UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER,

Plaintiff,

Civ. Action No. 2:16-cv-00943

KENOSHA UNIFIED SCHOOL DISTRICT
NO. 1 BOARD OF EDUCATION,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Plaintiff Ashton Whitaker's Amended Complaint asserts two causes of action against Defendant, the Kenosha Unified School District No. 1 Board of Education ("Defendant" or "the District"): (1) a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX") and (2) a 42 U.S.C. § 1983 claim for violation of Plaintiff's right to Equal Protection. This Court should dismiss Plaintiff's Title IX claim as the District's policies complained of did not violate the plain, unambiguous language of Title IX. Further, dismissal of Plaintiff's Title IX claim is also appropriate because the requested injunctive relief is moot and Plaintiff is not entitled to monetary damages under Title IX due to a lack of intentionality. As to Plaintiff's Equal Protection claim, Plaintiff has not alleged facts to show that Defendant acted with intent to violate Equal Protection and, as a matter of law, Plaintiff cannot meet the similarly situated requirement. For these reasons, which are detailed more fully below, this Court should dismiss Plaintiff's claims with prejudice.

APPLICABLE LAW

Defendant brings this motion pursuant Fed. R. Civ. P. 12(c) and Fed. R. Civ. P. 12(h)(2)(B). Rule 12 authorizes a motion for judgment on the pleadings for failure to state a claim upon which relief may be granted after the pleadings are closed – but early enough not to delay trial. A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is treated just like a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6). *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995) ("We review a motion pursuant to Rule 12(c) under the same standard as a motion to dismiss under Fed. R. Civ. P. 12(b)"); *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (standard for review identical for Rule 12(b)(6) and Rule 12(c)).

To survive dismissal under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Ultimately, whether a plaintiff has shown a "plausible claim for relief" is a "context specific" inquiry that requires the district court to "draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at 679.

A plaintiff fails to allege a plausible claim for relief when the claim is not cognizable under the law. *See Papasan v. Allain*, 478 U.S. 265, 283, 106 S. Ct. 2932, 2943, 92 L. Ed. 2d 209 (1986); *Lewis v. Richards*, 107 F.3d 549, 555 (7th Cir. 1997). Such legally insufficient claims should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Id.*

SUMMARY OF ALLEGATIONS[1]

Plaintiff is an eighteen-year-old, former student at George Nelson Tremper High School in the Kenosha Unified School District No. 1 in Kenosha, Wisconsin. Pltf.'s Amended Comp. at ¶1. Plaintiff was born as a biological female with a birth certificate that designates his[2] sex as "female". *Id.* Plaintiff identifies as being transgender with a gender identity of male. *Id*. Plaintiff lived as a female until middle school. *Id.* at ¶21.

In Plaintiff's freshmen and sophomore years of high school, he slowly began transitioning more publicly to identifying as male. *See id.* at ¶¶22-24. During this time frame, Plaintiff began

[1] While the facts in the Amended Complaint must be relied upon in bringing this motion for judgment on the pleadings, a brief overview is warranted. The District does not admit any of the allegations other than those specifically admitted to in its Answer and reserves the right to contest the same in the future.
[2] This brief uses "he," "him," and "his" to respect Plaintiff's desire to be referred to with male pronouns. This does not concede anything on any legal issues presented herein.

dressing more masculine, requesting to be referred to by male pronouns, and using a more masculine name. *Id.* Plaintiff had not undergone any sex change surgeries. *Id.* at ¶45.

In the Spring of 2015, Plaintiff asked to use the men's restroom while at school. *Id*. at ¶27. The District informed Plaintiff that it requires students to use the bathroom that corresponds with his or her birth sex or to use one of the available single user, gender neutral bathrooms. *Id*. at ¶27. In July 2015 Plaintiff requested to room with males on an orchestra trip to Europe. *Id*. at ¶33. The District informed Plaintiff at that time that it requires that when students travel on school-sponsored trips that students may only share rooms with other students who share the same birth sex. *Id*. The same policy was later enforced during a summer orchestra camp at a college campus where students used the college dormitories and Plaintiff elected a single user suite. *Id*. at ¶¶84-86. As a result of the District's policies, along with various other complained of issues related to pronoun usage, an initial hesitation to allow Plaintiff to run for prom king, green stickers, and the like, Plaintiff alleges to have suffered injuries. *Id.* at ¶¶98-108.

ARGUMENT

I. PLAINTIFF'S TITLE IX CLAIM REGARDING THE BATHROOM AND ROOMING POLICIES MUST BE DISMISSED BECAUSE DEFENDANT'S POLICIES COMPLIED WITH TITLE IX AS A MATTER OF LAW.

Plaintiff has brought a claim against the District alleging that it violated Title IX, which provides that: "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20. U.S.C. § 1681(a). According to Plaintiff, a policy which required all biological females and males to use the restroom which corresponded with the sex listed on their birth certificate violated Title IX along with a similar biologically based overnight accommodation policy. However, Title IX also provides for

numerous exceptions to the general prohibition on different treatment based on sex, including everything from individuals training for military service, to social fraternities and sororities, to separate boys' and girls' athletic conferences, to father-son/mother-daughter activities, to "beauty" pageants. 20 U.S.C. § 1681(a)(1)-(9). The regulations implementing Title IX also permit schools to provide separate facilities or programs for boys and girls in a variety of circumstances, including human sexuality classes in elementary and secondary schools, contact sports in physical education classes, choruses, and the like. *See* 34 C.F.R. § 106.34. In addition, and extremely important here, the Title IX regulations also explicitly and specifically permit schools to "provide separate toilet, locker room, and shower facilities" and "separate housing" "on the basis of sex", so long as the facilities provided are comparable. 34 C.F.R. §§ 106.32(b)(2) and 106.33.

Plaintiff's Title IX claim regarding the bathroom and overnight accommodation policies[3] is barred by the plain language of Title IX and its implementing regulations. In fact, the **only** way in which Plaintiff can bring the present Title IX claim is by convincing this Court that when Title IX uses the term "sex" in §106.32 and 106.33 that it completely and solely refers to "gender identity" and wholly excludes consideration of "biological sex." However, this would violate nearly every basic tenet of statutory interpretation and cannot be adopted. Rather, the text, history and structure of Title IX, and the plain language contained therein, must result in the conclusion that, as the law presently exists, the District fully complied with Title IX by providing separate but comparable restrooms and rooming accommodations based on "sex."

[3] *See* Plaintiff's Amended Complaint at ¶¶114-115. Plaintiff also claims Title IX was violated in regards to not using preferred pronouns, the junior prom court, monitoring and enforcing the bathroom policy, and green stickers. *Id*. at ¶¶116-117. However, these aspects of the Title IX claim are not subject to this particular section seeking dismissal.

A. Statutory and Regulatory Background.

In the words of its principal sponsor, Senator Birch Bayh of Indiana, Title IX aimed "a death blow" at "one of the great failings of the American educational system"—namely, "corrosive and unjustified discrimination against women." 118 Cong. Rec. 5809, 5803. Congress did so by enacting in Title IX, a ban on discrimination in federally funded educational programs on the basis of "sex." 20 U.S.C. § 1681(a). At the same time, Title IX preserved well-settled and respected expectations of privacy between males and females by permitting "separate living facilities for the different sexes," 20 U.S.C. § 1686, and "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33 ("section 106.33"). Such exceptions were "designed," as Bayh explained, "to allow discrimination only in instances where personal privacy must be preserved." 121 Cong. Rec. 16060.

1. The purpose and intent behind Title IX was to prohibit sex discrimination as a means of ending educational discrimination against women.

Title IX's ban on sex discrimination emerged from Congress's laudable multifaceted efforts in the early 1970's to address discrimination against women. *See generally* Paul C. Sweeney, *Abuse, Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. Rev. 41, 50–54 (1997). Frustrated with lack of progress on the Equal Rights Amendment ("ERA"), Senator Bayh decided to pursue its goals through other means. Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 Clev. St. L. Rev. 463, 467 (2007). Believing that the worst discrimination against women was in "the educational area," *id.* at 468, Bayh focused on the Higher Education Act of 1965, which granted money to universities. Sweeney, *supra*, at 51. In 1972, while that Act was being amended, floor

amendments added the text that has now become referred to as Title IX. *See* 117 Cong. Rec. 39098; 118 Cong. Rec. 5802–03.

Those amendments were designed principally to end discrimination against women in university admissions and appointments. *See* 117 Cong. Rec. 39250, 39253, 39258; 118 Cong. Rec. 5104–06. Title IX's architects viewed such discrimination as rooted in pernicious stereotypes about women. As Bayh succinctly summarized the stereotypes that Title IX was aimed at: "[w]e are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again." 118 Cong. Rec. 5804.

2. Congress explicitly carved out exceptions to the general premise of Title IX and allowed allows certain facilities and programs to be separated "based on sex."

At the same time, Congress rightly understood that not all distinctions between men and women are based on stereotypes. It is a matter of scientific biology, not stereotype, that females are born with different genitalia and reproductive systems than men and that certain distinctions are appropriate. Foremost among those are distinctions needed to preserve privacy. As ERA proponents had grasped at the time, "disrobing in front of the other sex is usually associated with sexual relationships," Barbara A. Brown, Thomas I. Emerson, Gail Falk, Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 901 (1971), and thus implicated the recently-recognized right to privacy. *See id.* at 900–01 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). That privacy right, the proponents believed, "would permit the separation of the sexes" in intimate facilities such as "public rest rooms[.]" *Id.*

Both the Senate and House likewise grasped this commonsense principle. For instance, Senator Bayh noted that sex separation would be justified where "absolutely necessary to the success of the program" such as "in classes for pregnant girls," and "in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807.[4] Representative Thompson—"disturbed" by suggestions that banning sex discrimination would prohibit all sex-separated facilities—proposed an amendment stating that "nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex." 117 Cong. Rec. 39260. The language was introduced that day and adopted by the House without debate. 117 Cong. Rec. 39263. Although Bayh's version lacked a similar proviso, the conference committee included Thompson's language without further discussion. H.R. Conf. Rep. No. 92-1085 at 222.

Subsequently, the Department of Health, Education, and Welfare ("HEW") proposed a Title IX regulation providing that sex separation would be permitted for "toilet, locker room and shower facilities." HEW, 39 Fed. Reg. 22228, 22230 (June 20, 1974). The final regulations retained HEW's clarification which can be found in §106.33. HEW, 40 Fed. Reg. 24128, 24141 (June 4, 1975); 34 C.F.R. § 106.33.[5] HEW's regulations continued to use the statutory term "sex," without elaboration or further definition.

[4] When unsuccessfully introducing similar legislation the year before, Bayh observed that, by "provid[ing] equal [educational] access for women and men students … [w]e are not requiring that intercollegiate football be desegregated, *nor that the men's locker room be desegregated*." 117 Cong. Rec. 30407 (emphasis added).

[5] HEW's regulations were recodified in their present form after the reorganization that created the Department of Education in 1980. *See* United States Dep't of Educ., 45 Fed. Reg. 30802, 30960 (May 9, 1980). Additionally, because multiple agencies issue Title IX regulations, the section 106.33 exception appears verbatim in 25 other regulations. *See, e.g.*, 7 C.F.R. § 15a.33 (Agriculture); 24 C.F.R. § 3.410 (Housing & Urban Development); 29 C.F.R. § 36.410 (Labor); 38 C.F.R. § 23.410 (Veterans Affairs); 40 C.F.R. § 5.410 (EPA).

When Congress considered the HEW regulation, Senator Bayh again linked the issue to privacy. He introduced into the record a scholarly article explaining that Title IX "was designed to allow discrimination only in instances where personal privacy must be preserved. For example, the privacy exception lies behind the exemption from the Act of campus living facilities. The proposed regulations preserve this exception, as well as permit 'separate toilet, locker room, and shower facilities on the basis of sex.'" 121 Cong. Rec. 16060.[6]

B. The Text and History of Title IX Refute The Notion That "Sex" Is Solely Equated To "Gender Identity."

It is beyond dispute that in the 1970s—when Congress enacted Title IX and HEW adopted §106.33—the term "sex" was based primarily, if not exclusively, on biological distinctions between men and women. It follows that when schools establish separate restrooms, locker rooms, and showers for boys and girls, Title IX and §106.33 affirmatively permit them to rely on biological sex to distinguish those facilities, regardless of whether the term "sex" today could be understood by some to partially include one's gender identity.

Plaintiff's likely contrary position depends on a reading of Title IX incompatible with the plain meaning of the term "sex": namely, that for Title IX purposes one's internal, perceived sense of gender identity is *solely determinative* of one's sex. Practically speaking, Plaintiff's position to get around the plain meaning of Title IX, means that biological sex is not only irrelevant to the analysis but would be *per se* an invalid consideration under Title IX as a basis for separating boys and girls in restrooms. Plaintiff's interpretation thus forbids something the statute and regulations affirmatively and clearly permit: use of the biological distinctions between

[6] Title IX regulations contain another relevant provision for separating male and female students, one also based on physical anatomical and biological differences. Funding recipients are prohibited from discriminating on the basis of sex in athletic activities and must provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(a), (c); HEW, 40 Fed. Reg. 24128 (June 4, 1975). Nonetheless, recipients are permitted to establish "separate teams for members of each sex where selection … is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b).

males and females to separate boys and girls in restrooms, locker rooms, and showers. Plaintiff's likely contrary position is incorrect as a matter of law.

1. The term "sex", at the absolute minimum, includes the biological distinctions between men and women.

As the Supreme Court has long held, "[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" as of "the era of [the statute's] enactment[.]" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quotes omitted). All available linguistic evidence and cannons of statutory construction confirm that the term "sex" deployed in Title IX and §106.33 referred overwhelmingly to the biological differences between men and women. The use of that term thus provides no support for the radical notion espoused by Plaintiff that one's "sex" for Title IX purposes should be determined, not by biological characteristics, but instead (and entirely) by one's internal "gender identity."

In fact, numerous dictionaries to define the term "sex" from around the time of the enactment of Title IX all relied on the biological differences between men and women. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736–37 (4th Cir.), *cert. granted in part,* 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), and *vacated and remanded,* 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) (summarizing dictionary definitions from time: *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"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's*

Third New International Dictionary 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change ..."); *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 ...").[7]

Plaintiff has no basis at all under any reasonable linguistic interpretation or cannon of statutory construction to argue that Title IX somehow does not permit the District to have separate bathroom facilities based on "sex."

2. Congress understood and intended Title IX to permit classification in certain instances based on biological differences.

Title IX's legislative history also makes it abundantly clear that "sex" was understood by the framers of Title IX and its regulations to encompass the biological differences between men and women. *See, e.g.*, *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612–13 (1987) (confirming textual meaning through legislative history). Congress's purpose in enacting Title IX's ban on "sex" discrimination was to fix the pervasive problem of discrimination against women in educational programs. *See, e.g.*, 118 Cong. Rec. 5803; 117 Cong. Rec. 39251. At the same time, however, Congress sought to preserve schools' ability to separate males and females to preserve

[7] Interestingly, even today, the term "sex" continues to be defined based on the biological distinctions between males and females. *See G.G.*, 822 F.3d at 736–37 (summarizing current dictionary definitions such as: *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam–Webster's Collegiate Dictionary* 1140 (11th ed.2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures").

"personal privacy," *see* 118 Cong. Rec. 5807 (Sen. Bayh), and to protect athletic opportunities for girls and women.[8]

These twin goals of Title IX confirm that Congress and HEW were employing the then-universal understanding of "sex" as a binary term describing biological males and biological females. Not a shred of legislative history suggests that Congress considered the concept of "gender identity" at all, much less that the concept could supplant biology in determining one's sex. Nor is there any evidence that in promulgating §106.33 HEW considered "sex" to include, much less turn exclusively on, gender identity.

Other indicators of congressional purpose likewise show that gender identity is outside the scope of Title IX. For example, the subsequently enacted Violence Against Women Act ("VAWA")—a Spending Clause statute, like Title IX—prohibits funded programs or activities from discriminating based on either "sex" or "gender identity." 42 U.S.C. § 13925(b)(13)(A). "Sex" and "gender identity" must have meant distinct things to the Congress that enacted VAWA, otherwise including gender identity with sex would create surplusage. *See, e.g.*, *National Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998) (rejecting agency interpretation under *Chevron* for this reason). Other statutes enacted after Title IX relate to discriminatory acts based on "gender" and "gender identity," implying Congress distinguished outward manifestations of sexual identity—akin to sex—from inward, perceived ones. 18 U.S.C. § 249 (federal hate crimes); 42 U.S.C. § 3716(a)(1)(C) (Attorney General authority to assist with State and local investigations and prosecutions); 20 U.S.C. § 1092(f)(1)(F)(ii) (crime reporting

[8] "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted" as Title IX, have been considered "an authoritative guide to the statute's construction." *N. Haven Bd. Of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982).

by universities); 42 U.S.C. § 294e-1(b)(2) (federal mental health grants). Yet Congress has never amended or supplemented Title IX with an addition to include any aspect of gender identity.

In addition to the absence in Title IX of a distinct prohibition on gender identity discrimination, in other contexts Congress has repeatedly declined to enact statutes forbidding gender identity discrimination in education. The Student Non-Discrimination Act, introduced in 2010, 2011, 2013, and 2015 in both the Senate and the House,[9] would have conditioned school funding on prohibiting gender identity discrimination. Another measure, the "Equality Act," would have amended the Civil Rights Act of 1964 to prohibit gender identity discrimination in various contexts, including employment and education.[10] Neither bill has ever left committee.

In the face of Congress's failure to add the concept of gender identity to Title IX— indeed, its repeated intentional decision not to do so—Plaintiff's position amounts to asking this Court to "update" the law based on societal changes through judicial amendment. But no court has that authority. And in any event, there is no evidence remotely showing that even modern Congresses believed that the term "sex" in Title IX already included gender identity when it was originally drafted. To the contrary, the only plausible explanation for the absence of the term "gender identity" from Title IX is that Title IX has never included it, and still does not. If Congress wishes to incorporate that distinct concept into Title IX, it knows full well how to accomplish that goal. But a court lacks the authority to do Congress' work of legislation for it, which is what accepting Plaintiff's likely proposed re-interpretation of Title IX would be.

[9] H.R. 4530 (111th Cong. 2010); S. 3390 (111th Cong. 2010); H.R. 998 (112th Cong. 2011); S. 555 (112th Cong. 2011); H.R. 1652 (113th Cong. 2013); S. 1088 (113th Cong. 2013); H.R. 846 (114th Cong. 2015); S. 439 (114th Cong. 2015).

[10] S. 1858 (114th Cong. 2015); H.R. 3185 (114th Cong. 2015).

3. Supreme Court precedent supports the District's policy as complying with Title IX.

Supreme Court sex discrimination precedent also offers compelling support for reading the term "sex" in Title IX as referring to the biological differences between men and women. When determining the nature of prohibitions on sex discrimination, the Supreme Court has focused on biological differences, especially in contexts involving the lawful separation of males and females for privacy purposes. That underscores the correctness of interpreting Title IX to rely on biology and to permit the District's restroom and overnight accommodation policy.

For instance, in *United States v. Virginia*, the Supreme Court held that the equal protection clause required the Virginia Military Institute to admit women. 518 U.S. 515, 540–46 (1996). Yet even as it rejected stereotypes based on "inherent differences" between the sexes, the Court nonetheless emphasized that "[p]hysical differences between men and women are enduring," and explained that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Virginia*, 518 U.S. at 533, 550 n.19. Thus, the Court's analysis of its "privacy" concerns was grounded in objective, "physical differences" between the sexes, and not in subjective factors like gender identity.

Similarly, in *Tuan Anh Nguyen v. INS*, the Supreme Court upheld an equal protection challenge to a federal immigration standard that made it easier to establish citizenship if a person had an unwed citizen mother, as opposed to an unwed citizen father. 533 U.S. 53, 59–60 (2001). The lesser burden for persons with citizen mothers was explicitly justified on solely biological grounds—namely that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. In so holding, the Court rejected the argument that this distinction "embodies a gender-based stereotype," explaining that "[t]here 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." *Id.* at 68. In its conclusion, the Court importantly added that:

> **To fail to acknowledge even our most basic biological differences**—such as the fact that a mother must be present at birth but the father need not be—**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 difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73 (emphasis added).

There are biological differences between men and women that are not stereotypes but are blatantly different physical traits such as different genitalia and reproductive systems. There is nothing in Title IX which prevents a school district from recognizing these biological differences and basing a bathroom and overnight accommodation policy on these and, in fact, Title IX explicitly approves of it.

C. Replacing "Sex" With "Gender Identity" In Title IX Would Undermine Title IX's Purpose and Structure.

Plaintiff's anticipated proposed approach would require this Court to conclude that when Title IX uses the term "sex" that it should be replaced with "gender identity." This is the only way in which the District's policy could be found to violate the clear, unambiguous language of Title IX and §106.32 and 106.33. However, like any statute, Title IX should be interpreted so that its "manifest purpose is furthered, not hindered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). And here, one of Title IX's purposes was to maintain schools' ability to separate male and female students in some circumstances—for example, when personal privacy is implicated in the bathroom or overnight accommodations.

But this purpose is incompatible with an approach that understands "sex," not by the biological distinctions between males and females, but instead by "gender identity."

If access to sex-separated facilities turns on gender identity, then the sex separation contemplated by Title IX and its regulations would effectively cease to exist. Instead of males and females being segregated in bathroom usage, showers, locker rooms and overnight accommodations based on their recognized different biology, under Plaintiff's mandate, bathrooms, showers, locker rooms and overnight accommodations would regularly include intermixing individuals with different biological sexes, with different genitalia and reproductive systems, in various intimate situations. An interpretation of the key term "sex" that frustrates the very goal of Title IX should be rejected.

By the same token, there is not the remotest suggestion that Title IX was intended to place school children in the position of using restrooms, lockers rooms, and showers in the presence of individuals with physical sex characteristics of the opposite sex. Plaintiff's interpretation thus nullifies what the framers of Title IX and its regulations plainly sought to preserve: spaces available to members of one biological sex and off-limits to the other. That outcome would shock Title IX's congressional advocates, who specifically authorized separate "living facilities" to ensure that members of different physical sexes would be separable in certain intimate settings. If the law's framers had contemplated that members of one sex could use the opposite sex's facilities, based on their *perception* of having been born in the wrong sex, there would have been no reason for permitting separation of sexes in intimate settings in the first place.

There is no supportable argument that the District's bathroom and overnight accommodation policies violated the plain, unambiguous language of Title IX. Title IX explicitly provides that the District may segregate bathrooms and living facilities based on "sex" and no

rational argument can be maintained that "sex" means solely "gender identity", especially in light of the legislative history and structure. Plaintiff's claims attempting to argue that the District violated Title IX in regards to the bathroom and overnight accommodation policies must be dismissed, with prejudice.

II. PLAINTIFF'S TITLE IX CLAIM MUST ALSO BE DISMISSED BECAUSE HIS GRADUATION RENDERS ANY CLAIM FOR INJUNCTIVE RELIEF MOOT AND ANY MONETARY DAMAGE CLAIMS ARE FORECLOSED GIVEN THE LACK OF INTENT TO DISCRIMINATE.

All of Plaintiff's claims under Title IX—including the policy based claims and the issues regarding pronoun usage, prom court, green stickers, and the like—must also be dismissed because of the circumstances present here which render Plaintiff with no justiciable controversy under Title IX at this stage of the litigation. In sum, any claim for injunctive relief is moot given his graduation from the District and there is no viable claim for money damages as the District cannot be found to have intentionally violated Title IX.

A. Any Claim For Injunctive Relief Under Title IX Is Moot Given Plaintiff's Graduation From The District.

Plaintiff graduated from the District in June 2017 and is no longer enrolled as a student.[11] In addition, there are no allegations in the Amended Complaint that Plaintiff intends to return in any form to the District or in any other fashion where Title IX could even arguably provide Plaintiff any legal protections.

Plaintiff seeks injunctive relief, declaratory relief and monetary damages in regards to the Title IX claim. However, the law is clear that once a student graduates from school, their Title IX claims are rendered moot and must be dismissed unless a claim for monetary damages exists.

[11] In the event that Plaintiff, for some reason, contests this fact given it is not present in the Amended Complaint, Defendant would ask this Court to take judicial notice of the publicly available records which establish Plaintiff graduated from Tremper high school in Kenosha Unified School District in June 2017. Such materials can be easily provided upon request.

Parker v. Franklin Cty. Cmty. Sch. Corp., 667 F.3d 910, 915 (7th Cir. 2012) ("Before diving into the merits, we first address defendants' argument that Parker's claims are moot because her daughter is no longer a student at Franklin. Parker's injunctive claims are moot; however, her claims for compensatory damages remain alive."). *See also Pederson v. Louisiana State Univ.*, 213 F.3d 858, 874 (5th Cir. 2000) ("As is so often the case in suits for injunctive relief brought by students, graduation or impending graduation renders their claims for injunctive relief moot."); *Flint v. Dennison,* 488 F.3d 816, 824 (9th Cir. 2007) ("Generally, once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy, and his case is therefore moot."). Clearly, Plaintiff's request for injunctive relief to allow him to use the men's restroom is rendered moot at this stage.

In addition, it does not save Plaintiff's Title IX claim to argue that Plaintiff sought injunctive relief beyond his own rights and interests or that Plaintiff also sought declaratory relief. As recognized by the Second Circuit in a similar context,

> [a] party's case or controversy becomes moot either when the injury is healed and only prospective relief has been sought or when it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury. We find that none of the claims brought by these four plaintiffs satisfies the prerequisites of justiciability….[the] graduations appear to prevent the courts both from addressing the predominant injury relied upon-deprivation of an educational environment free from condoned harassment-and from awarding the relief requested-an order directing Yale to institute effective procedures for receiving and adjudicating complaints of sexual harassment. None of these plaintiffs at present suffers from the alleged injury. Nor would the grant of the requested relief aid these plaintiffs in the slightest. Thus their claims appear moot.

Alexander v. Yale Univ., 631 F.2d 178, 184 (2d Cir. 1980). The fact that Plaintiff does not, and cannot, suffer any longer from the harm alleged (discrimination based on transgender status) renders any claim for relief under Title IX moot. Finally, to the extent that Plaintiff argues that he also sought declaratory relief, this too would not save the Title IX claim. "The granting of

declaratory relief, however, is discretionary…and is clearly precluded in the absence of any actionable live case or controversy." *Hansen v. Ahlgrimm*, 520 F.2d 768, 769 (7th Cir. 1975).

Plaintiff's graduation means that there is no longer a live case or controversy. The law is clear that unless Plaintiff can recover monetary damages, the Title IX claim brought in this lawsuit must be dismissed as any injunctive or declaratory relief has been rendered moot by Plaintiff's graduation. And, as shown immediately below, no claim for monetary damages can be asserted in these circumstances.

B. No Monetary Damages Are Available As A Violation Of Title IX Must Be Intentional To Recover Such Damages.

Unless the conduct complained of (here discrimination based on transgender status) is shown to be intentional, no monetary damages are available under Title IX. The Seventh Circuit has explained this requirement as follows: "This difference is significant because statutes adopted pursuant to Congress' spending power allow monetary recovery only for intentional discrimination….As the Supreme Court noted in *Franklin*, remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*." *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1028 (7th Cir. 1997) (internal citations omitted) (emphasis in original). And, Title IX was unquestionably adopted pursuant to Congress' spending power. *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 920–21 (7th Cir. 2012) ("Title IX was enacted as an exercise of Congress' powers under the Spending Clause…").

The reasoning behind this rule is that a private right of action under a statute that is adopted pursuant to Congress' spending power should only subject the funding recipient to monetary damages if they had adequate notice that they could be liable for monetary damages and chose to act in intentional disregard of the statute at issue. As summarized by the Seventh Circuit:

> That is because '[w]hen Congress enacts legislation under its spending power, that legislation is 'in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'' *Jackson,* 544 U.S. at 181–82, 125 S.Ct. 1497 (citing *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531). *Pennhurst,* however, does not preclude private suits for intentional acts that violate the clear terms of the statute. *Id.* (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999)). Recipients will have sufficient notice where a statute makes clear that some conditions are placed on the receipt of federal funds, even if Congress has not specifically identified and proscribed each condition in the legislation. *Id.* (citing *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665–66, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985)).

Parker, 667 F.3d at 920–21. *See also Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685, 689–93 (6th Cir. 2000) (stating that "proof of intent, however defined, is the *sine qua non* to compensatory relief for any type of Title IX violation. A brief history of the key Title IX cases makes that clear. In all of the relevant cases, the Supreme Court has consistently invoked a 'contract' rationale: that under Spending Clause legislation, the relationship between the government and the federal funding recipient is consensual. A recipient should therefore not be subject to money damages unless it has notice that it will be liable for the conduct at issue.")

C. The Conduct Complained Of Cannot Be Found Intentional As A Matter Of Law As Defendant Had No Notice That Its Policies Would Violate Title IX.

Two of the primary complaints by Plaintiff are in regard to the Defendant's policy that required students to use the bathroom corresponding with their biological sex, and to room with individuals with the same biological sex on overnight trips. However, as detailed more fully above, these policies are specifically permitted by the regulations promulgating Title IX and compliance with these Title IX regulations most certainly cannot be found to be an intentional violation of the law.

For the purposes of this motion, it is not necessary to establish, as a matter of law, that "sex" means "biological sex," as it was undoubtedly meant to when Title IX was drafted. Rather, it is sufficient that it was entirely reasonable for the District to interpret "sex" to mean "biological

sex." Therefore, assuming this to be a reasonable interpretation of Title IX—which it absolutely must be—then the District did not intentionally violate Title IX when it developed and applied the bathroom and overnight accommodation policies at issue. The District had every right to believe it was acting in accordance with Title IX, not in violation of it, under any fair reading of the regulations.

In fact, several sources of persuasive authority suggested that Defendant's actions were perfectly legal under Title IX at the time. For example, the decision of one of the only federal courts in the country at the time to address the issue of transgender bathroom usage in educational institutions supported the District's position that the claims asserted by Plaintiff here had no legal basis:

> Having carefully reviewed the relevant language of Title IX and the applicable case law, and having considered the erudite arguments of counsel, the Court finds that Plaintiff has failed to state a cognizable claim for discrimination under Title IX. Simply stated, Plaintiff has not alleged facts showing that Defendants unlawfully discriminated against him on the basis of sex in violation of Title IX. Specifically, the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination.

Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 672–74 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016). There, the court rejected both a "transgender status" claim under Title IX ("Thus, Title IX and its implementing regulations clearly permit schools to provide students with certain sex-segregated spaces, including bathroom and locker room facilities, to perform certain private activities and bodily functions consistent with an individual's birth sex….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…." *id. at 678*) and a "sex-stereotyping" claim under Title IX ("This allegation simply does not constitute a claim for sex stereotyping…the Court finds that Plaintiff has failed to state a plausible claim for relief under

Title IX, and will therefore dismiss Count II of Plaintiff's second amended complaint." *id. at 682*) The *Johnston* decision was issued on March 31, 2015, just a short time before the District made the policy decisions complained of in Plaintiff's Amended Complaint.

Further, it is abundantly clear that for more than four decades, states have accepted Title IX funding with the understanding that they could maintain separate facilities based on men and women's biological differences. How could the District have knowingly and intentionally violated Title IX when it was acting in accordance with what every state and school district had done for more than four decades and there had been no change in either the language of the law nor case interpretations of the law?

More broadly, and perhaps most importantly, all of Plaintiff's complaints—from the bathroom usage to the use of pronouns to the green stickers[12]—cannot be found to be intentional violations of Title IX because no court with precedential authority in Wisconsin had ruled at the time that differential treatment based on transgender status violated any aspect of Title IX. In fact, it was not until the decision by the Seventh Court in this very case, obviously long after the District took the alleged actions complained of, that any court had held that a transgender plaintiff might be able to prevail on any claim under Title IX. *See R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 2017 WL 3026757, at *8 (Mo. Ct. App. July 18, 2017), *reh'g and/or transfer denied* (Sept. 5, 2017) ("And to date, 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. *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–49 (7th Cir. 2017) (holding in a preliminary injunction proceeding that a

[12] Specifically in regards to the green stickers, Plaintiff would also not have a Title IX claim because there is no allegation that Plaintiff was ever provided a green sticker or asked to use it in any fashion. Thus, Plaintiff does not have standing to seek injunctive or declaratory relief in this regard and obviously could not assert a claim for monetary damages based on alleged conduct which never was directed at Plaintiff.

transgender student demonstrated substantial likelihood of success on the merits in a Title IX action where transgender student was denied access to boys' restrooms). As a matter of law, this Court should hold that Defendant's actions could not be intentional and, therefore, no monetary damages are available under Title IX.[13]

For all of these reasons, Defendant's conduct cannot be found to be intentional as a matter of law, and therefore monetary damages are not available under Title IX for any of the claimed violations.

D. Because No Forms of Relief Are Available to Plaintiff Under Title IX, The Claim Must Be Dismissed.

In order for this Court to have jurisdiction over the Title IX claim there must be an actual case or controversy and "a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1029–30 (E.D. Wis. 2008). Even a claim for nominal damages, which is not even made here, is not enough to give this Court jurisdiction to adjudicate the Title IX claim in light of the above issues identified. *See id*. As such, after this Court finds that Plaintiff is not entitled to either injunctive relief, declaratory relief or monetary damages, the Title IX claim must be dismissed.

[13] Further, adopting any other approach would risk violation of the rule of constitutional avoidance. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). That rule supports interpreting Title IX in a way that does not permit courts or agencies to "surpris[e] participating States with post-acceptance or retroactive conditions." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25, 101 S. Ct. 1531, 1544, 67 L. Ed. 2d 694 (1981)). This is yet another reason to reject the interpretation Plaintiff proposes.

III. PLAINTIFF'S EQUAL PROTECTION CLAIM MUST BE DISMISSED AS IT IS IMPOSSIBLE TO SHOW THAT THE CONSTITUTIONAL VIOLATION WAS INTENTIONAL AND HE CANNOT IDENTIFY A SIMILARLY SITUATED POPULATION.

In order to assert a § 1983 claim pursuant to the Equal Protection clause, Plaintiff must prove that the Defendant acted with discriminatory intent and that he was treated less favorably than others who were similarly situated in all material respects. Because Plaintiff cannot meet either requirement as a matter of law based on the circumstances present here, the Equal Protection claim must be dismissed.

A. Plaintiff Must Show That The Defendant Acted Intentionally In Violating The Equal Protection Clause And It Cannot Be Found That Defendant Acted With The Requisite Intent In These Circumstances.

For many of the same reasons identified above, Defendant cannot be shown to have acted with the required intent in violating the Equal Protection clause, and therefore, dismissal is appropriate. It is clear that the same intent standard applies to Equal Protection claims as Title IX claims.

> In order to establish liability under § 1983, [a plaintiff] must show that the defendants acted with a nefarious discriminatory purpose…The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. A plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation…A showing that the defendants were negligent will not suffice. [A plaintiff] must show that the defendants acted either intentionally or with deliberate indifference.

Nabozny v. Podlesny, 92 F.3d 446, 453–54 (7th Cir. 1996) (internal citations and quotations omitted). *See also Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922, 944–45 (7th Cir. 1996) ("Mr. Johnson is also required to demonstrate that the defendants acted with discriminatory intent."); *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000) ("To state a *prima facie* claim under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must demonstrate that (1) he is

otherwise similarly situated to members of the unprotected class; (2) he was treated differently from members of the unprotected class; and (3) the defendant acted with discriminatory intent.")

Discriminatory intent in the Equal Protection context means that "the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effect on an identifiable group." *Priester v. Lowndes Cty.*, 354 F.3d 414, 424 (5th Cir. 2004). This showing requires more than volition; it requires that a defendant acted purposely, with knowledge that its conduct violated the law:

> In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), the Supreme Court articulated exactly what a showing of discriminatory intent means in the equal protection context: '[I]t [is] not enough to prove that a policy maker could foresee the discriminatory consequences of his decision: '**Discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group**.' *Navarro*, 72 F.3d at 716 n. 5 (quoting *Feeney*, 442 U.S. at 279, 99 S.Ct. at 2296).

Moua v. City of Chico, 324 F. Supp. 2d 1132, 1140 (E.D. Cal. 2004) (emphasis added).

At the time the Defendant made its decisions to implement its bathroom and overnight accommodation policies in the Spring of 2015, there was no authority at either the Seventh Circuit or the United States Supreme Court to suggest that its actions would violate Equal Protection and, in fact, authority from other jurisdictions—which Defendant had every right to rely on in the absence of controlling authority—indicated it was acting within the law:

> First, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, **Plaintiff's discrimination claim is reviewed under the rational basis standard. This finding is consistent with numerous other courts that have considered allegations of discrimination by transgender individuals.** *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir. 2007)…
>
> Nevertheless, **even if a heightened standard of review were to apply**, the result would be the same as under rational basis review. Here, **UPJ's policy of**

> **segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest.'** *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). **Specifically, UPJ explained that its policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts.** *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (the use of women's public restrooms by a biological, transgender male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason); *Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975).
>
> The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: 'The heightened review standard our precedent establishes does not make sex a proscribed classification ... Physical difference between men and women, however, are enduring: '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.''…**As such, separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause.** Thus, 'while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.' *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 478, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) (Stewart, J., concurring).

Johnston, 97 F. Supp. 3d at 668–70 (emphasis added). The *Johnston* decision, released March 31, 2015 and immediately before the District made its policy decisions in regards to Plaintiff, affirmatively confirmed that it would not be violating Equal Protection by acting in the way it did. Even Plaintiff has readily admitted that neither the Supreme Court nor the Seventh Circuit had recognized transgender as a protected class at the time. Pltf.'s Memo. in Opp. to Motion to Dismiss at p. 6 ("To be sure, it is literally true that the Seventh Circuit and U.S. Supreme Court have not yet adopted this position.")

It cannot be found that Defendant acted with intent to violate the Equal Protection clause when at the time the decisions were made it was not established that the conduct complained of violated the law. Therefore, Plaintiff's Equal Protection claim must be dismissed.

B. The District's Bathroom Policy Treats All Students Precisely The Same And Cannot Violate Equal Protection.

In regards to Plaintiff's complaint about the District's bathroom and overnight accommodation policies violating Equal Protection, Plaintiff cannot show, as a matter of law, that he was treated differently than any other student. All students, regardless of their gender identity, how they dress or act, or any other aspect of their lives, have the same choices for bathroom and rooming use and thus, all students are treated the same. Plaintiff cannot demonstrate a violation of Equal Protection in terms of the policies at issue.[14]

Under the policy, all students have precisely two choices—they can either use the restroom that corresponds with their biological sex or they can use the single user, gender neutral restroom provided by the school. It does not matter under the policy whether one is transgender or cisgender, nor does it take any other factors into account such as how one walks, talks or dresses—it treats all students precisely the same. Cisgender males must use the men's restroom while cisgender females must use the women's restroom. Male to female transgender students must use the men's restroom while female to male transgender students must similarly use the women's restroom. Any student in any of these groups that is not comfortable with this arrangement may use the single user, gender neutral bathrooms provided by the District. All students have precisely the same choices available to them.

And, of course, the equal protection requirement "does not take from the States all power of classification." *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271, 99 S.Ct. 2282 (1979). Rather, it is meant to "keep[] governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326

[14] For simplicity, the bathroom policy will be addressed. However, the exact same analysis would apply to the similar overnight accommodation policy.

(1992). The District's policies most certainly accomplish this as it treats all individuals precisely the same with the only distinction being the sex segregated facilities which Title IX—a law enacted by Congress—specifically and explicitly permits.

C. Plaintiff Cannot Meet The Similarly Situated Requirement As A Matter Of Law.

Plaintiff will also be unable to identify similarly situated comparators as a matter of law, a fatal deficiency for maintaining a claim under Equal Protection under any articulation. Plaintiff's Amended Complaint is far from a paragon of clarity as to the precise type and manner of Equal Protection claim being asserted. Plaintiff vaguely alleges that various actions by Defendant means that Defendant "[has] discriminated and continue[s] to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes…" Pltf.'s Amended Comp. at ¶121. Based on these allegations, and other allegations in the Amended Complaint, it is unclear whether Plaintiff is attempting to bring a classic Equal Protection discrimination claim or a class of one Equal Protection claim.[15]

In any event, for the purposes of this motion, it does not matter which type of claim Plaintiff intends to bring as under both types of claim a plaintiff is required to show that they were treated differently than individuals outside their protected class who were otherwise similarly situated in all materials respects. In bringing a 'classic' Equal Protection discrimination claim, a plaintiff is required to show that "(1) he is otherwise similarly situated to members of the unprotected class; (2) he was treated differently from members of the unprotected class; and (3) the defendant acted with discriminatory intent." *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000); *see also Brown*

[15] Since filing the Complaint, Plaintiff's counsel has made overtures to the Court and counsel during a pre-motion to compel conference call, that Plaintiff was not asserting a class-of-one equal protection claim.

v. Budz, 398 F.3d 904, 916 (7th Cir. 2005). Similarly, in a class of one Equal Protection claim, a plaintiff "must first show that he was intentionally treated differently from others similarly situated...To be considered 'similarly situated,' the class-of-one challenger and his comparators must be *prima facie* identical in all relevant respects or directly comparable in all material respects." *United States v. Moore*, 543 F.3d 891, 896–97 (7th Cir. 2008) (internal citations omitted). Thus, regardless of the type of Equal Protection claim asserted, establishing that Plaintiff was treated less favorably than someone outside his protected class who was similarly situated in all materials respects, is a necessary element of proof.

While a plaintiff need not demonstrate 100% identical circumstances, "[t]o be considered "similarly situated," a plaintiff and his comparators (those alleged to have been treated more favorably) must be identical or directly comparable in all material respects…similarly situated individuals must be very similar indeed." *LaBella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010) (internal citations omitted).

Here, Plaintiff's purported protected class to which he belongs is "transgender males" (those born female but who identify as males) yet the individuals he compares himself to outside his protected class are "cisgender males" (those born males who also identify as males). *See* Amended Comp. at ¶121 (alleging the Defendant was "treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes"). In performing the similarly situated analysis, these differentiating characteristics—which render the individual members of different classes—are ignored to determine whether they are similarly situated in all other materials respects. *Alston v. City of Madison*, 853 F.3d 901, 906–07 (7th Cir. 2017) (noting the correct focus is not on the fact they are

members of different classes but, rather, on the other factors which supposedly render them similarly situated).

The Seventh Circuit has routinely addressed what renders individuals similarly situated in all materials respects under Title IX and in similar contexts, though they have never addressed the specific issue present here. For example, the Seventh Circuit has held that under Title VII, having different supervisors and different levels of experience and job responsibilities renders individuals not similarly situated. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). Outside of the employment context, the Seventh Circuit has held that under Equal Protection, property owners were not similarly situated when they submitted pier extension applications at different times and requested different extensions and renovations, *Bell v. Duperrault*, 367 F.3d 703, 708–09 (7th Cir. 2004), or when they requested different variances during different time periods, *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455–56 (7th Cir. 2004). In the school context, the Seventh Circuit has found that charter school students were not similarly situated to other students within a school district. *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 681 (7th Cir. 2005).

Here, Plaintiff's biological sex is female, Plaintiff has female reproductive organs, Plaintiff's chromosomes are that of a female, Plaintiff has gender dysphoria, and Plaintiff's gender identity is incongruent with his biological sex. While Plaintiff has not identified specific individuals to serve as comparators, the allegations in his Complaint make it clear that he compares himself to individuals whose biological sex is male, who have male reproductive organs, whose chromosomes are that of males, who do not have gender dysphoria, and whose gender identity is congruent with their biological sex. These crucial, important differences between Plaintiff and the proposed comparators mean they cannot be similarly situated in all materials respects as a matter

of law. This means any attempt to compare Plaintiff to cisgender males—regardless of whether it is the bathroom policy or pronoun usage—will be improper as a matter of law.

The entire purpose of the similarly situated requirement is to allow a factfinder to determine that the discrimination was intentional because, if all other things are equal save one factor, then as a matter of law one may conclude that differential treatment is based on the differentiating factor. Here, however, there are so many material differences between Plaintiff and the proposed comparators that no reasonable factfinder could conclude that the District intentionally discriminated against Plaintiff because of the differentiating factor—transgender versus cisgender.

CONCLUSION

For the reasons stated above, the District respectfully request that the Court grant its motion for judgment on the pleadings and dismiss Plaintiff's Amended Complaint with prejudice.

Dated this 25th day of October, 2017.

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