UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, a minor, by and through his next friend and mother, ERICA ADAMS KASPER,

Plaintiff, **Case No.: 3:17-cv-00739-TJC-JBT**

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.
_____/

DEFENDANT'S NOTICE OF FILING PRELIMINARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant, **THE SCHOOL BOARD OF ST. JOHNS COUNTY FLORIDA**, by and through undersigned counsel and pursuant to the Court's Case Management and Scheduling Order [Doc. 59], hereby gives notice of filing its Preliminary Findings of Fact and Conclusions of Law. A copy of the Preliminary Findings of Fact and Conclusions of Law shall be filed as an exhibit to this Notice.

Dated this 7th day of December, 2017.

[This space intentionally left blank]

Respectfully submitted,

/s/ Terry J. Harmon
TERRY J. HARMON
Trial Counsel
Florida Bar Number: 0029001
tharmon@sniffenlaw.com
/s/ Michael P. Spellman
MICHAEL P. SPELLMAN
Florida Bar Number: 937975
mspellman@sniffenlaw.com
/s/ Robert J. Sniffen
ROBERT J. SNIFFEN
Florida Bar Number: 0000795
rsniffen@sniffenlaw.com
/s/Kevin C. Kostelnik
KEVIN C. KOSTELNIK
Florida Bar Number: 0118763
kkostelnik@sniffenlaw.com

SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 205-1996
Facsimile: (850) 205-3004

Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of December, 2017, a true and correct copy of the foregoing was electronically filed in the U.S. District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Michael P. Spellman
MICHAEL P. SPELLMAN

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, a minor, by and through his next friend and mother, ERICA ADAMS KASPER,

Plaintiff,

v. **Case No.: 3:17-cv-00739-TJC-JBT**

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendants.
_____/

PRELIMINARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court commenced a non-jury trial on December 11, 2017 in this Cause. Based upon the testimony presented and the evidence admitted at trial, and being otherwise fully advised on the matter, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The District

1. The School Board of St. Johns County, Florida ("School Board") is the governing body of the St. Johns County School District ("District"), a K-12 school district responsible for the operation, control, and supervision of all public schools located in St. Johns County, Florida. Fla. Stat. §§1001.30; 1001.32(2). Authorized to exercise any power not expressly prohibited by law, Fla. Stat. §1001.32(2), the School Board is made up of five members elected from geographic districts within the County. Among its many duties, the

School Board is responsible for providing "proper attention to [the] health, safety, and other matters relating to the welfare of students." Fla. Stat. §1001.42(8)(a); see also, Fla. Stat. §1006.07. The School Board is also required to "[e]nsure that all plans and specifications for buildings provide adequately for the safety and well-being of students…" Fla. Stat. §1001.42(11)(b)8.

2. The School Board in St. Johns County appoints the Superintendent, who is responsible for the administration and management of the schools and for the supervision of instruction within the District. Fla. Stat. §1001.32(3); see also, Fla. Stat. §§1001.49; 1001.51 (general powers, duties and responsibilities of district school superintendents). The School Board appointed Tim Forson as its Superintendent in January 2017. Mr. Forson has served the District for almost 37 years total, previously serving as a Deputy Superintendent, high school principal, elementary school principal, teacher, and coach. Prior to Mr. Forson, Dr. Joseph Joyner served as Superintendent.

3. The District operates 36 K-12 schools (excluding alternate, virtual, and charter schools) across a 608 square mile region. With over 4,500 employees, the District enrolls just under 40,000 K-12 students during the 2017-2018 school year. The District has placed first out of 67 counties in total school accountability points for the past eight years and is one of only three A-rated school districts in Florida.

4. The District has always maintained an unwritten policy, consistent with the State's construction code for educational facilities, that segregates group or multi-user bathrooms by biological sex. There is no evidence the District ever allowed students to use group bathrooms designated for the opposite sex.

5. Each student who enrolls in a District school must complete an enrollment packet, which includes various information about the student. Some information must be supported by documentation, such as proof of residence (to ensure the student lives in the District and in the school's attendance zone), proof of immunizations, and, in the case of a child's sex, a birth certificate or birth registration card, and a physician's medical information. The information in the packet and/or the documentation presented is taken at face value unless the District becomes aware of information that disputes or questions its accuracy.

The Plaintiff

6. Plaintiff is presently a junior attending Allen D. Nease High School ("Nease") in Ponte Vedra, Florida, a school within the District.

7. Plaintiff is a biological female. From his birth until the end of the 2014-15 school year, Plaintiff identified consistent with his biological sex.

8. When Plaintiff enrolled in the District as a fourth grader in July of 2010, he submitted an enrollment packet which designated his sex as "female," documented by a State of Florida Birth Registration Card, which consistently marked his sex as "female," and by his physical examination report. From fourth through eighth grade, Plaintiff, like every other girl in the District, used the group restroom sex-segregated for girls, without complaint or incident.

9. Towards the end of the 2014-15 school year, Plaintiff was involved in a traumatic event, after which the District created a "Safety Plan" for Plaintiff, because he was

"triggered" by a variety of self-reported factors, none of which included gender identity issues or bathroom use.

10. Approximately three weeks after the event, Plaintiff watched the May 26, 2015 episode of the Ellen DeGeneres Show, a talk-variety show, which featured Aydian Dowling whose notoriety was due to him possibly becoming the first transgender man on the cover of Men's Health magazine.[1]

11. After watching Mr. Dowling's appearance Plaintiff "realized" he might be transgender. Within a few weeks, Plaintiff announced to his family he identified as a male, cut his hair short to appear like a male and began wearing a binder to minimize the appearance of his breasts.

The Development of the District's Best Practices

12. Prior to retiring in June 2016, Sallyanne Smith served as the District's Director of Student Services for many years. At some point between 2012 and 2013, then-Superintendent Dr. Joyner designated Ms. Smith to look into and make District-wide recommendations for handling issues involving transgender students.

13. Ms. Smith put together and led a task force to focus specifically on these recommendations. For the next several months, Ms. Smith and members of the task force took numerous steps to researching issues involving transgender students in an effort towards developing District-wide guidelines. These steps included: attending national conferences on LGBTQ student issues in schools; speaking with staff and administrators from other school

[1] The segment with Mr. Dowling can be seen on Youtube at this link: https://www.youtube.com/watch?v=LujYm465ntY

districts; meeting with students who were leaders of or involved in Gay-Straight Alliance clubs in various schools within the District; researching the policies of other school districts within the state and around the nation; reviewing news articles about evolving transgender issues; and hosting focus groups in the community attended by persons representing diverse interests and points of view.

14. After months of work, in March 2015, Ms. Smith composed the task force's draft recommendations for consideration by the District's executive cabinet. Attached to the recommendations was a draft of a table of "Best Practices" for LGBTQ students. For "Restrooms," the task force recommended, "Students will be given access to a gender-neutral restroom and will not be forced to use the restroom corresponding to their biological sex."

15. The task force based its recommendations, and specifically that related to restroom use, on the best interests of all the children in the District, and specifically, the comfort, safety and privacy of every student. From information learned during the research phase, the task force understood that offering the use of a gender-neutral bathroom was appropriate because it maintained the privacy of transgender students as well as other students.

16. In August 2015, Cathy Mittelstadt, then-Associate Superintendent of Student Support Services, presented the final draft of the task force's recommendations to the executive cabinet. After a review by the School Board's lawyer and outside counsel, the executive cabinet approved the recommendations in late August or early September 2015. Entitled "St. Johns County School District Guidelines for LGBTQ students-Follow Best Practices," the document covered various areas, among which included the use of nouns and

pronouns, changing official documents, privacy and the use of restrooms and locker rooms. Relevant to restrooms, the Best Practices authorized an alternative for students from the District's long-standing practice of separating bathrooms based on biological sex, providing "transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex."

17. The implementation of the Best Practices did not change the underlying prohibition against a student using a bathroom that was inconsistent with his or her biological sex. The District distributed the Best Practices to principals in early September 2015.

18. Although the District distributed the Best Practices after Plaintiff informed it that he identified as transgender, there is no question that the District had developed the Best Practices well in advance of that notification. The Best Practices were not implemented in response to Plaintiff. In fact, the District's teachers and staff were following the Best Practices relating to transgender bathroom usage before they were reduced to writing and distributed.

Plaintiff Enters Nease

19. Several weeks before the beginning of the 2015-16 school year, Plaintiff's mother contacted school officials and informed them that Plaintiff self-identified as a male and wished to present as a boy at Nease.

20. District staff, including social worker Holly Arkin, then-Nease Principal Kyle Dresback, and others met to discuss and implement a plan to ensure a smooth transition for Plaintiff. In this regard, Mr. Dresback met with each of Plaintiff's teachers to ensure they were aware of and would comply with Plaintiff's desire to be referred to by male nouns and

pronouns. The group also identified a gender-neutral restroom in the administration building (known as the C pod). Mr. Dresback also made arrangements to expedite creating a freshman photograph for Plaintiff's school record and student ID because Plaintiff did not want to use his eighth grade photograph, which showed him as a long-haired female.

21. Ms. Arkin informed Plaintiff's mother by telephone on August 3, 2015 that Plaintiff could use the gender-neutral restroom in C pod instead of the girls' restroom.

22. At the orientation for incoming students, school staff and administrators treated Plaintiff as a boy. For example, in exercises in which participants were segregated by sex, Plaintiff was on the "boys team." During the first week of school, District Guidance Counselor Michelle Sterling showed Plaintiff the location of the gender-neutral bathroom in C pod.

23. Six weeks into the new school year, Mr. Dresback received a complaint from two students that Plaintiff was using the boys' restroom. Mr. Dresback contacted Ms. Arkin, who met with Plaintiff and reiterated that his two options were the girls' restroom, which was consistent with his biological sex, or the gender-neutral bathroom in C pod.

24. Approximately one week later, Plaintiff's mother requested a meeting with Mr. Dresback. On October 9, 2015, Plaintiff's mother and Plaintiff attended a meeting with Mr. Dresback, Ms. Smith, and Ms. Arkin, among others. Plaintiff's mother requested Plaintiff be able to use the boys' restroom since he self-identified as male. District officials again reiterated the District's position, and the two options available to Plaintiff. Plaintiff's mother complained the gender-neutral restroom in C Pod was inconvenient to Plaintiff's

classes, and over the next several weeks, Nease opened three additional gender-neutral restrooms throughout the campus.

25. Since September 2015, Plaintiff has not used a boys' restroom at Nease. Plaintiff has produced no evidence that his use of the gender-neutral restroom has caused any negative impact on his academic performance nor that he has suffered any medical injury or condition or aggravation to any pre-existing condition. Such a cause and effect statement has not been established by any reliable evidence, but rather directly contradicted by Plaintiff who stated that he is no longer suffering. In fact, Plaintiff is a member of the National Honor Society and socially, has many friends and has a girlfriend.

26. In pleadings and in deposition, Plaintiff claims that his one-way walk from some of his classes to the nearest gender-neutral restroom is approximately ten to fifteen minutes. Video evidence pursuant to Plaintiff's Rule 34 inspection, however, confirmed that the furthest possible one-way distance from Plaintiff's class – 4th period –to the nearest gender-neutral restroom actually took three minutes to traverse.

27. Nease opened a building at the beginning of the 2017-18 school year, which provides six additional gender-neutral restrooms, bringing the total to 11. Although Plaintiff does not have any classes in the new building, during the Rule 34 inspection, Plaintiff confirmed he regularly uses at least two of these new restrooms.

Complaints and Community Concerns

28. The Defendant did not receive any complaints from students about Plaintiff using the boys' restroom other than the one received in the first six weeks of Plaintiff's

freshman year. The evidence, however, is undisputed that after September 22, 2015, Plaintiff has not used a boys' restroom.

29. Independently, certain parents of students and students (excluding Plaintiff and his parents) within the St. Johns County School District object to a policy or practice that would allow students to use a bathroom that matches their gender identity as opposed to the sex assigned at birth (also known as their biological sex). These individuals believe that such a practice would violate the bodily privacy rights of students and raise privacy, safety and welfare concerns.

30. When news of Plaintiff's lawsuit was publicized, the Defendant received a number of complaints from parents and concerned citizens. The number of emails in favor of the Defendant's policy was almost five times greater than those against. In addition, the Defendant received a petition signed by several hundred individuals advocating students use the bathroom consistent with their birth sex.

The DOE/DOJ Guidance

31. On May 13, 2016, the U.S. Departments of Education ("DOE") and Justice ("DOJ") jointly released a statement of guidance and best practices ("Joint Guidance"). The Guidance was not a rule duly promulgated through the administrative rule-making process, but rather provided an interpretation that federal laws which prohibit discrimination based on sex affect schools' obligations with regard to transgender students. Included within the Joint Guidance was a statement that schools must allow transgender students the opportunity to participate in and access sex-segregated facilities. The Guidance cited no case law or statutory authority, but rather referenced only previous internal pronouncements. Although

the Guidance claimed to "not add requirements to applicable law," it went on to impose "as a condition of receiving Federal funds" a seismic, and unsupported shift in the interpretation of Title IX and its implementing regulations.

32. On May 18, 2016, in response to the Joint Guidance, Dr. Joyner issued a statement which read, in pertinent part, "I am committed to doing what is right for each and every child. We believe our current practice is lawful and reasonable in that we provide gender-neutral restroom facilities to accommodate privacy and the safety for all students as needed or requested." The District, therefore, did not change its long-standing sex-segregated bathroom policy nor its Best Practices with respect to restroom use.

33. On February 22, 2017, DOE and DOJ withdrew the Joint Guidance and a prior DOE guidance consistent with the Joint Guidance. In doing so, the Departments emphasized that States and local school districts play the primary role in setting educational policy.

34. On October 4, 2017, Attorney General Jeff Sessions issued a memorandum the subject of which stated "Revised Treatment of Transgender Discrimination Claims Under Title VII of the Civil Rights Act of 1964." In that memorandum, Attorney General Sessions withdrew a December 14, 2014 memorandum issued by then-Attorney General Eric Holder, and confirmed that Title VII's express prohibition against discrimination "because … of sex" does not include gender identity. The memorandum explained, "'sex' is ordinarily defined to mean biologically male or female."

The OCR Complaint

35. In November of 2015, Plaintiff filed a complaint with DOE's Office for Civil Rights ("OCR"). In a December 28, 2015 letter, OCR notified the District of the Plaintiff's complaint, and advised that OCR would investigate the following issue: "Whether school officials have disallowed [Plaintiff] to use restrooms at Nease High School that are consistent with his gender identity, instead requiring him to use separate, gender-neutral employee restrooms, in noncompliance with Title IX." On January 15, 2016, the District notified OCR that it declined to participate in OCR's mediation program. On March 30, 2016, the District, through its legal counsel, responded to OCR's Title IX investigation, and denied any wrongdoing.

The Medical Facts[2]

36. Much has been made by Plaintiff regarding the medicine, science, and terminology behind what it means to be transgender, the diagnosis of gender dysphoria, how transgender people feel, and the necessary treatment protocols. "Biological sex" or "sex" refer to a member of a species in relation to the member's capacity to either donate or receive genetic materials for the purpose of reproduction. A person's sex is encoded in his or her genes at conception.

37. Sex differention occurs during fetal development when the presence of a Y chromosome directs the development of gonadal tissue, producing hormones that form male sex organs in tissue that would otherwise develop into female sex organs.

[2] Should the Court determine that the medical expert testimony is unnecessary to the ultimate determinations in this case, this entire Medical Facts section may be disregarded.

38. "Gender identity" refers to a person's inner sense of belonging to a particular gender. Although gender usually aligns with biological sex, some individuals may experience discordance between the two, such as, in this case, when a biological female whose has a gender identity of male. These individuals are referred to as "transgender." When individuals experience significant distress due to discordance between their gender, it is known as gender dysphoria.

39. Plaintiff argues that gender identity is determined at or before birth and is unchangeable, and therefore immutable. However, the established peer review literature and the testimony of Dr. Hruz and Dr. Josephson suggest that this may not be the case. Studies have been done with identical twins that refute this argument and peer reviewed literature suggest that the vast majority, up to 95%, of children who express gender dysphoria revert to a gender identity that is consistent with their biological sex by late adolescence.

40. Currently, there is not enough peer reviewed literature and data to determine the exact cause of gender dysphoria in individuals. Although the data is incomplete, the best evidence suggests that it is a result of a combination of prenatal hormone exposure, genetic variation, and postnatal environmental influences. Further, the limited emerging data does not establish whether any variations between brain functions of transgender and non-transgender individuals are innate and fixed or acquired and malleable. An infant cannot have a gender identity prior to developing the psychological equipment necessary to develop such an identity. The physical realities of an infant's sex, their chromosomal make up and their genitalia, come first, their thoughts cognitions, and feelings come later.

41. Regarding the use of bathroom facilities in accordance with one's gender identity as a necessary treatment protocol for individuals suffering from gender dysphoria, There is no reliable peer-reviewed scientific studies to support such a statement.

42. It is sufficient to say that the science in this area is rapidly evolving and still unsettled.

43. The diagnosis of gender dysphoria is one which is exclusively based on the subjective complaints (i.e., patients self-reporting) of the person allegedly suffering from it. Plaintiff's self-produced social media video makes clear that Plaintiff understands the symptoms associated with it. It also undercuts the allegations in this case as he repeatedly admits that he does not suffer from gender dysphoria.

CONCLUSIONS OF LAW

Plaintiff's Amended Complaint alleges that Defendant's policy excluding him from using the boys' restroom violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title IX of the Educational Amendments of 1972. Plaintiff seeks declaratory and injunctive relief as well as compensatory damages.

INTRODUCTION

The Supreme Court has long recognized that a State has broad authority to protect the physical, mental, and moral well-being of its youth, than of its adults. See e.g., Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 72-74 (1976); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

Education is not among the federal government's enumerated powers, but rather one of the many powers reserved to the states and the people, absent a constitutional restriction:

> [S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (emphasis added).

Local control over public education is "deeply rooted" in American tradition. Indeed, "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." Milliken v. Bradley, 418 U.S. 717, 741-742 (1974). Judicial restraint should characterize any federal attempt to intervene in public education:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint …. By and large, public education in our Nation is committed to the control of state and local authorities.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968). The same is true here. There is no reason for the federal judiciary to interfere in local school privacy policies and shut citizens out of the process.

The School Board is Vested with Setting Policy

As a matter of policy, the School Board follows the Title IX separate bathroom rule, which authorizes separating students on the basis of sex in the interest of bodily privacy. As pointed out in the February 22, 2017 Dear Colleague letter, specifically in reference to the sex segregated facilities authorized by Title IX, states and school district should play the "primary role" in "establishing educational policy." As the court stated in Texas v. United States:

> This case presents the difficult policy issue of balancing the

> protection of students' rights and personal privacy … while ensuring that no student is unnecessarily marginalized while attending school.
>
> * * *
>
> The resolution of this difficult policy issue, however, is not the subject of this Order. Instead the Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

201 F. Supp. 3d 810, 815 (N.D. Tex. 2016). Similarly, the court in G.G. ex rel., Grimm v. Gloucester County. School. Bd., 822 F.3d 709, 736 (4th Cir. 2016), vacated and remanded, 137 S.Ct. 1239 (2017) commented, "our Auer analysis complete, we leave policy formulation to the political branches." 822 F.3d at 724.

As the authority directly responsible for the welfare of St. Johns County school children and for establishing school policy, the School Board protects the privacy interests prescribed by the U.S. and Florida Constitutions, and follows the dictates of Title IX authorizing it to separate bathrooms on the basis of biological sex. The School Board's interest in protecting the bathroom privacy of the children in its charge is more immediate and just as important as Congress' in allowing separation of bathrooms on the basis of sex.

THE TITLE IX CLAIM

Plaintiff claims he has been discriminated against on the basis of sex in violation of Title IX, because Defendant has refused him use of the boys' restrooms at Nease. To succeed, Plaintiff must prove (1) that he was excluded from participation in, denied benefits of, or was subjected to discrimination in an educational program; (2) that the exclusion was on the basis of sex; and (3) that the Defendant receives federal financial assistance. Milward v. Shaheen, 2017 WL 3336471 at *6 (M.D. Fla. Aug. 4, 2017), reconsidered on other

grounds, 2017 WL 3662432 (M.D. Fla. Aug. 24, 2017). There is no dispute that Defendant receives federal financial assistance.

To accept Plaintiff's theory, the Court must find that the phrase "on the basis of sex" as used in Title IX and its implementing regulations actually means "on the basis of gender identity." There is simply no support for this theory.

Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. §1681(a). Whether the term "sex" refers to biological sex or self-reported gender identity is a question easily answered by plain and ordinary meaning of the statutes unambiguous terms. Such "inquiry begins with a statutory text and ends there as well if the text is unambiguous." BEDROC Ltd., LLC v. United States, 541 U.S. 176, 183 (2004).

As used in Title IX, Congress' use of the term "sex" unambiguously meant the person's actual sex – that is, the sex that an individual possesses by virtue of being born with certain immutable, physiological and biological characteristics such as an alignment of chromosomes and the possession of reproductive organs. "Ordinarily, a word's usage accords with its dictionary definition," Yates v. United States, 135 S.Ct. 1074, 1082 (2015), and in 1972, when Congress enacted Titles IX, "sex" was understood uniformly as referring to the biological or physiological characteristics that constitute a person's sex, and not an internal identification with one gender or the other.[3]

[3] See Judge Niemeyer's dissent in Grimm, 822 F.3d at 736 (noting dictionaries contemporaneous to Title IX's enactment relied on biological distinctions to define sex, and including the following, among other examples: The Random House College Dictionary 1206 (rev. ed. 1980)("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); American Heritage Dictionary 1187 (1976)("the property or quality by which organisms are classified according to their reproductive functions"); The American College Dictionary 1109 (1970)("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished…")).

Title IX's prohibition on sex discrimination, however, was not an absolute mandate barring all distinctions between men and women, including distinctions tied to biological differences or required by common decency. In fact, the law contained an explicit statutory exemption to protect privacy in intimate sections: "[N]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. §1686. Shortly after the law's passage, the Department of Education expanded this exemption through implementing regulations it adopted. Specifically, the Department passed a rule allowing but not mandating an educational institution to sex-segregate other facilities to protect privacy: "A recipient 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 facilities for students of the other sex." 34 C.F.R. §106.33.

Reviewing the legislative history behind the statutory language and its implementing regulation provides further support for what Congress intended. On the heels of the defeat of the Equal Rights Amendment, Title IX's sponsor, Senator Birch Bayh, stated on the Senate floor that Title IX was meant to serve as a "guarante[e] of equal opportunity in education for men and women," 118 Cong. Rec. 5,808 (1972), and was not "requiring integration of dorms between sexes," 117 Cong. Rec. 30,407 (1971). As Senator Bayh stated, the intent was not to desegregate "the men's locker room," but rather to "provide equal access for women and men students to the educational process and the extracurricular activities in a school…" Id.

The meaning of the term "sex" in Title IX is further confirmed by the many other uses in which Congress has employed the term in legislation enacted both before and after 1972. Never before has it been suggested that Congress meant the word "sex" to refer to something other than anatomy-based distinctions between males and females; in most instances, the context makes clear that an anatomy-based understanding was intended. See 10 U.S.C. §4320 (requiring that the housing provided to army recruits during basic training be limited "to drill sergeants and other training personnel who are the same sex as the recruits housed in that living area"); 19 U.S.C. §1582 (authorizing customs officials "to employ female inspectors for the examination and search of persons of their own sex"); 29 U.S.C. §206(d)(1) (forbidding certain employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex").

In contrast, where Congress has affirmatively decided to proscribe discrimination based on gender identity, it has done so clearly and expressly. In 2009, for example, Congress passed "hate crime" legislation that prohibits inflicting "bodily injury to any person because of [his or her] actual or perceived religion, national origin, gender, sexual orientation, *gender identity*, or disability." 18 U.S.C. §249(a)(2)(emphasis added). In addition, in 2013, Congress amended portions of the Violence Against Women Act to encompass discrimination "on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity*…sexual orientation, or disability." 42 U.S.C. §12291(b)(13)(A)(emphasis added); 34 U.S.C § 1229(13)(A) (separating the terms sex and

gender identity). These enactments make plain that Congress recognizes and differentiates between "sex," "gender," and "gender identity."

And while Congress has expanded certain laws to include gender identity as a protected characteristic, notably, it has rejected numerous attempts by its members to expand the scope of Title IX and Title VII. Members of Congress have proposed the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015), that would prohibit discrimination based on sexual orientation or gender identity under Title IX, as well as the Equality Act, S. 1858 (114th Cong. 2015) and S. 106 (115th Cong. 2016) that would prohibit discrimination on the basis of gender identity in Title VII. Congress, however, has repeatedly refused to enact this proposed legislation, rejecting it in various forms.

Although there was no support for grafting gender identity onto the definition of "sex" in either the letter of Title IX or the cases interpreting it, under former President Obama, the Office of Civil Rights ("OCR") of the United States Department of Education embraced it in a letter to Emily Prince dated January 7, 2015 and in a Dear Colleague letter dated May 13, 2016. Bypassing any semblance of rulemaking, in its Dear Colleague letter, OCR unilaterally announced its edict that schools "must allow transgender students access to [restrooms and locker rooms] consistent with their gender identity" or risk losing federal funding. On August 21, 2016, a federal district court enjoined enforcement of the guidance and held, "[I]t cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in §106.33 based on the biological differences between male and female students." Texas v. United States, 201 F. Supp. 3d at 833.

In Grimm, a 2-1 majority of the court gave the OCR gender identity interpretation of "sex" deference under Auer v. Robbins, 519 U.S. 452 (1997) and Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Over a vigorous dissent, the court reversed the district court's ruling that the separate bathroom rule (§106.33) was not ambiguous and "clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." Grimm, 132 F. Supp. 3d. at 746. Presciently, after giving OCR's interpretation Chevron deference, the majority observed that "a subsequent administration choose to implement a different policy … ." Grimm, 822 F.3d at 724.

By its Dear Colleague letter dated February 22, 2017, OCR and the Civil Rights Division of the United States Department of Justice ("DOJ") repudiated OCR's gender identity interpretation of "sex," expressly withdrawing the statements of policy and guidance reflected in OCR's January 7, 2015 Prince letter and May 13, 2016 letter. OCR and DOJ observed that since the issuance of those letters:

> [a] federal district court in Texas held that the term "sex" unambiguously refers to biological sex and that, in any event, the guidance was "legislative and substantive and thus full rulemaking should have occurred prior to the adoption of any such policy." In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.
>
> In addition, the departments believe that, in this context there must be due regard for the primary role of the states and local school districts in establishing educational policy.

Battle, Sandra and Wheeler, II, T.E. (2017, February 22). Dear colleague letter. Washington, DC: U.S. Department of Education, Office for Civil Rights and U.S. Department of Justice. (Emphasis added).

On August 3, 2016, the U.S. Supreme Court stayed the preliminary injunction entered in Grimm by the district court on remand from the Fourth Circuit. 136 S.Ct. 3442 (2016). Following the issuance of the February 22, 2017 Dear Colleague letter that withdrew OCR's previous gender identity guidance, the Supreme Court vacated the Fourth Circuit's decision and remanded the case back to that court "for further consideration in light of the [new] guidance document issued by the Department of Education and the Department of Justice." 137 S.Ct. 1239 (2017).

As the Supreme Court seemed to recognize, the withdrawal of the OCR gender identity guidance letters cut the legs out from under the theory that "sex" includes gender identity, which the Fourth Circuit deferred to in Grimm. Further retreating from that theory, the Attorney General's October 4, 2017 Memorandum reversed the previous administration's interpretation of "sex" to mean gender identity in the analogous Title VII context. The Attorney General advised:

> Title VII expressly prohibits discrimination "because of … sex" and several other protected traits, but it does not refer to gender identity. "Sex" is ordinarily defined to mean biologically male or female. See, e.g., Etsitty v. Utah Transit Auth., 502 F. 3d 1215, 1221-22 (10th Cir. 2007); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339,362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, "gender identity" discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination based on "sex" or "gender." See, e.g., 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A).
>
> * * *
>
> Although Title VII bars "sex stereotypes" insofar as that particular sort of "sex-based consideration[ ]" causes "disparate treatment of men and women," Price Waterhouse v. Hopkins,

> 490 U.S. 228, 242, 251 (1989) (plurality op.), Title VII in not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex, see, e.g., Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc).

Without the support of OCR's administrative interpretation and Chevron deference, Plaintiff's argument that for purpose of Title IX, "sex" means gender identity, and only gender identity, collapses. As the better-reasoned decisions recognized, there is nothing ambiguous about the word "sex." Accord Johnston v. University of Pittsburgh, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) ("On a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex"); Texas v. United States, 201 F. Supp. 3d at 832-33 ("[T]he plain meaning of the term sex as used in §106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth"); Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 688 (N.D. Tex. 2016) ("[T]he text, structure, and purpose reveal that the definition of sex in Title IX's prohibition of sex discrimination unambiguously prevented discrimination on the basis of the biological differences between males and females.").

Plaintiff's claim that sex under Title IX also means an individual's gender identity effectively asks this Court to redefine the plain meaning of the term "sex." In doing so, the Court would have to cast aside long standing precedent that requires courts to look at the intent behind a statute at the time it was created. See Thomas Jefferson Univ. v. Shalala, 512

U.S. 504, 512 (1994). Title IX was created and implemented because Congress was concerned about discrimination against women in education. Neal v. Bd. of Trustees of California State Universities, 198 F.3d 763, 766 (9th Cir. 1999).

Accordingly, because there is no legal or historical precedent to support Plaintiff's position that "sex" now means gender identity under Title IX, Defendant's policy does not violate Title IX. In fact, Defendant's policy does exactly what is permitted under Title IX, by separating its toilet, locker room, and shower facilities on the basis of sex. Thus, Plaintiff's Title IX claim must fail.

THE EQUAL PROTECTION CLAIM

Neither the Defendant's long-standing bathroom policy nor its Best Practices deny Plaintiff equal protection of the law guaranteed by the Fourteenth Amendment. First, neither the policy nor the Best Practices constitutes invidious or purposeful discrimination, but rather reflects a realistic solution based upon the actual physical differences between the sexes. Second, the Defendant's policy is based upon biological sex, and is not unlawful sex stereotyping. Third, the Defendant has a compelling interest in protecting its students' privacy rights, both under the United States Constitution and the Florida Constitution. Finally, Plaintiff cannot show that similarly situated individuals are treated any differently.

The District's Policy Does Not Reflect Invidious Discrimination

As a threshold matter, the guarantee of equal protection does not exist in a vacuum, but rather "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631 (1996). Indeed, the District's policy denying Plaintiff access to his

bathroom of choice only denies him equal protection if it reflects "invidious" discrimination. Personnel Adm'r of Mass. v Feeney, 442 U.S. 256, 274 (1979). As the Court in Feeney explained, "purposeful" discrimination is "the condition that offends the Constitution." Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 16 (1971).

While the Court has been willing to strike down classifications that reflect "archaic and overbroad" generalizations, Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), or "old notions," Stanton v. Stanton, 421 U.S. 7, 14 (1975), historically, the Court has been willing to take into account actual differences between the sexes, including physical ones. As Justice Rehnquist noted, the "Court has consistently upheld statutes where "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981)(citations omitted). "Physical differences between men and women … are enduring." United States v. Virginia, 518 U.S. 515, 533 (1996).

Plaintiff has not been denied access to the boys' restroom by a policy aimed at transgender students. Rather, the District has denied Plaintiff access to the boys' room as a function of the even-handed enforcement of the District's long-standing policy of providing separate bathrooms for boys and girls based on biology. That policy, purely based on the "physical differences between men and women," Virginia, 518 U.S. at 533, is consistent with Title IX's implementing rule adopted in 1974, which expressly authorizes schools to provide separate bathroom, locker room and shower facilities for male and female students based on biological sex. 34 C.F.R. §106.33. As such, Defendant has not engaged in purposeful, invidious discrimination. It is simply an incidental and constitutionally permissible

disadvantage of the legitimate classification of students by biological sex for the purpose of bathroom usage, as authorized by Title IX. See Romer, 517 U.S. at 631; Feeney, 442 U.S. at 271-72; Nguyen v. I.N.S, 533 U.S. 53, 60-61 (2001); Johnston, 97 F. Supp. 3d at 670; Carcaño v. North Carolina, 203 F.3d 615, 640, 644 (M.D. N.C. 2016)

Applying the Appropriate Scrutiny

Equal Protection claims are evaluated under one of three tests: rational basis scrutiny, intermediate scrutiny or strict scrutiny. Strict scrutiny is reserved for state "classifications based on race or national origin or classifications affecting fundamental rights," Clark v. Jeter, 486 U.S. 456, 461 (1988)(citation omitted). Plaintiff cannot establish that transgender individuals are a suspect class subject to a strict scrutiny analysis. Kirkpatrick v. Seligman & Latz, Inc., 475 F. Supp. 145, 147 (M.D. Fla. 1979), aff'd, 636 F.2d 1047 (5th Cir. 1981)("Transsexuals are not a 'suspect class' for purposes of equal protection analysis"). Plaintiff has failed to prove that being transgender is based on an immutable characteristic. See Chapman v. A1 Transport, 229 F.3d 1012, 1036 (11th Cir. 2000) (en banc) (distinguishing between a mutable trait and an impermissible consideration that is a protected category). See also Equal Employment Opportunity Comm'n v. Catastrophe Management Solutions, Case No. 14-13482 at p. 7 (11th Cir. Dec. 5, 2017) (Jordan, J. concurring in denial of rehearing en banc).

Under the intermediate scrutiny standard, Defendant must prove that its justification for denying Plaintiff's request to use the boys' bathroom is, "at minimum, substantially related to the furtherance of an important government interest." Nicholson v. Georgia Dept. of Human Res. (DHR), 918 F.2d 145, 148 (11th Cir. 1990). See also Handley, By & Through

Herron v. Schweiker, 697 F.2d 999, 1003 (11th Cir. 1983) ("[u]nder the…intermediate scrutiny test, classifications based on illegitimacy are invalid if they do not bear an evident and substantial relation to permissible state interests and if they are not carefully tuned to alternative considerations"). Furthermore, the justification for the policy must be "genuine, not hypothesized or invented post hoc in response to litigation." Virginia, 518 U.S. at 533; Carcaño, 203 F. Supp. 3d at 640.

Sex-Stereotyping

While acknowledging that intermediate scrutiny applies to Defendants' policy, this case is distinguishable from Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011). In Glenn, the Eleventh Circuit applied intermediate scrutiny in a case involving gender stereotyping of a transgender individual. There, the employer terminated plaintiff because it found her "gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable." Id. at 1314. The plaintiff's superior testified that he made the decision to terminate based on his perception of the plaintiff as "a man dressed as a woman and made up as a woman," Id. at 1320, showing direct evidence that plaintiff was fired because of her gender non-conformity.

Glenn, for the most part, followed the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In that case, Hopkins sued her employer for sex discrimination when it denied her partnership because her demeanor was insufficiently feminine. The Court recognized in the analogous Title VII context that stereotyped remarks could be used as evidence that an employer made a decision based on gender because a woman failed to dress or act like the employer thought a woman should. Id. at 235, 250-51.

Price Waterhouse and Glenn, therefore, stand for the proposition that intermediate scrutiny applies when an employer makes a decision based on a person's demeanor (behavior or acts) which is linked by a stereotype (how a man or woman should dress or behave) to a protected characteristic (a person's sex). This case, however, presents a clearly distinguishable situation.

In both Price Waterhouse and Glenn the plaintiff was subjected to an adverse employment action because the plaintiff did not act or dress in accordance with the stereotype associated with their respective gender. Here, the Defendant is not punishing Plaintiff because he identifies as, acts, or dresses like a male. Rather, Plaintiff's access to common restrooms is based solely on biological sex. The Defendant is making no judgment about Plaintiff's behavior, but using an objective standard which is applicable to all students – males and females alike. It is simply not a stereotype, and therefore not a sex-based distinction, to assign bathroom facilities based on biological sex. "Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007). Stated another way, telling Plaintiff he cannot use the boys' restroom because he is biologically a female is not "sex stereotyping" but a simple acknowledgement of reality.

In addition to following Price Waterhouse on the issue of sex stereotyping, the Glenn court also announced, "A person is defined as transgender because of the perception that his or her behavior transgresses gender. . . "[T]he very acts that define transgender people are those that contradict stereo-types of gender – appropriate stereotyping and behavior." Id. at 1316 (emphasis added). The court's dicta that transgender people are defined based on

"acts" and "behavior" is contrary to Plaintiff's allegations in the present case:

> Transgender persons are people whose gender identity diverges from the sex they were assigned at birth. A transgender boy's sex is male (even though he was assigned the sex of female at birth) and a transgender girl's sex is female (even though she was assigned the sex of male at birth).

(Doc. 60 at ¶21) Thus, it is the divergence between gender identity and biological (assigned at birth) sex that defines a person as transgender, not the person's expected "behavior" or "acts." It emanates from facts about a person – biological sex on the one hand, and gender identity ("a person's core internal sense of their own gender." (Doc. 60 at ¶20) Courts have made it clear that biological sex and the physiological differences between men and women are facts, not stereotypes, and cannot serve as the basis of sex stereotype discrimination. See Nguyen, 533 U.S. at 60-66; Bauer v. Lynda, 812 F.3d 340 (4th Cir. 2016).

In Nguyen, the Supreme Court upheld an INS regulation that treated the children of non-citizen mothers born abroad out of wedlock differently than such children of non-citizen fathers. The Court rejected the argument that the INS policy was based on stereotypes about the roles of mothers and fathers in child-rearing, stating that "the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis." Id. Instead, the Court found, "There is nothing irrational or improper in the recognition that at the moment of birth … the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype." Id. Finally, the Court concluded:

> To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure

> those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class.

Id. So too, the distinction between boys and girls in the District's separate bathroom policy is based on the very real "basic biological differences" between the sexes, not misconception or prejudice.

The Privacy of School Children in Sex-Segregated Bathrooms is an Important Government Interest

The District's policy of segregating restrooms on the basis of sex promotes the "important government interest" of "the protection of [students'] bodily privacy" by "excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions." Carcaño, 203 F. Supp. 3d at 641. As Judge Niemeyer explained in his Grimm dissent:

> Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind.
>
> * * *
>
> Title IX's allowance of the separation, based on sex, of living facilities, restrooms, locker rooms and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes.

822 F.3d at 734-735 (emphasis added). The Grimm majority agreed on the fundamental point "that an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not involuntarily exposed. Id. at 723.

Specifically in the academic setting, courts across the county have consistently recognized separating males and females in the interest of protecting bodily privacy and avoiding the unwanted exposure of one's body parts. See Virginia, 518 U.S. at 533, 550 n. 19 (recognizing that the two sexes "are not fungible" because of the "enduring" and manifest "[p]hysical differences between men and women," and that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from members of the other sex."); Dawson v. Clayton Cty. Sch. Dist., 830 F.3d 1306, 1313–14 (11th Cir. 2016) (people have a legitimate expectation of privacy in their persons "including an expectation that one should be able to avoid the unwanted exposure of one's body, especially one's 'private parts.'"); Brannum v. Overton County School Bd., 516 F.3d 489, 499 (6th Cir. 2008) ("[A] person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty…"); Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) (recognizing "society's undisputed approval of separate public restrooms for men and women based on privacy concerns [and observing that] [t]he need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different."); Beard v. Whitmore Lake Sch.

Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); Johnston, 97 F. Supp. 3d at 668, 678 (recognizing university's interest "in providing its students with a safe and comfortable environment consistent with society's long-held tradition of performing [personal bodily] functions in sex-segregated spaces based on biological or birth sex" and holding that "the University's policy of separating bathrooms and locker rooms on the basis of birth sex is permissible under Title IX and the United States Constitution."); Carcaño, 203 F. Supp. 3d at 641 ("All parties agree that bodily privacy qualifies as an important state interest and that sex-segregated facilities are substantially related to that interest."); Whitaker v. Kenosha Unified School District No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017) (recognizing that school districts have "a legitimate interest in ensuring bathroom privacy rights are protected").

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. Ct. App. 2014). Likewise, teenagers are "embarrass[ed]…when a member of the opposite sex intrudes upon them in the lavatory." St. Johns Home for Children v. W. Va. Human Rights Comm'n, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, 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).

These privacy interests are why a girls' 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 WL5149857, at *3 (Cal. Ct. App. Dec. 29, 2009). As the

Kentucky Supreme Court observed, traditionally, there is no "mixing of the sexes" in school locker rooms and restrooms. Hendricks v. Commw., 865 S.W.2d 332, 336 (Ky. 1993); McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty., 384 N.E.2d 540, 542 (Ill. App. Ct. 1978)(refusing to place male teacher as overseer of school girls' locker room).

Uniquely, the Defendant's obligation to protect its students' privacy rights is not limited by those rights recognized under the United States Constitution. The Defendant must also protect its students' rights to privacy, including but not limited to bodily privacy, under the express and explicit right to privacy set forth in Article I, Section 23 of the Florida Constitution. See Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017) (finding that under the Florida Constitution the right to privacy is a fundamental right); In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (holding that the Florida Constitution's right to privacy embraces more privacy interests and extends more protection than the Federal Constitution).

This fundamental right guaranteed by the Florida Constitution distinguishes the cases relied upon by Plaintiff for the proposition that the privacy rights of other students are inferior to the bathroom choice of a transgender student. Specifically, the decisions in Grimm, Whitaker, Board of Educ. of the Highland Local School District v. United States Dept. of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016), Evancho v Pine-Richland School Dist., 237 F. Supp. 3d 267 (W.D. PA 2017), and Doe by and through Doe v. Boyertown Area School Dist., 2017 WL 3675418 (E.D. PA Aug. 25, 2017), are inapposite as none of the four State Constitutions involved in those cases – Virginia, Wisconsin, Ohio, or Pennsylvania,

respectively – has an express Constitutional right to privacy.

Given the clear intent and meaning of the Title IX separate facilities rules, and the abundance of case law recognizing the importance of protecting bathroom privacy, it cannot be credibly denied that protecting the bathroom privacy of school children is an important government interest. No one disputes the authority of Congress and DOE under Title IX to implement the policy of allowing same sex bathrooms in the interest of student privacy. Nothing has happened since the 1970s to make school bathroom privacy any less important today. Plaintiff does not challenge the authority of Congress and the School District to separate bathrooms based on sex in the interest of privacy. Rather, he advocates reinterpreting the separate bathroom rule's language to suit the transgender policy he advocates. His position thus assumes the validity of the underlying governmental interest, and only takes issue with how to best serve it.

Separating Bathrooms Based on Biological Sex is Substantially Related to the School Board's Interest in Protecting Bathroom Privacy

As explained in the preceding sections, the District's same-sex bathroom policy serves the important governmental interest of protecting students' personal privacy. The District's policy not only is substantially related to the protection of student privacy, it directly assures the traditional and expected level of bathroom privacy by keeping biological boys out of the girls' bathroom and vice versa. The Title IX separate bathroom rule employs the same means to achieve the same purpose, yet its validity is not in question. Plaintiff has not explained how the school practice of following the Title IX separate bathroom rule is unconstitutional when the validity of the Title IX rule itself is not in question.

Plaintiff has suggested that the School Board's practice of separating bathrooms on

the basis of biological sex may be problematic as applied in rare hypothetical situations, such as where a student undergoes sex change surgery, or due to extensive hormone therapy, acquires the physical characteristics of the opposite sex. However, intermediate scrutiny does not require that the means for achieving the important government objective must be the least intrusive possible. United States v. Staten, 666 F.3d 154, 159 (9th Cir. 2011); "[T]he fit needs to be reasonable; a perfect fit is not required." Id. at 162; Carcano, 203 F.Supp.3d at 640.

The Board's Bathroom Policy is Not a Post Hoc Invention

The evidence is undisputed that the District's sex-segregated bathroom policy is "genuine," and was not "hypothesized or invented post hoc in response to litigation." Carcaño 203 F. Supp. 3d at 640 (quoting Virginia, 518 U.S. at 533). Plaintiff cannot dispute that the Defendant has always maintained sex-segregated multi-user or group bathrooms, even well before the enactment of Title IX. The age and undisputed provenance of the Board's separate bathroom policy clearly establish that it did not target transgender students. To put it colloquially, the transgender bathroom issue was not even on the radar when Title IX was enacted in the 1970s, much less in the 1950s, when the Defendant's schools were already separating bathrooms on the basis of biological sex.

In addition, the evidence is clear that the Defendant's Best Practices were thoroughly researched and in final draft form long before Plaintiff informed the Defendant he was transgender. Again, as with the long-standing policy, there is no evidence to support any inference that the Best Practices were a post hoc invention to respond to Plaintiff's notification or the filing of his complaint with OCR or this Court.

Unlike the schools in Whitaker and Evancho, the District's separate bathroom policy is long-standing and has been consistently applied. The policy, the Title IX rule which it predated and which authorizes its implementation, and the District's Best Practices all predate Plaintiff's informing the District of his transgender status and his complaints. Unlike the districts in Whitaker and Evancho, the District never allowed Plaintiff to use the boys' bathroom, and then changed its mind in an ad hoc decision in response to threatened litigation. There is nothing about the Board's position in this case to suggest that it was an afterthought, or pretext, prompted by the threat of litigation, as it was in those cases.

Plaintiff is Not Similarly Situated to His Biological Male Counterparts

Lastly, to successfully allege an equal protection claim, Plaintiff must establish that the school's policy treats individuals who are similarly situated in all relevant aspects differently. Bumpus v. Watts, 448 Fed. Appx. 3, 5 (11th Cir. 2011); Nordlinger v. Hahn, 505 U.S. 1, 10, (1992). Ultimately, Plaintiff cannot make this showing.

Plaintiff seeks to use the men's restroom at his high school. Plaintiff is not, however, a biological male. He has the biology of a female, including female genitalia. The School Board's policy has always been and remains to distinguish bathroom use based on biological sex. Plaintiff is allowed to use any female restrooms or any of the several gender neutral bathrooms located on his campus, as are all other biological females. Accordingly, because the bathroom policy treats Plaintiff the same as all other individuals who are biological females, it does not violate Plaintiff's equal protection rights.