UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

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

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.
_____/

DEFENDANT'S NOTICE OF FILING POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant, **THE SCHOOL BOARD OF ST. JOHNS COUNTY FLORIDA**, by and through undersigned counsel and in accordance with the Court's Orders [Docs. 154, 165] hereby gives notice of filing its Post-Trial Proposed Findings of Fact and Conclusions of Law. A copy of the Post-Trial Proposed Findings of Fact and Conclusions of Law shall be filed as an exhibit to this Notice.

Dated this 2nd day of February, 2018.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of February, 2018, a true and correct copy of the foregoing was electronically filed in the U.S. District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Terry J. Harmon
TERRY J. HARMON

UNITED STATES DISTRICT COURT
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DREW ADAMS, a minor, by and through his next friend and mother, ERICA ADAMS KASPER,

Plaintiff,

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THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

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DEFENDANT'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

This Court must resolve whether Defendant's policy of separating showers, locker rooms, and bathrooms on the basis of a student's biological sex violates Title IX of the Education Amendments of 1972 or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After hearing testimony and receiving evidence over a three-day trial, carefully reviewing the trial record and the parties' written submissions, and hearing oral argument, the Court finds that Defendant's policy is lawful and constitutional.

Findings of Fact[1]

The St. Johns County School Board/St. Johns County School District

1. The School Board of St. Johns County, Florida is the governing body of the St. Johns County School District, a K-12 school district responsible for the operation, control, and supervision of all public schools located in the County. Fla. Stat. §§1001.30; 1001.32(2). Authorized to exercise any power not expressly prohibited by law, Fla. Stat. §1001.32(2), the School Board is made up of five members elected from geographic districts within the County. Among its many duties, the School Board is responsible for providing "proper attention to [the] health, safety, and other matters relating to the welfare of students." Fla. Stat. §1001.42(8)(a); see also, Fla. Stat. §1006.07. The School Board is also required to "[e]nsure that all plans and specifications for buildings provide adequately for the safety and well-being of students…" Fla. Stat. §1001.42(11)(b)8.

2. The District's Superintendent, is responsible for the administration and management of schools and for the supervision of instruction. Fla. Stat. §1001.32(3); see also, Fla. Stat. §§1001.49; 1001.51.

3. There are approximately 40,000 students enrolled in the District's 36 schools. *T. II P. 254-255 L. 23-25, 1-2.* High school students' ages range from age 13

[1] Citations to the trial transcript will be to the volume, page(s) and line number(s). For example, Volume 2, pages 16-17, lines 1-25 and lines 1-5 will be cited as *T. II P. 16-17 L. 1-25, 1-5*. Citations to the parties' exhibits will be noted as either *P. Ex.* or *D. Ex.* Citations to the Court's exhibits will be noted as *C. Ex.*

to 21. *T. II P. 256 L. 18-24.* Only 16 of the 40,000 students enrolled in the District identify as transgender (nine of whom have not asked to use the bathroom conforming to their gender identity). *T. III P. 106-107 L. 17-25, 1-3.* There are five transgender students at Nease High School, *T. III P. 136 L. 2-4;* only Plaintiff has violated the District's bathroom policy. *T. III P. 142 L. 4-15.*

4. The School Board does not formally adopt a policy for each law it implements or that it is required to follow. *T. III P. 46-47 L. 25, 1-4.* Unlike policies, procedures and best practices are not adopted through statutory rule-making. *T. III P. 43-44 L. 25, 1-15.*

5. Student safety is vital. *T. III P. 69-70 L. 22-25, 1-5.* Schools must take precautions and protect students from foreseeable risks. *T. III P. 69-70 L. 22-25, 1-5.*

The School Board's Unwritten Bathroom Policy

6. The District provides sex-segregated bathrooms, meaning boys must use the boys' bathrooms and girls must use the girls' bathrooms. *T. II P. 149 L. 8-13, P. 227 L. 6-24; T. III P. 11-12 L. 22-25, 1-2, P. 34-35 L. 20-25, 1-3, P. 44-45 L. 20-25, 1-18.* The policy, in place for as long as anyone can remember, is unwritten and has successfully separated boys and girls as those terms have been traditionally defined. *T. II P. 248-249 L. 25, 1-7; T. III P. 45-46 L. 16-25, 1-23, P. 99-100 L. 20-24, 1-5* [2] This

[2] Mr. Upchurch was able to trace the policy back to the early 1950s. *T. III P. 45-46 L. 16-25, 1-7.* In Ms. Smith's 17 years as an employee in St. Johns County, students of one biological sex were never permitted to use the bathroom of the opposite biological sex. *T. II P. 149-150 L. 14-15, 1-8; P. 181 L. 2-6.*

long-standing practice creates an expectation of privacy, which begins at the bathroom door, for students and parents that the two biological sexes will not share bathrooms. *T. III P. 67-68 L. 12-20, 23-25, 1-6.*

7. The policy is enforced through the student code of conduct. *T. II P. 227-228 L. 6-25, 1-15.* If a student of one sex enters the bathroom of the opposite sex, it would be considered misconduct subject to discipline under the student code of conduct. *T. II P. 228 L. 4-18; T. III P. 36 L. 10-15.*

8. The sex of a student is determined at registration through enrollment materials. *T. II P. 205 L. 10-23, P. 234 L. 14-23.* When a student enrolls, he or she is required to submit a number of documents, including a Student Information/Entry Form, a Home Language Survey, a School Entry Health Exam document, and a birth certificate. *T. II P. 229-234; D. Ex. 142-145.* The District accepts at face value the sex of students as represented in enrollment documents unless or until it is put on notice that there is an issue, *T. III P. 53 L. 5-22,* and treats students consistent with the sex at enrollment for purposes of bathroom use. *T. II P. 234-235 L. 24-25, 1-2.* This method of determining student sex has not been a problem. *T. III P. 54-55 L. 9-25, 1-4.* Plaintiff identified as a female, and submitted documents consistent therewith, at enrollment. *T. II P. 234 L. 8-13; D. Ex. 142-145.*

Development of the District's Written Best Practices for LGBTQ Students

9. Sallyanne Smith, a former District employee, worked with transgender students in her role as Director of Student Services, a department which addressed all at-risk programs and students in the County. *T. II P. 143 L. 3-25.*[3] Administrators often called upon her for advice on transgender student issues. *T. II P. 145 L. 16-25.*

10. Cathy Mittelstadt is the Deputy Superintendent for Operations. *T. II P. 226 L. 9-22.* She also previously served the District as an Associate Superintendent for Student Services, principal, and assistant principal. *T. II P. 226 L. 6-22.*

11. Ms. Smith began working on LGBTQ student issues in 2012. *T. II P. 146 L. 12-23.* The District sent Ms. Smith and other employees to LGBTQ student conferences in 2013-2015. *T. II P. 146 L. 16-23.* Ms. Smith also educated herself by researching articles, attending Gay-Straight Alliance ("GSA") club meetings, talking to students, and meeting with JASMYN – a group in Duval County that works with LGBTQ students. *T. II P. 146-147 L. 24-25, 1-7.* Ms. Smith's determined that Florida school districts did not handle LGBTQ issues uniformly. *T. II P. 163 L. 9-14.*

12. Due to emerging LGBTQ issues in 2012, Ms. Smith formed a task force to get information from administrators, principals, attorneys, guidance counselors, and

[3] Ms. Smith holds a master's degree in Education Administration Supervision. *T. II P. 139 L. 1-8.* She is certified by the Florida Department of Education in K-8, early childhood education and administration supervision. *T. II P. 139-140 L. 16-25, 1-2.*

mental health counselors. *T. II P. 150-151 L. 22-25, 1-18*. Ms. Smith also formed a smaller focus group to help her. *T. II P. 152 L. 10-20.*

13. Task force and focus group members collected and reviewed policies from other counties and states. *T. II P. 174-179; D. Ex. 85, 157-159, 161-163, 168, 170-171, 177-179, 187-191, 203-204, 213, 217, 223, 225, 228.* Florida school districts did not uniformly include nondiscrimination language protecting individuals based on their gender identity. *D. Ex. 85 at SJCSB-DA PRR 1437, 1439, 1446-1447, 1453.*

14. In 2014, the task force obtained information on LGTBQ student issues from high school principals. *D. Ex. 27, 66.* The task force also utilized club sponsors at schools to learn how students felt. *T. II P. 158-159 L. 18-25, 1-3.* Student input was relayed to the task force through club sponsors. *T. II P. 201-202 L. 17-25, 1-21.*

15. On October 8, 2014, the focus group, which included District employees and members from the public, met to discuss various children's behavioral health issues, including the need to develop best practices. *T. II P. 161 L. 3-9; D. Ex. 90.*

16. On November 5, 2014, and again on February 18, the task force and focus group met separately to discuss LGBTQ student issues (including bathroom issues). *T. II P. 162-163 L. 1-25, 1-23; D. Ex. 66-70.* The focus group meeting included mental health therapists, a bullying coordinator, and gay and lesbian club sponsors from high schools. *T. II P. 162 L. 16-24; D. Ex. 70.*

17. On March 3, 2015, the task force proposed recommendations to the focus group to be submitted to the Superintendent's Executive Cabinet regarding LGBTQ student issues. *T. II P. 170 L. 4-22; D. Ex. 28.*[4] With respect to bathroom use, the task force recommended giving students access to a gender-neutral bathroom instead of forcing them to use the bathroom corresponding to their biological sex, as an exception to the District's long-standing policy requiring students use the bathroom of their biological sex. *T. II P. 171-72 L. 21-25, 1-4.*

18. In developing the recommendations for the Executive Cabinet, the District considered student safety and privacy issues, since bathrooms were unsupervised areas where students as young as 13 may be sharing a bathroom with older students. *T. II P. 172-173 L. 25, 1-21, P. 212 L. 222, P. 248 L. 12-20.* The District's concerns included students changing clothes (both inside and outside of stalls), going to the bathroom, and gender-fluid individuals (i.e. students whose gender changes on potentially a daily basis).[5] *T. II P. 212-214. L. 23-25, 1-25, 1-8, P. 221-222 L. 23-25, 1-10, P. 248 L. 2-11.* Gender-fluid student issues "came up several times" with the task force. *T. II P. 216 L. 10-16.*[6] The task force was primarily concerned about

[4] The Executive Cabinet is comprised of the Superintendent, Assistant or Associate Superintendent, and Directors. *T. II P. 169 L. 4-10.* The Executive Cabinet met weekly to discuss various situations and initiatives. *T. II P. 237-238 L. 22-25, 1-2.*

[5] Plaintiff's personal view is that individuals get to decide whether they are a boy, a girl, or neither (non-binary). *T. I P. 190-192 L. 9-25, 1-25, 1-11.*

[6] See also, *P. Ex. 66 at Plaintiff 1587* for an explanation of gender fluidity under the definition of "genderqueer."

privacy issues outside the bathroom stalls, *T. II P. 223 L. 1-11,*[7] with a focus on creating a policy that would prevent as many incidents as possible. *T. II P. 215 L. 12-21.*

19. The District's privacy concerns also arose under case law, the Florida Constitution, and the State Requirements for Educational Facilities ("SREF"). *T. III P. 66-67 L. 5-25, 1-10.*

20. Ms. Smith and her team also attended and obtained input at GSA club meetings where JASMYN was also present. *T. II P. 179-180 L. 10-25, 1-9.*

21. In July of 2015, Ms. Mittelstadt became Ms. Smith's supervisor. *T. II P. 181-182 L. 20-25, 1-15, P. 236 L. 2-19.* Ms. Mittelstadt's role was to help develop a final draft of the Guidelines for LGBTQ students – Follow Best Practices ("Best Practices"), bring it to the Executive Cabinet for discussion and approval, and ultimately implement it. *T. II P. 241 L. 1-7.* In August of 2015, Ms. Mittelstadt worked with Mr. Upchurch on various drafts of the Best Practices. *D. Ex. 71, 72, 120 at SJCSB-DA 1370-1416.*[8]

22. The Executive Cabinet finalized the Best Practices in late August or early September of 2015. *T. II P. 242-243 L. 20-25, 1-11, P. 246-247 L. 6-25, 1-3; D. Ex. 33.* The Best Practices provided guidance to teachers and staff. *T. III P. 110 L. 4-21.*

[7] The "boys" and "girls" bathroom signs are located on the outside of each group bathroom. *T. II P. 221-222 L. 15-25, 1-2.*

[8] Frank Upchurch has served as the School Board's attorney since 2007. *T. III P. 43 L. 1-7.*

23. By September 10, 2015, Ms. Mittelstadt had met with the District's principals and assistant principals to introduce the Best Practices. *T. II P. 243-245 L. 14-25, 1-25, 1-23, P. 246-257 L. 22-25, 1-3; D. Ex. 87.*

24. Under the Best Practices, students are permitted access to a gender-neutral bathroom or the bathroom matching their biological sex. *T. II P. 199 L. 5-20; D. Ex. 33.*[9] In this way, the Best Practices balance the plea of some transgender students while preserving the District's long-standing policy and concerns about students' safety and privacy. *T. II P. 247 L. 13-16; T. III P. 61 L. 6-13, P. 62 L. 5-12, 14-23. T. III P. 61 L. 6-13.*[10] It also accommodates gender fluid students, gender non-binary students (students who do not want to identify as a particular gender), and transgender students who may not want to use the bathroom matching their gender identity. *T. III P. 70-71 L. 21-25, 1-7, 15-21.* The Best Practices apply to all students. *T. II P. 247 L. 4-7.*

Guidance from DOE/DOJ/U.S. Attorney General

25. In May of 2016, The U.S. Departments of Education ("DOE") and Justice ("DOJ") issued guidance ("2016 Guidance") that the term "sex" under Title IX included gender identity. *D. Ex. 84, 106A.* In response, the District released a public statement through its then-superintendent Dr. Joseph Joyner that the District disagreed with the

[9] This provision is also consistent with Ms. Mittelstadt's actions prior to the development of the Best Practices document when she served as a principal in the District. *T. II P. 228-229 L. 16-25, 1-5.*

[10] The Best Practices do not prohibit transgender students from using the bathroom that matches their gender identity; rather, it is the District's unwritten, long-standing policy of assigning bathrooms on the basis of sex. *T. III P. 97 L. 4-11.*

2016 Guidance, and asserting that its practice of providing gender-neutral bathrooms for transgender students was lawful and reasonable. *T. III P. 75-78 L. 19-25, 1-25, 1-24; D. Ex. 84, 106A.*

26. On February 22, 2017, DOE and DOJ withdrew ("2017 Guidance") the 2016 Guidance. *D. Ex. 106B, 237.*

27. On October 4, 2017, the Office of the U.S. Attorney General issued a memorandum stating that the term "sex" under Title VII of the Civil Rights Act of 1964 "does not encompass discrimination based on gender identity *per se*, including transgender status." *D. Ex. 106D, 248.*

Complaints and Community Concerns

28. Plaintiff is the only transgender student in the District to complain about the Best Practices. *T. II P. 255 L. 17-20.*

29. Certain parents of students and students in the St. Johns County School District object to a policy or practice that would allow students to use a bathroom that matches their gender identity as opposed to their sex assigned at birth. These individuals believe that such a practice would violate the bodily privacy rights of students and raise privacy, safety and welfare concerns. [Doc. 116 at p. 11].

Broward County (Fla.) and Jefferson County (Ky.)

30. The Broward County School District ("Broward") has 271,000 students in 340 schools and is the sixth largest school district in the Country. *T. II P. 53 L. 19-*

21, P. 254-255 L. 23-25, 1-2. Michele Valbrun-Pope, an administrator from Broward, conceded that communities in Broward County and St. Johns County are different. *T. II P. 70 L. 4-16.*

31. Two major differences include: 1) Broward's nondiscrimination policy, which expressly distinguishes between gender identity and sex; *T. II P. 53-54 L. 22-25, 1-4; P. Ex. 65*; and 2) the adoption by Broward County of a local ordinance prohibiting discrimination on the basis of, among other things, sex and gender identity. *T. II P. 82 L. 11-14; P. Ex. 66 at Plaintiff 1593.*

32. Of the 271,000 students in Broward, Principal Michelle Kefford has only directly dealt with 12 transgender students. *T. II P. 109-110 L. 20-25, 1-2.* Ms. Kefford only has two transgender students in her high school of 2,600 students. *T. II P. 117 L. 8-11*.

33. Ms. Valbrun-Pope testified that there is a right to privacy in the bathroom, and it is possible for students in Broward to be punished for going in the bathroom of the opposite sex. *T. II P. 80-81 L. 16-25, 1-8.*

34. In addition to the nondiscrimination policy, Broward staff developed "guidance documents," including Broward's LGBT Critical Support Guide ("Broward's Guide"). *T. II P. 58 L. 2-12; P. Ex. 66.* Broward's Guide relies on the obsolete 2016 Guidance. *P. Ex. 66 at Plaintiff 1580, 1611, 1666*; *D. Ex. 84, 106B, 237.* Broward's Guide is not an adopted school board policy. *T. II P. 72 L. 6-17; P. Ex. 66*

at Plaintiff 1588. Broward does not have a written bathroom policy. *T. II P. 77 L. 20-22.*

35. Broward's Guide recognizes there is a difference between biological sex and gender identity, and it also permits students to use the bathroom that matches their gender identity or a gender-neutral bathroom. *T. II P. 80 L. 12-15, P. 99-102 L. 5-25, 1-25, 1-25, 1-17; P. Ex. 66.* Ms. Kefford testified that some students did not want to use the bathroom matching their gender identity. *T. II P. 111-112, L. 23-25, 1-3.* In her words, "[e]very case is different. So it's not like a one size fits all with these cases." *T. II P. 112 L. 8-9.* Even Broward's Guide recognizes that bathroom and changing facility issues are "among the more challenging issues presented by gender identity law and policy guidelines," thereby such issues should be "resolved on a customized case-by-case basis…" *P. Ex. 66 at Plaintiff 1618.*

36. Despite being published in 2012 and shared at conferences with other local and out-of-state school districts, only nine of the 67 school districts in Florida "have taken some of the pieces" of Broward's Guide and implemented "gender communication plans to help to affirm names and other areas in support of transgender students." *T. II P. 59-60 L. 21-25, 1-5 and 65-66 L. 22-25, 1-10.*

37. The District's task force reviewed and discussed Broward's Guide but elected not to adopt it. *T. II P. 216 L. 10-16.*

38. Dr. Thomas Aberli, a principal in Jefferson County, Kentucky, testified regarding Atherton High School's local decision to adopt a school policy permitting students to use the bathroom matching their gender identity. *T. I P. 22 L. 11-16, P. 43-44 L. 23-25, 1-7; P. Ex. 147.* The local policy-making body at Atherton made the decision after it adopted a nondiscrimination statement providing protections to individuals based on gender identity. *T. I P. 21 L. 21-25, P. 33, L. 10-23, P. 43-44, L. 23-25, 1-7; P. Ex. 146, 147.* Dr. Aberli conceded that one of the reasons schools provide separate bathrooms for boys and girls is to protect privacy rights. *T. I P. 65 L. 1-4.*[11]

39. Atherton's nondiscrimination statement distinguishes between sex and gender identity. *T. I P. 70 L. 6-9; P. Ex. 146.* Atherton's school space policy also distinguishes between gender identity and sex. *T. I P. 70-71 L. 10-25, 1-24; P. Ex. 147.* Similar to Broward's Guide, Atherton's school space policy fails to address the 2017 Guidance. *P. Ex. 147; D. Ex. 106B, 237.*

40. The Jefferson County School District (which includes Atherton) has not adopted a bathroom policy addressing transgender students. *T. I P. 60 L. 20-23.* Likewise, Dr. Aberli's current school (Highland Middle School) has elected not to adopt a transgender bathroom policy. *T. I P. 20 L. 4-29, P. 63 L. 14-19.*

[11] Dr. Aberli has suspended students for going into the bathroom of the opposite sex. *T. I P. 65 L. 5-7.*

Plaintiff and Nease High School

41. Plaintiff was born a female. *T. I P. 83 L. 2-4, 15-17.* His original birth certificate identified him as a female. *T. I P. 83 L. 8-10.* Plaintiff's mother knew she was having a girl before Plaintiff was born. *T. II P. 31 L. 20-25.*

42. Plaintiff has a vagina. *T. I P. 127 L. 15-24, P. 195 L.2-3.* He still experiences female-specific health issues. *C. Ex. 2 at P. 86 L. 12-15*. He has not presented any evidence to the District that he is a biological male. *T. III P. 36 L. 3-8.*

43. Plaintiff's enrollment documents identified him as a female. *T. II P. 234 L. 8-13; D. Ex. 142-145.* Plaintiff's official school records identify him as a female. *T. II P. 253 L. 6-15*

44. Plaintiff identified as a girl throughout elementary and middle school. *T. I P. 79 L. 4-10, P. 127-128 L. 25, 1-17.* He used the girls' bathroom in middle school. *T. I P. 129 L. 3-5.*

45. Plaintiff is a junior at Nease. *T. I P. 79 L. 2-3.* He attended Nease for his freshman (2015-2016) and sophomore years (2016-2017). *T. I P. 79 L. 2-3.* There are 2,450 students at Nease. *T. III P. 132 L. 8-9.*

46. Plaintiff began having issues with anxiety and depression in sixth or seventh grade. *T. I P. 130 L. 6-16, P. 215-216 L. 24-25, 1-5.* He attended therapy and took prescribed medication to treat his mental health conditions beginning in February of 2015. *T. I P. 90-92.*

47. [redacted]. That same month, Plaintiff felt he was a male after watching an episode of The Ellen Show featuring a transgender male. *T. I P. 103-104, L. 2-25, 1-19.* He returned to school after the District implemented extra precautions. *D. Ex. 7.*

48. During the summer of 2015, Plaintiff started referring to himself using male pronouns and used male-segregated public bathrooms. *T. I P. 96 L. 16-25.* He announced on social media that he was a transgender boy. *T. I P. 149 L. 12-15.* He notified Nease during the summer that he would be presenting as a male when he began his freshman year. *T. I P. 112 L. 9-15.* Plaintiff was never told he could use the boys' bathroom. *T. I P. 155 L. 3-5.* Likewise, Plaintiff's mother does not recall discussing bathrooms or locker rooms with anyone at Nease prior to the beginning of the school year. *T. I P. 252-253 L. 20-25, 1.*

49. Aside from bathroom use and official school records, Nease staff have treated plaintiff as a boy. *T. I P. 170 L. 22-25.*

50. Plaintiff claims he used the boys' bathrooms at Nease from August through September of 2015. *T. I P. 112-114, L. 22-25, 1-20.* This practice ended in September 2015 after a student or students complained to Nease administrators, and District staff met with Plaintiff and instructed him he could use gender-neutral or girls'

bathrooms but not the boys' bathrooms. *T. I P. 114-115 L. 10-25, 1-15. P. 117 L. 12-25; T. II P. 34 L. 14-24; D. Ex. 34.*

51. On October 9, 2015, Plaintiff and his mother met with then-Nease Principal Kyle Dresback and District staff Holly Arkin (social worker), Ms. Smith, and Christy McKendrick. *T. I P. 159-160, 254 L. 17-25, 1-1, 17-11; T. II P. 37-38 L. 21-25, 1-8.* Plaintiff was aware that the District's policy prohibited him from using the boys' bathroom. *T. I P. 160 L. 7-12; T. II P. 38 L. 12-17.* Ms. Smith explained it was a "district-level rule" that was based on the District's long-standing, unwritten policy. *T. I P. 255 L. 7-13; T. II P. 185 L. 14-17.* Ms. Smith also showed Plaintiff and his mother the Best Practices. *T. II P. 187-188 L. 15-25, 1-10.*

52. On November 23, 2015, Plaintiff's mother met with Ms. Mittelstadt and Brennan Asplen, the District's Deputy Superintendent for Academic and Student Services to discuss the District's policy. *T. I P. 256 L. 3-16; T. II P. 38 L. 18-21.* Ms. Mittelstadt explained the District's privacy concerns following the meeting. *T. II P. 251 L. 6-14.* Mr. Asplen did not say he was concerned about a transgender girl waiving her penis around in a bathroom. *T. II P. 251 L. 17-25.*

53. Plaintiff filed a complaint with DOE's Office of Civil Rights ("OCR") in November of 2015. *T. I P. 259-260, 16-25, 1-25.* On March 30, 2016, the District filed its response to Plaintiff's complaint, asserting its bathroom policies complied with Title

IX. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.* School Board members received copies of the District's response. *T. III P. 74-75 L. 16-25, 1-12; D. Ex. 40.*

54. Plaintiff's mother received a copy of the Best Practices in March of 2016 but never shared or discussed them with Plaintiff. *T. I P. 164 L. 16-25, P. 261-262 L. 16-25, 1-14; D. Ex. 14.* Ms. Mittelstadt also met with Plaintiff and his mother at the end of the 2015-2016 school year to see how he was doing, but there was no discussion regarding bathroom use. *T. II P. 252 L. 2-20.*

55. In June of 2016, Plaintiff started testosterone therapy, and he had. *T. I P.* a double mastectomy in May of 2017. *T. I P. 99-101, 105 L. 7-11.*

56. Plaintiff took steps to change his Florida driver's license and his birth certificate, both of which now identify him as a male. *T. I P. 109 L. 9-14, T. I P. 110 L. 10-20.*

57. Plaintiff has used the gender-neutral bathrooms at Nease since September of 2015. *T. I P. 118 L. 6-9.*[12] Plaintiff only uses the bathroom during class, which is typical of other students. *T. I P. 172 L. 8-10; P. 179 L. 5-10.* With respect to the current school year, the following is approximately how long it takes Plaintiff to walk to various bathrooms from each class (*T. I P. 176-178 L. 5-25, 1-25, 1-21; D. Ex. 133)*:

[12] During the 2016-2017 school year, Plaintiff was only tardy to class three times, including twice for first period. *D. Ex. 41.*

Class	Walking Distance
1st	*Rarely ever uses the bathroom
2nd	2:06 for gender-neutral bathroom 0:39 for boys' bathroom
3rd	0:48-0:49 for gender-neutral bathroom 0:12 for boys' bathrooms
4th	2:53 for gender-neutral bathroom 0:44 for boys' bathrooms
5th	*Almost never uses the bathroom
6th	0:08-0:09 (bathroom is in classroom)
7th	0:32-0:34 for gender-neutral bathroom 0:33 for boys' bathroom

Nease Site Visit and Description of Bathrooms/Locker Rooms/Showers

58. Nease has five sets of gang-style, sex-segregated bathrooms on campus. *T. III P. 131 L. 16-19.* There are two stalls in each boy's bathroom for a total of 10 on campus. *T. III P. 132-133 L. 1-25, 1-4.* There are 11 single-stall, gender-neutral bathrooms located on the first floor of Nease. *T. III P. 133-134 L. 5-25, 1-21.*

59. On January 5, 2018, this Court conducted a view at Nease accompanied by counsel for each party and Nease's principal.

60. The urinals in the boys' bathrooms are not divided by partitions. There were no urinals in the girls' bathrooms. The stall doors in both the boys' and girls' bathrooms have slight gaps on the outer edges of each door making some portion of the inside of the stall visible, and the tops and bottoms of the stall doors are open.

61. The boys' and girls' locker room changing areas are open such that students are in plain view of each other-meaning students see each other change clothes. The shower in the boys' locker room is a single room within the locker room with

several shower heads. There are no dividers or curtains and male students shower in plain view of each other. There is no door between the shower room and changing area of the boys' locker room. Students in the locker room can see into the shower. The showers in the girls' locker room are different. Girls are provided individual stalls within which to shower.

62. Contrary to Plaintiff's mother's testimony, Plaintiff had access to a gender-neutral bathroom during lunch. *T. I P. 279-280 L. 15-25, 1-8.*

Medical Issues

Gender Dysphoria/Bladder and Urinary Tract issues

63. No medical providers who allegedly diagnosed Plaintiff with gender dysphoria testified at trial.[13] Plaintiff's counsel conceded at trial that whether Plaintiff has gender dysphoria is irrelevant in determining whether the District's policy is constitutional. *T. I P. 244 L. 1-11.*

64. In February or March of 2017, unbeknownst to Dr. Adkins, Plaintiff professed publicly on YouTube that he does not have "dysphoria." *T. I P. 197-198 L. 24-25, 1-17; D. Ex. 238; C. Ex. 2 at P. 64 L. 10-14.*

65. Plaintiff has never disclosed to anyone at the District or been diagnosed with urinary or bladder problems. *T. P. 179 L. 11-14; C. Ex. 68 at P. 68 L. 10-20.*

[13] See also *T. I P. 240-251* (discussion of Defendant's position with respect to inadmissibility and relevance of the alleged gender dysphoria diagnosis).

Dr. Adkins and Dr. Ehrensaft

66. Plaintiff did not tender Dr. Adkins as an expert in any particular field during her videotaped trial deposition on December 6, 2017. *C. Ex. 1, 2.*[14] Dr. Adkins has no experience working in a K-12 public school setting. *C. Ex. 2 at P. 152 L. 6-18.*

67. Plaintiff has seen Dr. Adkins three times for testosterone treatments for a combined total of 75 minutes. *T. I P. 166, 169 L. 7-14, 3-13.*

68. Dr. Adkins did not diagnose Plaintiff with gender dysphoria or any other psychological or psychiatric disorder. *C. Ex. 2 at P. 16 L. 6-7, P. 62 L. 18-22.* She did not review Plaintiff's therapy records, including records from the individual who allegedly diagnosed him with gender dysphoria (Dr. Adkins did not even know the name of the therapist). *C. Ex. 2 at P. 76-77 L. 8-25, 1-10.* She likewise did not know whether her social worker contacted Plaintiff's therapist who allegedly diagnosed him with gender dysphoria. *C. Ex. 2 at P. 81 L. 18-23.* She did not review Plaintiff's or his mother's deposition transcripts. *C. Ex. 2 at P. 122 L. 22-24.* She did not review records regarding Plaintiff's mother's concerns about Plaintiff in August of 2016. *C. Ex. 2 at P. 112-122; D. Ex. 20, 255.*[15]

[14] In addition to the arguments raised in Defendant's pending Motion to Exclude Expert Testimony of Deanna Adkins, M.D., and Diane Ehrensaft, Ph. D. (Daubert Motion)(Doc. 129), Defendant would refer the Court to the additional grounds stated during trial. *T. II P. 24-30; T. III P. 159-166.*

[15] Plaintiff's mother forgot during her deposition that she prepared the document but recalled sometime later that she prepared it. *C. Ex. 5 at P. 232-235, 249-251.*

69. Dr. Adkins was unable to point to any methodology relied upon by the Pediatric Endocrine Society when it concluded that "no adverse consequences have occurred when schools have allowed transgender students to use the restroom that is consistent with their gender identity." *C. Ex. 2 at P. 137 L. 4-23; P. Ex. 47.* The statement from the Pediatric Endocrine Society is not in a peer-reviewed journal. *C. Ex. 2 at P. 137 L. 21-23.* It is not a study. *C. Ex. 2 at P. 139 L. 7-16.*

70. With respect to the term "sex," clinical practice guidelines from the Endocrine Society introduced into evidence by Plaintiff and relied upon/deemed authoritative by Dr. Adkins define "sex" as "…attributes that characterize biological maleness or femaleness. The best known attributes include the sex-determining genes, the sex chromosomes, the H-T antigen, the gonads, sex hormones, internal and external genitalia, and secondary sex characteristics." *C. Ex. 2 at P. 24 L. 6-18. P. Ex. 30 at Plaintiff 1245.* This is separate and distinct from "gender identity," which is an internal sense of gender. *P. Ex. 30 at Plaintiff 1245.* Dr. Adkins believes Plaintiff's "sex" is male which is in direct conflict with the definition of "sex" as set forth in the clinical practice guidelines from the Endocrine Society. *T. I P. 127 L. 15-24, P. 195 L.2-3; C. Ex. 2 P. 49 L. 14-17, P. 86 L. 12-15; P. Ex. 30 at Plaintiff 1245.*

71. Dr. Adkins also testified that the typical method to determine sex is through a physical exam at birth. *C. Ex. 2 at P. 39-40 L. 22-25, 1-18.*

72. Plaintiff, as part of this litigation and through the assistance of his legal team, met privately with Dr. Diane Ehrensaft three times over the internet for a combined total of three hours. *T. I P. 180-181 L. 8-25, 1-12.* Dr. Ehrensaft spent more time talking to Plaintiff's lawyers in preparation for her deposition than she did talking to Plaintiff. *C. Ex. 5 at P. 84 L. 8-21.* Dr. Ehrensaft is not licensed in Florida. *C. Ex. 3 at P. 45-46 L. 23-25, 1.* She has never taught, served as an administrator, or been responsible for implementing policies in a public school. *C. Ex. 5 at P. 67-68 L. 17-25, 1-6.* Dr. Ehrensaft directed the conversation with Plaintiff. *T. I P. 181-182 L. 24-25, 1.* She did not speak to Plaintiff's parents. *C. Ex. 3 at P. 49 L. 7-10.*

73. Plaintiff told Dr. Ehrensaft that it took him 10-20 minutes to walk to the bathroom, use it, and walk back to class. *C. Ex. 5 at P. 175 L. 5-14.*[16]

74. Dr. Ehrensaft's opinions in her July 14, 2017, Declaration are based solely on the Complaint and the Declarations of Plaintiff and his mother (neither of which is admitted as evidence). *C. Ex. 3 at ¶¶17-18.*

75. Dr. Ehrensaft did not conduct any diagnostic formulations of Plaintiff. *C. Ex. 3 at P. 49-50 L. 21-25, 1-6.* She did not evaluate Plaintiff or his self-reported levels of stress. *C. Ex. 3 at P. 55-56 L. 20-25, 1-13, P. 58 L. 1-15.* She did not obtain enough data to offer an evaluation or an opinion as to Plaintiff's mental status. *C. Ex. 3 at P. 56 L. 14-2; C. Ex. 5 at P. 165-166 L. 25, 1-18.2.* It would be unethical for her to testify

[16] This is a gross exaggeration when comparing the times reflected in ¶63.

about clinical impressions; instead, she can only testify to her clinical observations. *C. Ex. 3 at P. 57 L. 5-16.* Despite her admitted limitation, Dr. Ehrensaft testified at deposition that she could have used the word "observe" instead of "assess" when referring to her impression of whether Plaintiff was traumatized as stated in her expert report. *C. Ex. 5 at P. 167-168 L. 19-25, 1-14.*

76. Dr. Ehrensaft did not recommend therapy. *C. Ex. 3 at P. 50 L. 8-11.* She did not review Plaintiff's educational records or deposition. *C. Ex. 5 at P. 36 L. 9-18; P. 64-65 L. 6-25, 1, P. 146 L. 1-16.* She did not review all of Plaintiff's medical or psychological records, including the concerns expressed by Plaintiff's mother in August of 2016. *D. Ex. 20, 255.*

77. Dr. Ehrensaft testified that there are no studies with a published error rate that focus on the use of public school bathrooms as part of a treatment plan. *C. Ex. 5 at P. 128-130.* She also acknowledged that there have been controversies about the usefulness, validity and reliability of the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition: DSM-5. *C. Ex. 5 at P. 143 L. 2-12.*

78. Dr. Ehrensaft admitted that there are controversies about whether gender identity is an immutable characteristic. *C. Ex. 5 at P. 144 L. 12-25.*

79. Dr. Ehrensaft's description of a person's "sex" also conflicts with the definition of "sex" as set forth in the clinical practice guidelines from the Endocrine Society. *C. Ex. 3 at ¶20; P. Ex. 30 at Plaintiff 1245.*

Plaintiff's Alleged Harm

80. Plaintiff attends therapy on as-needed basis, and the frequency that he seeks therapeutic intervention has decreased. *T. I P. 131 L. 14-18.* Plaintiff has not taken medication since late 2016/early 2017. *T. I P. 187-188 L. 20-25, 11-13.*

81. At the time of trial, Plaintiff was taking the most rigorous classes offered at Nease and was a member of the National Honor Society. *T. III P. 129-130 L. 24-25, 1-3; D. Ex. 42, 43.* His academic performance has not declined during the 2017-2018 school year. *T. III 130 L. 18-20.*

Conclusions of Law

A. Background

Federal district courts must exercise judicial restraint when asked to enjoin the development or implementation of a school policy in light of the long-standing recognition by the Supreme Court that a State has broad authority to protect the physical, mental, and moral well-being of its youth. See Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 72-74 (1976); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Prince v. Massachusetts, 321 U.S. 158, 170 (1944). Indeed, education is not among the federal government's enumerated powers but rather one of the powers reserved to the states and the people, absent a constitutional restriction:

> [S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning

> property for development, to name but a few—even though the Constitution's text does not authorize any government to do so.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012) (emphasis added).

Local control over public education is "deeply rooted" in American tradition; and "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." Milliken v. Bradley, 418 U.S. 717, 741-742 (1974). Judicial restraint should, therefore, characterize any federal attempt to intervene in public education. See Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Students v. U.S. Dept. of Educ., No. 16-cv-4945, 2016 WL 6134121 at *24 (N.D. Ill. Oct .18, 2016).

In the context of sex-segregated facilities, DOE specifically stated in its 2017 Guidance that school districts should play the "primary role" in "establishing educational policy." Enjoining the federal government's enforcement of the 2016 Guidance, the court in Texas v. United States, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016), observed, "the Constitution assigns . . . policy choices (such as bathroom use) to the appropriate elected and appointed officials" even if the issue required balancing the protection of students' rights and that of personal privacy when using school bathrooms … while ensuring that no student is unnecessarily marginalized while attending school." See also G.G. ex rel., Grimm v. Gloucester County School Bd., 822 F.3d 709, 724 (4th Cir. 2016), vacated and remanded, 137 S.Ct. 1239 (2017)(where the court decided to "leave policy formulation to the political branches.").

Further, the School Board, which stands *in loco parentis*, is directly responsible for the health, safety, and welfare of St. Johns County children who attend its schools. Morse v. Frederick, 551 U.S. 393, 416 (2007) (Thomas, J. concurring). In exercising that responsibility, the School Board must establish policies and practices that protect the privacy rights of the children in its charge, as prescribed by the United States and Florida Constitutions. The policy and practice at issue here – segregating bathrooms (and locker rooms) on the basis of biological sex – protect those privacy interests and comply with Title IX and the Equal Protection Clause.

B. Title IX

To succeed on his Title IX claim, Plaintiff must prove that (1) he was excluded from participation in, denied benefits of, or was subjected to discrimination in an educational program; (2) the exclusion was on the basis of sex; and (3) the Defendant receives federal financial assistance.[17] Milward v. Shaheen, No. 6:15-cv-785-Orl- 31, 2017 WL 3336471 at *6 (M.D. Fla. Aug. 4, 2017), reconsidered on other grounds, 2017 WL 3662432 (M.D. Fla. Aug. 24, 2017).

Initially, the Court notes that several cases which held that separating bathrooms based on biological sex violates Title IX relied on and gave deference to the obsolete 2015 and 2016 Guidances. See Students; Board of Educ. of Highland Local School Dist. v. U.S. Dept. of Edu., 208 F.Supp.3d 850 (S.D. Ohio 2016); Carcaño v. McCrory,

[17] There is no dispute that Defendant receives federal financial assistance.

203 F. Supp. 3d 615 (M.D. N.C. 2016); G.G. As such, their holdings are inconsequential to the Court's analysis under Title IX.

This Court's responsibility is to give meaning to the phrase "on the basis of sex" as used in Title IX and its implementing regulations. Plaintiff claims the term "sex" includes gender identity while the School Board asserts the term means biological sex. The fundamentals of statutory interpretation easily answer this question. In the end, the term is not ambiguous, and should be given its plain and ordinary meaning. BEDROC Ltd., LLC v. United States, 541 U.S. 176, 183 (2004)("[I]nquiry begins with a statutory text and ends there as well if the text is unambiguous.").

"Ordinarily, a word's usage accords with its dictionary definition," Yates v. United States, 135 S. Ct. 1074, 1082 (2015). In 1972, when Congress enacted Title IX, "sex" was universally understood as referring to the biological or physiological characteristics that constitute a person's sex, and not an internal identification with one gender or the other.[18] As used in Title IX, "sex" unambiguously means the sex that an individual possesses by virtue of being born with certain immutable, physiological and

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

biological characteristics such as an alignment of chromosomes and the possession of reproductive organs.

Independent of the definition of the key term "sex," additional language in Title IX confirms that it was not intended as an absolute mandate barring all distinctions between men and women, including distinctions tied to biological differences or required by common decency. To the contrary, Title IX includes an explicit statutory exemption to protect privacy in intimate settings: "… nothing contained herein shall be construed to prohibit any educational institution… from maintaining separate living facilities for the different sexes." 20 U.S.C. §1686. Shortly after Title IX's passage, DOE elaborated in an implementing regulation that an educational institution "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. §106.33.

The legislative history of Title IX provides further support of Congress' intent. On the heels of the Equal Rights Amendment being defeated, Title IX's sponsor, Senator Birch Bayh, stated on the Senate floor that the law was meant to serve as a "guarante[e] of equal opportunity in education for men and women," 118 Cong. Rec. 5,808 (1972), and was not "requiring integration of dorms between sexes," 117 Cong. Rec. 30,407 (1971). The intent of Title IX was not to desegregate "the men's locker

room," but rather to "provide equal access for women and men students to the educational process and the extracurricular activities in a school…" Id.[19]

The meaning of "sex" in Title IX is further cemented by the manner in which Congress has employed it in legislation enacted both before and after 1972. Never before has it been suggested that Congress meant the word "sex" to refer to something other than anatomy-based distinctions between males and females; in most instances, the context makes clear that an anatomy-based understanding was intended. See 10 U.S.C. §4320 (requiring that the housing provided to army recruits during basic training be limited "to drill sergeants and other training personnel who are the same sex as the recruits housed in that living area"); 19 U.S.C. §1582 (authorizing customs officials "to employ female inspectors for the examination and search of persons of their own sex").

In contrast, where Congress has affirmatively decided to proscribe discrimination based on gender identity, it has done so clearly and expressly, and independently of "sex" or "gender." In 2009, for example, Congress passed "hate crime" legislation that prohibits inflicting "bodily injury to any person because of [his or her] actual or perceived religion, national origin, *gender*, sexual orientation, *gender*

[19] Although the congressional record reflects the concern that lack of women's living facilities was used to deny educational opportunities to women, 118 Cong. Rec. 5, 811 (1972), that concern was addressed by the statutory exemption permitting single-sex "living facilities," and the regulatory requirement that such facilities be "comparable," not that single-sex intimate facilities would be prohibited. In other words, Title IX and its implementing regulations permitted "differential treatment by sex" in "instances where personal privacy must be preserved." 118 Cong. Rec. 5,807 (1972).

identity, or disability." 18 U.S.C. §249(a)(2)(emphasis added). In 2013, Congress amended portions of the Violence Against Women Act to encompass discrimination "on the basis of actual or perceived race, color, religion, national origin, *sex*, *gender identity*…sexual orientation, or disability." 34 U.S.C. §12291(b)(13)(A)(emphasis added). These enactments make plain that Congress recognizes and differentiates between "sex," "gender," and "gender identity." See also, 20 U.S.C § 1092(f)(1)(F)(ii).[20]

The support for grafting gender identity onto the definition of "sex" for Title IX purposes appears to originate with two now-withdrawn letters issued by DOE. Without any semblance of rulemaking, DOE unilaterally proclaimed in the 2016 Guidance that schools "must allow transgender students access to [bathrooms and locker rooms] consistent with their gender identity" or risk losing federal funding. On August 21, 2016, a federal district court enjoined enforcement of that guidance and held, "[I]t cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in §106.33 based on the biological differences between male and female students." Texas, 201 F. Supp. 3d at 833. DOE's edict was short lived. The 2017 Guidance repudiated DOE's gender identity interpretation of "sex" and expressly withdrew the statements of guidance reflected in the 2015 and 2016 Guidances.

[20] Conversely, Congress has rejected attempts to amend Title IX (the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015)) and Title VII (the Equality Act, S. 1858 (114th Cong. 2015) and S. 106 (115th Cong. 2016)) to include gender identity as a prohibited basis of discrimination.

Further retreating from the theory that "sex" includes gender identity, on October 4, 2017, the Attorney General issued a Memorandum, which explicitly rejected interpreting "sex" to mean gender identity in the analogous Title VII context:

> Title VII expressly prohibits discrimination "because of … sex" and several other protected traits, but it does not refer to gender identity. "Sex" is ordinarily defined to mean biologically male or female. See, e.g., Etsitty v. Utah Transit Auth., 502 F. 3d 1215, 1221-22 (10th Cir. 2007); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339,362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, "gender identity" discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination based on "sex" or "gender." See, e.g., 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A) … Although Title VII bars "sex stereotypes" insofar as that particular sort of "sex-based consideration[ ]" causes "disparate treatment of men and women," Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 251 (1989) (plurality op.), Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex, see, e.g., Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc).

Without the support of DOE or DOJ and the deference that was previously afforded, Plaintiff's argument that "sex" under Title IX means gender identity collapses. As the better-reasoned decisions recognized, there is nothing ambiguous about the word "sex." See Johnston v. University of Pittsburgh, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015)("On a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex"); Texas, 201 F. Supp. 3d at 832-33; Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 688 (N.D. Tex.

2016) ("[T]he text, structure, and purpose reveal that the definition of sex in Title IX's prohibition of sex discrimination unambiguously prevented discrimination on the basis of the biological differences between males and females.").

Notwithstanding DOE's and DOJ's explicit withdrawal of their 2015 and 2016 Guidances, some courts continue to incorrectly interpret Title IX as prohibiting schools from segregating bathrooms on the basis of biological sex. See Whitaker By Whitaker v. Kenosha Unified School Dist., 858 F.3d 1034, 1049 (7th Cir. 2017); A.H. by Handling v. Minersville Area School Dist., No. 3:17-CV-391, 2017 WL 5632662 at * 5 (M.D. Pa. Nov. 22, 2017).

In Whitaker, the Seventh Circuit relied heavily on decisions interpreting Title VII to conclude that sex discrimination includes discrimination against a transgender person for gender non-conformity. Whitaker, 858 F.3d at 1048. Whitaker then bootstrapped this idea and held: "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes an individual for his or her gender non-conformance, which in turn violates Title IX." Id. at 1049.

In Evancho v. Pine-Richland School Dist., 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017), the court denied an injunction requested by a student but still concluded "Title IX's prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity." In doing so, the court relied on Whitaker and cases considering the "corollary" provisions in Title VII.

In denying a motion to dismiss, the court in Minersville rejected a school district's argument that the withdrawal of the 2015 and 2016 Guidances foreclosed a claim for discrimination based on transgender status under Title IX. 2017 WL 5632662 at *4, 6. Rather, the court found that the 2015 and 2016 Guidances could no longer form a basis of a Title IX claim. Id. Still, relying on Whitaker and Evancho, the court allowed plaintiff's claim under Title IX to proceed.

Unquestionably, Title VII prohibits employers from discriminating against employees for their failure to conform to sex stereotypes. See Evans v. Georgia Regional Hospital, 850 F.3d 1248, 1254-55 (11th Cir. 2017); Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011)(citing cases). Whitaker, Minersville, and Evancho all rely on Title VII gender nonconformity cases to create a violation of Title IX. Such rationale effectively abolishes the grant of authority to school districts under §106.33 to provide sex-segregated bathrooms. Plaintiff is excluded from the boys' bathroom solely because of his sex – not because he fails to conform to any particular stereotype of gender expectation. Simply stated, whether Plaintiff "acts like" a girl or boy has no bearing on the application of the School Board's policy.

There is no binding legal precedent to support Plaintiff's position that the term "sex" as used in Title IX and §106.33 includes "… gender nonconformity, transgender

status, gender expression, and gender transition." [Doc. 1 at ¶78]. Plaintiff's Title IX claim must fail, and judgment shall be entered in the Defendant's favor.[21]

C. Equal Protection

1. The School Board's Policy is Not Invidious Discrimination

The guarantee of equal protection does not exist in a vacuum but rather "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631 (1996). Indeed, the District's policy denying Plaintiff access to his bathroom of choice only denies him equal protection if it reflects "invidious" discrimination. Personnel Adm'r of Mass. v Feeney, 442 U.S. 256, 274 (1979). "[P]urposeful discrimination is 'the condition that offends the Constitution.'" Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 16 (1971).

While willing to strike down classifications premised on "administrative convenience," Reed v. Reed, 404 U.S. 71, 77 (1971), "archaic and overbroad" generalizations, Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), or "old notions,"

[21] Plaintiff amended the sex marker of his birth certificate and driver's license. Apparently, the Florida Department of Highway Safety and Motor Vehicles relied on an inter-office manual which cites to no rule or authority. [Doc. 147-1]. Rule 64V-1.003, Florida Administrative Code, allows limited amendments to a birth certificate if certain conditions are met. However, the Florida Department of Health disregarded its own rule by amending Plaintiff's Birth Certificate. See Rule 64V-1.003(2)(requiring that any supporting documents submitted to change the sex of a child under the age of 18 must be established within seven years of the date of birth); *T. I P. 96 L. 16-25*.

Stanton v. Stanton, 421 U.S. 7, 14 (1975), courts have historically been willing to take into account actual differences between the sexes, including physical ones. "Physical differences between men and women … are enduring: '[T]he two sexes are not fungible.'" United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting United States v. Ballard, 329 U.S. 187, 193 (1946). The Supreme Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981)(citations omitted). It is hard to conceive of a circumstance which could expose these physical differences more explicitly than a high school bathroom or locker room.

Plaintiff has been denied access to the boys' bathroom as a result of the District's long-standing policy which is purely based on the "physical differences between men and women," Virginia, 518 U.S. at 533, and the grant of authority under §106.33.[22] Undeniably, a school district does not engage in invidious discrimination when it follows an implementing regulation promulgated by DOE.

Plaintiff's claim that the School Board engaged in invidious discrimination by barring him from using the boys' bathroom collides with and runs afoul of Title IX and §106.33. Defendant did not engage in purposeful, invidious discrimination when it merely followed Title IX. While the practice denies Plaintiff access to the bathroom of

[22] Plaintiff has not challenged the validity of §106.33 or the District's ability to provide separate bathrooms for boys and girls.

his choice, that is simply an incidental and constitutionally permissible disadvantage of the legitimate classification of students according to the long-standing and generally accepted definition of "sex." See Romer, 517 U.S. at 631; Feeney, 442 U.S. at 271-72; Nguyen v. I.N.S, 533 U.S. 53, 60-61 (2001); Johnston, 97 F. Supp. 3d at 670; Carcaño, 203 F.3d at 640, 644.

2. Plaintiff is Not Similarly Situated to Biological Male Counterparts

Plaintiff must establish that the School Board's policy treats individuals who are similarly situated in all relevant aspects differently. Bumpus v. Watts, 448 Fed. Appx. 3, 5 (11th Cir. 2011); Nordlinger v. Hahn, 505 U.S. 1, 10, (1992). Ultimately, Plaintiff cannot make this showing. Plaintiff seeks to use the boys' bathroom at Nease; but Plaintiff is not a biological boy. Instead the District treats Plaintiff the same as all other biological females and therefore, does not violate Plaintiff's equal protection rights.

3. Intermediate Scrutiny Applies to Plaintiff's Claim

Of the three tests[23] used for analyzing Equal Protection claims, intermediate scrutiny applies to the School Board's policy. That is the scrutiny applied to

[23] Strict scrutiny does not apply in this case. Strict scrutiny is reserved for state "classifications based on race or national origin or classifications affecting fundamental rights," Clark v. Jeter, 486 U.S. 456, 461 (1988)(citation omitted). Plaintiff cannot establish that transgender individuals are a suspect class subject to a strict scrutiny analysis. See Kirkpatrick v. Seligman & Latz, Inc., 475 F. Supp. 145, 147 (M.D. Fla. 1979), aff'd, 636 F.2d 1047 (5th Cir. 1981. Plaintiff has failed to prove that being transgender is based on an immutable characteristic. See Chapman v. A1 Transport, 229 F.3d 1012, 1036 (11th Cir. 2000) (en banc) (distinguishing between a mutable trait and an impermissible consideration that is a protected category).

classifications based on sex, including discrimination against a transgender person for gender non-conformity. Glenn, 663 F.3d at 1316-17, 1320; Chavez v. Credit Nation Auto Sales, LLC., 641 Fed. Appx. 883, (11th Cir. 2016). Accord Ryan Karnoski, et al v. Donald J. Trump, et al., No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 12 2017); Stone v. Trump, No. MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017); Doe1 v. Trump, No. 17-1597 (CKK), 2017 WL 4873042 (D.D.C. Oct. 30, 2017).[24] The District's policy here is subject to intermediate scrutiny because, in spite of being expressly authorized under §106.33, it makes distinctions based on sex.

Under this standard, the District must prove that its justification for denying Plaintiff use of the boys' bathroom is, "at minimum, substantially related to the furtherance of an important government interest." Nicholson v. Georgia Dept. of Human Res. (DHR), 918 F.2d 145, 148 (11th Cir. 1990). 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.

4. Protecting the Privacy of School Children in Sex-Segregated Bathrooms is an Important Government Interest

The District's policy of segregating bathrooms on the basis of sex promotes the "important government interest" of "the protection of [students'] bodily privacy" by "excluding members of the opposite sex from places in which individuals are likely to

[24] Karnoski, Stone, and Doe1 all challenged a policy which specifically targeted transgender individuals, making those cases factually distinguishable from this case.

engage in intimate bodily functions." Carcaño, 203 F. Supp. 3d at 641. As Judge Niemeyer explained in his G.G. dissent:

> Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females … Title IX's allowance of the separation, based on sex, of living facilities, restrooms, locker rooms and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes.

822 F.3d at 734-735 (emphasis added).

In the school setting, courts nationwide have recognized that separating males and females serves the interest of protecting bodily privacy and avoiding the unwanted exposure of one's body parts. See Virginia, 518 U.S. at 533, 550 n. 19 (recognizing that the two sexes "are not fungible" because of the "enduring" and manifest "[p]hysical differences between men and women," and that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from members of the other sex."); Dawson v. Clayton Cty. Sch. Dist., 830 F.3d 1306, 1313–14 (11th Cir. 2016); Brannum v. Overton County School Bd., 516 F.3d 489, 499 (6th Cir. 2008) ("… teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty…"); Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) (recognizing "society's undisputed approval of separate public restrooms for men and women based on privacy concerns [and observing that] [t]he need for privacy justifies separation and

the differences between the genders demand a facility for each gender that is different."); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); Johnston, 97 F. Supp. 3d at 668, 678 (recognizing university's interest "in providing its students with a safe and comfortable environment consistent with society's long-held tradition of performing [personal bodily] functions in sex-segregated spaces based on biological or birth sex" and holding that "the University's policy of separating bathrooms and locker rooms on the basis of birth sex is permissible under Title IX and the United States Constitution."); Carcaño, 203 F. Supp. 3d at 641 ("All parties agree that bodily privacy qualifies as an important state interest and that sex-segregated facilities are substantially related to that interest.").

Females "using a women's restroom expect [ ] a certain degree of privacy from…members of the opposite sex." State v. Lawson, 340 P.3d 979, 982 (Wash. Ct. App. 2014). Likewise, teenagers are "embarrass[ed]…when a member of the opposite sex intrudes upon them in the lavatory." St. Johns Home for Children v. W. Va. Human Rights Comm'n, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." City of Phila. v. Pa. Human Relations Comm'n, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy interests are why a girls' locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." People v. Grunau, No. H015871, 2009 WL5149857, at *3 (Cal. Ct. App. Dec. 29, 2009). As the Kentucky Supreme Court observed, traditionally, there is no "mixing of the sexes" in school locker rooms and bathrooms. Hendricks v. Commw., 865 S.W.2d 332, 336 (Ky. 1993); McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty., 384 N.E.2d 540, 542 (Ill. App. Ct. 1978)(refusing to place male teacher as overseer of school girls' locker room).

The express and explicit right to privacy set forth in Article I, Section 23 of the Florida Constitution requires the Defendant to protect its students' rights to privacy, including but not limited to bodily privacy, independent of their rights under the United States Constitution. See Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017) (finding that under the Florida Constitution the right to privacy is a fundamental right); In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (holding that the Florida Constitution's right to privacy embraces more privacy interests and extends more protection than the Federal Constitution). This fundamental right guaranteed by the Florida Constitution undercuts the precedent Plaintiff cites for the proposition that the privacy rights of other students are inferior to the bathroom choice of a transgender student. Specifically, the decisions in G.G. Whitaker, Highland, Evancho, and Doe by and through Doe v. Boyertown Area School Dist., No. 17-1249, 2017 WL 3675418

(E.D. PA Aug. 25, 2017), are inapposite as none of the four State Constitutions involved in those cases – Virginia, Wisconsin, Ohio, or Pennsylvania, respectively – has an express Constitutional right to privacy.

Defendant's policy does not violate any federal laws. Unlike California, Massachusetts, or Washington D.C., there is no Florida law that prohibits discrimination on the basis of gender identity. Unlike Broward County, there is no ordinance in St. Johns County Ordinance that prohibits discrimination based on gender identity. Additionally, the Florida Constitution recognizes that individuals have a right to privacy and the State's own requirements for its school facilities segregate bathrooms on the basis of sex. See Fla. Admin. Code. R. 6A-20010 (*State Requirements for Educational Facilities*, Section 6.1, pages 90, 103)(2014).[25]

If the Court adopts Plaintiff's position and imposes it upon the District, it would be trampling the long-standing principals of federalism that allow for state and local decision-making authority. These notions directly protect state and local government's ability to make decisions that rest on the knowledge of local circumstances and help to develop a sense of shared purpose and commitment among local citizens. See Stephen Breyer, Active Liberty, 57 (Vintage Books 2006).

In light of §106.33, the abundance of case law recognizing the importance of protecting bathroom privacy and the Court's recognition of the need to respect local

[25]https://www.flrules.org/gateway/readRefFile.asp?refId=4664&filename=SREF%20for%20FAC.pdf (last visited January 30, 2018)

decision-making authority, the Court concludes that protecting the bathroom privacy of school children is an important government interest.

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

The District's policy is not only substantially related to the protection of student privacy, it directly assures the traditional and expected level of bathroom privacy by keeping biological boys out of the girls' bathroom and vice versa. Section 106.33 employs the same means to achieve the same purpose, yet its validity is not in question. Plaintiff has not explained how the practice of following §106.33 is unconstitutional when its validity has not been challenged.

There is simply "no question that the protection of bodily privacy is an important government interest, and that the State may promote that interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions." Carcaño, 203 F. Supp. 3d at 641.[26] Society has long approved the separation of bathrooms on the basis of sex to address privacy concerns. See Faulkner, 10 F.3d at 232; §106.33.

Plaintiff suggests that separating bathrooms on the basis of biological sex may be difficult to apply in rare situations, such as where a student undergoes sex change

[26] The parties in Carcaño agreed that protecting bodily privacy is an important government interest and that sex-segregated facilities are substantially related to that interest. 203 F.Supp.3d at 641. The plaintiffs in Carcaño were represented by legal counsel from Lambda Legal as is Plaintiff in this case.

surgery or, due to extensive hormone therapy, acquires the physical characteristics of the opposite sex. These hypothetical scenarios, however, are not before this Court, and in any event, intermediate scrutiny does not require that the means for achieving the important government objective must be the least intrusive possible. United States v. Staten, 666 F.3d 154, 159 (9th Cir. 2011); "[T]he fit needs to be reasonable; a perfect fit is not required." Id. at 162; Carcaño, 203 F. Supp. 3d at 640.

The Court is aware of other cases where courts have rejected the idea that separating bathrooms based on biological sex is an important governmental interest. All of these cases were decided without the benefit of a trial, and the facts upon which their decisions rest or the legal standard applicable distinguish them from the instant case.

For example, in Whitaker, the court recognized the school district's "legitimate interest in ensuring bathroom privacy rights" of students, but found that on the record before it, that privacy argument was "sheer conjecture." Whitaker, 858 F.3d at 1052. Underpinning this finding was the fact that plaintiff had used the boys' bathroom for nearly six months while at school or school-sponsored events without a single incident or complaint from another student. Id. Here, the record is quite different from that in Whitaker. First, the parties stipulated that students and parents within the District objected to bathroom use by a student which is inconsistent with the student's biological sex due to privacy, safety, and welfare concerns. (Doc. 116 at p. 22 ¶3) Second, the testimony at trial confirmed that a student complained within the first few weeks of

Plaintiff's freshman year that he was using boys' bathroom.

In Evancho, the court focused on the physical layout of the bathrooms and the lack of any evidence that the presence of the plaintiff would violate any cisgender student's privacy rights. Evancho, 237 F. Supp. 3d at 290-91. The court also had concerns that the policy implemented by the district essentially targeted three transgender students. Id. at 275-76. Here, the policy affects St. Johns County's estimated 40,000 students equally on the basis of biological sex. No evidence has been presented that Plaintiff or any other student was targeted by the School Board's policy (or Best Practices) Additionally, after examining the bathrooms at Nease, as well as the locker rooms, the Court is not persuaded that Evancho's analysis is applicable here.

In Boyertown, the court upheld a school district's policy allowing children to use a bathroom consistent with their gender identity. In doing so, the court cited to the numerous privacy protections the school installed which prevented students from involuntarily exposing their partially clothed or unclothed bodies, including single user showers, single user bathrooms, and urinal dividers. Id. at *12-13. Here, no such protections exist.

In Students, the court found that school children do not have a fundamental constitutional right to not share bathrooms or locker rooms with transgender students. Further, the court held that, because of the privacy measures the district put into place, no student was forced to expose themselves to a person of the opposite sex and thus

their privacy rights were protected. Id. at 29. Again, here there are no privacy measures.

Taking the reasoning in Evancho, Boyertown, and Students to their logical conclusion, there would be no need to separate bathrooms or locker rooms on the basis of sex. So long as the bathroom or locker room has stalls, urinal partitions and private showers, an individual's privacy would be protected regardless of the sex of the individuals within the facilities. Such an interpretation runs rough shot over the prevailing view that States may promote bodily privacy by excluding members of the opposite sex from places where individuals engage in intimate bodily functions. See Carcaño, 203 F. Supp. 3d at 641; Faulkner, 10 F.3d at 232; G.G., 822 F. 3d at 734 (Niemeyer dissenting); Virginia, 518 U.S. at 550 n. 19.

In Highland, the court rejected the school district's argument that its classification was rationally and substantially related to its privacy interest, because it was expressly permitted under §106.33. Highland, 208 F. Supp. at 876. However, the rationale for the Court's rejection of this argument on Equal Protection grounds was based on DOE's and DOJ's now-withdrawn 2016 Guidance. Id. Additionally, the court rejected the school district's privacy argument, reasoning that there was no evidence plaintiff would infringe upon the privacy rights of any other students. Id. This narrow view ignores the responsibility of schools to prevent problems – not simply to react to them. The evidence in this case overwhelmingly establishes that the School Board's policy is motivated by a desire to prevent foreseeable risks to the safety, privacy, and

welfare of students.

Accordingly, the Court finds that the School Board's policy is substantially related to protecting the bodily privacy rights of its students.

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

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

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

Unlike the schools in Whitaker and Evancho, the District's bathroom policy is long-standing and has been consistently applied. Moreover, dissimilar to Whitaker and

Evancho, the District never permitted Plaintiff to use the boys' bathroom. There is nothing about the Board's position in this case to suggest that it was an afterthought, or pretext, prompted by the threat of litigation, as it was in those cases.

D. Plaintiff Cannot Prevail on a Sex-Stereotyping Theory under Title IX or the Equal Protection Clause

In Glenn v. Brumby, the Eleventh Circuit held, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination." 663 F.3d at 1317. Brumby testified he fired Glenn because Glenn was "a man dressed as a woman and made up as a woman" which he considered "unnatural," "unsettling," and "inappropriate." Id. at 1320. As his "only one putative justification", Brumby offered that women might object to or even sue over Glenn's use of the single-user restroom. Id. at 1321. Applying intermediate scrutiny[27], the court tersely noted Brumby's reason failed to qualify as a governmental purpose, much less an "important governmental purpose." Id.

By using the phrase "because of" Glenn explicitly requires conduct based on gender-nonconformity to constitute sex discrimination. Here, there is no evidence the School Board is discriminating on that basis. In fact, the evidence overwhelmingly counters this assertion. Instead of penalizing, the School Board's Best Practices allow

[27] Importantly, Brumby defended the case under a rational basis test. At the lower level, he based "his entire defense" on Glenn not being a member of a protected class." Id. quoting Glenn, 724 F. Supp. 2d at 1302. Indeed, Brumby testified the possibility of a lawsuit by a co-worker was "unlikely" if Glenn was retained

and encourage transgender students to dress as they want, be called the name and pronoun of their choice, and, in all respects other than bathroom and locker room use, be treated *consistent* with their gender identity.

As in other bathroom cases, Plaintiff relies heavily on Glenn positing, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." Id. at 1316.[28] This is pure dicta, however.[29] This case is about Plaintiff identifying as transgender[30], not the Defendant "defining" him as such. While that definition may have been applicable in light of Brumby's specific testimony, it does not apply here.

Glenn, for the most part, extended Price Waterhouse, 490 U.S. 228 (1989). There, Hopkins sued after her employer denied her partnership because her demeanor was insufficiently feminine. The Court recognized in the analogous Title VII context that stereotyped remarks could be used as evidence an employer made a decision based on gender because a woman failed to dress or act like the employer thought a woman

[28] The court did not cite to a decision from any court for this proposition, instead citing to two law review articles including Taylor Finn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L.Rev. 392 (2001).

[29] See Black's Law Dictionary (9th ed. 2009)(defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)"), as cited in Hitchcock v. Secretary, Florida Dept. of Corrections, 745 F.3d 476, 490 (11th Cir. 2014).

[30] Plaintiff specifically alleged, "Transgender persons are people whose gender identity diverges from the sex they were assigned at birth." (Doc. 60 at ¶21).

should. Id. at 235, 250-51.

Employers in both Price Waterhouse and Glenn took adverse employment actions because their employees did not act or dress in conformance with their gender. Here, the School Board's policy is based solely on biological sex - an objective standard applicable to all students regardless of whether they conform to their gender. Courts have been clear that biological sex and the physiological differences between men and women are facts, not stereotypes, and cannot serve as the basis of sex stereotype discrimination. See Nguyen, 533 U.S. at 60-66; Bauer v. Lynda, 812 F.3d 340 (4th Cir. 2016). "Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." Etsitty, 502 F.3d 1215, 1224 (10th Cir. 2007).

In Nguyen, the Supreme Court upheld an INS regulation that treated the children of non-citizen mothers born abroad out of wedlock differently than children of non-citizen fathers. The Court rejected the argument the policy was based on stereotypes about the roles of mothers and fathers in child-rearing, stating, "the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis." Id. The Court concluded:

> To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class.

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

Were the Court to find that separating bathrooms, locker rooms, or other areas of privacy on the basis of sex is sex stereotyping which violates the Equal Protection Clause, it would be required to render portions of Title IX and §106.33 unconstitutional. The Court is unwilling to do so here. Accordingly, the District's policy does not violate the Equal Protection Clause, and judgment must entered in its favor.

Accordingly, it is hereby **ORDERED** that the Clerk of Court shall enter judgment in favor of Defendant and close the file.

DONE and **ORDERED** in Jacksonville, Florida this ___ day of _____, 2018.

_____
TIMOTHY J. CORRIGAN
United States District Judge