

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

Plaintiff,

vs.

THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,

Defendant.

Jacksonville, Florida

Case No. 3:17-cv-739-J-32JBT

Friday, February 16, 2018

9:32 a.m.

Courtroom No. 10D

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

COURT REPORTER:

Shelli Kozachenko, CRR, CRC, RPR
221 North Hogan, #185
Jacksonville, Florida 32202
Telephone: (904) 301-6842
shellikoz@gmail.com

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A P P E A R A N C E S

PLAINTIFF'S COUNSEL:

TARA L. BORELLI, ESQ.

Lambda Legal Defense and Education Fund, Inc.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308

OMAR GONZALEZ-PAGAN, ESQ.

Lambda Legal Defense
120 Wall Street, 19th Floor
New York, NY 10005-3919

SHANI RIVAUX, ESQ.

Pillsbury Winthrop Shaw Pittman
600 Brickell Avenue, Suite 3100
Miami, FL 33131

DEFENSE COUNSEL:

TERRY JOSEPH HARMON, ESQ.

MICHAEL P. SPELLMAN, ESQ.

ROBERT JACOB SNIFFEN, ESQ.

KEVIN CHARLES KOSTELNIK, ESQ.

JEFF SLANKER, ESQ.

Sniffen & Spellman, PA
123 North Monroe Street
Tallahassee, FL 32301-1509

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P R O C E E D I N G S

Friday, February 16, 2018

9:32 a.m.

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COURT SECURITY OFFICER: All rise. United States District Court in and for the Middle District of Florida is now in session, the Honorable Timothy J. Corrigan presiding.

Please be seated.

THE COURT: Good morning.

Before we tend to the matter at hand today, I want to make a statement.

It is not usually appropriate for a judge to speak from the bench about a matter of public interest unrelated to the case before the Court. However, there are exceptions, and this is one of those times.

I think it particularly appropriate, given that the case that is before the Court involves a school district which is tasked with educating 40,000 students, young persons who are the future of our community and nation.

While words are inadequate, they are all that I have. I join all Americans in feeling a profound sense of sadness and anger over the senseless deaths of 14 students and 3 heroic adults in Broward County.

These young people, cut down just as they were finding themselves and transitioning to becoming the responsible adults our society so desperately needs, have now

1 been robbed of their opportunity to live full and long lives.

2 I grieve for them and for their families, now
3 deprived of a loved one who helped define their very existence.
4 As a soon-to-be first-time grandfather, I think how these young
5 people will never have the opportunity to have children, and
6 their parents will never get to know the grandchildren they
7 would have had.

8 As an American I find this entirely unacceptable. No
9 parent should have to worry, when they send their child to
10 school, that their child will be murdered in a random spasm of
11 violence. No student should have to be concerned for their
12 safety while they are in school, and no teacher or
13 administrator should ever have to explain to a parent how their
14 child was lost to a hateful and evil act while under their
15 care.

16 A society cannot call itself civilized if it cannot
17 protect its children. We Americans have to do better than
18 this. We just have to.

19 God bless those who are lost and their families,
20 those who are wounded that they may recover, and God bless the
21 United States of America.

22 And I'll ask you to observe a moment of silence,
23 please.

24 (Pause in proceedings.)

25 THE COURT: Thank you.

1 This case before the Court is Adams versus The School
2 Board of St. Johns County, Florida, 3:17-cv-739.

3 I'll go ahead and get appearances. I've got a
4 written list of appearances but I'll go ahead.

5 Ms. Borelli, if you want to make your appearance and
6 have your co-counsel do as well, please.

7 MS. BORELLI: Good morning, Your Honor. Tara Borelli
8 with Lambda Legal on behalf of plaintiff Drew Adams.

9 I'll also mention that we're joined by Erica Adams
10 Kasper, Drew Adams' representative. Thank you.

11 MR. GONZALEZ-PAGAN: Good morning, Your Honor. I'm
12 Omar Gonzalez-Pagan on behalf of the plaintiff.

13 MS. RIVAUX: Good morning, Your Honor. Shani Rivaux
14 with the law firm Pillsbury Winthrop Shaw Pittman on behalf of
15 Drew Adams.

16 THE COURT: And, Ms. Kasper, welcome this morning.

17 Mr. Harmon, if you'll make your appearances and those
18 of your co-counsel, please.

19 MR. HARMON: Yes, Your Honor. Terry Harmon from
20 Sniffen & Spellman, PA, on behalf of the defendant.

21 And, Your Honor, Superintendant Forson may be running
22 a little bit late. His wife was in a minor fender-bender, but
23 he will be here.

24 The board chair, at the request of Your Honor, is
25 also present, Bill Mignon. He's in the gallery.

1 THE COURT: All right. Thank you.

2 MR. SPELLMAN: Good morning, Your Honor. Michael
3 Spellman, Sniffen & Spellman, on behalf of the defendant,
4 School Board of St. Johns County.

5 MR. KOSTELNIK: Good morning, Your Honor. Kevin
6 Kostelnik of Sniffen & Spellman on behalf of the defendant.

7 MR. SNIFFEN: Good morning, Your Honor. Rob Sniffen,
8 Sniffen & Spellman, PA, on behalf of the school board.

9 MR. SLANKER: Your Honor, Jeff Slanker on behalf of
10 the school board.

11 MR. WILEY: Trae Wylie, paralegal, Sniffen &
12 Spellman.

13 THE COURT: And welcome to all.

14 As we begin this morning -- and I appreciate
15 Mr. Mignon being here, and I apologize for the short notice,
16 and I apologize for having him have to drive up from St. Johns
17 County.

18 But it's an important issue. It's an issue that I
19 have thought important. I think maybe more -- I think I think
20 it's more important than the parties do, but here's why.

21 There was some indication in the plaintiff's briefing
22 on this issue -- and here's what happened.

23 After the trial, you know, I kept asking is this an
24 official policy of The School Board of St. Johns County,
25 Florida? Because if it's not, then I had a concern as to

1 whether I was being asked to adjudicate a constitutional issue
2 without the highest policy-making body of the institution being
3 on record as to what the policy was.

4 And so I -- and I also had the trial testimony of
5 Mr. Upchurch, who testified, quote, "I can tell you without a
6 doubt that this issue" -- the bathroom issue -- "would be very
7 divisive and controversial if it were taken up in a public
8 school board meeting."

9 And I wrote in my order, "But deciding divisive and
10 controversial issues affecting the St. Johns County schools is
11 precisely the function of the elected school board," and I
12 asked this question.

13 "Before asking a federal court to potentially insert
14 itself into matters of school district policy, should not the
15 school board be required to take a formal position on the
16 matter?"

17 And, of course, the testimony at trial was that the
18 school board, per se, had never actually considered the
19 unwritten policy that is being put forward by the lawyers for
20 the school board as being the policy that prohibits Mr. Adams
21 from using the boys' restroom at Nease High School.

22 And especially since the policy was unwritten, it
23 made me wonder whether this represented the official policy of
24 the school board or not. So I asked the parties to brief that
25 question, and they did a good job. And I'm -- I was relatively

1 persuaded by the briefing from the parties.

2 Both parties said that the case was at issue. They
3 both had a little different slant on it, but they both said
4 that it's something I should go ahead and decide.

5 And any implication that I'm somehow trying to weasel
6 out of this or that I'm shirking my responsibility by trying to
7 avoid a constitutional decision is a misreading of the
8 situation. In fact, what I am doing is fulfilling my
9 responsibility.

10 My responsibility, and it's a very well settled
11 principle of law, is that a court should avoid deciding a
12 constitutional question if it can do so and still do justice to
13 the cause.

14 And one of the ways that we know whether a
15 constitutional issue is really teed up and appropriate for the
16 Court to decide is whether or not the ultimate decision maker
17 has made the decision, and the ultimate decision maker in
18 St. Johns County is the school board.

19 And since I had what was a, quote, best practices
20 policy that was not decided by the school board and, in fact,
21 the best practices policy doesn't actually address prohibiting
22 Mr. Adams from using the boys' restroom -- I was repeatedly
23 told that it was an unwritten policy that prohibited him from
24 using the boys' restroom -- I felt it was important to know for
25 sure that The School Board of St. Johns County has taken the

1 position that Mr. Adams cannot use the boys' restroom at Nease
2 High School.

3 And so what I've decided to do -- and I appreciate
4 Mr. Mignon being here. I sent out an order the other day that
5 asked him to be here, and the question I'm intending to ask him
6 is this: Is the rule that prohibits Drew Adams from using the
7 boys' bathrooms at Nease High School the official policy of The
8 School Board of St. Johns County, Florida?

9 And depending upon what Mr. Mignon's answer to that
10 question is, this matter will either be resolved in my mind, or
11 we'll have some more discussion about it.

12 But that -- I thought it was important for me to put
13 on the record why I've been making such a big deal about this.
14 I'm not trying to get out of doing it. We decide
15 constitutional questions all the time, but we're not supposed
16 to do it unless it's required.

17 And a lot of the briefing from the school board,
18 rightfully so, keeps telling me that federal courts shouldn't
19 get involved in the business of schools, and the school
20 district should run its own affairs, and the local control of
21 schools is important, all of which I agree with.

22 And isn't that precisely the point? The point is
23 until and unless The School Board of St. Johns County can tell
24 the Court, "Yes, this is the policy we're enforcing," then I
25 was concerned that I might not have a proper controversy in

1 front of me.

2 If the school board chair tells me, "Yes, this is the
3 rule. This is our policy," then -- then my job then becomes
4 not to decide whether it's a good rule or a bad rule. That's
5 not my job. My job is to decide whether that rule, as
6 enforced, violates either Title IX, the education law, or the
7 Fourteenth Amendment Equal Protection Clause of the United
8 States Constitution.

9 And so you will never hear me and you will never read
10 an opinion from me whether I think this was a good rule or a
11 bad rule. That's not my job. That's the school board's job.
12 Setting policy -- setting policy for the school is the school's
13 job.

14 But my job is to decide whether the law has been
15 violated or the Constitution has been violated. And if it has,
16 it's my further job to say so, and if it hasn't, that's also my
17 job to say so. So that's what we're going to be doing here
18 today.

19 Now, Mr. Harmon, is Mr. Mignon prepared to answer the
20 direct question that the Court put in the order? And I put it
21 in the order because I wanted him to know exactly what I was
22 going to be asking him.

23 Is he prepared to answer that question?

24 MR. HARMON: Yes, Your Honor.

25 THE COURT: All right. Mr. Mignon, would you mind

1 just coming forward to the podium, and Mr. Harmon can come up
2 with you.

3 Good morning.

4 MR. MIGNON: Good morning. Good morning, Your Honor.

5 THE COURT: I really appreciate you coming up. I
6 know it was short notice, but it's kind of important.

7 MR. MIGNON: I understand.

8 THE COURT: Sure.

9 So you understand why I'm asking you this question?

10 MR. MIGNON: Yes.

11 THE COURT: Okay. And are you prepared to answer it?

12 MR. MIGNON: Yes, sir.

13 THE COURT: Okay. So, Mr. Mignon, can I just
14 establish for the record, are you the current chair of The
15 School Board of St. Johns County, Florida?

16 MR. MIGNON: Yes, I am, Your Honor.

17 THE COURT: Okay. And this is just my understanding,
18 but you tell me.

19 You actually are elected to the school board. Is
20 that correct?

21 MR. MIGNON: That is correct.

22 THE COURT: And then the school board members
23 themselves elect the chair? Is that right?

24 MR. MIGNON: Yes. That's correct.

25 THE COURT: Okay. All right. So you're elected by

1 your other members to be the chair.

2 MR. MIGNON: Right.

3 THE COURT: And when did you become the chair?

4 MR. MIGNON: I've been chair three different -- on
5 three different occasions. I'm in my twelfth year as a board
6 member.

7 THE COURT: Okay. Good. All right. Well, thank
8 you, sir. I appreciate you being here.

9 May I ask you this direct question: Is the rule that
10 prohibits Drew Adams from using the boys' bathrooms at Nease
11 High School the official policy of The School Board of
12 St. Johns County, Florida?

13 MR. MIGNON: Yes, it is, Your Honor.

14 THE COURT: Okay. Thank you very much, sir.

15 MR. MIGNON: Thank you.

16 THE COURT: Mr. Harmon, do you want to do anything
17 else for the record with regard to Mr. Mignon?

18 MR. HARMON: No, Your Honor. I think that was the --
19 the Court wanted to question him.

20 THE COURT: Ms. Borelli, do you have anything else I
21 need to do on that score?

22 MS. BORELLI: No, Your Honor. Nothing further.

23 THE COURT: All right. Mr. Mignon, you are, of
24 course, welcome to stay and I'd be delighted to have you stay,
25 but I appreciate you being here. And as far as I'm concerned,

1 you're free to go about your business, but I'm also happy to
2 have you stay and watch the argument.

3 I hope -- I hope it will be educational for all. I
4 know it will be for me. And thank you again for being here.

5 MR. MIGNON: Thank you.

6 THE COURT: All right. The Court -- and I know the
7 parties have been there way before I have been, but the Court
8 is satisfied that there is a controversy before the Court that
9 needs adjudication, and the Court will proceed to adjudicate
10 that controversy.

11 And so here's what I've done. I have -- of course, I
12 attended the trial and presided over it, and I didn't hesitate
13 to ask questions if I had them.

14 And let me just say something about questions. I
15 asked a lot of questions at trial, and I had that luxury
16 because it was a nonjury trial and I'm the one that's going to
17 be deciding the case. And so I didn't hesitate to ask
18 questions if I had them.

19 And I'm going to do the same thing today. And some
20 of the questions I'm going to ask, I think I already know the
21 answer to but I want to hear what your answer is. Some of the
22 questions I ask, I don't know the answer to.

23 Some of the questions -- because of the subject
24 matter, some of the questions are sensitive questions, and some
25 of them may touch on sensitivities.

1 But I can't worry about that. I just have to ask the
2 questions I'm going to ask, and I don't mean to be insensitive
3 to anybody. I don't mean to be ignorant. I don't mean to be
4 any of that. But this is an area that, just because of the
5 nature of it, anytime you're talking about sex-based issues,
6 there are sensitivities involved.

7 And -- but I've got to be able to ask the questions
8 that I need to ask, and I hope everybody will understand they
9 are only questions, and the answer from the Court will come in
10 the form of the Court's opinion.

11 So just because I ask a question doesn't mean I think
12 a certain thing or that I have a preordained idea about it.
13 The truth of it is I have none of that.

14 So what I did was I read all of the findings of fact
15 that y'all submitted, and I appreciate that. Of course, I'm
16 familiar with the trial record.

17 I've also read, probably over the last couple of
18 days, maybe -- I don't know, a lot of cases. There's a fair
19 amount of case law in this area already. And there's some
20 Supreme Court guidance, there's some Eleventh Circuit guidance,
21 and then there's circuit and district guidance from around the
22 country about how these matters have been handled in other
23 situations.

24 And one of the things I asked the parties to do in
25 their briefing was to tell me why a certain case that's been

1 handled a certain way in another part of the country, why that
2 should be -- why either that should be influential to me or it
3 shouldn't be influential to me, and the parties have attempted
4 to do that in their briefing. And I've read associated other
5 documents and things that came with the trial.

6 So I think I'm fairly conversant with the issues. I
7 also have prepared a list of questions to ask the plaintiff and
8 questions to ask the defendant and some of my own notes here.

9 And so what I'm going to do is this. Since the
10 plaintiff brought the case, has the burden of proof in the
11 case, and is seeking to change the status quo, I'm going to --
12 meaning the status quo of the rule, which is -- right now the
13 rule is that Mr. Adams cannot use the boys' restroom at Nease
14 High School.

15 And the plaintiff's suit is seeking to change that,
16 and they're the -- they brought the suit. So I'm going to let
17 them go first.

18 And what I'm going to do is -- one thing that you
19 didn't have when you wrote your findings of fact, you didn't
20 have the other side's findings of fact. And so one of the
21 things I'm going to be interested in hearing from you by way of
22 oral argument is some of the issues raised by your opponents
23 and why you are not persuaded by them, if that's your position.

24 So what I'm going to do is let you just start
25 talking, making your argument, making points you think are

1 important, and then I will not hesitate to interrupt you. And
2 in the course of that, I'm guessing I'm going to ask most of
3 the questions that I had.

4 At some point I'll take a break. I'll look at my
5 notes and see -- to make sure that I've covered the areas that
6 I want to cover, and I'll try to give you opportunity to make
7 sure that if there's some key point that I've left out, that
8 you get an opportunity to make that point.

9 So is it you, Ms. Borelli? Are you going to speak
10 for the plaintiff?

11 MS. BORELLI: Yes, Your Honor.

12 THE COURT: Come on up.

13 MS. BORELLI: Thank you.

14 Good morning, Your Honor. I'd like to begin today by
15 making some observations about some core areas of agreement
16 between the parties, because I think those areas of agreement
17 actually help focus the questions.

18 THE COURT: Stop right there.

19 MS. BORELLI: Yes, sir.

20 THE COURT: Can everybody -- can everybody hear me?

21 (Affirmative response.)

22 THE COURT: Can everybody hear Ms. Borelli?

23 (Negative response.)

24 THE COURT: Not so much. I don't know. We just had
25 our courtroom reconfigured, and we're still -- all right. Try

1 again.

2 MS. BORELLI: Thank you, Your Honor. I appreciate
3 that.

4 THE COURT: Can everybody hear better now, a little
5 better?

6 If we can bump -- is that it? Is it bumped up?

7 COURTROOM DEPUTY: Raise the podium just a little.

8 THE COURT: Thank you.

9 MS. BORELLI: Absolutely.

10 THE COURT: All right. And try to keep your voice
11 up, if you will.

12 MS. BORELLI: Thank you, Your Honor. I will.

13 So I was saying that I'd like to begin with some
14 observations about core areas of agreement between the parties
15 because I believe that those help focus the questions in front
16 of the Court.

17 First, one very key agreement between the parties is
18 that defendant agrees that its classification here is a
19 sex-based classification. And so defendant also agrees that
20 that means intermediate scrutiny must be applied to its
21 classification.

22 And under that level of review, defendant agrees that
23 it bears the burden of showing that the classification
24 substantially serves an important governmental interest today
25 and at the time that the classification was adopted.

1 The weight of the case law tells us how to conduct
2 this analysis. So we represented -- on the Court's list of
3 cases the Court wished to have addressed, there were three
4 military cases. There's a fourth one we cited in our brief
5 that hadn't yet been published on Westlaw.

6 But those four military cases all say very clearly,
7 under intermediate scrutiny, which they all applied, that when
8 the government tries to satisfy its burden under heightened
9 scrutiny, it cannot produce an interest that's hypothetical and
10 overbroad.

11 So, for example, in those cases it wasn't sufficient
12 for the government to say deployability. The Court said that
13 concept applies to every servicemember. That doesn't explain
14 why we should exclude transgender soldiers and servicemembers.

15 Similarly here, it isn't enough to say privacy, and
16 this is precisely what the second set of cases tells us, and
17 that's *Boyertown* and *Students and Parents for Privacy*.

18 Those are the two cases where plaintiffs sued seeking
19 to attack positive inclusive policies at schools. And those
20 decisions said your government interest has to be specifically
21 defined. There's no generic right of privacy, per se.

22 And when we look really carefully at what the parties
23 are asking for here, they're asking simply for the right of
24 privacy, purportedly, to be able to exclude transgender kids
25 from communal spaces like restrooms, and that's not a

1 recognized privacy right in any case.

2 And then, of course, we have --

3 THE COURT: Well, it is a recognized privacy right, I
4 think, to -- you and I could agree, I think, that it's
5 perfectly fine for Nease High School to say that boys should
6 use the boys' restroom and girls should use the girls'
7 restroom, right?

8 MS. BORELLI: Yes, Your Honor, and this case doesn't
9 challenge that norm in the slightest.

10 THE COURT: Right. So there is a privacy component
11 to restroom usage.

12 MS. BORELLI: Title IX allows for restrooms to be
13 separated.

14 THE COURT: Right.

15 MS. BORELLI: Yes, Your Honor.

16 THE COURT: So when you get to the core of it, I
17 think -- this is what I've been trying to think about --
18 isn't -- isn't the answer to this question as simple as this:
19 Drew says he's a boy. Nease High School says he's a girl?

20 Isn't that really what this is about? Because if
21 he's -- if he's a boy, he should be able to use the boys'
22 bathroom, but if he's a girl, he shouldn't be.

23 MS. BORELLI: Your Honor, on this record the Court
24 should find that he is a boy. The actual question in front of
25 the Court is whether there's a sex-based classification, but on

1 this record it's absolutely appropriate. We think the only
2 appropriate conclusion is that he's a boy.

3 THE COURT: So tell me how it's different than what I
4 just said. When you're talking about sex-based classification,
5 what -- how is that saying something different than what I just
6 said?

7 MS. BORELLI: The Court doesn't necessarily have to
8 decide what is sex writ large. That's not a question the Court
9 has to answer.

10 The Court simply has to ask is there discrimination
11 based on sex and can defendant produce an adequate government
12 interest to sustain it.

13 But on this record, it's more than appropriate. We
14 think the only --

15 THE COURT: You're going to have to say that again,
16 because I -- I understand you're going to say that on this
17 record I can find he's a boy, but you're saying I don't really
18 have to do that.

19 Why don't I have to do that? Because if I -- if I --
20 is there a -- is there a third category or -- I mean, I thought
21 the whole point of transgender is that you are -- you are, in
22 effect, a boy trapped in a girl's body.

23 Isn't that -- isn't that what we're talking about?

24 MS. BORELLI: I'm afraid I've confused the issues.
25 Let me distill it, Your Honor.

1 Yes. Drew is a boy. That's the only conclusion that
2 can be reached on this record based on the medical consensus,
3 based on the State of Florida's recognition of him, based on
4 his own testimony, the testimony of his parents, based on the
5 standards of care, the uncontested --

6 THE COURT: He's got a birth certificate that says
7 he's a boy. He's got a driver's license that says he's a boy.
8 The Florida High School Athletic Association says he's a boy.
9 He uses the boys' restroom when he comes in here to the federal
10 courthouse.

11 So -- but you heard the principal of Nease High
12 School say that she thinks he's a girl. And doesn't the best
13 practices policies and the other things -- don't they view
14 him -- and it's difficult to talk about pronouns with -- I
15 mean, we're talking -- but don't they -- isn't that what we're
16 talking about? That Nease High School and The School Board of
17 St. Johns County say that he's a girl, and if he's a girl, he
18 shouldn't be in the boys' bathroom?

19 MS. BORELLI: The evidence in this case shows that
20 he's a boy, however.

21 Your Honor, let's look for a moment at the *Glenn*
22 case.

23 THE COURT: Yeah.

24 MS. BORELLI: Mr. Sewell Brumby, in that case, viewed
25 Vandy Beth Glenn -- he didn't see her as a woman.

1 And the Court rejected that and said, "That's sex
2 stereotyping, and in fact, the supposed differences that you're
3 pointing to, those are actually evidence of sex stereotyping.
4 She just isn't the proper kind of woman, in your view. That is
5 sex discrimination, and you don't have an adequate interest to
6 justify that."

7 It's a similar concept here, Your Honor. Another way
8 to think of it is the school board has attempted to argue that
9 they can point to differences here.

10 They've argued in their findings of fact and
11 conclusions of law that Drew is not similarly situated. But,
12 of course, the crux of that inquiry is not can a person point
13 to any difference between two groups. That would defeat every
14 equal protection claim. It has to be relevant.

15 And here, the unrebutted evidence shows that in every
16 respect, in every material, relevant respect, Drew is a boy:
17 lives as a boy, acts as a boy, is recognized as a boy by
18 experts in the field, by the State of Florida, by the Florida
19 High School Athletic Association. They can't point to any
20 relevant difference, Your Honor.

21 So the only -- the only conclusion that can be
22 reached on this record, we respectfully submit, is that Drew is
23 a boy.

24 THE COURT: And do I -- is that a finding I need to
25 make? You were trying to tell me before that it wasn't, that

1 all I have to do is find, under equal protection analysis, that
2 it's a sex-based classification -- that being a transgender
3 person is a sex-based classification that deserves intermediate
4 scrutiny.

5 What am I saying when I say that? What am I -- how
6 is that different than saying he's a boy? That's what I'm
7 trying to understand.

8 MS. BORELLI: Well, that simply marches through the
9 prima facie analysis, Your Honor. But we do believe on this
10 record that the Court can and should make that finding, that
11 it's the only appropriate finding based on the evidence.

12 THE COURT: All right. And this is -- we'll probably
13 get back to that because the more I've been thinking about it,
14 I think -- it seemed like -- the more I thought about this, the
15 more I thought it just depends -- I mean, answers to all these
16 questions depend on whether he's a boy or a girl, because
17 nobody is saying that girls ought to be allowed to be in the
18 boys' restroom --

19 MS. BORELLI: Correct.

20 THE COURT: -- and nobody is saying that boys ought
21 to be allowed to be in the girls' restroom. So a transgender
22 person who has -- what's the word, trans- --

23 MS. BORELLI: Transitioned.

24 THE COURT: Transitioned, that's the word I was
25 trying to look for -- in the eyes of the law, is that person a

1 male then, a boy?

2 MS. BORELLI: Drew certainly is. That is the
3 position of the State of Florida.

4 And, Your Honor, I really believe, given the
5 unrebutted testimony and the reality of Drew's existence, that
6 there is no way to find that he is anything other than a boy.
7 He might be viewed as a certain subset, a certain type of boy,
8 but there is no way to make a finding that he is anything other
9 than a boy.

10 They've had their opportunity to try to rebut the
11 evidence, all of the evidence we've produced on that point in
12 this case, and they've failed because, in fact, it's not
13 possible to contest this evidence.

14 The State of Florida's position is what the State of
15 Florida's position is. The standards of care and the medical
16 consensus is what it is. And under any of those angles, Your
17 Honor, Drew is a boy. It is the only way he can be viewed.

18 An example of that, Your Honor, is we had testimony,
19 unrebutted testimony, about the standards of care. They are
20 preeminent. They are well recognized. They are uncontested.

21 And those standards of care recognize that when you
22 have someone with -- you know, sex is a multifaceted concept.
23 There are multiple sex-related characteristics for any
24 individual.

25 For a majority of us --

1 THE COURT: Let me ask you this. Mr. Adams testified
2 that he feels with every fiber of his being that he's a boy --

3 MS. BORELLI: Uh-huh.

4 THE COURT: -- and he also has taken physical -- he
5 has done things to his body to become, for lack of a better
6 term, more male, right?

7 MS. BORELLI: (Nods head up and down.)

8 THE COURT: I mean, he's had -- I think he's had
9 surgeries, right?

10 MS. BORELLI: Correct.

11 THE COURT: And he's done other things to -- and
12 before he did that, he bound himself up in order to look less
13 like a female, because he didn't want to look like a female,
14 was his testimony.

15 Is that a necessary incident of transitioning? What
16 I mean by that is this. Could Mr. Adams, in his -- still
17 testify, "In every fiber of my being, I'm a boy," but if he
18 looked and -- didn't do anything to change his looks and looked
19 like a prototypical female, if there is such a thing -- I
20 apologize if I'm --

21 MS. BORELLI: Not at all, Your Honor.

22 THE COURT: I'm just trying to do the best I can
23 here.

24 MS. BORELLI: Of course, Your Honor.

25 THE COURT: -- and he walked into the boys' bathroom

1 and he looked for all the world like what a girl would look
2 like, is that -- first of all, is that -- does that mean he's
3 not transitioned fully to being a boy? Is changing your
4 physical appearance a required incidence of transitioning?
5 What if you don't and you still think you're a boy?

6 Talk to me about that.

7 MS. BORELLI: Your Honor, the population of
8 transgender people that we're talking about do indeed
9 transition.

10 The testimony that we have from the experts is that
11 this is a population of people whose persistent, insistent, and
12 consistent experience of their gender identity is that they are
13 male or female, as their gender identity may be.

14 And the standard of care and what's involved in
15 aligning one's life to live in every respect as the male or
16 female that you are does indeed involve social, medical, and
17 legal transition. Gender identity and expression often go hand
18 in hand.

19 And, Your Honor, I would refer to some of the
20 testimony that we heard from Principal Kefford and Ms. Pope and
21 also Dr. Ehrensaft, which is that the entire point is to help
22 other people see you as the boy that you are, for a transgender
23 boy, and that involves transition. It involves cutting one's
24 hair and wearing stereotypically male clothing.

25 The medical transition might vary a bit. Some people

1 might not be ready for surgery before the age of 18. That's
2 why we have skilled medical professionals following these
3 established standards of care to provide individualized care.

4 But in every respect the goal is to align one's lived
5 experience and one's appearance. That is the goal of
6 transition, our experts testified, so that other people can
7 understand you to be the boy that you are.

8 THE COURT: Does -- and this is a question. And I
9 apologize. I had my microphone off.

10 This is a question. If you transition -- let's say
11 in this case you transition from being a female to a male and
12 you are -- so you're transgender, you transition, and now
13 you -- just as Mr. Adams testified, he considers himself with
14 every fiber of his being to be a boy, and he's gone to physical
15 lengths to conform his body to that. Does that have anything
16 to do with your sexuality?

17 In other words, can you be transgender -- can you
18 transition to become a boy and then you're homosexual? Are you
19 always heterosexual? Is there -- does one thing have to do
20 with the other? How does that work?

21 MS. BORELLI: They're not necessarily related in any
22 way, Your Honor. So, of course, everyone has a gender
23 identity. Everyone has a sexual orientation, the type of
24 person that they might form romantic attachments to and have
25 relationships with.

1 So it could be, for example, that if a person was a
2 female and was attracted to females -- and I'm also not being
3 very precise, Your Honor, so I'll ask for your indulgence.

4 If someone who sex assigned at birth was female and
5 that individual knew they had an attraction to females until
6 they understand and come to accept their gender identity, until
7 they realize that they have permission in society to live as
8 the gender that they truly are, they might think of that as
9 same-sex attraction.

10 At the point that that person understands "This is
11 why I've been depressed. This is why I've been suicidal. I'm
12 male and I haven't been able to live as who I am," once that
13 person transitions, they may continue to be attracted to
14 females and then they identify as heterosexual.

15 The bottom line is sexual orientation really is
16 distinct from gender identity.

17 THE COURT: And I recognize there wasn't a whole lot
18 of testimony about this at trial, but it's something that --
19 because what we haven't talked about yet -- we're going to --
20 is the privacy issues.

21 And the -- we've focused on Mr. Adams transitioning
22 and so forth, but we haven't focused on the stated reason that
23 the school board has its policies, and that has to do with the
24 interest of others who come in contact with Mr. Adams. And so
25 we'll talk about that.

1 But one thing that I heard a little bit about at
2 trial, and I didn't -- I don't -- and there wasn't much record
3 on it and I wanted to see if it has anything to do with this
4 case, and that's the concept of gender fluidity.

5 What is gender fluidity?

6 MS. BORELLI: Your Honor, there's a definition in
7 Plaintiff's Exhibit 66, which is the Broward guide. And the
8 definition provided in that guide is simply that it's somebody
9 who might have a more expansive concept of their gender
10 identity.

11 Frankly, Your Honor, this is not a new idea. The
12 label might be new. We've had tomboys forever. And so
13 although there was some innuendo about it at trial, as the
14 Court remarked during trial, "I haven't been given any evidence
15 on this point." And the findings of fact and conclusions of
16 law from defendants actually underscore that because the only
17 evidence that they point to is our exhibit, the Broward
18 guidelines.

19 And we had not one but two witnesses from Broward
20 testify there are no issues. That is exactly what the task
21 force found. Ms. Smith was pressed twice, when she raised this
22 idea, "And did the task force uncover any issues, any -- any
23 problem with this concept?" And she said no, after two years
24 of very robust research.

25 And the last point I'd like to make sure that I make

1 is this is not the population that we're talking about, however
2 one reads that definition. Transgender people are persistent,
3 insistent, and consistent in their gender identity. All of
4 the --

5 THE COURT: So you're saying that this -- because
6 just to the untrained ear, which is mine, the concept of gender
7 fluidity might lead one to believe that you -- your gender may
8 not always be -- your gender identity may not always be the
9 same, and therefore, that would raise issues about which
10 bathroom he's supposed to use.

11 I mean, that's what -- that's what the -- that's what
12 I hear or that's what I conjure up in my mind when I think
13 about gender fluidity. You're saying to me that's not exactly
14 what it is, and you're also saying to me that has nothing to do
15 with this case.

16 MS. BORELLI: Precisely right. And I do think
17 defendant knows that because in all of the sample policies that
18 the task force looked at, there's a definition of individuals
19 with a consistently asserted gender identity.

20 We heard testimony from Dr. Aberli -- and I think
21 this is true of every policy in the record -- when a person has
22 a consistent gender identity and they transition and they get
23 permission to use the restroom matching their gender identity,
24 that is the restroom they must use under these policies. And,
25 indeed, St. Johns County's guidelines for LBGT students already

1 incorporates that definition.

2 The *Boyertown* case was presented with sort of similar
3 innuendo about this and said -- on a record that looks much
4 like this one except without a trial, just an evidentiary
5 hearing for a preliminary injunction, the Court said there is
6 no suggestion here that that has anything to do with
7 transgender students -- for example, like Drew -- or that that
8 provides any reason whatsoever to discriminate against him.

9 It's simply a nonissue. If it were one, they would
10 have produced evidence, and they didn't.

11 THE COURT: All right. And I'm -- I don't know why.
12 I'm sorry. My microphone keeps clicking on and off here, so I
13 apologize.

14 I don't know if this -- two other questions about
15 that. And I recognize that there's not a lot of evidence on
16 this, but it's kind of important for me to -- as I'm thinking
17 about this, to make sure I'm either understanding or separating
18 out what I'm not understanding.

19 And there were two other references during trial that
20 are in the same genre of fluidity or -- what does the term
21 "intersex" mean? What is that?

22 MS. BORELLI: So, Your Honor, this is a population
23 that Dr. Adkins treats regularly and has for years. And she
24 testified at her trial preservation deposition about this
25 population being helpful because it helps us understand the

1 primacy of gender identity in understanding what a person's sex
2 is.

3 So people who are intersex, it's really a collection
4 of conditions. It can be something like roughly two dozen
5 different conditions where the very sex-related components of a
6 person's body may not line up and so somebody whose chromosome
7 is XXY, a set of chromosomes, or somebody who might have
8 certain internal structures that don't necessarily match their
9 gender identity or their external structures.

10 And she said in her testimony there's actually an
11 example of one particular intersex condition that's especially
12 helpful here because it makes so stark how critical gender
13 identity is and that gender identity can't be ignored or
14 overridden, and indeed it's unethical to try to do so.

15 And that is a condition called cloacal extrophy.
16 These are individuals who may be born really without any
17 genital structures, external or internal in their abdomen, and
18 even sometimes without a hormonal profile that doctors might
19 use to try to make a best guess at birth.

20 And she said when these individuals have had their
21 sex assigned at birth in a way that didn't match their gender
22 identity, there's documented, you know, depression, extreme
23 psychological harm, and suicidality. So that tells us that
24 gender identity is core.

25 In the same way, Your Honor, if somebody had an

1 accident and no longer had the same genital structures or any
2 genital structures after an accident, they wouldn't suddenly
3 become genderless. They would continue to be the same gender
4 that they always were.

5 THE COURT: All right. Last question in this area.
6 It is -- and, again, I don't even recall if there was evidence
7 about this, but it's just something I want to understand
8 because when you're talking about -- when you're talking about
9 bathroom usage, I think you and I could agree it's good to
10 know -- I mean, it's appropriate that we know which bathroom
11 somebody should be using -- right? --

12 MS. BORELLI: Yes.

13 THE COURT: -- unless we go to gender neutral and I
14 want to ask you about that.

15 But first I want to -- and, again, I apologize for my
16 relative ignorance on this, but I just want to understand.

17 It is in the lexicon, or at least in some lexicons
18 these days, that there are certain people who are asking that
19 they not be addressed by pronouns that identify them as either
20 male or female, right?

21 MS. BORELLI: Uh-huh.

22 THE COURT: I don't exactly know how it works, but
23 I -- and so tell me what that is and tell me how that would
24 bear on an issue like we have in this case.

25 MS. BORELLI: So, Your Honor, somebody who might ask

1 to be addressed by gender-neutral pronouns might be a person
2 who, you know, has a gender identity but recognizes -- for
3 example, if this is a person whose gender identity is female,
4 they might feel like there are aspects of their presentation or
5 their expression that are a little bit more masculine.

6 Again, in some ways I keep going back to the idea
7 that these concepts aren't new, necessarily. We've had tomboys
8 for a really long time. But that's somebody who feels like,
9 "There are aspects of me that are feminine, there are aspects
10 of me that are masculine, and I'm comfortable with
11 gender-neutral pronouns."

12 That person may still have a core gender identity,
13 and if they have a core gender identity, that is the restroom
14 that they should use, and that is straightforward and clear.
15 And this goes back to where you started, which is we have
16 agreement that we should be clear on which restrooms people
17 should use.

18 Somebody who might not be comfortable using gendered
19 restrooms could choose to use gender-neutral restrooms, and the
20 school has said, "We have plenty of those, and that's an option
21 for any student."

22 Regardless, Your Honor, that is very different from
23 transgender kids like Drew, and that's all this case is about.

24 THE COURT: You know, I understand that, and I'm not
25 trying to overplay this.

1 But, you know, if I'm running the school system
2 and -- and I -- and this is all kind of new to the school
3 system, because the questions I'm asking you are questions that
4 people of good faith are asking, of goodwill.

5 These aren't necessarily -- these aren't hostile
6 questions. These are just trying to understand in a world that
7 does appear to be changing, right?

8 MS. BORELLI: (Nods head up and down.)

9 THE COURT: And so -- and so the school system,
10 though, they don't get to sit around and think about the great
11 thoughts. They've got to run a school system, and they've got
12 to decide what we're going to do.

13 And they've got -- and not only that, they're not
14 dealing with adults; they're dealing with children. And so
15 they've kind of got to know what the rules are.

16 And so I guess the question is -- I understand that
17 Mr. Adams is transgender. I understand that you want to limit
18 it to what this case is, and I appreciate that.

19 But would relief in this case ipso facto or lead to
20 what sometimes in the law is referred to as a slippery slope
21 where we rule -- we make a ruling, and then all of a sudden
22 we're on this slope and we're just -- we've just got to keep
23 going and there's no principled way to stop?

24 MS. BORELLI: Let me be as emphatic as I can. The
25 answer is absolutely not.

1 As the witnesses in this trial testified, and as the
2 school amicae on the amicus brief have all said, "This
3 reifies -- Drew's claim reifies the concept of sex-separated
4 restrooms. It doesn't challenge that norm. It is based on
5 that norm."

6 And the amicae and the witnesses said, "This is about
7 having all the boys go to the boys' restroom and all the girls
8 go to the girls' restroom." If anything, this reifies the
9 concept. It's actually defendant's policy that I think really
10 blurs things in very odd ways.

11 The defendant has been very unequivocal that they
12 think it's perfectly appropriate for a transgender boy to go
13 into the girls' restroom, even if, as Mr. Adams has, that child
14 has had every form of medical care available to them at their
15 age, even if they're -- they have a deep voice, if they have
16 facial hair, if all of their peers recognize them as male,
17 they're just fine with that individual going into the girls'
18 restroom.

19 Our view is simply all boys go into the boys'
20 restroom, all girls go into the girls' restroom, simple as
21 that.

22 THE COURT: All right. And let me ask you and then
23 I'm going to let you talk for a little bit, because I know
24 I've -- but obviously -- two other questions I want to ask.

25 One is, is the scientific evidence -- and I don't

1 know what I have at trial. I guess I've got the experts.

2 But is transgender transitioning -- if a person has
3 transitioned, is that immutable? Is that what they are going
4 to be the rest of their lives?

5 MS. BORELLI: That is the expert testimony. Gender
6 identity is immutable. It is not something subject to
7 voluntary change, and that's precisely why the medical
8 consensus is that it is unethical to try to force conversion on
9 transgender youth, to try to force them to live as their
10 birth-assigned sex.

11 That's been tried, with great psychological harm and
12 damage to these young people. And so that practice isn't even
13 tolerated in the medical community any longer. So indeed,
14 being transgender is immutable.

15 THE COURT: Let me ask you about accommodation for a
16 moment. And I thought -- I've been thinking about this in
17 terms of -- and this really gets to the state's interests and
18 how the state implements its interests.

19 But if -- there are certain disabilities or --
20 disabilities is the wrong word. There are certain categories
21 of persons, and disabled is what I'm thinking of, where we say,
22 under the law, "We want to accommodate you in a way that gives
23 dignity to your situation, but we can't give you exactly what
24 other people have." And I'm thinking of persons who are
25 physically disabled.

1 People who are physically disabled, the remedy for
2 that has been to create a separate or different bathroom
3 situation for them than the average person in order to
4 accommodate their disability. It's either a bigger stall --
5 well, you know what it is.

6 I mean, and in many places there's men's room,
7 women's room, and in the middle disabled, right? And that's
8 where disabled people can go and have the proper grab bars and
9 all that.

10 And so the reason I'm bringing all that up is that
11 there is a concept that, even if we recognize that a person has
12 a situation that we need to address, sometimes we can address
13 that lawfully by an accommodation. And in this case the
14 accommodation that Nease has made is that it created all these
15 gender-neutral bathrooms.

16 And as you probably know, I went out there with
17 Ms. Doolittle and Mr. Harmon, and I may -- I don't know if I'm
18 the only person that has ever done this, but I have now been in
19 every single bathroom in Nease High School, every single one of
20 them. And we made sure nobody was in there before we went in,
21 and we went in. I looked at all of them.

22 And what they've done is -- and I think -- I don't
23 know the evidence says this exactly, but in response to this
24 issue, they have expanded pretty greatly the number of
25 gender-neutral bathrooms. They're all new, or most of them are

1 new. They're really nice. They are arguably much nicer than
2 the existing boys' and girls' restrooms, which frankly are
3 showing their age.

4 And, yes, do you have to walk another minute or so to
5 get to one of them from some places? And most of that -- most
6 of that was because they're in these portables, which I don't
7 think they really want to be in, but I guess they don't have
8 the funds to actually build buildings.

9 And so most of the walking is from the portables to
10 the more centrally located to get a gender-neutral bathroom.
11 But frankly, when you're out at the portables, even if you're
12 using the boys' and the girls' bathrooms, it's no great shakes
13 out there. The portables is -- you get worse bathroom service
14 across the board if you're in the portables than if you're in
15 the central campus, no matter what -- no matter who you are.

16 And so I guess I found myself wondering why isn't
17 that -- Drew has -- Drew wants to be treated as a boy. The
18 school district has these concerns. Other students and parents
19 have expressed those concerns. Here's a way to accommodate
20 everybody's interest in a reasonable way. That's a -- there's
21 a question mark on the end of that.

22 Why is that not sufficient?

23 MS. BORELLI: Because we are governed by not a
24 separate but equal clause but the Equal Protection Clause. And
25 let me go back for a moment to where the Court began, which was

1 with the example of accommodations for people who are disabled.

2 Sometimes separate spaces are created because it
3 isn't possible to include the accommodations necessary in a
4 girls' restroom or a boys' restroom, for people who are
5 wheelchair users, for example. Plenty of times that is
6 possible, and that's exactly what's done.

7 What could never be done under the law would be to
8 say, "Some people don't like you, and even though you're fully
9 capable of using these facilities just like everyone else,
10 because some people don't like you, you can't go in there any
11 longer. And we'll make sure that the place that you can go is
12 nice and comfortable, but you can't -- you don't belong in
13 there."

14 The law would not allow that, Your Honor. There's
15 no --

16 THE COURT: I don't know that that's quite a fair way
17 to say it, that they don't like Mr. Adams. I think that they
18 would say that they have safety and privacy concerns.

19 Now, whether they -- whether those concerns are valid
20 or whether they actually have any evidence of them, that's a
21 different question, and Mr. Harmon and I are going to be
22 talking about that. But I don't think -- I think it's probably
23 not a fair characterization to say, "We don't like you."

24 In fact, and this is another thing I'm going to talk
25 to Mr. Harmon about, Mr. Adams seems to be a well regarded and

1 popular student, who is well known and well liked by faculty
2 and students alike. That was my impression, anyway.

3 Am I wrong about that?

4 MS. BORELLI: No, I don't think you are, Your Honor.
5 Let me restate. I take the Court's point. Let me put it a
6 different way.

7 Ms. Smith testified that there was a concern that
8 girls might want to put on makeup in the girls' restroom and
9 might feel uncomfortable. There might be a sense of
10 discomfort. So let's talk about that concept for a moment.

11 An unfounded private fear of the unknown or sense of
12 discomfort isn't even a legitimate government basis, and the
13 law is relatively clear on that.

14 But what we have here is a record that actually shows
15 that Drew used the boys' restroom for six weeks with no issues,
16 no complaints from any boy who shared the restroom with him.

17 And Principal Kefford said, "I've never seen a child
18 with an objection. It tends to be the adults who have a fear
19 of the unknown." She said, "We fear what we don't know."

20 But that, in and of itself, can never form the basis
21 for separating or segregating a group of children out from
22 their peers. That's covered by the amicae as well which said,
23 "It tends to be the grownups for whom this might seem a little
24 bit newer."

25 But as these policies operate and people can see that

1 there are no privacy concerns, there are no safety concerns,
2 things just work smoothly and it's fine.

3 THE COURT: All right. I'm going to -- because we're
4 going to -- I'm going to give you five minutes just to talk,
5 because I need to make sure I give Mr. Harmon equal time, and
6 I'm sure there's something you want to say that I have not let
7 you say.

8 So I'm just going to let you talk for five minutes,
9 and then we'll see where we are. Okay?

10 MS. BORELLI: Thank you, Your Honor.

11 So let me pick up where I left off earlier. Again,
12 there's agreement between the parties. This is sex
13 discrimination. Intermediate scrutiny applies, at a minimum.

14 The government bears the burden for producing, you
15 know, an adequate safety or privacy interest. The military
16 cases say can't be hypothetical, can't be overbroad, can't be a
17 broad concept that applies to everyone. Can't be
18 deployability. That applies to everyone.

19 *Students and Parents for Privacy and Boyertown* say
20 it's got to be specifically identified. Privacy isn't enough.
21 What kind of privacy interest? Really what you're asking for
22 is a privacy right to exclude this group of kids. That's not
23 adequate. That's not recognized in any of the cases.

24 And, Your Honor, we would submit it's certainly not
25 in any of the cases in the defendant's findings of fact and

1 conclusions of law. None of those recognize some right of
2 privacy to exclude transgender people just because we think
3 that they're different or we don't understand them.

4 So, Your Honor, on this record defendant has not
5 carried its burden to produce any specifically defined,
6 adequate interest, let alone one that's supported by the record
7 evidence.

8 We talked briefly about privacy. I think it bears
9 emphasis again that they testified that they had a task force
10 study these issues robustly for at least two years and could
11 find zero problems with any school, any district that treats
12 their transgender students equally.

13 So for the right to privacy, I think when we
14 carefully define what it is that they're seeking here, that's
15 not a recognized right of privacy. But even setting that
16 aside, there is no adequate tailoring between whatever that
17 privacy interest is and this classification.

18 We have admissions in the record about the private
19 and enclosed nature of restrooms. We have admissions -- or I
20 should say we have unrebutted testimony that transgender
21 students tend to be very modest by their nature because, again,
22 the entire point of this very extensive, in some instances
23 quite burdensome process of transitioning is to help people see
24 you as the girl or boy you are.

25 So the last thing any transgender child is going to

1 do is engage in misconduct or expose themselves in a way that
2 contradicts that gender identity.

3 And finally, we have evidence, actually, that not
4 only does the classification not -- it's not furthered by any
5 privacy interest, it actually undermines privacy because we
6 have a singling out of these students. They can't go into the
7 restrooms with their peers.

8 Let's take Ms. Smith's example of going into the
9 restroom to put on makeup. Now no transgender girl can do that
10 with her friends, and when she can't go in with them, she has
11 to explain why.

12 In the lunchtime hour, we have all of these students
13 corralled three days a week. No gender-neutral restrooms was
14 what the testimony was. Any transgender student who wants to
15 go to the bathroom during lunch has to get special permission
16 and leave the area. No one else can. That doesn't further
17 privacy. It undermines it.

18 On safety, Your Honor, the testimony was that the
19 primary interest in safety -- primary interest -- is to protect
20 transgender students because they can be a vulnerable
21 population. And the testimony was we want to protect them from
22 bullying or being made fun of, I think, was how one witness put
23 it.

24 I think it's really important to note that
25 Defendant's Exhibit 65, which is their student code of conduct,

1 has a very specific section that covers bullying. And
2 absolutely nothing in that section says, "When you are the
3 victim of bullying or when we are afraid that you will be, you
4 must be segregated from their peers." To the contrary, it
5 specifies a range of discipline for bullying activity.

6 So coming up with a special rule for transgender
7 kids, I would say, Your Honor, I think it dresses this
8 exclusion up to give it the appearance of concern for these
9 students, but, again, there's no evidence Drew was bullied or
10 faces any risk of that.

11 As the Court noted, he's well liked. He's popular.
12 And so safety isn't an interest here that's served by this
13 classification.

14 And finally, I would just add that Title IX -- the
15 Title IX claim succeeds here for all of the same reasons that
16 *Glenn* tells us, that this is a Fourteenth Amendment violation
17 as well.

18 THE COURT: All right. Three questions and I'm going
19 to let you sit down.

20 Title IX. Interestingly, your opponents led with
21 Title IX and then followed up with equal protection. You led
22 with equal protection and then went to Title IX.

23 I get the feeling that they think they've got the
24 better deal on Title IX and are a little worried about equal
25 protection, and you think you've got a better deal on equal

1 protection and you're a little worried about Title IX.

2 And the reason you'd be worried about it is because
3 the Obama administration came out with its guidance, and then
4 the Trump administration has now come out with essentially
5 contrary guidance, and now what's a court to do?

6 And I guess the Court goes back to just looking at
7 the statute and deciding what it -- you know, whether it's
8 covered, but I have to say that any Title IX ruling now seems
9 fraught.

10 MS. BORELLI: So I will say, Your Honor, actually,
11 for us, the reason we structured our briefs the way we do is
12 because we take a lesson from *Glenn*. We think the statutory
13 claim is actually much easier.

14 THE COURT: Okay.

15 MS. BORELLI: *Glenn* said --

16 THE COURT: So I misread why -- I just thought it was
17 interesting that -- I would have thought both of you would have
18 been talking about it in the same order, but you weren't.

19 MS. BORELLI: I understand why they don't want to
20 talk about a constitutional claim, Your Honor.

21 But *Glenn* actually says relying interchangeably on
22 equal protection and Title VII authorities -- towards the end
23 of the opinion the Court says, "If this were a Title VII case,
24 the analysis would end here," because there isn't any analysis
25 of government interest. It's a sex-based classification. We

1 think that's more straightforward.

2 As for the guidance and the rescission and all of
3 that, I would point the Court towards *Minersville* because I
4 think it has a particularly clear distillation of these issues.

5 The Court looked at that question and said, "Well,
6 there was a substantive set of interpretive guidance under the
7 Obama administration, then it was rescinded." The decision
8 doesn't take any substantive position. It doesn't even
9 affirmatively contradict it. It simply says, "We withdraw
10 further study."

11 And what remains is what's always been there, which
12 is the statutory claim.

13 THE COURT: All right. I'm going to have to stop you
14 right there on that point. I apologize.

15 Your opponent says if I rule in your favor on the
16 Equal Protection Clause that I'm necessarily having to find
17 Title IX and the implementing regulation -- I guess it's
18 106.33 that says you can have sex-segregated bathrooms, I'm
19 necessarily finding those unconstitutional.

20 True or false?

21 MS. BORELLI: False.

22 THE COURT: Why?

23 MS. BORELLI: I can't see why that would be, Your
24 Honor. The regulation --

25 THE COURT: I'm not sure I see it either, but I

1 wanted to ask you.

2 MS. BORELLI: I appreciate that, Your Honor.

3 The regulation that allows sex-separated restrooms
4 and locker rooms and showers is permissive, and *Students and*
5 *Parents for Privacy* points this out and draws it up in a
6 particularly clear way, I think.

7 That case says the regulation is permissive. All it
8 says is schools may have sex-separated spaces. They're not
9 even required to. Title IX doesn't even require it. So --

10 THE COURT: All right. I appreciate that answer.

11 Last question. Your opponents also say that because
12 we're in Florida, the rulings in other courts around the
13 country are different because in Florida we have a
14 Constitution, a Florida Constitution, that specifically
15 protects the right of privacy.

16 That right of privacy protects the rights of students
17 to use a bathroom of their sex without having a person who they
18 deem to be not of their sex in the same bathroom. And so
19 Florida -- so a ruling under Florida -- a ruling with Florida
20 involved should be different than a ruling in Pennsylvania or
21 the other -- the Seventh Circuit or anyplace else.

22 Talk to me about that for about a minute.

23 MS. BORELLI: Okay. Notice, Your Honor, that they
24 haven't articulated why they even believe that there would be
25 such a conflict, and I think it's the same error that carries

1 through the other analysis, which is they'd like to project
2 biological sex on to this provision of law.

3 Of course, the uncontested testimony in this case is
4 that that's -- that's not a medically coherent term. It's not
5 something medical professionals think is even accurate. But I
6 very much doubt it's in the Florida Constitution.

7 More importantly, even if there were a conflict, and
8 I'm skeptical, the supremacy clause, of course, would control.
9 The Florida Constitution can't opt St. Johns County out of the
10 Fourteenth Amendment or Title IX.

11 THE COURT: Thank you.

12 MS. BORELLI: Thank you, Your Honor.

13 THE COURT: So, Mr. Harmon, we're going to go ahead
14 and get started with you, but I'll probably take a break about
15 11:00 o'clock to let everybody stretch their legs, but let's go
16 ahead and get started.

17 I'll let you just start talking, and then, as you
18 see, I don't have any hesitancy to interrupt.

19 MR. HARMON: Thank you, Your Honor.

20 Good morning.

21 THE COURT: Good morning.

22 MR. HARMON: We meet again --

23 THE COURT: Yes.

24 MR. HARMON: -- all here in the same place.

25 THE COURT: The last time that you and I were

1 together with Ms. Doolittle, we were touring bathrooms.

2 MR. HARMON: Yes.

3 THE COURT: So go ahead.

4 MR. HARMON: It does seem like *déjà vu*.

5 I just want to make one observation before I jump
6 into really addressing some of the key issues, and it's
7 something just to consider as we work through today and in the
8 Court's analysis.

9 When we did the tour of the bathrooms at Nease, every
10 bathroom that we went into, single stall, boys or girls, we
11 knocked to make sure nobody was in there. We had -- even in
12 the girls' bathroom, I think, we had Principal Kunze go in
13 first to make sure there were no girls in there.

14 And why is that? Because when you go into a bathroom
15 of the opposite sex, there's a privacy concern. There's a
16 hesitation that when you walk into that bathroom, there
17 shouldn't be women in there with you.

18 So I just want that to kind of resonate as I work
19 through a little bit and we get to the privacy issues and we
20 get to the different arguments that the school board has made
21 as to why separating bathrooms on sex and -- why sex and what
22 it means is necessary.

23 But I do want to address one other thing, the
24 elephants in the room, in this case. It was briefly touched on
25 by plaintiff in oral argument today, emphasized a little more

1 in written argument, and that's *Glenn v. Brumby* and what that
2 means and what the implication of that is in this particular
3 case.

4 *Glenn v. Brumby* is an Eleventh Circuit opinion that
5 involved, as Your Honor knows, a transgender female who worked
6 for a legislator, Brumby. And in that case the Eleventh
7 Circuit came out with this statement, that the very act of
8 being transgender goes against gender norms, against gender
9 stereotypes.

10 And plaintiff has taken that single sentence and
11 argued to Your Honor that simply being transgender means you're
12 protected from sex stereotyping, regardless of how you look,
13 how you talk, how you walk. Just being transgender means
14 you're protected from sex stereotypes. That's the extension
15 that they have made with *Brumby*.

16 That's what *Whitaker* did, and I believe that's also
17 what *Minersville* did, is they take this statement that the
18 Eleventh Circuit quoted from a law review article.

19 What is ignored, and I think what plaintiff has not
20 addressed and what I think needs to be emphasized, is
21 regardless of that quote, the *Glenn Brumby* court, when it goes
22 through, in the opinion it says, you know, "Here's the facts.
23 Here's what being transgender means. Here's why being
24 transgender goes against typical norms."

25 But the Court still looked at the facts of the case

1 to say, "Okay. Do we have a scenario here where there was
2 impermissible sex stereotyping?" And it happened in that case.

3 The Court said that the plaintiff in *Glenn* was
4 discriminated against because of failure to adhere to gender
5 stereotypes.

6 THE COURT: Well, they say, and I'm looking at page
7 1317: "Accordingly, discrimination against a transgender
8 individual because of her gender nonconformity is sex
9 discrimination, whether it's described as being on the basis of
10 sex or gender."

11 So what's the ambiguity there --

12 MR. HARMON: Yes.

13 THE COURT: -- or what's the difference there that
14 you're talking about?

15 MR. HARMON: Looking at page 1320 on to 1321 --

16 THE COURT: Okay.

17 MR. HARMON: -- the Court says, "We now turn to
18 whether Glenn was fired on the basis of gender stereotyping."

19 So it still looked at the case. Despite what Your
20 Honor just quoted, it still said, "Okay. Here's this concept.
21 Let's actually look in this particular case whether there was
22 an issue of gender stereotyping." And they said yes, there
23 was, because there was direct evidence of it.

24 The legislator said, "I don't like the way you talk.
25 I don't like the way you dress. Your appearance bothers

1 people." There was direct evidence of actual discrimination in
2 that case. That's not the facts here.

3 THE COURT: Well, isn't it -- isn't it kind of the
4 facts?

5 MR. HARMON: In our particular case?

6 THE COURT: I mean, isn't it that -- isn't it that
7 The School Board of St. Johns County doesn't want Drew Adams in
8 the boys' bathroom because they view him as not being a boy,
9 and there's fear, safety, and privacy concerns that flow from
10 that?

11 Isn't that -- I mean, that's the reason for the rule,
12 such as it is. Mr. Mignon has now told me it's the official
13 policy of the St. Johns County School Board, so I'm glad to
14 hear that. Of course, it's not written down anywhere.

15 But isn't that what is happening here?

16 MR. HARMON: That's the issue, but look at the facts
17 of this case. *Glenn* said there was sex stereotyping --

18 THE COURT: Right.

19 MR. HARMON: -- because of all of these direct
20 comments attributable to the defendant in the case: The way
21 you walk, the way you talk, the way you act.

22 Even the *Glenn* court, when it found there was gender
23 stereotyping, cited to other opinions where it was based on
24 walk, talk, act.

25 Looking at the facts of our case, plaintiff does not

1 dispute that the school board treated Mr. Adams as a male in
2 all respects other than the bathroom, and I know there's been a
3 dispute about the official records.

4 So we're looking in this particular case. The only
5 evidence plaintiff has presented on their sex stereotyping
6 theory is that we have not permitted plaintiff to use the
7 bathroom.

8 So the question is why? And the why is what the
9 school board argued is the physiological differences between
10 males and females, and that's not discrimination.

11 I mean, the *VMI* court, the *INS* court all said that
12 there are differences that are enduring and were different.

13 THE COURT: I'm not an expert on sex change, but I've
14 had actually a number of criminal defendants in my court over
15 the years who transitioned from being men to women, and some of
16 them actually had surgery to remove their male sexual organ and
17 create -- I'm not sure what the name of the surgery is, but you
18 know what I'm talking about.

19 So when you're talking about physiological
20 differences, in a situation like that, if such a surgery had
21 occurred, would the policy still require -- what would the
22 school district's policy require for a transgender female
23 who's -- no, it would be a male transitioned to a female.

24 How would that work --

25 MR. HARMON: I follow you.

1 THE COURT: -- if you're really talking about
2 physiological differences?

3 MR. HARMON: I follow Your Honor. I mean, when we're
4 looking at physiological differences, that's the why are we not
5 letting the sexes share bathrooms?

6 THE COURT: Right.

7 MR. HARMON: It's based purely on physiological
8 differences. That has nothing to do with sex stereotyping.

9 But to your question, what if a biological male has
10 the penis removed and goes through full -- I know we use it
11 informally, top and bottom surgery, right?

12 THE COURT: Right.

13 MR. HARMON: Changes into that, into a female by
14 appearance.

15 I would represent that there's been no evidence that
16 that's ever happened in a school system that's before your
17 court. None. But let's assume that's the case.

18 The policy that is before Your Honor is not perfect,
19 and to survive intermediate scrutiny, it doesn't have to be.

20 So picking one hypothetical of a minor who may go
21 through full sex-change surgery -- which I believe plaintiff's
22 evidence is that that's generally not something that's looked
23 at before the age of 18 -- could happen. How would the school
24 board react to that? I can't tell you because the school board
25 would have to make that call.

1 And that's why I say this policy is not perfect. And
2 I understand plaintiff and everyone is highlighting the
3 imperfections in it. What if there's a sex change?

4 But in terms of the intermediate scrutiny, I still
5 think it survives that.

6 THE COURT: Well, if -- remind me what the term
7 that's used -- and I apologize. I don't have your best
8 practice and policy right in front of me. I should have.

9 What's the term used in the best practices policy?
10 Is it biological sex? Is that right?

11 MR. HARMON: I think that's correct, yes.

12 THE COURT: And what does that mean? Is that the
13 same as physiological?

14 MR. HARMON: Yes, because I think the testimony and
15 the evidence presented to Your Honor was -- this is going from
16 plaintiffs, is sex is generally determined at birth by what
17 doctors look at. I think that's even what Dr. Adkins said.

18 THE COURT: Right.

19 MR. HARMON: It's based on the reproductive organs,
20 and in, you know, the overwhelming majority of cases, that is
21 accurate.

22 So when the school board says, "We -- our policy is
23 based on biological sex," it is based on that iden- -- what a
24 doctor decides the sex is.

25 THE COURT: So this is a question that, as I was

1 preparing -- I want to -- and I just want to make sure I get to
2 it because it's kind of been bothering me a little bit.

3 So I read a regulation from the State of Florida that
4 permits somebody -- specifically talks about gender change and
5 specifically allows somebody to submit documentation to have
6 their birth certificate changed from the sex they were assigned
7 at birth to their transitioned sex. And, in fact, the evidence
8 in this case is that Mr. Adams did that.

9 And if I also recall the evidence, his driver's
10 license, under Florida law, was changed to reflect male. And
11 so the State of Florida not only recognizes the ability to do
12 this, they allowed Mr. Adams to do it. The State of Florida
13 allowed him to change his driver's license.

14 Why does The School Board of St. Johns County get to
15 contradict what the State of Florida has done in terms of the
16 gender of Mr. Adams?

17 MR. HARMON: Couple of responses to that. Title IX
18 is one reason. We have a regulation on point that says we can
19 do this, the 106.33.

20 But on the State of Florida part, I would disagree
21 that the State of Florida recognizes Drew Adams as a male.
22 You've got two agencies, the Department of Health, who --
23 from -- again, they're not before us. I've not deposed them.
24 It appears violated their own rule when they changed Drew
25 Adams' birth certificate.

1 I believe what their rule said is within seven years,
2 you have to make that change. Drew Adams was born far greater
3 than seven years ago, so I don't think they even followed their
4 own rule on that.

5 The other one is getting a driver's license. The
6 Division of Highway and Motor Vehicles applied their internal
7 policy manual, which has not been subject to rulemaking, to
8 make that decision. That's their agency discretion to go ahead
9 and do so.

10 But there's no statute that says --

11 THE COURT: Well, is there any other -- I'm trying to
12 think. Is there any other official Florida record that would
13 now characterize Mr. Adams other than being a male?

14 MR. HARMON: I have no idea.

15 THE COURT: Yeah.

16 MR. HARMON: I don't know the answer to that.

17 THE COURT: So you're just saying -- you're saying
18 the health people didn't know what they were doing, and the
19 driver's license people didn't know what they were doing.

20 MR. HARMON: Not so much that they didn't know what
21 they were doing, but it appears on its face, without being able
22 to talk to them, that they did not follow their own rule.

23 THE COURT: And the other question that I've been
24 thinking about is this. As I understand it, the Florida High
25 School Athletic Association does recognize -- does allow an

1 athlete to compete under their gender identity and provides
2 that they should be given whatever accommodations are needed in
3 order to make that happen, right?

4 MR. HARMON: Sure.

5 THE COURT: And what about that? Why is that not an
6 indicia of -- the fact that a regulating authority that Nease
7 is a member of and that governs all athletic contests in the
8 state of Florida apparently recognizes Drew Adams as a boy?

9 MR. HARMON: I don't think it has. There's been no
10 testimony that the FHSAA recognizes Drew Adams as a boy.

11 Their -- the policy was filed in the court. Drew
12 Adams doesn't play sports, so I don't know that that's fair,
13 that the FHSAA does that.

14 THE COURT: All right. Well -- okay. I agree. They
15 don't put out a press release that says, "Drew Adams is a boy."

16 MR. HARMON: Right.

17 THE COURT: I agree with that.

18 But if he were to participate in any FHSA- -- if he
19 was a basketball player or a football player or any FH- -- he
20 would be -- they with be -- Nease would be under those rules,
21 wouldn't they?

22 MR. HARMON: Yes. I think there's --

23 THE COURT: Or, more to the point, if there was a
24 visiting team visiting Nease that had a transgender student on
25 it, would they not be required by FHSAA regulations to treat

1 that individual according to their gender identity?

2 MR. HARMON: I believe that the FHSAA -- and, again,
3 I'm going off memory and the regs have a committee that is
4 formed to make that decision. And, yes, it's certainly
5 possible that -- if that was the facts of the issue.

6 There are a lot of distinguishing, though, pieces
7 about the Department of Health, Department of Motor Vehicles,
8 and the FHSAA's local decision to define sex the way that they
9 do. It's completely different from --

10 THE COURT: Did you ever see that movie *Miracle on*
11 *34th Street*?

12 MR. HARMON: I will admit, Your Honor, I get chided a
13 lot because I don't watch a lot of movies, and so the answer's
14 probably no to that one.

15 THE COURT: So what happened in that case is the
16 question was whether the defendant in the dock was the real
17 Santa Claus or not. And at the end of the movie, somebody gets
18 the bright idea to have the post office divert all the letters
19 that are sent to Santa Claus to the courthouse.

20 And so the big scene in the movie is that all these
21 letters that are just addressed to Santa Claus have been
22 delivered to the defendant in the dock. And so they bring them
23 in and they pile them up on the judge's desk.

24 And the judge says, "Since the United States Post
25 Office, an official branch of the government of the United

1 States, says that this person is Santa Claus, this Court will
2 not dispute it. Case dismissed."

3 And I find myself a little bit thinking driver's
4 license, birth certificate, FHSAA -- and I probably could find
5 some more -- why isn't that an indicia that official government
6 agencies recognize Mr. Adams as a boy, and if that's so, why
7 doesn't the St. Johns County School Board?

8 MR. HARMON: Because we have a regulation on point
9 that uses the word "sex," and case law and agency
10 interpretation define that word "sex" not to mean what somebody
11 at the driver's license office, under their internal policy
12 manual, thinks sex is. This is what sex is.

13 I would also say what keeps Drew Adams from going to
14 the highway agency and changing his driver's license back to
15 female? Nothing. There's nothing that keeps that from
16 happening.

17 The reason why, under Title IX, that we've had a
18 regulation in place since 1972 is to separate boys and girls.
19 You can't change that. You can't mesh that. Boy is this and
20 girl is this.

21 The fact that an agency wants to do that, that's
22 fine. It --

23 THE COURT: Am I right in -- I asked -- I started
24 with Ms. Borelli and said, "Isn't this case about whether Drew
25 Adams is a boy or a girl?"

1 MR. HARMON: You have to --

2 THE COURT: I mean, if he's a boy, then you'd let him
3 use the boys' bathroom, and if he's -- but you think -- you
4 think he's a girl, or your client thinks he's a girl.

5 MR. HARMON: For purposes of the bathroom, yeah. I
6 think you have to make that decision. I don't think you can --

7 THE COURT: And the principal thinks he's a girl.

8 MR. HARMON: I think that in -- in fairness to her, I
9 think the question was, "Do you personally believe . . ."

10 THE COURT: That he's --

11 MR. HARMON: That he's a girl, and Principal Kunze
12 said yes.

13 THE COURT: Yeah.

14 MR. HARMON: But I think in order for Your Honor to
15 conclude that the school district violated Title IX and the
16 Equal Protection Clause --

17 THE COURT: Right.

18 MR. HARMON: -- you have to find that under those two
19 analyses that Drew is a boy.

20 THE COURT: And so that's really the case.

21 MR. HARMON: I --

22 THE COURT: If he's a boy, he gets to use the boys'
23 bathroom, and if he's a girl, he doesn't.

24 MR. HARMON: That's why the sex stereotyping
25 argument, it really doesn't apply in this case.

1 The qualifications to use the bathroom, under Title
2 IX, based on your sex, is what Title IX says it is. And
3 frankly, what -- it's always been defined as the word "sex."

4 But I don't think Your Honor can make the call that
5 there's been a violation of Title IX or equal protection
6 without making that finding.

7 THE COURT: So let me ask you this. If -- I read the
8 other day about a state representative, I believe, from
9 Virginia who is a transgender and -- and this is really just a
10 way to ask the question. It really doesn't matter.

11 If a transgender adult were to visit the campus of
12 Nease High School, would the regulation, the rule that
13 Mr. Mignon says applies, would that require that transgender
14 adult to use the restroom of their assigned sex at birth?

15 MR. HARMON: That's a great question.

16 THE COURT: Well, what's the answer to it?

17 MR. HARMON: I'm going to try to answer it. I'm not
18 a school administrator.

19 But I would first think that they're not allowed to
20 use the group stalls. I don't think a visiting adult is
21 permitted to go into a group bathroom on school campus where
22 students may be going. They probably, and I'm guessing here --

23 THE COURT: I don't think that's right. Okay.
24 Let's --

25 MR. HARMON: No. I think they have to use the front

1 bathrooms.

2 THE COURT: Well, hold on a second. We went to the
3 gym. Let's say they're at a basketball game. You're not
4 telling me they can't use those bathrooms, are you?

5 MR. HARMON: They could probably use those in the
6 very front of the gym, yes.

7 THE COURT: Well, but they're boys' and girls',
8 right?

9 MR. HARMON: I think --

10 THE COURT: I'm asking you whether the regulation,
11 the rule that Mr. Mignon says is the official policy of The
12 School Board of St. Johns County -- does it apply to adult
13 transgenders who are on campus? Does it apply to a teacher?
14 Does it apply to a transgender adult? If this state
15 representative from Virginia is visiting Nease High School,
16 does the rule apply to her?

17 MR. HARMON: My belief would be yes --

18 THE COURT: Okay.

19 MR. HARMON: -- that anybody visiting our campus
20 going into the girls' bathroom is a girl --

21 THE COURT: Okay.

22 MR. HARMON: -- as the school defines it.

23 THE COURT: And let me ask you this. Is The School
24 Board of St. Johns County -- does it have its own building?

25 MR. HARMON: Yes.

1 THE COURT: It's not on school property, right?
2 We -- it's like on School District Way or something, right?

3 MR. HARMON: Yeah. It's on 40 Orange Street. It has
4 its own district office.

5 THE COURT: Okay.

6 MR. HARMON: Yes.

7 THE COURT: Does the policy apply there? In other
8 words, if a transgender either student or adult walked into
9 that building and is attending -- let's say -- is that where
10 the school board meets?

11 MR. HARMON: The school board sometimes meets on
12 school campuses, and it sometimes meets at the school board
13 building.

14 THE COURT: Okay. So let's say we're having a school
15 board meeting and Drew Adams wants to speak. And he comes, and
16 he speaks to the school board, and then he has to go to the
17 bathroom.

18 Where does he go?

19 MR. HARMON: I don't know where Drew goes, and I --
20 it's a tough question, Your Honor, because I don't know the
21 school board's position on that. I can only go based on what I
22 believe it is from the evidence in the case.

23 And I think that that is when you are using a school
24 board bathroom, whether you're a child, which is the issue in
25 this case, or an adult visiting, that it's not ambiguous, that

1 if you are going into the girls' bathroom that you're a girl,
2 not a transgender girl or somebody who internally -- let me
3 rephrase that.

4 Not transgender, that when you go into the girls'
5 bathroom, you don't get to internally make that call, that
6 you're going in the girls' bathroom because you're -- you are
7 biologically a girl. I don't think that's an ambiguous concept
8 whatsoever.

9 THE COURT: So your understanding -- and I'm just
10 trying to understand what we're doing here.

11 Your understanding would be that any visitor to the
12 building of The School Board of St. Johns County would be under
13 the same rule that is applied to Drew Adams in this case.

14 MR. HARMON: I think. I just -- I don't know the
15 answer to that question.

16 THE COURT: Okay. Are you aware of any other
17 bathroom in St. Johns County where this rule would be applied
18 other than on school board property?

19 MR. HARMON: Well, the school board can only regulate
20 its own property, so I can't think that that's --

21 THE COURT: For example, I don't know, is there a
22 county commission building or something?

23 MR. HARMON: The -- St. Johns County doesn't have an
24 ordinance, to my knowledge, protecting individuals based on
25 gender identity.

1 THE COURT: Right. But is there any prohibition?
2 Because we're talking about a prohibition here, right? We're
3 talking about a rule that prevents Mr. Adams from going into
4 the boys' restroom.

5 Is there any other building in St. Johns --
6 governmental building in St. Johns County that has the same
7 rule as the school board does?

8 MR. HARMON: I don't know that, and I also don't know
9 whether any of those governmental buildings or businesses have
10 a federal regulation that would allow them to have that
11 prohibition --

12 THE COURT: Okay.

13 MR. HARMON: -- which maybe distinguishes the school
14 from all of those other examples.

15 THE COURT: And then the other -- the last question I
16 have on this genre, and then I'll let you talk for a little
17 while, Nease High School has really gone out of its way to
18 accommodate Mr. Adams regarding his transition to a male gender
19 identity in the way they address him, in the way that they
20 treat him, in really every other way except this one way, and
21 I'm wondering why they're doing that.

22 If they're willing to treat him like a boy in all
23 other aspects of his interaction at Nease High School, why not
24 in the bathroom?

25 MR. HARMON: Because there's no privacy interests in

1 being called "he" or "she." There's no privacy interest in
2 wearing a dress or jeans.

3 The bathroom is completely different from all of
4 those other ways in which the school treats Drew Adams as a
5 boy. And I think that's supported by case law.

6 THE COURT: Okay. You know what? Let's go ahead and
7 take a break because I know people probably need one.

8 And we'll just take -- I'm going to try to limit it
9 to about five minutes just to give a comfort break to
10 everybody.

11 And we'll get you back up here, and then I'm going to
12 try to let you talk for a little while. I've got some other
13 questions for you, but I want to make sure you get to say some
14 things you want to say.

15 So we are in recess for five minutes.

16 COURT SECURITY OFFICER: All rise.

17 (Recess from 11:11 a.m. until 11:18 a.m.; all parties
18 present.)

19 COURT SECURITY OFFICER: All rise. This Honorable
20 Court is now in session.

21 Please be seated.

22 THE COURT: I always know, when I say five minutes,
23 that that's impossible, but I try to -- try to do it, but I
24 think we have all the key players, looks like.

25 Okay. So, Mr. Harmon, you may proceed.

1 MR. HARMON: Yes, Your Honor.

2 Following up on a couple of topics that we had talked
3 about a little bit, when it comes to the FHSAA, the Department
4 of Health, the Division of Highway and Motor Vehicles, they
5 don't control what the St. Johns County School District does.
6 The St. Johns County School District is its own sovereignty.
7 It is permitted to establish its own policy and its own rules.

8 So what those agencies and what that association says
9 don't have to drive the decisions of the school district.

10 In looking at those particular issues, how
11 students -- or how people in this state drive and whether you
12 are identified as a male driver or a female driver, has nothing
13 to do with going to the bathroom in a school of kids.

14 The same issue goes for FHSAA. It's a competition.
15 The FHSAA doesn't talk about privacy. It doesn't talk about
16 bathrooms or locker rooms. It regulates competition between
17 individuals. There's no privacy concern there.

18 Same thing with the Department of Health.

19 THE COURT: I'm not sure about that because you have
20 locker rooms and facilities and so forth, and I'm not as sure
21 about that, but I take your point.

22 Go ahead.

23 MR. HARMON: What I think needs to be considered when
24 Your Honor is writing an order really hits home on what are we
25 doing with this case? What's the outcome of it? And I know I

1 say that in such a general scope. But we're talking about a
2 school district, this governmental entity, that stands *in loco*
3 *parentis* with the people walking around its campus. It's not
4 the case with Department of Health or any of those groups.

5 It stands *in loco parentis* to make decisions that
6 aren't in the abstracts that we can talk about, "Well, what
7 about if somebody is born this way or that way?" That's --
8 those are great hypotheticals. They're great examples.

9 But a school -- the school board in this case has to
10 regulate 40,000 kids. It has to adopt policies. It has to
11 implement procedures that will, in its best way possible,
12 accommodate the needs of all of its kids.

13 The evidence before Your Honor is that one student
14 out of 40,000 students disagrees with the way the school board
15 is doing business when it comes to this one policy. One out of
16 40,000 students is a pretty low hit rate in terms of whether or
17 not this policy is perfect, whether or not it's got holes,
18 or --

19 THE COURT: Well, let me ask you about that.

20 The evidence is that Mr. Adams used the restroom for
21 six weeks, I guess, in his freshman year, unnoticed and
22 uncomplained about. And then either one or two female
23 students, who, of course, weren't using the men's room in the
24 first place, I would assume, under the longstanding norms you
25 put forward -- they complained.

1 And based on those two students' complaints, the
2 Nease folks created this prohibition for Mr. Adams that now the
3 school board has had to affirm in order to have a case in
4 federal court, even though they never really actually addressed
5 it, right? It's not ever come up to them to that level, but
6 now they've -- now they've said, "Yep, that's our policy."

7 So, I mean, really, the evidence shows me that we've
8 got Mr. Adams on one side and two girls on the other side.
9 That's all -- that's all the complaining I know about.

10 I guess you gave me some -- I guess there were some
11 people that you told me early on in the case were -- did want
12 to complain or did want to take this position, but they didn't
13 want to be identified, and I wasn't too psyched about that.

14 I was willing to protect the children's identities,
15 but I wasn't so interested in protecting the identities of
16 adults who wanted to take a position against Mr. Adams but
17 weren't willing to be identified in doing so.

18 And so the way that got resolved is you-all agreed
19 among yourselves that you'd just be able to say that there are
20 some people that don't agree with Mr. Adams being able to use
21 the restrooms.

22 But -- so I guess I'm -- I hear what you're saying.
23 I don't know that it's Mr. Adams against 40,000 though.

24 MR. HARMON: No. My --

25 THE COURT: And so --

1 MR. HARMON: My point wasn't to say that it's 39,999
2 against one. It's just that if this policy is so violative of
3 the Constitution and runs such afoul of the laws, the evidence
4 is, is we've got one student who's got a concern about it.
5 That's the evidence.

6 THE COURT: I don't know, Mr. Harmon. You're not
7 quite as old as I am. I grew up when blacks and whites
8 couldn't use the same bathrooms in some places, and it only
9 takes one person to file a lawsuit and have the Constitution be
10 interpreted. So I'm not sure that's -- I'm not really sure
11 that's it, but I hear you.

12 I don't know that I'm going to be able to take a roll
13 call as to -- because I'm sure that if we took a vote -- which
14 we're not going to, of course, because that's not what
15 constitutional law is, but I'm sure there would be a lot of
16 people that supported the school board's policy, and I'm sure
17 there would be some that didn't, and so I'm not sure what
18 that's doing for me.

19 MR. HARMON: Okay. Another issue --

20 THE COURT: I mean, isn't that what constitutional
21 law is, to a large extent, protecting the rights of minorities?

22 MR. HARMON: Yeah. Your Honor, maybe I'm not stating
23 it the best way.

24 What I'm trying to get at with pointing that out is
25 when you're looking at the government's way that it goes about

1 protecting its governmental interest -- in the *Carcaño* case,
2 you have to look at what is it doing? Is it substantially
3 related to protecting that interest?

4 And I only bring that out -- this point out because
5 what the law says, it doesn't need to be a perfect fit. It
6 just needs to be reasonable. And the way that we've gone about
7 doing this with the various accommodations that we have
8 provided, with the various gender-neutral bathrooms, it seems
9 to be working just fine but for one person who disagrees.

10 I'm not saying -- that's the analysis that I'm trying
11 to make, Your Honor.

12 THE COURT: Okay.

13 MR. HARMON: But I do want to again emphasize under
14 *Glenn* that plaintiff has a burden in this case to show --

15 THE COURT: Are there any other -- you've told me
16 that -- you said in your brief that only nine districts have
17 adopted the Broward County policy in Florida, which I take to
18 mean a policy that specifically allows persons to use the --
19 students to use the bathroom of their gender identity, right?
20 That's what you said?

21 MR. HARMON: Well, what I said was that only nine of
22 the 69 districts have adopted pieces of the manual.

23 THE COURT: Okay.

24 MR. HARMON: There may be more than nine that
25 provide --

1 THE COURT: All right.

2 MR. HARMON: -- provide the same protection.

3 THE COURT: Are you aware of any other school
4 district in the state of Florida that has adopted the St. Johns
5 County School Board's policy that prohibits persons like
6 Mr. Adams from using the restroom of their gender identity?

7 MR. HARMON: Yes.

8 THE COURT: What are they?

9 MR. HARMON: I believe Volusia County is one.

10 THE COURT: They actually have a policy?

11 MR. HARMON: There's a complaint that was filed in
12 the Middle District of Florida about two weeks ago trying to
13 argue the same stuff that's before Your Honor.

14 THE COURT: Are you handling that?

15 MR. HARMON: No.

16 THE COURT: Okay.

17 MR. HARMON: Volusia County is one.

18 THE COURT: So Volusia County actually has a -- is it
19 a written school board policy, or is it a --

20 MR. HARMON: I don't know if it's a written policy.

21 I think, ballparking it, that where this issue arises
22 is that -- there are -- and I'm aware there are many school
23 districts in Florida that, in their discrimination protection
24 language, specifically say, "We protect individuals' gender
25 identity." That's what Broward did. That's what Kentucky did.

1 That's what -- there's other school districts.

2 Others school districts in the state say, "We protect
3 people based on sex," and they don't put gender identity. So
4 there are school boards in Florida that are accommodating
5 students on a case-by-case basis, but I don't know the ratio of
6 districts that have adopted a formal policy.

7 I know Marion County adopted a board resolution -- I
8 don't know if you want to call it policy, but adopted a board
9 resolution specifically rejecting what the Obama administration
10 said and took the position that students are to use the
11 bathroom of their biological sex.

12 I know Clay County went public with that as well, and
13 there are others that I -- I am aware of that are following in
14 the path of St. Johns County.

15 THE COURT: Okay.

16 MR. HARMON: A couple of points, Your Honor. Again,
17 under the *Glenn* analysis -- and I don't want to lose sight of
18 this, trying to make this point to Your Honor, is there needs
19 to be evidence of actual discrimination in this case. I just
20 think that the case law that provides that separating --

21 THE COURT: So when you're saying that, are you
22 meaning that -- are you meaning that just the fact that they
23 won't let him use the bathroom is not enough? There has to be
24 some evidence that they're doing so because they want to
25 discriminate?

1 Or what -- what are you -- are you likening it to the
2 *Glenn* case where there was actual comments made by the employer
3 that were deemed to be direct evidence of discrimination? Is
4 that what you're saying?

5 MR. HARMON: What I'm saying is if you look at
6 plaintiffs' brief -- let me see -- they say, under the equal
7 protection analysis, discrimination on the basis of sex.
8 Argument 1, bolded and italicized: "Discrimination against
9 transgender people inherently relies on sex stereotypes."

10 What sex stereotype evidence has plaintiff put
11 forward that the district engaged in? We have a policy that
12 separates biological boys, biological girls in the bathroom, as
13 those terms have been known.

14 There's nothing to do with how a person walks, talks,
15 acts, conforms to the expected behavior of gender. It's purely
16 based on the physiological differences between men and women
17 that the Supreme Court says exist.

18 We are different. It has nothing to do with gender
19 nonconformity or sex stereotyping. And what plaintiff is
20 arguing in *Glenn* is that, "Look, *Glenn* said that the very act
21 of being transgender means you don't conform to gender
22 stereotypes. Therefore, if you treat me different in any way,
23 it's sex discrimination."

24 That's not what *Glenn* says, and that's not what the
25 Court in *Glenn* actually did. And the problem with cases like

1 *Whitaker* is -- which was also argued, I believe, by the same
2 counsel in this case -- they're taking one sentence in *Glenn*,
3 they're running to *Whitaker*, and then *Whitaker* -- and then
4 *Evancho* is taking what *Whitaker* said.

5 It's a big house of cards on this one statement
6 attributed to a law review article, all the while ignoring that
7 you actually have to show evidence of sex stereotyping.

8 THE COURT: So is that what I will say in my opinion
9 if I'm ruling for you, that all these other courts -- and there
10 are starting to be a few of them now, and I know there's a
11 couple cases that go the other way, but that all these other
12 courts just didn't understand what they were doing?

13 MR. HARMON: I think the other courts misapplied the
14 *Glenn Brumby*. *Glenn Brumby* didn't say the very act of being
15 transgender means it's a sex stereotyping issue, because *Glenn*
16 actually went into a factual analysis to say, "Look" -- I
17 mean --

18 THE COURT: Well, isn't stereotyping -- why is it not
19 stereotyping to say to Mr. Adams, "I know you say you are a
20 boy, but because of your sexual organs given to you at birth,
21 we say you're a girl"?

22 MR. HARMON: Uh-huh.

23 THE COURT: Why is that not a form of sex
24 stereotyping?

25 MR. HARMON: Because it's based on physiological

1 differences. It's not an expectation that the school board is
2 saying that, you know, "We expect that you will walk, talk,
3 act, look, and behave like a girl because that's how girls
4 behave."

5 I mean, look at *Price Waterhouse*. That's what *Price*
6 *Waterhouse* was. It wasn't about biological parts. *Glenn*
7 *Brumby* wasn't about biological parts. It was about looking at
8 a person and saying, "You're not conforming to your gender in
9 the way that we expect you to."

10 And if you look at the cases that were cited by
11 plaintiff in the brief following *Glenn Brumby*, they're all
12 employment cases. They're all Title VII employment cases that
13 look at this issue of not conforming to your gender. Even
14 *Glenn* says a plaintiff can show discriminatory intent through
15 direct or circumstantial evidence.

16 The only issue that plaintiff has put before Your
17 Honor in evidence that they -- they argue consists of
18 discriminatory intent is a bathroom policy that separates
19 students on the basis of sex, something that has been
20 permissible under Title IX.

21 So I don't understand how it could be considered
22 discriminatory or invidious discrimination if it's permitted,
23 and there are other courts that have said this is not
24 discrimination, doing this.

25 *Whitaker* relied on *Glenn* in that one statement. And

1 if you look, too -- I'd like to point out in the *Whitaker* case,
2 they completely sidestep the argument that I'm making to Your
3 Honor. It is -- here it is. The Court in *Whitaker*, when it
4 goes to *Glenn*, says the following: "The school dis-" -- or it
5 says -- let me get to it.

6 "Following *Price Waterhouse*, the Court and others
7 have recognized a cause of action under Title VII when an
8 adverse action is taken because of an employee's failure to
9 conform to sex stereotypes.

10 "The school district argues that even under a sex
11 stereotyping theory, Ash cannot demonstrate a likelihood of
12 success on his Title IX claim because its policy is not based
13 on whether the student behaves, walks, talks, or dresses in a
14 manner that is consistent with any preconceived notions of sex
15 stereotypes.

16 "Instead, it contends that as a matter of law" -- and
17 here's the key -- "requiring a biological female to use the
18 women's bathroom is not sex stereotyping." And what the Court
19 said there is, "However, this view" -- this is *Whitaker*.

20 ". . . this view is too narrow."

21 The question is why did they conclude that? In the
22 very next paragraph they say, "By definition, a transgender
23 individual does not conform to sex-based stereotypes of the sex
24 that he or she was assigned at birth.

25 "We are not alone in this belief. In *Glenn* the

1 circuit court noted, 'A person is defined as transgender
2 precisely because of the perception that his or her behavior
3 transgresses gender stereotypes.'"

4 That's the quote that plaintiff is taking and
5 throwing at *Whitaker*, *Evancho*, and Your Honor, that the mere
6 act of being transgender means you transgress gender
7 stereotypes. That is not what *Glenn* said, so *Whitaker* is
8 misapplying that, *Evancho* is misapplying that, and it's getting
9 circulated.

10 Eleventh Circuit requires evidence of actual
11 sex-stereotype discrimination against an individual.

12 THE COURT: So give me an example, under your view of
13 the Eleventh Circuit, what would have had -- what extra thing
14 would have had to happen in Mr. Adams' case for this to be a
15 proper claim? What kind of evidence of discrimination would
16 you be looking for?

17 MR. HARMON: "Go into the girls' bathroom" -- or go
18 in -- "You're not allowed to go into the boys' bathroom because
19 you look too much like a girl and you'll make all of the boys
20 uncomfortable because you look like a girl."

21 That's sex stereotyping. "You're not conforming to
22 your sex. You look like a girl. You" --

23 THE COURT: But isn't that type of thinking, whether
24 it's said out loud -- doesn't that undergird the safety/privacy
25 type concerns that are being expressed by the school board *sub*

1 *silentio* for its policy?

2 I mean, isn't -- when we're talking about safety and
3 privacy and all that, isn't -- isn't that what we're talking
4 about, that we're uncomfortable? We don't want to see somebody
5 that looks to us like a boy in the girls' bathroom or vice
6 versa? Isn't that what is undergirding the policy?

7 MR. HARMON: No, not at all. The policy is
8 undergirded by a basis of physiological differences between men
9 and women. It has nothing to do with how a person dresses,
10 whether you wear a dress -- it's why we don't mind, in school
11 districts, if girls wear tuxedos to prom. It has no bearing on
12 physiological differences.

13 I mean, courts -- the *Faulkner* case -- I'll point out
14 to Your Honor -- which was cited by plaintiff. It's a Fourth
15 Circuit case, and it said, "The Court recognized, quote,
16 society's undisputed approval of separate public restrooms for
17 men and women based on privacy concerns and observing that the
18 need for privacy justifies separation, and the differences
19 between the genders demand a facility for each gender that is
20 different."

21 *Carcaño* said the same thing. *Virginia* said the same
22 thing. There are -- courts recognize there are physiological
23 differences. Has nothing to do with stereotyping.

24 Under our policy, if you're born a boy -- there's no
25 stereotyping done. It's purely based on physiological issues.

1 THE COURT: But I thought that the testimony at trial
2 from the best practices folks and Smith and -- I can't remember
3 the other person's name.

4 I thought that when they were asked what the reason
5 for the policy was, I thought they cited things like safety,
6 privacy. "We don't want our other students to have to go to
7 the bathroom with a person that they view as being of the
8 opposite sex." "We're concerned that there could be incidents
9 in the restrooms between a transgender person and a
10 nontransgender person." "We're concerned that Mr. Adams might
11 be bullied if he were in the boys' bathroom."

12 I thought that was what underlay the best practices
13 and then this unwritten rule that the school board has today,
14 in open court, adopted.

15 Isn't that what we're talking about?

16 MR. HARMON: The testimony from the task force and
17 the focus group -- best practices is in one bucket; the
18 unwritten policy is in another.

19 The unwritten policy has nothing to do with
20 transgender students. It has to do with a boy and what
21 bathroom a boy can use and a girl and what bathroom a girl can
22 use. It has nothing to do -- because some transgender
23 students --

24 THE COURT: But it does in this sense, because a
25 value judgment has to be made that Drew Adams is not a boy,

1 right?

2 In other words, in order for -- if you're saying the
3 whole policy is boys have to use the boys' restroom and girls
4 have to use the girls' restroom, the St. Johns County School
5 Board has to be making a value judgment, based on something,
6 that Drew Adams is a girl, because otherwise they'd let him use
7 the boys' bathroom, right?

8 MR. HARMON: Yeah, and the value judgment comes in
9 the form of the enrollment materials, which is, what are you
10 when you enroll in the school district?

11 THE COURT: All right. Well, let's talk about that.
12 I think the evidence was that -- I think Mr. Upchurch was asked
13 about it: "What happens if the person's already transitioned
14 before they come to your school and so the paperwork says boy?"

15 So you're telling -- and I think he said, "Well, then
16 we would treat him like a boy until we had reason not to," or
17 something like that.

18 MR. HARMON: Yeah. That's correct.

19 THE COURT: But I'm not exactly sure what that means.

20 So if the value judgment is made at the time of the
21 enrollment -- and what is it based on? It's based on --

22 MR. HARMON: The enrollment material.

23 THE COURT: I know, but remind me specifically --

24 MR. HARMON: Yeah.

25 THE COURT: -- what that is.

1 MR. HARMON: There's a school entry form where the
2 student identifies all their background --

3 THE COURT: Okay.

4 MR. HARMON: -- that has a box for gender or sex.

5 THE COURT: Okay.

6 MR. HARMON: There's a home language survey that also
7 has a box for gender or sex. There's a requirement for birth
8 certificate and birth identification card --

9 THE COURT: Okay.

10 MR. HARMON: -- and I think there was a fourth
11 document that also had a box --

12 THE COURT: Okay.

13 MR. HARMON: -- to check.

14 THE COURT: And so if all those boxes got checked
15 male and he'd gotten a birth certificate, which you know he can
16 do because he did it, that said male, he would be a male
17 according to the St. Johns County School District until what
18 happened? Until when?

19 MR. HARMON: Well, I think what Mr. Upchurch said,
20 until information was presented that suggested maybe that's not
21 right.

22 THE COURT: And how would that come to your
23 attention?

24 MR. HARMON: I don't know. I mean, in -- this
25 particular case is an example. I mean, sometimes students may

1 come and say that. Sometimes --

2 THE COURT: No, no, that's different, because Drew --
3 because Mr. Adams, when he enrolled in your school, said he was
4 a female, right?

5 MR. HARMON: Yes.

6 THE COURT: Okay. So that's different.

7 MR. HARMON: I guess the way I can illustrate it is
8 with an example.

9 St. Johns County is a high-performing school district
10 in the state, very high-performing. It's not out of the realm
11 of possibility that students that may live in surrounding
12 counties may want to enroll as a student in St. Johns County
13 and provide residential information showing that they live at a
14 particular address.

15 And if they do that, we admit them and we enroll them
16 based on that address, and we put them at Nease because they
17 live in the Nease zone. And we treat them as our student, and
18 they go to our classes.

19 And then three months later we find out, for one
20 reason or another, Mom may have lied on the admission
21 certificate and the student doesn't live at that home and is
22 not a student in this zone.

23 What would we do in that particular circumstance? We
24 would act on it and potentially not let that student attend our
25 schools.

1 THE COURT: So when Drew Adams, hypothetically, has
2 already transitioned, got a birth certificate that -- got his
3 birth certificate, under Florida regulations, changed to show
4 that he's a male, checked all the boxes that says he's a male,
5 considers himself a male, and has taken physical steps to try
6 to create a more male appearance, when he enrolls in Nease
7 under those circumstances and then later somebody figures out
8 that he actually transitioned to become a male, you treat that
9 as if he'd lied?

10 MR. HARMON: It would be based on -- well, again, no
11 policy is perfect. We know in this particular case that Drew
12 is not a male.

13 So in that hypothetical, I assume, just like
14 Principal Kefford said and just like Broward's policy says,
15 that it would be treated on a case-by-case basis. They would
16 meet with the student and try to accommodate that.

17 THE COURT: So you would -- but you would -- under
18 your analogy he would be treated as if he had lied just like
19 the person who said that they lived in the district when they
20 really didn't.

21 MR. HARMON: Yes. If he -- if he enrolled and
22 identified as a male but was not born a male, then there would
23 probably --

24 THE COURT: Even though he had a birth certificate,
25 even though he could check off all the boxes, even though he

1 had doctors that say he's a male, he'd still be lying.

2 MR. HARMON: Under our policy he would not be treated
3 as a male for the bathrooms.

4 And if I could tack on to that this issue, Your
5 Honor. You have a neat case to work with here in terms of the
6 facts, and what I mean by that is you've got a student who has
7 gone to all these lengths and has doctors coming in to say
8 there's -- you know, he's socially transitioning. It's a neat
9 box.

10 Everybody knows Drew Adams is a transgender male. He
11 goes on social media. So when he walks into the school, it's a
12 pretty simple issue. Everybody knows.

13 But this -- what plaintiff is asking you to do is to
14 invalidate a policy that won't just impact Drew Adams. And
15 under plaintiff's argument -- you asked about the slippery
16 slope question, and plaintiff emphatically said no, but that
17 is -- could not be further from what will happen.

18 What will happen, if Your Honor invalidates the
19 school board's policy, is Your Honor will be saying, under
20 Title IX, sex is how an individual identifies. That impacts
21 bathroom use. That impacts who showers with who at schools,
22 who sees who in a state of undress in bathrooms. It's not just
23 Drew Adams wanting to use a multi-stall bathroom.

24 So while the facts of this case are neat in that Drew
25 Adams has done all these things to transition, there is

1 nothing -- nothing preventing -- and, again, schools have to
2 look for privacy and safety on a -- not on an abstract basis
3 but on a -- I mean, we're responsible for the privacy and
4 safety of students.

5 THE COURT: Absolutely, and I fully appreciate that.

6 I guess the problem I have with the argument is that
7 there is zero evidence.

8 MR. HARMON: But does there have to be evidence?

9 THE COURT: Well, you would think that, because I've
10 got an amicus brief from 29 school districts. I've got
11 Kentucky. I've got Broward County, and I've got all these
12 other places that are doing this and have reported zero
13 problems. None of the things that people who are worried about
14 this worry about have ever happened.

15 And you were not able to adduce any evidence that it
16 had ever happened, nor were any of the people that worked on
17 the task force or anything, who had actually looked at all the
18 policies all over the country, were they able to identify any
19 of these bad things that could happen having ever happened
20 before.

21 And while I agree with you that you don't always have
22 to have a demonstrated problem before you can create a policy,
23 it does make one wonder whether the fear, the safety concerns,
24 the privacy concerns are based on things that are not the
25 reality on the ground.

1 MR. HARMON: Okay. So if the Court were to require
2 defendant to put on actual evidence of a problem before the
3 Court is going to actually find that there's a privacy issue
4 here, that the government has a legitimate governmental
5 interest in doing what it's doing, think of this scenario and
6 pose this question.

7 If there's no privacy concern, there's no issue,
8 there's no demonstrated legitimate issue with allowing a male
9 student, biological male student, to identify as female out of
10 the blue -- and I understand that's just a -- that's a
11 possibility.

12 But if there's no privacy issue and there's no
13 legitimate governmental interest in keeping a biological male
14 out of the girls' bathroom because he thinks he's a girl, why
15 do we put -- is Your Honor -- is it going to require us
16 removing "men" and "women" signs from the bathroom doors?
17 Because there's no privacy issue.

18 If a person can just internally decide what gender
19 they are and there's nothing to worry about, just go and do
20 what you need to do in the public school, why don't we just
21 take it off the bathroom doors? Why do we have "men" and
22 "women"? Just let people go to the bathroom.

23 The reason we have "men" and "women" on the doors is
24 because there is an expectation of privacy. There doesn't need
25 to be a violation of that expectation to justify putting a

1 policy in place to protect it. But that slippery slope, why
2 don't we just put "men" on the bathroom stall door -- and
3 that's another point.

4 The plaintiff has argued that our means to achieve
5 protecting privacy is undercut by the fact that there are
6 stalls in the bathrooms. If that is the case, then in the
7 girls' bathroom, why don't we just put the "girl" logo on the
8 stall door and just let men walk into the multi-stall bathroom
9 and do whatever they want to do in front of the mirror and just
10 not go into the stall with the female student?

11 Now, administrators can't protect that. They can't
12 watch that. They stand outside the bathroom doors, but --

13 THE COURT: See, I don't really think that's -- I
14 mean, I hear you, but I don't think your opponents are saying
15 there can't be boys' bathrooms or girls' bathrooms. The
16 question is who gets to go in them.

17 And I guess I'm -- so I'm imagining Mr. Adams, who
18 has transitioned -- and I -- you know, I understand. This
19 is -- I mean, I'm having to learn a lot in this case because I
20 didn't know lots of things, and I'm trying to learn. I'm
21 trying to understand.

22 But Mr. Adams, who by the accounts that I have -- and
23 I don't think it's un- -- I think it's unrebutted, has
24 transitioned from female to male, both in his way of looking at
25 himself -- which I guess is really how you get a gender

1 identity: How do you identify yourself?

2 But he's taken the extra step of physically changing
3 his appearance so that he looks -- if I may say, and I hope I
4 can -- like a more prototypical boy than he does a prototypical
5 girl now. And so -- and he testified that he considers himself
6 a boy. He doesn't want to be a girl.

7 And so what I'm imagining is if he were in using the
8 boys' bathroom at Nease High School and a girl came in, I'm
9 imagining he would not want a girl in the boys' bathroom, just
10 like the other boys wouldn't.

11 And I'm imagining that if he walked into the girls'
12 bathroom at Nease High School right now, which your policy
13 tells him he can do -- right?

14 MR. HARMON: Right. He can go to the girls' bathroom
15 or the gender-neutral bathroom.

16 THE COURT: He can walk into the girls' bathroom,
17 looking all the world like a boy, and that's perfectly fine
18 with St. Johns County.

19 MR. HARMON: Yeah, because it would be sex
20 stereotyping to do otherwise.

21 THE COURT: Okay.

22 MR. HARMON: There's no -- on your --

23 THE COURT: And you don't think that -- you don't
24 think girls -- talking about safety and privacy and all that,
25 you don't think girls at Nease High School who had a person who

1 looked for all the world like a boy and speaks like a boy,
2 walked into their bathroom, you don't think they'd have
3 something to say about it?

4 MR. HARMON: Well, we would have a problem if they
5 had something to say about that. That's not permitted. We
6 don't let students -- I don't know. It's a great hypothetical.
7 There's no facts to support that happening, but we --

8 THE COURT: Well, it's not hypothetical that -- it's
9 not -- you're right. My hypothetical about a girl walking into
10 the boys' bathroom and Drew Adams being in there, that's a
11 hypothetical. No evidence of that.

12 There actually is no evidence of Drew Adams walking
13 into the girls' bathroom either as -- after he's transitioned.
14 I agree with that. But that's exactly what your policy tells
15 him that he can do.

16 MR. HARMON: Uh-huh.

17 THE COURT: And what I'm saying to you is, if he
18 walks into a girls' bathroom looking like a boy, what about
19 safety? What about privacy? What about all the things that
20 St. Johns County says it's concerned about as a reason to keep
21 him out of the boys' bathroom?

22 Aren't those concerns either equally or even more
23 important in that scenario?

24 MR. HARMON: No, Your Honor, because we can't -- we
25 can't enforce privacy concerns and get to protecting student

1 privacy by regulating how students look and what type of
2 clothes they wear and how they cut their hair. That would be
3 an improper means to achieve protecting student privacy, by
4 regulating that type of appearances. That's sex stereotyping.

5 That's why I argue again that our way of protecting
6 privacy is the -- is substantially related to protecting
7 privacy and the least intrusive way to do it, birth sex.

8 One of the things that Your Honor mentioned was if
9 Drew Adams -- Drew Adams doesn't want a girl in the bathroom
10 with him. I think Your Honor said that. But if you accept
11 plaintiff's argument, Drew Adams will have no idea whether
12 there is a girl or a boy in the bathroom with him because
13 students --

14 THE COURT: So it really does --

15 MR. HARMON: -- will get to make that call.

16 THE COURT: -- just get back -- it really does just
17 get back to the fact that the St. Johns County School Board
18 thinks that Drew Adams is a girl.

19 MR. HARMON: For purposes of the bathroom, yes.

20 THE COURT: Right.

21 And he thinks he's a boy?

22 MR. HARMON: Yes.

23 THE COURT: And that's what makes the world go round,
24 I guess, right? I've got to -- I mean --

25 MR. HARMON: But that goes back to one of the

1 questions you posed to plaintiff which was, how is the
2 defendant going to argue to me that if I find an equal
3 protection violation, I also have to find that 106.33 is
4 unconstitutional?

5 And I think the argument there is if you have to make
6 the decision of whether plaintiff is a boy or a girl for
7 purposes of the equal protection, you're going to have to make
8 that call basically, under Title IX, whether sex means gender
9 identity or something different.

10 You have -- I think you have to make that call.

11 THE COURT: To what -- and this will be my last
12 question, I think, of you because I need to -- we need to kind
13 of wrap this up.

14 But to what extent does -- because Mr. Upchurch
15 testified that if this matter actually ever did go before the
16 school board, it would be very controversial.

17 And to what extent does public opinion or public
18 belief about what the policy should be -- to what extent does
19 that bear on the legal issues in the case?

20 MR. HARMON: Well, whether or not a policy is
21 constitutional or discriminatory has no bearing on public
22 opinion, no question.

23 Public opinion becomes a relevant piece of the puzzle
24 only in that the school board, by law, is required to elicit
25 public input on issues before it takes action.

1 THE COURT: Which, by the way, didn't happen here, we
2 already know, right?

3 MR. HARMON: From what I know, in terms of an
4 adoption of this policy, no. There was a meeting where the
5 public did attend and state its position, but not in the formal
6 adoption process.

7 THE COURT: Well, there were like five people. They
8 were all actually in favor of Mr. Adams' position.

9 MR. HARMON: Yes.

10 THE COURT: I'm confident they could find more than
11 five people that were against it, I bet. But the school board
12 never actually debated it or voted on it or anything.

13 MR. HARMON: No.

14 THE COURT: I did get Mr. Mignon to come in today and
15 tell me this is their policy, so I'm going to take his word for
16 it, but -- but anyway. Okay. I digress. What -- let me just
17 tell you why I'm asking and then you can . . .

18 In the *Minersville* case in Pennsylvania, the
19 superintendent, I believe, or somebody just came out and said,
20 "*Minersville* isn't ready for this."

21 And is St. Johns County just saying, "St. Johns
22 County just isn't ready for this"? Is that really what this
23 policy is?

24 MR. HARMON: No. I think the policy is protecting
25 privacy. Whether -- I mean, school boards make decisions every

1 day that run afoul of sometimes what communities think is best.

2 I mean, there's arguments about what content should
3 be in a textbook. There's arguments about whether students
4 should have to stand for the pledge. And the school board
5 makes -- school board members make unpleasant decisions every
6 day when it promulgates a policy.

7 But the school board has to look out for its 40,000
8 students, and I'm sure public input drives some
9 decision-making. But at the end of the day, whether or not the
10 public is or is not opposed and whether there's more in favor
11 or more against, I don't think, drives the decision.

12 THE COURT: Okay. Anything else you wanted to say?
13 Because you're about to run out of time here.

14 MR. HARMON: Yes, Your Honor. I'll just be -- I'm
15 not going to repeat my brief. I'm just going to be real brief
16 on --

17 THE COURT: Sure.

18 MR. HARMON: -- maybe a couple of points, Your Honor.

19 THE COURT: Sure.

20 MR. HARMON: One was the gender fluidity issue.

21 THE COURT: Yeah.

22 MR. HARMON: I do think it was fleshed out a little
23 bit more than maybe plaintiff is representing. I think the
24 testimony was that gender fluidity was addressed several times
25 during the meeting. I think Ms. Smith said that.

1 The Broward County policy, which is in evidence, that
2 actually plaintiff cited, has a real interesting take on that,
3 Your Honor. It says, at Bates page 1587, under gender
4 identity -- which is -- again, plaintiff's position in this
5 case is that sex means gender identity.

6 Broward County, which plaintiff wholeheartedly
7 supports and had come in here, said that "Gender identity
8 refers to a person's internal, deeply felt sense of being male
9 or female, boy or girl or other, for example, a blending of the
10 two."

11 So are we supposed to adopt a bathroom policy that is
12 specific for students who have a blended gender? That's taking
13 it a little bit too far, I think.

14 I think the policy that St. Johns County has in place
15 accommodates a wide range of students, whether they're
16 biological boy, biological girl, gender fluid. I think
17 plaintiff's testimony, through his YouTube video, was that
18 gender nonbinary individuals are neither.

19 So if we're going to treat sex -- if we're going to
20 treat sex as meaning gender identity, then we need to have
21 boys' room, girls' room, a blended gender fluid room, gender
22 nonbinary bathroom, and the list is just going to keep going on
23 and on.

24 I submit that that's a -- that's the slippery slope
25 we're going to go down if we find that sex means gender

1 identity. We're going to have to create bathrooms for people
2 who walk into school and go, "I'm uncomfortable being a boy or
3 girl. I'm a blending of the two. I want that bathroom."

4 And I understand that these are extensions and
5 arguments and whatnot, but that's the slippery slope, and that
6 may end happening.

7 It's why I would submit that the policy of separating
8 bathrooms based on biological sex is appropriate. It's an
9 appropriate way to protect the privacy rights of students.
10 That's exactly what *Carcaño* says. It doesn't need to be
11 perfect. It just needs to be reasonable.

12 I understand this case is about one student, but when
13 we're talking about a policy change in a school district, we
14 have to look at how this may apply on 40,000 students.

15 And that highlights the reason why I say we don't
16 have to wait for there to be a privacy violation to make
17 policy. We don't have to wait for a transgender student to
18 assault somebody in a bathroom to go, "See, I told you. Let's
19 make a policy now." We have to think these things out, about
20 what could happen.

21 And the reason plaintiff wants to avoid the slippery
22 slope is because then you're starting to get into policy-making
23 concerns. That's why the school board did what it did and why
24 plaintiff just wants to focus on Drew Adams, going -- who is,
25 by all means, a good student. There's no evidence against

1 that.

2 Wants to focus the issues in this court solely on
3 Drew Adams going into a multi-stall bathroom. But the reality
4 is, the decision, if plaintiff's argument is accepted, is we
5 will have biological females that when they identify as male,
6 they will be in the locker room showering in the presence of
7 boys. That's what happens.

8 So I think that's all I've got, Your Honor, and I
9 appreciate your indulgence.

10 THE COURT: Thank you, Mr. Harmon.

11 MR. HARMON: Thank you.

12 THE COURT: Appreciate it.

13 Ms. Borelli, I'm going to call you back up. I've got
14 a couple of questions for you, and then I'll give you just a
15 few minutes, and then we're going to shut it down.

16 We could, I'm sure, talk about this for a long time,
17 but probably two-and-a-half hours is going to be about enough.

18 My question for you is, following along the lines of
19 what Mr. Harmon just said, when I visited the Nease High
20 School, there are -- I did go into the locker rooms. There are
21 bathrooms -- if I'm recalling, bathrooms in the locker rooms.
22 There are showers in the locker rooms.

23 And in the boys' bathroom or locker room, kind of
24 consistent with custom, there is much less privacy. The shower
25 stall is just one big, long thing, and you just stand there and

1 take a shower in front of God and everybody, and there's no
2 privacy at all. There are bathrooms in there.

3 Is this ruling about that? Would Mr. Adams -- just
4 so I'm understanding, would Mr. Adams be -- under a ruling that
5 was favorable to him, would he be permitted to go into the
6 boys' locker room? Would he be permitted to take showers in
7 the shower? Would he be able to use the bathrooms in the
8 locker room?

9 What is the -- and the answer to that could either be
10 "No, that's not what the case is about," or "Yes, it is, and
11 here's why it's fine."

12 I don't know what the answer is, but I need to
13 understand what a ruling for Mr. Adams in this case would mean
14 for that scenario.

15 MR. HARMON: The relief that we're asking for is
16 simply that this blanket policy can't be sustained. There
17 shouldn't be a blanket exclusion of transgender students from
18 the facilities that match their gender identity.

19 What a policy actually looks like -- I mean, we would
20 love the opportunity to sit down with opposing counsel and
21 discuss what a policy might look like. Broward has a terrific
22 one. But the record is actually full of many examples of
23 variations of policies adopted across the country by schools
24 addressing each of these spaces.

25 What cannot stand is the blunt, unsupported rule that

1 never can a transgender student use a facility that matches
2 their gender identity.

3 THE COURT: One other question that occurred to me.
4 The judge in North Carolina, Judge Schroeder, who had to
5 address the so-called bathroom bill in North Carolina, he wrote
6 an opinion which was favorable to the plaintiff on Title IX but
7 was unfavorable to the plaintiff on equal protection.

8 I'm interested -- and it's really probably the
9 most -- I guess *Johnston* a little bit but it really was the --
10 probably the clearest explication of why Judge Schroeder didn't
11 think equal protection applied to this scenario.

12 What fault -- I assume you find fault with that.
13 What distinguishing factors in *Carcaño* or what -- why do you
14 think Judge Schroeder got it wrong on equal protection?

15 MS. BORELLI: I don't believe that that case could
16 have been decided the way it was in a circuit with authority
17 like *Glenn*, and the Fourth Circuit doesn't have that authority.

18 And so Judge Schroeder explained that the crux of his
19 decision was the assumption that men and women are different
20 because of physiology, and we can sort of reduce protection
21 from sex discrimination to that.

22 I don't believe that's the law since *Price*
23 *Waterhouse*, but the unanimous panel in *Glenn* certainly makes
24 clear that we protect -- yes, Your Honor.

25 THE COURT: Now, your opponent -- you raised the

1 question I wanted to ask next anyway.

2 Your opponent says that courts have taken *Glenn* out
3 of context and run with it and that *Glenn* only stands for the
4 proposition that sex stereotyping of a transgender person is
5 unlawful, but that's not what's going on here and that the
6 other courts have just misunderstood or misapplied *Glenn*.

7 Can you give me a minute or two on that, please?

8 MS. BORELLI: Yes, Your Honor. Let me start by
9 saying I am actually puzzled by why defendant wants to spend
10 quite so much time contesting whether this is sex stereotyping
11 or not, because what sex stereotyping is, is simply one of
12 several theories to determine whether there is sex
13 discrimination at play.

14 Defendant has already conceded that. It's explicitly
15 stated in their findings of fact and conclusions of law, along
16 with the concession that that means intermediate scrutiny and
17 it means that they carry the burden to show actual, concrete
18 interest, on this record, that justify excluding Drew from the
19 boys' restroom. So I'm a little puzzled at the amount of
20 energy the defendant is spending on it, to be totally frank.

21 But we do think that theory is absolutely correct.
22 *Glenn* doesn't make any distinction in its opinion about what we
23 sometimes call status versus conduct. You're protected if
24 you're discriminated against because you're acting in some way
25 but not if it's just because you are something.

1 We've seen those arguments actually a number of times
2 before in the law. It came up frequently in sexual orientation
3 cases, and the courts have rejected that, and *Glenn* certainly
4 doesn't make any distinction.

5 There was no suggestion that maybe Vandy Beth Glenn
6 would get protection if she was discriminated against because
7 she wasn't skillful enough in putting on her makeup but not if
8 it was about the fact that she's transgender.

9 What defendant is trying to say here is, "We're just
10 relying on a so-called fact about physiological differences.
11 That has nothing to do with sex." And I think there are two
12 answers to that.

13 Number 1, there was evidence that Mr. Brumby in that
14 case was unsettled by the thought of Vandy Beth Glenn's sexual
15 organs under her dress, and the Court said, "That's direct
16 evidence of sex stereotyping, if this is the reason or a reason
17 that you think she's not a proper woman or a real woman."
18 That's exactly what's going on here.

19 We also have a number of other cases that have
20 addressed that argument head on -- the *Roberts versus Clark*
21 case, *Lusardi*, and *Rene versus MGM* -- where the courts
22 confronted the argument, "This isn't about stereotyping or sex.
23 It's just physiological fact."

24 And the courts all said, "You can't point to
25 sex-related anatomy and claim it has nothing to do with sex.

1 That's exactly what it has to do with."

2 So, again, I'm not sure what the contest is here
3 because they've already admitted this is sex discrimination.
4 But at any rate, we think that this record shows that the
5 assumptions here are premised entirely on sex stereotypes.

6 THE COURT: All right. I'm going to just give you a
7 couple minutes or so because we really are kind of over budget
8 here, but I -- I know it's important, but we could talk about
9 it forever.

10 But if there's a point or two you really -- or three
11 that you really want to make in response, do it as concisely as
12 you can, and I'll let you go.

13 MS. BORELLI: Thank you, Your Honor.

14 I would underscore what the Court pointed out, which
15 is it's really notable under this policy that Drew is treated
16 as a boy by the school in every respect except for facilities
17 use. In other words, they just deem him not to be sufficiently
18 masculine or boy enough for a facility's use. That, again, is
19 evidence this is based on sex stereotyping.

20 But they did nonetheless admit, Ms. Mittelstadt
21 admitted, that he is a transgender boy. And we have
22 uncontested, unrebutted evidence from the medical experts and
23 the medical amicus brief that that means that he has to be
24 treated -- his medical care, his medical course of treatment,
25 that means that he has to be treated as a boy in every respect.

1 And it's very damaging to young transgender people to
2 be treated as if there's something shameful about them or to
3 have this specter raised of assault when there's absolutely no
4 evidence of anything like that.

5 Drew testified, "It makes me feel like I'm not fit to
6 be with my peers." It's profoundly damaging, and they have not
7 produced any evidence whatsoever, Your Honor, to carry their
8 burden to show that this is justified by privacy or justified
9 by safety interests.

10 Perhaps the last point I'll make, Your Honor, is they
11 mentioned that Drew is just one out of 40,000. We do have
12 testimony that seven transgender students have asked to use
13 restroom facilities using their -- matching their gender
14 identity or consistently held gender identity.

15 So Drew is not alone. It is a small group of
16 students. That's precisely the moment when the courts are
17 supposed to be especially skeptical of government
18 discrimination and to require that the interests produced be
19 specific and that they be backed up with actual evidence.

20 Defendant has simply failed to carry that burden
21 here.

22 Thank you, Your Honor.

23 THE COURT: Thank you, ma'am.

24 Mr. Harmon, I'll give you about a minute or so if
25 there's something that -- I just want to make sure people don't

1 leave here saying, "I didn't get to say the one thing I wanted
2 to say," but we do need to shut it down.

3 But let me hear from you if you care to be heard.

4 MR. HARMON: Your Honor, I almost said I didn't have
5 anything to say, but as a lawyer, when the judge gives me an
6 opportunity to say something, I have to say something.

7 THE COURT: All right.

8 MR. HARMON: I would just point out that plaintiff
9 mentioned that the exclusion of plaintiff from the bathroom is
10 based on masculinity. There's no evidence of that whatsoever.

11 The other thing is, again, plaintiff is trying to
12 take *Glenn Brumby*, skip the part about where you have to show
13 discrimination, and jump right into the burden on the
14 governmental entity -- governmental entity to meet the
15 intermediate scrutiny test.

16 *Glenn* still requires evidence of discrimination, and
17 we have not conceded that we have engaged in sex-based
18 discrimination in this case. So that needs to be satisfied
19 first before we even get to the legitimate governmental
20 interest part.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 All right. The case is submitted.

24 Let me thank counsel for their well done
25 presentations this morning. I think they were very

1 professional and very helpful to me. I am in the mode of
2 searching, and I'm trying to understand, and I think -- I think
3 you-all helped me with that today.

4 And so I'm now satisfied that the school board has
5 this policy, and therefore that issue is not something I'm
6 going to spend a lot of time thinking about, so now I've got to
7 decide the case on its merits. I will do that. I will write
8 an opinion. It will not be quick for me to do that.

9 And I want it to be -- if I do it like I want to do
10 it, it will not only be able to be read by lawyers but will be
11 able to be read by other people who might be interested in a
12 way that hopefully I can explain what I'm doing.

13 And I'm going to have to think about it some more,
14 and then I'm going to have to start writing an opinion, and
15 then I will issue it just as soon as I can.

16 I have said in the past that by expediting the case
17 the way we have, my hope is to have an opinion out in advance
18 of Mr. Adams' senior year so that -- so that whatever the
19 decision is will be applicable, subject, of course, to any
20 appeal or whatever, wherever that might go.

21 So I'm going to do the best I can to get it out to
22 you just as soon as I can, but it will not be -- it will not be
23 quick. I'm sure of that, especially given the press of other
24 business in the court.

25 I will say this. I know this is a developing area,

1 and I would put upon the parties the obligation to file notices
2 of supplemental authority and other -- anything that you think
3 is relevant and, you know, not beyond the pale of what I'm able
4 to consider, I would be grateful if you would do it.

5 I would always ask you to let the other side know,
6 either an unopposed filing of notice of supplemental authority
7 or a conference, and if the -- I wouldn't be asking,
8 necessarily, for additional argument, but I want both sides to
9 be aware of what's happening and be able to feel like they've
10 been treated fairly in whatever way makes sense for them.

11 So I will not put a prohibition from hearing from you
12 again, but keep me informed as to what's going on so that I
13 have the latest information before I make a final ruling.

14 So with all that, is there anything else from the
15 plaintiff, Mr. Adams, at this time?

16 MS. BORELLI: No, Your Honor.

17 THE COURT: From the school board?

18 MR. HARMON: No, Your Honor.

19 THE COURT: All right. Thank you again for all your
20 good work, and we will be in recess.

21 COURT SECURITY OFFICER: All rise.

22 (The proceedings were concluded at 12:15 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT)
MIDDLE DISTRICT OF FLORIDA)

I hereby certify that the foregoing transcript is a true and correct computer-aided transcription of my stenotype notes taken at the time and place indicated therein.

DATED this 21st day of March, 2018.

s/Shelli Kozachenko
Shelli Kozachenko, RPR, CRR
Official Court Reporter