UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN JONES and JANE JONES; and MACY ROE, Plaintiffs, vs. BOYERTOWN AREA SCHOOL DISTRICT; DR. RICHARD FAIDLEY, in his official capacity as Superintendent of the Boyertown Area School District; DR. BRETT COOPER, in his official capacity as Principal; and DR. E. WAYNE FOLEY, in his official capacity as Assistant Principal, Defendants, And PENNSYLVANIA YOUTH CONGRESS FOUNDATION, Defendant Intervenor.	**Case No. 17-1249-EGS** **The Honorable Edward G. Smith** **PLAINTIFFS' SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW**

PLAINTIFFS' SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Court's Order of July 25, 2017, Plaintiffs' submit their Supplemental Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Boyertown Area School District ("District") is a public school district organized under the laws of the Commonwealth of Pennsylvania. (Am. Complaint at 14-15).

2. The District receives federal financial assistance. (Pl. Ex. 42).

3. Dr. Richard Faidley was the District Superintendent at all times relevant to the facts underlying this litigation. (Am. Complaint at 20).

4. Dr. Brett Cooper is the Principal of Boyertown Area High School. (Am. Complaint at 21).

5. Dr. E. Wayne Foley is an Assistant Principal of Boyertown Area High School. (Am. Complaint at 22).

6. Until the 2016-17 school year, the Boyertown Area School District's practice was to provide privacy facilities like locker rooms and restrooms exclusively based on biological sex. (Foley Dep. 23; Cooper Dep. 27:21-25).

7. This practice was designed to protect students' personal privacy from members of the opposite sex while they are in such facilities. (7-31-17 Hearing Transcript 131:20-24; Cooper Dep. 35:14-22; Foley Dep. 26, 53-54).

8. Under this prior practice, students were disciplined for entering the privacy facilities of the opposite sex. (7-31-17 Hearing Transcript 112:8-12; Cooper Dep. 31:17-19; Foley Dep. 24-25).

9. In the 2014-15 school year, a school counselor communicated to Dr. Cooper that Student ee, a biological female, no longer wanted to share privacy facilities with other females. (Cooper Dep. 75:8-15, 78:13-17).

10. The school allowed Student EE (Aidan DeStefano) to use a private, single-user facility. (Cooper Dep. 79:12-15; Faidley Dep. 28:20-24).

11. Prior to the start of the 2016-17 school year, Student EE (Aidan DeStefano) asked to use the boys' multi-user privacy facilities. (Cooper Dep. 80:9-23).

12. Dr. Cooper sought direction from and consulted with Central Administration, which was headed by Dr. Faidley. (Cooper Dep. 20:25-21:5, 80:24-81:2; Faidley Dep. 30:3-12).

13. After discussions between Dr. Faidley and Assistant Superintendent Scoboria, Mr. Scoboria advised Dr. Cooper that in light of the Obama Administration's *Dear Colleague* letter issued on May 13, 2016, the school should allow students who identify with the opposite sex to use to privacy facilities of the opposite sex if that makes them more comfortable. (Faidley Dep. 31:14-21; Cooper Dep. 107:22-108:21).

14. Dr. Cooper communicated that decision to his administrative team. (Cooper Dep. 109:21-110:2).

15. As a result, when two biological females (Student A and Student EE (Aidan DeStefano)) and a biological male (Student B), asked to use the

privacy facilities of the opposite sex, Dr. Cooper gave them permission. (Cooper Dep. 80:24-81:2, 89:3-8, 92:19-93:16).

16. Three other Boyertown students, Student FF, Student GG, and Student HH, also identify with the opposite sex. (Cooper Dep. 94:7-12, 98:21-25, 103:1-3).

17. Student EE (Aidan DeStefano), though using the privacy facilities of the *opposite* sex, shared overnight school accommodations with a student of the *same* biological sex. (7-17-17 Hearing Transcript 226:5-15).

18. The District has not received any complaints from students about sharing privacy facilities with persons of the same biological sex who identify with the opposite sex. Therefore, the District's change in practice was not made on this basis. (7-31-17 Hearing Transcript 136:5-24).

19. A student who identifies with the opposite sex is not required to use the privacy facilities of the sex with which they identify. (7-31-17 Hearing Transcript 142:19-143:7; Cooper Dep. 103:19-23).

20. The school's only criteria for allowing a student who identifies with the opposite sex to use the privacy facilities of the opposite sex is whether it makes that student comfortable. (7-31-17 Hearing Transcript 110:8-9; Cooper Dep. 114:21-115:3).

21. Students need not dress or groom as the opposite sex, and they need not change their names or pronouns, receive hormone treatments, or undergo surgery. All that matters to the school is what makes those students most

comfortable. (7-31-17 Hearing Transcript 138:18-21, 139:17-24, 140:6-14; Cooper Dep. 115:4-25).

22. The District has never turned down a request from a student who identifies with the opposite sex. (7-31-17 Hearing Transcript 140:15-17).

23. The District changed its practice without notifying parents and other students. (7-31-17 Hearing Transcript 134:16-20; Faidley Dep. 46:22-47:11; Foley Dep. 30; Cooper Dep. 29:13-16).

24. The privacy facilities are marked with signs with the universal symbol for men and women and/or the words "boys" or "girls." (Cooper Dep. 60:8-11, 60:24-61:3, 69:6-11, 70:11-13, 71:15-16).

Joel Doe

25. During the 2016-17 school year, Plaintiff Joel Doe was a junior at the Boyertown Area High School. (7-17-17 Hearing Transcript 82:23-24).

26. On October 31, 2016, Joel Doe began changing in the boys' locker room for PE class. When he was standing in his underwear about to put his gym clothes on, a student next to Joel tapped him on the shoulder and told him to turn around. Upon turning around, Joel saw a female, Student A, changing with him in the locker room and wearing nothing but shorts and a bra. (7-17-17 Hearing Transcript 85:5-6,11; 88:4-10; Am. Complaint at 50).

27. There were approximately 15 boys in the locker room at the time of the incident. (7-17-17 Hearing Transcript 85:14).

28. Joel Doe was embarrassed and humiliated to find himself partially undressed in the presence of a female. He quickly put his clothes on, put his belongings in the locker, and hurriedly left the boys' locker room. (7-17-17 Hearing Transcript 88:23-25, 89:16, 112:18-20).

29. Joel Doe, along with various classmates, went to the guidance counselor's officer and were directed to speak to their grade-level Assistant Principal, Dr. Foley, to let him know what had happened. (7-17-17 Hearing Transcript, 92:1-11).

30. During the meeting, as Dr. Foley testified was his custom, the door of his office remained open. Dr. Foley acknowledged he had no expectation of confidentiality during the meeting. (Foley Dep. 42:16-43:5).

31. The conversation went as follows:

> Joel: So I have a quick, a few quick questions. There was a girl in our locker room today.
>
> Dr. Foley: Mhm.
>
> Joel: Um, I was questioning the legality of that.
>
> Dr. Foley: The legality of that right now as it stands is anybody that is a transgender student. . .
>
> Joel: Okay.
>
> Dr. Foley: . . . may choose the bathroom and/or locker room in which they identify their gender with.
>
> Joel: Okay.
>
> Dr. Foley: And we are trying to get another ruling on that too, because that law continues to change instantaneously.

Joel: Can you define transgender for me?

Dr. Foley: Sure.

Joel: Just so that we are on the same page.

Dr. Foley: Transgender could be any mental state that a person has that they believe that they identify with.

Joel: So mental, not physical?

Dr. Foley: It does not have to be physical at this point.

(Plaintiff Exhibit 6).

32. Joel Doe asked whether there was anything that Dr. Foley could do to protect the boys in the locker room. Specifically, the interaction went as follows:

Joel: I guess the question is - is there anything you can do as in separating this group of boys from that situation?

Dr. Foley: There is nothing that I can do instantaneously.

(Plaintiff Exhibit 6).

33. Dr. Foley told Joel Doe, "In the meantime I just need you to, unfortunately, tolerate it." Dr. Foley continued, "You know, try and make it as unnatural [sic] as possible. You know, just make it as natural as you possibly can." (Plaintiff Exhibit 6).

34. When Joel Doe asked Dr. Foley to tell Joel when Dr. Foley found out whether this would continue, Dr. Foley again reinforced that the boys should continue to use the locker room with Student A when he replied, "Yeah, well,

you'll know because either Student A will stay there or Student A will no longer be there." (Plaintiff Exhibit 6).

35. As the students were leaving, Dr. Foley reemphasized, "As natural as possible... as kind as you can be...." (7-17-17 Hearing Transcript 93:5-7; Plaintiff Exhibit 6).

36. Before speaking with Dr. Foley, Joel was not made aware of the school's change in practice to allow students to use the bathrooms and locker rooms of the opposite sex if they identified with that sex. (7-17-17 Hearing Transcript 110:10-14).

37. After speaking with Dr. Foley, Joel understood that there were no other options available to him. He was to tolerate changing with girls and try to make it as natural as possible; this was his "only option." (7-17-17 Hearing Transcript 110:15-20).

38. Joel was unable to get dressed in any other area because he had nowhere to safely secure his belongings (7-17-17 Hearing Transcript 111:4-18).

39. The anxiety, embarrassment, and stress Joel feels as a result of his loss of privacy has caused him to refrain from using restrooms as much as possible, to stress about when and if he can use a given restroom without running into females, and to opt to hold his bladder rather than use the school's restroom. (7-17-17 Hearing Transcript 113:2-5, 113:14-22).

40. Since the incident, Joel went from using the high school restrooms approximately once a day to two or three times a week. (7-17-17 Hearing Transcript 112:24-113:5).

41. When he did use a school restroom, Joel tried to use only the single-user restroom to avoid running into a female in the boys' multi-user restroom. He only used the 700s hallway bathroom in an absolute emergency. (7-17-17 Hearing Transcript 113:11-17).

42. When standing in the stall in the 700s hallway bathroom, it is possible to see over the sides of the walls of the stall (7-17-17 Hearing Transcript 114:13-16, Pl. Ex. 30).

43. Now that girls are allowed in the boys' restrooms, Joel can no longer comfortably use the multi-user restrooms designated for males without fear of running into a female. (7-17-17 Hearing Transcript 115:6-13).

44. As a result of his loss in privacy, Joel has altogether stopped using the boys' locker room, has stopped changing for gym, and has consequently received partial credit for failing to dress appropriately for gym class. (7-17-17 Hearing Transcript 110:25-111:5, 111:23-25, 112:12-14).

45. As a result of the school's change in practice, Joel has not decided whether to return to Boyertown for his senior year. (7-17-17 Hearing Transcript 84:25-85:3).

46. Joel does not object to using a restroom with a boy who dresses like a stereotypical girl or a biologically male transgender student. (7-17-17 Hearing Transcript 115:21-116:4).

47. Joel filed this lawsuit because a girl viewed him in his underwear in the boys' locker room and when he went to the administration for help they told him he had to tolerate it and make it as natural as possible. (7-17-17 Hearing Transcript 85:5-9).

48. Joel is requesting a preliminary injunction from the court so he can continue to use the locker rooms and restrooms provided to males. (7-17-17 Hearing Transcript 116:15-17).

Jack Jones

49. Plaintiff Jack Jones was a junior at Boyertown Area High School in the 2016-17 school year. (Jack Trial Dep. 4:19-21, 7:11-13).

50. During the first week of November 2016, Jack began changing in the locker room after PE class. He was standing facing his locker, and Student cc was standing to his right. Just after Jack changed his shirt and when he was standing in his underwear about to put his shorts on, Student cc tapped Jack's shoulder. As Jack turned to face him, Student cc gestured at something behind Jack. When Jack turned around, he saw a girl in the locker room with him, while he was in his underwear. (Jack Trial Dep. 7:18-21, 17:20-18:4).

51. Jack experienced immediate confusion, embarrassment, humiliation, and loss of dignity upon finding himself in this circumstance. He quickly moved to another part of the locker room behind other boys and where he believed he would be most secluded from the female, put his shorts on, and left the locker room. (Jack Trial Dep. 18:6-13, 19:15-18, 19:21-20:1, 21:20-21).

52. The anxiety, embarrassment, and stress he felt as a result of his loss of privacy has caused him to refrain from using restrooms as much as possible, stress about when and if he can use the locker room or a given restroom without running into members of the opposite sex, and opt to hold his bladder rather than use the school's restroom. This has caused an ever-present distraction throughout the school day. (Jack Trial Dep. 23:4-7, 23:24-24:10, 24:15-16).

Mary Smith

53. Mary Smith, a junior at Boyertown Area High School in the 2016-17 school year, entered a girls' bathroom in the high school in March 2017, and saw a male student, Student B. (7-17-17 Hearing Transcript 31:18-32:1).

54. Mary was shocked and confused, and didn't know what to do. So she ran away. "I ran away. I ran directly out to my LGI, which is right next to it." (7-17-17 Hearing Transcript 44:2-44:13).

55. While Mary was telling the LGI instructor about the male in the bathroom, another male student came into the room and said he had

witnessed a male leaving the girl's bathroom. (7-17-17 Hearing Transcript 45:10-45:13).

56. This confirmed her story to the LGI instructor who said, "This is important, we need to go report this to the office right away, this is an important matter, it needs to be discussed." (7-17-17 Hearing Transcript 45:13-45:18).

57. Mary reported the incident to the school office. (7-17-17 Hearing Transcript 44:7-12, 45:10-18).

58. The school determined through video that it was Student B, a male who now identifies as female. Further video review revealed Mary could be seen "hurriedly exiting the lav back to the LGI." (7-17-17 Hearing Transcript 47:20-47:25; Pl. Ex. 62).

59. Mary Smith reported the incident to Dr. Foley. It was then that Mary learned for the first time that the school was now permitting members of the opposite sex to use the girls' bathrooms. (7-17-17 Hearing Transcript 48:16-49:18).

60. Dr. Foley stated, "we have a policy at BASH that anyone who identifies as the opposite sex are allowed to use the bathrooms that they identify with." (7-17-17 Hearing Transcript 49:14-49:19).

61. Mary told Dr. Foley that she hadn't heard this was happening and inquired whether the school ever told her parents about this. Dr. Foley

responded that they had not told parents about this but he believed the school might be working on that. (7-17-17 Hearing Transcript 49:18-22).

62. Dr. Foley did not offer Mary the option of using restrooms or locker rooms outside the presence of male students (whether the nurse's office or otherwise), nor did he follow-up with Mary to address her concern. (7-17-17 Hearing Transcript 49:20-24).

63. Mary plays a sport that requires her to change into a uniform, and she usually changes in the common area rather than the restroom stalls due to the stalls' cramped and less sanitary conditions. (7-17-17 Hearing Transcript 34:19-25; 41:15-42:4)

64. Three to five people typically changed in the restroom at the same time. (7-17-17 Hearing Transcript 34:24-35:22).

65. One of the bathrooms she frequently used to change into her sports uniform is the bathroom where she saw male student, Student B. (7-17-17 Hearing Transcript 43:11).

66. As part of Mary's gym class, she is required to change into gym clothes every day for a semester. When she changes, she uses the common area rather than one of the three stalls in the locker room for sanitary reasons and time constraints. (7-17-17 Hearing Transcript 51:16-25, 57:11-25)

67. Mary takes off her top to put on a sports bra. Then she takes off her pants and, depending what time of the month it is, she likes to change her underwear. (7-17-17 Hearing Transcript 39:11-39:15).

68. Other girls do the same, and Mary has seen their breasts, backsides, and private areas while changing clothes. Girls are very comfortable around other girls while they change. (7-17-17 Hearing Transcript 39:20-40:2)

69. When Mary has her period, she changes in a shower stall for privacy. However, it wasn't completely private because females would rip open the curtains not realizing the shower stall was occupied. (7-17-17 Hearing Transcript 41:18-41:20).

70. The loss of privacy due to males being permitted into bathrooms and locker rooms has caused her to refrain from using school restrooms as much as possible, stress about when and if she can use a given restroom without running into males, and hold her bladder rather than using the school's restroom. (7-17-17 Hearing Transcript 50:9-51:9).

71. When Mary was asked why she objects to sharing a privacy area with a boy that identifies as a girl, she responded, "They're not the same sex as me. It's uncomfortable." (7-17-17 Hearing Transcript 50:6-50:8).

72. Mary also stated that she used to use the bathrooms at BASH before March 22nd about three to four times a day. After the incident, it significantly declined to about three to four times a week. (7-17-17 Hearing Transcript 50:11-50:14).

73. Mary is more cautious about when and where to use the bathroom. She does not use the main multi-user bathrooms because they have more

open area, and more chance for exposure. (7-17-17 Hearing Transcript 51:7-51:9).

74. Mary does not have a problem sharing the girls' bathrooms with a transgender student who is the same sex as she is. (7-17-17 Hearing Transcript 60:16-60:21).

75. Mary states she should be allowed to use any bathroom designated for females and know that only girls are allowed in that bathroom. (7-17-17 Hearing Transcript 61:2-61:6).

76. When asked if toilet stalls provide the privacy she needed, she responded, "No, that's only protection from the same sex, a female. I am opening pads, using tampons, my pants are on the floor and you can see my underwear." She continued, "There is a gap between the door and the side of the stall where I've made awkward eye contact with people. It's weird, uncomfortable. But I know there is a female on the other side, hopefully." (7-17-17 Hearing Transcript 61:7-61:15).

77. When asked why Mary brought this lawsuit she stated, "My privacy was violated! The school didn't protect me." (7-17-17 Hearing Transcript 61:17-61:21).

78. Mary "want[s] the Court to allow only girls to be in the bathrooms and the locker rooms." (7-17-17 Hearing Transcript 62:11-62:13).

79. As a result of the stress and anxiety caused by Defendants' new practice, Mary will not return to the Boyertown Area School District for her

senior year unless the school's practice changes. (Am. Complaint at 117; 7-17-17 Hearing Transcript 32:2-3).

Macy Roe

80. Macy Roe was a senior at Boyertown Area High School during the 2016-17 school year. (Macy Trial Dep. 5:18-20).

81. Macy learned from another Boyertown student that boys had seen a girl in their locker room, and the school office said they had to deal with it. (Macy Trial Dep. 9:8-20).

82. Learning about the school's new practice caused Macy anxiety and stress. She worried that if other student had encountered a member of the opposite sex in their locker rooms and bathrooms, that it could happen to her, too--especially because she knew of at least one male student who identified as a girl. (Macy Trial Dep. 10:1-9).

83. As a result, Macy refrained from using school restrooms whenever possible, stressed about when and if she could use a restroom without encountering a male, and opted to hold her bladder rather than risk encountering a male in the girls' restroom. (Macy Trial Dep. 10:1-24, 15:25-16:3).

Dr. Scott Leibowitz

84. Dr. Scott Leibowitz is the medical director for the behavioral health component of the THRIVE gender and sex development program at

Nationwide Children's Hospital in Columbus. (7-17-17 Hearing Transcript 134:21-24, 136:21-23).

85. Dr. Leibowitz has not served as a tenured full professor or as a tenured associate professor at any medical school, college, or university. (7-17-17 Hearing Transcript 202:11-23).

86. Dr. Leibowitz has not conducted or published any 30-year, 10-year, or 5-year follow-up studies on patients who underwent gender affirmation through his treatments, and admitted that he is not a researcher. (7-17-17 Hearing Transcript 197:7-23).

87. Dr. Leibowitz stated that there is limited evidence when it comes to how a clinician determines if and when social transition is an appropriate treatment for a particular patient (7-17-17 Hearing Transcript 154:16-23).

88. Dr. Leibowitz stated that multiple methods of treating gender dysphoria exist, including social transition, hormonal treatments, surgical treatments, or a combination of those treatments or transitions. (7-31-17 Hearing Transcript 7:12-18).

89. Dr. Leibowitz stated that social transition includes using the privacy facilities of the opposite sex. Social transition may also be used to diagnose whether a person has gender dysphoria. (7-31-17 Hearing Transcript 47:22-48:25, 50:13-19, 56:7-13).

90. Some youth who experience gender dysphoria may not want to use the bathroom of either sex, however, as they are not yet comfortable with living

in the "gender role" of the opposite sex. (7-31-17 Hearing Transcript 50:21-51:1, 51:21-24).

91. After social transition, a person may determine whether to continue with additional treatments or, "in other situations, it would lead that person to feeling, you know, perhaps this is something that I am purely just not ready for." (7-31-17 Hearing Transcript 48:17-21).

92. The time necessary to determine whether a person did not have gender dysphoria would be about half a year, while more time would be necessary to determine if a person had gender dysphoria. (7-31-17 Hearing Transcript 52:19-53:1).

93. A person who is gender dysphoric may ultimately identify with a non-binary gender. (7-31-17 Hearing Transcript 57:13-16).

94. Dr. Leibowitz acknowledged that the science supporting social transition as a tool to treat or diagnose gender dysphoria is not "sound and settled." (7-31-17 Hearing Transcript 8:13-15).

95. He also acknowledged that limited science and standards exist concerning social transition. (7-31-17 Hearing Transcript 57:21-25).

96. Dr. Leibowitz affirmed that the "newer and better psychometric instruments used to diagnose gender dysphoria have not yet been scientifically validated, and that the field is relatively new and is "in evolution." (7-31-17 Hearing Transcript 46:10-15, 90:18-23, 94:23-24).

97. Furthermore, Dr. Leibowitz affirmed that limited evidence exists to aid child psychiatrists in treating gender dysphoria. (7-31-17 Hearing Transcript 53:21-54:12).

98. Dr. Leibowitz affirmed that the first clinic in the United States which addresses gender identity in adolescents through multiple disciplines has existed for no more than ten years. (7-31-17 Hearing Transcript 9:3-5).

99. As a clinician, Dr. Leibowitz does not make decisions about which bathroom a person should use, nor does he decide the gender of a person. He only determines whether a person can be diagnosed with gender dysphoria. (7-17-17 Hearing Transcript 171:6-10).

100. Dr. Leibowitz defines gender identity as "one's subjective, deep-core conviction sense of self as a particular gender. In most situations, male or female, but maybe some aspect of both, or in between." (7-17-17 Hearing Transcript 143:12-15).

101. Many transgender youth do their best to conceal their anatomy because they don't want their biological sex to be exposed. (7-17-17 Hearing Transcript 180:21-181:13).

102. Transgender patients are also particularly modest about exposing themselves while using privacy facilities. (7-31-17 Hearing Transcript 58:1-5).

103. Dr. Leibowitz sees the provision of a single-user facility as a reasonable accommodation of a transgender student's particular modesty about their body. 7-31-17 Hearing Transcript 58:1-24.

104. When asked how a student being required to use facilities not aligning with an adolescent's gender identity would affect that person's psychological distress, Dr. Leibowitz replied, "And I believe that for me to sit here and say that this automatically will lead to something would be not true." (7-31-17 Hearing Transcript 72:21-73:6).

105. Many children, especially the less resilient ones, simply want to be accepted in living out their gender identity but do not want to feel the pressure of using the locker room or restroom with individuals of the opposite sex like Aiden did. (7-31-17 Hearing Transcript 74:14-16; 75:18-76:6).

106. Dr. Leibowitz was unable to cite any study sufficiently robust to support a causal link between gender dysphoria and suicide. (7-31-17 Hearing Transcript 42:1-44:6)

107. Dr. Leibowitz affirmed that extremely few persons in any high school setting are transsexual (i.e. have undergone surgery of their reproductive anatomy). (7-31-17 Hearing Transcript 86:16-18).

108. When asked to define scientific consensus, Dr. Leibowitz stated, "I don't know that I can answer that question accurately. I think it's subjective scientific consensus, to my knowledge. So when I say what scientific

consensus means to me, you might ask four other physicians and get four other answers." (7-31-17 Hearing Transcript 15:4-8).

109. When asked whether scientific consensus was stable over time, Dr. Leibowitz answered that "research is evolving, clinical issues are evolving." (7-31-17 Hearing Transcript 15:24-16:12).

110. Dr. Leibowitz admitted that gender identity is a "field in evolution." 7-31-17 Hearing Transcript 94:23-24.

111. Dr. Leibowitz admitted that whether transgender is a mental condition or a mental illness is the subject of a "big debate that many scholars have spent hours and papers writing about." 7-31-17 Hearing Transcript 85:7-11.

112. Dr. Leibowitz admitted that he "cannot say what makes them comfortable or not" in respect to a gender non-conforming student using a single-sex bathroom.

113. Dr. Leibowitz cannot tell how school officials are supposed to know whether someone is gender non-conforming or whether they are gender dysphoric. 7-31-17 Hearing Transcript 92:2-6.

114. Dr. Leibowitz had not met Aidan Destefano prior to the 7-17-17 evidentiary hearing, and only exchanged a few words with him in a "5.8 second interaction" when they did meet at that hearing. 7-31-17 Hearing Transcript 73:12-21.

115. There have been no results from the first-of-its-kind National Institutes of Health United States multi-site study regarding the medical

safety of treating adolescent gender identity issues. (7-31-17 Hearing Transcript 19:17-20).

116. Dr. Leibowitz also testified that he could not provide statistical probability that his gender dysphoria patients might be eventually harmed by his following the standards of care.. (7-17-17 Hearing Transcript 200:3-7; 7-31-17 Hearing Transcript 21:13-21, 32:8-33:4).

117. Dr. Leibowitz gives no consideration to potential impacts to other persons which may result from his patient accessing a multi-user locker room as part of their social transition (unless the rare threat-to-others Tarasoff obligation arises). 7-31-17 Hearing Transcript 58:25-60:10.

118. In Dr. Leibowitz's view, it would be unethical to conduct a randomized controlled study of how social reinforcement of gender identity would be impacted by a person being given access to privacy facilities based on their gender identity versus not being given access to those facilities, and no such research exists. Leibowitz Depo. 83:2-84:5

Aidan DeStefano

119. Aidan DeStefano is a 2017 graduate of Boyertown Area Senior High whose sex is female, has a "female body" and "vagina", but identifies as a transgender male. (7-17-17 Hearing Transcript 212:1-11, 213:1-10, 231:14-16).

120. During seventh through ninth grade, Aidan used the nurse's bathroom at Junior High East to relieve himself and change for gym class. (7-17-17 Hearing Transcript 213:16-214:7).

121. Aidan played on the girls' basketball and track and field teams during junior high, changing in the girls' locker room when preparing for games and practices. (7-17-17 Hearing Transcript 214:19-215:2).

122. In tenth grade at Boyertown Area High School, Aidan was on the girls' cross-country and track and field teams. In twelfth grade, Aidan was on the boys' cross country team. (7-17-17 Hearing Transcript 218:7-15).

123. Aidan chose not to participate in girls' sports after beginning to take hormones. (7-17-17 Hearing Transcript 245:19-20).

124. Aidan used the nurse's bathroom during tenth and eleventh grade because "that's where I was the most comfortable" and Aiden knew other male students would be uncomfortable. (7-17-17 Hearing Transcript 219:2-14, 225:3-16).

125. Aidan considered it fine to use the nurse's bathroom in tenth and eleventh grade. (7-17-17 Hearing Transcript 216:22-217:1).

126. Aiden's received stares in both girls privacy facilities in 10th and 11th grade, and in boys privacy facilities in 12th grade. "My public transition began when I started 10th grade at BASH. The first time I stepped into the girl's bathroom here, everyone stared at me, because I did not look like the girls in that bathroom." Aiden stated that in his senior year when using male

facilities, like his experience in girls restrooms, male students sometimes stared as well. (Aiden Declaration #4 and #13, Dkt. 7-3).

127. During his senior year, Aidan used the boys' locker room after making sure his peers were comfortable with him being there. He would have used the nurse's bathroom if other students were uncomfortable. (7-17-17 Hearing Transcript 220:9-16, 228:14-22).

128. After being given permission to use the boys' bathroom, Aidan continued to use "the nurse's bathroom quite frequently." (7-17-17 Hearing Transcript 224:14-22).

129. When going on an overnight school trip, Aidan roomed with a female cousin rather than other female or male friends. Aidan was supposed to room with other girls, but "their parents were iffy about it," so he decided to room with a female cousin. (7-17-17 Hearing Transcript 226:7-227:7).

130. Aidan was okay with not rooming with boys on school trips because those are the school rules. (7-17-17 Hearing Transcript 231:14-22).

131. Throughout his life, Aidan has not experienced any bullying, questioning, or physical altercation. He states "I never got discriminated against." (7-17-17 Hearing Transcript 237:14-20; 241:17-18; 242:3-4).

132. Aidan was on the homecoming court senior year. He states, "I got the loudest cheers out of the other four nominees." Aidan considered it awesome to be acknowledged by his peers and teachers. (7-17-17 Hearing Transcript 222:23; 223:19-224:3).

133. At graduation, Aidan wore black, the color boys wore at the ceremony. (7-17-17 Hearing Transcript 234:16-20).

134. When asked by other transgender students for advice, Aidan recommended that they make sure other people would be comfortable with their presence in the locker room or bathroom. If others were uncomfortable, he told the transgender students to use the nurse's office, change in a stall, or wear gym clothes to school. (7-17-17 Hearing Transcript 244:18-245:6).

135. Aidan knows of one gender fluid student at Boyertown Area High School. (7-17-17 Hearing Transcript 232:11-23).

136. Aidan asserted repeatedly that a single-user bathroom, may be a solution to the situation for trans and gender fluid students, and has often suggested that to other students. (7-17-17 Hearing Transcript 229:17-18, 232:1-10, 239:5-7).

137. Aidan repeatedly testified that in the absence of the school's new practice, he would just use the nurse's bathroom. (7-17-17 Hearing Transcript 240:13-17, 243:19-20).

138. Aidan stated that, "I see both sides." He recognizes that some students are uncomfortable undressing together and he would go elsewhere to change. (7-17-17 Hearing Transcript 243:5-11).

Additional Findings

139. The term "sex" refers to one's biological/anatomical status as either male or female. Sex is fixed at conception, binary, objectively verifiable, and

rooted in our human reproductive nature. (*Random House College Dict*. 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *American Heritage Dict*. 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *The American College Dict*. 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished ..."); 9 *Oxford English Dict*. 578 (1961) ("[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.")).

140. Dr. Leibowitz defined "sex in a medical sense as being the anatomical and physiological processes that lead to or denote male and female, typically." (7-31-17 Hearing Transcript 6:7-11).

141. According to Dr. Leibowitz, "Transsexual is a term that had previously been used to indicate individuals who had gone through the complete transition. So those who have gone through what some call sex reassignment surgery…." He also stated, "transgender has evolved to indicate largely the larger overwhelming group of people, whether they've pursued some degree of transition or not, socially, medically, or surgically, and is more acceptable because people can't afford the surgeries." (7-31-17 Hearing Transcript 81:5-7, 18-22).

142. Dr. Leibowitz defines gender identity as "one's subjective, deep-core conviction sense of self as a particular gender. In most situations, male or female, but maybe some aspect of both, or in between." and "one's personal sense of self as a particular gender, whether that be male or female, in most cases or a combination thereof in select individuals." (7-17-17 Hearing Transcript 143:12-15)(7-31-17 Hearing Transcript 5:25-6:5).

143. Being gender fluid, according to Dr. Leibowitz, is a "kind of feeling a certain gender at a certain moment in time, and then switching, and then switching, perhaps, back." It's a "temporal relationship with gender." (7-17-17 Hearing Transcript 169:2-12).

144. Gender non-binary means that someone can identify as "somewhere in the middle," according to Dr. Leibowitz (7-17-17 Hearing Transcript 170:7-23).

145. When asked whether students who are genderfluid could choose the privacy facility that makes them most comfortable, Dr. Cooper indicated that such decisions have not yet been made. He also indicated no plan is in place to handle requests from students who identify as third gender or non-binary. (7-31-17 Hearing Transcript 130:2-6; Cooper Dep. 84:17-19, 85:7-18).

146. Rather than constituting a binary replacement for biological sex that conveniently dictates which of the two separate facilities we use, gender identity theory defies binary categories and is entirely unworkable for maintaining distinct privacy facilities. *See, e.g.*, American Psychological

Association. *Answers to your questions about transgender people, gender identity, and gender expression*. 1-2 (2011), *available at* http://www.apa.org/topics/lgbt/transgender.aspx (explaining that "Genderqueer is a term that some people use who identify their gender as falling outside the binary constructs of 'male' and 'female.'" Other terms "include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people." These "often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive."); Asaf Orr, Esq., et al., National Center for Lesbian Rights, Schools in Transition: *A Guide for Supporting Transgender Students in K-12 Schools* 5 (describing gender and gender identity as falling on a "gender spectrum") and 7 (defining "gender identity" as "a personal, deeply-felt sense of being male, female, both or neither") (2015), *available at* http://bit.ly/2kc8Ooi.

147. While Defendants Faidley, Cooper, and Foley implemented the new practice pursuant to their roles in the school, the school board voted to continue the practice with a 6-3 vote on March 28, 2017.

148. The District does not have any administrators at the high school who can determine if a student is gender dysphoric or the gender identity of a student. The District relies on what a student reports. (7-31-17 Hearing Transcript 130:21-131:4).

149. The District agreed that toilet stalls, urinal dividers, and shower stalls provide some added personal privacy from members of the same sex. (7-31-17 Hearing Transcript 132:14-17; Cooper Dep. 123:20-124:10).

150. It is possible to see under and over toilet stall partitions. (Pl. Ex. 30-31, 34).

151. Macy Roe testified that people can see through gaps in the bathroom stalls. Specifically, Macy stated that "there are large gaps in the stalls that I have made eye contact through before. It happens." (Macy Trial Dep. 15:18-21)

152. Macy Roe testified that she can be heard relieving herself in the bathroom, and female students can be heard attending to their periods. Specifically, Macy stated, "It's awkward because you can hear someone opening a pad or a tampon, so it can be heard when I do need to take care of my period, and it's terrifying that a boy could walk in as I'm doing such." (Macy Trial Dep. 11:17-24, 15:18-19).

153. Mary Smith testified that she does not change in the stalls frequently because the stalls "are not very big. They're kind of tiny, actually. And typically there's paper towel rolls and feces on the ground and it's kind of disgusting. It's not a sanitary place. I don't want my clothes on the floor. It's like -- it's tiny and it's disgusting." (7-17-17 Hearing Transcript 41:22-42:3).

154. Mary also testified that in the bathroom, "I'm opening up pads. I'm using tampons. My pants are on the floor. You can see my underwear. Girls

peek in. You can -- there's a gap between the door and the side of the stall where I've made awkward eye contact with people." (7-17-17 Hearing Transcript 61:10-14).

155. Shower stalls are not accessible unless walking through the locker room. (Jack Trial Dep. 28:17-22).

156. Mary also testified that while she would change in the shower stalls when she needed additional privacy during her period, "it wasn't completely private because I would have instances when females would rip open curtains to try to get in…. There was no real privacy from that. Like they would peek in to try to see. It was a hectic situation. Curtains were being ripped open. It's happened plenty of times…." (7-17-17 Hearing Transcript 58:14-25).

157. Students not only change in the common areas of the locker rooms, but also in the common areas of the restrooms. (Macy Trial Dep. 12:3-8; 7-17-17 Hearing Transcript 39:20-22).

158. Students see other students' private parts in the common areas of the locker room. (Macy Trial Dep. 14:11-13; Jack Trial Dep. 9:23-10:6; 7-17-17 Hearing Transcript 39:23-40:4).

159. New renovations have included "moving the lockers themselves to the outside walls and creating a large open space in the common area of the locker rooms." (Cooper Dep. 38:24-39:3).

160. Macy Roe testified that in the open space in the locker rooms, "there wasn't a lot of privacy. . . . You could see everyone." (Macy Trial Dep. 13:9-13).

161. It is mandatory that students in PE class change into clothing appropriate for PE class. Students who do not change into appropriate clothing lose points and receive a bad grade, and if they fail PE class, will be unable to graduate. (Jack Trial Dep. 23:8-14).

162. Dr. Cooper agreed that before the District's change in practice, students who used the common areas of the bathrooms to change their clothing had an expectation of privacy in those common areas. (7-31-17 Hearing Transcript 132:18-24).

163. The District now contends that there is no expectation of privacy from members of the opposite sex in the common areas of restrooms or locker rooms. (7-31-17 Hearing Transcript 133:24-134:9; Cooper Dep. 126:7-23).

164. Plaintiffs do not object to students of the same biological sex using private facilities with them, regardless of how they self-identify. (7-17-17 Hearing Transcript 60:1-21, 115:21-116:4; Jack Trial Dep. 24:23-25:8; Macy Trial Dep. 14:14-24, 17:2-24).

165. Dr. Cooper affirmed that the District can support transgender students in many ways without giving them access to the bathrooms and locker rooms of the opposite sex. (7-31-17 Hearing Transcript 138:8-11).

166. Under the prior practice where privacy facilities were separated on the basis of sex, the District was "very supportive" of transgender students, including granting students' requests to be called by an initial instead of their name; granting requests for changes to student's first name to align with their prefered gender; encouraging teachers and staff to use student's prefered pronouns; giving students access to single-user bathrooms if they were uncomfortable in bathrooms of their biological sex; and providing counseling support. The District also supported the election of a transgender student to the king's court for homecoming in the 2016-17 school year. (7-31-17 Hearing Transcript 136:25-138:7).

167. Students who identify with the opposite sex have generally been accepted and integrated by the student body at BASH in many instances where privacy rights from the opposite sex were not relevant. (7-31-17 Hearing Transcript 116:21-24).

168. If a student is uncomfortable using a locker rooms with a student of the opposite biological sex, that student may be given access to the team locker room. If a student who identifies with the opposite sex is uncomfortable changing in the locker room of either sex, that student would also be given access to the same team locker room. (7-31-17 Hearing Transcript 142:11-18).

CONCLUSIONS OF LAW

Constitutional Right to Bodily Privacy

1. The importance of privacy has long been considered central to our western notions of freedom: a measure of personal isolation and personal control over the conditions of privacy's abandonment is of the very essence of personal freedom and dignity.

2. One has a "constitutionally protected privacy interest in his or her partially clothed body." *Doe v. Luzerne County*, 660 F.3d at 175-76 n.5 (3d Cir. 2011).

3. The "right to privacy is now firmly ensconced among the individual liberties protected by our Constitution." *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994).

4. There is a "right to privacy in one's unclothed or partially unclothed body." *Poe v. Leonard*, 282 F.3d at 138 (2d Cir. 2002) .

5. The Sixth Circuit located this right in the Fourth Amendment, *see Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008), but this circuit as well as the Second and Ninth Circuit located this right in the Fourteenth Amendment, *see Doe v. Luzerne County*, 660 F.3d at 176 n.5 (3d Cir. 2011); *Poe v. Leonard*, 282 F.3d 123, 136-39 (2d Cir. 2002) (locating this right in the Fourteenth Amendment); *York v. Story*, 324 F.2d 450, 454-56 (9th Cir. 1963).

6. The contours of the right are the same regardless of the constitutional basis. *See Doe v. Luzerne County*, 660 F.3d at 176 n.5 (3d Cir. 2011).

7. A "reasonable expectation of privacy" exists "particularly while in the presence of members of the *opposite sex*." *Doe v. Luzerne County*, 660 F.3d at 177 (3d Cir. 2011) (emphasis added).

8. "The desire to shield one's unclothed figure from views of strangers, and *particularly* strangers *of the opposite sex*, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d at 455 (9th Cir. 1963) (emphasis added).

9. Viewing a person in a bathroom would be sufficient to support an intrusion of privacy, even if they aren't viewed on a toilet, because "it is sufficient that the seclusion of the bathroom, a private area, was intruded upon." *Koeppel v. Speirs*, No. 9-902 / 08-1927, 2010 Iowa App. LEXIS 25, at * 16 (Iowa Ct. App. Jan. 22, 2010).

10. The collection of urine samples may constitute an invasion of privacy if "it involves the use of one's senses to oversee the private activities of another" since the performance in public of such activities are "generally prohibited by law as well as social custom." *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992) (Both "visual or aural observation" were of concern.).

11. "[M]ost people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

12. That feeling is magnified for teens, who are "extremely self-conscious about their bodies[.]" *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993).

13. Their "adolescent vulnerability intensifies the . . . intrusiveness of the exposure." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009).

14. Forcing minors to risk exposing their bodies to the opposite sex is an "embarrassing, frightening, and humiliating" experience. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 366 (2009).

15. The Constitution prohibits Defendants from placing students in situations where their bodies or private, intimate activities may be exposed to the opposite sex or where these students will use privacy facilities with someone of the opposite sex.

16. Fundamental rights like these are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

17. It is impossible to conceive of ordered liberty in the midst of the injustice of government pressuring our children to change clothing or to use the restroom in the presence of the opposite sex.

18. The District may not use its substantial power over those students in its care to condition the use of locker rooms and multi-user restrooms upon surrendering their fundamental right to bodily privacy.

19. Our understanding of personal privacy from persons of the opposite sex is so universal as to require the use of separate facilities on the basis of sex in a myriad of contexts. *See* Public School Code of 1949, 24 P.S. § 7-740 (requiring that privacy facilities "shall be suitably constructed for, and used separately by the sexes"). *See also* 43 P.S. § 109 (requiring application of industrial sanitation code to all employers, which involves separate restrooms); 7 Pa. Code § 1.57 (requiring separate facilities for meat packers); 7 Pa. Code § 78.75 (separate restrooms at eating establishments); 7 Pa. Code § 82.9 (requiring separate facilities on the basis of sex for seasonal farm labor, "distinctly marked 'for men' and 'for women' by signs printed in English and in the native languages of the persons" using those facilities); 28 Pa. Code § 18.62 (requiring "separate dressing facilities, showers, lavatories, toilets and appurtenances for each sex" at swimming pools); 25 Pa. Code § 171.16 (requiring schools to follow the provisions of the Public Bathing Law (35 P. S. § § 672—680d) and 28 Pa. Code Chapter 18 (requiring separate privacy facilities at swimming and bathing places); 28 Pa. Code §19.21 (requiring separate restrooms on the basis of sex at camps); 28 Pa. Code § 205.38 (requiring separate restrooms at long term care facilities); 31 Pa. Code § 41.121 (requiring separate privacy facilities for each sex on railroads); 31

Pa. Code § 41.122 (requiring separate bathrooms to be provided for each sex and clearly designated and forbidding any person to use or frequent a toilet room assigned to the opposite sex); 31 Pa. Code § 47.127 (same); 34 Pa. Code § 403.28 (requiring restrooms for each sex); 43 Pa. Code § 41.24 (designating the entrance of "retiring rooms" to be clearly marked by sex and preventing opposite sex entry); 43 Pa. Code § 41.31 (requiring separate toilet rooms "for each sex" which shall be clearly designated and that "no person shall be permitted to use or frequent a toilet room assigned to the opposite sex"); 43 Pa. Code § 41.32 (requiring partitions separating toilet rooms on account of sex, which shall be "soundproof").

20. The requirement of separate facilities for men and women is also reflected in our national experience.

21. We recognize "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation. . . ." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).

22. When women began working in factories, the law began mandating sex-specific facilities. Massachusetts adopted the first such law, in 1887. *See* Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass Acts, 668, 669.

23. Later, when public buildings began offering multi-toilet restrooms, they designated one for men and one for women and this became an American norm based on the real and relevant differences between the sexes.

24. This is why "same-sex restrooms [and] dressing rooms" are allowed "to accommodate privacy needs," and why "white only rooms," which have no basis in bodily privacy, are illegal. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010).

25. Females "using a women's restroom expect[] a certain degree of privacy from . . . members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. App. 2014).

26. Specifically, teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (Vir. 1988).

27. Students "have a significant privacy interest in their unclothed bodies" at school. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005).

28. "[P]rivacy matters" to children and is "central to their development and integrity." Samuel T. Summers, Jr., *Keeping Vermont's Public Libraries Safe*, 34 VT. L. REV. 655, 674 (2010) (quoting Ferdinand Schoeman, *Adolescent Confidentiality and Family Privacy*, in PERSON TO PERSON 213, 219 (George Graham & Hugh Lafollette eds., 1989)).

29. Allowing opposite-sex persons to view adolescents in restrooms and locker rooms, which exist exclusively so that intimate and private activities can take place, risks their "permanent emotional impairment" under the

mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

30. Students' right to privacy explains why a girl's locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009).

31. "Unquestionably, a girls' locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009). (recognizing the important privacy rights of a student who was showering, even while wearing a bathing suit).

32. That continued norm is why the Kentucky Supreme Court observed that "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commonwealth*, 865 S.W.2d 332, 336 (Ky. 1993).

33. The ideal of stamping out discrimination is undermined when we disregard the important differences between men and women and violate their bodily privacy.

34. Employers may hire on the basis of sex to vindicate "a juvenile's 'privacy interest'" that "would be violated if required to . . . disrobe and shower in front of a staff member of the opposite sex." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1289 (Pa. Commw. Ct.

1992) (citing *Philadelphia v. Pennsylvania Human Rights Comm'n*, 300 A.2d 97).

35. "[W]here there is a distinctly private activity involving exposure of intimate body parts, there exists an implied bona fide public accommodation qualification which may justify otherwise illegal sex discrimination. Otherwise . . . such sex segregated accommodations such as bathrooms, showers and locker rooms, would have to be open to the public." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1291 (Pa. Commw. Ct. 1992).

36. "The standard for recognizing a privacy interest as it relates to one's body is not limited to protecting one where there is an exposure of an 'intimate area,' but such a right may also be recognized where one has a reasonable basis to be protected against embarrassment or suffer a loss of dignity because of the activity taking place." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1291 (Pa. Commw. Ct. 1992).

37. "To hold otherwise would mean that separate changing rooms in factories, mines and construction sites where workers change from street clothes to work clothes and back and where 'intimate areas' are not exposed, would not be permitted." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1293 n.6 (Pa. Commw. Ct. 1992).

38. The right to bodily privacy from persons of the opposite sex under the Fourteenth Amendment is not coequal with the prohibition of sex

discrimination under Title IX, and therefore is not subsumed under Title IX pursuant to *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981).

39. While the question of whether students may use opposite-sex facilities is new, "the applicable legal principles are well-settled." *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015).

40. The right to bodily privacy requires that Plaintiffs have locker rooms and multi-user restrooms that are separated from persons of the opposite sex and not be put in the humiliating and vulnerable position of seeking partial shelter behind a curtain or stall door under a standard that opens common areas of locker rooms and restrooms to members of the opposite sex.

41. A woman's right to bodily privacy does not spring into existence, or cease to exist, depending on what a man believes about his gender. Her right to bodily privacy is hers and hers alone. And the same is true of a man's right to bodily privacy.

42. Government cannot condition the use of multi-user restrooms and locker rooms on Plaintiffs waiving their right to bodily privacy.

43. "[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983).

44. Government may not condition a benefit on someone waiving a constitutional right. *See Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2594 (2013).

45. No compelling interest justifies obligating students to cease using locker rooms and bathrooms that are reserved for their sex unless they forfeit their privacy from members of the opposite sex.

46. Instead, Pennsylvania law governing this school requires that facilities "shall be suitably constructed for, and used separately by, the sexes." Public School Code of 1949, 24 P.S. § 7-740.

47. Defendants' practice violates the requirement of separate privacy facilities and denies Plaintiffs and all students the right to the protections afforded them in using such a sex separated facility, instead conditioning the use of the "boys'" and "girls'" locker rooms, showers, and restrooms on surrendering the right to bodily privacy from persons of the opposite sex.

48. The practice of permitting students of the opposite sex to access bathrooms and locker rooms of the opposite sex violates Plaintiffs' Fourteenth Amendment right to bodily privacy from persons of the opposite sex.

Title IX

49. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

50. A student has a right "to sue a school under Title IX for 'hostile environment' harassment." *Dejohn v. Temple University*, 537 F.3d 301, 316 n.14 (3d Cir. 2008) (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2000)).

51. "To recover in such a case, a plaintiff must establish 'sexual harassment [ ] that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities.'" *Dejohn v. Temple University*, 537 F.3d at 316 n.14 (3d Cir. 2008) (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d at 205-06 (3d Cir. 2000)).

52. Title IX's protections on the basis of sex apply to biological sex.

53. Title IX's language uses binary phrases "one sex," "the other sex," and "both sexes." *See*, 28 U.S.C. § 1681(2) (some educational institutions admit "students of both sexes"); 28 U.S.C. § 1681(8) (if certain sex-specific activities are provided "for one sex," reasonably comparable ones must be provided to "the other sex"); 28 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes").

54. The legislative record also confirms that Title IX allows differential treatment among the biological sexes, such as "classes for pregnant girls . . ., in sport facilities *or other instances where personal privacy must be*

preserved." 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added).

55. Congress did not advance bills that would have added gender identity directives in the educational context. *See* H.R. 998, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/house-bill/998; S. 555, 112th Cong., (2011), https://www.congress.gov/bill/112th-congress/senate-bill/555; H.R. 1652, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/1652; S. 1088, https://www.congress.gov/bill/113th-congress/ senate-bill/1088; H.R. 848, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/846/related-bills; S. 439, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/439.

56. The plain language of Title IX, contemporary dictionary definitions, legislative history, and subsequent Congressional inaction on gender identity in schools all communicate that Congress intended to preserve distinct privacy facilities on the basis of sex, not theories of gender identity.

57. The analysis of a hostile educational environment on the basis of sex is similar to the analysis of a hostile work environment on the basis of sex.

58. A workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant." *See* EEOC policy guidance, https://www.eeoc.gov/policy/docs/currentissues.html.

59. Presence of a male in a dressing room and restroom of a female "intensified" "the hostile and offensive nature of that environment." *See Schonauer v. DCR Entm't, Inc.*, 905 P.2d 392, 401 (Wash. Ct. App. 1995).

60. Entry by a female into a men's locker room was sufficient to create a hostile work environment. *See Washington v. White*, 231 F. Supp. 2d 71, 80-81 (D.D.C. 2002).

61. A reasonable student would find the environment hostile and harassing. "Unquestionably, a girls locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009).

62. "[A] normal female who was showering in a girls locker room would unhesitatingly be shocked, irritated, and disturbed" if she saw a biological male "gazing at her, no matter how briefly he did so." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009).

63. Permitting opposite sex persons into restrooms even if only to clean, "would cause embarrassment and increased stress in both male and female washroom users." *See Norwood v. Dale Maint. Sys., Inc.,* 590 F. Supp. at 1417 (N.D. Ill. 1984), (recognizing "the invasion of privacy that would be created [by the practice] would be extreme").

64. It is likewise hostile and offensive to allow students of the opposite sex into school locker rooms and restrooms.

65. Defendants' practice creates a hostile and offensive environment and causes Plaintiffs to suffer humiliation, loss of dignity, stress, apprehension, fear, and anxiety.

66. Federal and state law contemplates separate privacy facilities for boys and girls.

67. It is because the policy specifically provides for students to use the privacy facilities of the *opposite* sex that students are experiencing harassment.

68. The harassment that Plaintiffs are experiencing is precisely on the basis of sex because those students seeking to use opposite sex facilities are doing so because of the sex of those using those facilities.

69. "[I]n order for conduct to constitute harassment under a 'hostile environment' theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment." *Saxe*, 240 F.3d at 205.

70. Plaintiffs satisfy the subjective prong because they suffer humiliation, fear, anxiety, stress, and loss of dignity as a result of Defendants' practice.

71. "[T]he objective prong of this inquiry must be evaluated by looking at the 'totality of the circumstances.' 'These may include . . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or

humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citing *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23 (1993)).

72. These standards, continuing to reference employment, have been imported into the Title IX context. *See id*.

73. In the education context the "work performance" phrase is altered to apply to harassment that "so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities." *Dejohn*, 537 F.3d at 316 n.14 (quoting *Saxe*, 240 F.3d at 205-06).

74. The situation is severe because if Plaintiffs wish to use the locker room or multi-user restrooms, they know that students of the opposite sex may be present or walk in on them.

75. The situation is also pervasive because this is not an isolated occurrence that the school has since fixed or one involving a claim that the school failed to fix the harassment of another. Instead, the harassment is ongoing and is the direct, foreseeable result of a policy that directly sanctions the harassing activity.

76. The practice is threatening and humiliating to Plaintiffs because they must either give up their right to use the facilities designed for them or face the prospect of being viewed or viewing a person of the opposite sex.

77. A school is responsible for a victim's harassment, when the harassment "so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities." *Dejohn*, 537 F.3d at 316 n.14 (quoting *Saxe*, 240 F.3d at 205-06).

78. All students have a right to use the school facilities corresponding to their sex.

79. The harassment effectively denies Plaintiffs access to the locker rooms and multi-user restrooms corresponding to their sex because their use is conditioned on remaining in the harassing environment.

80. Defendants are more than deliberately indifferent to the sexual harassment against Plaintiffs, because it is Defendant's purposeful practice to allow persons of the opposite sex to use these privacy facilities.

81. Defendants continue to violate Title IX even though they are offering the use of a single user bathroom to Plaintiffs because it is insufficient under Title IX to require victims to remove themselves from a harassing environment. *See Seiwert v. Spencer-Owen Cnty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

82. The District's practice also violates Title IX because Plaintiffs cannot use the facilities designed for their sex under state and federal law without being subjected to sexual harassment.

83. Allowing biological girls into boys' privacy facilities and biological boys into girls' privacy facilities creates a hostile environment on the basis of sex under Title IX.

84. Plaintiffs have established all the elements of sexual harassment under Title IX.

Invasion of Seclusion

85. The Restatement (Second) of Torts "most ably defines the elements of invasion of privacy as that tort has developed in Pennsylvania." *Id*.

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other person for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B (1977).

86. Unlike other privacy torts, no publication is required. *See Borse*, 963 F.2d at 621 (citing *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984)).

87. "The tort may occur by (1) physical intrusion into a place where the plaintiff has secluded himself or herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation or examination into plaintiff's private concerns." *Id*. at 621.

88. The intrusion must "cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." *Kline v. Security Guards, Inc.*, 386 F.3d 246, 260 (3d Cir. 2004).

89. "The importance of privacy has long been considered central to our western notions of freedom."

> "[A] measure of personal isolation and personal control over the conditions of [privacy's] abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant."

Koeppel v. Speirs, 808 N.W.2d 177, 180 (Iowa 2011) (citing Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 973-74 (1964)).

90. Joel Doe and Jack Jones had secluded themselves from people of the opposite sex when they entered and used the locker room, whose signs designated them for use by boys.

91. "There also can be no dispute a bathroom is a place where one enjoys seclusion." *Koeppel*, 2010 Iowa App. LEXIS 25, at * 6.

92. Even where a woman "did not expect privacy from other women in the women-only restroom, she reasonably expected her activities to be secluded from perception by men." *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005)

93. Here, Defendants caused and continue to cause physical intrusions into a place where Plaintiffs seclude themselves, and such intrusion is highly offensive.

94. While physical intrusion into a place where Plaintiffs seclude themselves is alone enough to support a violation, here the violations also include the second manner of intruding upon another's seclusion, the use of senses to oversee or overhear Plaintiffs' private affairs. *See Borse*, 963 F.2d at 621.

95. In the context of being viewed by a person of the opposite sex in a restroom or locker room, "[t]here is no question viewing or recording [a person] while in the bathroom would be considered 'highly offensive' by any reasonable person." *Koeppel*, 2010 Iowa App. LEXIS 25, at * 6.

96. Joel Doe's and Jack Jones' experience of being viewed in their underwear by a member of the opposite sex, and in Joel Doe's case, also seeing a member of the opposites sex in a state of undress, would be highly offensive to a reasonable person and was highly offensive to both Joel Doe and Jack Jones.

97. Plaintiffs all risk such experiences in the locker rooms and restrooms in the future in the absence of an injunction against Defendants' practice.

98. The objective offensiveness to the reasonable person is evident in the fact that we have long recognized the right to a private setting, free from persons of the opposite sex in restrooms and locker rooms, which are only

made necessary since we often enter into a state of undress or perform private functions therein.

99. The Public School Code of 1949 requires that facilities "shall be suitably constructed for, and used separately by, the sexes." 24 P.S. § 7-740.

100. Defendants' practice violates the requirement of separate facilities and denies Plaintiffs the right to use such a facility, instead conditioning the use of the "boys'" locker room on surrendering their right to bodily privacy from persons of the opposite sex.

101. The statutory requirement to have separate privacy facilities on the basis of sex is a clear recognition and directive by the legislature that privacy from the opposite sex is a fundamental need worthy of protection. *Cf. Harris*, 483 A.2d at 1387 ("statutory ban against disclosing the names of public assistance recipients is a clear recognition and directive by the legislature that the privacy of the recipient is a fundamental need worthy of protection" and "the court is bound to give great deference to this sound legislative judgment").

102. Even hearing the act of urination implicates privacy interests and could constitute an intrusion upon seclusion. *Borse*, 963 F.2d at 621.

103. Where the performance of an activity, if performed in public, would be "generally prohibited by law as well as social custom," that would also constitute an intrusion upon seclusion. *Id.* at 621.

104. Undressing, which is permitted in private, would be contrary to social norms and considered illegal in most contexts.

105. Invasions of seclusion will continue to occur in the absence of an injunction.

Preliminary Injunction

106. "A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs*., 724 F.3d 377, 382 (3d Cir. 2013), *rev'd sub nom on other grounds*, *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751 (2014) (quoting *Kos Pharms., Inc. v. Andrx Corp*., 369 F.3d 700, 708 (3d Cir. 2004)).

107. Plaintiffs are likely to prevail on the merits because their right to bodily privacy has been violated and continues to be violated, they have been sexually harassed and continue to experience sexual harassment under Title IX, and their seclusion has been invaded and will continue to be invaded.

108. Irreparable injury is presumed since Plaintiffs established likelihood of success in a case involving privacy rights. *See Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987). *See also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("the right of

privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief").

109. In respect to Title IX, the irreparable harm question is simply what "injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

110. Plaintiffs suffer irreparable harm because the sexual harassment under Title IX cannot be adequately compensated through monetary damages.

111. Plaintiffs suffer irreparable harm because an invasion upon seclusion cannot be adequately compensated through monetary damages.

112. The balance of hardships always favors preventing violations of the constitutional right to privacy, sexual harassment under Title IX, and invasion of seclusion. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

113. Only an injunction will stop the irreparable harm experienced by Plaintiffs, but an injunction does no harm to Defendants because the policy is unconstitutional and illegal, and the government is not harmed when it is prevented from enforcing unconstitutional and otherwise illegal laws. *See Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004).

114. Issuing an injunction would restore the status quo prior to the 2016-17 school year of protecting student privacy via truly sex-separated privacy facilities and thereby effect a legal interest in privacy that is wholly consistent with Title IX and the referenced state and federal law.

115. The balance of hardships favors Plaintiffs.

116. "[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *United States v. Raines*, 362 U.S. 17, 27 (1960).

117. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

118. It is also in the public interest to prevent the government from "violat[ing] the requirements of federal law," *Ariz. Dream Act Coal.*, 757 F.3d at 1069, such as Title IX.

119. Waiving the bond requirement is warranted because Plaintiffs seek to vindicate constitutional and statutory rights, and so their lawsuit is in the public interest. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 n.8 (3d Cir. 1989) (collecting cases); *Powelton Civic Home Owners Ass'n v. Dep't of Housing and Urban Development*, 284 F. Supp. 809, 840 (E.D. Pa. 1968); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (noting that courts have recognized that public interest litigation is an exception to the Rule 65 bond requirement); *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers,*

Helpers, Warehousemen, & Packers, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984) ("no bond is required in suits to enforce important federal rights or public interests.") (quotation marks omitted).

120. Waiving the bond requirement here is particularly appropriate because Plaintiffs raise important claims that serve the public interest by vindicating students' constitutional and statutory rights.

Respectfully submitted this 10th day of August, 2017.

By: /s/ Randall L. Wenger

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on Thursday, August 10, 2017, the foregoing was filed electronically and served on the other parties via the court's ECF system.

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