

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Case No. 17-3113

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE;
MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN
JONES and JANE JONES; and MACY ROE,
Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his
official capacity as Principal*; DR. E. WAYNE FOLEY, in his official capacity as
Assistant Principal*; DAVID KREM, Acting Superintendent*,
Appellees

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,
Appellee-Intervenor

PETITION FOR REHEARING EN BANC

APPEAL FROM THE ORDER DATED AUGUST 25TH, 2017 OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA AT DOCKET NO. 5:17-CV-01249-EGS DENYING
APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

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**The District Court dismissed the individual Defendants/Appellees from the case on November 7, 2017, pursuant to agreement of the parties.*

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INTRODUCTION

Privacy matters in bathrooms, locker rooms, and showers because of the anatomical differences between men and women. Its importance is amplified in the context of minor children at school: Joel Doe saw an undressed girl in his locker room.¹ He was told by his principal to make it natural.² Mary Smith encountered a boy in her restroom, with the approval of her school.³ Yet the panel decision rejected the nation's longstanding protections for privacy and against sexual harassment, creating an issue of exceptional importance.

Six students sought a preliminary injunction after the Boyertown Area School District instituted a policy allowing male students to fully undress in and use female privacy facilities when they identify as girls, and vice versa. In affirming the denial of injunctive relief, the panel rejected the significance of bodily privacy from the opposite sex. This rejects the Supreme Court's, Third Circuit's, and Congress's definition of sex, which is grounded in the bodily differences between men and women. Intermingling the sexes in high school locker rooms and restrooms merits a preliminary injunction, just as the Supreme

¹ J.A. at 36.

² *Id.* at 38.

³ *Id.* at 56, 58.

Court issued a stay allowing sex-based privacy facilities to continue in *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).

STATEMENT OF COUNSEL

Pursuant to Local App. Rule 35.1, undersigned counsel expresses the belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States. Consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. The panel decision is contrary to the following decisions of this Court and the Supreme Court:

- *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016) (granting stay to maintain sex-based privacy facilities during appeal).
- *Nguyen v. INS*, 533 U.S. 53, 68, 73 (2001) (rejecting plaintiff's argument that childbirth is merely a feminine stereotype rather than an operative biological fact contrasting the sexes).
- *U.S. v. Virginia*, 518 U.S. 515, 533, 550 n.19 (1996) (recognizing the "enduring" "[p]hysical differences between men and women," which make the two sexes distinct and require separate privacy facilities).
- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that sex stereotypes may be indirect evidence of disparate treatment of the sexes).
- *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.").

- *Doe v. Luzerne Cty.*, 660 F.3d 169 (3d Cir. 2011) (finding a Fourteenth Amendment fundamental right to bodily privacy from persons of the opposite sex viewing our partially clothed bodies).

This case involves questions of exceptional importance because allowing boys into areas where girls are undressed or attending to sensitive personal hygiene, or vice versa, eviscerates bodily privacy, violates students’ constitutional rights, and subjects them to sexual harassment.

ARGUMENT

En banc review is necessary because the panel decision disregards precedent regarding sex, a proper reading of Title IX, precedent regarding bodily privacy, and exceptionally important policy implications.

I. The panel misconstrued the nature of sex.

Sex is not the same as gender identity. Conflating these terms confuses the analysis of sexual harassment under Title IX and of the right to bodily privacy. It is the presence of the opposite sex in privacy facilities—restrooms, locker rooms, and showers—that constitutes sexual harassment and that violates privacy. While the panel suggested that the phrase “opposite sex” was confusing,⁴ this unambiguous terminology is the norm in sexual harassment and bodily privacy cases.

⁴ Oral Argument Audio at 04:23.

Appellees' expert, Dr. Scott Leibowitz, explained that "sex" is "the anatomical and physiological processes that lead to or denote male or female"⁵ while "[g]ender identity is one's subjective, deep-core conviction sense of self as a particular gender. In most situations, male or female, but maybe some aspect of both, or in between."⁶ Sex and gender identity necessarily stand in contradistinction since "transgender" does not make sense apart from a person's subjective beliefs about their gender differing from their sex.

The panel, in rejecting "sex"⁷ and substituting gender identity, discards the Supreme Court's decades-old recognition that sex is based on biological differences.⁸ "Sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). That biological differences define sex rather than exist as mere sex stereotypes is discussed at length in *Nguyen v. INS*, 533 U.S. 53 (2001), involving an equal protection challenge to the statute governing the acquisition of citizenship where only one parent is a citizen. Citizenship is automatically granted when the

⁵ J.A. at 70.

⁶ *Id.* at 375.

⁷ Oral Argument Audio at 04:23.

⁸ Likewise, this circuit has recognized the significance of privacy concerns, specifically from the "opposite sex." *Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011).

mother is the citizen, but additional proofs are necessary where the father is the citizen.

There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.

Id. at 68. The Court cautioned against “[m]echanistic classification of all our differences as stereotypes.” *Id.* at 73. “To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.” *Id.* at 73. Nguyen’s argument was flawed because he characterized childbirth as a mere stereotype of womanhood, rather than being inextricably tied to the fact of being female—just as the present panel ignored anatomical differences and treated them as mere stereotypes.

Likewise, when the Supreme Court opened Virginia Military Institute (VMI) to women to combat sex discrimination, it pointedly observed the need to alter facilities “to afford members of each sex privacy from the other sex.” *U.S. v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Anatomical differences were indisputably at issue. *See id.* at 533 (“[p]hysical differences between men and women,” which are “enduring,” render “the two sexes . . . not fungible.”). And this Court tracked *VMI* by sanctioning an otherwise sex-discriminatory employment policy when the

job duties include accompanying patients to a bathroom. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133-34 (3d Cir. 1996).

The U.S. Department of Education also follows *VMI*, announcing that it would not investigate complaints about lack of access to opposite-sex facilities: “Title IX prohibits discrimination on the basis of sex, not gender identity” and “separating facilities on the basis of sex is not a form of discrimination.”⁹ This aligns with Title IX and its regulations, which repeatedly reference “one sex,” “the other sex,” and “both sexes,”¹⁰ binary terms that are inconsistent with the gender identity continuum.¹¹

Despite the clear definition of sex scientifically, in caselaw, and in Title IX, this panel asserted that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) introduced a new understanding of sex, one not based on anatomy.¹² But *Price Waterhouse* only recognized that reliance on sex stereotypes may evidence sex discrimination. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 188–89 (2009)

⁹ Moriah Balingit, *Education Department no longer investigating transgender bathroom complaints*, Washington Post (February 12, 2018), available at: <https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/>, (last visited June 21, 2018).

¹⁰ *See, e.g.*, 20 U.S.C. § 1681(2) and (8); 34 C.F.R. § 106.33.

¹¹ J.A. 70-72 (discussing the nonbinary and sometimes fluid aspect to gender).

¹² Opinion at 29.

(explaining controlling opinion in the case).¹³ Conversely, it is a violation of *Price Waterhouse* to segregate restrooms and locker rooms as Boyertown has—by evaluating whether a biological girl has a sufficiently male identity to use male privacy facilities.

The panel should not have redefined sex to include gender identity contrary to the clear definition established by the Supreme Court, Congress, and the Department of Education.¹⁴

II. In conflating sex and gender identity under Title IX, the panel makes it more difficult to combat harassment.

The panel contends that there can be no sexual harassment because there is no disparate impact based on sex.¹⁵ But neither an educational institution under Title IX nor an employer under Title VII should escape liability by fostering an environment that invites sexual harassment against both sexes. Such an

¹³ The panel, on page 29, suggested that sex should be uncoupled from biology since *Oncale v. Sundowner Offshore Servs.*, states that “statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concern of our legislators by which we are governed.” 523 U.S. 75, 79 (1998). But supplanting sex with gender and thus intermingling the sexes is not “reasonably comparable” to preserving the privacy between the sexes in locker rooms and restrooms. As the Tenth Circuit said, the “[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.” *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007).

¹⁴ Moreover, with regards to Title IX, it is a legislative function to harmonize new, inconsistent categories into the law.

¹⁵ Opinion at 25-26.

environment was at issue in *Venezia v. Gottlieb Mem'l Hosp., Inc.*, 421 F.3d 468 (7th Cir. 2005), where a husband and wife both raised sexual harassment claims. *See id.* at 471-72. Mr. Venezia was subjected to naked photos and other harassment while his wife was subjected to rumors and a vulgar photograph. *See id.* at 469-70. The Seventh Circuit in distinguishing *Pasqual v. Metropolitan Life Insurance Company*, 101 F.3d 514 (7th Cir. 1996), cited by the present panel,¹⁶ sought to maintain “vicarious liability for the employer with respect to two related employees who are in different settings, reporting to different supervisors, with different co-workers.” *Venezia*, 421 F.3d. at 472.

This case is like *Venezia* in that harassment occurs by different persons. Certain students have access to restrooms and locker rooms of the opposite sex. When, for example, a male enters the girls' restroom, he does so because the facility is set aside for girls. A male student entering the girls' restroom sexually harasses the girls in that setting, just as a female entering the boys' restroom harasses boys in that setting. The school, like the *Venezia* employer, is responsible for this harassment since it was invited by the school's policy.

While the panel acknowledged that the sexual harassment need only be severe or pervasive,¹⁷ it concluded that the “mere presence of transgender students

¹⁶ Opinion at 26 n.110.

¹⁷ Opinion at 24 n.99.

in bathrooms and locker rooms”—in other words, students of the opposite sex who may be unclothed and observe others who are unclothed—does not constitute “sexual harassment so severe, pervasive, or objectively offensive and ‘that so undermines and detracts from the victims’ educational experience that [the plaintiff] is effectively denied equal access to an institution’s resources and opportunities.’”¹⁸

The panel failed to acknowledge the severity of the situation: the policy invites students—indeed, children—of the opposite sex to undress in front of each other. It is all the more severe because of the power differential: those with less power (students) are forced to abandon what they otherwise would not (their own privacy). The policy pressures children to ignore the real bodily differences of the opposite sex and to “make it natural.” These minors are forced to withstand these pressures or suffer silently and endure the harassment. In addition to being manifestly severe and objectively offensive—as evidenced by the cases in various contexts cited in Appellants' briefing—the policy also makes the harassment pervasive because such behavior is invited in every multi-user privacy facility. This policy has resulted in a denial of access to the school’s resources: for

¹⁸ *Id.* at 26 (quoting *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 n.14 (3d Cir. 2008)).

example, one student left the school¹⁹ and all students reduced their use of the facilities.²⁰

This is a matter of exceptional importance because opposite sex entry in privacy facilities is sexually harassing.²¹ The subjective intent of the opposite sex intruder is not an element of harassment—which is why even a well-meaning maintenance worker of the opposite sex is properly excluded from the other sex’s privacy facility.²²

The panel concluded that Boyertown can escape liability since students who do not want to share multi-user facilities with the opposite sex can retreat

¹⁹ J.A. at 46; 317.

²⁰ *Id.* 42-43, 50, 59, 63.

²¹ The Second Circuit recognized in an unpublished opinion that entering an opposite sex locker room is an act of sexual harassment. *See Lewis v. Triborough Bridge & Tunnel Auth.*, 31 F. App’x 746, 747 (2d Cir. 2002) (pointing out that “male . . . cleaners frequently engaged in a variety of specific acts of sexual harassment, including entering the . . . women’s locker room when female employees were undressed”). In insisting that this case is distinguishable on the basis of additional bad acts, *see* Opinion at 27, the panel missed the point that entry itself constitutes harassment. *See also, Washington v. White*, 231 F. Supp. 2d 71, 80-81 (D.D.C. 2002) (recognizing that a female entering the men’s locker room “on five to ten occasions” constituted sexual harassment).

²² *See, e.g., Norwood v. Dale Maint.*, 590 F. Supp. 1410, 1417 (N.D. Ill. 1984) (upholding sex as a bona fide occupational qualification for restroom janitors due to privacy violations that would otherwise result, which an expert described as “extreme” and resulting in “embarrassment and increased stress”); *Brooks v. ACF Industries*, 537 F.Supp. 1122, 1132 (S.D. W.Va. 1982) (reasoning that “male employees had legitimate privacy rights that would have been violated by a female’s entering and performing janitorial duties therein during their use thereof, and to protect those rights, those male employees were entitled to insist that defendant not assign plaintiff to do so”).

elsewhere.²³ However, forcing a victim of harassment to seek relief elsewhere leaves the hostile environment intact, awaiting the next student’s entry. Such a “solution” underscores the problem—denying “access to an institution’s resources and opportunities.”²⁴

III. The panel decision improperly limits the right to bodily privacy.

A. The panel decision fails to recognize that the right to bodily privacy turns on bodily differences.

The panel took an extreme position. “Regardless of the degree of the appellants’ undress at the time of the encounters . . . the School District’s policy served a compelling interest.”²⁵ Taken to its logical limits, even complete nudity would not trigger a sufficient privacy interest to outweigh the interest of “preventing discrimination,” rather than recognizing (as did the *VMI* court and 34 C.F.R. § 106.33²⁶) that there is no discrimination when distinctions are based on real bodily differences between men and women. *See also Nguyen*, 533 U.S. at 73.

The panel recognized that a person has a constitutionally protected privacy interest in his or her partially clothed body,²⁷ but later exposed its redefinition of sex into gender identity, saying that “the presence of transgender students in these

²³ Opinion at 17-18.

²⁴ *DeJohn*, 537 F.3d at 316 n.14.

²⁵ Opinion at 14.

²⁶ Authorizing sex discrimination in school privacy facilities.

²⁷ Opinion at 13.

spaces does not offend the constitutional right of privacy. . . .”²⁸ That can be true only if one accepts that sex is not defined by reproductive nature, but by a psychological state.

Caselaw has consistently recognized the material import of the opposite sex in privacy claims. In fact, the cases cited by the panel when recognizing the “protected privacy interest in his or her own partially clothed body” in footnote 53 deal with privacy between the sexes. “Doe had a reasonable expectation of privacy while in the Decontamination Area, particularly while in the presence of members of the opposite sex.” *Luzerne County*, 660 F.3d at 177. Single occupant “bathrooms . . . obviously . . . [were] not intended to be used by both sexes at the same time.” *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1375 (3d Cir. 1992). This privacy interest is rooted in anatomical differences. *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (“special sense of privacy in their genitals”) (*quoting Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)). The Sixth Circuit rightly grounded this understanding in “an abundance of common experience” that “there must be a fundamental constitutional right to be free from forced exposure of one’s person to strangers of the opposite sex. . . .” *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489, 495 (6th Cir. 2008) (internal citations omitted). This is also true in the context of

²⁸ *Id.* at 22.

“underwear clad teen and pre-teen boys and girls.” *Id.* But under the panel’s holding, each of those cases would have turned out differently if the opposite sex intruder claimed transgender status—which erases the principle of privacy between the sexes.

B. The panel decision fails to analyze unconstitutional conditions.

The panel recognized “that a person has a constitutionally protected privacy interest in his or her partially clothed body,” but failed to address Boyertown’s unconstitutionally conditioning the use of multi-user facilities on waiving that right to bodily privacy. Appellants do not allege, as suggested by the panel, that the Constitution requires Boyertown to create separate multi-user facilities. However, state law requires such facilities to be separated by sex, which is fitting for vulnerable minors in a custodial setting who are compelled to attend school. Because all students have a constitutionally protected privacy interest in their partially clothed bodies, and because the Commonwealth bestowed a benefit by statute—namely, the use of sex-specific restrooms and locker rooms—it is axiomatic that the government cannot now condition the use of that benefit on waiving privacy rights.

Unconstitutional conditions are illegal even when the benefit is gratuitous²⁹—something that the legislature could give or take away. Here, the

²⁹ Appellants’ Br. at 25.

deprivation is even more severe because the benefit was given to protect the very constitutional right which Boyertown now requires students to forfeit: the right to bodily privacy.

Of course, to avoid this, the panel ultimately concluded that a male's "subjective, deep-core conviction sense of self as a particular gender"³⁰ supersedes every girl's right to privacy from males in her restroom and locker room, and vice versa. Nowhere is the error of supplanting objective sex with subjective gender identity more obvious than when the panel held that "the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces."³¹

C. The panel is incorrect that the new policy serves a compelling governmental interest in preventing discrimination since sex-separated privacy facilities are not discriminatory.

Separating multi-user restrooms and locker rooms on the basis of sex is not gender identity discrimination. All students, regardless of their gender identity are treated equally.³² Thus, discrimination is not implicated. Importantly, Title IX specifically enumerates sex as the only "basis for separating restroom and locker

³⁰ J.A. at 375.

³¹ Opinion at 22.

³² Boyertown treats students unequally since three transgender students use the privacy facilities based on their sex and three based on their gender identity. *See* District Br. at 3.

rooms,” and Pennsylvania law explicitly *requires* sex-specific privacy facilities. We do not separate privacy facilities because of any protected class, but we separate them *in spite of* sex being a protected class, because bodily privacy from the opposite sex is so fundamental as to justify the differential treatment as discussed more fully in Appellants’ principal brief.³³

D. There is no compelling governmental interest in affirming a student’s subjective perception of their gender in every context.

The panel found compelling an interest in “protecting the physical and psychological well-being of minors.”³⁴ But it, and the lower court, failed to address the damaging admissions made by Appellees’ expert, Dr. Leibowitz. After raising a broad concern about elevated suicide risks among gender dysphoric persons, he could not cite any study regarding those risks in correlation to usage of any particular restroom,³⁵ or that cross-sex usage was a necessary treatment.³⁶ Dr. Leibowitz could not discuss the probability of harm to his patients by his treatments which include cross-sex usage³⁷ or of harm to third parties.³⁸ In fact, he presented cross-sex usage as a diagnostic tool,³⁹ such that a boy may use girls’

³³ Appellants’ Br. at 28-31.

³⁴ Opinion at 15.

³⁵ J.A. at 82.

³⁶ *Id.* at 437.

³⁷ *Id.* at 526-28.

³⁸ *Id.* at 553-54.

³⁹ *Id.* at 72, 546.

facilities for months before concluding he is not transgender.⁴⁰ While claiming that gender affirmation was the scientific consensus, Dr. Leibowitz admitted that much debate and evolution was underway in the gender identity model.⁴¹ Given Dr. Leibowitz's inability to parse out the impacts and risks related to using school privacy facilities as a treatment or diagnostic tool when the school has a long list of alternate gender affirmation methods,⁴² the panel's balancing of harms is not supported by the opposition's own expert.

IV. The exceptionally important policy implications of the panel decision extend well beyond this case.

The panel asserted that Appellants seek privacy “in a space that is, by definition and common usage, just not that private.”⁴³ They are “spaces where it is not only common to encounter others in various stages of undress, it is expected.”⁴⁴

⁴⁰ *Id.* at 77, 381.

⁴¹ *Id.* at 540.

⁴² There are many ways to affirm the dignity and worth of transgender students without violating privacy. *Id.* at 632 (testimony from the high school principal). Boyertown allowed transgender students to choose the graduation gown matching their gender identity, *id.* at 466, encouraged teachers to use the names and pronouns of preference, and created a nurturing environment, *id.* at 630-32. Aidan DeStefano, a transgender student, counseled other transgender students to use single user facilities if classmates were uncomfortable with the situation. *Id.* at 476-77. The school should provide reasonable accommodations to transgender students in instances where other students' right to privacy is not implicated. The school can encourage a live and let live environment of respect without violating the rights of others.

⁴³ Opinion at 20.

⁴⁴ *Id.*

But it is precisely because we do not expect privacy when sharing locker rooms and restrooms with persons of the same sex, that we prevent the opposite sex from entering. If lack of privacy from the same-sex would render these settings non-private from the opposite sex, there would be no recourse for a male supervisor walking in on a female employee in a locker room so long as there was no additional bad act.

The panel's conclusion that bodily privacy from the opposite sex is not implicated in situations involving persons who are transgender⁴⁵ has far reaching implications. For instance, strip searches in school are conducted by persons of the same-sex due to bodily privacy concerns. Based on the panel's reasoning, however, bodily privacy concerns would not be raised by a man who identifies as a woman administering the strip search of a minor girl at school or providing security for the showers at a women's prison. The panel decision should be revisited to correct these issues.

CONCLUSION

For the foregoing reasons, Appellants request rehearing en banc.

⁴⁵ *Id.* at 22.

Respectfully submitted, this 2nd day of July, 2018.

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CERTIFICATION OF BAR MEMBERSHIP,
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I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

The electronic copy of the motion has been scanned for viruses using Trend Micro Virus Protection.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,896 words as calculated by the word processing program used in the preparation of this motion, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 2, 2018, the foregoing was filed electronically and served on the other parties via the court's ECF system.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3113

JOEL DOE, a Minor, by and through his Guardians
John Doe and Jane Doe; MACY ROE; MARY SMITH;
JACK JONES, a minor, by and through his Parents
John Jones and Jane Jones, *CHLOE JOHNSON, A minor
by and through her Parent Jane Johnson; *JAMES JONES, A Minor
by and through his Parents John Jones and Jane Jones
Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT;
DR. BRETT COOPER, In his official capacity as Principal;
DR. E. WAYNE FOLEY, In his official capacity as Assistant Principal;
DAVID KREM, Acting Superintendent

PENNSYLVANIA YOUTH CONGRESS FOUNDATION (Intervenor in D.C.)

*(Pursuant to Court Order dated 04/06/18)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 5-17-cv-01249)
District Judge: Honorable Edward G. Smith

Argued May 24, 2017

Before: MCKEE, SHWARTZ and NYGAARD, Circuit Judges

JUDGMENT

We agree Plaintiffs have not demonstrated a likelihood of success on the merits and that they have not established that they will be irreparably harmed if their Motion to Enjoin the Boyertown School District's policy is denied.

We therefore Affirm the District Court's denial of a preliminary injunction substantially for the reasons that the Court explained in its exceptionally well reasoned Opinion of August 25, 2017.

A formal Opinion will follow. The mandate shall issue forthwith. The time for filing a petition for rehearing will run from the date that the Court's formal opinion is entered on the docket.

For the Court,

Theodore A. McKee
Circuit Judge

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: May 24, 2018

PRECEDENTIAL

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Before: McKEE, SHWARTZ and NYGAARD, *Circuit Judges.*

(Opinion Filed: June 18, 2018)

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OPINION OF THE COURT

McKEE, *Circuit Judge*.

This appeal requires us to decide whether the District Court correctly refused to enjoin the defendant School District from allowing transgender students to use bathrooms and locker rooms that are consistent with the students' gender identities as opposed to the sex they were determined to have at birth. The plaintiffs—a group of high school students who identify as being the same sex they were determined to have at birth (cisgender) —believe the policy violated their constitutional rights of bodily privacy, as well as Title IX, and Pennsylvania tort law. As we shall explain, we conclude that, under the circumstances here, the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the

presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs' rights under Title IX.

In an exceedingly thorough, thoughtful, and well-reasoned opinion, the District Court denied the requested injunction based upon its conclusion that the plaintiffs had not shown that they are likely to succeed on the merits and because they had not shown that they will be irreparably harmed absent the injunction. Although we amplify the District Court's reasoning because of the interest in this issue, we affirm substantially for the reasons set forth in the District Court's opinion.

I. BACKGROUND

A. The Setting.

Because such seemingly familiar terms as “sex” and “gender” can be misleading in the context of the issues raised by this litigation, we will begin by explaining and defining relevant terms. Our explanation is based on the District Court testimony of Dr. Scott Leibowitz, an expert in gender dysphoria and gender-identity issues in children and adolescents, and the findings that the District Court made based upon that expert's testimony.

“Sex” is defined as the “anatomical and physiological processes that lead to or denote male or female.”¹ Typically, sex is determined at birth based on the appearance of external genitalia.²

“Gender” is a “broader societal construct” that encompasses how a “society defines what male or female is within a certain cultural context.”³ A person's gender identity is their subjective, deep-core sense of self as being a particular gender.⁴ As suggested by the parenthetical in our opening paragraph, “cisgender” refers to a person who identifies with

¹ App. 500.

² App. 375.

³ App. 500.

⁴ App. 375.

the sex that person was determined to have at birth.⁵ The term “transgender” refers to a person whose gender identity does not align with the sex that person was determined to have at birth.⁶ A transgender boy is therefore a person who has a lasting, persistent male gender identity, though that person’s sex was determined to be female at birth.⁷ A transgender girl is a person who has a lasting, persistent female gender identity though that person’s sex was determined to be male at birth.⁸

Approximately 1.4 million adults—or 0.6 percent of the adult population of the United States—identify as transgender.⁹ Transgender individuals may experience “gender dysphoria,” which is characterized by significant and substantial distress as a result of their birth-determined sex being different from their gender identity.¹⁰ Treatment for children and adolescents who experience gender dysphoria includes social gender transition and physical interventions such as puberty blockers, hormone therapy, and sometimes surgery.¹¹

“Social gender transition” refers to steps that transgender individuals take to present themselves as being the gender they most strongly identify with.¹² This typically includes adopting a different name that is consistent with that gender and using the corresponding pronoun set, wearing clothing and hairstyles typically associated with their gender identity rather than the sex they were determined to have at birth, and using sex-segregated spaces and engaging in sex-segregated activities that correspond to their gender identity rather than their birth-determined sex.¹³ For transgender individuals, an important part of social gender transition is having others perceive them as being the gender the

⁵ App. 393, 550.

⁶ App. 375.

⁷ App. 2107.

⁸ App. 2107.

⁹ App. 376.

¹⁰ App. 376-77, 379.

¹¹ App. 2110.

¹² App. 2110.

¹³ App. 2110.

transgender individual most strongly identifies with.¹⁴ Social gender transition can help alleviate gender dysphoria and is a useful and important tool for clinicians to ascertain whether living in the affirmed gender improves the psychological and emotional function of the individual.¹⁵

Policies that exclude transgender individuals from privacy facilities that are consistent with their gender identities “have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals.”¹⁶ These exclusionary policies exacerbate the risk of “anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes.”¹⁷ The risk of succumbing to these conditions is already very high in individuals who are transgender. In a survey of 27,000 transgender individuals, 40% reported a suicide attempt (a rate nine times higher than the general population).¹⁸ Yet, when transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students “reflect the same, healthy psychological profile as their peers.”¹⁹

Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes “severe psychological distress often leading

¹⁴ App. 2110.

¹⁵ App. 2111.

¹⁶ Br. for Amici Curiae American Academy of Pediatrics, American Medical Association, et al., 17.

¹⁷ *Id.* at 18 (quoting Am. Psychol. Ass’n & Nat’l Ass’n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* 4 (2015)).

¹⁸ *Id.* at 18–19 (citing Sandy E. James et al., Nat’l Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 114 (2016)).

¹⁹ Br. for Amici Curiae of the National PTA, GLSEN, et al., 7 (citing Lily Durwood et al., *Mental Health and Self Worth in Socially Transitioned Transgender Youth*, 56 J. of the Am. Academy of Child & Adolescent Psychiatry 116, 116 (2017)).

to attempted suicide.”²⁰ The result is that those students “avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the day.”²¹ This behavior can lead to medical problems and decreases in academic learning.²²

We appreciate that there is testimony on this record that the cisgender plaintiffs have also reduced water intake, fasted, etc. in order to reduce the number of times they need to visit the bathroom so they can minimize or avoid encountering transgender students there. For reasons we discuss below, we do not view the level of stress that cisgender students may experience because of appellees’ bathroom and locker room policy as comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity. Given the majority of the testimony here and the District Court’s well-supported findings, those situations are simply not analogous.

Dr. Leibowitz testified that forcing transgender students to use facilities that are not aligned with their gender identities “chips away and erodes at [the individual’s] psychological wellbeing and wholeness.”²³ It can exacerbate gender dysphoria symptoms by reinforcing that the “world does not

²⁰ Br. for Amici Curiae of the National PTA, GLSEN, et al., 18 (citing Max Kutner, *Denying Transgender People Bathroom Access Is Linked to Suicide*, NEWSWEEK (Dec. 16, 2016); Kristen Clements-Nolle, et al., *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 *Journal of Homosexuality* 53, 63-65 (2006)).

²¹ Br. for Amici Curiae of the National PTA, GLSEN, et al., 18 (citing Joseph Kosciw, et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, & Queer Youth in Our Nation’s Schools* 12-13, GLSEN (2016)).

²² *Id.* at 18–19 (citing Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 *J. of Pub. Mgmt. & Soc. Pol’y* 65, 74–75 (2013)).

²³ App. 395.

appreciate or understand” transgender students.²⁴ In short, it is “society reducing them to their genitals.”²⁵ Dr. Leibowitz also noted that “hundreds of thousands of physicians in the United States . . . take the position that individuals with gender dysphoria should not be forced to use a restroom that is not in accordance with their gender identity.”²⁶ We have already noted the disparate suicide rates between transgender and cisgender students.

Prior to the 2016–17 school year, Boyertown Area School District required students at Boyertown Area Senior High School (“BASH”) to use locker rooms and bathrooms that aligned with their birth-determined sex.²⁷ BASH changed this policy in 2016 and for the first time permitted transgender students to use restrooms and locker rooms consistent with their gender identity. In initiating this policy, BASH adopted a very careful process that included student-specific analysis. Permission was granted on a case-by-case basis.²⁸

The District required the student claiming to be transgender to meet with counselors who were trained and licensed to address these issues and the counselors often consulted with additional counselors, principals, and school administrators.²⁹ Once a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity, the student was required to use only those facilities. The student could no longer use the facilities corresponding to that student’s sex at birth.³⁰

BASH has several multi-user bathrooms.³¹ Each has individual toilet stalls.³² Additionally, BASH has between four and eight single-user restrooms that are available to all

²⁴ App. 395.

²⁵ App. 396.

²⁶ App. 397.

²⁷ App. 625.

²⁸ App. 604.

²⁹ App. 638, 923–25.

³⁰ App. 931–32.

³¹ App. 612.

³² App. 612–13.

students, depending on the time of day.³³ Four of these restrooms are always available for student use.³⁴

The locker rooms at BASH consist of common areas, private “team rooms,” and shower facilities.³⁵ Over the past (approximately) two years, BASH has renovated its locker rooms. The “gang showers” were replaced with single-user showers which have privacy curtains.³⁶ BASH does not require a student to change in the locker room prior to gym class, although the student must change into gym clothes.³⁷ A student who is uncomfortable changing in the locker room can change privately in one of the single-user facilities, the private shower stalls, or team rooms.³⁸

B. The Litigation.

Four plaintiffs—proceeding pseudonymously under the names Joel Doe, Jack Jones, Mary Smith, and Macy Roe—sued the District after it changed its bathroom and locker room policy to the policy we have described above.³⁹ Their claims were based on encounters between some of the plaintiffs and transgender students in locker rooms or multi-user bathrooms. The plaintiffs sought to enjoin BASH’s policy of permitting transgender students to use the bathrooms and locker rooms that aligned with their gender identities. They sought a preliminary injunction on three grounds. First, the plaintiffs alleged that the School District’s policy violated their constitutional right to bodily privacy. Next, they claimed that the School District’s policy violated Title IX of the Education

³³ App. 613.

³⁴ App. 616.

³⁵ App. 617–19.

³⁶ App. 619–20.

³⁷ App. 618–19.

³⁸ App. 618–19.

³⁹ The plaintiffs included parents and guardians of some of the anonymous students. The District Court provided a detailed recitation of the factual background of this suit, including the particular conduct each plaintiff alleges as the basis for the alleged violation of a privacy interest. *See Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 335–64 (E.D. Pa. 2017).

Amendments of 1972 (Title IX).⁴⁰ Finally, they alleged that the policy was contrary to Pennsylvania tort law. After discovery and evidentiary hearings, the District Court filed the extensive and well-reasoned opinion we have already referred to, in which it explained that the plaintiffs had not demonstrated that they were likely to succeed on the merits of any of their claims and that plaintiffs had not shown that they would be irreparably harmed absent an injunction.

For reasons the court identified, it concluded that even if the School District's policy implicated the plaintiffs' constitutional right to privacy, the state had a compelling interest in not discriminating against transgender students. The court also determined that the School District's policy was narrowly tailored to serve that interest. Accordingly, the District Court ruled that even if a cisgender plaintiff had been viewed by a transgender student, it would not have violated the cisgender student's constitutional right to privacy. We agree.

The District Court rejected the plaintiffs' Title IX claim for two reasons. First, it found that the School District's policy did not discriminate on the basis of sex, because it applied equally to all students—cisgender male and cisgender female, as well as transgender male and transgender female students—alike. The court also concluded that the plaintiffs had not identified any conduct that was sufficiently serious to constitute Title IX harassment. The mere presence of a transgender student in a locker room should not be objectively offensive to a reasonable person given the safeguards of the school's policy.

For essentially the reasons described above, the District Court also declined to issue an injunction based on the Pennsylvania tort of intrusion upon seclusion. It found that there was insufficient evidence in the record to demonstrate that a transgender student ever viewed a partially clothed plaintiff, and that the presence of a transgender student would not be highly offensive to a reasonable person.

The District Court rejected the plaintiffs' theory of irreparable harm that posited that the plaintiffs were being

⁴⁰ 86 Stat. 373, as amended 20 U.S.C. § 1681 *et. seq.*

forced to give up a constitutional right to use segregated locker rooms and bathrooms. It noted that the School District permitted the students to use the locker room facilities “without limitation.”⁴¹ Any student who was uncomfortable being in a state of undress or going to the bathroom with transgender students could use the single-user bathrooms or team rooms that BASH has made available.

Having found that the plaintiffs had no likelihood of success on the merits and did not face irreparable harm, the District Court entered an order on August 25, 2017 denying the injunction. This appeal followed.⁴²

II. DISCUSSION⁴³

Preliminary injunctive relief is an “extraordinary remedy.”⁴⁴ It may be granted only when the moving party shows “(1) a likelihood of success on the merits; (2) that [the movant] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.”⁴⁵ The movants must establish entitlement to relief by clear evidence.⁴⁶ We review the denial

⁴¹ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d at 410.

⁴² Numerous amici filed briefs on behalf of the appellees, and one group filed a brief on behalf of the appellants. At the conclusion of briefing we heard argument. Recognizing the time-sensitive nature of this appeal and the concerns of all of the parents and students in the School District, as well as the District itself, we adjourned to conference to determine if a ruling could be made from the bench. After conferencing, the panel voted to unanimously to affirm the ruling of the District Court. We announced that decision and entered an accompanying order. We now supplement that order with this opinion.

⁴³ The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

⁴⁴ *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

⁴⁵ *Id.*

⁴⁶ *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008).

of a preliminary injunction for “an abuse of discretion, an error of law, or a clear mistake in the consideration of proof.”⁴⁷ We exercise plenary review of the lower court’s conclusions of law but review its findings of fact for clear error.⁴⁸

A. Likelihood of Success on the Merits

The District Court correctly concluded that the appellants were not entitled to an injunction because none of their claims are likely to succeed on the merits.

The District Court correctly concluded that the appellants’ constitutional right to privacy claim was unlikely to succeed on the merits.

The appellants contend that the District Court erroneously concluded they were unlikely to succeed on their claim that the School District’s policy violated their constitutional right to privacy. They assert that the District Court (1) failed to recognize the “contours” of the right to privacy; (2) failed to recognize that a policy opening up facilities to persons of the opposite sex necessarily violates that right; (3) erroneously concluded that the School District’s policy advanced a compelling interest; and (4) incorrectly found that the policy was narrowly tailored to serve that interest. We reject each of these arguments in turn.

The appellants’ challenge to the School District’s policy was brought as a civil rights claim pursuant to 42 U.S.C. § 1983. Section 1983 claims can succeed only if the underlying act—here, the alleged exposure of the appellants’ partially clothed bodies to transgender students whose birth-determined sex differed from the appellants—violated a constitutional right.⁴⁹ When a plaintiff’s § 1983 claim is premised on a

⁴⁷ *Kos Pharm.*, 369 F.3d at 708 (citation omitted).

⁴⁸ *Id.* (citations omitted).

⁴⁹ *Doe v. SEPTA*, 72 F.3d 1133, 1137 (3d Cir. 1995) (“A § 1983 action cannot be maintained unless the underlying act violates a plaintiff’s [c]onstitutional rights.”).

violation of the constitutional right to privacy, it will succeed only if it is “limited to those rights of privacy which are fundamental or implicit in the concept of ordered liberty.”⁵⁰

The touchstone of constitutional privacy protection is whether the information at issue is “within an individual’s reasonable expectations of confidentiality.”⁵¹ The Supreme Court has acknowledged two types of constitutional privacy interests rooted in the Fourteenth Amendment—“the individual interest in avoiding disclosure of personal matters” and the “interest in independence in making certain kinds of important decisions.”⁵² Based on the first principal described above, we have held that a person has a constitutionally protected privacy interest in his or her partially clothed body.⁵³

⁵⁰ *Id.* (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976) (alterations and internal quotation marks omitted)).

⁵¹ *Doe v. Luzerne County*, 660 F.3d 169, 175 (3d Cir. 2011) (quoting *Malleus v. George*, 641 F.3d 560, 564 (3d Cir. 2011)).

⁵² *Id.* (citations omitted).

⁵³ *Id.* at 177. Other Circuits have come to the same conclusion. *Brannum v. Overton Cty. School Bd.*, 516 F.3d 489, 494, 498 (6th Cir. 2008) (finding a violation of the Fourth Amendment right to privacy when a school surveilled partially clothed middle school students in their locker room, and further noting that this is the “same privacy right . . . located in the Due Process clause”); *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002) (“[T]here is a right to privacy in one’s unclothed or partially clothed body.”); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (“We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed [figure] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”). The District Court noted that *Doe v. Luzerne County* did not explicitly hold there was a constitutional right to privacy in an individual’s unclothed or partially clothed body. However, by concluding that Doe had a reasonable expectation of privacy and remanding the case to determine the exact contours of that right, we implicitly recognized that such a privacy right exists. The District Court assumed the existence of the right, and the parties seemingly agreed that the right exists. If there

The appellants advance two main arguments in support of their contention that their right to privacy was violated by the School District’s policy of permitting transgender students to use bathrooms and locker rooms that aligned with their gender identities. Neither is persuasive.

First, the appellants claim that their right to privacy was violated because the policy permitted them to be viewed by members of the opposite sex while partially clothed.⁵⁴ Regardless of the degree of the appellants’ undress at the time of the encounters, the District Court correctly found that this would not give rise to a constitutional violation because the School District’s policy served a compelling interest—preventing discrimination against transgender students—and was narrowly tailored to that interest.

The constitutional right to privacy is not absolute.⁵⁵ It must be weighed against important competing governmental interests.⁵⁶ Only unjustified invasions of privacy by the government are actionable in a § 1983 claim.⁵⁷ That is, the constitution forbids governmental infringement on certain fundamental interests unless that infringement is sufficiently

were any doubt after *Doe v. Luzerne County* that the constitution recognizes a right to privacy in a person’s unclothed or partially clothed body, we hold today that such a right exists.

⁵⁴ See Br. for Appellants, 18 (“The privacy interest is vitiated when a member of one sex is viewed by a member of the opposite sex.” (citation omitted)).

⁵⁵ *Doe v. SEPTA*, 72 F.3d at 1138.

⁵⁶ *Doe v. Luzerne County*, 660 F.3d at 178; *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000) (“In examining right to privacy claims, we, therefore, balance a possible and responsible government interest in disclosure against the individual’s policy interest.”).

⁵⁷ See *Doe v. SEPTA*, 72 F.3d at 1138 (citing *Whalen v. Roe*, 429 U.S. 589, 602 (1977)); see also *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandies, J., dissenting) (“every *unjustifiable* intrusion upon the privacy of an individual . . . must be deemed a [constitutional] violation” (emphasis added)).

tailored to serve a compelling state interest.⁵⁸ The District Court found that the School District’s policy served “a compelling state interest in not discriminating against transgender students” and was narrowly tailored to that interest.⁵⁹ We agree.

As set forth in detail above, transgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination. There can be “no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”⁶⁰ The risk of experiencing substantial clinical distress as a result of gender dysphoria is particularly high among children and may intensify during puberty.⁶¹ The Supreme Court has regularly held that the state has a compelling interest in protecting the physical and psychological well-being of minors.⁶² We have

⁵⁸ *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). The District Court found that this “compelling interest” analysis was the appropriate level to review BASH’s policy. *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d at 390 (citing *Reno*, 507 U.S. at 302). The parties do not explicitly challenge this choice. Br. for Appellants, 27-33; Br. for Appellees, 30; Br. for Intervenor-Appellee, 36. In other privacy-rights contexts, we have found that an “intermediate standard of review” was appropriate, and that the “more stringent ‘compelling interest analysis’ would be used when the intrusion on an individual’s privacy was severe.” *Doe v. SEPTA*, 72 F.3d at 1139–40. Because we hold that BASH’s policy survives the more stringent standard of review, we need not decide which standard of review is appropriate here.

⁵⁹ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d at 390.

⁶⁰ *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

⁶¹ App. 2276–78.

⁶² See *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 125 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (a state “has an independent interest in

similarly found that the government has a compelling interest in protecting and caring for children in various contexts.⁶³ Mistreatment of transgender students can exacerbate gender dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior. When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening. This record clearly supports the District Court’s conclusion that the School District had a compelling state interest in protecting transgender students from discrimination.

Moreover, the School District’s policy fosters an environment of inclusivity, acceptance, and tolerance. As the appellees’ amicus brief from the National Education Association convincingly explains, these values serve an important educational function for both transgender and cisgender students.⁶⁴ When a school promotes diversity and inclusion, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting [because] the students have the greatest possible variety of backgrounds.”⁶⁵ Students in diverse learning environments have higher academic achievement leading to better outcomes for all students.⁶⁶ Public education “must prepare pupils for

the well-being of its youth”); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).

⁶³ See, e.g., *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (noting that the government has a compelling interest in the “protection of children,” and in protecting children from abuse).

⁶⁴ Br. for Amicus Curiae National Education Association, 7–11.

⁶⁵ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

⁶⁶ Br. for Amicus Curiae National Education Association, 9–10 (citing Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School- Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 J. Educ. Psychol. 570, 571 (2003); John Rosales, *Positive School Cultures Thrive When Support Staff Included*, NEA

citizenship in the Republic,”⁶⁷ and inclusive classrooms reduce prejudices and promote diverse relationships which later benefit students in the workplace and in their communities.⁶⁸ Accordingly, the School District’s policy not only serves the compelling interest of protecting transgender students, but it benefits all students by promoting acceptance.

As we have already noted, we do not intend to minimize or ignore testimony suggesting that some of the appellants now avoid using the restrooms and reduce their water intake in order to reduce the number of times they need to use restrooms under the new policy. Nor do we discount the surprise the appellants reported feeling when in an intimate space with a student they understood was of the opposite biological sex.⁶⁹ We cannot, however, equate the situation the appellants now face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter’s needs and concerns. Moreover, as we have mentioned, those cisgender students who feel that they must try to limit trips to the

Today (Jan. 10, 2017); N. Eugene Walls et al. *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 *Youth & Soc’y* 307, 323-25 (2010); Stephen T. Russell, *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers’ Perspectives*, 54 *J. Sch. Psychol.* 29 (2016)).

⁶⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citation omitted).

⁶⁸ *Br. for Amicus Curiae National Education Association*, 10 (citing Jeanne L. Reid & Sharon Lynn Kagan, *A Better Start: Why Classroom Diversity Matters in Early Education* 9 (Apr. 2015)).

⁶⁹ App. 276, 1943. To the extent that the appellants’ claim for relief arises from the embarrassment and surprise they felt after seeing a transgender student in a particular space, they are actually complaining about the implementation of the policy and the lack of pre-implementation communication. That is an administrative issue, not a constitutional one. To the extent that the appellants are expressing discomfort being around students whom they define as different from themselves, that discomfort does not implicate a privacy interest, even when viewed through the lens of strict scrutiny.

restroom to avoid contact with transgender students can use the single-user bathrooms in the school.

Assuming the policy is subject to strict scrutiny, it must advance a compelling state interest and the means of achieving that interest must be “specifically and narrowly framed to accomplish that purpose.”⁷⁰ Having correctly identified a compelling state interest, the District Court correctly held that the School District’s policy was narrowly tailored. The appellants contend that “a much more tailored solution is to provide single-user accommodations.”⁷¹ They reason that “all students would be allowed to access the individual facilities, [so] no stigma would attach to the professed transgender students’ using them, and preserving the sex-specific communal facilities to single-sex use would resolve all privacy concerns.”⁷²

This argument is not only unpersuasive, it fails to comprehend the depths of the problems the School District’s policy was trying to remedy or the steps taken to address them. The School District already provides single-user accommodations for all students. Any student who is uncomfortable changing around their peers in private spaces, whether transgender or cisgender, may change in a bathroom stall, single-user bathroom, or the private team rooms.⁷³ The appellants seemingly admit that these accommodations “resolve all privacy concerns.”⁷⁴ Yet they insist that the policy should be changed to require that transgender students use individual bathrooms if they do not wish to use the communal facilities that align with their birth-determined sex. Not only would forcing transgender students to use single-user facilities or those that correspond to their birth sex not serve the compelling interest that the School District has identified here, it would significantly undermine it.⁷⁵ As the Court of Appeals

⁷⁰ *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

⁷¹ Br. for Appellants, 32.

⁷² *Id.*

⁷³ App. 618–19.

⁷⁴ Br. for Appellants, 32.

⁷⁵ See Br. for Amici Curiae American Academy of Pediatrics et al., 17–18. (“[F]orcing transgender students to use separate

for the Seventh Circuit has recognized, a school district's policy that required a transgender student to use single-user facilities "actually invited more scrutiny and attention from his peers."⁷⁶ Adopting the appellants' position would very publicly brand all transgender students with a scarlet "T," and they should not have to endure that as the price of attending their public school.

Nothing in the record suggests that cisgender students who voluntarily elect to use single-user facilities to avoid transgender students face the same extraordinary consequences as transgender students would if they were forced to use them. As we explain more fully below, requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination.

It is therefore clear that the District Court was correct in concluding that the appellants are unlikely to succeed in establishing a violation of their right to privacy based on a transgender student potentially viewing them in a state of undress in a locker room or restroom. The challenged policy is narrowly tailored to serve a compelling governmental interest. There is no constitutional violation.

The appellants also urge us to recognize constitutional privacy protections for alleged violations that resulted from conduct other than being viewed by transgender students in a locker room or bathroom. They assert that "government actors cannot force minors to endure *the risk* of unconsented intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy."⁷⁷ They claim that their constitutional privacy rights were violated "when the sexes intermingle[d]" in the bathrooms and locker rooms.⁷⁸ They also argue that the female appellants' privacy rights are violated if they are forced to attend to their menstrual hygiene in a facility where members of the opposite sex may potentially

facilities sends a stigmatizing message that can have a lasting and damaging impact on the health and well-being of the young person.").

⁷⁶ *Whitaker*, 858 F.3d at 1045.

⁷⁷ Br. for Appellants, 18 (emphasis added).

⁷⁸ *Id.* at 27.

be present.⁷⁹ In other words, they contend that their constitutional right to privacy is necessarily violated because they are forced to share bathrooms and locker rooms with transgender students whose gender identities correspond with the sex-segregated space, but do not align with their birth sex.

We reject the premise of this argument because BASH's policy does not force any cisgender student to disrobe in the presence of any student—cisgender or transgender. BASH has provided facilities for any student who does not feel comfortable being in the confines of a communal restroom or locker room. BASH has installed privacy stalls and set some bathrooms aside as single-user facilities so that any student who is uneasy undressing or using a restroom in the presence of others can take steps to avoid contact. BASH's policy does not compel a privacy violation for any student.

In any event, we decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so. As counsel for the School District noted during oral argument, the appellants are claiming a very broad right of personal privacy in a space that is, by definition and common usage, just not that private. School locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected. The facilities exist so that students can attend to their personal biological and hygienic needs and change their clothing. As the Supreme Court has stated, “[p]ublic school locker rooms . . . are not notable for the privacy they afford.”⁸⁰

Thus, we are unpersuaded to the extent that the appellants' asserted privacy interest requires protection from the risk of encountering students in a bathroom or locker room whom appellants identify as being members of the opposite sex. As the Seventh Circuit noted in *Whitaker* “[a] transgender student's presence in the restroom provides no more of a risk

⁷⁹ *Id.* at 26. We note that the appellants do not allege that the female plaintiffs ever actually tended to their periods in the presence of a transgender female student.

⁸⁰ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."⁸¹

None of the cases cited by the appellants is to the contrary.⁸² For example, in their brief and at argument, they placed substantial reliance on *Faulkner v. Jones*⁸³ for the proposition that "society [has] undisputed[ly] approv[ed] separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation"⁸⁴ But that case did not recognize a constitutional mandate that bathrooms and locker rooms must be segregated by birth-determined sex. Although it acknowledged that privacy concerns *may* justify separate facilities for men and women in certain circumstances,⁸⁵ it did not hold that the Constitution *compels* separate bathroom facilities. Moreover, as we have explained and as the District Court more thoroughly described, BASH has carefully crafted a policy that attempts to address the concerns that some cisgender students may have. To its credit, it has done so in a way that recognizes those concerns as well as the needs, humanity, and decency of transgender students.

The appellants' reliance on *Chaney v. Plainfield Healthcare Center*⁸⁶ is similarly unconvincing. That was an appeal from a Title VII suit brought against a nursing home after a Black nursing assistant was fired for protesting a patient's demand that he receive care only from White nursing aids.⁸⁷ The court distinguished medical care based on race

⁸¹ *Whitaker*, 858 F.3d at 1052.

⁸² Br. for Appellee, 15–31.

⁸³ 10 F.3d 226 (4th Cir. 1993).

⁸⁴ Br. for Appellants, 17 (alterations added) (quoting *Faulkner*, 10 F.3d at 232).

⁸⁵ *Faulkner*, 10 F.3d at 232 ("In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.").

⁸⁶ 612 F.3d 908, 913 (7th Cir. 2010).

⁸⁷ *Chaney*, 612 F.3d at 910–12.

from medical care based on sex, noting that just as “the law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race providers.”⁸⁸ Like *Faulkner, Chaney* held that the Constitution *tolerates* single-sex accommodations. It did not hold that the constitution *demand*s it.

Equally unpersuasive is the appellants’ reliance on cases discussing far more intrusive invasions of privacy than allowed by BASH’s policy. Cases about strip searches⁸⁹ and a criminal conviction for voyeurism after a person repeatedly looked at women in the stalls of public restrooms⁹⁰ are wholly unhelpful to our analysis. Those cases involve inappropriate conduct as well as conduct that intruded into far more “intimate aspects of human affairs” than here.⁹¹ There is simply nothing inappropriate about transgender students using the restrooms or locker rooms that correspond to their gender identity under the policy BASH has initiated, and we reject appellants’ attempt to argue that there is. Appellants do not contend that transgender Students A or B did anything remotely out of the ordinary while using BASH’s facilities. Indeed, the appellants’ privacy complaint is not with transgender students’ conduct, but with their mere presence. We have already explained that the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces.

In an argument that completely misses (or deliberately ignores) the reason for the disputed policy or the circumstances it addresses, the appellants insist that it is improper to consider a student’s transgender status when conducting this privacy analysis and that we must only look at the student’s anatomy.⁹² We disagree. Constitutional right to privacy cases “necessarily

⁸⁸ *Id.* at 913.

⁸⁹ *Canedy v. Boardman*, 16 F.3d 183, 185–86, 188 (7th Cir. 1994).

⁹⁰ *State v. Lawson*, 340 P.3d 979 (Wash. App. 2014).

⁹¹ *Doe v. Luzerne County*, 660 F.3d at 176 (quoting *Nunez v. Pachman*, 578 F.3d 228, 232 (3d Cir. 2009)).

⁹² Br. for Appellants, 10–12.

require fact-intensive and context-specific analyses.”⁹³ Bright line rules cannot be drawn.⁹⁴ Put simply—the facts of a given case are critically important when assessing whether a constitutional right to privacy has been violated. A case involving transgender students using facilities aligned with their gender identities after seeking and receiving approval from trained school counselors and administrators implicates different privacy concerns than, for example, a case involving an adult stranger sneaking into a locker room to watch a fourteen year-old girl shower. The latter scenario—taken from a case the appellants rely upon⁹⁵— is simply not analogous to the circumstances here.

1. The District Court correctly concluded that the appellants’ Title IX claim was unlikely to succeed on the merits.

The District Court rejected the appellants’ Title IX claim because the School District’s policy treated all students equally and therefore did not discriminate on the basis of sex, and because the appellants had failed to meet the elements of a “hostile environment harassment” claim. We again agree. We also agree with the School District’s position that barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.

Title IX prohibits discrimination based on sex in all educational programs that receive funds from the federal government.⁹⁶ However, discrimination with regard to privacy facilities is exempt from that blanket prohibition. An 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 provided for students of the other sex.”⁹⁷ This exception is

⁹³ *Doe v. Luzerne County*, 660 F.3d at 176.

⁹⁴ *Id.*

⁹⁵ *People v. Grunau*, No. H015871, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009) (unpublished memorandum opinion).

⁹⁶ 20 U.S.C. § 1681(a).

⁹⁷ 34 C.F.R. § 106.33.

permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes.

Title IX also supports a cause of action for “hostile environment harassment.”⁹⁸ To recover on such a claim, a plaintiff must establish sexual harassment that is so severe, pervasive, or objectively offensive and that “so undermines and detracts from the victims’ educational experience that [he or she] is effectively denied equal access to an institution’s resources and opportunities.”⁹⁹ To support a claim of hostile environment harassment, a plaintiff must demonstrate that the offensive conduct occurred because of his or her sex.¹⁰⁰

Title IX’s “hostile environment harassment” cause of action originated in a series of cases decided under Title VII of

⁹⁸ *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 n.14 (3d Cir. 2008) (citation omitted).

⁹⁹ *Id.* (alterations in original) (citation omitted). We recently noted that we have not always been consistent in stating whether a plaintiff claiming sexual harassment must prove the harassment was “severe *or* pervasive” or “severe *and* pervasive.” *Castleberry v. STI Grp.*, 863 F.3d 259, 263–64 (3d Cir. 2017) (emphasis added). Much of the confusion stems from the fact that the Supreme Court has used both the conjunctive and the disjunctive to describe the plaintiff’s burden. *Compare Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive . . .”), with *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (concluding that an action for Title IX harassment “will lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”). In *Castleberry*, we concluded that the “correct standard is severe *or* pervasive.” *Castleberry*, 863 F.3d at 264. Accordingly, we will proceed using the disjunctive inquiry here.

¹⁰⁰ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (holding, in the Title VII context, that a plaintiff “must always prove that the conduct at issue . . . constituted *discrimination* because of . . . sex.” (internal quotations omitted)).

the Civil Rights Act of 1964 (“Title VII”).¹⁰¹ The Supreme Court has “extended an analogous cause of action to students under Title IX.”¹⁰² Title VII cases are therefore instructive.¹⁰³

Title VII prohibits employers from discriminating based on sex.¹⁰⁴ In *Oncale*, the Supreme Court considered whether Title VII prohibited “discrimination because of sex” when the harasser and the harassed employee were the same sex.¹⁰⁵ In concluding that Title VII could support such a claim, the Court held that Title VII is concerned only with “discrimination because of sex.”¹⁰⁶ It noted that the Court had never held that “workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”¹⁰⁷ Rather, “the critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹⁰⁸ The plaintiffs in a Title VII action must therefore always “prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex.”¹⁰⁹ The same requirement holds true for Title IX claims.

The appellants have not provided any authority—either in the District Court or on appeal—to suggest that a sex-neutral policy can give rise to a Title IX claim. Instead, they simply

¹⁰¹ 42 U.S.C. § 2000e *et seq.*

¹⁰² *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 205 (3d Cir. 2001).

¹⁰³ *Id.* Courts have frequently looked to Title VII authority for guidance with Title IX cases. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX.” (collecting cases)).

¹⁰⁴ 42 U.S.C. § 2000e-2.

¹⁰⁵ *Oncale*, 523 U.S. at 76.

¹⁰⁶ *Id.* at 80.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

¹⁰⁹ *Id.* at 81 (internal alterations, emphasis, and quotation marks omitted).

hypothesize that “harassment” that targets both sexes equally would violate Title IX; that is simply not the law.¹¹⁰ The touchstone of both Title VII and Title IX claims is disparate treatment *based on sex*.¹¹¹ The School District’s policy allows all students to use bathrooms and locker rooms that align with their gender identity. It does not discriminate based on sex, and therefore does not offend Title IX.

The District Court also correctly found that the appellants had not met their burden of establishing that the mere presence of transgender students in bathrooms and locker rooms constitutes sexual harassment so severe, pervasive, or objectively offensive and “that so undermines and detracts from the victims’ educational experience that [the plaintiff] is effectively denied equal access to an institution’s resources and opportunities.”¹¹² That is particularly true given the many safeguards the School District put in place as part of the challenged policy.

Rather than relying on relevant legal authority to establish that the mere presence of a transgender student in a locker room or bathroom rises to the level of harassment, the appellants again cite inapposite cases that involve egregious harassment. That is not surprising since we have found no authority that supports the appellants’ claims. Two cases that the appellants attempt to analogize to their situation are particularly illustrative of the weakness of their position—

¹¹⁰ See *Pasqual v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996) (“Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.”); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (“[T]here may be cases in which a supervisor makes sexual overtures of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, [the] harassment would not be based on sex because men and women are accorded like treatment . . . and the plaintiff would have no remedy under Title VII.”).

¹¹¹ *Oncale*, 523 U.S. at 80.

¹¹² *DeJohn*, 537 F.3d at 316 n.14 (citations omitted).

*Lewis v. Triborough Bridge and Tunnel Authority*¹¹³ and *Schonauer v. DCR Entertainment Inc.*¹¹⁴ *Lewis* involved harassment that is worlds apart from anything in the present record. There, cisgender men not only entered a locker room while cisgender female employees were changing, they “leer[ed]” at them, “crowd[ed] the entrance to the locker room, forcing [them] to ‘run the gauntlet[,]’ and brush[ed] up against them.”¹¹⁵ When a supervisor was informed, he referred to the female employees as “cunts” and “the biggest bunch of fucking crybabies.”¹¹⁶ Any comparison to the circumstances the appellants face here is patently frivolous.

Schonauer is also distinguishable. There, the plaintiff was employed as a beverage server at a topless nightclub and alleged that she had been harassed by a manager.¹¹⁷ In addition to entering the women’s changing facility, the manager repeatedly encouraged the plaintiff to enter nude dance contests, asked questions about her sexual fantasies, and probed her sexual history.¹¹⁸ When the plaintiff resisted these advances, she was fired.¹¹⁹ The Washington Court of Appeals found that this behavior could constitute harassment not simply because the manager entered the changing facility, but because he pressed the plaintiff to “provide sexually explicit information and to dance on stage in a sexually provocative way.”¹²⁰

The District Court no doubt realized that the appellants’ attempt to seize upon *Lewis* and *Schonauer* demonstrated the weakness of their arguments. Here, there are no allegations of harassment, let alone any that are even remotely as “severe, pervasive, [or] objectively offensive.”¹²¹ Still, the appellants

¹¹³ 77 F. Supp. 2d 376, 377–78 (S.D.N.Y. 1999).

¹¹⁴ 905 P.2d 392, 396–97, 400–01 (Wash. Ct. App. 1995).

¹¹⁵ 77 F. Supp. 2d at 377.

¹¹⁶ *Id.* at 378.

¹¹⁷ *Schonauer*, 905 P.2d at 396.

¹¹⁸ *Id.* at 396–97.

¹¹⁹ *Id.* at 397.

¹²⁰ *Id.* at 400.

¹²¹ *DeJohn*, 537 F.3d at 316 n.14; *Castleberry*, 863 F.3d at 264.

unconvincingly try to equate mere presence in a space with harassing activity.

This case is far more analogous to *Cruzan v. Special School Dist., No. 1*,¹²² a Title VII case from the Court of Appeals for the Eighth Circuit. *Cruzan* held that a transgender individual in a bathroom did not create a hostile environment because there was no evidence that the individual “engaged in any inappropriate conduct other than merely being present in the women’s faculty restroom.”¹²³ That is, a transgender person in a restroom did not create an environment that was “permeated with discriminatory intimidation, ridicule, and insult” as required to sustain a harassment claim under Title VII.¹²⁴ We agree with the Eighth Circuit’s conclusion. As we have emphasized, the appellants’ real objection is to the presence of transgender students, not to any “environment” their presence creates. Indeed, the allegations here include an assertion that a cisgender student was harassed merely by a transgender student washing that student’s own hands in a bathroom or changing in a locker room. That is not the type of conduct that supports a Title IX hostile environment claim.¹²⁵ The District Court recognized this and correctly ruled that this claim was unlikely to succeed.

The School District, on the other hand, contends that barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination under a sex-stereotyping theory in violation of Title IX.¹²⁶ We need not decide that very different issue here. We note only that the School District’s argument finds support in the very persuasive opinion from the Seventh Circuit in *Whitaker*, and the analysis there supports the District Court’s conclusion that appellants were not likely to succeed on the merits of their Title IX claim.

¹²² 294 F.3d 981, 984 (8th Cir. 2002).

¹²³ *Id.*

¹²⁴ *Id.* (citation omitted).

¹²⁵ This is not to say that the transgender students could not engage in conduct that would rise to the level of harassment. It would be the same conduct required for cisgender students to harass someone.

¹²⁶ Br. for Appellees, 38–40.

In *Whitaker*, a transgender boy sued the Kenosha Unified School District for prohibiting him from using the boys' bathrooms and locker room.¹²⁷ He alleged that Kenosha's policy violated Title IX and denied him equal protection.¹²⁸ The District Court agreed and the school district appealed.¹²⁹ The Court of Appeals for the Seventh Circuit affirmed, finding that Kenosha's policy constituted sex-based discrimination.

Specifically, *Whitaker* held that Kenosha's policy violated Title IX because it discriminated against transgender people based on their failure to conform to sex stereotypes.¹³⁰ "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."¹³¹ Accordingly, Kenosha's policy subjected Whitaker, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX."¹³² The court also dismissed Kenosha's argument that gender-neutral bathroom alternatives were sufficient because such a policy would itself violate the Act.¹³³

Whitaker explained that the Supreme Court has adopted an expansive view of "sex" under Title VII.¹³⁴ Rather than limit the definition of sex to one's anatomy, a plurality of the Supreme Court held in *Price Waterhouse* that Title VII "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹³⁵ The Supreme Court reiterated Title VII's broad view of "sex" in *Oncale*, wherein Justice Scalia wrote that "statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concern of our legislators by which we

¹²⁷ *Whitaker*, 858 F.3d at 1042.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1042–43.

¹³⁰ *Id.* at 1048–49.

¹³¹ *Id.* at 1048.

¹³² *Id.* at 1049–50.

¹³³ *Id.* at 1049–50

¹³⁴ *Id.* at 1048.

¹³⁵ *Id.* at 1047–48 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality)).

are governed.”¹³⁶ *Whitaker* noted that, following *Price Waterhouse*, many courts (including the Third Circuit) have recognized a cause of action under Title VII when an employee faces discrimination for failing to conform to sex stereotypes.¹³⁷

The injunction that the appellants have requested here would essentially have replicated the Kenosha policy. The Boyertown Area School District can hardly be faulted for being proactive in adopting a policy that avoids the issues that would have otherwise arisen under Title IX. Contrary to the appellants’ assertions, “sex” has not been narrowly limited to a person’s anatomy under Title VII—nor by analogy is it so limited under Title IX.

This conclusion is a natural extension of our decision in *Prowel v. Wise Business Forms, Inc.*, where we recognized that a plaintiff can state a claim under Title VII for sexual discrimination based on gender stereotyping.¹³⁸ While *Prowel* did not involve a transgender person, we did consider whether a man who did not adhere to male gender stereotypes could state a claim for sex discrimination under Title VII.¹³⁹ Relying on *Price Waterhouse*, we held that Title VII’s prohibition on discrimination “because of sex” also prohibited discriminating against someone who did not conform to gender stereotypes.¹⁴⁰

Title IX prohibits discrimination against transgender students in school facilities just as Title VII prohibited discrimination against Prowel in the workplace. Therefore a court may not issue an injunction that would subject the

¹³⁶ *Id.* at 1048 (quoting *Oncale*, 523 U.S. at 79).

¹³⁷ *Id.* (citing *Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263–64 (3d Cir. 2001); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999)).

¹³⁸ 579 F.3d 285 (3d Cir. 2009).

¹³⁹ *Prowel*, 579 F.3d at 287.

¹⁴⁰ *Id.* at 290–92.

transgender students to different conditions than their cisgender peers are subjected to.

We are not alone in reaching this conclusion. In addition to the Seventh Circuit’s decision in *Whitaker*, the Courts of Appeals for the Eleventh and Sixth Circuits have concluded that discriminating against transgender individuals constitutes sex discrimination.¹⁴¹ Similarly, the First Circuit has relied on Title VII in holding that a person may state a claim under the Equal Credit Opportunity Act, which prohibits discrimination “with respect to . . . sex[,]” if that person does not conform to sex stereotypes.¹⁴² The Ninth Circuit has also looked to Title VII and held that a transgender female inmate who did not conform to sex stereotypes could state a claim under the Gender Motivated Violence Act.¹⁴³

We therefore hold that the District Court correctly declined to issue an injunction based on the appellants’ Title IX claim.

¹⁴¹ *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (holding that a “person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (holding that sex discrimination under Title VII “encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms”).

¹⁴² *Rosa v. Park West Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that the plaintiff, a birth-assigned male whose “attire did not accord with his male gender,” could state a claim if a banker did not give him a loan).

¹⁴³ *Schwenk v. Hartford*, 204 F.3d 1187, 1200, 1202 (9th Cir. 2000) (“Congress intended proof of gender motivation under the GMVA to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII ‘[S]ex’ under Title VII encompasses both sex—that is, the biological difference between men and women—and gender.”).

2. The District Court correctly concluded that the appellants' state law tort claim was unlikely to succeed on the merits.

Finally, the appellants contend that the District Court erred in denying the injunction as to their Pennsylvania-law tort claim for intrusion upon seclusion. Pennsylvania has adopted the Second Restatement of Torts' definition of intrusion upon seclusion:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.¹⁴⁴

In denying this claim, the District Court concluded that the mere presence of a transgender individual in a bathroom or locker room is not the type of conduct that would be highly offensive to a reasonable person. As we have noted, students in a locker room expect to see other students in varying stages of undress, and they expect that other students will see them in varying stages of undress. We will affirm the District Court's rejection of the appellants' tort claim.

B. Irreparable Harm

In addition to finding that the appellants were unlikely to succeed on the merits of their claims, the District Court denied injunctive relief because they had not demonstrated that the failure to issue an injunction would result in irreparable harm. The District Court found that:

¹⁴⁴ *Tagouma v. Investigative Consultant Servs, Inc.*, 4 A.3d 170, 174 (Pa. Super. Ct. 2010) (quoting Restatement (Second) of Torts § 652B (1965)).

On a practical level . . . the privacy protections that are in place at BASH, which include the bathroom stalls and shower stalls in the locker rooms, the bathroom stalls in the multi-user bathrooms, the availability of a number of single-user bathrooms (a few of which will have lockers for storing items), the [ability] of students to store personal items in their locker or leave those items with the gym teacher, and the availability of the team rooms in the locker rooms (which would not involve students passing through the common area of the locker room), and the overall willingness of the [appellees] to work with the students and their families to assure that the students are comfortable at BASH, mitigates against a finding of irreparable harm. . . . The privacy protections available to students in 2017-18 are more than suitable to address any privacy concerns relating to the presence of transgender students in the locker rooms and bathrooms at BASH.¹⁴⁵

We agree that the appellants did not demonstrate irreparable harm would result from denying an injunction. The School District has provided adequate privacy facilities for the appellants to use during this litigation. Even if the appellants could otherwise succeed on one or more of their claims (and, as explained above, we do not suggest that they can), the single-user facilities ensure that no appellant faces irreparable harm in the meantime.

¹⁴⁵ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp 3d. at 410.

III. CONCLUSION

The Boyertown Area School District has adopted a very thoughtful and carefully tailored policy in an attempt to address some very real issues while faithfully discharging its obligation to maintain a safe and respectful environment in which everyone can both learn and thrive.

The District Court correctly concluded that the appellants' attempt to enjoin that policy based on an alleged violation of their privacy rights and their rights under Title IX and Pennsylvania tort law is not likely to succeed on the merits. The District Court was also correct in deciding that denying the injunction would not irreparably harm the appellants. For the reasons set forth above and in the well-reasoned District Court opinion, we will affirm the District Court's denial of the requested preliminary injunction.