

**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; TIM FORSON, in his
official capacity as Superintendent of
Schools for the St. Johns County School
District; and LISA KUNZE, in her official
capacity as Principal of Allen D. Nease High
School,**

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

Defendants, through undersigned counsel, submit the following Response to Plaintiff's Motion for Preliminary Injunction ("Motion"). [Doc. 22].¹

Introduction

Plaintiff seeks to eviscerate a bathroom use policy designed to balance and protect the rights and interests of students attending St. Johns County public schools. Despite living under it for two years, Plaintiff asks this Court to enjoin further application of the policy under the exacting standard applicable to mandatory or affirmative injunctive relief. As detailed below,

¹ The Offices of the Superintendent and Principal of Nease High School have separately filed a Motion to Dismiss as party-defendants to this action. [Doc. 34]. In the event the Court denies that Motion, both join in this Response.

Plaintiff cannot meet the heavy burden of establishing that the law and the facts are clearly in his favor and that he can satisfy the four-prong test applicable to preliminary injunctions.

Since the beginning of the 2015-2016 school year, any student within the St. Johns County School District could use two types of bathrooms: (1) the bathroom corresponding to their biological sex; or (2) a gender-neutral bathroom. Not satisfied with either, Plaintiff, whose junior year of high school begins on August 10, asks this Court to require the School Board to allow him to use the bathroom corresponding to his self-identified gender. Plaintiff erroneously theorizes that the term “sex” under Title IX of the Education Amendments of 1972 (“Title IX”) and its implementing regulations also means what a person perceives their gender to be irrespective of their biological sex. Alternatively, Plaintiff invites the Court to construe the Equal Protection Clause of the Fourteenth Amendment in a manner that utterly disregards the privacy interests of non-transgender students based solely on perceived needs and speculative claims of irreparable harm.

This is not one of those “rare” occasions for which mandatory or affirmative injunctive relief is appropriate. Plaintiff is not likely, let alone substantially likely, to prevail on his novel claims or make the necessary showing of irreparable harm, requiring this Court deny the Motion.

Factual Background

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.

In St. Johns County, the School Board 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 and duties and responsibilities of a district school superintendent). The School Board appointed Tim Forson as its Superintendent in January 2017. [Forson ¶2]. Mr. Forson has served the District for almost 37 years as a Deputy Superintendent, high school principal, elementary school principal, teacher, and coach. [Forson ¶4].

Today, the District operates 36 K-12 schools (excluding alternate, virtual, and charter schools) across a 608 square mile region. [Forson ¶3]. With over 4,500 employees, approximately 39,000 students will enroll in the District’s K-12 system at the beginning of the 2017-2018 school year. [Id.]. 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. [Id.].

Nease High School

For as long as anyone can recall, the District has maintained a policy that requires students to use the bathroom corresponding to their biological sex. [Forson ¶¶4-5; Smith ¶3].

In 1979, the District constructed Allen D. Nease High School (“Nease”) in northern St. Johns County. [Rose ¶4, Ex. 1]. Consistent with its long-standing practice, the District designed and constructed Nease with separate gang-style, multi-user bathrooms and locker rooms for students based on their biological sex. [Kunze ¶4]. In addition to the multi-user bathrooms, Nease also had a number of single-user bathrooms located throughout its campus, originally designated for staff or specific areas such as the clinic. [Id.].

The Development of the District’s Best Practices Guidance

In 2013 and 2014, District staff attended conferences focusing on LGBTQ student issues in schools. [Smith ¶¶3, 4]. After attending such a conference, Sallyanne Smith, then-Director of Student Services, attended student-led Gay-Straight Alliance meetings and listened to students discuss their needs. [Id. ¶4]. Subsequently, Ms. Smith created an LGBTQ focus group and task force to address these issues and develop District-wide guidance. [Id. ¶5]. After a thorough process, Ms. Smith and others drafted a document entitled “Guidelines for LGBTQ students – Follow Best Practices” (“Best Practices”) for handling various situations involving LGBTQ students. [Smith ¶6; Mittelstadt ¶5, Ex. 1].

Relevant to this case, the Best Practices provided an alternative for students from the District’s long-standing practice of separating bathrooms based on biological sex, declaring “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.” [Id. ¶6, Ex.1]. The implementation of the Best Practices did not change the prohibition against a student using a bathroom that was inconsistent with their biological sex. [Smith ¶6].

From information she learned at conferences, Ms. Smith understood that offering the use of a gender-neutral bathroom was appropriate because it maintained the privacy of the transgender student as well as the other students. [*Id.* ¶7]. By offering the gender-neutral bathroom, Ms. Smith believed the District balanced the privacy, safety and feelings of discomfort of all the students in the school. [*Id.*]

Ms. Smith delivered the Best Practices draft to Cathy Mittelstadt, then-District Associate Superintendent of Student Support Services. [Mittelstadt ¶¶2, 5]. The draft was reviewed by the District’s legal counsel, approved by the Superintendent’s executive cabinet, and presented to principals, guidance counselors and school staff in the first few weeks of the 2015-2016 school year. [*Id.* ¶¶6, 7; Ex. 1]. The idea of addressing LGBTQ student issues, and the consideration and drafting of the Best Practices, including the accommodation of offering a transgender student a gender-neutral bathroom, were all initiated and completed before Plaintiff entered Nease. [Smith ¶9].

Plaintiff

Plaintiff is a biological female. [Doc. 22 at p. 1; Doc. 22-1 at p. 1, ¶4]. When Plaintiff enrolled in the District as a fourth grader in July of 2010, and through the completion of middle school, he identified as a female. Towards the end of his eighth grade year in 2015, 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.² That spring, Plaintiff was accepted into Nease’s International Baccalaureate program.

² The reasons given, while relevant, are part of an exhibit filed under seal, and are therefore not explicitly described here. *See* [Kunze ¶12, Ex. 3].

During the summer prior to the 2015-2016 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. [Dresback ¶3]. The week before school started, in early August 2015, school officials met with Plaintiff and his mother to ensure a smooth transition. School officials were supportive and accommodating, allowing Plaintiff to present as a male and making sure staff used his preferred male pronoun. [Id. ¶4]. School officials expedited creating a freshman photograph for his school record and student ID because Plaintiff did not want his eighth grade photograph, which showed him as a long-haired female, used on an interim basis. [Id.]. School officials also referred him to various groups and activities to support his interest in transgender and LBGTQ issues and activities. [Id.]. For the 2015-2016 school year, Nease initially designated a gender-neutral bathroom in C-Pod, located near the main entrance of the school, and shortly thereafter, a second gender-neutral bathroom in C-Pod. [Id. ¶5].

In October 2015, Plaintiff and his mother attended two separate meetings with District personnel at which they raised concerns that the designated gender-neutral bathrooms at Nease were too far from Plaintiff's classes. [Smith ¶10; Mittelstadt ¶9]. Shortly after these meetings, Nease opened two additional gender-neutral bathrooms, one in K-Pod, and another in H-Pod. [Dresback ¶6]. By January 2016, Plaintiff could use four gender-neutral bathrooms at Nease, exclusive of the two single-user bathrooms located in the coaches' office in the boys' and girls' locker rooms, respectively. [Kunze ¶5].

Plaintiff will enter the 2017-2018 school year as a Junior at Nease. He will be among nearly 2,500 other students enrolled at the school. [Kunze ¶3].

The DOE/DOJ Guidance

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”) explaining how 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. [Spellman Ex. 9].

On May 18, 2016, in response to the Joint Guidance, then-Superintendent Dr. Joseph 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.” [Forson ¶6].

On February 22, 2017, DOE and DOJ withdrew the Joint Guidance and a prior guidance, noting that it is the role of States and school districts to create education policy. [Spellman Ex. 10].

The OCR Complaint

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.” [Spellman Ex. 11]. On January 15, 2016, the District notified

OCR that it declined to participate in OCR's mediation program. [Spellman Ex. 12]. On March 30, 2016, the District, through its legal counsel, responded to OCR's Title IX investigation, and denied any wrongdoing. [Spellman Ex. 13].

Nease High School Addition Opening 2017-2018

On the first day of the 2017-2018 school year, Nease will open a new wing, which will house classrooms, administration and a revamped media center. Relevant to this case, the new addition at Nease will contain six single-user, gender-neutral bathrooms. [Kunze ¶10; Rose ¶6, Ex. 2]. As such, Nease will have 11 gender-neutral bathrooms available throughout the campus. [Kunze ¶11].

Distance and Effect

Plaintiff grossly exaggerates when he contends "it [took] approximately 15 to 20 minutes to get to and from the gender neutral restrooms in the administrative building" from his classes in the portables. [Doc. 1 at p. 13, ¶52]. Based upon her personal experience, Lisa Kunze, the Principal at Nease, estimates it does not take more than five minutes to walk from any classroom to a gender-neutral bathroom, even during class changes when students are in the hallways. [Kunze ¶7]. This specifically takes into consideration walking from the portable classrooms to bathrooms in C-Pod, or "the administrative building." [Id.].

Plaintiff's contention that using the gender-neutral bathrooms "generally required [Plaintiff] to miss significant amounts of class time" is also unsupported by the record. [Doc. 1 at p. 13, ¶52]. During the entirety of the 180-day 2016-2017 school year, Plaintiff was tardy one time to one class (other than the opening class), which was excused. [Kunze ¶12, Ex. 2].

Sex, Gender Identity, and Gender Dysphoria³

Through supporting Declarations and attached published articles and studies, Plaintiff contends that sex is determined by one's gender identity, with the outlandish allegation, "[t]he medical consensus is that gender identity is innate and efforts to change it are unethical." [Doc. 1 at p. 3]. This alleged "expert evidence", at best, contradicts accepted medical and scientific standards, and should be rejected outright.

A. Sex and Gender Identity

According to standard medical science, the concept of sex in human beings is defined in terms of the complimentary roles that males and females play in reproduction. [Spellman Ex. 1 ¶10; Ex. 2 ¶15; Ex. 3 ¶10; Ex. 4 ¶¶13, 22-26; Ex. 8 at 86].⁴ Sex is accordingly a "binary," either-or proposition: a person is either male or female, and the hypothesis of a "third" is contrary to a sound medical and physiological understanding of the human person. [Spellman Ex. 1 ¶15; Ex. 2 ¶15; Ex. 3 ¶10; Ex. 4 ¶¶24-26, 32; Ex. 8 at 93]. All of this is readily confirmable by science. [Spellman Ex. 1 ¶29; Ex. 4 ¶23].

A person's sex is encoded in his or her genes at conception. [Spellman Ex. 1 ¶14; Ex. 2 ¶12; Ex. 3 ¶10]. Sex differentiation occurs in fetal development, when the presence of a Y

³ The following section and many of the declarations cited in support are substantially copied, with the permission of counsel of record, from the Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction [Doc. 149] in the case styled United States of America v. State of North Carolina, et al., in the United States District Court, Middle District of North Carolina, case number 1:16-CV-00425-TDS-JEP.

⁴ See also, Spellman Ex. 5, "Gender Dysphoria," *Diagnostic and Statistical Manual of Mental Disorders*, at 451 (American Psychiatric Ass'n, 5th ed. 2013)("DSM-V")("sex" means "the biological indicators of male and female (understood in the context of reproductive capacity)"); Ex. 6, American Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* ("APA Answers to Your Questions")(noting "[s]ex...refers to ones biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy"), <http://www.apa.org/topics/lgbt/transgender.aspx>.

chromosome directs development of gonadal tissue, producing hormones that form male sex organs in tissues that would otherwise develop into female sex organs. [Spellman Ex. 1 ¶14; Ex. 2 ¶12]. To be sure, rare disorders of sexual development (“DSDs”) involving chromosomal or hormonal abnormalities can result in ambiguous genitalia. [Spellman Ex. 1 ¶18; Ex. 2 ¶¶12-14, 16, 18; Ex. 3 ¶11; Ex. 8 at 93-94]. Fortunately, these conditions are extremely rare – occurring in one out of 4,500 to 5,500 live births. [Spellman Ex. 2 ¶14; Ex. 3 ¶11]. Persons born with these conditions – sometimes called “intersex” – do not constitute a “third” sex but instead have medically verifiable conditions requiring careful evaluation and therapeutic interventions. [Spellman Ex. 1 ¶¶19, 20-21; Ex. 2 ¶¶15-20; Ex. 4 ¶¶35-37]. The overwhelming majority of people, however, do not suffer from these conditions, and thus observance of external genitalia at birth is a highly accurate method for determining sex, accurate in over 99.9% of cases. [Spellman Ex. 1 ¶¶15-17, 29; Ex. 4 ¶73].

In contrast to sex, “gender” describes psychological and cultural characteristics associated with a person’s sex. [Spellman Ex. 1 ¶11; Ex. 2 ¶21; Ex. 3 ¶¶12-17; Ex. 4 ¶22; *cf.*, *e.g.*, *Id.* Ex. 5 at 451 (“gender...denote[s] the public (and usually legally recognized) lived role as boy or girl, man or woman”; Ex. 8 at 87)]. Understood in that way, gender is by definition distinct from a person’s birth sex. [Spellman Ex. 1 ¶22; Ex. 2 ¶16; Ex. 4 ¶20]. “Gender identity” is “a category of social identity and refers to an individual’s identification as male, female, or, occasionally, some category other than male or female.” [Spellman Ex. 5 at 451; Ex. 1 ¶12].

Like many aspects of a person’s identity, gender identity begins to develop during early childhood.⁵

B. Gender Dysphoria

For reasons not fully understood, some small number of individuals experience incongruence between their gender identity – how they internally perceive themselves as male, female, or some other category – and their sex. [Spellman Ex. 1 ¶¶12-22; Ex. 2 ¶22; Ex. 3 ¶¶19-20; Ex. 4 ¶42; Ex. 8 at 86]. Formerly called “gender identity disorder”, today this rare⁶ condition is called “gender dysphoria.” [Spellman Ex. 1 ¶31; Ex. 2 ¶¶23, 25; Ex. 3 ¶21; Ex. 8 at 86].⁷ The condition may lead a person to desire to be the opposite sex, “but may [also] include a desire to be of an alternative gender, provided that it differs from the individual’s assigned gender.” [Spellman Ex. 5 at 453]. The condition is properly understood as a psychological pathology requiring compassionate care and treatment, because incongruence between one’s gender identity and one’s sex is not considered a normal developmental variance. [Spellman Ex. 1 ¶¶31-32; Ex. 3 ¶25].

Some persons who experience gender incongruence are referred to as “transgender.” [Spellman Ex. 3 ¶23; Ex. 4 ¶¶43-44].⁸ As the American Psychological Association (“APA”)

⁵ Spellman Ex. 3 ¶¶12-17 (explaining that gender identity “initially develops early in life around the ages of three to four, and is continually shaped and modified by interactions with the environment, typically family and parental influences”).

⁶ While difficult to document, the condition is estimated in a tiny percentage of persons. See, e.g., Spellman Ex. 1, ¶23 (prevalence “has not been established by rigorous scientific analysis,” but noting estimates in DSM-V between “0.005% to 0.014% for adult males and 0.002% to 0.003% for adult females”); Ex. 2 ¶24 (observing “[e]xact estimates are hard to document since reporting is often anecdotal,” but estimating “0.001% of biological females and 0.0033% of biological males”).

⁷ And see, Spellman Ex. 5 at 451 (“[g]ender dysphoria” is “a general descriptive term [that] refers to an individual’s affective/cognitive discontent with the assigned gender,” and “the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender”).

⁸ See, e.g., Spellman Ex. 5 at 451 (noting “[t]ransgender refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender”).

explains, “[m]any identities fall under the transgender umbrella,” including “transsexuals,” “cross-dressers,” and “drag queens and drag kings.” [Spellman Ex. 6]. According to the APA, the term also embraces persons with more fluid conceptions of gender, such as “gender queer” (*i.e.*, persons who “define their gender as falling somewhere on a continuum between male and female” or “as wholly different from these terms”), as well as “androgynous, multigendered, gender nonconforming, third gender, and two-spirit people,” terms whose “[e]xact definitions...vary from person to person and may change over time, but often include a sense of blending or alternating genders.” [Id.].

Strong scientific evidence refutes the theory that gender identity is determined at birth and fixed.⁹ Such evidence comes from identical-twin studies, and also from “well established peer reviewed literature” indicating that the vast majority (80-95%) of gender dysphoric children “revert to a gender identity concordant with their biological sex by late adolescence.” [Spellman Ex. 1 ¶¶24-25].¹⁰ The best evidence available indicates that the causes of gender dysphoria are multifactorial and primarily involve post-natal environmental factors. [Spellman Ex. 1 ¶24; Ex. 2 ¶¶35-36; Ex. 3 ¶¶31-32; Ex. 4 ¶48]. Such factors may include family psychopathology (especially paternal) and a history of abuse. [Spellman Ex. 3 ¶¶31-32; Ex. 4 ¶41]. Gender dysphoria is often accompanied by “comorbidities” such as dissociative disorders, depression, anxiety, and suicidal thoughts. [Spellman Ex. 3 ¶33; Ex. 5 at 458-459].

⁹ See, e.g., Spellman Ex. 4 ¶40 (“scientific assertions that gender identity is innate or fixed at a young age and the gender identity has a strong biological basis are simply unsubstantiated.”); id. ¶72 (“unlike the differences between the sexes, there are no biological features that can reliably identify transgender individuals as different from others.”).

¹⁰ See also, Spellman Ex. 2 ¶35 (“regarding transgenderism, twin studies of adults prove definitively that prenatal genetic and hormone influent is minimal.”); Ex. 3 ¶24 (“there is strong evidence against the theory that gender identity is determined at or before birth and is unchangeable.”).

The hypothesis of some transgender advocates that societal rejection is the root cause of gender dysphoria “was validly questioned by a study from Sweden showing that gender dysphoria was not eliminated by hormonal and surgical treatment, even with widespread societal acceptance.” [Spellman Ex. 2 ¶40 (citing Dhenje, Cecilia et. al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, *PLoS ONE*, Feb. 2011, Vol. 6, Issue 2, e16885)]. Furthermore, as the DSM-V observes, “anxiety has been found to be relatively common in individuals with gender dysphoria, even in cultures with accepting attitudes toward gender-variant behavior.” [Spellman Ex. 5 at 459].

There is no reliable evidence of a biological difference between gender dysphoric individuals and individuals who do not suffer from that condition. [Spellman Ex. 1 ¶26; Ex. 2 ¶¶31-34]. Studies purporting to show differences in brain structure in gender-dysphoric persons are unpersuasive due to poor methodology, limited number of subjects, and the failure to account for neuroplasticity, the well-established phenomenon in which long-term behavior alters brain micro-structures. [Spellman Ex. 2, ¶¶31-34; Ex. 3, ¶30; Ex. 4, ¶51, 53-73; Ex. 8 at 104].

C. Treatment of Gender Dysphoria

There is no widely accepted standard of care among medical professionals for the treatment of gender dysphoria.¹¹ The guidelines of advocacy organizations such as the “World Professional Association for Transgender Health” (“WPATH”) do not establish scientifically

¹¹ See, e.g., Spellman Ex. 3 ¶34 (noting “a paucity of research data on the treatment of gender discordance, particularly in children and adolescents” and “no controlled studies assigning youth to either psychological intervention or medical intervention groups”); Ex. 2 ¶57 (noting absence of consensus on “where to send the [gender dysphoric] patient for valid psychological care”); Ex. 4 ¶77 (noting “the uncertainty surrounding the diagnosis of and prognosis for gender dysphoria in children” and noting “high level of uncertainty regarding various outcomes after sex-reassignment surgery” in gender dysphoric adults).

or medically sound standards for treating gender dysphoria or for addressing its underlying psychological and psychiatric etiology. [Spellman Ex. 2 ¶¶53-55; Ex. 1 ¶27].

For children and adolescents diagnosed with gender dysphoria, strong evidence shows that the vast majority of cases (80-95%) will resolve by the end of puberty. [Spellman Ex. 1 ¶¶25, 35].¹² Thus, the most effective course of treatment is individual psychological therapy, family therapy, and treatment of psychological comorbidities, along with allowing nature do its work in puberty. [Spellman Ex. 1 ¶35; Ex. 2 ¶¶38, 41, 43; Ex. 4 ¶¶ 77-80].

Puberty is not a diseased condition, but is rather a necessary part of a young person's development into a healthy adult; thus, contrary to approaches advocated by some, puberty cannot be delayed without serious adverse consequences. [Spellman Ex. 1 ¶35; Ex. 2 ¶42; Ex. 4 ¶¶82-86]. Preventing or delaying puberty in children and the adolescents through hormone "blockers" is not a medically supported form of treatment. [Spellman Ex. 1 ¶34; Ex. 8 at 107]. Such treatment is "without scientific basis" and dangerous. [Spellman Ex. 2 ¶¶44-45 (noting that "use of cross-sex hormones during this time frame has no basis of safety and ethicacy")]. "Other potential adverse effects include disfiguring acne, high blood pressure, weight gain, abnormal glucose intolerance, breast cancer, liver disease, thrombosis, and cardiovascular disease." [Spellman Ex. 1 ¶36].¹³ According to a recent statement from the American College

¹² See also, Spellman Ex. 2 ¶41 (noting "the high degree of eventual desistence of gender discordance/dysphoria by the end of puberty"); *id.* at ¶43 (noting "proven scientific evidence that 80%-95% of pre-pubertal children with [gender dysphoria] will come to identify with their biological sex by late adolescence"); Ex. 3 ¶26 (discussing "[l]ongitudinal studies of pre-pubertal children" which "indicate that for the majority of children studied, cross-gender wishes or desires typically fade over time and do not persist into adulthood," with "approximately 65% to 95% of youth no longer being gender incongruent by late adolescence"); Ex. 4 ¶76 (noting "[t]here is little evidence that gender identity issues have a high rate of persistence in children")(citing Ex. 5 at 455).

¹³ See also, Spellman Ex. 2 ¶40 ("considering the dire risks of psychopathology suicidal behavior, pure rejection, and the known risks of transition and lifelong hormone use, including permanent sterility, combined with the likelihood that gender discordance will remit (desist) by the end of puberty, a thorough exploration of contributing factors and empathic guidance in aligning gender with natal sex is indicated.").

of Pediatricians, “the treatment of [gender dysphoria] in childhood with hormones effectively amounts to mass experimentation on, and sterilization of, youth who are cognitively incapable of providing informed consent.” [Spellman Ex. 7 at 11].

Additionally, because the vast majority of gender dysphoria cases in young people will resolve by late adolescence, so-called “gender affirming” treatments are counter-productive.¹⁴ Such misguided treatments include promoting cross-sex social behaviors such as using restrooms or other facilities consistent with a gender dysphoric persons perceived gender instead of his or her sex.¹⁵ Indeed, such social transition measures may well “interfere with known rates of gender resolution”; that is, any treatment that “encourages or perpetuates transgender persistence for those who would otherwise desist can cause significant harm, including permanent sterility, to such persons,” and particularly to children who “are likely incapable of making informed consent to castrating treatments.” [Spellman Ex. 1 ¶38; Ex. 2 ¶39 (“it is unlikely that most adolescents understand the effects of hormone treatments and potential effects on fertility.”)].

Argument and Authority

I. Mandatory or Affirmative Preliminary Injunction Standard

This Court is well aware of the extraordinary nature of requests for preliminary injunctive relief. Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1247 (11th Cir. 2016). The request in this case is even more extraordinary because Plaintiff asks that this Court change

¹⁴ See, Spellman Ex. 2 ¶41 (observing that “[c]hildren and adolescents should receive individual therapy to understand some of the factors that fuel” gender dysphoria and “attempt to resolve any conflicts and problems rather than solely be affirmed in the belief that they were born in the ‘wrong body’”).

¹⁵ See, Spellman Ex. 1 ¶38 (observing that “[w]ith regard to public restroom and other intimate facilities, there is no evidence to support social measures that promote or encourage gender transition as a medically necessary or effective treatment for gender dysphoria”).

the “status quo” and alter School Board policy. Thus, Plaintiff is requesting the issuance of a “mandatory or affirmative injunction” which exacts an even heavier burden. See, Teel v. Aaron's, Inc., Case No. 3:14-CV-640-J-32PDB, 2015 WL 1346846, at *3 (M.D. Fla. Mar. 24, 2015).

To obtain a “mandatory or affirmative injunction,” Plaintiff must prove that “the facts and law are clearly in [his] favor...” Haddad v. Arnold, 784 F. Supp. 2d 1284, 1295 (M.D. Fla. 2010). Issuance of such an injunction is considered rare. Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)(“Mandatory preliminary relief...is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party...”); Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 441 F.2d 560, 561-562 (5th Cir. 1971)(describing a movant’s burden as “heavy”).¹⁶

“A plaintiff moving for a preliminary injunction must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the injury to the nonmovant; and (4) that the injunction would not disserve the public interest.” Statewide Detective Agency v. Miller, 115 F.3d 904, 905 (11th Cir. 1997). The test established by the Eleventh Circuit requires the moving party “clearly establish” the burden of persuasion as to each of the four elements. Accord, Siegel v. LePore, 234 F. 3d 1163, 1176 (11th Cir. 2000) (internal citations omitted).

¹⁶ The Eleventh Circuit in Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) adopted as binding precedent all decisions of the Fifth Circuit as of the close of business on September 30, 1981.

II. There is No Substantial Threat of Irreparable Harm

Despite Plaintiff's invitation to bypass it, this Court must first evaluate his evidence of irreparable harm. As the Court is well aware, if there is no substantial threat of irreparable harm, no further analysis is required. Northeastern Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990); Siegel, 234 F.3d at 1176 (“Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.”) (internal citations omitted). The mere possibility of injury to Plaintiff is not enough to satisfy this threshold element; rather, Plaintiff must prove that there is a substantial likelihood of an actual and imminent irreparable injury. Siegel, 234 F.3d at 1176.

A. Plaintiff's Harm is Speculative and Exaggerated

To show irreparable harm, Plaintiff grossly exaggerates the length of time it took to access gender-neutral bathrooms at Nease. Plaintiff alleges that “it [took] approximately 15 to 20 minutes to get to and from the gender neutral restrooms in the administrative building.” [Doc. 1 at p. 13, ¶52]. The reality is that it takes a person of normal gait no more than five minutes to access a gender-neutral bathroom from any classroom on campus. [Kunze ¶7]. Moreover, beginning in the 2017-2018 school year, six additional gender-neutral bathrooms will be available at Nease, for a total of 11.

The other basis of his irreparable injury – missing class time – is also contradicted by the record. Plaintiff's official attendance records confirm he was tardy to one class (other than

the first class of the day) one time during the entire 2016-2017 school year. [Kunze ¶12, Ex. 12].

B. Plaintiff's "Expert Evidence" is not Credible

Plaintiff submits the declaration of Dr. Diane Ehrensaft (Ph.D.) for the proposition that he will suffer psychological harm if he uses the girls or gender-neutral bathrooms at Nease. The opinions of Plaintiff and his mother, together with the declaration from Dr. Ehrensaft – a psychologist from California who has neither met nor spoken with Plaintiff or his mother – are insufficient to show the irreparable harm needed for a mandatory or affirmative injunction. (Doc. 22-1 at p. 6, ¶18). See, United States v. Masferrer, 367 F. Supp. 2d 1365, 1373 (S.D. Fla. 2005)(“Proffered expert testimony generally will not help the trier of fact when it offers nothing more than factual and legal conclusions...”). The Court need not accept the *ipse dixit* of Dr. Ehrensaft. Olin v. Demings, 6:12-CV-1455-ORL-28, 2014 WL 117081, at *3 (M.D. Fla. Jan. 13, 2014).¹⁷

Equally damning is the fact that Dr. Ehrensaft has not even reviewed any medical or education records related to Plaintiff. [Doc. 22-1 at p. 6, ¶17]. Instead of any direct opinions related to Plaintiff, Dr. Ehrensaft applies a one-size-fits-all approach to stereotyping the psychological harm that “a transgender child” will suffer if required to use a gender-neutral bathroom. [Doc. 22-1 at ¶48]. Dr. Ehrensaft’s attempt to define “sex” is also vehemently opposed by other experts in the profession, and contradicted by accepted medical and scientific standards. See, supra. Simply put, gender identity is a social identity whereas sex is based

¹⁷ Dr. Ehrensaft’s over-generalized, theoretical and conclusory statements about Plaintiff’s potential psychological reaction fall woefully short of meeting the requirements for admissibility under Rule 702 of the Federal Rules of Evidence and would undoubtedly be subject to attack under the factors outlined in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

purely on biology. Even if Dr. Ehrensaft's opinions are given weight, the evidence is, at best, mixed on this issue, and undoubtedly insufficient to grant the drastic relief sought by Plaintiff.

C. Plaintiff's Delay in Seeking Injunctive Relief is Fatal

The Court's inquiry into Plaintiff's alleged irreparable harm must also include consideration of Plaintiff's delay in seeking injunctive relief. Bar-Navon v. Sch. Bd. of Brevard County, Fla., 6:06-CV-1434-ORL-19-KRS, 2007 WL 121342, at *5 (M.D. Fla. Jan. 11, 2007). Plaintiff lived under the challenged policy for two years. Rather than seek immediate injunctive relief, Plaintiff waited until just before the start of the 2017-2018 school year (August 10, 2017) to file this Motion. Courts have consistently rejected awarding injunctive relief for similar delays. Musgrove v. Sch. Bd. of Brevard County, 608 F. Supp. 2d 1303, 1306 (M.D. Fla. 2005)(court denied injunctive relief where plaintiffs "aggravated this situation by waiting until the last minute to file this action or particularly the temporary restraining order aspect of it..."); Wreal, 840 F.3d at 1248 ("a party's failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm."); Powers v. Sec'y, Florida Dep't of Corr., 2017 WL 2364366, at *2 (11th Cir. May 31, 2017)("the district court did not clearly abuse its discretion in determining that Mr. Powers' apparent (i.e., unexplained) delay in seeking relief undercut the claim of imminent irreparable injury"); Kotori Designs, LLC v. Living Well Spending Less, Inc., 2:16-CV-637-FTM-99CM, 2016 WL 6833004 at *3 (M.D. Fla. Nov. 21, 2016)("Having failed to act with the requisite urgency, Plaintiff cannot now plausibly establish a need for the extraordinary relief of a preliminary injunction to prevent imminent irreparable harm").

D. Plaintiff's Cases are Distinguishable

Plaintiff cites to three district court cases to support his irreparable injury. As shown below, all of the cases cited are inapplicable.

In both Ray v. Sch. Dist. of DeSoto County, 666 F. Supp. 1524, 1534-35 (M.D. Fla. 1987) and Alejandro v. Palm Beach State Coll., 843 F. Supp. 2d 1263, 1270-71 (S.D. Fla. 2011), the student-plaintiffs were denied equal access to attending class (or an integrated classroom). In both cases the courts found that the schools' actions interfered with the students' education, which constituted irreparable harm meriting injunctive relief. Unlike those cases, here the School Board's policy does not deny Plaintiff or any other student access to education.

In Daniels v. Sch. Bd. of Brevard County, Fla., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997), the court, in comparing a high school girls' softball and boys' baseball programs held the lack of a restroom was only one of a litany of inequities, the cumulative effect of which were so significant to warrant injunctive relief. Id. at 1462. Here, the District has afforded Plaintiff access to all bathrooms except the ones that are not consistent with his biological sex, and there is no evidence establishing that those he wishes to use are qualitatively inferior. Rather, the perceived inferiority is based on Plaintiff's own subjective feelings.

III. Plaintiff Cannot Demonstrate a Substantial Likelihood of Success on his Title IX Claim

Title IX was enacted 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). Hence, Title IX expressly prohibits discrimination on the basis of sex in educational programs receiving federal financial assistance. 20 U.S.C. §1681; 34 C.F.R.

§106.31; see also, Palmer ex rel. Palmer v. Santa Rosa County, Fla., Sch. Bd., Case No. 3:05CV218/MCR, 2005 WL 3338724, at *4 (N.D. Fla. Dec. 8, 2005).¹⁸

Importantly, Title IX permits educational institutions to provide “separate living facilities *for the different sexes*” (20 U.S.C. §1686), and the DOE regulations implementing Title IX allow educational institutions to provide “*separate toilet*, locker room, and shower *facilities on the basis of sex...*” 34 C.F.R. §106.33. The School Board’s policy of requiring all students to use bathrooms based on their biological sex is entirely consistent with these provisions.

Plaintiff attempts to turn Title IX on its head and redefine the term “on the basis of sex”, as used in Title IX and §106.33 (and for purposes of his Equal Protection claim) to include “gender identity.” According to Plaintiff, “sex” is based on an adolescent’s individual feelings, feelings that are not immutable and are often fluid.¹⁹ Accepting Plaintiff’s position, §106.33 would read as follows:

Educational institutions are permitted to provide “separate toilet, locker room, and shower facilities on the basis of [a person’s internal feeling of their gender].”

This unique approach to defining “sex” effectively abolishes any recognition that biological males and females are different and adds language to the regulation that does not exist. See, Carcaño v. McCrory, 203 F. Supp. 3d 615, 642 (M.D.N.C. 2016). See also, United States v. Virginia, 518 U.S. 515, 550 n.19 (1996)(“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other

¹⁸ As a threshold matter, the School Board admits that it receives federal financial assistance.

¹⁹ Plaintiff’s position that “sex” is determined by a person’s internal feelings is also at odds with individuals who may not identify as any sex, thus further obliterating the intent of Title IX and §106.33.

sex in living arrangements...”); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981)(“this 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.”).

Plaintiff’s attempt to engraft the term “gender identity” onto Title IX and §106.33 also ignores precedent that requires courts to look at the intent of a regulation at the time it was drafted. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). There is no question that “sex” under Title IX and §106.33 does not encompass “gender identity” or an individual’s feeling of their gender. See, Texas v. United States, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016), order clarified, 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (holding, “the 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.”); Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (holding, “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”). See also, R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., Case No. WD 80005, 2017 WL 3026757, at *8 (Mo. Ct. App. July 18, 2017)(an analogous case finding the Missouri legislature did not intend “discrimination on the grounds of sex to include the deprivation of a public accommodation—the boys’ restroom and locker room—because a person is transitioning from female to male”).

The DOE’s current interpretation of Title IX and §106.33 guts Plaintiff’s argument. On February 22, 2017, DOE issued a Dear Colleague letter (“2017 Guidance”) withdrawing its

prior statements of policy and guidance as reflected in January 7, 2015, and May 13, 2016, guidance letters. DOE's 2017 Guidance makes clear that its prior guidance equating gender identity to sex under Title IX was not well founded.

Following the issuance of the 2017 Guidance, the district court in Evancho v. Pine-Richland School District, 2017 WL 770619 at *22 (W.D. Penn. Feb. 27, 2017) concluded:

...this Court simply cannot conclude that the path to relief sought by the Plaintiffs under Title IX is at the moment sufficiently clear such that they have a reasonable likelihood of success on the merits of that claim. Put plainly, the law surrounding the Regulation and its interpretation and application to Title IX claims relative to the use of common restrooms by transgender students, including the impact of the 2017 Guidance, is at this moment so clouded with uncertainty that this Court is not in a position to conclude which party in this case has the likelihood of success on the merits of that statutory claim.

As recently as July 26, 2017, the United States filed an *Amicus Curiae* brief in Zarda v. Altitude Express, Inc., Case No. 15-3775 (2nd Cir. 2017), explaining the position that although "sex" is not defined under Title VII, it means biologically male or female.

IV. Plaintiff Cannot Demonstrate a Substantial Likelihood of Success on his Equal Protection Claim²⁰

Plaintiff claims the School Board's bathroom policy denies him equal protection of the law guaranteed by the Fourteenth Amendment. As a threshold matter, it is clear that 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). To establish his equal protection claim, Plaintiff must prove he has been treated differently from

²⁰ For the sake of brevity, Defendants reincorporate its arguments regarding the definition of "sex" herein. Plaintiff did the same in his Motion. [Doc. 22 at p. 20].

“other similarly situated individuals.” Johnston, 97 F.Supp.3d at 667. Plaintiff cannot make this showing. Plaintiff is a biological female and, like all other biological females, is not allowed to use the boys’ bathroom. Plaintiff is transgender, but the fact remains he is not similarly situated to the other students who are allowed to use the boys’ bathroom, because they are biological males and Plaintiff is not.

A. Intermediate Scrutiny Applies to Plaintiff’s Claim

Plaintiff cannot establish that transgender individuals are a suspect class subject to a strict scrutiny analysis. Rather, binding precedent and other cases apply, at most, intermediate scrutiny to these claims. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011)(applying intermediate scrutiny to case involving gender stereotyping of a transgender individual); 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”); Adkins v. City of New York, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015); Carcaño, 203 F. Supp. 3d at 640.

B. Protecting the Bodily Privacy of K-12 Students in Bathrooms is an Important Governmental Interest

Plaintiff must prove that the School Board’s justification for denying his request to use the boys’ bathroom is not “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. Unlike strict scrutiny, the School Board is not required to show that the policy is the “least intrusive means of achieving the relevant government objective to withstand intermediate scrutiny.” Id.

Protecting the bodily privacy of minor and young-adult students in K-12 schools is unquestionably an important governmental interest supporting the School Board’s bathroom use policy.²¹ “Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms...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 nude 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.” G.G. ex rel. Grimm v. Gloucester County Sch. Bd., 822 F.3d 709, 734 (4th Cir. 2016)(Niemeyer, J., concurring in part and dissenting in part), cert. granted in part, 137 S. Ct. 369 (2016), and vacated and remanded, 137 S. Ct. 1239 (2017); see also, Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 73 (2001)(“To fail to acknowledge even our most basic biological differences...risks making the guarantee of equal protection superficial, and so disserving it”).

Numerous other courts have recognized the importance of the right to bodily privacy in analogous situations. Carcaño, 203 F. Supp. 3d at 641, 645; Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981); St. John's Home for

²¹ It bears repeating that such a policy is authorized under Title IX and §106.33.

Children v. W. Virginia Human Rights Com'n, 180 W. Va. 137, 139, 375 S.E.2d 769, 771 (W.V. 1988); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963); Kohler v. City of Wapakoneta, 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005); State v. Lawson, 340 P.3d 979, 982 (Wash. Ct. App. 2014); and Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005). Thus, it cannot be gainsaid that protecting the privacy of students is a legitimate government interest.

C. The School Board's Bathroom Policy is Substantially Related to Protecting the Bodily Privacy of Students in Bathrooms

The School Board's policy assures the traditional and expected level of bathroom privacy by keeping biological boys out of the girls' bathroom and vice versa. Carcaño, 203 F. Supp. 3d at 643 ("the privacy interests that justify the State's provision of sex-segregated bathrooms, showers, and other similar facilities arise from physiological differences between men and women, rather than differences in gender identity"). The School Board's approach accommodates the needs of all students by providing a gender-neutral bathroom option. Such an option protects the privacy interests of, among others, students who desire not to use a bathroom based on a particular biological sex, and simultaneously protects the bodily privacy rights of students who desire to only use bathrooms with others of the same sex.

The School Board's longstanding bathroom use policy – requiring students to use the bathroom consistent with their biological sex - denied Plaintiff access to the boys' bathroom. The Best Practices did not change that policy, but rather was an accommodation that gave transgender students an alternative to using the group bathroom designated for their biological sex while at the same time respecting and balancing the privacy rights of others. Unlike the schools in Grimm and Evancho, the School Board has been consistent in the application of its

bathroom use policy: Plaintiff was never permitted to use the boy's bathroom. Any suggestion that the Best Practices should be the focus of the Court's scrutiny is a red herring.

Additionally, the Best Practices is a common sense solution. By offering the gender-neutral bathroom, the School Board balances the privacy, safety and feelings of discomfort of all students in the District. See, Kastl v. Maricopa County Community College District, 325 Fed. Appx. 493, at n. 1 (9th Cir. 2009); Grimm, 2015 WL 5560190 (E.D. Va. 2015); Johnston, 97 F.Supp.3d at 661; Doe v. Clark County School Dist., 2008 WL 4372872 (D. Nev. 2008).

It is indisputable that the School Board's bathroom policy is "genuine," and was not "hypothesized or invented *post hoc* in response to litigation" or anything else. Carcaño 203 F. Supp. 3d at 640 (quoting Virginia, 518 U.S. at 533). Separate boys' and girls' bathrooms have been the norm in the District well before Plaintiff brought this lawsuit and long before bathroom assignment on the basis of "gender identity" emerged as an issue in public schools or the workplace. That history belies any suggestion that that policy targets transgender students, or was "invented *post hoc* in response to litigation", or to Plaintiff's complaint that he should be allowed to use the boys' bathroom. Virginia, 518 U.S. at 533. Accordingly, the fact that the policy does not allow Plaintiff to use the bathroom matching his gender identity is not invidious discrimination. It is simply an incidental and constitutionally permissible disadvantage of a legitimate classification of students by biological sex for the purpose of bathroom usage. See, Romer, 517 U.S. at 631; Feeney, 442 U.S. at 271-72; Nguyen, 533 U.S. at 60-61; Johnston, 97 F.Supp.3d at 670; Carcaño, 203 F.Supp.3d at 640-644.

D. Plaintiff's Reliance on Seventh Circuit Precedent is Flawed (Whitaker)

Plaintiff relies heavily on Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Edu., 858 F.3d 1034 (7th Cir. 2017), which carries no weight in the Eleventh Circuit. Importantly, however, the Seventh Circuit's standard for the entry of a preliminary injunction is drastically different than that employed by the Eleventh Circuit. The Seventh Circuit only requires a movant to "show that his chances to succeed on his claims are 'better than negligible,'" which the court in Whitaker characterized as a "low threshold." Id. at 1046 (internal citations omitted). In stark contrast, the Eleventh Circuit requires a movant to show "a substantial likelihood of success on the merits." Even more, where, as here the movant is requesting an affirmative injunction, the burden is more stringent.

Additionally, the court in Whitaker explicitly noted the district court's reliance on the testimony and findings of a doctor who physically met with and examined the plaintiff to establish irreparable harm. Id. at 1045. That doctor opined that the school district's policies were directly causing the plaintiff's psychological distress. Id. Here, Dr. Ehrensaft has not examined Plaintiff, has not met Plaintiff and has not opined directly about Plaintiff's purported psychological distress or the causation underlying it.

Finally, the court in Whitaker determined that the school board's gender-neutral bathroom policy stigmatized the plaintiff, because it required him to use a separate bathroom "where he was the only student who had access." Id. This is clearly not the case here, as the gender-neutral bathrooms are available to all students at Nease.

E. The School Board's Bathroom Policy has Nothing to do with Sex Stereotyping

Plaintiff relies heavily, if not entirely, on Glenn v. Brumby, *supra*, to argue “Defendants’ discriminatory rule codifies sex stereotypes into school policy by banishing those whose gender identity does not match their birth-assigned sex from the facilities that others are permitted to use.” (Doc. 22 at p. 10). While Glenn found sex stereotyping may be discrimination on the basis of sex, it cannot be seriously contended that a policy premised only on biological sex is a form of sex stereotype discrimination.

Glenn is also distinguishable from the instant case in several ways. First, the plaintiff in Glenn was terminated because her employer 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.” Glenn, 663 F.3d at 1314. The School Board has not taken any of these positions in this case, and the bathroom policy has nothing to do with gender non-conformity.

Second, the court in Glenn found “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes” but still went on to analyze whether plaintiff was fired on the basis of gender stereotyping. *Id.* at 1316, 1320. Plaintiff is not denied access to the boys’ bathroom because he is transgender or because he does not conform to some gender stereotype; rather, he is not allowed to use the boys’ bathroom because, and only because, the boys’ bathroom is reserved for biological males. See, R.M.A., 2017 WL 3026757, at *8 (in denying a student’s claim that “sex” under a Missouri public accommodation statute included “gender identity,” the court stated “only a single

federal appellate circuit has concluded that ‘on the basis of sex’ as used in Title IX likely includes transgender students within its ambit on a theory of sexual stereotyping).”²²

Third, the employer’s decision in Glenn was not based on bodily privacy rights – let alone the bodily privacy rights of minor children and young adults in K-12 public schools. Simply stated, Glenn is inapplicable.

In sum, Plaintiff is being treated exactly the same as all other students whose access to group bathrooms is determined by their biological sex. That is the antithesis of discrimination.

V. The Injury to the Defendants Significantly Outweighs the Speculative Injury to Plaintiff (i.e. Balance of Harms) and the Entry of an Injunction would Disserve the Public Interest

The final two elements of this Court’s analysis (balancing of harms and consideration of public interest) are intertwined and best considered together. There is no debate that the School Board’s power over students is “custodial and tutelary” thereby granting it “a degree of supervision and control that could not be exercised over free adults.” Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995). Further, “[t]he School Board[’s] hegemony must be respected in its management of any school system under its jurisdiction.” Alford v. Collier Co. Sch., Case No. 96-160-CIV-FTM-17, 1996 WL 289038 at *3 (M.D. Fla. May 23, 1996). Thus, the Court must consider Plaintiff’s speculative injuries against the School Board’s responsibility to attend to the welfare of all of its students. In so doing, the Court should be cautious not to sit as a “super-school board or [] all-knowing parent.” Villanueva v. Carere, 873 F. Supp. 434, 442 (D. Colo. 1994), aff’d, 85 F.3d 481 (10th Cir. 1996).

²² The “single federal appellate circuit” referenced in R.M.A. was the Seventh Circuit’s opinion in Whitaker.

The relief sought by Plaintiff is not to maintain the status quo, which is the “chief function” of a preliminary injunction; instead, Plaintiff asks this Court to stand in the place of the School Board and create a new bathroom policy until a trial on the merits can be held. Plaintiff’s claim of injury should not outweigh the privacy rights of other students. See, Siegel, 234 F.3d at 1177-78; Northeastern Fla. Chapter of Ass’n of Gen. Contractors, 896 F.2d at 1285.

The School Board’s policy throughout all of its K-12 schools has been to separate bathrooms based on biological sex. It would be inequitable and a drastic shift in policy to reverse course suddenly, let alone at the beginning of a school year.

On the other hand, if the Court denies Plaintiff’s Motion, he will simply have to continue doing what he has done for the past two school years with double the number of gender-neutral bathrooms. To be sure, denying Plaintiff’s Motion would maintain the status quo until the trial on the merits. GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers, 38 F. Supp. 3d 1365, 1379 (N.D. Ga. 2014), aff’d, 788 F.3d 1318 (11th Cir. 2015)(“While the Court in no way means to downplay the importance of protecting individual rights, given the relatively uncertain nature of Second Amendment rights and the fact that the status quo is, and has been for some time, the continued enforcement of the Firearms Regulation, such a temporary setback to Plaintiffs' firearms use is relatively minor.”); Black Warrior Riverkeeper, Inc. v. Alabama Dept. of Transp., Case No. 2:11-CV-267-WKW, 2014 WL 200578 at *8, 78 ERC 1526, (M.D. Ala. Jan. 17, 2014)(Injunctive relief may not be proper “when it would harm the public interest, even if doing so would cause irreparable injury to the movant”); Yakus v. U.S., 321 U.S. 414, 440 (1944)(“where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot

compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff”).

Conclusion

Courts have been vigilant in protecting the safety and sensibility of impressionable children required to attend schools. This protection has been exercised to prohibit certain compelled religious behavior in schools and protect children from involuntarily reciting the Pledge of Allegiance.

The St. Johns County School Board has acted in its students’ best interests by maintaining a policy protecting these same impressionable students’ privacy and feelings of security with their own bodies when at their most vulnerable. The bathroom has been a traditional area where individuals are likely to engage in intimate bodily functions. Clearly, the exposure of a child’s body, even inadvertent, to someone from the opposite sex can be demeaning and humiliating.

For these reasons, and for the reasons above, the School Board’s policy regarding bathroom use must withstand Plaintiff’s challenge. Plaintiff’s motion must be denied.

Dated this 4th day of August, 2017.

Respectfully submitted,

/s/ Terry J. Harmon

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of August, 2017, a true and correct copy of the foregoing was electronically filed in the United States 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/ Terry J. Harmon

TERRY J. HARMON