

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child,)	
)	
Plaintiff,)	
v.)	Cause No. 3:18-cv-37-WTL-MPB
)	
EVANSVILLE VANDERBURGH SCHOOL)	
CORPORATION,)	
Defendant.)	

NOTICE OF UPDATED AUTHORITY

Comes now the Defendant, by counsel, and submits the following Notice of Updated Authority.

Plaintiff filed his motion for preliminary injunction in this matter on April 10, 2018. Said motion has been fully briefed, an evidentiary hearing has been held, and both parties submitted their proposed findings of fact and conclusions of law on July 27, 2018.

Both parties cited *Doe v. Boyertown Area School District*, 893 F.3d 179 (3d Cir. June 18, 2018), in their briefs. See Dkt. No. 41 at 3; Dkt. No. 54 at 16 n.15. On July 26, 2018, the United States Court of Appeals for the Third Circuit granted panel rehearing in that case, vacated the previous opinion, and issued the attached revised opinion. *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 2018 U.S. App. LEXIS 20792 (3d Cir. July 26, 2018). On the same date, the Third Circuit also denied rehearing *en banc*, a decision from which Judge Jordan, joined by Judges Chagares, Hardiman, and Bibas, dissented. *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 2018 U.S. App. LEXIS 20848 (3d Cir. July 26, 2018) The dissenting opinion from the denial of rehearing *en banc* is also attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of August, 2018, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's electronic filing system upon:

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3113

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

v.

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

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

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

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OPINION OF THE COURT

McKEE, *Circuit Judge*.

This appeal requires us to decide whether the District Court correctly refused to enjoin the defendant School District from allowing transgender students to use bathrooms and locker rooms that are consistent with the students' gender identities as opposed to the sex they were determined to have at birth. The plaintiffs—a group of high school students who identify as being the same sex they were determined to have at birth (cisgender)—believe the policy violated their constitutional rights of bodily privacy, as well as Title IX, and Pennsylvania tort law. As we shall explain, we conclude that, under the circumstances here, the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs' rights under Title IX.

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

identity rather than the sex they were determined to have at birth, and using sex-segregated spaces and engaging in sex-segregated activities that correspond to their gender identity rather than their birth-determined sex.¹³ For transgender individuals, an important part of social gender transition is having others perceive them as being the gender the transgender individual most strongly identifies with.¹⁴ Social gender transition can help alleviate gender dysphoria and is a useful and important tool for clinicians to ascertain whether living in the affirmed gender improves the psychological and emotional function of the individual.¹⁵

Policies that exclude transgender individuals from privacy facilities that are consistent with their gender identities “have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals.”¹⁶ These exclusionary policies exacerbate the risk of “anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes.”¹⁷ The risk of succumbing to these conditions is already very high in individuals who are transgender. In a survey of 27,000 transgender individuals, 40% reported a suicide attempt (a rate

¹³ App. 2110.

¹⁴ App. 2110.

¹⁵ App. 2111.

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

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

nine times higher than the general population).¹⁸ Yet, when transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students “reflect the same, healthy psychological profile as their peers.”¹⁹

Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes “severe psychological distress often leading to attempted suicide.”²⁰ The result is that those students “avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the

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

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

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

day.”²¹ This behavior can lead to medical problems and decreases in academic learning.²²

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

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

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

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

²³ App. 395.

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

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

The District required the student claiming to be transgender to meet with counselors who were trained and licensed to address these issues and the counselors often consulted with additional counselors, principals, and school administrators.²⁹ Once a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity, the student was required to use only those

²⁴ App. 395.

²⁵ App. 396.

²⁶ App. 397.

²⁷ App. 625.

²⁸ App. 604.

²⁹ App. 638, 923–25.

facilities. The student could no longer use the facilities corresponding to that student's sex at birth.³⁰

BASH has several multi-user bathrooms.³¹ Each has individual toilet stalls.³² Additionally, BASH has between four and eight single-user restrooms that are available to all students, depending on the time of day.³³ Four of these restrooms are always available for student use.³⁴

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

³⁰ App. 931–32.

³¹ App. 612.

³² App. 612–13.

³³ App. 613.

³⁴ App. 616.

³⁵ App. 617–19.

³⁶ App. 619–20.

³⁷ App. 618–19.

³⁸ App. 618–19.

B. The Litigation.

Four plaintiffs—proceeding pseudonymously under the names Joel Doe, Jack Jones, Mary Smith, and Macy Roe—sued the District after it changed its bathroom and locker room policy to the policy we have described above.³⁹ Their claims were based on encounters between some of the plaintiffs and transgender students in locker rooms or multi-user bathrooms. The plaintiffs sought to enjoin BASH’s policy of permitting transgender students to use the bathrooms and locker rooms that aligned with their gender identities. They sought a preliminary injunction on three grounds. First, the plaintiffs alleged that the School District’s policy violated their constitutional right to bodily privacy. Next, they claimed that the School District’s policy violated Title IX of the Education Amendments of 1972 (Title IX).⁴⁰ Finally, they alleged that the policy was contrary to Pennsylvania tort law. After discovery and evidentiary hearings, the District Court filed the extensive and well-reasoned opinion we have already referred to, in which it explained that the plaintiffs had not demonstrated that they were likely to succeed on the merits of any of their claims and that plaintiffs had not shown that they would be irreparably harmed absent an injunction.

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

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

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

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

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

The District Court rejected the plaintiffs' theory of irreparable harm that posited that the plaintiffs were being forced to give up a constitutional right to use segregated locker

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

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

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

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

II. DISCUSSION⁴³

Preliminary injunctive relief is an “extraordinary remedy.”⁴⁴ It may be granted only when the moving party shows “(1) a likelihood of success on the merits; (2) that [the movant] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.”⁴⁵ The movants must establish entitlement to relief by clear evidence.⁴⁶ We review the denial of a preliminary injunction for “an abuse of discretion, an error of law, or a clear mistake in the consideration of proof.”⁴⁷ We exercise plenary review of the lower court’s conclusions of law but review its findings of fact for clear error.⁴⁸

A. Likelihood of Success on the Merits

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

1. The District Court correctly concluded that

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

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

⁴⁵ *Id.*

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

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

⁴⁸ *Id.* (citations omitted).

the _____ appellants’
constitutional right to
privacy claim was
unlikely to succeed on
the merits.

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

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

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

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

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

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

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

⁵² *Id.* (citations omitted).

⁵³ *Id.* at 177. Other Circuits have come to the same conclusion. *Brannum v. Overton Cty. School Bd.*, 516 F.3d 489, 494, 498 (6th Cir. 2008) (finding a violation of the Fourth Amendment right to privacy when a school surveilled partially clothed middle school students in their locker room, and further noting that this is the “same privacy right . . . located in the Due Process clause”); *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002) (“[T]here is a right to privacy in one’s unclothed or partially clothed body.”); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (“We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed [figure] from view of strangers, and particularly strangers of the opposite sex, is impelled by

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

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

elementary self-respect and personal dignity.”). The District Court noted that *Doe v. Luzerne County* did not explicitly hold there was a constitutional right to privacy in an individual’s unclothed or partially clothed body. However, by concluding that Doe had a reasonable expectation of privacy and remanding the case to determine the exact contours of that right, we implicitly recognized that such a privacy right exists. The District Court assumed the existence of the right, and the parties seemingly agreed that the right exists. If there were any doubt after *Doe v. Luzerne County* that the constitution recognizes a right to privacy in a person’s unclothed or partially clothed body, we hold today that such a right exists.

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

The constitutional right to privacy is not absolute.⁵⁵ It must be weighed against important competing governmental interests.⁵⁶ Only unjustified invasions of privacy by the government are actionable in a § 1983 claim.⁵⁷ That is, the constitution forbids governmental infringement on certain fundamental interests unless that infringement is sufficiently tailored to serve a compelling state interest.⁵⁸ The District

⁵⁵ *Doe v. SEPTA*, 72 F.3d at 1138.

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

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

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

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

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

stringent standard of review, we need not decide which standard of review is appropriate here.

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

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

⁶¹ App. 2276–78.

⁶² See *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 125 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (a state “has an independent interest in the well-being of its youth”); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical

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

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

and psychological well-being of a minor’ is ‘compelling.’” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).

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

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

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

understood was of the opposite biological sex.⁶⁹ We cannot, however, equate the situation the appellants now face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns. Moreover, as we have mentioned, those cisgender students who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school.

Assuming the policy is subject to strict scrutiny, it must advance a compelling state interest and the means of achieving that interest must be "specifically and narrowly framed to accomplish that purpose."⁷⁰ Having correctly identified a compelling state interest, the District Court correctly held that the School District's policy was narrowly tailored. The appellants contend that "a much more tailored solution is to provide single-user accommodations."⁷¹ They reason that "all students would be allowed to access the individual facilities,

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

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

⁷¹ Br. for Appellants, 32.

[so] no stigma would attach to the professed transgender students’ using them, and preserving the sex-specific communal facilities to single-sex use would resolve all privacy concerns.”⁷²

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

⁷² *Id.*

⁷³ App. 618–19.

⁷⁴ Br. for Appellants, 32.

⁷⁵ See Br. for Amici Curiae American Academy of Pediatrics et al., 17–18. (“[F]orcing transgender students to use separate facilities sends a stigmatizing message that can have a lasting and damaging impact on the health and well-being of the young person.”).

sexes intermingle[d]” in the bathrooms and locker rooms.⁷⁸ They also argue that the female appellants’ privacy rights are violated if they are forced to attend to their menstrual hygiene in a facility where members of the opposite sex may potentially be present.⁷⁹ In other words, they contend that their constitutional right to privacy is necessarily violated because they are forced to share bathrooms and locker rooms with transgender students whose gender identities correspond with the sex-segregated space, but do not align with their birth sex.

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

In any event, we decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so. As counsel for the School District noted during oral argument, the appellants are claiming a very broad right of personal privacy in a space that

⁷⁸ *Id.* at 27.

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

is, by definition and common usage, just not that private. School locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected. The facilities exist so that students can attend to their personal biological and hygienic needs and change their clothing. As the Supreme Court has stated, “[p]ublic school locker rooms . . . are not notable for the privacy they afford.”⁸⁰

Thus, we are unpersuaded to the extent that the appellants’ asserted privacy interest requires protection from the risk of encountering students in a bathroom or locker room whom appellants identify as being members of the opposite sex. As the Seventh Circuit noted in *Whitaker* “[a] transgender student’s presence in the restroom provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions.”⁸¹

None of the cases cited by the appellants is to the contrary.⁸² For example, in their brief and at argument, they placed substantial reliance on *Faulkner v. Jones*⁸³ for the proposition that “society [has] undisputed[ly] approv[ed] separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation”⁸⁴ But that case did not recognize a constitutional mandate

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

⁸¹ *Whitaker*, 858 F.3d at 1052.

⁸² Br. for Appellee, 15–31.

⁸³ 10 F.3d 226 (4th Cir. 1993).

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

that bathrooms and locker rooms must be segregated by birth-determined sex. Although it acknowledged that privacy concerns *may* justify separate facilities for men and women in certain circumstances,⁸⁵ it did not hold that the Constitution *compels* separate bathroom facilities. Moreover, as we have explained and as the District Court more thoroughly described, BASH has carefully crafted a policy that attempts to address the concerns that some cisgender students may have. To its credit, it has done so in a way that recognizes those concerns as well as the needs, humanity, and decency of transgender students.

The appellants' reliance on *Chaney v. Plainfield Healthcare Center*⁸⁶ is similarly unconvincing. That was an appeal from a Title VII suit brought against a nursing home after a Black nursing assistant was fired for protesting a patient's demand that he receive care only from White nursing aids.⁸⁷ The court distinguished medical care based on race from medical care based on sex, noting that just as "the law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race providers."⁸⁸ Like *Faulkner*, *Chaney* held that the

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

⁸⁶ 612 F.3d 908, 913 (7th Cir. 2010).

⁸⁷ *Chaney*, 612 F.3d at 910–12.

⁸⁸ *Id.* at 913.

Constitution *tolerates* single-sex accommodations. It did not hold that the constitution *demand*s it.

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

In an argument that completely misses (or deliberately ignores) the reason for the disputed policy or the circumstances it addresses, the appellants insist that it is improper to consider a student's transgender status when conducting this privacy

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

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

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

analysis and that we must only look at the student’s anatomy.⁹² We disagree. Constitutional right to privacy cases “necessarily require fact-intensive and context-specific analyses.”⁹³ Bright line rules cannot be drawn.⁹⁴ Put simply—the facts of a given case are critically important when assessing whether a constitutional right to privacy has been violated. A case involving transgender students using facilities aligned with their gender identities after seeking and receiving approval from trained school counselors and administrators implicates different privacy concerns than, for example, a case involving an adult stranger sneaking into a locker room to watch a fourteen year-old girl shower. The latter scenario—taken from a case the appellants rely upon⁹⁵— is simply not analogous to the circumstances here.

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

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

⁹² Br. for Appellants, 10–12.

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

⁹⁴ *Id.*

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

transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.

Title IX prohibits discrimination based on sex in all educational programs that receive funds from the federal government.⁹⁶ However, discrimination with regard to privacy facilities is exempt from that blanket prohibition. An institution “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”⁹⁷ This exception is permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes.

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

⁹⁶ 20 U.S.C. § 1681(a).

⁹⁷ 34 C.F.R. § 106.33.

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

⁹⁹ *Id.* (alterations in original) (citation omitted). We recently noted that we have not always been consistent in stating whether a plaintiff claiming sexual harassment must prove the harassment was “severe *or* pervasive” or “severe *and* pervasive.” *Castleberry v. STI Grp.*, 863 F.3d 259, 263–64 (3d Cir. 2017) (emphasis added). Much of the confusion stems from the fact that the Supreme Court has used both the

environment harassment, a plaintiff must demonstrate that the offensive conduct occurred because of his or her sex.¹⁰⁰

Title IX's "hostile environment harassment" cause of action originated in a series of cases decided under Title VII of the Civil Rights Act of 1964 ("Title VII").¹⁰¹ The Supreme Court has "extended an analogous cause of action to students under Title IX."¹⁰² Title VII cases are therefore instructive.¹⁰³

conjunctive and the disjunctive to describe the plaintiff's burden. *Compare Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive . . ."), with *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (concluding that an action for Title IX harassment "will lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"). In *Castleberry*, we concluded that the "correct standard is severe or pervasive. *Castleberry*, 863 F.3d at 264. Accordingly, we will proceed using the disjunctive inquiry here.

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

¹⁰¹ 42 U.S.C. § 2000e *et seq.*

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

¹⁰³ *Id.* Courts have frequently looked to Title VII authority for guidance with Title IX cases. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) ("This Court has

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

The appellants have not provided any authority—either in the District Court or on appeal—to suggest that a sex-neutral

also looked to its Title VII interpretations of discrimination in illuminating Title IX.” (collecting cases)).

¹⁰⁴ 42 U.S.C. § 2000e-2.

¹⁰⁵ *Oncale*, 523 U.S. at 76.

¹⁰⁶ *Id.* at 80.

¹⁰⁷ *Id.*

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

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

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

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

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

¹¹¹ *Oncale*, 523 U.S. at 80.

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

safeguards the School District put in place as part of the challenged policy.

Rather than relying on relevant legal authority to establish that the mere presence of a transgender student in a locker room or bathroom rises to the level of harassment, the appellants again cite inapposite cases that involve egregious harassment. That is not surprising since we have found no authority that supports the appellants' claims. Two cases that the appellants attempt to analogize to their situation are particularly illustrative of the weakness of their position—*Lewis v. Triborough Bridge and Tunnel Authority*¹¹³ and *Schonauer v. DCR Entertainment Inc.*¹¹⁴ *Lewis* involved harassment that is worlds apart from anything in the present record. There, cisgender men not only entered a locker room while cisgender female employees were changing, they “leer[ed]” at them, “crowd[ed] the entrance to the locker room, forcing [them] to ‘run the gauntlet[,]’ and brush[ed] up against them.”¹¹⁵ When a supervisor was informed, he referred to the female employees as “cunts” and “the biggest bunch of fucking crybabies.”¹¹⁶ Any comparison to the circumstances the appellants face here is patently frivolous.

Schonauer is also distinguishable. There, the plaintiff was employed as a beverage server at a topless nightclub and alleged that she had been harassed by a manager.¹¹⁷ In addition to entering the women's changing facility, the manager

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

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

¹¹⁵ 77 F. Supp. 2d at 377.

¹¹⁶ *Id.* at 378.

¹¹⁷ *Schonauer*, 905 P.2d at 396.

repeatedly encouraged the plaintiff to enter nude dance contests, asked questions about her sexual fantasies, and probed her sexual history.¹¹⁸ When the plaintiff resisted these advances, she was fired.¹¹⁹ The Washington Court of Appeals found that this behavior could constitute harassment not simply because the manager entered the changing facility, but because he pressed the plaintiff to “provide sexually explicit information and to dance on stage in a sexually provocative way.”¹²⁰

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

This case is far more analogous to *Cruzan v. Special School Dist., No. 1*,¹²² a Title VII case from the Court of Appeals for the Eighth Circuit. *Cruzan* held that a transgender individual in a bathroom did not create a hostile environment because there was no evidence that the individual “engaged in any inappropriate conduct other than merely being present in the women’s faculty restroom.”¹²³ That is, a transgender

¹¹⁸ *Id.* at 396–97.

¹¹⁹ *Id.* at 397.

¹²⁰ *Id.* at 400.

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

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

¹²³ *Id.*

person in a restroom did not create an environment that was “permeated with discriminatory intimidation, ridicule, and insult” as required to sustain a harassment claim under Title VII.¹²⁴ We agree with the Eight Circuit’s conclusion. As we have emphasized, the appellants’ real objection is to the presence of transgender students, not to any “environment” their presence creates. Indeed, the allegations here include an assertion that a cisgender student was harassed merely by a transgender student washing that student’s own hands in a bathroom or changing in a locker room. That is not the type of conduct that supports a Title IX hostile environment claim.¹²⁵ The District Court recognized this and correctly ruled that this claim was unlikely to succeed.

The School District, on the other hand, contends that barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination under a sex-stereotyping theory in violation of Title IX.¹²⁶ We need not decide that very different issue here. We note only that in 2017, the Seventh Circuit held that a school district’s policy of prohibiting transgender students from using bathrooms and locker rooms consistent with their gender identity violated Title IX because it discriminated against transgender students by subjecting them to “different rules, sanctions, and treatment than non-transgender

¹²⁴ *Id.* (citation omitted).

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

¹²⁶ Br. for Appellees, 38–40.

be highly offensive to a reasonable person.¹²⁸

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

B. Irreparable Harm

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

On a practical level . . . the privacy protections that are in place at BASH, which include the bathroom stalls and shower stalls in the locker rooms, the bathroom stalls in the multi-user bathrooms, the availability of a number of single-user bathrooms (a few of which will have lockers for storing items), the [ability] of students to

¹²⁸ *Tagouma v. Investigative Consultant Servs, Inc.*, 4 A.3d 170, 174 (Pa. Super. Ct. 2010) (quoting Restatement (Second) of Torts § 652B (1965)).

store personal items in their locker or leave those items with the gym teacher, and the availability of the team rooms in the locker rooms (which would not involve students passing through the common area of the locker room), and the overall willingness of the [appellees] to work with the students and their families to assure that the students are comfortable at BASH, mitigates against a finding of irreparable harm. . . . The privacy protections available to students in 2017-18 are more than suitable to address any privacy concerns relating to the presence of transgender students in the locker rooms and bathrooms at BASH.¹²⁹

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

¹²⁹ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp 3d at 410.

III. CONCLUSION

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

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3113

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

v.

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

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

*(Pursuant to Court Order dated 4/6/18)

(E.D. Pa. No. 5-17-cv-01249)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, RESTREPO, BIBAS, and NYGAARD*, Circuit Judges

The petition for panel rehearing and rehearing en banc filed by appellants in the above-entitled case has been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service. The judges who issued the Court's decision have voted to grant panel rehearing. Accordingly, the opinion entered June 18, 2018 is hereby VACATED and a revised opinion will be entered. The petition for rehearing en banc is denied without prejudice in light of the grant of panel rehearing. The parties may renew their request for rehearing en banc within fourteen days of the date of this order pursuant to Fed.R.App.P. 35(c) and 40(a)(1) (permitting a court to extend the time for filing a petition for rehearing en banc). Judge Jordan would have granted rehearing en banc and writes separately on the matter, joined by Judges Chagares, Hardiman, and Bibas.

BY THE COURT,

s/ Theodore A. McKee

Circuit Judge

Date: July 26, 2018

CJG/cc: All Counsel of Record

* The Honorable Richard L. Nygaard's vote is limited to panel rehearing.

JORDAN, *Circuit Judge*, joined by Chagares, Hardiman and Bibas, *Circuit Judges*, dissenting.

The record in this case, as described in the revised panel opinion, can support the factual conclusion that the Boyertown Area School District engaged in a thoughtful and deliberative process to address a controversy over transgender students' desire to use school bathrooms and locker rooms of their choice. Those same facts also can support the legal conclusion that the policy Boyertown eventually decided upon is sufficient to withstand the Appellants' request for a preliminary injunction. Thus, my purpose in writing now is not to take issue with the panel's ultimate denial of injunctive relief. It is rather to note my disagreement with the panel's suggestion that it would have been a violation of federal law for the school district to adopt a policy requiring transgender students to either use a single-user bathroom or facilities corresponding to their biological sex.¹ Accordingly, I dissent from the Court's denial of the Appellants' petition for rehearing en banc.

The revised panel opinion rightly acknowledges that a school policy addressing transgender students' use of bathrooms and locker rooms is a matter of high importance to Boyertown and its students. Given that public importance and the obvious sensitivity of the issues involved, one would have thought that the opinion would address only the facts at issue and then only to the extent necessary. But the panel went beyond what was necessary when it chose to address Boyertown's tangential argument that the school district would have run afoul of Title IX had it implemented a policy that confined transgender students to use of bathrooms and locker rooms designated for their biological sex. The revised panel opinion claims that "requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination." *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, slip op. at 19 (3d Cir. July 26, 2018). In approving

¹ As an aside, I also note my discomfort with the tone of the opinion at certain points, which, despite the panel members' assurance that they do not intend to minimize the concerns of the Appellants regarding privacy in dealing with hygiene and bodily functions, seems very much to minimize those concerns and treat them as a thin cover for bigotry.

Boyertown’s decision to permit transgender students to use the bathrooms and locker rooms of their choice, the revised opinion implies that the school district would have been legally mistaken to do otherwise, saying Boyertown “can hardly be faulted for ... adopting a policy that avoids the issues that may otherwise have occurred under Title IX.” *Id.* at 29.

That suggestion is unnecessary and is certainly open to debate.² True, the revised opinion is not as far out on a limb as the originally published opinion was. The idea that Boyertown could not have designed a constitutionally acceptable policy that required transgender students to use single-user bathrooms and locker room facilities or ones corresponding to their biological sex was more explicit in that earlier opinion. *See Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179, 199 (3d Cir. 2018) (“Title IX prohibits discrimination against transgender students in school facilities Therefore a court may not issue an injunction that would subject the transgender students to different conditions than their cisgender peers are subjected

² Underlying that debate is the substantial controversy over how to interpret the meaning of the word “sex” in Title IX, namely, whether Title IX’s use of the term denotes only biological sex or if it also encompasses concepts of gender identity. In assuming the latter, the revised opinion ignores the clear-statement rule, which limits liability for legislation enacted pursuant to the Spending Clause such as Title IX. *See Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 640 (1999) (treating Title IX as Spending Clause legislation); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (adopting clear-statement rule for Spending Clause legislation). That rule requires “Congress [to] speak with a clear voice” and “unambiguously” put state funding recipients on notice of the conditions of federal funds. *Pennhurst*, 451 U.S. at 17. Nowhere does Title IX unambiguously specify liability for failure to open locker rooms and bathrooms to transgender students of the opposite sex. I am not encouraging the panel to go deeper into dicta by addressing the clear-statement rule. I am simply pointing out that one of the problems with sweeping statements of the sort that still characterize the revised opinion is that they sidestep nuanced analysis that would necessarily be undertaken if a properly presented issue were under consideration.

to.”), *vacated by order of July 26, 2018*. Nevertheless, even the revised opinion appears to communicate the same unwarranted and unsupported implication. Although I appreciate the panel’s thoughtful effort to cure the overreach in its now-vacated opinion, it still wrongly suggests that our Court has reached decisions that it has not.

There is a good reason why we avoid wading into fraught waters without needing to and without careful legal analysis supporting the conclusions we reach. Dicta are often dangerous. Because they are unmoored from any concrete set of facts and are frequently the product of judicial musing rather than adversarial presentations from parties with a vested interest in exploring issues in detail, dicta can be ill-informed. All too often, they can short-circuit the legal process and end up substituting mere assertion for reason. As has been wisely observed, “[t]he problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law. The distinction between dictum and holding is more and more frequently disregarded.” Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1250 (2006).

Reasonable people can and will disagree about the most appropriate way to address transgender students’ desire to select which bathroom or locker room facilities to use. It is a problem without a perfect solution, and we have not even begun to analyze those competing interests except for in this one specific fact circumstance presented for preliminary injunctive relief. Despite that, the panel’s dicta in the revised opinion continue to imply otherwise, and so are likely to handicap efforts by local school districts throughout this Circuit to thoughtfully address how to best handle the issue in their own communities. The law does not mandate only one outcome, as the panel opinion suggests.³

³ The revised panel opinion still relies on the United States Court of Appeals for the Seventh Circuit’s recent opinion in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017). The court in *Whitaker* affirmed a lower court’s order granting the plaintiff, a biological girl, an injunction permitting use of the

It is the province of elected officials, including those on local school boards, to weigh competing interests and debate the wisdom of policy choices. It is our role to assess whether a specific policy choice, as understood in a specific factual context, violates the Constitution or other federal law. That is as far as we should go.

In short, because “both the adversary system and the premise that courts have less authority to prescribe general-

boys’ bathrooms at school. *Id.* at 1039. Employing a sex-stereotyping theory of discrimination, the court reasoned that the student had demonstrated a reasonable likelihood of success on a Title IX claim that the school district had discriminated on the basis of sex by prohibiting use of the boys’ bathrooms. *Id.* The sex-stereotyping theory, also known as gender-stereotyping, derives from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). We have accepted that theory and permit plaintiffs to sue for sex discrimination on the basis of “noncompliance with gender stereotypes.” *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009) (citation omitted). According to *Whitaker*, “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance[.]” 858 F.3d at 1049. *Whitaker* is alone among the courts of appeals, however, in concluding that a policy requiring employees or students to utilize bathroom facilities corresponding to their biological sex is tantamount to sex-stereotyping discrimination. Indeed, the issue has been viewed very differently by the United States Court of Appeals for the Tenth Circuit. That court has stated in a Title VII case that “prohibition on sex discrimination, however, does not extend so far” as to require a government entity to permit a transsexual person to use the bathroom designated for use by persons of the opposite biological sex. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). And Title IX’s implementing regulations expressly permit schools to “separate toilet, locker room, and shower facilities on the basis of sex.” 34 C.F.R. § 106.33. To say or imply that there is only one legally defensible policy decision that a school district can reach is not only unsupported; it is unsupportable.

purpose rules than do legislatures are so firmly rooted in American legal practice as to rank as axiomatic[.]” Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2003 (1994) (footnote omitted), it is equally axiomatic that we should confine ourselves to resolving the specific matters before us, not some bigger issue we might like to address. I therefore vote for rehearing en banc to vacate the panel opinion and give our full Court the opportunity to consider the case and articulate an appropriately limited rationale for our result.