

interests in the Board of Education policies, which are designed to protect transgender students against physical and emotional harm, and the denial of this motion would impair his ability to protect these personal interests; and (3) his interests are not adequately represented by the defendant Board of Education, which is charged with acting in the interests of the entire Frederick County public school community, not just on behalf of the personal interests of transgender students like J.V.K.

Alternatively, permissive intervention is appropriate because J.V.K. has common issues of fact and law that relate directly to the policies and practices of the Board of Education that Plaintiffs challenge.

WHEREFORE, for these reasons and those set forth in the accompanying Memorandum in Support, J.V.K. respectfully requests that this Court grant this Motion and permit him to intervene as a defendant in this action.

Date: October 20, 2017

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)**

MARY SMITH, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:17-cv-02302-ELH
)	
BOARD OF EDUCATION OF FREDERICK)	
COUNTY, MARYLAND, et al.,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AS DEFENDANT**

I. FACTUAL BACKGROUND

The Board of Education of Frederick County, Maryland governs the Frederick County Public Schools system, which is charged with overseeing 66 public education elementary, middle, high, public charter, alternative, and special education schools in the county. In June of 2017, the Board of Education revised a policy and issued a new policy to address bullying, discrimination, stigmatization, and harassment of transgender and gender non-conforming students in the County.

The first one, Policy 437, prohibits bullying, harassment, or intimidation on school property, at school functions, or through electronic technology, and prohibits retaliation associated with the witnessing or reporting of such conduct. The second, Policy 443, sets standards for creating a welcoming and inclusive environment for transgender and gender non-conforming students, including by allowing students access to the facilities, restrooms, lockers, and sports teams corresponding to their gender identity. It also provides students who may be

uncomfortable with using a single-sex facility for any reason, irrespective of their gender identity or expression, the use of privacy curtains, private or office restrooms, or a separate changing schedule. In addition, it directs staff to use the preferred names and gender pronouns of students and eliminates separate dress codes for girls and boys.

On August 11, 2017 “Jane Doe,” a minor girl and student at a Frederick County high school, and her mother, “Mary Smith,” brought this action against the Board of Education and the School System, challenging Policies 437 and 443 (the “Policies”) and other actions by the school district as violations of the Constitution and state laws¹. Plaintiffs ask this Court to declare the challenged Policies unconstitutional and otherwise unlawful and issue a permanent injunction enjoining the Policies.

Movant J.V.K.

J.V.K. is a 17-year-old resident of Frederick, Maryland, and a senior at Governor Thomas Johnson High School (“TJ Senior High”). J.V.K. Decl. ¶ 1 (attached as **Exhibit A**). His favorite classes are History and English. *Id.* He is an honor student and has won various awards for school writing competitions and Excellence in Social Studies and English. *Id.* In addition to founding TJ Senior High’s Gender Sexuality Alliance (GSA), J.V.K. is part of TJ Senior High’s Academic Team, and he participates in schools plays and musicals. *See id.* J.V.K. is also a youth spokesperson for the National Center for Transgender Equality and a member of the Gay, Lesbian & Straight Education Network’s National Student Council. *Id.*

¹ *See* Compl. at pp. 15-32 (asserting violation of constitutional rights to privacy, free speech, parental liberty, and separation of powers; Title IX of the Education Amendments Act of 1972; and Maryland law prohibiting the torts of intrusion upon bodily seclusion and privacy, and state education and building laws).

J.V.K. is a boy who is transgender; he was assigned the sex female at birth, but has known he was a boy since a young age. *See id.* at ¶¶ 3-4. J.V.K. realized that he was transgender when he was thirteen years old. *Id.* at ¶ 4. At that time, he was living in Shepherdstown, West Virginia. *Id.* When others learned that he was transgender, the Principal informed him that he had to use the restroom in the nurse's office and that he was prohibited from going to gym class. *Id.* After that, J.V.K.'s life in Shepherdstown was very difficult. *Id.* at ¶ 5. J.V.K. felt alone and confused, and he could not learn under the circumstances. *See id.*

After coming out as a boy, J.V.K. also began seeing a therapist who diagnosed the distress that J.V.K. felt about not being recognized as a boy as "gender dysphoria." *Id.* at ¶ 6. J.V.K. began dressing as a boy and living as a boy in all aspects of his life, and he started going by the name he chose to match his identity. *Id.*

When J.V.K. started going to school at TJ Senior High in ninth grade, he was known at school by his chosen name, but he was not known as transgender by other students. *Id.* at ¶ 8. The school administration told him that he could use whichever facilities he felt most comfortable using. *Id.* However, J.V.K. felt anxiety and distress about using restrooms at school at that time, so he avoided them. *See id.* J.V.K. did not believe that the school system would help him if he were harassed by students or teachers. *See id.*

As a Sophomore at TJ Senior High, J.V.K. felt more comfortable in school because he helped start the school's GSA. *Id.* at ¶ 9. He felt more comfortable using the boys' restrooms, but he tried to only do so when they were empty, to avoid harassment and ridicule. *See id.*

J.V.K.'s name was changed legally by a Frederick County judge in August 2015. *Id.* at ¶ 7. He changed his gender marker with the United States Social Security Administration, and

after he became an American citizen in 2017, he received a passport with the gender marker ‘male’ and his correct name. *See id.*

At school, teachers frequently used the wrong pronouns for J.V.K. *Id.* at ¶ 11. This left him scared and unsafe, and he felt as though he was not in a position to correct them. *Id.* When he did try to correct them, they responded with hostility. *Id.*

In his Junior year at TJ Senior High, the student body became aware that J.V.K. is transgender after he was thrown out of a Ted Cruz rally because he was wearing a transgender flag; the story was in the local Frederick County news. *Id.* at ¶ 12. He faced bullying by other students. *Id.*

The experiences J.V.K. had during his first three years in high school, along with the Trump Administration’s repeal of the Title IX guidance on restroom access for transgender students, led J.V.K. to join other transgender students who advocated for the School Board to adopt a policy protecting transgender students. *See id.* at ¶ 13. J.V.K. and other transgender students shared their experiences numerous times at School Board meetings. *Id.* They also held rallies before the Board of Education. *Id.*

The passage of Policies 437 and 443 in June 2017 was an incredible moment for J.V.K. *See id.* at ¶ 14. Never before had J.V.K. been recognized and affirmed as a boy by a school system. *Id.* Upon learning that the Policies passed, J.V.K. felt hope for the first time that he would be treated just like any other male student at school. *See id.* J.V.K. felt that all of his prior negative experiences had all been worth it because he knew that younger students would not have to endure the trauma he did. *Id.*

This year, in his Senior year at TJ Senior High, J.V.K. feels that he has support from the School Board by virtue of Policies 437 and 443. *See id.* at ¶ 12. Teachers seem to be making

more of an effort to use the correct pronouns and he feels safer correcting people when they use incorrect pronouns when speaking with or about him. *Id.* at ¶ 11. He is facing fewer problems with other students. *See id.* at ¶ 12.

J.V.K. is now concerned that Policies 437 and 443 will be ended as a result of this lawsuit. *See id.* at ¶¶ 15-18. If the Policies are revoked, J.V.K. would be devastated and would not feel safe going to school. *Id.* at ¶ 15. He fears things will return to the way they were before the Policies were enacted. *See id.* at ¶ 17. And if he were barred from using the boys' restrooms, it would be distressing because it would mean that he is not being recognized as the boy he is.² *See id.* at ¶ 16. And he could not use the girls' restrooms any more than other boys could. *See id.* So he would effectively be required to use separate facilities than those used by other students, sending the stigmatizing message to all students that he is not fit to use the facilities used by other students. *See id.* at ¶ 16-18.

J.V.K. has fought so long for the right to be himself. *Id.* at ¶ 17. Revocation of protections provided by Policies 437 and 443 would cause him to feel as if he does not deserve to exist and be himself in public. *See id.* at ¶ 16.

II. ARGUMENT

A. J.V.K. SATISFIES THE FOURTH CIRCUIT'S STANDARD FOR INTERVENTION AS OF RIGHT.

Federal Rule of Civil Procedure 24 governs intervention. Leave to intervene may be granted as a matter of right, under Rule 24(a), or by permission, under Rule 24(b). Judicial economy generally favors the disposition of related issues and claims in a single lawsuit. *See, e.g., Hill v. W. Elec. Co.*, 672 F.2d 381, 387 (4th Cir. 1982); *Board of Educ. of the Highland*

² J.V.K. has never used locker facilities at TJ Senior High or any other public school in Frederick County; he participated in an online gym program. *Id.* at ¶ 10.

Local Sch. Dist. v. United States Dep't of Educ., No. 2:16-CV-524, 2016 U.S. Dist. LEXIS 107614, at *6 (S.D. Ohio Aug. 15, 2016).

The Fourth Circuit has explained that a district court “must” permit intervention as a matter of right under Rule 24(a)(2) if the proposed intervenor can demonstrate “(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the [movant’s] interest is not adequately represented by existing parties to the litigation.” *Stuart v. Huff*, 706 F.3d 345, 349-50 (4th Cir. 2013) (quoting *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991)). The Fourth Circuit also considers timeliness to be a “cardinal consideration.” *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999).

The motion to intervene should be granted because J.V.K. satisfies each of the factors required by the Fourth Circuit. This motion is timely because it has been filed shortly after commencement of this action, and before a responsive pleading or motion has been filed. J.V.K. seeks intervention because he is a transgender student who depends on the challenged Policies and, thus, has a deeply personal interest in this action, the protection of which would be impaired absent intervention. And his interests are not adequately represented by existing parties in this case.

1. This motion is timely.

This motion is timely because it is being filed in the early stages of this litigation. Plaintiffs commenced this action approximately two months ago; no responsive pleadings or motions have been filed; a scheduling order has not yet been issued; and discovery has not begun. Filing this motion prior to these events satisfies the timeliness factor identified by the

Fourth Circuit. *See, e.g., Md. Restorative Justice Initiative v. Hogan*, 316 F.R.D. 106, 111 n.5 (D. Md. 2016).

2. J.V.K. has a direct and substantial interest in this action, the protection of which would be impaired absent intervention.

As a transgender student who attends public school in Frederick County, J.V.K. has a legally cognizable interest in this case because the current policies directly protect movants' ability to feel safe and learn at school. The Policies protect transgender students like J.V.K. from bullying and harassment based on his gender identity, allow him to use restrooms consistent with his gender identity, and direct staff to use his correct names and pronouns.

The legal interests of J.V.K. will certainly be affected or impaired by the disposition of this matter because Plaintiffs seek invalidation of Policies 437 and 443. Indeed, Plaintiffs seek a declaratory judgment that the Policies are unconstitutional and otherwise unlawful.

J.V.K. has a direct and substantial interest in anti-harassment and anti-bullying rules that are part of Policy 437 because he has experienced bullying or other hardships during prior school years. He also has a direct and substantial interest in being recognized as a boy by staff and being able to use the boys' restrooms in accordance with Policy 443. As explained above (see Factual Background, *supra*), being prohibited from using the boys' restrooms at school would be distressing and humiliating to J.V.K., and it would deny him full participation in school life.

In *Board of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, a federal district court permitted intervention by a transgender student under analogous circumstances. *See* 2016 U.S. Dist. LEXIS 107614 at *4. The proposed intervenor, Jane, a transgender girl and student at Highland Elementary School, sought to intervene in a lawsuit filed by the School District against the Department of Education regarding its conclusion that the School District's treatment of Jane violated Title IX. *Id.* at *1. The district court granted Jane's

motion to intervene under Rule 24(a) because Jane's right to be treated in a non-discriminatory manner by her school was a substantial legal interest. *Id.* at *3 ("Jane and her guardians have a substantial legal interest in this proceeding and easily satisfy this element of the intervention-as-of-right standard. Jane has a far more compelling interest in the disposition of this case than any number of potential intervenors in other cases whose injuries were 'clearly indirect.'") (internal citations omitted).

Like Jane, J.V.K. has a substantial legal interest in being treated in a non-discriminatory manner by his school. And like Jane, his rights might be directly affected or impaired by the disposition of this matter because Plaintiffs seek to halt policies and practices that protect the wellbeing of J.V.K.

3. The interests of J.V.K. are not adequately represented by the existing defendants.

The interests of transgender students are not adequately represented by the existing defendants. Even where parties "may share some objectives," possible divergence of interest is sufficient to demonstrate that representation may be inadequate under Rule 24(a). *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991).

While a "putative intervenor must mount a strong showing of inadequacy" when seeking to intervene "in the government's defense of a statute," *Stuart*, 706 F.3d at 351-52, that requirement does not apply in this case. The Fourth Circuit's rationale for applying a more exacting standard in *Stuart* was predicated on the fact that the case involved a constitutional challenge to a state statute that the Attorney General was charged to defend. The court explained, "[T]he need for government to exercise its representative function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge." *Id.* at 351. No such basic representative function is applicable here. The court's rationale does not apply in a case

like this, involving a constitutional challenge to policies enacted by a public school board rather than a legislature.

In *Students & Parents for Privacy v. United States Dep't of Educ.*, a case very similar to this one, the plaintiffs sued the school district and federal defendants, challenging the school district's inclusive facilities policies and the Department of Education's then-guidance concerning transgender students' access to single-sex facilities. No. 16C 4945, 2016 WL 3269001, at *1 (N.D. Ill. June 15, 2016) (recommendation of magistrate). While the court concluded that putative intervenors had not "overcome the presumption that the *federal defendants* adequately represented their interests," the court observed that there "does not appear to be any dispute that the *District* inadequately represents the movant's interests." *Id.* at *2-3 (emphasis added). Even with the federal defendants' participation, the court ultimately granted permissive intervention to the transgender students. *Id.* at *3; *see also Doe v. Boyertown Area Sch. Dist.*, No. CV 17-1249, 2017 WL 3675418, at *5 (E.D. Pa. Aug. 25, 2017) (noting that motion to intervene in similar case had been granted without objection). In this case, there is no participating federal entity charged by law with advocating for the position of J.V.K. Rather, there is only the Board of Education.

There are other reasons why the Board of Education does not adequately represent the interests of J.V.K. First, the Board of Education has not taken the position that its practice is compelled by established law. Instead, it solicited public comments as part of a deliberative process to determine a policy regarding transgender and gender nonconforming students. Statement from the Bd. of Educ. of Frederick County (Feb. 27, 2017), <http://www.fcps.org/about/news/980783/statement-from-the-board-of-education-of-frederick-county>. J.V.K. intends to show that relief sought by Plaintiffs is not only unwarranted, but also,

if granted, relief requested by Plaintiffs would violate the rights of J.V.K. under Title IX and the Equal Protection Clause. *See* Proposed Mot. to Dismiss at 12-17 (attached as **Exhibit B**).

Second, the Board of Education's charge is to represent the interests of all students—including Plaintiff Mary Smith—whereas J.V.K. is representing the interests and priorities particular to himself. To the extent that the J.V.K.'s interests currently align with the Board of Education's interest in maintaining its policies, their interests are not guaranteed to align in the future. The Board of Education, whose personnel could change, might alter, abandon, or reverse its current position.

More specifically, the interests of J.V.K. are more parochial or personal than the position of the Board of Education in support of a general policy. *See In re Sierra Club*, 945 F.2d at 780 (reversing denial of intervention as of right where proposed intervenor had differing interests because, unlike the government agency party, intervenor did not need to consider interests of everyone in the state). A ruling in Plaintiffs' favor would directly affect J.V.K. in a personal and immediate way: he would be barred from using the boys' restrooms, which for him would be devastating, humiliating, and stigmatizing. And he would return to feeling unsafe at school without having policies in place that he could rely on. Thus, J.V.K. faces real and personal consequences in this case. He will be disadvantaged if Plaintiffs obtain the relief they seek, and that disadvantage is not the same as that faced by the Board of Education. These are precisely the types of interests that are intended to be protected through Rule 24.

B. J.V.K. ALSO MEETS THE STANDARD FOR PERMISSIVE INTERVENTION.

Even if J.V.K. did not meet the standard for intervention as a matter of right, permissive intervention under Rule 24(b)(1)(B) would be warranted. When considering whether to exercise discretion to allow permissive intervention, courts consider whether: (1) the motion was timely;

(2) the movant's claims or defenses share a common question of law or fact with the main action; (3) independent grounds exists for subject matter jurisdiction; and (4) intervention will delay or prejudice the adjudication of the original parties' rights. *See Shanghai Meihao Elec., Inc. v. Leviton Mfg. Co.*, 223 F.R.D. 386, 387 (D. Md. 2004).

1. The motion of J.V.K. is timely, and intervention would not delay or prejudice existing parties.

With respect to the first and fourth factors identified by this Court in *Shanghai*, this case is in its nascent stages, and intervention by J.V.K. will cause neither delay nor prejudice to the adjudication of any party's rights. J.V.K. is filing his own proposed motion to dismiss simultaneously with his motion to intervene, by the due date for the filing of the Board of Education's responsive pleading. Further, the Board of Education does not object to intervention by J.V.K. And there is no reason to believe that intervention by J.V.K. will materially delay discovery or any proceedings in this case.

2. J.V.K.'s defenses in this case share common issues of law and fact with the main action.

Plaintiffs challenge the legality of the Policies that J.V.K. seek to maintain. The legal issues in this case are whether those Policies violate the Constitution or state law as Plaintiffs allege. And any factual presentations that J.V.K. would make would relate to those same legal issues.

Because resolution of Plaintiffs' claims will have a direct bearing on the day-to-day life of J.V.K. at TJ Senior High, it is appropriate that he have the opportunity to assert his defenses in this case. *Cf. Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (granting permissive intervention to current and prospective minority students in case challenging use of race the University's student admission process). Indeed, J.V.K. seeks to

intervene so that he can show that relief requested by Plaintiffs would violate his rights under Title IX and the Equal Protection Clause. *See* Ex. B at 12-17. Accordingly, granting the motion to intervene might avoid a multiplicity of suits by transgender or gender non-conforming students whose rights would be abridged by any relief granted to Plaintiffs in this case. *Cf. United States v. Cont'l Cas. Co.*, No. ELH-16-3047, 2017 U.S. Dist. LEXIS 135691, at *14-15 (D. Md. Aug. 24, 2017).

3. Intervention may not be denied based on grounds of jurisdiction.

J.V.K. merely seeks to intervene as a defendant in this case, which is predicated on federal question jurisdiction rather than diversity of citizenship. Accordingly, there is no basis to exclude him on grounds of jurisdiction. *See, e.g.*, 6-24 Moore's Federal Practice – Civil § 24.22[2]; *Conseco v. Wells Fargo Fin. Leasing, Inc.*, 204 F. Supp. 2d 1186, 1191-94 (S.D. Iowa 2002) (collecting and analyzing authorities).

III. CONCLUSION

J.V.K. has personal interests in defending the policies and practices challenged by Plaintiffs. He is a transgender student who has lived through the wrongs that the policies are intended to address—and are addressing—which allows him to provide a distinctly personal perspective in defense of the policies. While he applauds the efforts of the Board of Education in implementing these policies, J.V.K. has the most at stake. In that sense, J.V.K. seeks leave to intervene so that his voice may be heard, and his interests protected, as one of the transgender students in Frederick County who is likely to be most directly affected by the outcome of this case. J.V.K. respectfully requests that this Court grant him leave to intervene and champion his own defense.

Date: October 20, 2017

Respectfully submitted,

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

**MARY SMITH, a minor,
by and through her mother and guardian
JANE DOE, et al.,**

Plaintiffs,

v.

**BOARD OF EDUCATION OF FREDERICK
COUNTY, et al.,**

Defendants.

Case No. 17-cv-O2302-ELH

DECLARATION OF J.V.K.¹

I, J.V.K., declare as follows:

1. I am a 17-year-old resident of Frederick, MD, and a senior at Governor Thomas Johnson High School, which we students call “TJ”. My favorite subjects are History and English. I’m an honor student, and I have won various school writing competitions as well as awards for Excellence in Social Studies and English. In addition to founding my school’s Gender Sexuality Alliance, I’m on TJ’s Academic Team (the school trivia team), and I participate in the drama program’s plays and musicals. I am also a youth spokesperson for the National Center for Transgender Equality and a member of the Gay, Lesbian & Straight Education Network (GLSEN)’s National Student Council.
2. I submit this declaration in support of my motion to intervene, in order to explain my interest in this litigation.
3. I am a transgender male.

¹ Because Defendant-Intervenor is a minor child, he is identified only by his initials, as required by Fed. R. Civ. P. 5.2(a)(3).

4. I realized that I was transgender (*i.e.*, that my internal sense of gender does not match the sex I was assigned at birth), when I was thirteen. At that time, I was living in Shepherdstown, West Virginia. In September of my eighth grade year, I came out to my mom and some of my middle school friends at the time. My “friends” told everyone else at school, including the Principal and Vice Principal. The administration called a meeting with me and my mom without telling us what it was about. At that meeting, the Principal informed me that I had to stop using the girls’ restroom and locker rooms, and could only use the restroom in the nurse’s office. They also barred me from gym class, which in West Virginia students are required to take daily.

5. I found it really difficult to exist in Shepherdstown after that. I was seen as an “exception.” People were talking about why I wasn’t in gym. I was banished from sex-segregated restrooms. I lost all of my friends after I came out. My teachers didn’t like me. I felt really alone and really confused. I just wasn’t able to learn there.

6. In addition to coming out as a boy, I started seeing a therapist who specializes in gender, who diagnosed the distress I feel from not being recognized as a boy and the discomfort I feel with my body as “gender dysphoria.” I began dressing as male in all aspects of my life. I started going by my chosen name, “James,” which matches my identity (unlike my birth name, which is a girl’s name).

7. My name was changed legally by a Frederick County judge in August 2015. I changed my gender marker with Social Security, and after I became an American citizen in 2017, I received a passport with the gender marker ‘male’ and my correct name. It was very difficult because when I came out as transgender, I wasn’t a citizen, and had to go through that process first.

8. When I started high school at TJ in the ninth grade, I was known in school as “James” though I was not “out” as trans to the students. The school administration told me that I could use whatever facilities I felt most comfortable with. Using restrooms in school caused me lots of anxiety and distress at the time, so I didn’t use the restrooms in school in ninth grade. Because I didn’t use the bathroom all day, the last two periods of school were uncomfortable and distracting to me.

9. Starting in tenth grade, however, I felt more comfortable in school because I had started our school’s Gender Sexuality Alliance. Since I didn’t feel as isolated, I felt comfortable to start using the men’s restrooms. I’ve tried to use the restrooms when they are empty since I have been worried about harassment and ridicule.

10. I have never used a locker room at TJ or any other Frederick County Public School. I took gym online.

11. Though I’ve never had an issue with teachers calling me James, I am often mispronounced (called “she” or “her”). When I am mispronounced, I get very scared. I’ve never wanted to get in trouble for correcting a teacher. And when I have corrected others, they have reacted with hostility. Now that the protections passed by the School Board are in place, I feel safer correcting people more. I feel like my teachers are trying harder this year.

12. In my junior year at TJ, I was thrown out of a Ted Cruz rally because I was wearing the transgender flag. It made local Frederick County news, which meant I was officially out to the student body as transgender. As far as I know, TJ is the most diverse school in Frederick County, but there are a few people in my grade who hate me because I’m trans. I was bullied last year, and I’m told that these individuals are often talking about me behind my back. This

year, I'm still experiencing difficulties, but I feel more empowered to do things because the protections passed by the School Board exist.

13. It was because of the experiences I had my first three years of high school along with the Trump's administration's repeal of the Title IX guidance on restroom access for transgender students that I was one of a group of transgender students from across the county who advocated for the School Board to adopt protections for transgender students. Along with other trans students and alumni, I shared my experiences numerous times during the Board's public comments period at their meetings. We also held rallies before the Board of Education.

14. In June of 2017, the protections eventually passed. It was an incredible moment for me. Never in my whole life had I been recognized by my school system because I was trans—most of the time I felt completely alone. Seeing the protections passed felt like a promise that I was going to be treated just like any other male student. I felt like all of the things I'd been through at school were worth it, because now I know that younger transgender students won't have to go through what I did.

15. If the protections were taken away, I would be devastated. Although I am very involved school activities and have always been an honor student, I would not feel safe going to school.

16. If had to start using the girls' restroom, this would be really confusing and damaging to me because I am a boy. Using the men's restroom is an affirmation of my identity in the simplest, but most visible way. Every boy I know in the school has one thing in common - they use the men's bathroom. Following that logic, I'm not recognized or feel like a boy if I don't also do that. The restroom is also a public place that everyone is entitled to occupy, and if I'm not allowed to use the one that matches me best, then what does that say about the validity of my identity? It tells me I don't deserve to exist in public.

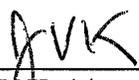
17. I've fought so long for the right to just be me. To have to go back to being treated as someone who I'm not would be really damaging.

18. The bullying, harassment, and isolation that the School Board's protections were designed to prevent has taken its toll on me. If they were revoked, I would feel helpless for all of the trans students in high school who are not graduating this year, and for those that are even younger, knowing that they would no longer be protected, but instead be actively oppressed. I'm fortunate because I have a safe place to come home to. Many trans students do not. A lot of trans kids have told me that they are feeling really scared and helpless because of the lawsuit. I have friends who can only be out as trans at school. Rescinding the protections would take that sense of safety away from them.

I make this declaration from my own knowledge of the facts and circumstances set forth above. If necessary, I could and would testify to these facts and circumstances.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: 10-19-2017



J.V.K. (sign with initials only)

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)**

_____)	
MARY SMITH, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:17-cv-02302-ELH
)	
BOARD OF EDUCATION OF FREDERICK)	
COUNTY, MARYLAND, et al.,)	
)	
Defendants.)	
_____)	

DEFENDANT-INTERVENOR’S MOTION TO DISMISS

Proposed Defendant-Intervenor moves to dismiss Plaintiffs’ Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The bases for this Motion are set forth in the accompanying memorandum.

Date: October 20, 2017

Respectfully submitted,

/s/

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Counsel for Proposed Intervenor

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)**

MARY SMITH, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:17-cv-02302-ELH
)	
BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND, et al.,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF
DEFENDANT-INTERVENOR’S MOTION TO DISMISS**

INTRODUCTION

Mary Smith is a student in the Frederick County Public School system (“FCPS”). Compl. ¶ 12. Her mother, Jane Doe, is also a resident of Frederick County. *Id.* ¶ 13. Smith and Doe have sued Defendant Board of Education of Frederick County (the “Board”) and Frederick County Public Schools (“Schools”) (collectively, “School Defendants”) for creating or revising policies 437, 443, 400-36, and 400-48 (the “Policies”). The Policies are designed to address discrimination, harassment, and bullying and create a welcoming and inclusive environment for transgender and gender non-conforming students at FCPS.

Proposed Intervenor-Defendant J.V.K. is a transgender student who attends public high school in Frederick County and depends on the protections afforded by the Policies. *See* Mot. to

Intervene. He submits this brief in support of his motion to dismiss Plaintiffs' Complaint. J.V.K. addresses only the Complaint's failure to state a claim, not issues of justiciability.¹

Plaintiffs ask this Court to declare that the Policies concerning single-sex facilities violate their right to privacy, Title IX, and state tort law, and order School Defendants to compel transgender students to use the restrooms and locker rooms of the sex they were assigned at birth, rather than the gender they live every day. *Id.* at 33. If Plaintiffs prevail, transgender students will be barred from the facilities used by all other students of their gender, and forced to use separate facilities that other students may *choose* to use, but that only transgender students will be *required* to use. This sends a stigmatizing message that the mere presence of transgender students in the facilities used by their peers is unacceptable. School Defendants' policy and practice concerning single-sex facilities does not violate any law; to the contrary, as several courts have recognized, it is the facilities policy and practice sought by Plaintiffs that would violate Title IX, as well as the Equal Protection Clause.

Plaintiffs further assert a First Amendment challenge to Policy 437's prohibition against harassment and bullying, and the provision of Policy 443 that calls for respect for transgender students' gender identity by recognizing their right to be referred to by pronouns that match who they are. There is no basis for Plaintiffs' contention that the First Amendment bars such protection against deliberate harassment of transgender students.

Finally, Plaintiffs also seek to compel the School Defendants to notify parents of every conversation "regarding or involving their child's sexuality or gender or related information or behavior." *Id.* If Plaintiffs prevail, students will be forced to remain silent about their gender or sexuality at school for fear of being outed to their families, which may expose some students to

¹ Intervenor-Defendant's choice not to address the justiciability of Plaintiffs' claims should not be interpreted as a concession that Plaintiffs have demonstrated standing or ripeness.

abuse or rejection. Such an outcome would also chill reporting of gender- and sexuality-based harassment, bullying, and violence. Mandatory parental notification of all behavior or conversation related to gender or sexuality would create serious health and safety risks for transgender, lesbian, gay, and bisexual students who will no longer be able to confide in trusted school officials or participate in school as their true selves. Such notification is not mandated by the Constitution.

FACTUAL BACKGROUND

Plaintiffs are a student in a FCPS school and her mother. They object to two policies School Defendants enacted: Policy 437 on Bullying, Harassment, Intimidation, and Policy 443, on Creating Welcoming and Affirming Schools for Transgender and Gender Nonconforming Students, as well as related regulations 400-36 and 400-48. Policy 443 is designed to “prevent discrimination, stigmatization, harassment, and bullying of students who are transgender or who are gender nonconforming and to create school cultures that are safe, welcoming, and affirming for all students.” Pls’ Ex. C (ECF No. 1-3) at Policy 443. It accurately defines gender identity as a “person’s deeply held sense or psychological knowledge of their own gender,” transgender as an “adjective describing a person whose gender identity or expression is different from that traditionally associated with an assigned gender at birth,” and transition as the “process in which a person goes from living and identifying as one gender to living and identifying as another.” *Id.*

Policy 443 further sets out a number of measures consistent with federal law and medical recommendations with regard to transgender and gender nonconforming students, although most, if not all, of the policy applies equally to cisgender students. *See id.* In particular, Policy 443 states that staff must use preferred names and pronouns for all students; that all students must have access to facilities that correspond to their gender identity; that any student may use

alternatives to single-sex facilities, such as single-occupancy restrooms; that personally identifiable and medical information about students may only be disclosed when consistent with law; that all students may participate in sports and physical education in a way that is consistent with their gender identity; that the comfort of all students should be maximized during overnight field trips; that dress codes should not differentiate based on gender; and that FCPS staff should receive relevant training. *See id.* Regulation 400-36 elaborates on these measures. *See id.* at Reg. No. 400-36.

Policy 437 “prohibits bullying, harassment, or intimidation of any person on school property or at school sponsored functions.” *Id.* at Policy 437. Regulation 400-48 provides procedures for reporting bullying, harassment, and intimidation. *See id.* at Reg. No. 400-48.

J.V.K. is a transgender student at FCPS.

ARGUMENT

Plaintiffs have not stated a plausible claim. In reviewing a 12(b)(6) motion to dismiss, the court should “take the facts in the light most favorable to the plaintiff,” but “need not accept the legal conclusions drawn from the facts,” and “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000)). The complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Because Plaintiffs have not alleged sufficient facts that would plausibly entitle them to relief under the law, their claims should be dismissed with prejudice. *See id.* at 679.

I. The Constitutional right to privacy does not encompass the right to exclude transgender students from single-sex facilities.

Plaintiffs' challenge to the Policies' provisions concerning transgender students' access to single-sex facilities fails to state a constitutional privacy claim upon which relief can be granted. Plaintiffs are asserting a new privacy right under the Due Process Clause that has never been recognized by any court in this country, and should not be recognized now: the right to exclude people from common spaces.

The right to bodily privacy protects against unwanted exposure of the intimate parts of one's body to others in some instances. *See Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (permitting claim to proceed where male prisoner was forced to urinate, defecate, shower, and change clothes in full view of others, including female correctional officers, with no stall door, shower curtain, or other barrier); *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981) (holding forceful removal of female prisoner's underclothing in presence of male guards violated her privacy rights).² Such unwanted exposure is not at issue in this case.

Smith has alleged that another girl, whom she has not alleged is transgender, violated school rules by filming Smith while she was undressing in a locker room. Compl. ¶ 45. While this incident appears serious, Smith has failed to allege any plausible causation between bullying experienced at the hands of her cisgender peer and her challenge to the policies concerning transgender students' access to single-sex facilities.

Smith has not alleged that School Defendants have ever forced her to expose the intimate parts of her body to anyone, or that they plan to do so in the future. Nothing in the challenged policies or practices requires Smith to undress in front of any other person of any gender. In fact,

² Maryland's state constitutional right to privacy has not been construed as broader than the federal constitutional right. *See Doe v. Dep't of Pub. Safety & Corr. Servs.*, 185 Md. App. 625, 643, 971 A.2d 975, 986 (2009) ("Assuming, arguendo, that the right to privacy is also protected by the Maryland Constitution, we hold that those protections are in pari materia with those provided by the U.S. Constitution.")

the Policy explicitly provides that any student may have access to a completely private facility.

Specifically, the policy states:

Any student, regardless of gender or gender identity or expression, who is uncomfortable for any reason using a gender-segregated facility will be provided a safe and nonstigmatizing alternative. Options include, but are not limited to, privacy curtains, provisions to use private restrooms or office restrooms, or a separate changing schedule. These options are provided to any student without question or complicating procedures required. Under no circumstance is any student required or directed to use a private use facility.

Plaintiffs' Ex. C (ECF No. 1-3) at Policy 443.

Other courts have recognized that the presence of transgender students in common restrooms or locker rooms does not infringe anyone's constitutional right to privacy. *Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *55 (E.D. Pa. Aug. 25, 2017) (“[H]igh school students ... have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs”); *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *2 (N.D. Ill. Oct. 18, 2016) (same); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290 (W.D. Pa. 2017) (finding that the presence of a girl who was transgender in a girl’s school bathroom did not show “any threatened or actually occurring violations of personal privacy”); *Board of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 876 (S.D. Ohio 2016) (“*Highland*”) (finding that school district’s policy preventing a girl who was transgender from using a girl’s bathroom was not substantially related to the district’s interest in student privacy); *see also Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting cisgender female prisoner’s claim that housing a transgender female prisoner with her violated her right to privacy). While the mere presence of transgender people would not violate Smith’s right to privacy, she has not alleged that she has ever encountered a transgender student. Also, in this

case as in *Boyertown*, “any cisgender student concerned with running into a transgender student in a bathroom and who does not think that urinal dividers or toilet stalls provide the requisite protection of their privacy can access one of the single-user facilities.” 2017 WL 3675418 at *55.

The Maryland statute regarding building codes cited by Plaintiffs does not establish, define, or expand a constitutional right. *See* Md. Code, Pub. Safety Art. § 12-503. It merely requires agency adoption of an extensive model construction code. Also, while this code contemplates single-sex facilities in certain structures, it is silent on the issue of who may use such facilities, and does not contradict the Policies.

II. Permitting transgender students to use facilities that match their gender identity does not violate Title IX.

Plaintiffs have not pled sufficient facts to support a claim of discrimination on the basis of sex under Title IX. On the contrary, they seek injunctive relief that would violate Title IX by discriminating against transgender students.

A. Plaintiffs have not alleged facts that, if true, would support a finding of discrimination on the basis of sex.

To sustain a sexual harassment claim under Title IX, plaintiffs must establish that they were students at a school receiving federal funds, that they experienced harassment based on sex, that the harassment was “sufficiently severe or pervasive to create a hostile (or abusive) environment,” and that “there is a basis for imputing liability to the institution.” *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 695 (4th Cir. 2007). Imputed liability requires deliberate indifference to sexual harassment of which the institution has actual knowledge. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *see also Doe v. Bd. of Educ. of Prince George's Cty.*, 605 F. App'x 159, 167 (4th Cir. 2015).

Plaintiffs do not allege that the presence of transgender students in girls' facilities has resulted in sexual harassment against Smith at the school.³ Rather, they advance a novel claim—that a policy that allows transgender students to use facilities that accord with their gender identity, in and of itself, creates “an environment of sexual harassment” sufficient to state a claim under Title IX. Compl. ¶ 108. It does not.

It is offensive and legally insufficient to allege that permitting transgender students to use bathrooms and locker rooms consistent with their gender identity is the equivalent of sexual harassment. Such a conclusion would require finding that simply being transgender transforms the ordinary use of a bathroom or locker room into an act of harassment. 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; *see also Doe*, 2017 WL 3675418 at *67; *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (rejecting female employee’s claim that a transgender female co-worker’s use of the women’s restrooms constituted sexual harassment).

Plaintiffs refer to Title IX “provid[ing] for” separate facilities based on sex. Compl. ¶ 117. To the extent Plaintiffs seek to rely on 34 C.F.R. § 106.33, that reliance is misplaced. The regulation states that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such

³ While Smith alleges she was filmed by another girl while undressing in the locker room, she has not alleged that the school district had actual notice of previous harassment against her or showed deliberate indifference to any act of harassment. Instead, the Complaint focuses exclusively on the possible future presence of transgender people in facilities, without attempting to explain any connection to the alleged incident beyond vague and conclusory statements about a “sexualized climate.”

facilities provided for students of the other sex.”⁴ This regulation permits, but does not require, single-sex facilities. It does not permit, much less require, that schools force transgender students out of the facilities that will be most consistent with their gender identity, health, safety, or dignity.

Again, while the mere presence of a transgender student in a restroom or locker room with Smith would not constitute sexual harassment, Plaintiffs have not even alleged that any such presence has occurred. In fact, the Complaint contains no allegations that Smith has ever met a transgender person—much less that a transgender student has harassed her.

The Policies to which Plaintiffs object do not permit sex-based discrimination or harassment. Nothing in them says that girls may be treated differently or worse than boys, that sexual harassment of students will be tolerated, or that school officials will abstain from taking action against students, teachers, or staff who discriminate against or harass people on the basis of sex. In fact, the opposite is true. The Policies take a strong stance against sex-based discrimination, including harassment. *See* Pls’ Ex. C at Policy 443.1 (ECF No. 1-3) (“Bullying, harassment, and intimidation based on perceived or real sex, sexual orientation, or gender identity or expression is prohibited in FCPS”); *id.* at Policy 437 (“[T]he Board believes that bullying, harassment, intimidation, discrimination, or hazing are both morally wrong and offensive and will not tolerate such conduct on the part of any employee, supervisor, manager, administrator, student, or visitor.”).

⁴ The Department of Education previously issued a January 7, 2015 opinion letter and a May 13, 2016 “Dear Colleague” letter interpreting 34 C.F.R. § 106.33, but after a change in administration, the Department rescinded those documents. The Department has abstained from providing any new guidance regarding the interpretation of 34 C.F.R. § 106.33.

Further, the conduct Plaintiffs allege—allowing transgender students to use single-sex facilities that accord with their gender—does not target Smith on the basis of sex. *See* 20 U.S.C. § 1681. Plaintiffs have not alleged that Smith is being treated differently from others, or that she is being singled out because she is female, she is cisgender, or she does not match sex stereotypes. According to the facts as stated in the Complaint, like any other student, Smith is permitted to use a multi-occupancy restroom and locker room consistent with her gender identity; like any other student, if she does not wish to do so, she may use a single-occupancy facility; and like any other student, she is entitled to protection against sexual harassment and bullying. The substance of Plaintiffs’ claims appears to be not an objection to Smith receiving different or worse treatment than other students, but to transgender students receiving equal treatment.

B. The injunctive relief Plaintiffs seek would discriminate on the basis of sex.

The injunctive relief Plaintiffs seek, which would bar transgender students from access to restrooms and locker rooms consistent with their gender identity, would violate Title IX and the Equal Protection Clause. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050, 1053-54 (7th Cir. 2017) (Title IX and equal protection); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (equal protection); *Highland*, 208 F. Supp. 3d at 874-77 (equal protection).

The First, Sixth, Seventh, Ninth, and Eleventh Circuits have recognized that discrimination against a transgender individual is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution. *See Whitaker*, 858 F.3d at 1051; *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Rosa*

v. Park W. Bank & Tr. Co., 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000).⁵

A person's transgender status is an inherently sex-based characteristic. The incongruence between gender identity and gender designated at birth is what makes a person transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination on the basis of "sex." See *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016).

Discrimination against people because they have undergone a gender transition is also inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. Cf. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes discrimination against people who have undergone a gender transition from the gender designated for them at birth. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy); *Glenn*, 663 F.3d at 1314 (firing employee because of her "intended gender transition" is sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14-CV-00583-SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (same).

⁵ The Fourth Circuit ruled the same, according *Auer* deference to the Department of Education's interpretation of its own regulations. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir.), cert. granted in part, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), and vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017). The document interpreting those regulations has since been withdrawn and not replaced. See *supra* n.4. The Fourth Circuit decision has been vacated, and the case continues to be litigated. *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 290 (4th Cir. 2017) (remanding case to district court for mootness determination).

In addition, discrimination against people because they are transgender is sex discrimination because it inherently rests on sex stereotypes and gender-based assumptions. As the Supreme Court recognized in *Price Waterhouse v. Hopkins*, “assuming or insisting that [individual men and women] match[] the stereotype associated with their group” is discrimination because of sex. 490 U.S. 228, 251 (1989) (plurality).⁶ By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed, “a person is defined as transgender precisely because” that person “transgresses gender stereotypes.” *Glenn*, 663 F.3d at 1316; *accord Whitaker*, 858 F.3d at 1048; *Dodds*, 845 F.3d at 221. “[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is ... discrimination on the basis of sex as interpreted by *Price Waterhouse*.” *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *accord G.G. v. Gloucester County Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (explaining that discrimination against a transgender boy, who does “not conform to some people’s idea about who is a boy,” is discrimination on the basis of sex); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574-75 (6th Cir. 2004) (discriminating based on a person’s failure to “act and/or identify with” one’s sex assigned at birth is discrimination on the basis of sex); *Schwenk*, 204 F.3d at 1201 (transgender individuals are inherently gender nonconforming in their “outward behavior and inward identity”); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) (“Because the term ‘transgender’ describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual’s transgender status constitutes discrimination based on gender

⁶ All members of the Court agreed that discrimination on that basis would violate Title VII, although they divided over which party should bear the burden of proving causation. *See id.* at 259 (White, J., concurring); *id.* at 273 (O’Connor, J., concurring); *id.* at 295 (Kennedy, J., dissenting).

stereotyping.”); *Schroer*, 577 F. Supp. 2d at 305 (discrimination against an “inherently gender-nonconforming transsexual” is sex discrimination).

As the Seventh Circuit recently explained: “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Whitaker*, 858 F.3d at 1049. Indeed, “the most obvious example” of a Title IX violation is “the overt, physical deprivation of access to school resources.” *Davis*, 526 U.S. at 650; cf. *Snyder ex rel. R.P. v. Frankfort-Elberta Area Sch. Dist.*, No. 1:05-CV-824, 2006 WL 3613673, at *1-2 (W.D. Mich. Dec. 11, 2006) (finding that requiring Black elementary school student to use separate restroom in response to harassment from others deprived her of “equal access to restroom facilities”).

Physical exclusion carries a powerful stigma that marks transgender students as unfit to use the same facilities as others. “[I]t is humiliating to be segregated from the general population.” *G.G.*, 853 F.3d at 729 (Davis, J., concurring). Our laws have long recognized the “daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.” *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). “[D]iscrimination itself, ... by stigmatizing members of the disfavored group[,] ... can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.” *Heckler v. Mathews*, 465 U.S. 728, 729 (1984); cf. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on gender “[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified”); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that refusal to recognize marriages of same-

gender couples “tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition”).

The harms caused by discriminatory policies are not only dignitary, but also psychological and physical. *See Whitaker*, 858 F.3d at 1040-41 (student limits “his water intake” to avoid using restroom, causing “fainting and dizziness” and “migraines, depression, and anxiety” from lack of hydration); *Highland*, 208 F. Supp. 3d at 871 (“Jane often goes the entire day without using the bathroom because she hates being singled out when she is forced to use a separate bathroom.”).⁷ It impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. *See Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014) (evidence “established that a student’s psychological well-being and educational success depend[ed] upon being permitted to use the communal bathroom consistent with her gender identity”); *Boyertown*, 2017 WL 3675418 at *40 (recounting expert testimony that excluding transgender students from the common restrooms “often negatively impacts their self-esteem and self-worth, ability to trust others, and willingness to go out into the world, during a critical aspect of development”).

At school, at work, or in society at large, limiting a person’s ability to use the restroom limits their ability to participate as a full and equal member of the community. *G.G.*, 853 F.3d at 729 (Davis, J., concurring). In this context, as elsewhere, “discriminatory treatment exerts a pervasive influence on the entire educational process.” *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

⁷ Preventing boys and girls who are transgender from using the same restrooms as other boys and girls can sometimes have catastrophic psychological consequences. *See Dodds*, 845 F.3d at 221 (“Highland’s exclusion of Doe from the girls’ restrooms has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old child [i.e., multiple suicide attempts prior to entry of the injunction]. These are not distant or speculative injuries.”).

Thus, far from violating Title IX, School Defendants have done what is necessary to comply with it and the Equal Protect Clause. Plaintiffs have not stated a claim for which relief may be granted.

III. Permitting transgender students to access single-sex facilities consistent with their gender does not violate state tort law.

Filming someone who is unclothed can constitute the tort of intrusion upon seclusion. *Bailer v. Erie Ins. Exch.*, 344 Md. 515, 534, 687 A.2d 1375, 1384 (1997) (discussing conduct of a male employer who filmed a female employee without her consent while she was showering). If Smith were bringing a claim against the other student who filmed her, or claiming that the School Defendants knew about and deliberately failed to take action to prevent this incident, it is possible that she would have stated a claim upon which relief could be granted. But she has done neither.

Again, Smith has not alleged that any transgender student has ever shared a locker room or bathroom with her under any circumstances, or that any transgender students attend her school. But even if she had made such allegations, simply sharing a girl's locker room or restroom with a transgender girl does not demonstrate any intentional intrusion on Smith's solitude, seclusion, or private affairs, much less in a way that would be highly offensive to a reasonable person. *See Boyertown*, 2017 WL 3675418 at *71.

IV. The Board's anti-harassment policy is plainly permitted by the First Amendment.

Smith has failed to state a claim that her free speech rights have been infringed upon by the existence of the Policies. Smith has not alleged that the Policies have been applied to her personally, and on their face, nothing in the Policies prohibits expression of Smith's viewpoints. Rather, the Policies prohibit bullying, harassment, and intimidation. FCPS is well within its

rights and obligations under Title IX to pass policies addressing gender-based harassment and bullying, and has not violated the First Amendment in doing so.

Policy 437 prohibits intentional conduct that creates a hostile educational environment by substantially interfering with a student's educational opportunities. This language comports with the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits sex discrimination—including verbal harassment—in educational programs receiving government funding. *See Jennings*, 482 F.3d at 695 (finding that to make out a claim under Title IX plaintiff must show “the harassment was sufficiently severe or pervasive to create a hostile... environment in an educational program or activity”).

Plaintiffs attempts to characterize the anti-harassment policy as a content-based speech regulation. But courts have consistently held that verbal harassment is actionable under sex discrimination statutes without violating the First Amendment. *See, e.g., Harris v. Mayor and City Council of Balt.*, 429 Fed. Appx. 195, 200 (4th Cir. 2011) (holding a reasonable juror could find sexually explicit language by coworkers constituted a hostile environment, regardless of whether they were directed at plaintiff); *Jennings*, 482 F.3d at 701 (holding allegations of sexually suggestive comments by athletic coach, if proved, would amount to sexual harassment under Title IX); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003) (finding Title VII violation occurred where a “victim is harassed in such sex-specific and derogatory terms”). Identifying gender-based harassment and bullying as prohibited conduct in a school policy, as FCPS has done, is not an impermissible content-based regulation. Rather, schools have an *obligation* to address gender-based harassment to comply with Title IX. Doing so has never been held to violate the Constitution. The language of Policy 437 is in line with the “hostile

environment” standard set out by the federal courts in addressing gender-based harassment under Title IX.

Smith objects to the language in Policy 443 that schools “recognize[] the right of every student to be referred to by their preferred name and pronouns.” The policy refers to staff, not students. However, FCPS is well within its rights to address *intentional* disregard and denial of a student’s gender by other students if it rises to the level of creating a hostile environment. Under Policies 443 and 437, as well as 400-48, schools may address deliberate verbal harassment of transgender students. Smith does not allege—nor does Policy 443 instruct—discipline for honest mistakes about students’ names or pronouns, or isolated incidents of misgendering without malicious intent. Rather, Smith is advocating for the right, while on school grounds, to consistently and deliberately single out any transgender student she meets in the future to deny that student’s gender identity. Courts have held this kind of conduct can rise to the level of impermissible sex discrimination. *See, e.g., Burns v. Johnson*, 829 F.3d 1 (1st Cir. 2016) (finding plaintiff’s allegations, including employer’s purposeful and condescending use of the pronoun “she” to a male transgender employee, supported a reasonable inference of discrimination on the basis of sex); *Doe v. City of New York*, 976 N.Y.S.2d 360 (N.Y. Sup. Ct. 2013) (holding transgender woman had sufficiently alleged discrimination under state sex discrimination law when the state HIV/AIDS Service Administration continued to address her by her former name, “he,” and “him”).

Under Title IX, schools are permitted—and indeed obligated—to address gender-based harassment that is severe and pervasive and creates a hostile educational environment. The First Amendment does not bar schools from having policies that allow them to address intentional gender-based harassment toward transgender students on a case-by-case basis. Smith has not

alleged any particular set of facts pertaining to discipline or implementation under the policy. Because the policy on its face sets out a standard clearly within the bounds of Title IX, Smith has failed to state a First Amendment claim.

V. The Constitution does not require schools to disclose students' LGBT status to parents.

Plaintiff Doe has failed to state a claim under the Fourteenth Amendment against School Defendants for violating her parental liberty rights through Policy 443. Doe alleges that comments from Board of Education members about Policy 443 suggest schools will not inform parents of their child's transgender status if they determine it would be against the health and safety interests of the student to do so. She does not allege FCPS failed to notify her about the gender transition of her own child—indeed, it is hard to believe Doe is concerned Smith is transgender, given that Doe and Smith are suing to revoke a policy protecting transgender students' rights.⁸ Smith has failed to allege any facts that suggest her own parental rights have been or will be violated. Further, there is simply no case law that supports the proposition that the right to parental autonomy requires affirmative reporting of every voluntary conversation between school staff and students, regardless of whether those conversations involve discussion of the student's gender.

Voluntary interactions with school personnel do not require parental notification or consent. *See Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980) (rejecting parental autonomy challenge to state operation of birth control clinic that distributed contraceptives to minors without parental consent because the program was voluntary; parents remained free to inculcate their values in their children and exercise their parental role); *Parents United For Better Sch., Inc. v. Sch. Dist.*

⁸ To the extent Doe intends to allege that Smith is or may be transgender and chooses not to disclose that status to Doe, it would appear that a conflict of interest prevents joint representation of Doe and Smith.

of Phila. Bd. of Educ., 148 F.3d 260, 275 (3d Cir. 1998) (rejecting parental autonomy challenge to school condom distribution program without parental notification for same reason); *Curtis v. Sch. Comm. of Falmouth*, 420 Mass. 749, 753 (1995) (same).

No aspect of the Policies compels students to have personal conversations about their gender identity that they do not want to have. Rather, the Policies suggest only that, within certain parameters, schools have the discretion to respect the privacy of students by not divulging personal information to their parents that have they voluntarily shared. Nothing in the Constitution requires the mandatory disclosure that Plaintiffs seek. There is no compulsion by school officials involved, and so no claim for a violation of parental rights has been stated.

Furthermore, to the extent that Plaintiffs allege that the Policies forbid any and all communication with the parent of a transgender student about that student's gender, Plaintiffs' own exhibit plainly contradicts any such allegation. Policy 443 and Regulation 400-36 encourage cooperation between students, parents, and staff where appropriate. In fact, the policy requires "every effort" be made to "support communication" between transgender students and their parents, "unless there is a health or safety concern." Pls' Ex. C (ECF No. 1-3) at Policy 400.36(III)(F). It further requires school staff to "respect the rights of the parent/guardian to have access to student records in compliance with federal and state law," and suggests offering joint meetings between the parent and student. *Id.*

FCPS is well within its rights under the Fourteenth Amendment to have a policy that does not require mandatory disclosure of all information about students' sexuality, gender identity, or transgender status.

VI. School board non-discrimination policies do not violate separation of powers.

Federal and Maryland law do not acknowledge a cause of action against a county government body or county officials for violating separation of powers. *See, e.g., Barranca v. Prince George's Cty.*, 287 A.2d 286, 291 (Md. 1972) (“The constitutional requirement of separation of powers is not applicable to local government.”).

To the extent Plaintiffs seek to allege that the School Board has exceeded its statutory authority, they have failed to state a plausible claim for which relief can be granted. The School Board operates pursuant to a broad statutory mandate. Md. Code Ann., Educ. § 4-101 (providing that “educational matters that affect the counties shall be under the control of a county board of education in each county” and that “[e]ach county board shall seek in every way to promote the interests of the schools under its jurisdiction”). Creation of non-discrimination and anti-harassment policies affecting the schools under its jurisdiction is well within the powers and duties of the School Board.

VII. The Policies are not barred by state education and construction codes.

Plaintiffs argue that Maryland law precludes the School Defendants from defining “sex” to include transgender students. Compl. ¶¶ 174-77. This is not the case. To the contrary, Maryland courts have recognized the medical consensus that “gender is not determined by any single criterion,” and several factors may be relevant. *In re Heilig*, 816 A.2d 68, 73 (Md. 2003).

None of the education and construction codes Plaintiffs cite create a private right of action or preclude the Policies. Maryland incorporates by reference the International Building Code (“IBC”) in its public safety code. *See* Md. Code, Pub. Safety Art. § 12-503. The IBC discusses occupancy requirements for single-sex restrooms, but nothing in the code requires defining sex to exclude transgender individuals. The code merely establishes construction and occupancy requirements, and is silent as to who may use the facilities.

School Defendants are not precluded by public safety and construction codes—or any other state law—from passing non-discrimination policies, nor do the codes mandate excluding a subset of students from existing facilities. The relief Plaintiffs seek is not mandated by state education or construction codes, and as discussed supra Part II. B., would violate federal law.

VIII. Policies 437 and 443 do not violate the federal constitution.

Plaintiffs have failed to allege any new claims in Count 8. They appear to attempt to anticipate statutory defenses, and allege no facts upon which relief may be granted.

CONCLUSION

For the foregoing reasons, J.V.K.'s motion to dismiss should be granted.

Date: October 20, 2017

Respectfully submitted,

/s/

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)**

MARY SMITH, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:17-cv-02302-ELH
)	
BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND, et al.,)	
)	
Defendants.)	

ORDER

This matter is before the Court on J.V.K.'s Motion to Intervene. Upon consideration of the Motion to Intervene and the entire record herein,

IT IS HEREBY ORDERED that the Motion to Intervene is GRANTED, and J.V.K. shall be added as Intervenor-Defendant.

The proposed Motion to Dismiss, filed as Exhibit B to the Motion to Intervene, shall be considered filed as of the date of this Order.

SO ORDERED this _____ day of _____, 2017.

Ellen L. Hollander
United States District Judge