

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

JOEL DOE, a minor, by and through his  
Guardians JOHN DOE and JANE DOE, et al.,

Plaintiffs,

v.

BOYERTOWN AREA SCHOOL DISTRICT,  
et al.,

Defendants,

and

PENNSYLVANIA YOUTH CONGRESS  
FOUNDATION,

Intervenor-Defendant.

Civil Action No. 17-1249-EGS

**INTERVENOR-DEFENDANT PENNSYLVANIA YOUTH CONGRESS  
FOUNDATION'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Intervenor-Defendant Pennsylvania Youth Congress Foundation, in support of its opposition to Plaintiffs' motion for a preliminary injunction, and in accordance with this Court's May 24, 2017 Scheduling Order, respectfully submits the following proposed Findings of Fact and Conclusions of Law.

**PROPOSED FINDINGS OF FACT**

***Use of Sex-Segregated Facilities at Boyertown Area High School***

1. In the 2016-2017 School Year, the Boyertown Area School District allowed some transgender students to use restrooms and locker rooms consistent with their gender identity. BASD Response to Plaintiffs' Request for Admission #3; BASD Response to Plaintiffs' Interrogatory #11.

2. The District reviews transgender students' requests to use restrooms and locker rooms consistent with their gender identity on a case-by-case basis. BASD Response to Plaintiffs' Request for Admission #5; BASD Response to Plaintiffs' Interrogatory #7. Each request is evaluated in consultation with the building's principal and/or assistant principals, the student, the student's guidance counselor, and the student's parents or guardians. BASD Response to Plaintiffs' Interrogatory #12; Faidley Dep. 23:14-23.

3. Students are expected to use sex-segregated spaces in accordance with their birth-assigned sex unless and until the District gives them permission to use facilities consistent with their gender identity. BASD Response to Plaintiffs' Request for Admission #5.

4. Boys are not permitted to freely enter girls' restrooms and locker rooms, and girls are not permitted to freely enter the boys' restrooms and locker rooms. BASD Response to Plaintiffs' Request for Admission #6, 7.

5. The District's practice with respect to transgender students' use of sex-segregated facilities was prompted by the Department of Education's May 13, 2016 "Dear Colleague Letter," which directed public schools to allow transgender students to use restrooms and locker rooms consistent with their gender identity. BASD Response to Plaintiffs' Interrogatory #4; Foley Dep: 15:15-22, 20:13 – 21:4; Faidley Dep. 24:12 – 25:2. Although the Department of Education's May 13, 2016 Dear Colleague Letter was rescinded by the current administration, District officials have continued their practice with respect to sex-segregated facilities because "the district believes that transgender students should have the right to use school bathroom and locker facilities on the same basis as non-transgender students." BASD Frequently Asked Questions About Issues Regarding Doe vs. BASD (March 27, 2017). The District believes that its "position is consistent with guidance from the Pennsylvania School Boards Association, the

National School Boards Association, our Solicitor and what the school district administration believe is fair and equitable under the circumstances.” BASD Frequently Asked Questions About Issues Regarding Doe vs. BASD (March 27, 2017).

6. It is the District’s practice to work with all students, regardless of whether they are transgender or not, to offer them an area to change in which they feel comfortable. Faidley Dep. 63:10-20; 65:19-66:5.

***Restrooms at the High School***

7. The High School has 11 multi-user restrooms designated for students who are girls and 10 multi-user restrooms designated for students who are boys. BASD Response to Plaintiffs’ Interrogatory #15.

8. The High School also has six single-user restrooms for general student use. BASD Response to Plaintiffs’ Interrogatory #15. As of the completed renovations at the High School, these restrooms include a single family-accessible toilet and the nurse’s office bathroom, as well as toilets in the Attendance Office, the In-School Suspension Room, in an office near where the gifted teacher and other occupational therapists work, and in the Guidance Office. Cooper Dep. 50:4-20, 52:2-53:22, 61:21 – 65:7. There is also a new single access toilet on the second floor. Cooper Dep. 69:15 – 70:3.

9. There are two additional restrooms for use exclusively by students in the High School’s “Life Skills” special education class, and one restroom has a shower. BASD Response to Plaintiffs’ Interrogatory #15.

10. Students can use the new single family-accessible toilet room or multi-user restrooms without prior permission, and the other single-user rooms are available on a case-by-case basis to students depending on their needs. Cooper Dep. 65:8 – 66:18. Students who go to

the nurse's office can receive permission from the nurse to use the toilet there. Cooper Dep. 67:4-15.

11. The High School has separate restrooms for staff use. BASD Response to Plaintiffs' Interrogatory #15. Visitors may use single-user or staff restrooms, but are not permitted to use student restrooms. BASD Response to Plaintiffs' Interrogatory #15; Faidley Dep. 57:25 – 58:2.

***Locker Rooms at the High School***

12. The High School has one multi-user locker room for boys taking physical education classes and one multi-user locker room for girls in physical education classes. BASD Response to Plaintiffs' Interrogatory #15. Each locker room has four individual shower stalls with privacy curtains. BASD Response to Plaintiffs' Interrogatory #15. Each locker room also has individual toilet stalls with doors. Cooper Dep. 39:4 - 40:18.

***Transgender Youth***

13. Individuals who identify as transgender are those whose gender identity, or sense of self as a particular gender, is incongruent with the gender associated with their assigned sex at birth. Declaration of Scott F. Leibowitz, M.D. ("Leibowitz Decl.") ¶ 5. Sex is typically assigned at birth based on the appearance of external genitalia. Leibowitz Decl. ¶ 5.

14. An individual assigned male at birth who experiences a lasting, persistent female identity would be considered a transgender female. Leibowitz Decl. ¶ 5. An individual assigned female at birth who experiences a lasting, persistent male identity would be considered a transgender male. Leibowitz Decl. ¶ 5.

15. Gender dysphoria is the clinical diagnostic classification used when an individual has clinically-significant distress that results from a lack of alignment between an individual's gender identity and their assigned sex at birth. Leibowitz Decl. ¶ 6.

16. According to the accepted standards of care for the treatment of gender dysphoria, clinical interventions for appropriately assessed adolescents with gender dysphoria include social gender transition and potentially physical interventions, such as puberty blockers, hormone therapy, and sometimes surgery. Leibowitz Decl. ¶ 13.

17. Social gender transition refers to steps an individual takes to present himself or herself as the gender with which he or she most identifies. Leibowitz Decl. ¶ 14. It typically includes adopting a different name, use of different pronoun set, wearing clothes and hairstyles associated with the individual's experienced gender identity, and using sex-segregated spaces and engaging in sex-segregated activities that correspond with the individual's gender identity. Leibowitz Decl. ¶ 14.

18. An important part of social gender transition for transgender individuals is being perceived by others as the gender with which they identify. Leibowitz Decl. ¶ 14. Social gender transition can help alleviate gender dysphoria and is also a useful and important tool used by clinicians to ascertain whether, and the extent to which, living in the affirmed gender improves the individual's psychological and emotional functioning. Leibowitz Decl. ¶ 14.

19. In early puberty, for individuals whose emotional, psychological, and social development is impaired as a direct result of the discrepancy between their gender identity and their physical anatomy and the changes occurring to their body, mental health professionals may recommend suppressing puberty through the use of puberty blockers. Leibowitz Decl. ¶ 16. For adolescents who meet the clinical criteria for such intervention, pubertal suppression has been

deemed highly effective in alleviating the distress associated with puberty, and is a component of the standards of care for treating gender dysphoria in pediatric populations. Leibowitz Decl. ¶ 16.

20. For mature adolescents who continue to identify as a gender other than what they were assigned at birth, and continue to experience distress as a result (thereby meeting the criteria for gender dysphoria of adolescence/adulthood), cross-sex hormone therapy may ultimately be indicated should social gender transition not suffice to alleviate the significant discomfort they experience. Leibowitz Decl. ¶ 17. These interventions are used to help an individual develop characteristics of the gender with which they identify, e.g. facial hair for transgender males, and breasts for transgender females. The provision of hormonal interventions in mature adolescents with appropriately screened gender dysphoria is also part of the accepted standards of care for treating gender dysphoria in adolescents. Leibowitz Decl. ¶ 17.

***The Importance of Access to Sex-Segregated Facilities that Match One's Gender Identity***

21. Using sex-segregated spaces that are consistent with one's experienced gender identity is an important part of social gender transition and a critical process that allows a person to experience societal validation in synchronicity with their internal sense of self, a key aspect of understanding and/or alleviating the distress associated with gender dysphoria. Leibowitz Decl. ¶ 18.

22. Policies that restrict the ability of individuals to use restrooms and other sex-segregated facilities consistent with their gender identity directly interfere with the ability of medical professionals to develop and implement clinically appropriate treatments for individuals with gender dysphoria. Leibowitz Decl. ¶ 19.

23. Forbidding individuals from using restrooms and other sex-segregated facilities consistent with their gender identity sends the message that their identity is invalid, inauthentic, or problematic. Leibowitz Decl. ¶ 20. For adolescents, this often negatively impacts their self-esteem and self-worth, ability to trust others, and willingness to go out into the world, during a crucial aspect of development. Leibowitz Decl. ¶ 20.

24. Transgender youth who meet clinical criteria for gender dysphoria are far more likely to want to conceal their physical anatomy and are typically extremely hypervigilant within sex-segregated situations. Leibowitz Decl. ¶ 21. One of the criteria of the diagnostic classification Gender Dysphoria in Adolescence and Adulthood is a desire to be perceived as another gender and a rejection of aspects of their body that connote their assigned sex at birth. Leibowitz Decl. ¶ 21.

25. Transgender youth who cannot use the restroom or other facilities consistent with their gender identity may leave school and resist leaving home for any reason. Leibowitz Decl. ¶ 22. This hampers their ability to access opportunities traditionally associated with growing up and maturing into adults, such as getting a job or exploring educational enrichment opportunities. Leibowitz Decl. ¶ 22. The loss of these activities during an important development stage of youth can have long term consequences on an individual's financial and employment prospects later in life, which can lead to many other psychiatric concerns. Leibowitz Decl. ¶ 22.

26. Forcing a transgender youth to use a separate single-user restroom can undermine the benefits of their social gender transition by sending the message that they are not really who they identity as. Leibowitz Decl. ¶ 23. It is stigmatizing for the individuals required to use them by reinforcing an inappropriate sense of "otherness." Leibowitz Decl. ¶ 23.

27. Restrictions on the ability of transgender youth to use gender-identity appropriate facilities undermine a physician's ability to help patients because, in many cases, using a gender-identity appropriate facility is an essential component of any appropriate treatment plan. Leibowitz Decl. ¶ 24.

28. The risks associated with not being able to use all of the clinically appropriate tools to manage gender dysphoria in children and adolescents are particularly grave. Leibowitz Decl. ¶ 25. Gender dysphoria, if not addressed, places children at greater risk for mental health problems, including suicide. Leibowitz Decl. ¶ 25. Transgender youth are at much higher risk for suicidal behavior when compared to youth who are not transgender. Leibowitz Decl. ¶ 25. Peer reviewed research demonstrates that as many as 45% of adolescents with gender dysphoria have had thoughts of suicide compared to 17% in this age group in 2015. Leibowitz Decl. ¶ 25.

29. The major professional medical organizations have come out against policies that bar transgender people from accessing sex-segregated facilities that correspond to their gender identity. Leibowitz Decl. ¶ 26. Such policies are harmful to the healthy psychological and emotional functioning of transgender youth, and these negative consequences can have ramifications through adulthood. Leibowitz Decl. ¶ 26.

***The Anatomy and Physiology of Transgender Adolescents Who Receive Hormone Treatment***

30. Transgender youth who have been treated with puberty blockers do not go through puberty of the sex they were assigned at birth. Leibowitz Decl. ¶ 27. In other words, someone who was assigned female at birth who is treated with puberty blockers will not go through a female puberty. Leibowitz Decl. ¶ 27. That individual will not develop breasts or other changes to the body that girls experience during puberty, such as a widening of the hips and a change in the distribution of fat. Leibowitz Decl. ¶ 27. Similarly, someone who is

assigned male at birth who is treated with puberty blockers will not go through male puberty. Leibowitz Decl. ¶ 27. That individual will not develop an Adam's apple, facial hair, chest hair, broadening of the shoulders, increase in muscle mass, squaring of the jaw, or a deepening of the voice. Leibowitz Decl. ¶ 27.

31. Gender dysphoric adolescents who receive hormone therapy will develop secondary sex characteristics that are in accordance with their gender identity. Leibowitz Decl. ¶ 28. Transgender females receiving estrogen will develop breasts and the muscle mass and fat distribution typical of female. Leibowitz Decl. ¶ 28. Transgender males receiving testosterone will develop facial and body hair, a deeper voice, and muscle mass typical of males. Leibowitz Decl. ¶ 28.

32. As a result of the medical treatments for gender dysphoria in adolescents, transgender adolescent males will not necessarily align physically with non-transgender girls, and transgender adolescent females will not necessarily align physical with non-transgender males. Leibowitz Decl. ¶ 29.

***Aidan DeStefano***

33. Aidan DeStefano is 18 years old and a 2017 graduate of the Boyertown Area Senior High School. Declaration of Aidan DeStefano in Support of Motion for Leave to Intervene ("DeStefano Decl.") ¶ 1. In his senior year, Aidan was a member of the boys' cross-country team and was elected to the homecoming court. DeStefano Decl. ¶¶ 10-11.

34. Aidan is transgender, meaning that his assigned sex at birth was female, but his gender identity is male. DeStefano Decl. ¶ 3. When Aidan started at the High School, he used girls' facilities and participated in girls' athletic activities. DeStefano Decl. ¶ 4. The first time Aidan stepped into the girls' bathroom at the High School, everyone stared at him, because he

did not look like the girls in the bathroom. DeStefano Decl. ¶ 4. It was clear to everyone, including Aidan, that he did not belong in that bathroom. DeStefano Decl. ¶ 4. Aidan also received stares and questions when he competed with the girls' cross country team. DeStefano Decl. ¶ 6.

35. Aidan began seeing a psychotherapist who is a gender specialist in May 2014. DeStefano Decl. ¶ 7. As he progressed with his treatment, he took greater steps to live in a way that reflected his male gender identity. DeStefano Decl. ¶ 7.

36. In the summer of 2015, Aidan began receiving transition-related hormone therapy. DeStefano Decl. ¶ 8. Aidan also began the process to legally change his name to Aidan Maxwell DeStefano, which became final in 2016. DeStefano Decl. ¶ 8. He changed his legal documents to indicate that he is male, and in the summer of 2016 he had a bilateral mastectomy to further bring his physical appearance in line with his identity as a male. DeStefano Decl. ¶ 10.

37. By the 2016-2017 School Year – his senior year – Aidan was living consistently with his male identity in all aspects of his life, including home, school, work, and church. DeStefano Decl. ¶ 9.

38. At the beginning of his senior year, Aidan began using the male restrooms and locker room, after a decision was made by school district officials. Faidley Dep. 29:13 - 30:12; DeStefano Decl. ¶ 10. To Aidan, “That feels so good – I am finally ‘one of the guys’, something I have waited for my whole life.” DeStefano Decl. ¶ 11.

39. Other students are supportive of Aidan, as demonstrated in part by his election to the homecoming court by his fellow students. DeStefano Decl. ¶ 11. He ran with the guys on the track team for senior night. DeStefano Decl. ¶ 11.

40. Being able to be his true self is incredibly important to Aidan. DeStefano Decl. ¶ 12. He was able to maintain Honor Roll, which he was unable to do prior to his transition because of distraction and stress. DeStefano Decl. ¶ 12.

41. When Aidan was a senior, he had no trouble in the bathrooms or locker rooms. DeStefano Decl. ¶ 13. Aidan is not the transgender male student described in the complaint. DeStefano Decl. ¶ 14.

42. Had Aidan been told that he could not use the male restrooms and locker rooms at the High School, it would have been devastating to him. DeStefano Decl. ¶ 17. It would have been devastating for his own school not to recognize him as a man, and to have to “go backward” in his transition. DeStefano Decl. ¶ 17. It would have been distressing for Aidan, and deeply uncomfortable for everyone, if Aidan had been forced to return to using the girls’ facilities, as he could no more use those facilities than any other male student could. DeStefano Decl. ¶ 17. By his senior year of high school, Aidan had facial hair, a male chest, a deep voice, and was widely recognized as a man. DeStefano Decl. ¶ 17. A prohibition on Aidan’s use of the male facilities would have forced him to use separate facilities. DeStefano Decl. ¶ 18. Early in his transition, Aidan did choose to use the separate facilities, but to be told that he was required to use separate facilities from other boys, including his teammates, would have been humiliating and stigmatizing. DeStefano Decl. ¶ 19.

***Plaintiff Joel Doe***

43. Joel Doe was in eleventh grade during the 2016-2017 School Year and will be a senior in the 2017-2018 School Year. Joel Doe Dep. 16:12-18.

44. On October 31, 2016, Joel Doe observed Student A changing in the boys’ locker room at the High School. Joel Doe Response to BASD Interrogatory #2. Student A is a

transgender male student at the High School. Cooper Dep. 87:11-12. Joel Doe wants boys' facilities to be limited to individuals who were "born a male". Joel Doe Dep. 85:19-88:15; 220:23-221:10; 229:23 – 230:4.

45. Joel Doe says there is no way to tell a person's sex based on their appearance. Joel Doe Dep. 233:10-14.

46. Joel Doe's concern is not about genitals. If someone had surgery to remove their penis and create a vagina, he would not object to that person using the boys' locker room. Joel Doe Dep. 230:5-13.

47. Joel Doe's concern is not about exposure to breasts. He would not object to a transgender girl who has breasts changing in the boys' locker room. Joel Doe Dep. 233:25 – 234:13, 235:21 – 236:6.

48. Joel Doe has never exposed his genitals in the common areas of the locker room or seen other students' genitals in the locker room or bathroom. Joel Doe Dep. 231:9 – 232:14.

49. Joel Doe has never seen anyone take a shower in the boys' locker room. Joel Doe Dep. 73:14-19.

50. In November 2016, Joel Doe and his legal guardians were informed by school officials (Assistant Principal Foley, Principal Cooper, and Superintendent Faidley) that Joel could change his clothes for gym in the nurse's office or a single user restroom if he was uncomfortable in the boys' locker room. Joel Doe Response to BASD Interrogatory ## 10, 13, 19; BASD Response to Plaintiffs' Interrogatory #19; Foley Dep. 47:9 – 48:15; Cooper Dep. 120:13-17. The High School has made accommodations for students for various reasons to permit them to change in different locations, and Dr. Cooper told Joel Doe's guardians that the High School would do the same for Joel Doe. Cooper Dep. 118:10-20.

51. Joel Doe declined to use the nurse's office to change for PE class, choosing instead to participate in his street clothes for reduced credit. Joel Doe Dep. 175:9 – 177:6.

52. Joel Doe could leave his clothes in his hallway locker or with the physical education teacher, or the High School would move his hallway locker closer to the changing facility if necessary. Cooper Dep. 120:18 – 121:8.

***Plaintiff Jack Jones***

53. Jack Jones was in eleventh grade during the 2016-2017 School Year and will be a senior in the 2017-2018 School Year. Jack Jones Dep. 14:3-10.

54. In early November 2016, Jack Jones saw a transgender boy he said was wearing shorts and a sports bra in the locker room. Jack Jones Response to BASD Interrogatory #2; Jack Jones Dep. 29:3-9. Jack Jones did not notice the student until one of his friends pointed out that the student was standing next to him. Jack Jones Dep. 20:25 – 22:25, 135:12 – 138:18.

55. Jack Jones believes the presence of a transgender boy in the boys' locker room violates his privacy. Jack Jones Dep. 60:12 – 61:11.

56. Jack Jones believes his privacy would be protected by access to single user facilities for going to the bathroom and changing clothes for gym, but believes he has the right to use the boys' locker room and common restrooms. Jack Jones Trial Dep. 43:3-21. His parents agree. John Jones Dep. 22:13 – 23:15; Jane Jones Dep: 40:1 – 42:1.

57. Jack Jones does not believe that "modifications" to a person's genitals have any bearing on which locker or restroom they should use. He believes if someone was born with a vagina and had surgery and now has a penis, they should still use the girls' facilities. Jack Jones Trial Dep. 36:11 – 37:10, 39:24 – 40:12, 45:5 – 46:2.

58. Jack Jones' parents would not object to their son being exposed to someone's breasts or a vagina in the boys' locker room as long as that person was designated male at birth. John Jones Dep. 20:16-22; Jane Jones Dep. 33:16-20. Nor would they object to their daughter being exposed to someone's penis in the girls' locker room as long as that person was designated female at birth. John Jones Dep. 20:23 – 21:9.

59. Jack Jones says that he has been harmed because it is embarrassing to be the person to complain about the District's practice regarding transgender students' use of facilities and to "be the guy who has to stand up and say that's wrong." Jack Jones Dep. 149:9-18; Jack Jones Trial Dep. 19:19 – 20:1 ("I mean, it was kind of humiliating because I moved after that, right as I had seen her, and it kind of looks weird like, why did I move. And I kind of feel ashamed that I had to be the one who moved, it's embarrassing."). Jack Jones does not know of other boys who avoid using the locker room because a transgender boy might be in there. Jack Jones Dep. 158:5-25.

***Plaintiff Macy Roe***

60. Macy Roe graduated from the High School at the end of the 2016-2017 School Year and will be attending college in the fall. Macy Roe Response to BASD Interrogatory #3; Macy Roe Dep. 10:5-15.

61. Macy Roe is the sister of Jack Jones and learned of the District's practice when she heard it being discussed by Jack Jones and their parents. Macy Roe Trial Dep. 9:7-23; Macy Roe Dep. 21:1 – 23:17.

62. Macy Roe is not aware of any time she has been in a bathroom or locker room at school while a transgender girl has been present. Macy Roe Response to BASD Interrogatory #2; Macy Roe Dep. 20:3-6.

63. Macy Roe believes her privacy would be protected by access to single user facilities for going to the bathroom and changing clothes for gym, but believes she has the right to use the girls' locker room and common restrooms. Macy Roe Trial Dep. 18:25 – 19:13.

64. Macy Roe does not object to seeing someone's penis in the girls' locker room as long as that person was born female. Macy Roe Trial Dep. 17:2 – 18:7.

65. Macy Roe is now concerned that she may find herself sharing a women's restroom with a transgender woman and will look around any restroom she enters to make sure that it is not occupied by someone she thinks looks like a man. If she saw such a person, she would leave the facility. Macy Roe Trial Dep. 21:22 – 24:8.

***Plaintiff Mary Smith***

66. Mary Smith was in eleventh grade during the 2016-2017 School Year. Mary Smith Dep. 15:21 – 16:1.

67. She will not be attending Boyertown High School for her senior year. Mary Smith Dep. 126:4-24.

68. On March 22, 2017, Mary Smith observed Student B washing her hands at the sink of the girls' bathroom at the High School. Mary Smith Response to BASD Interrogatory #2; Mary Smith Dep. 17:3 – 20:2.

69. Student B is a transgender female. Cooper Dep. 90:13-14.

70. Mary Smith wants the school to prohibit transgender girls from using the girls' facilities regardless of any surgical interventions, their appearance, and school records as to their gender. Mary Smith Dep. 64:1-68:24.

## PROPOSED CONCLUSIONS OF LAW

### *Legal Standard for Disposing of a Motion for Preliminary Injunction*

71. Preliminary injunctive relief is “an extraordinary remedy, which should be granted only in limited circumstances.” *Novartis Consumer Health v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002).

72. “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

73. The “failure to establish any element ... renders a preliminary injunction inappropriate.” *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999).

74. The movant bears the burden of showing that these four factors weigh in favor of granting the injunction. *See Opticians Ass’n of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990).

### *Plaintiffs Are Unlikely to Succeed on the Merits of Their Constitutional Privacy Claim*

75. Plaintiffs are unlikely to succeed on the merits of their constitutional privacy claim because they are not required to use the multi-user restrooms and locker rooms and are not being subjected to any intrusion on their right to privacy. The presence of a transgender student in a restroom or locker room consistent with the student’s gender identity does not establish any actual or threatened violation of personal privacy. *See, e.g., Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, -- F. Supp. 3d --, 2017 WL 770619, at \*14 (W.D. Pa. Feb. 27, 2017).

76. The physical layout of the High School’s restrooms and locker rooms affords actual physical privacy from others, and so the practice of allowing transgender students to use

the restrooms and locker rooms consistent with their gender identity does not implicate any actual privacy concerns. *See, e.g., Evancho*, 2017 WL 770619, at \*14.

77. There is no need for students to undress in the common areas of the multi-user facilities because of the availability of toilet stalls and private showers with curtains that would enable students to undress out of sight of other students. Inside those stalls and showers, there is no meaningful risk that a student's unclothed body would be seen by another person, thereby mitigating any potential risk of unwanted exposure. *See, e.g., Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at \*1-2 (N.D. Ill. Oct. 18, 2016).

78. There is no need for students to view other students undressing in the common areas of the multi-user facilities or for students to use the multi-user restrooms if they are uncomfortable doing so because the District has private single-user restrooms available for going to the bathroom or changing clothes and will provide additional private accommodations for students who seek additional privacy.

***Plaintiffs Are Unlikely to Succeed on the Merits of Their State Law Privacy Claim***

79. To prevail on a claim of intrusion upon seclusion under Pennsylvania law, Plaintiffs must show that (1) there was an intentional intrusion, (2) upon their solitude or seclusion, or their private affairs or concerns, that was (3) substantial and (4) highly offensive to a reasonable person. *See Burger v. Blair Med. Assocs., Inc.*, 946 A.2d 374, 379 (Pa. 2009); *Gabriel v. Giant Eagle, Inc.*, 124 F. Supp. 3d 550, 571-72 (W.D. Pa. 2015); *Ruder v. Pequea Valley Sch. Dist.*, 790 F. Supp. 2d 377, 404 (E.D. Pa. 2011).

80. Plaintiffs do not allege that anyone intruded upon them in the private restroom stalls or showers or in separate facilities.

81. Mary Smith, on one occasion, saw a transgender female washing her hands at the sink in the girls' restroom. The mere presence of a transgender female in the girls' restrooms is not an intentional intrusion upon solitude, seclusion, or private affairs or concerns. Nor is the mere presence of a transgender female washing her hands in the common area of a girls' restroom highly offensive to a reasonable person.

82. Plaintiffs Joel Doe and Jack Jones, each on one occasion, saw a transgender boy in the common area of the boys' locker room. The mere presence of a transgender boy in the boys' locker room is not an intentional intrusion upon solitude, seclusion, or private affairs or concerns. Nor is the mere presence of a transgender boy in the common area of a boys' locker room highly offensive to a reasonable person.

***Plaintiffs Are Unlikely to Succeed on the Merits of Their Title IX Claim***

83. To establish sexual harassment under Title IX, Plaintiffs must demonstrate sexual harassment that is "severe, pervasive, and objectively offensive." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2001) (emphasis added); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). The sexual harassment must "so undermin[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resource and opportunities." *Davis*, 526 U.S. at 651.

84. The "mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases." *Students*, 2016 WL 6134121, at \*32. Plaintiffs allege only the mere presence of transgender students, and their presence is not objectively offensive. *See, e.g., Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002).

85. Plaintiffs have not been targeted on the basis of sex. *See* 20 U.S.C. § 1681. The District’s practice permits transgender girls and transgender boys to use the facilities consistent with their gender. Plaintiffs’ discomfort stems from a practice that is not directed at Joel Doe and Jack Jones because they are male or at Mary Smith and Macy Roe because they are female. The District’s practice applies to all students, transgender and non-transgender, and to all restrooms, for boys and girls. *See, e.g., Students*, 2016 WL 6134121, at \*31.

86. Plaintiffs are unlikely to succeed on their Title IX claim because the relief they seek, the exclusion of transgender students from facilities that accord with their gender identity, violates Title IX. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017); *see also Evancho*, 2017 WL 770619, at \*23 (violates Equal Protection Clause).

87. Every federal appellate court that has considered sex discrimination claims by transgender people after *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), has affirmed that law prohibiting sex discrimination do not exclude transgender people from their protections. *See Whitaker*, 858 F.3d at 1047-49. In *Price Waterhouse*, the Supreme Court recognized that sex discrimination includes adverse actions based on sex stereotypes, including a person’s gender expression and conformity (or lack of conformity) with social gender roles. 490 U.S. at 250 (plurality opinion). Because “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes,” discrimination based on transgender status is a form of impermissible sex stereotyping. *See Glen v. Brumby*, 663 F.3d 1312, 1316-18 (11th Cir. 2011) (collecting cases).

88. A “policy that requires an individual to use a bathroom that does not conform with her or her gender identity punishes that individual for his or her gender non-conformance,

which in turn violates Title IX.” *Whitaker*, 858 F.3d at 1049; *see also Evancho*, 2017 WL 770619, at \*11 (excluding transgender students from shared restrooms “is essentially the epitome of discrimination based on gender nonconformity”).

***Plaintiffs Will Not Suffer Irreparable Harm If Their Motion is Denied***

89. Joel Doe and Jack Jones will not suffer irreparable harm if their motion is denied because they can easily avoid the multi-user boys’ facilities. The District has stated that any student, without prior permission, may use the single family-accessible toilet in the school, or request to use the nurse’s restroom from the nurse. Further, the District allows all students who are uncomfortable in multi-user facilities to request alternative accommodations. The High School has at least six single-user toilets that can be made available for student use.

90. Macy Roe will not suffer irreparable harm without a preliminary injunction because she has already graduated and no longer attends the High School.

91. Mary Smith will not suffer irreparable harm without a preliminary injunction because she does not plan to attend the High School next year. But even if Mary Smith did choose to attend the High School, she is also easily able to avoid the multi-user girls’ facilities as discussed in para. 8-10, *supra*.

92. Moreover, to the extent that Joel Doe has alleged the District’s practice has impeded his ability to participate in physical education, the High School has offered him alternative accommodations that address his concerns regarding privacy while changing and securing his belongings.

***The Balance of Equities Weighs Against Granting an Injunction***

93. The Plaintiffs’ requested relief would require the District to prohibit transgender students from using the restrooms and locker rooms consistent with their gender identity. Such a

prohibition would cause significant distress and stigmatization to transgender students who attend the High School. *See* para. 21-29, 42 *supra*. It would also violate Title IX by discriminating against transgender students based on their gender.

94. Given the harm injunctive relief would impose on transgender students and the alternatives readily available to address Plaintiffs' privacy concerns, the balance of the equities weighs strongly against the injunctive relief requested.

***An Injunction is Not in the Public Interest***

95. Injunctive relief requiring the High School to subject transgender students to harmful, stigmatizing, discriminatory treatment is not in the public interest.

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Respectfully submitted,

/s/ *Mary Catherine Roper*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of July, 2017, the foregoing Proposed Findings of Fact and Conclusions of Law was filed electronically with the Court and a true and correct copy was served on all counsel of record via the Court's ECF system.

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