

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

**M.A.B., a minor,**  
*by and through his parents and next friends,*  
**L.A.B. and L.F.B.,**  
*Plaintiff,*

v.

**BOARD OF EDUCATION OF TALBOT  
COUNTY, et al.,**  
*Defendants.*

Civil Action No. **GLR-16-2622**

**JOINT NOTICE OF SUPPLEMENTAL AUTHORITY**

The parties, Plaintiff, M.A.B., by and through his undersigned counsel, and Defendants, the Board of Education of Talbot County, Kelly L. Griffith, and Tracy Elzey, by and through their undersigned counsel, hereby respectfully submit the following Joint Notice of Supplemental Authority and state as follows:

In line with the request to this Court at the September 12, 2017 teleconference on this case, the parties have attached Judge Smith's August 25, 2017 memorandum opinion in *Doe ex rel. Doe v. Boyertown Area School District*, No. 17-1249, 2017 WL 3675418 (E.D. Pa. Aug. 25, 2017). Each party now offers the following argument on the case:

**Plaintiff's Position:**

Defendants have repeatedly invoked an ill-defined constitutional right to bodily privacy from the opposite sex as justification for denying M.A.B. access to the same restrooms and locker rooms other boys use. (ECF 36-1 at 21-24, 26-27; ECF 43 at 16-17.) *Boyertown* is the latest court

decision to reject similarly alleged bodily privacy rights.<sup>1</sup> The *Boyertown* case—like the *Students & Parents for Privacy* case—involved access to both restrooms *and* locker rooms. Even in that context, the court held that the plaintiffs (non-transgender students) were unlikely to succeed on their claim that allowing boys and girls who are transgender to use the same facilities as other boys and girls violates the privacy rights of non-transgender students. The court explained that plaintiffs were arguing for “the recognition of a very broad constitutional privacy right that has never been recognized by another court.” *Id.* at \*53. The right to bodily privacy was not implicated in the case because all students had the option to change in a stall or alternative private area if they were uncomfortable changing in the presence of other students, whether transgender or not. *Id.* at \* 55. These privacy alternatives similarly exist in M.A.B.’s school or could be made available.<sup>2</sup>

Importantly, the court also rejected the plaintiffs’ depiction of transgender students as members of the opposite sex triggering any alleged bodily right to privacy: “[T]he School District’s practice here does not allow cisgender boys to go into the girls’ bathrooms and locker rooms or allow cisgender girls to go into the boys’ bathrooms and locker rooms. Instead, the School District permits students who indicate that they identify with a gender different than the sex assigned to them at birth to use the bathrooms and locker rooms which correspond to their gender

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<sup>1</sup> See also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017); *Evancho v. Pine Richland Sch. Dist.*, 237 F. Supp. 3d 267, 289-90 (W.D. Pa. 2007); *Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 867-68 (S.D. Ohio 2016); *Students and Parents for Privacy v. DOE*, No. 16-cv-4945, 2016 WL 6134121 (Oct. 18, 2016) (report and recommendation).

<sup>2</sup> In *Boyertown*’s locker room, like here, the locker rooms had single-stall showering facilities, toilet stalls with doors and locks for changing, and unisex bathroom alternatives. *Id.* at \* 56. The defendants here admit that their team could be modified to allow student changing areas, if necessary. (ECF 43 at \* 7.)

identity.” *Id.* at \*55.<sup>3</sup> Like M.A.B., these transgender students “live in a manner that is consistent with their gender identity.” *Id.*

Under the authority cited in M.A.B.’s Motion for Preliminary Injunction/Opposition to Defendants’ Motion to Dismiss, and now *Boyertown*, the non-existent privacy rights of non-transgender students do not trump M.A.B.’s actual constitutional and statutory rights to be treated like any other high school student whose gender identity is male. M.A.B. again respectfully submits that like any other male student, he deserves immediate access to these facilities.

**Defendants’ Position:**

The United States District Court for the Eastern District of Pennsylvania’s recent opinion in *Doe v. Boyertown Area Sch. Dist.*, 2017 WL 3675418 (E.D. Pa. Aug. 25, 2017), is inapposite to the instant matter and actually counsels in favor of this Court denying Plaintiff’s Motion for Preliminary Injunction. As an initial matter, the court denied the plaintiffs’ motion for a mandatory preliminary injunction to block the defendant school board’s policy—i.e., a change of the status quo—in light of the “heavy burden” on movants seeking such an “extraordinary remedy.” *See id.* at \*2, \*45. Plaintiff’s burden is equally heavy in the instant case, and in fact he cannot meet it.

As to inappositeness, the claims at issue in *Doe* are different from those in the instant case; the *Doe* plaintiffs brought a claim under the Substantive Due Process Clause of the Fourteenth Amendment and a hostile school environment claim under Title IX, whereas Plaintiff herein brings a claim under the Equal Protection Clause of the Fourteenth Amendment and a traditional sex discrimination claim under Title IX. The standards and governing case law for those respective sets of claims are different, and thus the *Doe* court’s reasoning is largely inapposite. Although

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<sup>3</sup> One who is “cisgender” describes a person who is not transgender. *See* <https://www.glaad.org/reference/transgender> (last accessed September 13, 2017).

Plaintiff may argue that the court’s substantive due process claim is relevant to his equal protection claim insofar as the court found that public 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,” the court’s reasoning was based largely on the fact that cisgender students were not literally forced to change in the presence of students of the opposite sex or be exposed to such students in various stages of undress insofar as cisgender students could change in the toilet stalls or single-user facilities. *Id.* Thus, the court placed the burden on cisgender students to deliberately seek other accommodations—a burden which Plaintiff himself claims is unbearable in this case because he admits that it causes stigmatization and emotional harm.

Lastly, the *Doe* court’s analysis of the plaintiffs’ Title IX claim is inapposite because the court did not opine on the crucial statutory construction issue before the Court in the instant case—namely, whether the word “sex” includes “gender identity—and instead focused on whether “the School District’s practice [wa]s so severe, pervasive, and objectively offensive that it undermined and detracted from their educational experience.” *Id.* at \*63.

We have kept these arguments brief in accordance with the Court’s instructions in our telephone conference; however, we are prepared to provide further argument if the Court so directs.

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. In addition, because this electronic filing exceeds 15 or more total pages, a courtesy copy will be delivered to the court within 48 hours of the date of the electronic filing.

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/s/  
Jennifer Kent