilbert's report and recommendation (*see* Dkt. 160 at 19-22), Plaintiffs' allegation that the Federal Defendants and District 211 have violated students' fundamental right to privacy "in their unclothed bodies" and their right "to be free from government-compelled risk of intimate exposure to the opposite sex" (Compl. ¶ 393) fails to narrowly and accurately define the interest that they actually seek to vindicate. Instead, as Magistrate Judge Gilbert recognized, "Plaintiffs' constitutional claim posits this question: do high school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different from theirs?" Dkt. 134 at 45. There is no such fundamental right.

Plaintiffs say that *Whitaker* is factually distinguishable because it involved use of restrooms rather than locker rooms. Pl. Br. at 2. But *Whitaker*'s legal analysis of sex stereotyping applies equally to locker rooms and restrooms. *See* 858 F.3d at 1049 ("A policy that requires an individual to use a bathroom that does not conform to his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."). And District 211 has ensured that it is as true here as it was in the Kenosha school district that students "who have true privacy concerns" are able to utilize screened changing facilities: no student concerned

about privacy need ever change in an exposed area. District 211 made available private shower facilities for students who wish to use them. Dkt. 78-1 at 3-4. District 211 also agreed "to take steps to protect the privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker rooms," which any student may use. *Id.* at 3. Accordingly, the policy does *not* mandate "forced observations or inspections of the naked body" by anyone, let alone by "a member of the opposite sex." *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994). Plaintiffs' contention that the Agreement "*[f]orc[es]* minors to risk exposing their bodies to the opposite sex" and otherwise "*obligat[es]* adolescent children . . . to share intimate facilities with a member of the opposite sex" is simply untrue. Dkt. 146 at 19 (emphasis added). Plaintiffs fail to explain why, in these circumstances, the presence of a transgender student in the restroom or locker room would implicate constitutional privacy interests.

Plaintiffs also attempt to distinguish *Whitaker* by arguing that the school district in *Whitaker* "put only minimal evidence of privacy complaints—specifically, a single complaint lodged by a parent." Pl. Br. at 1. As *Whitaker* recognizes, the "speculative" allegation that a student or parents may suffer harm—absent evidence that the present of a transgender student "has actually caused an invasion of any other student's privacy"—is insufficient to establish a violation of the right to privacy. *See Whitaker*, 858 F.3d at 1054. Plaintiffs' complaints here are similarly based on "sheer conjecture and abstraction." *Whitaker*, 858 F.3d at 1052. As Magistrate Judge Gilbert observed, "Plaintiffs do not allege that Girl[] Plaintiffs have stopped going to physical education class, quit an extracurricular activity, received lower grades, or struggled to focus during class." Dkt. 134 at 75. Plaintiffs cannot provide the "who, what, where, when, why, and how" of their alleged injuries, and could not do so because they successfully opposed

discovery on those issues and failed to submit affidavits or other evidence establishing those alleged facts. *See* Dkt. 146 at 28–29.[2]

C. Intervenor-Defendants would be irreparably harmed if they were forced to use facilities that do not align with their gender identity.

"Gender dysphoria" is the medical diagnosis for the incongruence and accompanying distress when an individual's gender identity differs from their birth-assigned sex. Dkt. 79-3 ¶ 15. Untreated gender dysphoria can result in significant clinical distress, debilitating depression, and suicidality. *Id.* ¶ 15. The medically accepted treatment for gender dysphoria must include alleviating distress through supporting outward expressions of the person's gender identity. *Id.* ¶ 18. It is critical that transgender children access this medically necessary care and live their lives as the boys and girls they know themselves to be—including their use of restrooms, locker rooms, and other spaces and activities typically separated by sex. *Id.* ¶¶ 23-29. Forcing Intervenor-Defendants to use facilities that do not align with their gender identity would be disruptive to their medically necessary care and cause them irreparable harm. The court in *Whitaker* agrees.

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[2] Plaintiffs claim that in contrast to *Whitaker*, "bodily privacy claims are the very genesis" of this case. Relying on allegations in their Complaint, Plaintiffs cite "fifty-one families—including sixty-three district students and seventy-three parents—plus the expressive association Students and Parents for Privacy, [who] expressly rais[e] bodily privacy claims." Pl. Br. at 2 (citing Compl. at 7). They also cite to instances where Girl Plaintiffs complained of sharing a locker room with Student A. *Id.* at 2-3. Plaintiffs rely on facts alleged in their Complaint in an attempt to distinguish this case from *Whitaker*, even though they represented to the Court that discovery in this case to establish "who told whom what" is not necessary because "[w]ho has seen whom naked is irrelevant to the[ir] claims." *See* Dkt. 50 at 2. Plaintiffs argued that they are posing questions of law that "are not fact-intensive" (*id.* at 4), that any information regarding specific interactions "is simply not going to be helpful to the Court in deciding the preliminary injunction motion", and that the Court only needs to know that the School District's "policy allows a biological student into a locker room and restroom." 6/9/16 Tr. at 18 (attached as Exhibit 1). Plaintiffs cannot have it both ways. Plaintiffs cannot concurrently argue that they present only questions of law that do not warrant discovery, while at the same time claiming unspecified instances where Girl Plaintiffs objected to sharing a locker room with Student A. In any event, Plaintiffs' allegations in their Complaint based on "sheer conjecture and abstraction" are insufficient to establish a violation of the right to privacy. *Whitaker*, 858 F.3d at 1052.

See Whitaker, 858 F.3d at 1045 ("These experts opined that use of the boys' restrooms is integral to Ash's transition and emotional well-being.").

For the Intervenor-Defendants here, before Student B came out as transgender, he suffered from serious depression and anxiety, was often withdrawn and uncommunicative, had difficulty sleeping, and exhibited self-harming behaviors. Dkt. 32-2 ¶ 9. But since transitioning, Student B has been visibly happier, more confident, and more comfortable in his everyday life. *Id.* ¶ 10. Student C's transition to living his life as a boy has resulted in his becoming more outgoing and confident, more social, less apt to hide in his room, and a lot happier and carefree. Dkt. 32-3 ¶ 9. Students B and C will suffer significant discomfort, embarrassment, and psychological harm if they are unable to use gender-appropriate restrooms. Dkt. 32-2, ¶¶ 19–21; Dkt. 32-3, ¶¶ 10–12. Forcing Student C to use a single-use restroom or to dress apart from the other boys would separate him from the other students and send him the message that he is different and should be ashamed of who he is. Dkt. 32-3 ¶ 10.[3]

IV. CONCLUSION

For the reasons stated above, Intervenor-Defendants urge the Court follow *Whitaker* and adopt the Report and Recommendation.

Dated: July 26, 2017

Respectfully submitted,

/s/ Britt M. Miller

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[3] Student A graduated from Fremd High School in May 2017. During the time that Student A was allowed full access to the girls' locker room at school, she was noticeably happier, more confident and more comfortable going to school. Student A talked about her access to the locker room making a big difference in everyone's acceptance of her at school, as it signaled to others that Student A should be treated equally with other girls. Dkt. 32-1 ¶ 19.

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF EDUCATION, et al., Defendants.	No. 16 C 4945 Chicago, Illinois June 9, 2016 11:11 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. JEFFREY T. GILBERT, MAGISTRATE JUDGE

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THE CLERK: 16 CV 4945, Students and Parents for Privacy, et al., versus United States Department of Education, et al., for motion hearing.

THE COURT: Okay. Good morning. So for my edification, could we start to my left, your right, so that I could write your names down in order rather than how you would choose to do otherwise.

09:53:44

MS. SHI: Good morning. Linda Shi of Mayer Brown for the intervenor defendant.

09:55:37

THE COURT: Okay. How do you spell Shi?

MS. SHI: S-h-i.

MS. HAMMARGREN: And Laura Hammargren, H-a-m-m-a-r-g-r-e-n, from Mayer Brown also for the intervenor defendant.

09:56:54

MR. BREEN: Good morning, Your Honor. Peter Breen on behalf of the plaintiffs from the Thomas More Society.

MR. TEDESCO: Jeremy Tedesco on behalf of the plaintiffs.

MR. WARNER: Michael Warner on behalf of District 211.

09:57:47

MS. SMITH: Jennifer Smith also on behalf of District 211.

MS. SCOTT: Sally Scott on behalf of District 211.

THE COURT: And on the phone we have?

MS. CROWLEY: (Via telephone) Good morning, Your Honor. This is Megan Crowley from the Department of Justice on

09:58:03

behalf of the federal defendants.

MR. LaRUE: (Via telephone) Good morning, Your Honor. This is Joe LaRue from Alliance Defending Freedom on behalf of the plaintiffs, and I just want to thank you for making it
09:58:35 possible for us to attend by telephone.

THE COURT: Yes, you're more than welcome. I wanted to do this so you didn't have to be sitting there in your bath robe at 7:00 o'clock in the morning or something on a 9:15 call. So I'm glad that you're able to participate.

09:58:58 Hold on for one sec.

Okay. So good morning, everybody. I have one prefatory comment directed toward plaintiffs. So in the room, it's Mr. Breen and Mr. Tedesco.

MR. TEDESCO: Yes.

09:59:38 THE COURT: Rule 1, even before Federal Rule of Civil Procedure 1, spell the judge's name right. So you've been in front of Judge Alonso, and that's phonetic. It's good, although he could be z-o or s-o so that's confusing, but you guys got it right.

10:00:26 I'm Jeffrey Gilbert. So I'm the r-e-y Jeffrey, not the e-r-y Jeffery. So anyway for the future, I take no offense; I just am starting this really on a light note. But there are people, and I have no -- I don't hold anything against them, who spell their names r-e-y, and there are
10:01:13 Geoffreys that do it G-e-o-f-f-r-e-y. I happen to do it

J-e-f-f-r-e-y, not because that was my choice, but that was my parents. So in honor of my parents, get my name right. Okay?

MR. TEDESCO: We will from this point forward. I apologize, Your Honor.

10:01:56 THE COURT: No problem, no even need for an apology. That's quite all right.

Okay. More substantively, I have now had a chance to look at the district's limited, quote-unquote, limited focused discovery, which is the way it was characterized the last time

10:02:40 you were here, and also the plaintiffs' opposition in the form of your motion for a protective order.

When I left the bench last time -- and I should say on the phone, before I go any further, I think one of my law clerks who is working from home today is also on the home, just

10:03:22 for full disclosure.

Is that right, Katie? I guess not. One of my law was going to --

THE CLERK: I'm sorry, Judge. Pardon me.

THE COURT: Oh, okay. I just wanted to make sure you

10:04:08 were on the line, too. All right?

THE CLERK: Yes, I am on the line.

THE COURT: Okay. I just was letting these people know that.

THE CLERK: I had you on mute.

10:04:33 THE COURT: That's fine. I just wanted them to know

that there was another participant on the call.

THE CLERK: I identified myself when -- oh, but not for people in the courtroom. Yes, I am here listening.

THE COURT: Okay. Bye.

10:05:05 THE CLERK: Bye.

THE COURT: Anyway, when I left the courtroom last time and realized that what I had said was in an effort to accommodate plaintiffs' requests for quick movement that I was going to get a brief from you yesterday and have a hearing

10:05:20 today, I thought: Are you crazy?

But I don't think I was, and I want you to know that I've read everything you submitted to me. I read the district's discovery. I read your motion for a protective order. I've since had an opportunity to go back and look again

10:05:57 at what had been filed, the complaint and the preliminary injunction motion and all that stuff. So I feel good that I'm kind of well-versed in where we are.

I guess what I'd like to do is tell you where I am, and I'd like to tell the district where I am because, frankly,

10:06:28 my inclination is to grant the motion for a protective order. What I'd like to do is tell you why and then listen to what you have to say and see whether or not we need any further proceedings or not, so that you're not speaking to a cold bench, you know, and you don't know what I'm thinking and also

10:07:10 because, although I don't intend to do this all the time, I do

think getting a ruling on this sooner rather than later, given the briefing schedule we've set and where we're going, is not a bad thing to do.

So here's where I am. First of all, I looked at your discovery. This is not fault or anything, but I don't view it as kind of, quote-unquote, limited focused discovery. It's not everything in the world that you might want to discover in the case. Sometimes when lawyers put pen to paper -- and I was one of those people -- sometimes it's hard to stop. So I'm not criticizing; it just is. There's a lot of interrogatories and a lot of subparts.

10:07:30

10:08:06

Would I like to know the answers to all of the questions you're asking if I were deciding this case on the merits? Yes, but it is more -- it is very merits based, and I do understand that your hook on this is that this is necessary for you to fully vet and address probability of success on the merits and irreparable harm in the context of the preliminary injunction proceeding that we're in.

10:08:37

So as I said, would I want those answers if this case were being tried on the merits? Yes. Would you be entitled -- well, I'm not even going to rule on that, but I get why you want the answers to those questions.

10:09:07

The question for me is do I need the answers in order to decide the preliminary injunction motion, which is really the first issue that we're here on, and I'm not sure I do.

10:09:32

Okay? Here's why.

First of all, the plaintiffs say I don't need those answers. Okay? It's the plaintiffs' case, and the plaintiffs set the table in the context of their preliminary injunction motion. It's their burden. It's the plaintiffs' burden to come forward and convince the Court that they are entitled to the preliminary injunction that they're seeking. The way they frame the case at the preliminary injunction stage, they say we don't need -- the Court doesn't need answers to these questions and, instead, the way they framed the case, the Court and the defendants and potentially the intervenors can address the issues that the Court needs to decide without extensive discovery.

You know, in particular, the plaintiffs say in their response -- in their motion for a protective order or in their memorandum in support of the motion for protective order which is ECF document number 50 that the preliminary injunction motion places before the Court two questions of law related to the activities of the district, and this is at page 3. They say two, but it's really three questions. Okay?

The first is: Does letting a biological male use the girl's locker rooms and restrooms, and so subjecting the girl plaintiffs to the risk -- you know, I pause on the risk because that's the way the plaintiffs focus it -- of compelled exposure of their bodies to the opposite biological sex, violate the

girl plaintiffs' constitutional right to privacy?

So that's the way they characterized the first question that they're dealing with here, and that is consistent with their motion for preliminary injunction and the memorandum in support.

10:12:32

The second question they say is: Does letting a biological male use these private female facilities -- and I guess I would focus on letting a biological male because the policies of the district allow that and the locker room agreement allows it -- does that create a hostile environment for the girl plaintiffs in violation of Title IX?

10:13:11

And although this is a run-on sentence in the plaintiffs' motion, I really think it's a separate question, which is the third question: Does offering the girl plaintiffs incomparable facilities -- and by that I take it as not comparable facilities as opposed to incomparable, meaning they're the most wonderful facilities in the world -- not comparable facilities as compared to boy students violate Title IX?

10:13:49

So those are the issues that the plaintiffs are framing that they want the Court to decide on the preliminary injunction motion, and they say that in large part a lot of the issues that underlie these are not necessarily disputed.

10:14:26

I mean, the way the plaintiffs phrase the issues, again, it's the plaintiffs' motion. They set the table. It's

10:14:59

their burden. Given the way they framed the issues and what needs to be decided, given that this is an expedited proceeding, given that plaintiffs are correct that normally in preliminary injunction proceedings a lot of information may
10:15:30 come in that doesn't necessarily meet every single admissibility standard that we would demand at trial, but it's kind of a quick look, if you will, as to whether or not, you know, all the factors, you know, all the irreparable harm, probability of success on the merits, inadequate remedy at law,
10:16:03 all those things are met, you know, the plaintiffs to some extent are entitled to frame what they would like.

Now, there are often proceedings on preliminary injunctions where plaintiffs come in and say: Before I put on my case for the preliminary injunction, before I file my brief,
10:16:36 I want discovery. You know, in a trade secret case, I want to depose the people who allegedly stole my trade secrets. I want the defendants to produce their computers. I want to make sure of all this stuff.

That's not this case now. The plaintiffs are coming
10:17:02 in and saying: This is what I'm asking for and this is how I phrase it, and I want to present the case in this way to the Court and I want the defendants to respond to the case in this way.

So, you know, framed in this way, plaintiffs say the
10:17:20 defendants don't need the discovery that they're asking for,

interrogatories, to respond to the plaintiffs' preliminary injunction motion, and plaintiffs conversely don't need any discovery in order to put their position in front of the Court.

So my thinking from looking at all this is I agree at this stage. All right? The only caveat is that if I proceed with this case and I believe that I disagree with what I just said in some way, I mean, I suppose I could adjust it. But right now we've got a briefing schedule in which we're supposed to get the defendants' response by a certain date, plaintiffs' reply, and if plaintiffs are consistent with what they're saying and if defendants meet what plaintiffs are saying, I think that I can address plaintiffs' arguments without a lot of discovery.

The second reason is a practical and procedural reason, and that's once we start down this path of, quote-unquote, limited discovery, now I've seen what the district means by limited discovery. Again, I'm not casting any aspersions, you know. I know how interrogatories get drafted, and I'm not -- you know, there can always be another subpart. There can always be something that you're asking for.

But if we get to the point of saying, and I toyed with the idea of saying, well, certainly certain interrogatories could be asked, ones that are focused not on -- that are, you know, some of the factual allegations or something. But if the plaintiffs don't answer those as the defendants want, then you

meet and confer. Then you have a motion to compel. Then maybe somebody says: Well, I really need the depositions of these people.

Pretty soon, we're really merging the preliminary injunction phase of this case into the merits phase of the case. If the case was here on consent on all fours, I still don't think I would want to do that. Okay? However, you know, it makes it a little bit different. But right now and in view of the posture of this case as it is currently on referral, I haven't seen any limited consent to the injunction, and I know we have intervenors waiting so, you know, they would have to weigh in on that potentially, too.

You've got lots of procedural -- I mean, even now, for example, if the district disagrees with my ruling on whether or not this discovery is necessary for me to decide the preliminary injunction, even though it's a discretionary ruling and even though the preliminary injunction is in front of me and even though I'm saying I don't need that, you technically have the ability to appeal it to Judge Alonso because the case is on referral.

So, you know, that continues to elongate, complicate, and in some ways -- in ways that I'm not sure are very helpful. So I'm not inviting an appeal, but I'm just saying that in the current procedural posture of the case, given the way plaintiffs have framed it, the types of discovery you want, and

where I think we need to go, as long as I put a marker down with respect to my caveat that as I look at this more carefully or get under the hood a little bit more I can adjust if I need to, my inclination is to grant the motion for protective order and move forward.

10:22:40

So that's a long way of saying that's what I've been thinking, Mr. Warner, Ms. Smith, Ms. Scott, and if you want to say anything or push me in some way, I mean, I am fine with interacting. If you tell me something that I take a pause on, I can think about it or whatever, but that's where I'm headed.

10:23:11

MR. WARNER: Well, thank you, Your Honor. I think your explanation for what you're thinking and your rationale behind it is extremely helpful certainly to the district and hopefully for all the parties, because I do think it helps focus what the purposes of the preliminary injunction proceedings are and what the issues and how the issues can be framed that you have to decide.

10:23:57

To that note, we had conversations very similar to what's going on in your own mind when we read the legal issues in the brief that you just read to us. Now, we would quibble with the phraseology and wording, how they phrased things, because a lot of it is conclusory. But if, in fact, the issues are as described there and they are purely legal issues, frankly, I can't really disagree with your ruling.

10:24:26

The problem here is both in the verified complaint, in

10:25:01

the motion and brief in support of the motion for preliminary injunction, and in their motion for protective order, plaintiffs are completely inconsistent in terms of the position they're taking. On the one hand, they're saying: This is
10:25:25 purely legal. These are purely legal issues here.

They are, but then they go on to say: Oh, but we have a verified complaint, and we want the Court to take the allegations in the verified complaint as actual evidence because our complaint is verified.

10:25:53 They really can't have it both ways. If they're asking this Court to take as a matter of fact these allegations as to what actually has happened in locker rooms and restrooms, what their clients have experienced, it seems to me we do need some additional information in order to respond to that, in
10:26:18 fact, if that's what they want to do, and they're still not committing themselves either way to that. So with that uncertainty, you know, that's why we issued the discovery.

If the Court is saying you're going to look at this as a purely legal issue as you've just framed, you know, I think
10:26:41 that makes a lot of sense. But, you know, our fear is that as the briefing goes down, that's not the way it evolves, and we don't want to be -- particularly in the tight time frame, we don't want to be prejudiced in terms of how we respond.

For instance, if plaintiffs come back in their reply
10:27:09 briefs with affidavits or citing to the specific factual

allegations in the complaint and relying on that in reply, we're going to potentially be seeking discovery then. You know, by that time, it will complicate things even further.

But if there's an understanding, you know, among the
10:28:00 Court and the litigants that really we are looking at this as a legal issue in looking at the first issue, that this is really, okay, is the risk of exposure and, I would say, in front of a biological male whose gender identity is female, because I think the intervenors would agree that's an important fact that
10:28:27 I don't think anybody disputes needs to be considered here, if there's an understanding that that's the real issue here and it's the risk as opposed to looking at what plaintiffs allege has actually happened in locker rooms and restrooms, I think the district is very comfortable proceeding on that basis. But
10:29:00 once you get -- if they get into specifics, we need to get into specifics.

THE COURT: Well, I'd like to hear from the plaintiffs on this. I will say in reaction to what you're saying a couple things. One, I don't know whether it's a matter of law or not,
10:29:33 but what I do know is that what the plaintiffs are telling me right now is that there are certain things that are undisputed. Yes, they have a very long verified complaint and there's a lot of stuff in there, and they have objected to your discovery about some of those factual allegations that you would want to
10:30:01 rebut, for example, harassing comments and statements, what

exactly happened in a locker room, who saw what, when, and who was there, and was there a complaint made.

I would be interested in what plaintiffs have to say about this but, you know, I'm not going to put anybody's foot in stone right now. But if plaintiffs come in with -- well, I'll listen to what plaintiffs have to say. The way they are framing some of this, though, there are certain facts that they have in the complaint that are not even disputed by the defendants, right? There is a policy. There is a locker room agreement.

MR. WARNER: And, Your Honor, I don't believe we dispute those facts, which is why we didn't ask any interrogatories with regard to those.

THE COURT: Right, right, right. And to the extent that -- well, I mean, I'll hold my fire until I hear something from them.

As you were talking, although you didn't see it, some of the plaintiffs' lawyers were shaking their head with respect to if they're going to come in with X, Y, and Z.

So does somebody want to say something? Mr. Tedesco, I think you traveled the farthest, right?

MR. TEDESCO: Yes, I did. Thank you, Your Honor.

THE COURT: Okay.

MR. TEDESCO: So a couple things. One, it's true that Your Honor could rule on the preliminary injunction based on

some of the very basic undisputed facts in the case. Consistent with policy, a biological male student is permitted in the locker rooms and the restrooms on a daily basis. This is a reality for the students at the school.

10:33:30 But I would say to the school district's arguments about this, the specific circumstances that are talked about in the complaint, those are the natural, obvious, you know, logical result of adopting the very policy that the school adopted. So their position is that they need that evidence

10:33:58 because they misunderstand the sexual harassment/hostile environment claim. They say: Well, we didn't have actual knowledge of these specific instances, and we need to have that actual knowledge for you to prove your claim.

Our point is that the adoption of the policy

10:34:25 authorizes everything that the plaintiffs have experienced in the locker room and restroom. Those are just specific obvious kinds of results of a policy that allows a biological boy into the girls' locker room and restroom, and so they have actual knowledge because they've adopted the policy that authorizes

10:34:47 it.

Then the other thing that I think is important about their interrogatories is they're primarily based on another misunderstanding about the case. As you were saying earlier, we're the plaintiffs, and we get to frame the case. Their

10:35:20 interrogatories are based primarily on getting information

related to who saw who in the state of undress or naked, and that is not relevant to the claims, especially at the preliminary injunction stage. We don't need to prove that. We didn't allege that in the complaint, nor do we rely on it at the preliminary injunction stage.

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That's primarily what they're seeking, who saw who, when, where, and what state of undress were they in or were they nude, and that information is simply not going to be helpful to the Court in deciding the preliminary injunction motion.

10:36:05

What you need to know, Your Honor, is that the policy exists, nobody disputes that, that the policy allows a biological student into a locker room and restroom, and that, of course, results in interactions in the locker rooms on a daily basis between girls and boys.

10:36:28

Now, those specific interactions don't need to occur because the violation is the fact that a boy could enter after -- so say a girl enters the locker room or restroom. They know that a boy is authorized to enter those facilities when they're using them to change, to use the restroom, and to engage in other kind of private activities.

10:37:04

So that is the bar when it comes to the Title IX and the privacy violation. Inserting the biological male into those facilities is sufficient to show the violation.

THE COURT: I am -- thanks, Mr. Tedesco. I am sure

10:37:36

the district defendants and probably the Department of Education defendants disagree with a lot of what you've just said about what is sufficient or not sufficient to prove your case, and I'm really not going to wade into that because I haven't -- I'm at the early stage. But nothing that you've said and nothing that Mr. Warner said disabuses me of the notion that I should grant your motion and deny the -- grant your motion as to the interrogatories that were served to be expedited at this point.

10:38:37 You can argue what you want to argue. Okay? You've got a complaint on file, you've got a motion for preliminary injunction, and also you filed an opposition, your motion for protective order, and I can read it and they can read it. Okay? I've told you how I interpret what you've said and I've

10:38:58 told you why I'm going to rule in the way I am, and the defendants are going to respond.

As I said, if I see something as this develops, including something that the plaintiffs might do to frame the issues differently or put something at issue that I think I

10:39:23 need discovery on, I can revisit this issue. All right? So to some extent, you control it. As I said, I mean what I say when I say the plaintiffs can set the table on their own preliminary injunction motion.

Whether the defendants would say you should pursue

10:39:44 something differently or whether I would say either I would do

it differently if we were going -- you know, I mean, one option obviously is to say let's do everything on the merits. I mean, there are some judges who say let's collapse the preliminary injunction with expedited discovery on the merits and go
10:40:20 forward, but we're not in a procedural posture to be able to do that and, as I said, I'm not sure that I would do that regardless. Okay? Because it may be that this is the type of case that needs that kind of a ruling early on based upon how plaintiffs present their case and what I can see.

10:40:55 So I don't feel like -- I'm not going to go in in detail and micromanage what you're going to say or what the defendants are going to say. Based upon the posture of the case in front of me right now, I'm comfortable. With respect to what I hear plaintiffs arguing and what I see defendants
10:41:24 wanting to discover leaning more on the merits, I'm comfortable not having that discovery in front of me now. That doesn't prevent --

You know, there hasn't even been a date for the defendants to answer yet. I mean, I think you have -- I don't
10:41:49 know if you were served under the waiver or not. I don't know if you have 60 days or 30 days. I think the Government uniformally gets 60 days to respond to some stuff, and 60 days hasn't really passed.

So what I'm saying is not intended to dissuade anybody
10:42:14 from seeking discovery on the merits, which is not in front of

me, you know, or putting together a discovery plan that goes past a preliminary injunction. Maybe you'll say: I don't want to do that. I want to focus on the preliminary injunction, see where the chips fall on that, and then regroup.

10:42:40 So all of that is fine. So I have to take it in steps. Where I am at this particular step, faced with the discovery that is being served and what I've seen in the motion for protective order, I'm going to grant the motion for a protective order. I'm going to keep my briefing schedule in

10:43:09 place. I'm going to see how it plays out, and then I'm going to rule as promptly as I can, you know, and keep the case going forward.

I think the result of it is also kind of less complicated for the intervenor parties because, you know, they

10:43:45 know what -- they see how the table is set right now if they're going to come in either as intervenors or amicus or something else. I don't know, but that is also playing out. I read the briefs that were filed on the 7th, and I think you have a brief on the 14th, right? So that's where I am. Okay?

10:44:27 So I appreciate you're coming in. As I said, I am not --

MS. HAMMARGREN: Your Honor, can I ask one point of clarification?

THE COURT: Yes.

10:44:46 MS. HAMMARGREN: In your original scheduling order,

the last sentence talked about leaving open the possibility that perhaps (inaudible) parties could move for leave for discovery at a later date, depending on time and where the case was. Is that still permitted?

10:45:34 THE COURT: Yes, that's still where I am. I mean, I have that, and I have the order in front of me. But I think I heard what -- I don't think it was you. It was somebody else talking about the issue that you felt you wanted to litigate either on the merits or at the preliminary injunction stage, and I'm not weighing in on that at all. I don't know if you're in the case or not. Once you're in the case, we can talk about it.

I think you should be -- I'm not taking anything back because I don't want to say to anybody you can't do what you haven't done yet when I don't know what you're doing. You know what I mean? I mean, I like to try and rule on things as I see them, and that's why I think it was actually a decent idea to get your interrogatories rather than have a lot of discussion of whether discovery can proceed in the abstract, and I feel the same way about what you're saying here.

But you should understand some of the way I'm looking at this, too, you know. We've got a motion for a preliminary injunction on particular issues, and having read more about this and read other courts' decisions in this area in the last week, I think I have some sense of what you're talking about.

I'm not sure where I come out on any of that and whether it's relevant at the preliminary injunction stage, again, as the plaintiffs have phrased this.

You know, first they've got the whole, you know, the 10:48:16 legislative guidance as to rule making and all the kind of the DOE kinds of stuff, and then there are the issues that are happening at the school. I know you and your clients have a view about the terminology that's used and not even terminology, but some, you know, very substantive issues, and I 10:48:48 get that.

You'll have to think about whether those have to be part of discovery or they're in briefing or whatever, but that's a long way of answering your question, which is, I'm not taking anything back and I'm moving forward.

10:49:53 MS. HAMMARGREN: Okay. Yeah, I appreciate that clarification, and we'll certainly take into account everything.

THE COURT: Yes. The only thing I'm taking back from my original order was I said this was going to be the initial 10:50:36 hearing because I really felt like I'd like to kind of initially get everybody in and talk about this, and it's actually the final hearing on the motion for a protective order. But to me that's fine, because at least you get a decision earlier rather than later. Everybody knows where they 10:51:12 stand. You can do what you want to do with it.

So because what I intended was just to get anybody in here quickly and continue to try and move, in my mind I also might have gotten a written response from the district after they saw this thing. I just wanted to continue to manage it. But as I've seen it, as I've thought about it, as I see kind of how the playing field is beginning to come into focus for me, that's where I am.

MR. TEDESCO: Your Honor, can I ask one other question?

10:52:12 THE COURT: Yes.

MR. TEDESCO: I think the initial briefing schedule and hearing date on the PI was set in anticipation that there would likely be discovery, so I'm wondering if we can push it forward two weeks maybe on everything or leave it where it is.

10:52:53 THE COURT: No, no. The answer is no, and part of the reason for that is when the district defendants came in they had asked for like 28 days after their discovery came in. They've got a lot of things to brief. I would like to keep it open. I'm pressing the proposed intervenors if they do get in 10:53:18 the case on the schedule already, and I don't want to press anybody more.

Also, I had a chance to reflect, Mr. Tedesco, on the plaintiffs' position the last time that we got to go, go, go. As I read everything -- and I understand that, but as I read 10:53:46 everything I came to understand a little bit more that this

issue, the issue of A, that the DOE is interpreting the so-called issue of transgender and how it relates to Title IX and the requirements on schools for quite a long time.

I think in the materials you guys submitted in support of your motion, I want to say from memory there was something in January 2014. I am sure that there was extensive guidance in April of 2015. So this issue has been percolating for a while at certain levels, and the fact that the plaintiffs chose to file when they filed in this district this case at this time is fine, but I don't feel that justifies moving my entire schedule up another two weeks and forcing this.

You know, I mean, lawyers, me included when I was on that side of the bench, often come in and say: Judge, we could do that in two weeks. Then as we're doing it and we're seeing what we have to do, there's what you call that motion for extension of time because we need a little bit more time. All right? So you guys held yourself to two weeks. Maybe you are going to hold it, too. Maybe these guys will hold it, too, but we've got to see.

You know, I don't know where the intervenors are going to be. You know, if I were them -- and I am sure they are -- they'd be working on whatever the heck they want to file if they can file it, you know, if they're in the case. I don't know what they would do if they don't have a ruling, whether they -- I don't know what the -- I don't get a lot of amicus

briefs at the district court level, not like the Supremes and what they get. I don't know if that's an option or not, and I'm not even ruling on that, you know. But I'm just saying, if they want to get their views known, I don't know if they're going to do that, either.

10:56:57

But I think the briefing schedule I set was aggressive enough without pushing it farther. I would say that I set a briefing schedule that I thought was fair and then pushed hard on when the discovery responses would be to get into that briefing schedule, not the opposite. So I don't think I calibrated the briefing schedule off of the response date as much as, you know, I said you guys should respond by the 17th so you can get the brief in. Now you don't have to do that, so you won that part. Okay? Anything further?

10:57:15

10:58:12 MR. WARNER: Nothing, Your Honor.

MR. TEDESCO: Nothing, Your Honor.

THE COURT: Okay. Good. Have a good day.

MR. TEDESCO: Thank you, Your Honor.

MR. WARNER: Thank you, Your Honor.

10:58:41 MS. HAMMARGREN: Thank you, Your Honor.

MR. BREEN: Thank you, Your Honor.

THE COURT: Have a good flight back. You're from? Where are you from?

MR. TEDESCO: Scottsdale.

(Proceedings concluded.)

C E R T I F I C A T E

I, Patrick J. Mullen, do hereby certify that the foregoing is an accurate transcript produced from an audio recording of the proceedings had in the above-entitled case before the Honorable JEFFREY T. GILBERT, one of the magistrate judges of said Court, at Chicago, Illinois, on June 9, 2016.

/S/ Patrick J. Mullen
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division