IN THE UNITED STATES DISTRICT COURT
FOR THE 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.**,	)	Case No. 16-cv-4945
Plaintiffs,	)	Judge Jorge L. Alonso
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**.	)	

DEFENDANT BOARD OF EDUCATION OF TOWNSHIP
HIGH SCHOOL DISTRICT 211'S SUPPLEMENTAL BRIEF

Defendant Board of Education of Township High School District 211, by its attorneys Franczek Radelet, P.C., hereby submits its Brief in accordance with this Court's Order dated June 20, 2017, giving all parties the opportunity to address the recent decision by the Seventh Circuit in *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

INTRODUCTION

In his Report and Recommendation issued on October 18, 2016, Magistrate Gilbert recommended that Plaintiff's pending motion for preliminary injunction should be denied. Since then, the agreement between the District and the United States Department of Education that Plaintiffs sought to enjoin has been terminated and Student A, who was the subject of that Agreement has graduated, rendering the bulk of the relief requested by Plaintiffs moot. The only relief sought in the original motion that arguably is not moot is Plaintiffs request that the court enjoin the District from allowing students to use the restroom based on the student's gender identity. This practice, however, is legally required by the Seventh Circuit's recent decision in *Whitaker v. Kenosha*, in which the court upheld a preliminary injunction compelling a school to allow a student to use a restroom that was consistent with his gender identity. Judge Gilbert was correct on October 18, 2016, and subsequent events and Seventh Circuit decisions have only confirmed the correctness of his original decision. This Court is bound by the reasoning of *Whitaker* and Plaintiff's disagreement with that decision provides no basis for granting the requested preliminary injunction. For these reasons, explained in detail below, as well as all the reasons previously set forth in the District's prior submissions, this Court should adopt the recommendation of Magistrate Judge Jeffrey Gilbert and deny Plaintiffs' motion for a preliminary injunction in its entirety.

PROCEDURAL BACKGROUND

Plaintiffs filed the pending motion for a preliminary injunction on May 23, 2016, which sought to "enjoin enforcement of the Locker Room Agreement, by which the Defendants allow a biological male student access to the locker rooms designated for girls, and also the Restroom Policy, by which the Defendant School Directors allow restroom entry and usage based on

gender identity, irrespective of biological sex." Doc. # 21. Plaintiffs sought additional relief from the federal defendants, but Plaintiffs have voluntarily dismissed them from this lawsuit so the claims against them are no longer at issue. Doc. # 178. The only requested relief still pending is Plaintiffs' request that the Court enjoin the "Locker Room Agreement" and the "Restroom Policy."

On August 15, 2016, Magistrate Judge Jeffrey Gilbert heard argument on the pending motion and issued a detailed Report and Recommendation on October 18, 2016. In November 2016, the parties submitted legal briefs regarding this Court's consideration of the Report and Recommendation. Since then, there have been several developments on the issues presented by Plaintiffs' original motion. The Departments of Education and Justice rescinded the prior guidance to schools regarding transgender students;[1] the Locker Room Agreement between the Department of Education and the District was terminated; and Student A, the student who was the subject of that Agreement, graduated from high school.

The United States Supreme Court accepted for review and then remanded a case regarding restroom access for a transgender student. *See Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017). And in *Whitaker*, the Seventh Circuit Court of Appeals decided in favor of a transgender student who sought a preliminary injunction to secure restroom access consistent with the student's gender identity.

On July 5, 2017, Plaintiffs filed a supplemental brief maintaining their request for a preliminary injunction against the School District. Plaintiffs continue to press for this Court to enjoin the School District from enforcing the Locker Room Agreement and from maintaining the

[1] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx.

so-called Restroom Policy. They "urge this Court to issue the requested preliminary injunction before the onset of the new school year. . ." Doc. # 180 at 15.

ARGUMENT

I. The Plaintiffs' Request for Relief Regarding the Locker Room Agreement Is Moot

Plaintiffs' request to enjoin enforcement of the "Locker Room Agreement" should be denied as moot because the Locker Room Agreement terminated on June 7, 2017. In December 2015, the District entered into a Resolution Agreement with the U.S. Department of Education's Office of Civil Rights (OCR) to resolve a complaint filed against it on behalf of Student A. The Resolution Agreement applied specifically to Student A and stated in pertinent part:

> For the duration of Student A's enrollment in the District:
>
> 1. based on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room facilities designated for female students at school and 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 to accommodate Student A and any students who wish to be assured of privacy while changing;

Doc. # 21-3, Exhibit 1. p. 3. The Agreement further provided that "OCR anticipates closing its monitoring of this Agreement by June 30, 2017." *Id*. at p. 5.

Student A graduated from the District and is no longer an enrolled student. Kovack Affidavit ¶ 6. On June 7, 2017, OCR notified the District that "OCR is now terminating the Agreement as of the date of this letter. No further action is required of the District." *Id*. ¶ 9. Therefore, the Locker Room Agreement is no longer in effect and is not binding in any respect on the District.

To satisfy the Article III case or controversy requirement for requests for injunctive relief, it must appear that the injury about which the petitioner complains is continuing or that the

petitioner is under an immediate threat that the injury complained of will be repeated. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects."); *Young v. Lane*, 922 F.2d 370, 373-74 & n. 8 (plaintiffs' requests for injunctive and declaratory relief regarding their exercise of religion are mooted by their transfer from institution where allegedly illegal restrictions took place). A claim becomes moot when the issues presented are no longer live or the parties lack an interest in the outcome that the law recognizes as actionable. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Stotts v. Community School Dist. No. 1*, 230 F.3d 989, 990 (7th Cir. 2000).

The Locker Room Agreement provided access for only Student A, who has graduated from the District. Student A's graduation and the termination of the agreement fully resolves the matter of Student A's locker room access. Furthermore, the relief sought does not fall within the "capable of repetition yet evading review" exception to mootness. Given the ED's complete disavowal of the interpretation of Title IX that led it to compel the District to enter into the Locker Room Agreement, there is no possibility that the concern that Plaintiffs' seek to address through the requested injunctive relief is "capable of repetition yet evading review." The Plaintiffs' request for relief as related to the Locker Room Agreement is moot and should be denied on that basis.

II. *Whitaker* Is Binding Authority and Requires Denial of the Remainder of the Plaintiff's Preliminary Injunction Motion

Plaintiffs argue in their Supplemental Brief that the Seventh Circuit's decision in *Whitaker* is not controlling of this case because this case is factually distinguishable and because *Whitaker* is wrongly decided. Neither argument is persuasive.

A. This Court Must Disregard the Unsupported Factual Assertions Contained in the Verified Complaint and Relied Upon in Plaintiffs' Supplemental Brief

Plaintiffs try to avoid the binding authority of *Whitaker* by distinguishing the decision based on their unverified factual allegations, but their efforts fail. Plaintiffs claim that while the school board in *Whitaker* "put up only minimal evidence of privacy complaints," the fifty-one families forming their association "recounted specific instances where Student A, a male, had entered the girls' locker room," and "related that Student A had been proximate to them in the girls' locker room, and they knew that Student A could walk in on them when they were disrobing for their PE class." Doc. # 180 at 2. Plaintiffs also argue that the Girl Plaintiffs "who had mandatory swim class necessarily fully disrobed in their girls' locker room to change into or out of their swimsuits," and that they "objected to the male Student A being given unrestricted access to their locker room." *Id.* at 3.

As an initial matter, Plaintiffs assume that had similar, verified facts been developed as part of the record in *Whitaker*, the Seventh Circuit's decision would have been different. The *Whitaker* rationale and discussion of the law gives no indication that the facts were outcome-determinative. Regardless, though, Plaintiffs' Complaint suffers from the same flaw because the Plaintiffs have not provided any verified evidentiary or factual support for their claims in this case.

For assertions in a verified complaint to be accepted as evidence, the allegations must meet the requirements for summary judgment affidavits specified in Rule 56(e) - they "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Ford v. Wilson*, 90 F.3d 245, 247 (7th Cir. 1996); *see Lucas v. Chicago Transit Authority*, 367 F.3d 714, 726 (7th Cir. 2004) (Rule 56 requires affidavits that cite specific concrete facts

establishing the existence of truth of the matter asserted). "[P]ersonal knowledge" may include inferences and, therefore, opinions, "[b]ut the inferences and opinions must be grounded in observation or other first-hand personal experience." *Visser v. Packer Eng'g Associates, Inc*., 924 F.2d 655, 659 (7th Cir. 1991). They must not be "flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience." *Id.* Moreover, hearsay evidence must be disregarded. *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir.1987). *Eyler v. Babcox*, 582 F. Supp. 981, 986 (N.D. Ill. 1983).

The allegations in Plaintiffs' Verified Complaint, and relied on in their Supplemental Brief, fail to meet these standards. First, the allegations in the Verified Complaint are not verified by any of the "Girl Plaintiffs;" they are verified only by some of the "Girl Plaintiffs" parents. *See* Doc. # 1 at 79-83. The "verified" allegations are, therefore, not really verified at all, as they are not sworn to by any student who has "first-hand personal experience" of what actually occurred in District locker rooms. The kind of "abstraction" and "conjecture" which the Seventh Circuit criticized in *Whitaker* is equally problematic in Plaintiffs' allegations. Moreover, the allegations that generically refer to what unidentified students have experienced or observed in the school locker rooms or bathrooms lack even the minimal foundation required to render the allegations admissible in evidence. Finally, many of the assertions are exactly the sorts of "flights of fancy, speculations, and hunches" that are not admissible in evidence. *Visser* at 659. Accordingly, Plaintiffs' efforts to distinguish this case from the *Whitaker* decision fail.

Additionally, Plaintiffs previously declined the opportunity to develop an evidentiary or factual record in this case. Plaintiffs had the opportunity to present testimony and evidence when this case was before Magistrate Judge Gilbert in the summer of 2016. However, Plaintiffs explicitly represented to the Court that they were not relying on any specific factual assertions

regarding interactions in either restrooms or locker rooms between any Plaintiff and Student A. Doc. # 134 at 14. Based on these representations, the Magistrate denied the District's motion for leave to take discovery as to the facts underlying Plaintiffs' "anonymous, general, and relatively conclusory allegations in their Complaint." *Id.* Plaintiffs cannot now reverse course and attempt to rely on the unverified factual allegations in the Complaint when they specifically said they would not do so for purposes of their request for preliminary injunctive relief.

B. *Whitaker* Is Additional Authority Showing Plaintiffs Cannot Prevail on Their Constitutional Claim

Throughout their Brief, Plaintiffs simply disagree with the Seventh Circuit's decision in the *Whitaker* case. Such arguments are misdirected at this stage as this Court is obliged to follow binding precedent from the Seventh Circuit Court of Appeals. *Reiser v. Residential Funding Corp*., 380 F.3d 1027, 1029 (7th Cir.2004) ("Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of this court whether or not they agree."); *United States v. Glaser*, 14 F.3d 1213, 1216 (7th Cir.1994) (citing *Colby v. J.C. Penney* Co., 811 F.2d 1119, 1123 (7th Cir.1987)).

And, contrary to Plaintiffs' arguments, *Whitaker* confirms that the Magistrate correctly recommended finding that Plaintiffs did not have a viable Constitutional privacy claim that justified preliminary relief. Doc. #134 at 40-61; *see also* District's Memorandum in Opposition to Plaintiffs' Response to Magistrate's Report and Recommendation, Doc. #159 at 5-10. In *Whitaker* the court expressly rejected the Kenosha School District's assertion that the privacy rights of other students justified prohibiting the plaintiff student from using the restroom that conformed to his gender identity. *Whitaker*, 858 F.3d at 1052. The Seventh Circuit made short work of the Kenosha school district's generalized concerns regarding student privacy in communal bathrooms opining that "common sense tells us that the communal restroom is a place

where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall." *Whitaker*, 858 F.3d at 1052.

C. *Whitaker* Is Additional Authority Showing Plaintiffs Cannot Prevail on Their Title IX Claims

Whitaker also confirms that the Magistrate correctly recommended that Plaintiffs did not have a sufficient likelihood of success on their Title IX claim to justify preliminary injunctive relief. Doc. #134 at 61-70; *see also* District's Memorandum in Opposition to Plaintiffs' Response to Magistrate's Report and Recommendation, Doc. #159 at 10-11. Like the Magistrate, the Seventh Circuit found that the mere presence of a transgender student in a sex-separated facility does not violate the privacy rights of others—the apparent basis of the Plaintiffs' claim that a transgender student's presence would be objectively and subjectively offensive. The Seventh Circuit opined regarding the transgender student's presence in the restroom as follows:

> A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall. Nothing in the record suggests that the bathrooms at Tremper High School are particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line.

858 F.3d at 1052–53.

Contrary to Plaintiffs' position that Title IX prohibits transgender students from using restrooms based on identity, the Seventh Circuit found that 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. Further, the

Seventh Circuit opined that a policy that subjects a transgender student "to different rules, sanctions, and treatment than non-transgender students" violates Title IX. *Id.* The Seventh Circuit's ruling on this point is even stronger authority mandating denial of the injunction than what existed at the time of Judge Gilbert's Recommended Decision. Because the Seventh Circuit has now spoken on the issue and interpreted Title IX to require school districts to provide restroom access, this Court must give complete deference to the Seventh Circuit and the reasoning in *Whitaker*. Plaintiff's motion must be denied for this reason alone.

CONCLUSION

In essence, Plaintiffs' Supplemental Brief articulates a disagreement with the Seventh Circuit's decision in *Whitaker*. While Plaintiffs grasp for factual distinctions and revel in semantics, this Court should focus on the essence of their request for injunctive relief: if granted the relief they seek, Plaintiffs would force the District to institute a bathroom use policy identical to one which the Seventh Circuit found a likelihood of violating Title IX and the U.S. Constitution only months ago. Plaintiffs' attempts to distinguish this case are unpersuasive, and this Court must consider *Whitaker* binding authority.

Dated: July 26, 2017

Respectfully submitted,

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211

By: /s/Jennifer A. Smith
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she caused a true and correct copy of the foregoing **DEFENDANT BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211'S SUPPLEMENTAL BRIEF** to be filed with the Clerk of the Court using the CM/ECF system which will send notification to the following counsel of record this 26th day of July, 2016:

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IN THE UNITED STATES DISTRICT COURT
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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.**,	Case No. 16-cv-4945
Plaintiffs,	Judge Jorge L. Alonso
v.	Magistrate Judge Jeffrey T. Gilbert
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.	

DECLARATION OF MARK J. KOVACK

I, Mark J. Kovack, state the following under oath or affirmation:

1. I am employed by the Board of Education of Township High School District 211 ("District"). The District is a high school district located in Cook County, Illinois comprised of five high schools.

2. My official title is Associate Superintendent for Student Services.

3. I am responsible for supporting the efforts of the building administrators for student services, which includes services for students seeking support for issues related to gender identity.

4. I have served as a member of Student A's student support team, which supported Student A's gender identity needs.

5. Student A first enrolled in the District at the start of the 2013-2014 school year.

6. Student A graduated from the District at the end of the 2016-2017 school year.

7. In December 2015, to resolve a complaint filed by Student A, the District entered into a Resolution Agreement with the Department of Education's Office for Civil Rights ("OCR") that allowed Student A to access the communal girls' locker room based on her representation that she would change in private changing stations.

8. The Resolution Agreement states that "OCR anticipates closing its monitoring of this Agreement by June 30, 2017."

9. On June 7, 2017, the District received written notification from OCR that "OCR is now terminating the Agreement as of the date of this letter. No further action is required of the District."

I declare under penalty of perjury that the foregoing is true and correct.

Mark J. Kovack

Executed on (Date): 7/25/17