APPEAL NO. 18-13592-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DREW ADAMS,
Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
District Court No. 3:17-cv-00739-TJC-JBT

APPELLANT'S APPENDIX IN SUPPORT OF INITIAL BRIEF
VOLUME V

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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,

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

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA; TIM FORSON, in his official capacity as Superintendent of Schools for the St. Johns County School District; and LISA KUNZE, in her official capacity as Principal of Allen D. Nease High School,

Defendants.
_____/

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants, through undersigned counsel, submit the following Response to Plaintiff's Motion for Preliminary Injunction ("Motion"). [Doc. 22].[1]

Introduction

Plaintiff seeks to eviscerate a bathroom use policy designed to balance and protect the rights and interests of students attending St. Johns County public schools. Despite living under it for two years, Plaintiff asks this Court to enjoin further application of the policy under the exacting standard applicable to mandatory or affirmative injunctive relief. As detailed below,

[1] The Offices of the Superintendent and Principal of Nease High School have separately filed a Motion to Dismiss as party-defendants to this action. [Doc. 34]. In the event the Court denies that Motion, both join in this Response.

Plaintiff cannot meet the heavy burden of establishing that the law and the facts are clearly in his favor and that he can satisfy the four-prong test applicable to preliminary injunctions.

Since the beginning of the 2015-2016 school year, any student within the St. Johns County School District could use two types of bathrooms: (1) the bathroom corresponding to their biological sex; or (2) a gender-neutral bathroom. Not satisfied with either, Plaintiff, whose junior year of high school begins on August 10, asks this Court to require the School Board to allow him to use the bathroom corresponding to his self-identified gender. Plaintiff erroneously theorizes that the term "sex" under Title IX of the Education Amendments of 1972 ("Title IX") and its implementing regulations also means what a person perceives their gender to be irrespective of their biological sex. Alternatively, Plaintiff invites the Court to construe the Equal Protection Clause of the Fourteenth Amendment in a manner that utterly disregards the privacy interests of non-transgender students based solely on perceived needs and speculative claims of irreparable harm.

This is not one of those "rare" occasions for which mandatory or affirmative injunctive relief is appropriate. Plaintiff is not likely, let alone substantially likely, to prevail on his novel claims or make the necessary showing of irreparable harm, requiring this Court deny the Motion.

Factual Background

The School Board of St. Johns County, Florida ("School Board") is the governing body of the St. Johns County School District ("District"), a K-12 school district responsible for the operation, control, and supervision of all public schools located in St. Johns County, Florida. Fla. Stat. §§1001.30; 1001.32(2). Authorized to exercise any power not expressly prohibited

by law, Fla. Stat. §1001.32(2), the School Board is made up of five members elected from geographic districts within the County. Among its many duties, the School Board is responsible for providing "proper attention to [the] health, safety, and other matters relating to the welfare of students." Fla. Stat. §1001.42(8)(a); see also, Fla. Stat. §1006.07. The School Board is also required to "[e]nsure that all plans and specifications for buildings provide adequately for the safety and well-being of students…" Fla. Stat. §1001.42(11)(b)8.

In St. Johns County, the School Board appoints the Superintendent, who is responsible for the administration and management of the schools and for the supervision of instruction within the District. Fla. Stat. §1001.32(3); see also, Fla. Stat. §§1001.49; 1001.51 (general powers and duties and responsibilities of a district school superintendent). The School Board appointed Tim Forson as its Superintendent in January 2017. [Forson ¶2]. Mr. Forson has served the District for almost 37 years as a Deputy Superintendent, high school principal, elementary school principal, teacher, and coach. [Forson ¶4].

Today, the District operates 36 K-12 schools (excluding alternate, virtual, and charter schools) across a 608 square mile region. [Forson ¶3]. With over 4,500 employees, approximately 39,000 students will enroll in the District's K-12 system at the beginning of the 2017-2018 school year. [Id.]. The District has placed first out of 67 counties in total school accountability points for the past eight years and is one of only three A-rated school districts in Florida. [Id.].

Nease High School

For as long as anyone can recall, the District has maintained a policy that requires students to use the bathroom corresponding to their biological sex. [Forson ¶¶4-5; Smith ¶3].

In 1979, the District constructed Allen D. Nease High School ("Nease") in northern St. Johns County. [Rose ¶4, Ex. 1]. Consistent with its long-standing practice, the District designed and constructed Nease with separate gang-style, multi-user bathrooms and locker rooms for students based on their biological sex. [Kunze ¶4]. In addition to the multi-user bathrooms, Nease also had a number of single-user bathrooms located throughout its campus, originally designated for staff or specific areas such as the clinic. [Id.].

The Development of the District's Best Practices Guidance

In 2013 and 2014, District staff attended conferences focusing on LGBTQ student issues in schools. [Smith ¶¶3, 4]. After attending such a conference, Sallyanne Smith, then-Director of Student Services, attended student-led Gay-Straight Alliance meetings and listened to students discuss their needs. [Id. ¶4]. Subsequently, Ms. Smith created an LGBTQ focus group and task force to address these issues and develop District-wide guidance. [Id. ¶5]. After a thorough process, Ms. Smith and others drafted a document entitled "Guidelines for LGBTQ students – Follow Best Practices" ("Best Practices") for handling various situations involving LGBTQ students. [Smith ¶6; Mittelstadt ¶5, Ex. 1].

Relevant to this case, the Best Practices provided an alternative for students from the District's long-standing practice of separating bathrooms based on biological sex, declaring "transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." [Id. ¶6, Ex.1]. The implementation of the Best Practices did not change the prohibition against a student using a bathroom that was inconsistent with their biological sex. [Smith ¶6].

From information she learned at conferences, Ms. Smith understood that offering the use of a gender-neutral bathroom was appropriate because it maintained the privacy of the transgender student as well as the other students. [Id. ¶7]. By offering the gender-neutral bathroom, Ms. Smith believed the District balanced the privacy, safety and feelings of discomfort of all the students in the school. [Id.]

Ms. Smith delivered the Best Practices draft to Cathy Mittelstadt, then-District Associate Superintendent of Student Support Services. [Mittelstadt ¶¶2, 5]. The draft was reviewed by the District's legal counsel, approved by the Superintendent's executive cabinet, and presented to principals, guidance counselors and school staff in the first few weeks of the 2015-2016 school year. [Id. ¶¶6, 7; Ex. 1]. The idea of addressing LGBTQ student issues, and the consideration and drafting of the Best Practices, including the accommodation of offering a transgender student a gender-neutral bathroom, were all initiated and completed before Plaintiff entered Nease. [Smith ¶9].

Plaintiff

Plaintiff is a biological female. [Doc. 22 at p. 1; Doc. 22-1 at p. 1, ¶4]. When Plaintiff enrolled in the District as a fourth grader in July of 2010, and through the completion of middle school, he identified as a female. Towards the end of his eighth grade year in 2015, the District created a "Safety Plan" for Plaintiff, because he was "triggered" by a variety of self-reported factors, none of which included gender identity issues or bathroom use.[2] That spring, Plaintiff was accepted into Nease's International Baccalaureate program.

[2] The reasons given, while relevant, are part of an exhibit filed under seal, and are therefore not explicitly described here. See [Kunze ¶12, Ex. 3].

During the summer prior to the 2015-2016 school year, Plaintiff's mother contacted school officials and informed them that Plaintiff self-identified as a male and wished to present as a boy at Nease. [Dresback ¶3]. The week before school started, in early August 2015, school officials met with Plaintiff and his mother to ensure a smooth transition. School officials were supportive and accommodating, allowing Plaintiff to present as a male and making sure staff used his preferred male pronoun. [Id. ¶4]. School officials expedited creating a freshman photograph for his school record and student ID because Plaintiff did not want his eighth grade photograph, which showed him as a long-haired female, used on an interim basis. [Id.]. School officials also referred him to various groups and activities to support his interest in transgender and LBGTQ issues and activities. [Id.]. For the 2015-2016 school year, Nease initially designated a gender-neutral bathroom in C-Pod, located near the main entrance of the school, and shortly thereafter, a second gender-neutral bathroom in C-Pod. [Id. ¶5].

In October 2015, Plaintiff and his mother attended two separate meetings with District personnel at which they raised concerns that the designated gender-neutral bathrooms at Nease were too far from Plaintiff's classes. [Smith ¶10; Mittelstadt ¶9]. Shortly after these meetings, Nease opened two additional gender-neutral bathrooms, one in K-Pod, and another in H-Pod. [Dresback ¶6]. By January 2016, Plaintiff could use four gender-neutral bathrooms at Nease, exclusive of the two single-user bathrooms located in the coaches' office in the boys' and girls' locker rooms, respectively. [Kunze ¶5].

Plaintiff will enter the 2017-2018 school year as a Junior at Nease. He will be among nearly 2,500 other students enrolled at the school. [Kunze ¶3].

The DOE/DOJ Guidance

On May 13, 2016, the U.S. Departments of Education ("DOE") and Justice ("DOJ") jointly released a statement of guidance and best practices ("Joint Guidance") explaining how federal laws which prohibit discrimination based on sex affect schools' obligations with regard to transgender students. Included within the Joint Guidance was a statement that schools must allow transgender students the opportunity to participate in and access sex-segregated facilities. [Spellman Ex. 9].

On May 18, 2016, in response to the Joint Guidance, then-Superintendent Dr. Joseph Joyner issued a statement which read, in pertinent part, "I am committed to doing what is right for each and every child. We believe our current practice is lawful and reasonable in that we provide gender-neutral restroom facilities to accommodate privacy and the safety for all students as needed or requested." [Forson ¶6].

On February 22, 2017, DOE and DOJ withdrew the Joint Guidance and a prior guidance, noting that it is the role of States and school districts to create education policy. [Spellman Ex. 10].

The OCR Complaint

In November of 2015, Plaintiff filed a complaint with DOE's Office for Civil Rights ("OCR"). In a December 28, 2015 letter, OCR notified the District of the Plaintiff's complaint, and advised that OCR would investigate the following issue: "Whether school officials have disallowed [Plaintiff] to use restrooms at Nease High School that are consistent with his gender identity, instead requiring him to use separate, gender-neutral employee restrooms, in noncompliance with Title IX." [Spellman Ex. 11]. On January 15, 2016, the District notified

OCR that it declined to participate in OCR's mediation program. [Spellman Ex. 12]. On March 30, 2016, the District, through its legal counsel, responded to OCR's Title IX investigation, and denied any wrongdoing. [Spellman Ex. 13].

Nease High School Addition Opening 2017-2018

On the first day of the 2017-2018 school year, Nease will open a new wing, which will house classrooms, administration and a revamped media center. Relevant to this case, the new addition at Nease will contain six single-user, gender-neutral bathrooms. [Kunze ¶10; Rose ¶6, Ex. 2]. As such, Nease will have 11 gender-neutral bathrooms available throughout the campus. [Kunze ¶11].

Distance and Effect

Plaintiff grossly exaggerates when he contends "it [took] approximately 15 to 20 minutes to get to and from the gender neutral restrooms in the administrative building" from his classes in the portables. [Doc. 1 at p. 13, ¶52]. Based upon her personal experience, Lisa Kunze, the Principal at Nease, estimates it does not take more than five minutes to walk from any classroom to a gender-neutral bathroom, even during class changes when students are in the hallways. [Kunze ¶7]. This specifically takes into consideration walking from the portable classrooms to bathrooms in C-Pod, or "the administrative building." [Id.].

Plaintiff's contention that using the gender-neutral bathrooms "generally required [Plaintiff] to miss significant amounts of class time" is also unsupported by the record. [Doc. 1 at p. 13, ¶52]. During the entirety of the 180-day 2016-2017 school year, Plaintiff was tardy one time to one class (other than the opening class), which was excused. [Kunze ¶12, Ex. 2].

Sex, Gender Identity, and Gender Dysphoria[3]

Through supporting Declarations and attached published articles and studies, Plaintiff contends that sex is determined by one's gender identity, with the outlandish allegation, "[t]he medical consensus is that gender identity is innate and efforts to change it are unethical." [Doc. 1 at p. 3]. This alleged "expert evidence", at best, contradicts accepted medical and scientific standards, and should be rejected outright.

A. Sex and Gender Identity

According to standard medical science, the concept of sex in human beings is defined in terms of the complimentary roles that males and females play in reproduction. [Spellman Ex. 1 ¶10; Ex. 2 ¶15; Ex. 3 ¶10; Ex. 4 ¶¶13, 22-26; Ex. 8 at 86].[4] Sex is accordingly a "binary," either-or proposition: a person is either male or female, and the hypothesis of a "third" is contrary to a sound medical and physiological understanding of the human person. [Spellman Ex. 1 ¶15; Ex. 2 ¶15; Ex. 3 ¶10; Ex. 4 ¶¶24-26, 32; Ex. 8 at 93]. All of this is readily confirmable by science. [Spellman Ex. 1 ¶29; Ex. 4 ¶23].

A person's sex is encoded in his or her genes at conception. [Spellman Ex. 1 ¶14; Ex. 2 ¶12; Ex. 3 ¶10]. Sex differentiation occurs in fetal development, when the presence of a Y

[3] The following section and many of the declarations cited in support are substantially copied, with the permission of counsel of record, from the Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction [Doc. 149] in the case styled United States of America v. State of North Carolina, et al., in the United States District Court, Middle District of North Carolina, case number 1:16-CV-00425-TDS-JEP.

[4] See also, Spellman Ex. 5, "Gender Dysphoria," *Diagnostic and Statistical Manual of Mental Disorders*, at 451 (American Psychiatric Ass'n, 5th ed. 2013)("DSM-V")("sex" means "the biological indicators of male and female (understood in the context of reproductive capacity"); Ex. 6, American Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression ("APA Answers to Your Questions")*(noting "[s]ex…refers to ones biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy"), http://www.apa.org/topics/lgbt/transgender.aspx.

chromosome directs development of gonadal tissue, producing hormones that form male sex organs in tissues that would otherwise develop into female sex organs. [Spellman Ex. 1 ¶14; Ex. 2 ¶12]. To be sure, rare disorders of sexual development ("DSDs") involving chromosomal or hormonal abnormalities can result in ambiguous genitalia. [Spellman Ex. 1 ¶18; Ex. 2 ¶¶12-14, 16, 18; Ex. 3 ¶11; Ex. 8 at 93-94]. Fortunately, these conditions are extremely rare – occurring in one out of 4,500 to 5,500 live births. [Spellman Ex. 2 ¶14; Ex. 3 ¶11]. Persons born with these conditions – sometimes called "intersex" – do not constitute a "third" sex but instead have medically verifiable conditions requiring careful evaluation and therapeutic interventions. [Spellman Ex. 1 ¶¶19, 20-21; Ex. 2 ¶¶15-20; Ex. 4 ¶¶35-37]. The overwhelming majority of people, however, do not suffer from these conditions, and thus observance of external genitalia at birth is a highly accurate method for determining sex, accurate in over 99.9% of cases. [Spellman Ex. 1 ¶¶15-17, 29; Ex. 4 ¶73].

In contrast to sex, "gender" describes psychological and cultural characteristics associated with a person's sex. [Spellman Ex. 1 ¶11; Ex. 2 ¶21; Ex. 3 ¶¶12-17; Ex. 4 ¶22; *cf., e.g.,* Id. Ex. 5 at 451 ("gender…denote[s] the public (and usually legally recognized) lived role as boy or girl, man or woman"; Ex. 8 at 87)]. Understood in that way, gender is by definition distinct from a person's birth sex. [Spellman Ex. 1 ¶22; Ex. 2 ¶16; Ex. 4 ¶20]. "Gender identity" is "a category of social identity and refers to an individual's identification as male, female, or, occasionally, some category other than male or female." [Spellman Ex. 5 at 451; Ex. 1 ¶12].

Like many aspects of a person's identity, gender identity begins to develop during early childhood.[5]

B. Gender Dysphoria

For reasons not fully understood, some small number of individuals experience incongruence between their gender identity – how they internally perceive themselves as male, female, or some other category – and their sex. [Spellman Ex. 1 ¶¶12-22; Ex. 2 ¶22; Ex. 3 ¶¶19-20; Ex. 4 ¶42; Ex. 8 at 86]. Formerly called "gender identity disorder", today this rare[6] condition is called "gender dysphoria." [Spellman Ex. 1 ¶31; Ex. 2 ¶¶23, 25; Ex. 3 ¶21; Ex. 8 at 86].[7] The condition may lead a person to desire to be the opposite sex, "but may [also] include a desire to be of an alternative gender, provided that it differs from the individual's assigned gender." [Spellman Ex. 5 at 453]. The condition is properly understood as a psychological pathology requiring compassionate care and treatment, because incongruence between one's gender identity and one's sex is not considered a normal developmental variance. [Spellman Ex. 1 ¶¶31-32; Ex. 3 ¶25].

Some persons who experience gender incongruence are referred to as "transgender." [Spellman Ex. 3 ¶23; Ex. 4 ¶¶43-44].[8] As the American Psychological Association ("APA")

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[5] Spellman Ex. 3 ¶¶12-17 (explaining that gender identity "initially develops early in life around the ages of three to four, and is continually shaped and modified by interactions with the environment, typically family and parental influences").

[6] While difficult to document, the condition is estimated in a tiny percentage of persons. See, e.g., Spellman Ex. 1, ¶23 (prevalence "has not been established by rigorous scientific analysis," but noting estimates in DSM-V between "0.005% to 0.014% for adult males and 0.002% to 0.003% for adult females"); Ex. 2 ¶24 (observing "[e]xact estimates are hard to document since reporting is often anecdotal," but estimating "0.001% of biological females and 0.0033% of biological males").

[7] And see, Spellman Ex. 5 at 451 ("*[g]ender dysphoria"* is "a general descriptive term [that] refers to an individual's affective/cognitive discontent with the assigned gender," and "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender").

[8] See, e.g., Spellman Ex. 5 at 451 (noting "*[t]ransgender* refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender").

explains, "[m]any identities fall under the transgender umbrella," including "transsexuals," "cross-dressers," and "drag queens and drag kings." [Spellman Ex. 6]. According to the APA, the term also embraces persons with more fluid conceptions of gender, such as "gender queer" (*i.e.*, persons who "define their gender as falling somewhere on a continuum between male and female" or "as wholly different from these terms"), as well as "androgynous, multigendered, gender nonconforming, third gender, and two-spirit people," terms whose "[e]xact definitions…vary from person to person and may change over time, but often include a sense of blending or alternating genders." [Id.].

Strong scientific evidence refutes the theory that gender identity is determined at birth and fixed.[9] Such evidence comes from identical-twin studies, and also from "well established peer reviewed literature" indicating that the vast majority (80-95%) of gender dysphoric children "revert to a gender identity concordant with their biological sex by late adolescence." [Spellman Ex. 1 ¶¶24-25].[10] The best evidence available indicates that the causes of gender dysphoria are multifactorial and primarily involve post-natal environmental factors. [Spellman Ex. 1 ¶24; Ex. 2 ¶¶35-36; Ex. 3 ¶¶31-32; Ex. 4 ¶48]. Such factors may include family psychopathology (especially paternal) and a history of abuse. [Spellman Ex. 3 ¶¶31-32; Ex. 4 ¶41]. Gender dysphoria is often accompanied by "comorbidities" such as dissociative disorders, depression, anxiety, and suicidal thoughts. [Spellman Ex. 3 ¶33; Ex. 5 at 458-459].

[9] See, e.g., Spellman Ex. 4 ¶40 ("scientific assertions that gender identity is innate or fixed at a young age and the gender identity has a strong biological basis are simply unsubstantiated."); id. ¶72 ("unlike the differences between the sexes, there are no biological features that can reliably identify transgender individuals as different from others.").

[10] See also, Spellman Ex. 2 ¶35 ("regarding transgenderism, twin studies of adults prove definitively that prenatal genetic and hormone influent is minimal."); Ex. 3 ¶24 ("there is strong evidence against the theory that gender identity is determined at or before birth and is unchangeable.").

The hypothesis of some transgender advocates that societal rejection is the root cause of gender dysphoria "was validly questioned by a study from Sweden showing that gender dysphoria was not eliminated by hormonal and surgical treatment, even with widespread societal acceptance." [Spellman Ex. 2 ¶40 (citing Dhenje, Cecilia et. al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden, PLoS ONE*, Feb. 2011, Vol. 6, Issue 2, e16885)]. Furthermore, as the DSM-V observes, "anxiety has been found to be relatively common in individuals with gender dysphoria, even in cultures with accepting attitudes toward gender-variant behavior." [Spellman Ex. 5 at 459].

There is no reliable evidence of a biological difference between gender dysphoric individuals and individuals who do not suffer from that condition. [Spellman Ex. 1 ¶26; Ex. 2 ¶¶31-34]. Studies purporting to show differences in brain structure in gender-dysphoric persons are unpersuasive due to poor methodology, limited number of subjects, and the failure to account for neuroplasticity, the well-established phenomenon in which long-term behavior alters brain micro-structures. [Spellman Ex. 2, ¶¶31-34; Ex. 3, ¶30; Ex. 4, ¶51, 53-73; Ex. 8 at 104].

C. Treatment of Gender Dysphoria

There is no widely accepted standard of care among medical professionals for the treatment of gender dysphoria.[11] The guidelines of advocacy organizations such as the "World Professional Association for Transgender Health" ("WPATH") do not establish scientifically

[11] See, e.g., Spellman Ex. 3 ¶34 (noting "a paucity of research data on the treatment of gender discordance, particularly in children and adolescents" and "no controlled studies assigning youth to either psychological intervention or medical intervention groups"); Ex. 2 ¶57 (noting absence of consensus on "where to send the [gender dysphoric] patient for valid psychological care"); Ex. 4 ¶77 (noting "the uncertainty surrounding the diagnosis of and prognosis for gender dysphoria in children" and noting "high level of uncertainty regarding various outcomes after sex-reassignment surgery" in gender dysphoric adults).

or medically sound standards for treating gender dysphoria or for addressing its underlying psychological and psychiatric etiology. [Spellman Ex. 2 ¶¶53-55; Ex. 1 ¶27].

For children and adolescents diagnosed with gender dysphoria, strong evidence shows that the vast majority of cases (80-95%) will resolve by the end of puberty. [Spellman Ex. 1 ¶¶25, 35].[12] Thus, the most effective course of treatment is individual psychological therapy, family therapy, and treatment of psychological comorbidities, along with allowing nature do its work in puberty. [Spellman Ex. 1 ¶35; Ex. 2 ¶¶38, 41, 43; Ex. 4 ¶¶ 77-80].

Puberty is not a diseased condition, but is rather a necessary part of a young person's development into a healthy adult; thus, contrary to approaches advocated by some, puberty cannot be delayed without serious adverse consequences. [Spellman Ex. 1 ¶35; Ex. 2 ¶42; Ex. 4 ¶¶82-86]. Preventing or delaying puberty in children and the adolescents through hormone "blockers" is not a medically supported form of treatment. [Spellman Ex. 1 ¶34; Ex. 8 at 107]. Such treatment is "without scientific basis" and dangerous. [Spellman Ex. 2 ¶¶44-45 (noting that "use of cross-sex hormones during this time frame has no basis of safety and ethicacy")]. "Other potential adverse effects include disfiguring acne, high blood pressure, weight gain, abnormal glucose intolerance, breast cancer, liver disease, thrombosis, and cardiovascular disease." [Spellman Ex. 1 ¶36].[13] According to a recent statement from the American College

[12] See also, Spellman Ex. 2 ¶41 (noting "the high degree of eventual desistence of gender discordance/dysphoria by the end of puberty"); id. at ¶43 (noting "proven scientific evidence that 80%-95% of pre-pubertal children with [gender dysphoria] will come to identify with their biological sex by late adolescence"); Ex. 3 ¶26 (discussing "[l]ongitudinal studies of pre-pubertal children" which "indicate that for the majority of children studied, cross-gender wishes or desires typically fade over time and do not persist into adulthood," with "approximately 65% to 95% of youth no longer being gender incongruent by late adolescence"); Ex. 4 ¶76 (noting "[t]here is little evidence that gender identity issues have a high rate of persistence in children")(citing Ex. 5 at 455).

[13] See also, Spellman Ex. 2 ¶40 ("considering the dire risks of psychopathology suicidal behavior, pure rejection, and the known risks of transition and lifelong hormone use, including permanent sterility, combined with the likelihood that gender discordance will remit (desist) by the end of puberty, a thorough exploration of contributing factors and empathic guidance in aligning gender with natal sex is indicated.").

of Pediatricians, "the treatment of [gender dysphoria] in childhood with hormones effectively amounts to mass experimentation on, and sterilization of, youth who are cognitively incapable of providing informed consent." [Spellman Ex. 7 at 11].

Additionally, because the vast majority of gender dysphoria cases in young people will resolve by late adolescence, so-called "gender affirming" treatments are counter-productive.[14] Such misguided treatments include promoting cross-sex social behaviors such as using restrooms or other facilities consistent with a gender dysphoric persons perceived gender instead of his or her sex.[15] Indeed, such social transition measures may well "interfere with known rates of gender resolution"; that is, any treatment that "encourages or perpetuates transgender persistence for those who would otherwise desist can cause significant harm, including permanent sterility, to such persons," and particularly to children who "are likely incapable of making informed consent to castrating treatments." [Spellman Ex. 1 ¶38; Ex. 2 ¶39 ("it is unlikely that most adolescents understand the effects of hormone treatments and potential effects on fertility.")].

Argument and Authority

I. Mandatory or Affirmative Preliminary Injunction Standard

This Court is well aware of the extraordinary nature of requests for preliminary injunctive relief. Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1247 (11th Cir. 2016). The request in this case is even more extraordinary because Plaintiff asks that this Court change

[14] See, Spellman Ex. 2 ¶41 (observing that "[c]hildren and adolescents should receive individual therapy to understand some of the factors that fuel" gender dysphoria and "attempt to resolve any conflicts and problems rather than solely be affirmed in the belief that they were born in the 'wrong body'").
[15] See, Spellman Ex. 1 ¶38 (observing that "[w]ith regard to public restroom and other intimate facilities, there is no evidence to support social measures that promote or encourage gender transition as a medically necessary or effective treatment for gender dysphoria").

the "status quo" and alter School Board policy. Thus, Plaintiff is requesting the issuance of a "mandatory or affirmative injunction" which exacts an even heavier burden. See, Teel v. Aaron's, Inc., Case No. 3:14-CV-640-J-32PDB, 2015 WL 1346846, at *3 (M.D. Fla. Mar. 24, 2015).

To obtain a "mandatory or affirmative injunction," Plaintiff must prove that "the facts and law are clearly in [his] favor…" Haddad v. Arnold, 784 F. Supp. 2d 1284, 1295 (M.D. Fla. 2010). Issuance of such an injunction is considered rare. Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)("Mandatory preliminary relief…is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party…"); Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 441 F.2d 560, 561-562 (5th Cir. 1971)(describing a movant's burden as "heavy").[16]

"A plaintiff moving for a preliminary injunction must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the injury to the nonmovant; and (4) that the injunction would not disserve the public interest." Statewide Detective Agency v. Miller, 115 F.3d 904, 905 (11th Cir. 1997). The test established by the Eleventh Circuit requires the moving party "clearly establish" the burden of persuasion as to each of the four elements. Accord, Siegel v. LePore, 234 F. 3d 1163, 1176 (11th Cir. 2000) (internal citations omitted).

[16] The Eleventh Circuit in Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) adopted as binding precedent all decisions of the Fifth Circuit as of the close of business on September 30, 1981.

II. There is No Substantial Threat of Irreparable Harm

Despite Plaintiff's invitation to bypass it, this Court must first evaluate his evidence of irreparable harm. As the Court is well aware, if there is no substantial threat of irreparable harm, no further analysis is required. Northeastern Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990); Siegel, 234 F.3d at 1176 ("Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.") (internal citations omitted). The mere possibility of injury to Plaintiff is not enough to satisfy this threshold element; rather, Plaintiff must prove that there is a substantial likelihood of an actual and imminent irreparable injury. Siegel, 234 F.3d at 1176.

A. Plaintiff's Harm is Speculative and Exaggerated

To show irreparable harm, Plaintiff grossly exaggerates the length of time it took to access gender-neutral bathrooms at Nease. Plaintiff alleges that "it [took] approximately 15 to 20 minutes to get to and from the gender neutral restrooms in the administrative building." [Doc. 1 at p. 13, ¶52]. The reality is that it takes a person of normal gait no more than five minutes to access a gender-neutral bathroom from any classroom on campus. [Kunze ¶7]. Moreover, beginning in the 2017-2018 school year, six additional gender-neutral bathrooms will be available at Nease, for a total of 11.

The other basis of his irreparable injury – missing class time – is also contradicted by the record. Plaintiff's official attendance records confirm he was tardy to one class (other than

the first class of the day) one time during the entire 2016-2017 school year. [Kunze ¶12, Ex. 12].

B. Plaintiff's "Expert Evidence" is not Credible

Plaintiff submits the declaration of Dr. Diane Ehrensaft (Ph.D.) for the proposition that he will suffer psychological harm if he uses the girls or gender-neutral bathrooms at Nease. The opinions of Plaintiff and his mother, together with the declaration from Dr. Ehrensaft – a psychologist from California who has neither met nor spoken with Plaintiff or his mother – are insufficient to show the irreparable harm needed for a mandatory or affirmative injunction. (Doc. 22-1 at p. 6, ¶18). See, United States v. Masferrer, 367 F. Supp. 2d 1365, 1373 (S.D. Fla. 2005)("Proffered expert testimony generally will not help the trier of fact when it offers nothing more than factual and legal conclusions…"). The Court need not accept the *ipse dixit* of Dr. Ehrensaft. Olin v. Demings, 6:12-CV-1455-ORL-28, 2014 WL 117081, at *3 (M.D. Fla. Jan. 13, 2014).[17]

Equally damning is the fact that Dr. Ehrensaft has not even reviewed any medical or education records related to Plaintiff. [Doc. 22-1 at p. 6, ¶17]. Instead of any direct opinions related to Plaintiff, Dr. Ehrensaft applies a one-size-fits-all approach to stereotyping the psychological harm that "a transgender child" will suffer if required to use a gender-neutral bathroom. [Doc. 22-1 at ¶48]. Dr. Ehrensaft's attempt to define "sex" is also vehemently opposed by other experts in the profession, and contradicted by accepted medical and scientific standards. See, supra. Simply put, gender identity is a social identity whereas sex is based

[17] Dr. Ehrensaft's over-generalized, theoretical and conclusory statements about Plaintiff's potential psychological reaction fall woefully short of meeting the requirements for admissibility under Rule 702 of the Federal Rules of Evidence and would undoubtedly be subject to attack under the factors outlined in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

purely on biology. Even if Dr. Ehrensaft's opinions are given weight, the evidence is, at best, mixed on this issue, and undoubtedly insufficient to grant the drastic relief sought by Plaintiff.

C. Plaintiff's Delay in Seeking Injunctive Relief is Fatal

The Court's inquiry into Plaintiff's alleged irreparable harm must also include consideration of Plaintiff's delay in seeking injunctive relief. Bar-Navon v. Sch. Bd. of Brevard County, Fla., 6:06-CV-1434-ORL-19-KRS, 2007 WL 121342, at *5 (M.D. Fla. Jan. 11, 2007). Plaintiff lived under the challenged policy for two years. Rather than seek immediate injunctive relief, Plaintiff waited until just before the start of the 2017-2018 school year (August 10, 2017) to file this Motion. Courts have consistently rejected awarding injunctive relief for similar delays. Musgrove v. Sch. Bd. of Brevard County, 608 F. Supp. 2d 1303, 1306 (M.D. Fla. 2005)(court denied injunctive relief where plaintiffs "aggravated this situation by waiting until the last minute to file this action or particularly the temporary restraining order aspect of it…"); Wreal, 840 F.3d at 1248 ("a party's failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm."); Powers v. Sec'y, Florida Dep't of Corr., 2017 WL 2364366, at *2 (11th Cir. May 31, 2017)("the district court did not clearly abuse its discretion in determining that Mr. Powers' apparent (i.e., unexplained) delay in seeking relief undercut the claim of imminent irreparable injury"); Kotori Designs, LLC v. Living Well Spending Less, Inc., 2:16-CV-637-FTM-99CM, 2016 WL 6833004 at *3 (M.D. Fla. Nov. 21, 2016)("Having failed to act with the requisite urgency, Plaintiff cannot now plausibly establish a need for the extraordinary relief of a preliminary injunction to prevent imminent irreparable harm").

D. Plaintiff's Cases are Distinguishable

Plaintiff cites to three district court cases to support his irreparable injury. As shown below, all of the cases cited are inapplicable.

In both Ray v. Sch. Dist. of DeSoto County, 666 F. Supp. 1524, 1534-35 (M.D. Fla. 1987) and Alejandro v. Palm Beach State Coll., 843 F. Supp. 2d 1263, 1270-71 (S.D. Fla. 2011), the student-plaintiffs were denied equal access to attending class (or an integrated classroom). In both cases the courts found that the schools' actions interfered with the students' education, which constituted irreparable harm meriting injunctive relief. Unlike those cases, here the School Board's policy does not deny Plaintiff or any other student access to education.

In Daniels v. Sch. Bd. of Brevard County, Fla., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997), the court, in comparing a high school girls' softball and boys' baseball programs held the lack of a restroom was only one of a litany of inequities, the cumulative effect of which were so significant to warrant injunctive relief. Id. at 1462. Here, the District has afforded Plaintiff access to all bathrooms except the ones that are not consistent with his biological sex, and there is no evidence establishing that those he wishes to use are qualitatively inferior. Rather, the perceived inferiority is based on Plaintiff's own subjective feelings.

III. Plaintiff Cannot Demonstrate a Substantial Likelihood of Success on his Title IX Claim

Title IX was enacted because Congress was concerned about discrimination against women in education. Neal v. Bd. of Trustees of California State Universities, 198 F.3d 763, 766 (9th Cir. 1999). Hence, Title IX expressly prohibits discrimination on the basis of sex in educational programs receiving federal financial assistance. 20 U.S.C. §1681; 34 C.F.R.

§106.31; see also, Palmer ex rel. Palmer v. Santa Rosa County, Fla., Sch. Bd., Case No. 3:05CV218/MCR, 2005 WL 3338724, at *4 (N.D. Fla. Dec. 8, 2005).[18]

Importantly, Title IX permits educational institutions to provide "separate living facilities ***for the different sexes***" (20 U.S.C. §1686), and the DOE regulations implementing Title IX allow educational institutions to provide "***separate toilet***, locker room, and shower ***facilities on the basis of sex***…" 34 C.F.R. §106.33. The School Board's policy of requiring all students to use bathrooms based on their biological sex is entirely consistent with these provisions.

Plaintiff attempts to turn Title IX on its head and redefine the term "on the basis of sex", as used in Title IX and §106.33 (and for purposes of his Equal Protection claim) to include "gender identity." According to Plaintiff, "sex" is based on an adolescent's individual feelings, feelings that are not immutable and are often fluid.[19] Accepting Plaintiff's position, §106.33 would read as follows:

> ***Educational institutions are permitted to provide "separate toilet, locker room, and shower facilities on the basis of [a person's internal feeling of their gender]."***

This unique approach to defining "sex" effectively abolishes any recognition that biological males and females are different and adds language to the regulation that does not exist. See, Carcaño v. McCrory, 203 F. Supp. 3d 615, 642 (M.D.N.C. 2016). See also, United States v. Virginia, 518 U.S. 515, 550 n.19 (1996)("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other

[18] As a threshold matter, the School Board admits that it receives federal financial assistance.
[19] Plaintiff's position that "sex" is determined by a person's internal feelings is also at odds with individuals who may not identify as any sex, thus further obliterating the intent of Title IX and §106.33.

sex in living arrangements…"); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981)("this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.").

Plaintiff's attempt to engraft the term "gender identity" onto Title IX and §106.33 also ignores precedent that requires courts to look at the intent of a regulation at the time it was drafted. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). There is no question that "sex" under Title IX and §106.33 does not encompass "gender identity" or an individual's feeling of their gender. See, Texas v. United States, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016), order clarified, 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (holding, "the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth."); Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (holding, "the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex"). See also, R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., Case No. WD 80005, 2017 WL 3026757, at *8 (Mo. Ct. App. July 18, 2017)(an analogous case finding the Missouri legislature did not intend "discrimination on the grounds of sex to include the deprivation of a public accommodation—the boys' restroom and locker room—because a person is transitioning from female to male").

The DOE's current interpretation of Title IX and §106.33 guts Plaintiff's argument. On February 22, 2017, DOE issued a Dear Colleague letter ("2017 Guidance") withdrawing its

prior statements of policy and guidance as reflected in January 7, 2015, and May 13, 2016, guidance letters. DOE's 2017 Guidance makes clear that its prior guidance equating gender identity to sex under Title IX was not well founded.

Following the issuance of the 2017 Guidance, the district court in Evancho v. Pine-Richland School District, 2017 WL 770619 at *22 (W.D. Penn. Feb. 27, 2017) concluded:

> …this Court simply cannot conclude that the path to relief sought by the Plaintiffs under Title IX is at the moment sufficiently clear such that they have a reasonable likelihood of success on the merits of that claim. Put plainly, the law surrounding the Regulation and its interpretation and application to Title IX claims relative to the use of common restrooms by transgender students, including the impact of the 2017 Guidance, is at this moment so clouded with uncertainty that this Court is not in a position to conclude which party in this case has the likelihood of success on the merits of that statutory claim.

As recently as July 26, 2017, the United States filed an *Amicus Curiae* brief in Zarda v. Altitude Express, Inc., Case No. 15-3775 (2nd Cir. 2017), explaining the position that although "sex" is not defined under Title VII, it means biologically male or female.

IV. Plaintiff Cannot Demonstrate a Substantial Likelihood of Success on his Equal Protection Claim[20]

Plaintiff claims the School Board's bathroom policy denies him equal protection of the law guaranteed by the Fourteenth Amendment. As a threshold matter, it is clear that the guarantee of equal protection does not exist in a vacuum, but rather "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631 (1996). To establish his equal protection claim, Plaintiff must prove he has been treated differently from

[20] For the sake of brevity, Defendants reincorporate its arguments regarding the definition of "sex" herein. Plaintiff did the same in his Motion. [Doc. 22 at p. 20].

"other similarly situated individuals." Johnston, 97 F.Supp.3d at 667. Plaintiff cannot make this showing. Plaintiff is a biological female and, like all other biological females, is not allowed to use the boys' bathroom. Plaintiff is transgender, but the fact remains he is not similarly situated to the other students who are allowed to use the boys' bathroom, because they are biological males and Plaintiff is not.

A. Intermediate Scrutiny Applies to Plaintiff's Claim

Plaintiff cannot establish that transgender individuals are a suspect class subject to a strict scrutiny analysis. Rather, binding precedent and other cases apply, at most, intermediate scrutiny to these claims. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011)(applying intermediate scrutiny to case involving gender stereotyping of a transgender individual); Kirkpatrick v. Seligman & Latz, Inc., 475 F. Supp. 145, 147 (M.D. Fla. 1979), aff'd, 636 F.2d 1047 (5th Cir. 1981)("Transsexuals are not a 'suspect class' for purposes of equal protection analysis"); Adkins v. City of New York, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015); Carcaño, 203 F. Supp. 3d at 640.

B. Protecting the Bodily Privacy of K-12 Students in Bathrooms is an Important Governmental Interest

Plaintiff must prove that the School Board's justification for denying his request to use the boys' bathroom is not "at minimum, substantially related to the furtherance of an important government interest." Nicholson v. Georgia Dept. of Human Res. (DHR), 918 F.2d 145, 148 (11th Cir. 1990). See also, Handley, By & Through Herron v. Schweiker, 697 F.2d 999, 1003 (11th Cir. 1983)("[u]nder the…intermediate scrutiny test, classifications based on illegitimacy are invalid if they do not bear an evident and substantial relation to permissible state interests and if they are not carefully tuned to alternative considerations"). Furthermore, the justification

for the policy must be "genuine, not hypothesized or invented *post hoc* in response to litigation." Virginia, 518 U.S. at 533; Carcaño, 203 F. Supp. 3d at 640. Unlike strict scrutiny, the School Board is not required to show that the policy is the "least intrusive means of achieving the relevant government objective to withstand intermediate scrutiny." Id.

Protecting the bodily privacy of minor and young-adult students in K-12 schools is unquestionably an important governmental interest supporting the School Board's bathroom use policy.[21] "Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms…on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind." G.G. ex rel. Grimm v. Gloucester County Sch. Bd., 822 F.3d 709, 734 (4th Cir. 2016)(Niemeyer, J., concurring in part and dissenting in part), cert. granted in part, 137 S. Ct. 369 (2016), and vacated and remanded, 137 S. Ct. 1239 (2017); see also, Tuan Anh Nguyen v. I.N.S, 533 U.S. 53, 73 (2001)("To fail to acknowledge even our most basic biological differences…risks making the guarantee of equal protection superficial, and so disserving it").

Numerous other courts have recognized the importance of the right to bodily privacy in analogous situations. Carcaño, 203 F. Supp. 3d at 641, 645; Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981); St. John's Home for

[21] It bears repeating that such a policy is authorized under Title IX and §106.33.

Children v. W. Virginia Human Rights Com'n, 180 W. Va. 137, 139, 375 S.E.2d 769, 771 (W.V. 1988); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963); Kohler v. City of Wapakoneta, 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005); State v. Lawson, 340 P.3d 979, 982 (Wash. Ct. App. 2014); and Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005). Thus, it cannot be gainsaid that protecting the privacy of students is a legitimate government interest.

C. The School Board's Bathroom Policy is Substantially Related to Protecting the Bodily Privacy of Students in Bathrooms

The School Board's policy assures the traditional and expected level of bathroom privacy by keeping biological boys out of the girls' bathroom and vice versa. Carcaño, 203 F. Supp. 3d at 643 ("the privacy interests that justify the State's provision of sex-segregated bathrooms, showers, and other similar facilities arise from physiological differences between men and women, rather than differences in gender identity"). The School Board's approach accommodates the needs of all students by providing a gender-neutral bathroom option. Such an option protects the privacy interests of, among others, students who desire not to use a bathroom based on a particular biological sex, and simultaneously protects the bodily privacy rights of students who desire to only use bathrooms with others of the same sex.

The School Board's longstanding bathroom use policy – requiring students to use the bathroom consistent with their biological sex - denied Plaintiff access to the boys' bathroom. The Best Practices did not change that policy, but rather was an accommodation that gave transgender students an alternative to using the group bathroom designated for their biological sex while at the same time respecting and balancing the privacy rights of others. Unlike the schools in Grimm and Evancho, the School Board has been consistent in the application of its

bathroom use policy: Plaintiff was never permitted to use the boy's bathroom. Any suggestion that the Best Practices should be the focus of the Court's scrutiny is a red herring.

Additionally, the Best Practices is a common sense solution. By offering the gender-neutral bathroom, the School Board balances the privacy, safety and feelings of discomfort of all students in the District. See, Kastl v. Maricopa County Community College District, 325 Fed. Appx. 493, at n. 1 (9th Cir. 2009); Grimm, 2015 WL 5560190 (E.D. Va. 2015); Johnston, 97 F.Supp.3d at 661; Doe v. Clark County School Dist., 2008 WL 4372872 (D. Nev. 2008).

It is indisputable that the School Board's bathroom policy is "genuine," and was not "hypothesized or invented *post hoc* in response to litigation" or anything else. Carcaño 203 F. Supp. 3d at 640 (quoting Virginia, 518 U.S. at 533). Separate boys' and girls' bathrooms have been the norm in the District well before Plaintiff brought this lawsuit and long before bathroom assignment on the basis of "gender identity" emerged as an issue in public schools or the workplace. That history belies any suggestion that that policy targets transgender students, or was "invented *post hoc* in response to litigation", or to Plaintiff's complaint that he should be allowed to use the boys' bathroom. Virginia, 518 U.S. at 533. Accordingly, the fact that the policy does not allow Plaintiff to use the bathroom matching his gender identity is not invidious discrimination. It is simply an incidental and constitutionally permissible disadvantage of a legitimate classification of students by biological sex for the purpose of bathroom usage. See, Romer, 517 U.S. at 631; Feeney, 442 U.S. at 271-72; Nguyen, 533 U.S. at 60-61; Johnston, 97 F.Supp.3d at 670; Carcańo, 203 F.Supp.3d at 640-644.

D. Plaintiff's Reliance on Seventh Circuit Precedent is Flawed (Whitaker)

Plaintiff relies heavily on Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Edu., 858 F.3d 1034 (7th Cir. 2017), which carries no weight in the Eleventh Circuit. Importantly, however, the Seventh Circuit's standard for the entry of a preliminary injunction is drastically different than that employed by the Eleventh Circuit. The Seventh Circuit only requires a movant to "show that his chances to succeed on his claims are 'better than negligible,'" which the court in Whitaker characterized as a "low threshold." Id. at 1046 (internal citations omitted). In stark contrast, the Eleventh Circuit requires a movant to show "a substantial likelihood of success on the merits." Even more, where, as here the movant is requesting an affirmative injunction, the burden is more stringent.

Additionally, the court in Whitaker explicitly noted the district court's reliance on the testimony and findings of a doctor who physically met with and examined the plaintiff to establish irreparable harm. Id. at 1045. That doctor opined that the school district's policies were directly causing the plaintiff's psychological distress. Id. Here, Dr. Ehrensaft has not examined Plaintiff, has not met Plaintiff and has not opined directly about Plaintiff's purported psychological distress or the causation underlying it.

Finally, the court in Whitaker determined that the school board's gender-neutral bathroom policy stigmatized the plaintiff, because it required him to use a separate bathroom "where he was the only student who had access." Id. This is clearly not the case here, as the gender-neutral bathrooms are available to all students at Nease.

E. The School Board's Bathroom Policy has Nothing to do with Sex Stereotyping

Plaintiff relies heavily, if not entirely, on Glenn v. Brumby, supra, to argue "Defendants' discriminatory rule codifies sex stereotypes into school policy by banishing those whose gender identity does not match their birth-assigned sex from the facilities that others are permitted to use." (Doc. 22 at p. 10). While Glenn found sex stereotyping may be discrimination on the basis of sex, it cannot be seriously contended that a policy premised only on biological sex is a form of sex stereotype discrimination.

Glenn is also distinguishable from the instant case in several ways. First, the plaintiff in Glenn was terminated because her employer found her "gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable." Glenn, 663 F.3d at 1314. The School Board has not taken any of these positions in this case, and the bathroom policy has nothing to do with gender non-conformity.

Second, the court in Glenn found "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes" but still went on to analyze whether plaintiff was fired on the basis of gender stereotyping. Id. at 1316, 1320. Plaintiff is not denied access to the boys' bathroom because he is transgender or because he does not conform to some gender stereotype; rather, he is not allowed to use the boys' bathroom because, and only because, the boys' bathroom is reserved for biological males. See, R.M.A., 2017 WL 3026757, at *8 (in denying a student's claim that "sex" under a Missouri public accommodation statute included "gender identity," the court stated "only a single

federal appellate circuit has concluded that 'on the basis of sex' as used in Title IX likely includes transgender students within its ambit on a theory of sexual stereotyping)."[22]

Third, the employer's decision in Glenn was not based on bodily privacy rights – let alone the bodily privacy rights of minor children and young adults in K-12 public schools. Simply stated, Glenn is inapplicable.

In sum, Plaintiff is being treated exactly the same as all other students whose access to group bathrooms is determined by their biological sex. That is the antithesis of discrimination.

V. The Injury to the Defendants Significantly Outweighs the Speculative Injury to Plaintiff (i.e. Balance of Harms) and the Entry of an Injunction would Disserve the Public Interest

The final two elements of this Court's analysis (balancing of harms and consideration of public interest) are intertwined and best considered together. There is no debate that the School Board's power over students is "custodial and tutelary" thereby granting it "a degree of supervision and control that could not be exercised over free adults." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995). Further, "[t]he School Board['s] hegemony must be respected in its management of any school system under its jurisdiction." Alford v. Collier Co. Sch., Case No. 96-160-CIV-FTM-17, 1996 WL 289038 at *3 (M.D. Fla. May 23, 1996). Thus, the Court must consider Plaintiff's speculative injuries against the School Board's responsibility to attend to the welfare of all of its students. In so doing, the Court should be cautious not to sit as a "super-school board or [] all-knowing parent." Villanueva v. Carere, 873 F. Supp. 434, 442 (D. Colo. 1994), aff'd, 85 F.3d 481 (10th Cir. 1996).

[22] The "single federal appellate circuit" referenced in R.M.A. was the Seventh Circuit's opinion in Whitaker.

The relief sought by Plaintiff is not to maintain the status quo, which is the "chief function" of a preliminary injunction; instead, Plaintiff asks this Court to stand in the place of the School Board and create a new bathroom policy until a trial on the merits can be held. Plaintiff's claim of injury should not outweigh the privacy rights of other students. See, Siegel, 234 F.3d at 1177-78; Northeastern Fla. Chapter of Ass'n of Gen. Contractors, 896 F.2d at 1285.

The School Board's policy throughout all of its K-12 schools has been to separate bathrooms based on biological sex. It would be inequitable and a drastic shift in policy to reverse course suddenly, let alone at the beginning of a school year.

On the other hand, if the Court denies Plaintiff's Motion, he will simply have to continue doing what he has done for the past two school years with double the number of gender-neutral bathrooms. To be sure, denying Plaintiff's Motion would maintain the status quo until the trial on the merits. GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers, 38 F. Supp. 3d 1365, 1379 (N.D. Ga. 2014), aff'd, 788 F.3d 1318 (11th Cir. 2015)("While the Court in no way means to downplay the importance of protecting individual rights, given the relatively uncertain nature of Second Amendment rights and the fact that the status quo is, and has been for some time, the continued enforcement of the Firearms Regulation, such a temporary setback to Plaintiffs' firearms use is relatively minor."); Black Warrior Riverkeeper, Inc. v. Alabama Dept. of Transp., Case No. 2:11-CV-267-WKW, 2014 WL 200578 at *8, 78 ERC 1526, (M.D. Ala. Jan. 17, 2014)(Injunctive relief may not be proper "when it would harm the public interest, even if doing so would cause irreparable injury to the movant"); Yakus v. U.S., 321 U.S. 414, 440 (1944)("where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot

compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff").

Conclusion

Courts have been vigilant in protecting the safety and sensibility of impressionable children required to attend schools. This protection has been exercised to prohibit certain compelled religious behavior in schools and protect children from involuntarily reciting the Pledge of Allegiance.

The St. Johns County School Board has acted in its students' best interests by maintaining a policy protecting these same impressionable students' privacy and feelings of security with their own bodies when at their most vulnerable. The bathroom has been a traditional area where individuals are likely to engage in intimate bodily functions. Clearly, the exposure of a child's body, even inadvertent, to someone from the opposite sex can be demeaning and humiliating.

For these reasons, and for the reasons above, the School Board's policy regarding bathroom use must withstand Plaintiff's challenge. Plaintiff's motion must be denied.

Dated this 4th day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of August, 2017, a true and correct copy of the foregoing was electronically filed in the United States District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Terry J. Harmon
TERRY J. HARMON

DE 45

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

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

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA, et al.,

Defendants.

No. 3:17-cv-00739-TJC-JBT

PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE AS TO DEFENDANTS TIM FORSON AND LISA KUNZE ONLY

Plaintiff Drew Adams, by and through his next friend and mother, Erica Adams Kasper, hereby gives notice of voluntary dismissal, without prejudice, of the action against Defendant Tim Forson, in his official capacity as Superintendent of Schools for the St. Johns County School District, and Defendant Lisa Kunze, in her official capacity as Principal of Allen D. Nease High School, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). Plaintiff notes that the School Board of St. Johns County, Florida acknowledges its "bathroom use policy" in Defendants' Response to Plaintiff's Motion for Preliminary Injunction [Doc. 42]. Thus, Plaintiff voluntarily dismisses without prejudice the action against Defendants Forson and Kunze only.

Dated: August 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing and all attachments with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing and all attachments to be served on all counsel of record.

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DE 48

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

DREW ADAMS, et al.,

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA, et al.,

Defendants.

No. 3:17-cv-00739-TJC-JBT

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Local Rules 3.01(c) and this Court's Order dated August 7, 2017 (ECF No. 46), Plaintiff Drew Adams ("Drew" or "Plaintiff"), by and through his next friend and mother, Erica Adams Kasper, respectfully submits this reply memorandum in further support of his Motion for Preliminary Injunction (ECF No. 22).

A. Background

On July 19, 2017, Plaintiff filed a Motion for a Preliminary Injunction (the "Motion"). ECF No. 22. On August 4, 2017, Defendant The School Board of St. Johns County, Florida ("Defendant") filed its opposition to the Motion. ECF No. 42. In its opposition, Defendant included numerous documents filed in an unrelated, out-of-circuit case. ECF No. 41-7. Plaintiff submits this brief reply memorandum to provide the Court with evidence rebutting the information from that unrelated case.

B. Argument

Defendant submitted numerous documents filed in a different case, pending in a different district court and circuit jurisdiction, that included testimony regarding sex and gender identity. *See, e.g.*, Ex. 1-4 to ECF No. 41-7. None of the parties here are parties in that case, and the materials were not prepared for this lawsuit nor subscribed for use in this suit by the original declarants. Specifically, Defendants submitted four purported "expert" declarations that were filed in *United States v. North Carolina*, Case No. 1:16−cv−00425−TDS−JEP (M.D.N.C.), which Defendant relies upon for its contentions about what constitutes sex and gender identity, how these issues are determined, and the treatment of gender dysphoria. *See* ECF No. 42 at 9-15. Conspicuously absent from the evidence submitted by Defendant is any indicia of whether these "experts" would testify the same in *this* case, or even if they would testify at all. As such, the evidence tendered by Defendants should not be given any weight. Nonetheless, should the Court be inclined to consider such "evidence," fairness and completeness dictates that the Court also consider the rebuttal evidence offered in *United States v. North Carolina*, as well as resolutions and statements from major medical and professional health organizations rebutting Defendants' purported "expert" testimony. *See* Exs. A - F to the Decl. of Tara L. Borelli.

C. Conclusion

Plaintiff respectfully suggests that this Court disregard the purported "expert" testimony submitted by Defendants because it has no bearing or relevance of the issues and claims pending here. Alternatively, Plaintiff urges the Court to consider and accord substantial weight to the enclosed declarations and documentary evidence setting forth the medical

consensus contravening Defendant's purported "expert" testimony and consistent with Plaintiff's expert testimony in *this* case.

Dated: August 8, 2017

Respectfully submitted,

/s/ *Tara L. Borelli*
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Counsel for Plaintiff

Certificate of Service

I hereby certify that on August 8, 2017, I electronically filed the foregoing and all attachments with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing and all attachments to be served on all counsel of record.

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

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

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA; et al.,

Defendants.

No. 3:17-cv-00739-TJC-JBT

DECLARATION OF TARA L. BORELLI

I, Tara L. Borelli, pursuant to 28 U.S.C §1746, declare as follows:

1. I am over the age of eighteen (18) and make this declaration of my own personal knowledge, and, if called as a witness, I could and would testify competently to the matters stated herein.

2. I am an attorney with Lambda Legal Defense and Education Fund, Inc., and counsel for Plaintiff Drew Adams in this litigation. I am licensed to practice law in Georgia, Washington, and California, and was admitted *pro hac vice* to practice before this Court. I make this declaration in support of Plaintiff's Reply in Further Support of Plaintiff's Motion for Preliminary Injunction.

3. Attached as Exhibit A is a true and correct copy of Supplemental Expert Declaration of George R. Brown, MD, DFAPA in support of the United States' Motion for

Preliminary Injunction submitted in *United States v. North Carolina*, Case No. 1:16−cv−00425−TDS−JEP (M.D.N.C.).

4. Attached as Exhibit B is a true and correct copy of the Expert Declaration of Deanna Adkins, MD in support of the United States' Motion for Preliminary Injunction submitted in *United States v. North Carolina*, Case No. 1:16−cv−00425−TDS−JEP (M.D.N.C.).

5. Attached as Exhibit C is a true and correct copy of the Brief of *Amici Curiae* American Academy of Pediatrics, American Psychiatric Association, American College of Physicians, American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, American Academy of Nursing, American Academy of Physician Assistants, American Medical Women's Association, American Nurses Association, American Psychoanalytic Association, Association of Medical School Pediatric Department Chairs, the Endocrine Society, GLMA: Health Professionals Advancing LGBT Equality, Mental Health America, National Association of Social Workers, Society for Adolescent Health and Medicine, and Society for Physician Assistants in Pediatrics in support of Plaintiff-Appellant submitted in *G.G. v. Gloucester County School*, Case No. 15-2056 (4th Cir.) (Doc. No. 135-1).

6. Attached as Exhibit D is a true and correct copy of Robert Nagler Miller, *AMA takes several actions supporting transgender patients*, AMA News (June 12, 2017), *available at* https://wire.ama-assn.org/ama-news/ama-takes-several-actions-supporting-transgender-patients.

7. Attached as Exhibit E is a true and correct copy of American Academy of Family Physicians, *Resolution No. 508 (Washington C): Transgender Use of Public Facilities* (2015), *available at* http://www.teachtraining.org/wp-content/uploads/2013/10/2016-passed-resolutions.pdf.

8. Attached as Exhibit F is a true and correct copy of American Psychological Association and National Association of School Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015), *available at* http://www.apa.org/about/policy/orientation-diversity.aspx.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated on this 8th day of August, 2017.

Tara Borelli

Tara L. Borelli

INDEX OF EXHIBITS TO BORELLI DECLARATION

Letter	Title
A	Supplemental Expert Declaration of George R. Brown, MD, DFAPA, *United States v. North Carolina*, Case No. 1:16−cv−00425−TDS−JEP (M.D.N.C.)
B	Expert Declaration of Deanna Adkins, MD, *United States v. North Carolina*, Case No. 1:16−cv−00425−TDS−JEP (M.D.N.C.)
C	*Amici Curiae* Brief of Medical and Mental Health Organizations in *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir.)
D	*AMA takes several actions supporting transgender patients*, AMA News (June 12, 2017)
E	American Academy of Family Physicians, *Resolution No. 508 (Washington C): Transgender Use of Public Facilities* (2015)
F	American Psychological Association and National Association of School Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015)

Exhibit A

Exhibit A to Borelli Decl.: Supplemental Expert Declaration of George R. Brown, MD, DFAPA

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants.	Case No. 1:16-cv-425

SUPPLEMENTAL EXPERT DECLARATION OF GEORGE R. BROWN, MD, DFAPA IN SUPPORT OF THE UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION

1. As is detailed in my June 20, 2016 declaration submitted in support of the United States' preliminary injunction motion, I am a Professor of Psychiatry and Associate Chairman of the Department of Psychiatry at East Tennessee State University and I have been retained by counsel for the United States as an expert in this litigation. I submit this supplemental declaration to address opinions offered by Defendants' expert witnesses in opposition to the motion.

2. I have been publishing books and articles on the subject of the diagnosis and treatment of Gender Dysphoria for over three decades, as my June 20 declaration makes clear. During this time, I have kept up with published research, continued to contribute original research to the literature on this topic, and I have consistently been deeply engaged with the community of experts in this field through conferences, consultations, lecturing, and other professional activities. I have never before heard of any of Defendants' medical experts prior to reviewing their declarations. To my knowledge, I have never encountered them at any professional conferences

on this subject. I am not aware of any publications by them concerning Gender Dysphoria, or related issues in any book or peer-reviewed scientific journal, and I see none listed on their CVs.

Medical Standards Established in the DSM and WPATH Standards of Care

3. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5") is the authoritative source for psychiatric diagnoses in the United States and many other countries. The process of determining the diagnoses and diagnostic criteria included in the DSM involves a robust review of available evidence by numerous experts with varying perspectives in the relevant field over the course of several years of research, planning and debate. There is no sound basis for concluding that its contents are the product of influence from "political interest groups." (Josephson ¶ 24). The process by which this 947 page document was developed was well publicized, interactive with thousands of clinicians and researchers, and well described in the literature (DSM-5, pp. 5-10, 897-916).

4. There is no basis for Dr. Josephson's assertion that the change to the current diagnosis and nomenclature for Gender Dysphoria was the result of "political interest groups" as opposed to "scientific information." (Josephson ¶ 24). Having been present for discussions about these changes, presented by the Chair of Sexual and Gender Identity Disorders Committee, Dr. Kenneth Zucker, the reasons for the title change from "Gender Identity Disorder" to "Gender Dysphoria" was based on a more thorough understanding of this condition in the intervening 13 years between the publication of DSM's Fourth Edition, Text Revision ("DSM-IV-TR") and DSM-5. Gender Dysphoria, as a diagnosis, focuses on the treatable symptoms that a patient experiences. "Dysphoria," rather than "Identity," is the focus of treatment, and there is substantial evidence that Dysphoria can be treated successfully.

5. Likewise, Dr. Mayer's critique of the DSM-5's diagnosis of Gender Dysphoria in children reveals a lack of understanding of both the DSM and how it is used in practice. He isolates one aspect of a comprehensive set of criteria (gender atypical play preferences) and notes that it would not be a sound basis for a diagnosis. (Mayer ¶¶ 46-47). But that is precisely why it is only part of a comprehensive set of criteria provided to clinical professionals to use in the context of their practice to make a diagnosis. In fact, to arrive at a diagnosis of Gender Dysphoria in a child, a minimum of 6 of 8 specified "A" criteria must be met, accompanied by a minimum time frame criterion and a clinical significance criterion "B." All of these requirements must be met to arrive at a diagnosis. As with all psychiatric diagnoses, patients must be reassessed over time, and diagnoses may or may not be present at future time points.

6. Defendants' medical experts further situate themselves outside the mainstream of the field by rejecting well-accepted treatment protocols recognized by the major medical and mental health professional associations in the United States. As set forth in my June 20 declaration, the World Professional Association of Transgender Health ("WPATH") publishes Standards of Care for treating Gender Dysphoria. WPATH is an internationally recognized association comprising nearly 1,000 medical, surgical, mental health, and other professionals who specialize in the treatment of transgender and gender non-conforming people. The WPATH Standards of Care ("SOC"), which are in their seventh revision, represent the evidence-based consensus of experts in the field and have been recognized as the authoritative treatment protocols by the major medical and mental health associations in the United States, including the American Psychiatric Association, the American Medical Association, and the American Psychological Association. The largest health care system in the United States, the Veterans Health Administration ("VHA"), treats transgender veterans largely based on the guidelines set forth in

the current version of the WPATH SOC, and references these standards in their national training programs. I have been directly involved with the national VHA training program since its inception in 2012.

7. Some of Defendants' expert witnesses characterized WPATH as an advocacy organization with a social and political agenda (Van Meter ¶ 53), as opposed to a professional medical association that uses evidence-based standards. WPATH is a medical association in the same mold as every other medical association dedicated to the treatment of a particular condition— it creates a community of experts to share research and clinical experience; it establishes best practices for treatment based on experts in the field engaging in a robust review of the available evidence; and it supports policies that enhance the well-being of its patient population. There is ample evidence supporting the WPATH SOC, which are in widespread use throughout the United States and other countries. Any psychiatrist or other clinician trained in or with experience in this field would be aware of this.

Illustrative Errors in Defendants' Experts Opinions

8. Many of the opinions offered by Defendants' experts are unsound, reflecting a lack of experience in this field. The following are some pertinent examples.

The Suggestion That Transgender People are Delusional

9. I have not heard the theory that transgender people are suffering from a delusion articulated by any credible mental health professional in over thirty years. That theory has been soundly disproven and rejected by the medical profession.

10. In suggesting that transgender people are suffering from a delusion, Defendants' experts use a dictionary definition of "delusion" to oversimplify a complex psychiatric issue and draw an illogical and ill-informed conclusion that has no basis in evidence.

11. Contrary to Defendants' experts' opinion, the medical definition of a "delusion" is not merely "a fixed, false belief which is held despite clear evidence to the contrary." (Josephson ¶ 42; Van Meter ¶ 50). As the DSM-5 notes, a delusion is a fixed belief not amenable to change in light of conflicting evidence, which is associated with certain psychotic disorders and generally characterized by persecutory, religious or other grandiose themes (DSM-5, pp. 819-820). Delusional ideas or beliefs are "held despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary" (DSM-5, p. 819). Delusions are generally treated with antipsychotic medication.

12. By contrast, transgender people have a very clear understanding of the reality that their body does not align with their gender identity. If you asked a transgender woman, prior to her transition, whether she has male genitals, is perceived by others who look at her body to be a man, or whether her birth certificate labels her a male, she is acutely aware of these realities. It is precisely the accurate understanding of these realities coupled with the incongruence between experienced gender identity and objectively observable bodily realities that leads to psychological distress and the diagnosis of Gender Dysphoria. Patients with Gender Dysphoria harbor no delusions whatsoever about "external reality" and to categorize these patients as delusional is not only inaccurate, but completely out of step with modern, mainstream, medical thinking.

The Suggestion That the Only Appropriate Treatment for Gender Dysphoria is to Align Gender Identity with Birth Sex

13. The WPATH Standards of Care emphasize the importance of the social transition for transgender people with Gender Dysphoria. Defendants' expert witnesses seem to suggest that rather than follow these professional standards, clinicians who see such patients should try to help them change their gender identity to align with their birth-assigned sex. As I noted in my June 20 declaration, attempts to do this have been found to be ineffective and are recognized as

potentially harmful by professional associations. The only treatment approaches for Gender Dysphoria in adolescents and adults that is supported by evidence and, thus, represents the medical consensus, is the gender-affirming protocols set forth in the WPATH Standards of Care and in the Endocrine Society's guidelines as applied to the hormonal aspects of multimodal treatment for this condition. I note that two of Defendant's experts are members of the Endocrine Society (Drs. Van Meter and Hruz), but their statements about Gender Dysphoria place them completely out of step with their own professional Society in this regard.

14. Evidence cited by Defendants' expert, Dr. Mayer, supports the conclusion that gender identity is real, fixed, and not generally malleable based on external interventions. Dr. Mayer cites the case of David Reimer, who was reported to have been assigned male at birth with no sign of any intersex condition but whose penis was severely damaged in a botched circumcision. According to the sources cited by Dr. Mayer, David's parents, in an effort to grapple with the consequences of the circumcision, opted for additional surgical and hormonal interventions and raised David as a girl ("Brenda"), concealing his history. These decisions were made after consultation with experts at Johns Hopkins. Notwithstanding this alteration to the external sex characteristics and hormones, as well as consistent social inputs affirming that David was a girl, David's gender identity remained fixed as male, and he suffered psychological distress as a result of the divergence between his male gender identity on the one hand and his female social identity, hormones, and external feminized sexual characteristics on the other hand. David lived the last 20 years of his life (from age 18-38) as a male, consistent with his gender identity. This evidence, offered by Defendants' expert, illustrates well the stability of gender identity in the face of overwhelming external interventions, and not the contrary.

The Erroneous Lumping Together of Pre-Pubertal Children, Adolescents, and Adults

15. Defendants' expert witnesses erroneously generalize about the appropriate course of treatment for Gender Dysphoria in adults or adolescents based on data about pre-pubertal children. The DSM-5 recognizes separate criteria for diagnosing Gender Dysphoria in children, on the one hand, and adults and adolescents on the other. The WPATH Standards of Care have distinct standards of care for pre-pubertal children (generally up to about age 10), adolescents and adults.

16. Defendants' experts point to the fact that some professionals do not favor social transition in pre-pubertal children based on data showing high rates of young gender incongruent children ceasing to experience gender incongruence by adulthood. They erroneously suggest that this applies to adolescents and adults as well. It does not. Gender Dysphoria in postpubertal adolescents and adults is very unlikely to "disappear." For example, in one follow-up study of adolescents treated at a gender clinic, 100% of the 70 individuals treated ultimately underwent hormone therapy and continued to identify with a gender different than the one assigned to them at birth. (de Vries, Steensma, Doreleijers, & Cohen-Kettenis, 2010). In my personal experience, I have had no adult or late adolescent patients with Gender Dysphoria have a resolution of these clinical symptoms without one or more interventions.

Misunderstanding the Evidentiary Basis for the Accepted Treatment Protocols

17. Defendants' expert witnesses assert that there is a lack of evidence demonstrating the effectiveness of the accepted protocols for the treatment of Gender Dysphoria. Dr. Hruz argues that there is a need for clinical research trials on treatments. (Hruz ¶ 33). Dr. Mayer specifically criticizes studies demonstrating positive effect, arguing that they lack a matched

control group. (Mayer ¶ 85). Dr. Josephson also criticizes the absence of controlled studies on youth and adolescents. (Josephson ¶ 34).

18. But these kinds of studies are not the only type of evidence scientists and doctors rely on. Studies demonstrating that patients' conditions improved after treatment can be very informative, whether or not there are matched control groups. (Manieri, Castellano, Crespi, et al., 2014). Moreover, Defendants' experts ignore another critically important source of evidence—the clinical experience of generations of doctors who have treated patients with Gender Dysphoria. There is abundant clinical experience going back 50 years establishing the effectiveness of social transition, hormone therapy and surgeries as treatment for Gender Dysphoria.

19. Medical professionals every day make choices about treatment protocols that are not based on matched control group studies or randomized control trials. For example, many aspects of the treatment protocols for common psychiatric conditions such as bipolar disorder, depression, and schizophrenia (the bulk of patients seen in outpatient psychiatric clinics) are not matched with control group studies or double blind clinical trials, but rather have been accepted by the profession as the standard of care based on clinical experience, limited published data, case series, or other types of evidence available. Another common example is a doctor's decision to select one drug over another in treating a particular condition. In many cases, the decision to select drug A over drug B or drug C is not validated by a control group study demonstrating that drug A produces results superior to drug B or drug C. Instead, the doctor makes a decision among available drugs based on clinical experience and his or her overall assessment of a patient's situation. That decision does not lack an evidentiary basis simply because there is not a matched control group study to support it.

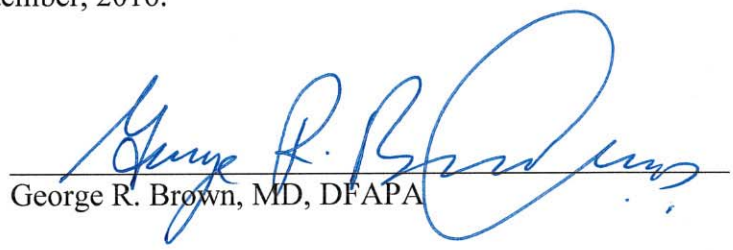
20. I personally would never hold myself up as an expert in a clinical psychological condition without having not just some clinical experience but substantial clinical experience. Clinical experience is particularly important in the specialty area of transgender health. Reviewing relevant literature is not a sufficient basis for developing expertise on these subjects. To draw valid conclusions, one must integrate knowledge of the literature with personally obtained clinical information, up-to-date presentations at conferences, consultation with colleagues who work with similar patients, interviewing family members, and other sources of important clinical information. I am hard-pressed to see evidence of relevant clinical experience with gender dysphoric children, adolescents or adults among the Defendants' experts (or in the case of Dr. Mayer, *any* clinical experience).

The Asserted Definition of Sex

21. To the extent that Defendants' experts define sex based on the ability to procreate or engage in reproduction, they are relying on outdated sources that do not reflect the current medical consensus. As I noted in my June 20 declaration, with citations to the relevant sources reflecting the current consensus view, "biological sex" is a broad and complex concept that consists of a number of variables, including gender identity, genital anatomy (internal and externally visible), secondary sexual characteristics, brain anatomy, hormonal levels in the brain and body, and chromosomal complement. Failure to account for these aspects of sex that extend beyond reproductive systems reflects an incomplete and ill-informed understanding of "sex." Defendants' experts limited definition of "sex" does not account for the many humans who have no ability to procreate and may not or cannot engage in reproduction.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 14th day of September, 2016.

By: 

George R. Brown, MD, DFAPA

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Manieri, Chiara & Castellano, Elena, et al., *Medical Treatment of Subjects with Gender Identity Disorder: The Experience in an Italian Public Health Center*, Int'l J. Transgenderism 15:53-65 (2014).

Mayer, Lawrence & McHugh, Paul, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, The New Atlantis: A Journal of Technology & Society (2016).

World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, Version 7 (2011).

Exhibit B

Exhibit B to Borelli Decl.: Expert Declaration of Deanna Adkins, MD

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants, STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Counterclaim Plaintiffs, v. UNITED STATES OF AMERICA, Counterclaim Defendant.	Case No. 1:16-cv-425

EXPERT DECLARATION OF DEANNA ADKINS, MD, IN SUPPORT OF THE UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION

Qualifications and Background

1. I have been retained by counsel for United States as an expert in connection with the above-captioned litigation. I have also been retained by counsel for the Plaintiffs in the related matter of *Carcaño, et al. v. McCrory, et al*., No. 16-236, and submitted a report in that case and the above-captioned case on August 12, 2016. A true and accurate copy of that report is attached as Exhibit A. I have actual knowledge of the matters stated in this declaration and in the report attached as Exhibit A. My professional background, experience, and publications are detailed in my curriculum vitae, a true and accurate copy of which is included in Exhibit A.

2. As detailed in my attached report and CV, I am currently the Fellowship Program Director of Pediatric Endocrinology at Duke University School of Medicine and the Director of the Duke Center for Child and Adolescent Gender Care. *See* Exhibit A.

3. I have extensive experience working with children with endocrine disorders and I am an expert in the treatment of children with differences of sex development and gender dysphoria. As part of my practice, I stay familiar with the latest medical science and treatment protocols related to differences of sex development and gender dysphoria.

4. In preparing this declaration, I reviewed the materials listed in the Bibliography included in Exhibit A as well as the expert declarations submitted in opposition to the United States' motion for a preliminary injunction. I may rely on those documents as support for my opinions. I have also relied on my years of experience in this field, as set out in my CV and on the materials listed therein. *See* Exhibit A. The materials I have relied upon in preparing this declaration are the same types of materials

that experts in my field of study regularly rely upon when forming opinions on the subject.

5. In the past four years, I have testified as an expert at trial or deposition in the following matter: *United States v. Oversby, Brandon R.*, SPC, U.S. Army, B Company (Second Judicial Circuit, Fort Bragg Oct. 15, 2014).

Standards of Care for Treatment of Gender Dysphoria

6. In my current practice, I treat over 125 patients who have gender dysphoria.

7. I treat my patients based on their individual medical needs and follow the protocols for treatment set out by the World Professional Association for Transgender Health (WPATH) Standards of Care and clinical guidelines for treatment of gender dysphoria developed by the Endocrine Society. These standards recommend gender transition, including social transition, hormone therapy, and surgery depending on the age and medical needs of the patient.

8. The WPATH Standards of Care are recognized by the major medical and mental health groups in the United States–including the American Medical Association, the American Psychiatric Association, and the American Psychological Association–as the authoritative protocols for treating gender dysphoria.

9. Dr. Van Meter suggests that the WPATH Standards of Care should be disregarded because WPATH is "an agenda-driven advocacy organization." (Van Meter, ¶ 53). WPATH, like many other medical associations, is an organization of hundreds of professionals who work to share information about the best ways to treat a medical condition. Just like the American Diabetes Association or the American Heart

Association puts on conferences, develops guidelines for treatment, and educates its members and the community, so too does WPATH. Members of WPATH are invested in the care of individuals with gender dysphoria just like members of the American Diabetes Association are invested in the care of individuals with diabetes. This is not a "social and political agenda." It is about improving outcomes and treatment for individuals with medical needs.

10. The American College of Pediatricians, which rejects the well-established medical protocols for the treatment of gender dysphoria, is not the major medical association of pediatricians in this country. In fact, I had never heard of them until my involvement in this case. The American Academy of Pediatrics, which is the major pediatric professional association with approximately 66,000 members, has called for the repeal of North Carolina's HB 2. The CEO and Executive Director of the American Academy of Pediatrics called for repeal of H.B. 2, saying: "Adolescents who are transgender are already at heightened risk for violence, bullying and harassment, and are already more prone to depression and engaging in self-harm, including suicide . . . HB2 and other measures making their way through state legislatures across the country exacerbate those risks by creating hostile environments for transgender youth, all implying the same message; 'you're different, something is wrong with you, you need to change in order to fit in here.'" American Academy of Pediatrics, AAP News, "AAP calls for repeal of N.C. transgender law" (April 20, 2016) (http://www.aappublications.org/news/2016/04/20/Transgender042016

The Consensus Regarding treatment of Adolescents and Adults with Gender Dysphoria

11. The Defendants' experts mistakenly focus on questions related to the treatment of pre-pubertal children (i.e., pre-Tanner Stage 2, generally around age 10) to challenge well-established treatment protocols for adolescents and adults. There are different approaches within the community of experts treating gender dysphoria about how to treat pre-pubertal children. Some support social transition for pre-pubertal children and others, like Dr. Kenneth Zucker—who is cited repeatedly by Defendants—do not in most cases based in significant part on the fact that there are studies that found that many children with gender incongruence in early childhood did not have gender dysphoria by the time they reached adolescence.

12. When it comes to adolescents and adults, there is no evidence that gender incongruence ceases over time and there is a clear medical consensus recognized by the major medical associations (and Dr. Zucker, who is an author of the most recent WPATH Standards of Care) that gender transition–including social transition, hormone therapy and/or surgeries where medically necessary–is appropriate treatment. Defendants' conflation of pre-pubertal children and adolescents reflects their lack of knowledge about treatment in this field. In fact, the Diagnostic & Statistic Manual (DSM) has completely separate diagnoses for the condition in childhood and the condition in adolescence. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed., "Gender Dysphoria in Children" and "Gender Dysphoria in Adolescents and Adults" (2013).

13. It is incorrect and unsupported by the data to suggest that studies on the treatment of gender incongruence and gender dysphoria in children who are pre-Tanner Stage 2 can be used to draw conclusions about the treatment of adolescents and adults with the condition. Such suggestions misrepresent the understanding and consensus view of experts who research and treat gender dysphoria.

14. For younger children who are pursuing social transition as part of a medically supervised treatment plan, that social transition includes use of single-sex spaces consistent with gender identity. For the young children that I treat, access to such spaces has greatly improved their health and well-being.

15. Dr. Van Meter's description of the nature of puberty blocking treatment for gender dysphoric patients is not accurate. This treatment has been used for decades on children with precocious puberty and none of the potential health consequences cited by Dr. Van Meter have been documented in that population. We only administer hormone blockers to delay the onset of puberty within the typical range. Even the articles cited by Dr. Van Meter to support his contentions in fact say the opposite of what he claims. For example, Dr. Van Meter claims that "[t]here is evidence that bone mineral density is irreversibly decreased if puberty blockers are used." (Van Meter, ¶ 44). But the article that Dr. Van Meter cites to support that claim says the opposite, concluding instead that the use of puberty blockers "is safe and reversible for the reproductive system, [Bone Mineral Density] BMD, and [Body Mass Index] BMI." (Van Meter, n. 25).

Sex Assignment and the Nature of Gender Identity

16. Dr. Mayer's opinion that "biological sex can still be defined strictly in terms of the structure of reproductive systems" is an extremely outdated view of biological sex. (Mayer, ¶ 29). In the past when assigning sex to an individual with sex-related characteristics that did not completely align as stereotypically male or stereotypically female, doctors would assign sex based solely on how the individual would be able to reproduce. This has long since been abandoned as an approach as even Defendants' other experts recognize in favor of a more nuanced approach that takes into account the range of sex-related characteristics with the goal of assigning sex consistent with gender identity.

17. The experience of Dr. John Money's patients discussed by Dr. Mayer demonstrates that a person's gender identity cannot be altered through socialization. The lessons of Dr. Money's failed experiments have significantly influenced how endocrinologists and other doctors assign sex for individuals with differences of sex development (DSDs)—that assignment should be based on gender identity, once it is known. For those of us involved in the care of infants with DSDs, we are deeply concerned about any permanent surgical treatment on an infant before the infant is able to communicate gender identity.

18. The occurrence of intersex conditions (also known as DSDs) are not "rare" as Drs. Hruz and Van Meter suggest. (Hruz, ¶ 20; Van Meter, ¶ 14). The statistic cited by Dr. Van Meter (one in every 4500 to 5500 births) refers to just one subset of intersex conditions—ambiguous genitalia at birth. The article he cites for that statistic also notes

that Klinefelter syndrome–a DSD–is estimated in one of 500 to 1000 births, and that "when all congenital genital anomalies are considered . . . the rate may be as high as [one in 200 to 300]." Lee PA et al., Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care, 2016 Horm Res Paediatr., at 159-60. *See* Exhibit A, ¶¶ 36-38 for a discussion of the nature of the more common intersex conditions. This makes DSDs significantly more common than other common genetic variations such as Down Syndrome, which occurs in approximately 1 in every 1,000 live births. See World Health Organization, Genes and Human Disease, http://www.who.int/genomics/public/geneticdiseases/en/index1.html.

Defendants' Experts are not Individuals Known in the Field of Treatment of Gender Dysphoria

19. To effectively treat my patients, I stay current on the research and literature in the field of treatment for gender dysphoria and I attend conferences and lectures where the latest research is discussed and clinicians share their experience. I have never seen any of the Defendants' experts at a conference or meeting regarding gender dysphoria; nor do I recognize their names as individuals who publish in this field.

20. Physicians who treat children and adolescents with gender dysphoria regularly encounter each other at meetings and conferences regarding treatment, even those of us who take different approaches to the management of the condition. For example, Dr. Kenneth Zucker, who is cited extensively by Drs. Hruz, Van Meter, and Mayer, is a member of WPATH and speaks regularly at meetings regarding the treatment of the condition. I have seen him speak twice in the past year.

21. As in any medical field, attending conferences and being part of a professional community of clinicians provides a doctor with an opportunity to learn about the clinical experience of hundreds of colleagues, which in turn informs the development of generally accepted practices of experts in the field. Clinical experience is an important part of the body of knowledge about any medical condition, including gender dysphoria.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 13 day of September, 2016.

By: _____
Deanna Adkins, M.D.

Exhibit A

Adkins CV

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO ET AL., *Plaintiffs*, v. PATRICK MCCRORY ET AL., *Defendants*.	No. 1:16-cv-00236-TDS-JEP

EXPERT DECLARATION OF DEANNA ADKINS, M.D.

PRELIMINARY STATEMENT

1. I have been retained by counsel for Plaintiffs as an expert in connection with the above-captioned litigation. I have actual knowledge of the matters stated in this declaration. My professional background, experience, and publications are detailed in my curriculum vitae, a true and accurate copy which is attached as Exhibit A to this declaration. I received my medical degree from the Medical College of Georgia in 1997. I am currently the Fellowship Program Director of Pediatric Endocrinology at Duke University School of Medicine and the Director of the Duke Center for Child and Adolescent Gender Care.

2. I have been licensed to practice medicine in the state of North Carolina since 2001.

3. I have extensive experience working with children with endocrine disorders and I am an expert in the treatment of children with differences or disorders of sex development and gender dysphoria.

4. I am a member of the American Academy of Pediatrics, the North Carolina Pediatric Society, the Pediatric Endocrine Society, and The Endocrine Society. I am also a member of the World Professional Association for Transgender Health ("WPATH"), the leading association of medical and mental health professionals in the treatment of transgender individuals.

5. I am the founder of the Duke Center for Child and Adolescent Gender Care ("Gender Care Clinic"), which opened in 2015. I currently serve as the Director of the clinic. The Gender Care Clinic treats children, adolescents, and young adults between the ages of 7 and 22 who have gender dysphoria and/or differences or disorders of sex development. I have been caring for these individuals in my routine practice for many years prior to opening the clinic

6. I currently treat approximately 90 transgender and intersex young people from North Carolina and across the southeast at the Gender Care Clinic. I have treated approximately 150 transgender and intersex young people in my career.

7. As part of my practice, I stay familiar with the latest medical science and treatment protocols related to differences or disorders of sex development and gender dysphoria.

8. I am regularly called upon by colleagues to assist with the sex assignment of infants who cannot be classified as male or female at birth due to a range of variables in which sex-related characteristics are not completely aligned as male or female.

9. In preparing this declaration, I reviewed the materials listed in the attached Bibliography (Exhibit B). I may rely on those documents as additional support for my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein. The materials I have relied upon in preparing this declaration are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject.

10. In the past four years, I have testified as an expert at trial or deposition in the following matter: *United States v. Oversby, Brandon R.*, SPC, U.S. Army, B Company (Second Judicial Circuit, Fort Bragg Oct. 15, 2014).

11. I am being compensated at an hourly rate for actual time devoted, at the rate of $275 per hour. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

WHAT DOES IT MEAN TO BE TRANSGENDER OR INTERSEX?

12. A transgender individual is an individual who has a gender identity that differs from the person's birth-assigned sex.

13. Individuals who are intersex (also known as having "differences of sex development") have sex characteristics that are a mixture of those typically associated with both "male" and "female" sex designations.

14. At birth, infants are generally classified as male or female based on observation of their external genitalia. This classification becomes the person's birth-assigned sex but may not be the same as the person's gender identity.

15. A person's gender identity refers to a person's inner sense of belonging to a particular gender, such as male or female.

16. Gender identity is a deeply felt and core component of a person's identity.

17. Everyone has a gender identity.

18. Children usually become aware of their gender identity early in life.

19. Most people have a gender identity that aligns with the sex they were assigned at birth. However, for some people, their deeply felt, core identification and self-image as a particular gender does not align with the sex they were assigned at birth. This lack of alignment can create significant distress for individuals with this experience and can be felt in children as young as 2 years old.

20. Gender identity cannot be voluntarily altered including for individuals whose gender identity does not align with their birth-assigned sex.

21. Although research regarding the precise determinant of gender identity is still ongoing, evidence strongly suggests that gender identity is innate or fixed at a young age and that gender identity has a strong biological basis.

22. Both post-mortem and functional brain studies that have been done on the brains of individuals with gender dysphoria show that these individuals have brain structure, connectivity, and function that do not match their birth-assigned sex. Variations in these studies include overall brain size, intra- and inter-hemispheric connectivity (number of connections within each half of the brain and between halves of the brain). Differences have been shown in visuospatial and verbal fluency tasks and their activation patterns in the brain. Variations in cortical thickness in the sensory motor

areas, the white matter microstructure, and regional cerebral blood flow are also present in those with gender incongruence compared to those without.

HOW DO EXPERTS ASSIGN OR "DETERMINE" SEX?

23. From a medical perspective, the appropriate determinant of sex is gender identity.

24. For many people, gender identity aligns with the sex assigned to the individual at birth, so assigning sex based on sex-characteristics such as external genitalia is a proxy for assigning sex based on one's gender identity.

25. For transgender people and people with differences or disorders of sex development, however, there is not complete alignment among sex-related characteristics. Medicine and science require that where a more careful consideration of sex assignment is needed that it be based on gender identity rather than other sex characteristics.

26. In the past, when mental health and medical practitioners identified a disconnect between a person's gender identity and assigned sex at birth, treatment often focused on efforts to bring the individual's gender identity into alignment with the assigned sex. These practices were unsuccessful and incredibly harmful. Deep depression, psychosis, and suicide frequently resulted.

27. Medical science has since recognized that appropriate treatment for individuals who are transgender must focus on alleviating distress through supporting outward expressions of the person's gender identity and bringing the body into alignment with that identity to the extent deemed medically appropriate based on assessments

between individual patients and their medical and mental health providers. These treatments have been very successful.

28. In infants with sex-characteristics associated with both males and females, if an assignment is made that later conflicts with gender identity, then the only appropriate medical course is to re-assign or re-classify the individual's sex to align with gender identity.

29. It is harmful to make sex assignments based on characteristics other than gender identity. For example, in cases where surgery was done prior to the ability of the child to understand and express their gender identity, there has been significant distress in these individuals who then have to endure further surgeries to reverse the earlier treatments. It has become standard practice to wait until the gender identity is clear to make permanent surgical changes in these patients unless the changes are required to maintain the life or health of the child.

30. A person's gender identity (regardless of whether that identity matches other sex-related characteristics) is fixed, cannot be changed by others, and is not undermined or altered by the existence of other sex-related characteristics that do not align with it.

31. Today, medical and mental health care providers who specialize in the treatment of these individuals with gender dysphoria recognize that being transgender is a normal developmental variation.

32. For individuals with gender dysphoria and individuals with differences of sex development, gender identity is the only medically supported determinant of sex when sex assignment as male or female is necessary. It would be unethical and

extremely harmful to, for example, force a man with congenital adrenal hyperplasia, discussed below, to be classified as a woman simply because he was classified as female at birth. Likewise it would be unethical and extremely harmful to force a man who has gender dysphoria to be classified as female simply because he was assigned female at birth.

33. The cost of not assigning sex based on gender identity is dire. It is counter to medical science to use chromosomes, hormones, internal reproductive organs, external genitalia, or secondary sex characteristics to override gender identity for purposes of classifying someone as male or female. Gender identity does and should control when there is a need to classify an individual as a particular sex.

34. With the exception of some serious childhood cancers, gender dysphoria is the most fatal condition that I treat because of the harms that flow from not properly recognizing gender identity. Attempted suicide rates in the transgender community are over 40%, which is a risk of death that far exceeds most other medical conditions. The only treatment to avoid this serious harm is to recognize the gender identity of patients with gender dysphoria and differences of sex development.

WHAT IS "BIOLOGICAL SEX"?

35. Rather than assign sex based on gender identity, North Carolina, because of H.B. 2, now by law requires sex assignment in single-sex facilities within public buildings to be based on "biological sex," defined as "the physical condition of being male or female, which is stated on a person's birth certificate." In addition to being

counter to medical science as explained above, this definition and conception of "biological sex" is inherently flawed.

36. Although we generally label infants as "male" or "female" based on observing their external genitalia at birth, external genitalia do not account for the full spectrum of sex-related characteristics nor do they "determine" one's sex. Instead, sex-related characteristics include external genitalia, internal reproductive organs, gender identity, chromosomes, secondary sex characteristics and genes. These sex-related characteristics do not always align as completely male or completely female in a single individual. In fact, this occurs frequently enough that doctors use a scale called the Prader Scale to describe the genitalia on a spectrum from male to female.

37. Particularly for individuals with a difference or disorder of sex development, sex assignment at birth can involve the evaluation of the sex chromosomes, the external genitalia, the internal genitalia, hormonal levels, and sometimes, specific genes. There are also cases in which the appearance of the external genitalia can change at puberty as well as variations in the appearance of secondary sex characteristics that may signal that there is a difference in sex development in a person.

38. Many individuals, including individuals who have intersex traits or gender dysphoria, have biological, sex-related characteristics that are typically associated with both men and women. For example:

a. Individuals with Complete Androgen Insensitivity have 46-XY chromosomes, which are typically associated with males, but do not have the tissue receptors that respond to testosterone or other androgens. The body, therefore, does not develop external genitalia or secondary sex

characteristics typically associated with males but does, generally, have testes. At birth, based on the appearance of the external genitalia, individuals with Complete Androgen Insensitivity are generally assigned female.

b. Individuals with Klinefelter Syndrome have 47-XXY chromosomes and internal and external genitalia typically associated with males, however, the testicles in individuals diagnosed with Klinefelter Syndrome lose function over time. This may lead to breast development and infertility in addition to a number of other health issues.

c. Individuals with Turner Syndrome have 45-XO chromosomes, which means they have one less chromosome than everyone else. In utero, these individuals form sex characteristics typically associated with females including all internal structures but the ovaries begin to die soon after birth and the individuals are unable to make estrogen. Without treatment, individuals with Turner Syndrome do not develop secondary sex characteristics typically associated with women.

d. Individuals with Mosaic Turner Syndrome may have two different sets of chromosomes. They lose a sex chromosome in the early stages of embryonic development. The cells that are descendants of the cell that lost a chromosome will have Turner Syndrome features. The cells that are descendants of the cells that did not lose a sex chromosome will have features of the embryo's initial chromosomal sex. Sometimes this initial sex was XX and sometimes it is XY. When there are cells with XY

chromosomes present, the fetus produces testosterone and there is at least some testicular tissue. There may also be ovarian tissue. The external genitalia can then be a mixture of external genitalia typically associated with both males and females.

e. Individuals with congenital adrenal hyperplasia (CAH) are individuals who have XX chromosomes and external genitalia typically associated with women but are born with extra androgens, including testosterone, and from early in gestation, their brains are exposed to high levels of androgen. Despite frequently being assigned female at birth because of external genitalia, many individuals with this condition have a male gender identity.

f. Individuals with 5-alpha reductase are chromosomally XY but they have an enzyme deficiency that does not allow them to convert testosterone to dihydrotestosterone, the active form of testosterone. At birth, based on external genitalia, they are often assigned female, but their gender identity is almost always male as adults. Their external genitalia also changes at puberty because hormonal changes allow them to make more dihydrotestosterone which is needed for the physical changes that occur causing the development of external genitalia typically associated with males. During early development there is enough testosterone to affect the brain, which often results in a male gender identity.

g. Individuals with cloacal exstrophy have external genitalia at birth that is often split in half and most of their internal pelvic organs are located on

the outside of their bodies. They are born with both XX and XY chromosomes. However, because of the severity of the changes in their external genitalia, most of the XY patients had sex reassignment in infancy and were raised as females. Follow-up studies of these patients as adults show that almost all of the XY patients have a gender identity of male, despite their female sex assignment. This is powerful evidence that one's core gender identity cannot be changed.

h. A transgender person who transitioned at a young age and takes hormone blockers would not develop the secondary sex characteristics typically associated with their birth-assigned sex. This process suspends their pubertal development until the blockers are stopped or until gender affirming hormones are added.

i. A woman who is transgender may have XY chromosomes, undergo hormone treatment and surgery, and have external genitalia and secondary sex characteristics typically associated with women.

j. A man who is transgender may undergo hormone therapy, have hormone levels comparable to non-transgender men, and thus develop masculine secondary sex characteristics.

39. As the examples above underscore, "biological sex" as used in H.B. 2 is not an accurate or useful medical term with respect to individuals whose sex-related characteristics are not in alignment with each other. Rather, the medically appropriate determinant of sex is gender identity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 5/13, 2016.

By: _____
Deanna Adkins, M.D.

Expert Declaration of Deanna Adkins, M.D.

EXHIBIT A

CURRICULUM VITAE

Name: Deanna Wilson Adkins, MD

Primary Academic Appointment: Assistant Professor
Program Director Pediatric Endocrinology
Director Pediatric Diabetes and Endocrinology
Duke Children's Raleigh
Director Duke Center for Child and Adolescent Gender Care

Primary Academic Department: Department of Pediatrics
Division of Endocrinology

Present Academic Rank and Title : Assistant Professor

Date and Rank of First Duke Faculty Appointment: July 1, 2004 Clinical Associate

Medical Licensure: North Carolina License #:200100207
Date of License: March 15, 2001

Specialty Certification: Pediatrics current
Pediatric Endocrine current

Birth Place: Albany, GA, USA

Citizen of: United States

Education	Institution	Date	Degree
High School	Tift County High School	1988	Diploma
College	Georgia Institute of Technology	1993	B.S. Molecular Bio. And Genetics
Graduate or Professional School	Medical College of Georgia	1997	MD

Professional Training and Academic Career

Institution	Position/Title	Dates

University of North Carolina Hospitals, Chapel Hill, North Carolina	Pediatrics Resident	1997-2000
University of North Carolina Hospitals, Chapel Hill, North Carolina	Pediatric Endocrine Fellow	2000-2004
Duke University Medical Center, Durham, North Carolina	Clinical Associate/Medical Instructor	2004-2008
Duke University Medical Center, Durham, North Carolina	Assistant Clinical Professor	2008-present
Duke University Medical Center, Durham, North Carolina	Fellowship Program Director Pediatric Endocrinology	2008-2010
Duke University Medical Center, Durham, North Carolina	Associate Fellowship Program Director Pediatric Endocrinology	2010-2014
Duke University Medical Center, Durham, North Carolina	Fellowship Program Director Pediatric Endocrinology	2014-present
Duke University Medical Center, Durham, North Carolina	Director Duke Center for Child and Adolescent Gender Care	2015-present

Publications

Refereed Journals:

1. **Zeger MD**, **Adkins D**, **Fordham LA**, **White KE**, **Schoenau E**, **Rauch F**, **Loechner KJ**. Hypophosphatemic rickets in opsismodysplasia. J Pediatr Endocrinol Metab. 2007 Jan;20(1):79-86. PMID: 17315533
2. **Gordon Worley MD[1*], Blythe Crissman MS CGC[2], Emily Cadogan BS MSI[4], Christie Milleson BA[2], Deanna W. Adkins MD[3], Priya Kishnani MD[4]**; DOWN SYNDROME DISINTEGRATIVE DISORDER: NEW-ONSET AUTISTIC REGRESSION, DEMENTIA, AND INSOMNIA IN OLDER CHILDREN AND ADOLESCENTS WITH DOWN SYNDROME

Non-Refereed Publications:

b. Selected Abstracts

1. **Rohit Tejwani, Deanna Adkins, Brian J. Young, Muhammad H. Alkazemi, Steven Wolf, John S. Wiener, J. Todd Purves, and Jonathan C. Routh**; Contemporary Demographic and Treatment Patterns for Newborns Diagnosed with Disorders of Sex Development: Poster American Urological Association 2016
2. **Lydia Snyder, MD, Deanna Adkins, MD, Ali Calikoglu**, MD; Celiac Disease and Type 1 Diabetes: Evening of Scholarship UNC Chapel Hill 3/2015 poster
3. **Laura Page, MD; Benjamin Mouser, MD; Kelly Mason, MD; Richard L. Auten, MD; Deanna Adkins, MD** CHOLESTEROL SUPPLEMENTATION IN SMITH-LEMLI-OPITZ: A Case of Treatment During Neonatal Critical Illness; - poster 06/2014
4. **Kellee M. Miller[1], David M. Maahs[2], Deanna W. Adkins[3], Sureka Bollepalli[4], Larry A. Fox[5], Joanne M. Hathway[6], Andrea K. Steck[2], Roy W. Beck[1] and**

Maria J. Redondo[7] for the T1D Exchange Clinic Network; Twins Concordant for Type 1 Diabetes in the T1D Exchange -poster at ADA scientific sessions 6/2014

5. **Adkins, D.W. and Calikoglu, A.S.**: Delayed puberty due to isolated FSH deficiency in a male. Pediatric Research Suppl. 51: Abstract #690. page 118A
6. **Zeger, M.P.D., Adkins, D.W., White, K., Loechner, K.L.**: Opsismodysplasia and Hypophosphatemic Rickets. Pediatric Research Suppl.-from PAS 2005

c: Editorials, Position, and Background Papers

1. **Reviewer Hormone Research, lancet, NC Medical journal**
2. **Reviewer AAP National meeting COCIT submissions**
3. **Review International Journal of Pediatric Endocrinology**
4. **Pediatric OnCall Reviewer Panel**
5. **Journal of Pediatrics Reviewer**

Consultant Appointments:

North Carolina Newborn Screening Committee

Professional Awards and Special Recognitions:

ESPE Fellows Summer School, 2001
NIH Loan Repayment Program Recipient
Lawson Wilkins AstraZeneca Research Fellow,
2003-2004

Organizations and Participation:

American Academy of Pediatrics
-Council on Information Technology
----Reviewer AAP annual meeting presentations
-Section on Endocrinology

NC Pediatric Society

The Endocrine Society

WPATH-International transgender society

Pediatric Endocrine Society
--Education Committee
--web publication for pediatrician education
American Pediatric Program Directors

Human Rights Campaign
-pediatric and adolescent transgender advisory committee

American Diabetes Association

Name: Adkins, Deanna W Date: July 1, 2015

1. Course Director: ADA Camp Carolina Trails rotation for fellows and residents
2. 2014 Walk Recruitment Committee and Team Captain

Research:

Novo Nordisk Growth Hormone Registry-closed
Exubera inhaled insulin-trial ended
Type 1 Diabetes Exchange PI-ongoing
Celiac and Type 1 diabetes-collaboration with UNC Chapel Hill-complete publication in process
Metabolic Bone Disease in neonates
Service over education in residency and fellowship-start-up phase
EPA study for pediatric subspecialties-ongoing multicenter study pending publications
Oral Tolvaptan in hyponatremia clinical trial ongoing

Expert Declaration of Deanna Adkins, M.D.

EXHIBIT B

Bibliography

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Henriette A Delemarre-van de Waal and Peggy T Cohen-Kettenis; Clinical management of gender identity disorder in adolescents: a protocol on psychological and pediatric endocrinology Aspects; *European Journal of Endocrinology* (2006) 155 S131–S137.

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Wylie C. Hembree et al.; Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline; *J Clin Endocrinol Metab*, September 2009, 94 (9):3132–3154

Melissa Hines; Prenatal endocrine influences on sexual orientation and on sexually differentiated childhood behavior; *Frontiers in Neuroendocrinology* 32 (2011) 170–182.

Elseline Hoekzemaa, et al.**;** Regional volumes and spatial volumetric distribution of gray matter in the genderdysphoric *Psychoneuroendocrinology* (2015) 55, 59—71.

Pasterski V, Zucker KJ, Hindmarsh PC, Hughes IA, Acerini C, Spencer D, Neufeld S, Hines M.; *Arch Sex Behav.* Increased Cross-Gender Identification Independent of Gender Role Behavior in Girls with Congenital Adrenal Hyperplasia: Results from a Standardized Assessment of 4- to 11-Year-Old Children. 2015 Jul; 44 (5):1363-75.

Lee Pa, et al.; Global DSD Update Consortium; Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care**.** *Horm Res Paediatr.* 2016; 85(3):158-80.

Exhibit C

Exhibit C to Borelli Decl.: *Amici Curiae* Brief of Medical and Mental Health Organizations

No. 15-2056

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.G., by his next friend and mother, **DEIRDRE GRIMM**,

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division

BRIEF OF *AMICI CURIAE* AMERICAN ACADEMY OF PEDIATRICS, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN COLLEGE OF PHYSICIANS, AND 14 ADDITIONAL MEDICAL AND MENTAL HEALTH ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

FRAP RULE 26.1 and LOCAL RULE 26.1

Pursuant to FRAP 26.1 and Local Rule 26.1, American Academy of Pediatrics, the American Psychiatric Association, the American College of Physicians, the American Academy of Child and Adolescent Psychiatry, the American Academy of Family Physicians, the American Academy of Nursing, the American Academy of Physician Assistants, the American Medical Women's Association, the American Nurses Association, the American Psychoanalytic Association, the Association of Medical School Pediatric Department Chairs, the Endocrine Society, GLMA: Health Professionals Advancing LGBT Equality, Mental Health America, the National Association of Social Workers, the Society for Adolescent Health and Medicine, and the Society for Physician Assistants in Pediatrics, who are *amici curiae*, make the following disclosure:

1. No *amicus* is a publicly held corporation or other public entity.
2. No *amicus* has any parent corporations.
3. No publicly held corporation or other publicly held entity owns 10% or more of the stock of any of the *amici*.
4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.
5. This case does not arise out of a bankruptcy proceeding.

Dated: May 15, 2017

JENNER & BLOCK LLP

/s/ Scott B. Wilkens

Scott B. Wilkens

Counsel for Amici American Academy of Pediatrics, et al.

KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, PLLC

/s/ Aaron M. Panner

Aaron M. Panner

Counsel for Amicus Curiae American Psychiatric Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are 17 leading medical and mental health organizations: the American Academy of Pediatrics, the American Psychiatric Association, the American College of Physicians, the American Academy of Child and Adolescent Psychiatry, the American Academy of Family Physicians, the American Academy of Nursing, the American Academy of Physician Assistants, the American Medical Women's Association, the American Nurses Association, the American Psychoanalytic Association, the Association of Medical School Pediatric Department Chairs, the Endocrine Society, GLMA: Health Professionals Advancing LGBT Equality, Mental Health America, the National Association of Social Workers, the Society for Adolescent Health and Medicine, and the Society for Physician Assistants in Pediatrics.

Collectively, *amici* represent hundreds of thousands of physicians and mental health professionals, including specialists in pediatrics and adolescent care, family medicine, internal medicine, and endocrinology; over one hundred thousand physician assistants; and millions of nurses. *Amici* share a commitment to improving

[1] *Amici* hereby certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici* and their counsel contributed money intended to fund preparation or submission of the brief. The parties have consented to the filing of this brief.

the physical and mental health of all Americans—regardless of gender identity—and to informing and educating lawmakers, the judiciary, and the public regarding the public health impacts of laws and policies.

Amici submit this brief to inform the Court of the medical consensus regarding what it means to be transgender; the protocols for the treatment of gender dysphoria; and the predictable harms to the health and well-being of transgender adolescents when they are excluded from restrooms that match their gender identity.

SUMMARY OF ARGUMENT

Transgender individuals have a gender identity that is incongruent with the sex they were assigned at birth. The medical community's understanding of what it means to be transgender has advanced greatly over the past century. It is now understood that being transgender implies no impairment in a person's judgment, stability, or general social or vocational capabilities. According to recent estimates, approximately 1.4 million transgender adults live in the United States—0.6 percent of the adult population.

Many transgender individuals, like Plaintiff-Appellant, have a condition called gender dysphoria, which is characterized by clinically significant distress and impairment of function resulting from the incongruence between one's gender identity and the sex assigned at birth. The international medical consensus regarding treatment for gender dysphoria is to assist the patient to live in accordance with his or her gender identity, thus alleviating the distress. Treatment may include any or all of the following: counseling, social transition (through, *e.g.*, use of a new name and pronouns; new clothes and grooming; and use of single-sex facilities, including restrooms, most consistent with the individual's gender identity), and hormone therapy and surgical interventions.

Access to single-sex facilities that correspond to one's gender identity is a critical aspect of social transition and, thus, successful treatment of gender

dysphoria. By contrast, excluding transgender individuals from facilities consistent with their gender identity undermines their treatment; exposes them to stigma and discrimination; harms their physical health by causing them to avoid restroom use; and impairs their social and emotional development. Similarly, transgender students who must use separate facilities that other students are not required to use are at risk of being bullied and discriminated against and suffer psychological harm. The stigma and minority stress that result from discrimination can, in turn, lead to poorer health outcomes for transgender individuals.

ARGUMENT

I. What It Means To Be Transgender And To Suffer From Gender Dysphoria

Transgender individuals have a "gender identity"—a "deeply felt, inherent sense" of their gender—that is not aligned with the sex assigned to them at birth.[2] Transgender people differ from cisgender (*i.e.*, non-transgender) individuals, whose gender identity aligns with the sex assigned at birth.[3]

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[2] Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 834 (2015) **[hereinafter "Am. Psychol. Ass'n Guidelines"]**; *see also* David A. Levine & Comm. on Adolescence, Am. Acad. of Pediatrics Technical Report, *Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics e297, 298 (2013) **[hereinafter "AAP Technical Report"]**. Although most people have a gender identity that is male or female, some individuals have a gender identity that is "a blend of male or female[,] or an alternative gender." Am. Psychol. Ass'n Guidelines at 834.

[3] Am. Psychol. Ass'n Guidelines, *supra*, at 861.

Recent estimates suggest that approximately 1.4 million transgender adults live in the United States, or 0.6 percent of the adult population.[4] That said, "population estimates likely underreport the true number of [transgender] people."[5] People of all different races and ethnicities identify as transgender.[6] They live in every state, serve in our military, and raise children.[7] Gender identity is distinct from and does not predict sexual orientation; transgender people, like cisgender people, may identify as heterosexual, gay, lesbian, bisexual, or asexual.[8]

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[4] Andrew R. Flores et al., The Williams Inst., *How Many Adults Identify as Transgender in the United States?* 2 (2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

[5] Am. Psychol. Ass'n Guidelines, *supra*, at 832.

[6] *See* Halley P. Crissman et al., *Transgender Demographics*: *A Household Probability Sample of US Adults, 2014*, 107 Am. J. Pub. Health 213, 214-15 (2017); Andrew R. Flores et al., The Williams Inst., *Race and Ethnicity of Adults Who Identify as Transgender in the United States* 2 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf.

[7] Gary J. Gates & Jody L. Herman, The Williams Inst., *Transgender Military Service in the United States* (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf; Sandy E. James et al., Nat'l Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 2 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf; Rebecca L. Stotzer et al., The Williams Inst., *Transgender Parenting: A Review of Existing Research* (2014), http://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014.

[8] Am. Psychol. Ass'n Guidelines, *supra*, at 835-36; James et al., Nat'l Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, *supra*, at 246.

The medical profession's understanding of gender has advanced considerably over the past fifty years. Throughout much of the twentieth century, individuals who were not gender conforming were often viewed as "perverse or deviant."[9] Practices during that period tried to "correct" this perceived deviance by attempting to force transgender people to live in accordance with the sex assigned to them at birth. These efforts failed and caused significant harm to the individuals subjected to them.[10]

Much as our professions recognize that homosexuality is a normal form of human sexuality—and that stigmatizing gay people causes significant harm—we now recognize that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[11]

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[9] Am. Psychol. Ass'n, *Report of the APA Task Force on Gender Identity and Gender Variance* 26-27 (2008), https://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf **[hereinafter "Am. Psychol. Ass'n Task Force Report"]**.

[10] *Id.*; Substance Abuse and Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 13, 25 (2015), http://store.samhsa.gov/shin/content/SMA15-4928/SMA15-4928.pdf.

[11] Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (2012), https://psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2012-Transgender-Gender-Variant-Discrimination.pdf.

A. Gender Identity

"[G]ender identity" refers to a person's internal sense of being male, female, or another gender.[12] Every person has a gender identity,[13] which cannot be altered voluntarily[14] or ascertained immediately after birth.[15] Many children develop stability in their gender identity between ages 3 and 4.[16]

"[G]ender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics."[17] There are many individuals who depart from stereotypical male and female

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[12] Am. Psychol. Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (2014), http://www.apa.org/topics/lgbt/transgender.pdf.

[13] *See* Caitlin Ryan, Family Acceptance Project, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual, & Transgender Children*, 17 (2009), http://familyproject.sfsu.edu/sites/default/files/FAP_English%20Booklet_pst.pdf.

[14] Colt Meier & Julie Harris, Am. Psychol. Ass'n, *Fact Sheet: Gender Diversity and Transgender Identity in Children* 1, http://www.apadivisions.org/division-44/resources/advocacy/transgender-children.pdf; *see also* Am. Acad. of Pediatrics, *Gender Identity Development in Children* (2015), https://healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx.

[15] Am. Psychol. Ass'n Guidelines, *supra*, at 862.

[16] *Id.* at 841. "Although gender identity is usually established in childhood, individuals may become aware that their gender identity is not in full alignment with sex assigned at birth in childhood, adolescence, or adulthood." *Id.* at 836.

[17] Am. Psychol. Ass'n, *Answers to Your Questions About Transgender People, supra*, at 1.

appearances and roles, but who are not transgender.[18] Indeed, most people who express their gender in a non-stereotypical or non-conforming manner are or become comfortable with the sex they were assigned at birth.[19] In contrast, a transgender boy or transgender girl "consistently, persistently, and insistently" identifies as a gender different than the sex they were assigned at birth.[20]

Psychologists, psychiatrists, and neuroscientists are not certain why some people are transgender. Some research suggests there may be biological influences,[21] including, for example, exposure of natal females to elevated levels of

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[18] Ethan C. Cicero & Linda M. Wesp, *Supporting the Health and Well-Being of Transgender Students*, J. Sch. Nursing 1, 6 (2017).

[19] World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 5 (7th Version, 2011), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=4655 **[hereinafter "WPATH Standards of Care"]**.

[20] *See* Meier & Harris, *Fact Sheet: Gender Diversity and Transgender Identity in Children*, *supra*, at 1; *see also* Cicero & Wesp, *Supporting the Health and Well-Being of Transgender Students*, *supra*, at 6.

[21] *See* Am. Acad. of Pediatrics, *Gender Non-Conforming & Transgender Children* (2015), https://healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Non-Conforming-Transgender-Children.aspx; Peggy T. Cohen-Kettenis et al., *The Treatment of Adolescent Transsexuals: Changing Insights*, 5 J. Sexual Med. 1892, 1895 (2008).

testosterone in the womb.[22] Brain scans and neuroanatomical studies of transgender individuals may also support these biological explanations.[23]

B. Gender Dysphoria

Being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[24] However, many transgender individuals are diagnosed with gender dysphoria, a condition that is characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex.[25]

1. The Diagnostic Criteria And Seriousness Of Gender Dysphoria

The Diagnostic and Statistical Manual of Mental Disorders codifies the diagnostic criteria for gender dysphoria in adolescents and adults as follows: "A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two" out of six criteria, and "clinically significant distress or impairment in social, occupational, or

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[22] Arianne B. Dessens et al., *Gender Dysphoria and Gender Change in Chromosomal Females with Congenital Adrenal Hyperplasia*, 34 Arch. Sexual Behav. 389, 395 (2005).

[23] *See, e.g.*, Francine Russo, *Is There Something Unique About the Transgender Brain?* Sci. Am. (Jan. 1, 2016), https://www.scientificamerican.com/article/is-there-something-unique-about-the-transgender-brain/.

[24] Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals*, *supra*.

[25] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451-53 (5th ed. 2013) **[hereinafter "DSM-5"]**.

other important areas of functioning."[26] The six criteria include (1) "[a] marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics"; (2) "[a] strong desire to be rid of one's primary and/or secondary sex characteristics"; (3) "[a] strong desire for the primary and/or secondary sex characteristics of the other gender"; (4) "[a] strong desire to be of the other gender (or some alternative gender)"; (5) "[a] strong desire to be treated" as a gender different from one's assigned gender; and (6) "[a] strong conviction that one has the typical feelings and reactions" of a different gender.[27]

Transgender children often experience intensified gender dysphoria and worsening mental health as the hormonal and anatomical changes associated with puberty cause the body to develop in ways that diverge from the child's gender identity.[28] For instance, a deepening voice for male-assigned individuals or the growth of breasts and the beginning of a menstrual cycle for female-assigned individuals can cause severe distress.

If untreated, gender dysphoria can cause debilitating distress, depression, impairment of function, substance use, self-mutilation to alter one's genitals or

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[26] *Id.*

[27] *Id.* at 452.

[28] Am. Psychol. Ass'n Task Force Report, *supra*, at 45; Substance Abuse and Mental Health Servs. Admin., *Ending Conversion Therapy*, *supra*, at 3.

secondary sex characteristics, other self-injurious behaviors, and suicide.[29] Transgender individuals also are frequently subjected to prejudice and discrimination in multiple areas of their lives, which exacerbates these negative health outcomes.[30]

2. The Accepted Treatment Protocols For Gender Dysphoria

Until the middle of the twentieth century, most mental health practitioners treated transgender people by attempting to make the patient's gender identity consistent with the sex assigned at birth.[31] There is no evidence that these methods alleviate gender dysphoria or that they can prevent someone from being transgender.[32] To the contrary, they can "often result in substantial psychological

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[29] *See, e.g.*, DSM-5, *supra*, at 455, 458; Stephanie A. Brill & Rachel Pepper, *The Transgender Child: A Handbook for Families and Professionals* 202 (2008) (discussing risk of self-mutilation).

[30] Michael L. Hendricks & Rylan J. Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 Prof'l Psychol.: Research & Practice 460 (2012); Jessica Xavier et al, Va. Dep't of Health, *The Health, Health-Related Needs, and Lifecourse Experiences of Transgender Virginians* (2007), http://www.vdh.virginia.gov/content/uploads/sites/10/2016/01/THISFINALREPORTVol1.pdf.

[31] Am. Psychol. Ass'n Guidelines, *supra*, at 835; Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 Arch. Sexual Behav. 427, 436-40 (2010).

[32] Substance Abuse and Mental Health Servs. Admin., *Ending Conversion Therapy*, *supra*, at 26; Jack Drescher, *Controversies in Gender Diagnoses*, 1 LGBT Health 9, 12 (2013).

pain by reinforcing damaging internalized attitudes,"[33] and can damage family relationships and individual functioning by increasing feelings of shame.[34]

In the last few decades, transgender people and those suffering from gender dysphoria have gained widespread access to gender-affirming psychological and medical support.[35] For over 30 years, the generally-accepted treatment protocols for gender dysphoria[36] have aimed at alleviating the distress associated with the incongruence between gender identity and birth-assigned sex.[37] These protocols are laid out in the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (Version 7)* developed by the World Professional Association for Transgender Health ("WPATH").[38] Many of the major medical and mental health groups in the United States recognize the WPATH Standards of Care

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[33] Am. Psychoanalytic Ass'n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression* (2012), http://www.apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender.

[34] Darryl B. Hill et al., *An Affirmative Intervention for Families with Gender Variant Children: Parental Ratings of Child Mental Health and Gender*, 36 J. Sex & Marital Therapy 6, 10 (2010); Robert Wallace & Hershel Russell, *Attachment and Shame in Gender-Nonconforming Children and Their Families: Toward a Theoretical Framework for Evaluating Clinical Interventions*, 14 Int'l J. Transgenderism 113, 119-20 (2013).

[35] Am. Psychol. Ass'n Guidelines, *supra*, at 835; WPATH Standards of Care, *supra*, at 8-9.

[36] Earlier versions of the DSM used different terminology, *e.g.*, gender identity disorder, to refer to this condition. Am. Psychol. Ass'n Guidelines, *supra*, at 861.

[37] Am. Med. Ass'n, Comm. on Human Sexuality, *Human Sexuality* 38 (1972).

[38] WPATH Standards of Care, *supra*.

as representing the consensus of the medical and mental health community regarding the appropriate treatment for gender dysphoria.[39]

The recommended treatment for transgender people with gender dysphoria includes assessment, counseling, and, as appropriate, social transition, puberty-blocking drug treatment, hormone therapy, and surgical interventions to bring the body into alignment with one's gender identity.[40] However, each patient

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[39] Am. Med. Ass'n House of Delegates, Resolution 122 (A-08), *Removing Financial Barriers to Care for Transgender Patients* 1 (2008); Am. Psychol. Ass'n Task Force Report, *supra*, at 32; AAP Technical Report, *supra*, at 307-08.

[40] Am. Psychol. Ass'n Task Force Report, *supra*, at 32-39; Am. Psychol. Ass'n & Nat'l Ass'n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015), http://www.apa.org/about/policy/orientation-diversity.aspx **[hereinafter "APA/NASP Resolution"]**; Am. Psychiatric Ass'n Workgroup on Treatment of Gender Dysphoria, *Assessment and Treatment of Gender Dysphoria and Gender Variant Patients: A Primer for Psychiatrists* 16-18 (2016); AAP Technical Report, *supra*, at 307-09. Some clinicians still offer versions of "reparative" or "conversion" therapy based on the idea that being transgender is a mental disorder. However, all of the leading medical professional organizations have explicitly rejected such treatments. *See* Am. Med. Ass'n, Policy Number H-160.991, *Health Care Needs of Lesbian, Gay, Bisexual, and Transgender Populations* (rev. 2016), https://searchpf.ama-assn.org/SearchML/searchDetails.action?uri=%2FAMA Doc%2FHOD.xml-0-805.xml; Am. Sch. Counselor Ass'n, *The School Counselor and LGBTQ Youth* (2016), https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_LGBTQ.pdf; Hillary Daniel et al., *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper from the American College of Physicians*, 163 Annals Internal Med. 135, 136 (2015); AAP Technical Report, *supra*, at 301; Am. Psychoanalytic Ass'n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression*, *supra*.

requires an individualized treatment plan that accounts for the patient's specific needs.[41]

Social transition—*i.e.*, living one's life fully in accordance with one's gender identity—is often a critically important part of treatment. This typically includes publicly identifying oneself as that gender; adopting a new name; using different pronouns; grooming and dressing in a manner typically associated with one's gender identity; and using restrooms and other single-sex facilities consistent with that identity.[42] Transgender children who live in accordance with their gender identity in all aspects of life have lower rates of depression compared to transgender children who have not socially transitioned.[43]

For some adults and adolescents, hormone treatment to feminize or masculinize the body may be medically necessary to treat their gender dysphoria.[44]

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[41] Am. Psychol. Ass'n Task Force Report, *supra*, at 32.

[42] AAP Technical Report, *supra*, at 308; Am. Psychol. Ass'n Guidelines, *supra*, at 840.

[43] Lily Durwood et al., *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56 J. Am. Acad. Child & Adolescent Psychiatry 116 (2017); Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 Pediatrics 1 (2016).

[44] Am. Med. Ass'n House of Delegates, Resolution 122 (A-08), *Removing Financial Barriers to Care for Transgender Patients*, *supra*, at 1; Am. Psychol. Ass'n Guidelines, *supra*, at 861, 862; Madeline B. Deutsch, Center of Excellence for Transgender Health, University of California, San Francisco, *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People* 23 (2d ed. 2016); WPATH Standards of Care, *supra*, at 33, 54.

Both the Endocrine Society and the Lawson Wilkins Pediatric Endocrine Society consider these treatments to be the standard of care for gender dysphoria.[45] A transgender boy undergoing hormone treatment, for example, will be exposed to the same levels of testosterone as other boys who go through male puberty; and just as they would in any other boy, these hormones will affect most of his major body systems.[46] Hormone treatment alters the appearance of the patient's genitals and produces secondary sex characteristics such as increased muscle mass, increased facial hair, and a deepening of the voice in transgender boys and men, and breast growth and decreased muscle mass in transgender girls and women.[47] For children experiencing the onset of puberty, treatment may include medication to prevent further progression of puberty ("puberty blockers").[48] This fully reversible treatment allows children with gender dysphoria to delay the development of secondary sex characteristics that do not match their gender identity, giving them

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[45] *See* Wylie C. Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. Clinical Endocrinology & Metabolism 3132, 3132 (2009); *see also* Alessandra D. Fisher et al., *Cross-Sex Hormone Treatment and Psychobiological Changes in Transsexual Persons: Two-Year Follow-Up Data*, 101 J. Clinical Endocrinology & Metabolism 4260 (2016).

[46] Hembree et al., *Endocrine Treatment of Transsexual Persons*, *supra*, at 3132-33; *see also* Brill & Pepper, *The Transgender Child*, *supra*, at 217.

[47] Hembree et al., *Endocrine Treatment of Transsexual Persons*, *supra*, at 3140-45.

[48] *Id.* at 3138.

additional time to decide whether hormone treatment to feminize or masculinize the body is appropriate.[49]

Surgical interventions may also be an appropriate and medically necessary treatment for some patients. These procedures could include chest reconstruction surgery for transgender men, breast augmentation (*i.e.* implants) for transgender women, or genital surgery.[50] Studies show these procedures are effective in reducing gender dysphoria and improving mental health.[51] Because these surgical procedures are largely irreversible, some are recommended only for transgender individuals who have reached the age of legal majority.[52]

Ultimately—regardless of the particular treatments required for a specific individual and when such treatment begins—the goal is for individuals with gender dysphoria to experience "identity integration," where "being transgender is no

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[49] *Id.* at 3133, 3140-41; Am. Psychol. Ass'n Guidelines, *supra*, at 842; WPATH Standards of Care, *supra*, at 18-20.

[50] Hembree et al., *Endocrine Treatment of Transsexual Persons*, *supra*, at 3148-49; *see also* WPATH Standards of Care, *supra*, at 57-58.

[51] William Byne et al., *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, 41 Arch. Sexual Behav. 759, 778-79 (2012); Annelou L.C. de Vries, *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134 Pediatrics 696 (2014).

[52] WPATH Standards of Care, *supra*, at 21.

longer the most important signifier of one's identity" and the individual can refocus on their relationships, school, jobs, and other life activities.[53]

Some who oppose the medical protocols for gender dysphoria—including Dr. Paul R. McHugh et al.—claim that most gender dysphoric children "desist" and ultimately have a gender identity that matches their sex assigned at birth.[54] In fact, studies indicate that children who actually are transgender—those who persistently, consistently, and insistently identify as a gender other than the sex assigned at birth (as distinguished from gender non-conforming children generally)—are unlikely to desist.[55] Moreover, McHugh et al. conflate the vastly different experiences of pre-

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[53] Walter Bockting & Eli Coleman, *Developmental Stages of the Transgender Coming-Out Process: Toward an Integrated Identity*, *in Principles of Transgender Medicine and Surgery* 137, 153 (Randi Ettner, Stan Monstrey & Eli Coleman eds., 2d ed. 2016).

[54] Brief of *Amici Curiae* Dr. Paul R. McHugh, M.D., et al. in Support of Petitioner at 12, *Gloucester County School Board v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 219355.

[55] *See, e.g.*, Am. Acad. of Pediatrics, *Gender Non-Conforming & Transgender Children*, *supra* ("Research suggest that children who are persistent, consistent, and insistent about their gender identity are the ones who are most likely to become transgender adults."); Annelou L.C. de Vries et al., *Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow-up Study*, 8 J. Sexual Med. 2276, 2281 (2011); Thomas D. Steensma et al., *Desisting and Persisting Gender Dysphoria after Childhood: A Qualitative Follow-up Study*, 16 Clinical Child Psychol. & Psychiatry 499, 504, 505 (2011); Madeleine S.C. Wallien & Peggy T. Cohen-Kettenis, *Psychosexual Outcome of Gender-Dysphoric Children*, 47 J. Am. Acad. Child & Adolescent Psychiatry 1413, 1420-21 (2008). The research relied on by opponents of the standard protocols tracked broad groups of prepubertal children who were referred to clinics for gender expansive non-conforming behavior, and counted any child who did not return for follow-up treatment as someone who desisted, thereby running "a strong risk of inflating estimates of the

pubertal children and adolescents.[56] There is no evidence that adolescents, like Plaintiff-Appellant, whose gender identities do not match their birth-assigned sex, are likely to desist.[57] For these reasons, among others, nearly 600 academics and clinicians with expertise in gender development have challenged Dr. McHugh's work.[58]

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number of youth" who desist. Am. Psychol. Ass'n Guidelines, *supra*, at 842; *see also* Thomas D. Steensma & Peggy Cohen-Kettenis, *More Than Two Development Pathways in Children with Gender Dysphoria?*, 54 J. Am. Acad. Child & Adolescent Psychiatry 147, 147 (2015).

[56] The McHugh et al. brief filed in the Supreme Court relies substantially on a publication of the American College of Pediatricians that Dr. McHugh co-authored, and an article written by the College's president, Michelle Cretella. The American College of Pediatricians "does not acknowledge the scientific and medical evidence regarding sexual orientation, sexual identity, sexual health, or effective health education." Am. Acad. of Pediatrics, *Just the Facts About Sexual Orientation and Youth* (Apr. 13, 2010), https://web.archive.org/web/20101119095249/http://aap.org/featured/sexualorientation.htm (alerting school administrators to a campaign by the College, "which is in no way affiliated with the American Academy of Pediatrics," and encouraging school officials, parents, and youth to "utilize the AAP developed and endorsed resources on this issue for reliable, sound, scientific, medical advice").

[57] De Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, *supra*; Am. Psychol. Ass'n Task Force Report, *supra*, at 48; Byne et al., *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, *supra*, at 763 ("GID that persists into adolescence is more likely to persist into adulthood."); Substance Abuse and Mental Health Servs. Admin., *Ending Conversion Therapy*, *supra*, at 3.

[58] Letter dated Mar. 22, 2017, https://medschool.vanderbilt.edu/lgbti/files/lgbti/publication_files/ExpertLGBTIConcensusLetter.pdf; *see also* Chris Beyrer, Robert W. Blum, & Tonia C. Poteat, Opinion, *Hopkins Faculty Disavow 'Troubling' Report on Gender and Sexuality*, Balt. Sun, Sept. 28, 2016, http://www.baltimoresun.com/news/opinion/oped/bs-ed-lgbtq-hopkins-20160928-story.html.

Thus, while there are those like McHugh et al. who oppose the medical consensus regarding gender dysphoria—as there are outliers in every area of medicine—the protocols discussed above are well-established in the fields of medicine and psychology.

II. Excluding Transgender Individuals From Facilities Consistent With Their Gender Identity Endangers Their Health, Safety, And Well-Being.

Transgender students should have access to the sex-segregated facilities, activities, and programs that are *consistent* with their gender identity—including but not limited to bathrooms, locker rooms, sports teams, and classroom activities.[59] Evidence confirms that policies excluding transgender individuals from facilities consistent with their gender identity (hereinafter, "exclusionary policies") have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals. And while schools like Gloucester High School often provide private restrooms for any student who seeks greater privacy for any reason, forcing transgender students to use those separate facilities sends a stigmatizing message that can have a lasting and damaging impact on the health and well-being of the young person.

In contrast, there is no evidence of any harm to the physical or mental health of other children and adolescents when transgender students use facilities that match

[59] APA/NASP Resolution, *supra*, at 9.

their gender identity. *Amici* are not hearing from their members about students experiencing any such harm—even though numerous states and school districts have policies allowing transgender individuals to use restrooms that match their gender identity.

A. Exclusionary Policies Exacerbate Gender Dysphoria And Are Contrary To Widely Accepted, Evidence-Based Treatment Protocols.

For transgender individuals, being treated differently from other men and women can cause tremendous pain and harm.[60] Indeed, exclusionary polices that force transgender people to disregard or deny their gender identity every time they must use a restroom disrupt medically appropriate treatment protocols. While those protocols provide that transgender individuals should live all aspects of their life in the gender with which they identify, *see supra* at 11-19, exclusionary policies require transgender individuals to live one facet of their lives in contradiction with their gender identity. As a result, exclusionary policies threaten to 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" that many transgender individuals face.[61] Those risks are already all too serious: in a comprehensive survey of over 27,000 transgender individuals, 40

[60] *See, e.g.*, Sam Winter et al., *Transgender People: Health at the Margins of Society*, 388 Lancet 390, 394 (2016).

[61] APA/NASP Resolution, *supra*, at 4.

percent reported a suicide attempt—a rate *nine times* that reported by the general U.S. population.[62]

B. Exclusionary Policies Expose Transgender Individuals To Harassment And Abuse.

Exclusionary policies expose transgender individuals to harassment and abuse by forcing them to occupy gender-segregated spaces where their presence may be met with hostility, harassment, and abuse. For example, transgender men are visually recognized as men by other individuals; the presence of a transgender man in a women's restroom would be just as alarming as the presence of a cisgender man in the same women's restroom.

Exclusionary policies thus force transgender individuals to disclose their transgender status, because it is only transgender individuals who must use facilities that are incongruent with their gender identity and how they live and are recognized in the world. Because some children will have transitioned before they arrive in a particular school, exclusionary policies may be the only way that they are forcibly "outed" to their peers as transgender.

Such compelled disclosure of one's transgender status is harmful for at least two reasons. First, control over the circumstances in which a person may choose to disclose being transgender is fundamental to the development of individuality and

[62] James et al., Nat'l Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, *supra*, at 114.

autonomy.[63] Exclusionary policies rob transgender individuals of the personal choice regarding whether and when to reveal their transgender status. Disclosure of one's status as transgender is often anxiety-inducing and fraught; it is critical to a person's sense of safety, privacy, and dignity to have control over when and how that information is shared.

Second, such compelled disclosure exposes transgender individuals to the risk of harassment or abuse. In a 2013 survey, 68 percent of transgender respondents reported experiencing at least one instance of verbal harassment, and 9 percent reported suffering at least one instance of physical assault in gender-segregated bathrooms.[64]

These harms affect youth and adults alike. "[M]any gender and sexual orientation diverse children and adolescents experience harassment, bullying, and physical violence in school environments."[65] Because unwanted disclosure may cause such significant harm, the American Academy of Pediatrics' guidance states

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[63] Am. Acad. of Pediatrics, *American Academy of Pediatrics Opposes Legislation that Discriminates Against Transgender Children* (Apr. 18, 2016), https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPOpposesLegislationAgainstTransgenderChildren.aspx.

[64] Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 73 (2013).

[65] APA/NASP Resolution, *supra*, at 5; *see* Joseph G. Kosciw et al., GLSEN, *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth In Our Nation's Schools* 12 (2016).

that care should be confidential, and it is not the role of the pediatrician to inform parents/guardians about a patient's sexual identity or behavior as doing so could expose the patient to harm.[66] Indeed, the American Academy of Pediatrics announced its opposition to exclusionary policies by noting that they undermine children's ability "to feel safe where they live and where they learn."[67]

C. Exclusionary Policies Exacerbate Stigma And Discrimination, Leading To Negative Health Outcomes.

It is well documented that transgender individuals experience widespread prejudice and discrimination, and that this discrimination frequently takes the form of violence, harassment, or other abuse.[68] For example, in a Virginia survey of transgender individuals, 50 percent of participants reported that they had experienced discrimination in healthcare, employment, or housing, and many individuals had experienced discrimination in more than one area.[69]

Exclusionary policies perpetuate such stigma and discrimination, both by forcing transgender individuals to disclose their status, and by marking transgender

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[66] AAP Technical Report, *supra*, at 305.

[67] Am. Acad. of Pediatrics, *American Academy of Pediatrics Opposes Legislation that Discriminates Against Transgender Children*, *supra*.

[68] Jamie M. Grant et al., Nat'l Center for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 2-8 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

[69] Judith Bradford et al., *Experiences of Transgender-Related Discrimination and Implications for Health: Results from the Virginia Transgender Health Initiative Study*, 103 Am. J. Pub. Health 1820, 1825 (2013).

individuals as "others" who are unfit to use the restrooms used by everyone else. Such policies inherently convey the state's judgment that transgender individuals are different and deserve inferior treatment.

Research increasingly shows that stigma and discrimination can have deleterious health consequences,[70] including striking effects on the daily functioning and emotional and physical health of transgender persons.[71] A 2012 study of transgender adults found a rate of hypertension twice that in the general population, which it attributed to the known effects of emotions on cardiovascular health.[72] Another study concluded that "living in states with discriminatory policies . . . was associated with a statistically significant increase in the number of psychiatric disorder diagnoses."[73] And a third study demonstrated that past school victimization may result in greater risk for post-traumatic stress disorder, depression, anxiety, and

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[70] *See generally* Am. Psychol. Ass'n, *Stress in America: The Impact of Discrimination* (2016), https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf.

[71] *See, e.g.,* Am. Psychoanalytic Ass'n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression*, *supra* ("bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health").

[72] Randi Ettner et al., *Secrecy and the Pathophysiology of Hypertension*, Int'l J. Family Med. (2012).

[73] Bradford et al., *Experiences of Transgender-Related Discrimination and Implications for Health*, *supra*, at 1827.

suicidality.[74] As the American Psychological Association has concluded, "the notable burden of stigma and discrimination affects minority persons' health and well-being and generates health disparities."[75] There is thus every reason to anticipate that exclusionary policies will negatively affect the health of transgender individuals.

D. Exclusionary Policies Lead To Avoidance Of Restroom Use, Harming Physical Health.

Exclusionary policies have more immediate health effects as well. Though most of us take it for granted, all individuals require regular access to a restroom. Exclusionary policies that preclude transgender individuals from using restrooms consistent with their gender identity put transgender individuals to a difficult choice: (1) violate the policy and face potential disciplinary consequences; (2) use the restroom inconsistent with their gender identity or "special" single-user restrooms, which undermines their health care needs and risks discrimination or harassment; or (3) attempt not to use the restroom at all.

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[74] Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 Developmental Psychology 1580, 1581 (2010).

[75] APA/NASP Resolution, *supra*, at 3-4; *see also* Institute of Medicine Committee on LGBT Issues and Research Gaps and Opportunities, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 13 (2011) (noting that "prejudice, discrimination, and violence" underlie the "health disparities" between transgender and cisgender populations).

This difficult choice produces heightened anxiety and distress around restroom use, which may make it difficult for transgender individuals to concentrate or focus at school or work and potentially cause them to eschew social activities or everyday tasks.[76] At least one study of transgender college students associated being denied access to restrooms consistent with one's gender identity to an increase in suicidality.[77]

Studies also show that it is common for transgender students to avoid using restrooms.[78] But that avoidance can have medical consequences, including recurrent urinary tract infections and constipation, as well as the possibility of more serious health complications, including hematuria (blood in the urine), chronic kidney disease or insufficiency, urolithiasis (stones in the kidney, bladder, or urethra), infertility, and cancer.[79]

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[76] Herman, *Gendered Restrooms and Minority Stress*, *supra*, at 75.

[77] Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. Homosexuality 1378, 1388-89 (2016).

[78] Am. Psychol. Ass'n Guidelines, *supra*, at 840.

[79] *See, e.g.*, Herman, *Gendered Restrooms and Minority Stress*, *supra* at 75 (surveying of transgender and gender non-conforming people in Washington D.C., and finding that 54% of respondents reported a "physical problem from trying to avoid using public bathrooms" including dehydration, urinary tract infections, kidney infection, and other kidney-related problems); James et al., Nat'l Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, *supra*, at 246; Anas I. Ghousheh et al., *Advanced Transitional Cell Carcinoma of the Bladder in a 16-Year-Old Girl with Hinman Syndrome*, 80 Urology 1141 (2012).

Some transgender students experiencing fear and anxiety about restroom usage may attempt to dehydrate themselves so that they will need to urinate less frequently.[80] Chronic dehydration has been linked to a variety of conditions, including urinary tract infections, kidney stones, blood clots, kidney disease, heart disease, and colon and bladder cancer.[81]

These negative outcomes are not alleviated by forcing students into separate single-user restrooms. Being required to use separate facilities may force disclosure of one's transgender status and cause anxiety and fear related to being singled out and separated from peers. Additionally, single-user facilities are generally less available and more inconvenient, causing people to further avoid restroom use or disrupt their schedules to go to the restroom. Separate restrooms thus do not alleviate the anxiety, fear, or negative health consequences that result from exclusionary bathroom policies.

E. Exclusionary Policies Harm Adolescent Social And Emotional Development—With Lifelong Effects.

Finally, exclusionary policies have a particularly deleterious effect on the social and emotional development of children and adolescents. Discrimination and harassment of children and adolescents in their formative years may have effects that

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[80] Herman, *Gendered Restrooms and Minority Stress*, *supra*, at 75.

[81] Lawrence E. Armstrong, *Challenges of Linking Chronic Dehydration and Fluid Consumption to Health Outcomes*, 70 Nutrition Rev. S121, 122 (2012).

linger long *after* they leave the school environment. Unsurprisingly, unwelcoming school environments produce particularly poor educational outcomes for transgender individuals.[82] Poorer educational outcomes, standing alone, may lead to lower lifetime earnings and an increased likelihood of poorer health outcomes later in life.[83]

Moreover, and as already discussed, exclusionary policies may produce and compound the stigma and discrimination that transgender children and adolescents face in the school environment. That stigma and discrimination, in turn, is associated with an increased risk of post-traumatic stress disorder, depression, anxiety, and suicidality in subsequent years.[84]

Conversely, evidence demonstrates that a safe and welcoming school environment may promote positive social and emotional development and health

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[82] *See* APA/NASP Resolution, *supra*, at 6; Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* (2009).

[83] *See, e.g.*, Emily B. Zimmerman et al., U.S. Dep't of Health and Human Servs. Agency for Healthcare Research & Quality, *Understanding the Relationship Between Education and Health: A Review of the Evidence and an Examination of Community Perspectives* (2015), https://www.ahrq.gov/professionals/education/curriculum-tools/population-health/zimmerman.html.

[84] Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth*, *supra*, at 1581; *see also* APA/NASP Resolution, *supra*, at 6.

outcomes. Numerous studies show that safer school environments lead to *reduced* rates of depression, suicidality, or other negative health outcomes.[85]

* * *

With appropriate support—including safe and supportive schools—transgender youth can become happy and productive adults who contribute much to our society. By making schools into places of stress and conflict rather than welcoming spaces, exclusionary policies worsen stigma and discrimination against transgender students, causing myriad harms to their health, safety, and overall well-being.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the judgment below.

[85] AAP Technical Report, *supra*, at 301, 302, 304-05; *see, e.g.*, Marla E. Eisenberg et al., *Suicidality Among Gay, Lesbian and Bisexual Youth: The Role of Protective Factors*, 39 J. Adolescent Health 662 (2006); Stephen T. Russell et al., *Youth Empowerment and High School Gay-Straight Alliances*, 38 J. Youth Adolescence 891 (2009).

Dated: May 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limits because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments), this brief contains 6,425 words, based on the "Word Count" feature of Microsoft Word 2016.

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Dated: May 15, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Exhibit D

Exhibit D to Borelli Decl.: *AMA takes several actions supporting transgender patients*, AMA News (June 12, 2017)

AMA NEWS

AMA takes several actions supporting transgender patients

JUN 12, 2017

Robert Nagler Miller
Contributing Writer
AMA Wire

Acknowledging that individuals' gender and sexual identities do not always fit neatly into binary paradigms, delegates to the 2017 AMA Annual Meeting in Chicago took several actions that support broadening how gender identity is defined within medicine and how transgender patients are treated by society.

The AMA House of Delegates (HOD) did so in an attempt to enhance care for the thousands of Americans who identify as transgender, as well as for many others who do not identify with one particular gender.

Delegates directed the AMA to work with other appropriate organizations to "inform and educate the medical community and the public on the medical spectrum of gender identity." The authors of the adopted resolution wrote that gender is "incompletely understood as a binary selection" because gender, gender

identity, sexual orientation, and genotypic and phenotypic sex are not always aligned.

The HOD also adopted policy opposing any efforts that would prevent a transgender person from "accessing basic human services and public facilities in line with one's gender identity." Transgender people who live in states with discriminatory policies have "statistically significant increases in mental health and psychiatric diagnoses," according to the resolution delegates adopted.

"Prejudice and discrimination affect transgender individuals in many ways throughout their daily lives, often in the form of physical or verbal abuse or bullying," said Jesse M. Ehrenfeld, MD, MPH, member of the AMA Board of Trustees.

"Laws and policies that restrict the use of public facilities based on biological gender can have immediate and lingering physical consequences, as well as severe mental health repercussions," Dr. Ehrenfeld added. To protect the public health and to promote social equality and safe access to public facilities and services, the American Medical Association is opposed to policies that prevent transgender individuals from accessing basic human services and public facilities in line with their gender identity."

In another action, delegates called upon the AMA to work with the Food and Drug Administration to establish a gender-neutral patient categorization in risk evaluation and mitigation strategies (REMS). The idea is to take the focus away from gender identity and place

it on reproductive potential. That is because there are patients who identify as male who may be taking medication that puts them at risk for damage to their biologically female reproductive systems.

Delegates also called for future AMA meetings to take place, whenever possible, only in those counties, cities and states that have nondiscriminatory policies.

Read more news coverage from the 2017 AMA Annual Meeting.

House of Delegates Health Disparities

Medical Ethics

Submitted by renejaxbooks on Monday, June 12, 2017 - 23:59

AMA dear lord what is wrong with you all? Where was your support of transgender patients when Hirschfeld operated on Einer Wegener and killed him with that experimental surgery? Where was your support when Harry Benjamin began giving female hormones to his 1st male patient without 1st understanding the causative factors of the condition? Where was your support and concern for transsexual patients when John Money destroyed the lives of the Reiner Twins and family? Where was your support when Stoller separated Gender out from sex and not a single one of your members questioned or challenged his theory? And now you want to stand up and show your support with this linguistic tap dancing BS that

"males can be pregnant and show just how sensitivity the medical profession is to the patient. OMG. If the lot of you want to show your support for patients who are confused about their sex and sex role, then find out what is the cause of it. Then do real research, real scientific, down in the weeds research and find out if all these pills and plastic surgery and sexual mutilation is the right treatment for the ailment. It's been a hundred years of brutal, deadly and Nazi like experimentation and none of you know the reason why I and thousands like me are confused with our sex and social roles. Now you doctors want to show your support by playing this linguistic mind game by using neutral gender pronouns. Keep your politically correct show of support and give me cold hard irrefutable science to back up your medical treatments. Then and only then I will applaud your support.

Submitted by boyd2345 on Thursday, June 15, 2017 - 14:57

America sees that the AMA is a group of doctors that states that "transgender" is a mental disorder, but should be accepted and supported by everyone. The act of forcing everyone to accept the actions of transgender people against their will, takes away the rights and privileges given unto other people. North Carolina past House Bill 142 that forces everyone and place to allow everyone to use the restrooms, showers and locker rooms of the sex in which they identify with and against the will of the opposite sex with them in these places. This action effects the rights, mental comparison and actions other people will take against these actions. The First Amendment states in the US Constitution "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." This means that Congress, judges and the AMA can not take any action that takes away the rights of other people to exercise their religious beliefs and freedom of speech. This also means that everyone has the right to exercise their belief that the actions of transgenders to be wrong and that they believe their actions are hurting America with their right to freedom of speech. NC's House Bill 142 has students in public schools using the restrooms, showers and locker rooms of the gender they identify with against the will of other students and their parents. The acts of transgenders are welcome in public schools against the will of other people, but followers of Christianity is denied in every public school. Does the AMA not believe that all transgender students should attend and learn from private schools like the government has forced Christians to do? Does the AMA believe that transgenders should have their own restrooms and not be forced upon people of the opposite sex against their will? NC has had men stating they are transgender, enter women's restrooms and take pictures of females using the restroom. The police said these men did nothing wrong. How far should these actions of supporting transgenders continue before laws are past against it, placing restrictions on transgender's actions. The AMA and doctors supporting these actions of the transgenders, can be sued by other citizens for malpractice for the amount of money they believe their malpractice has hurt them. Think of the billions of dollars that AMA and doctors are ready to be paying for their support of transgender's actions. Is the cost worth this action of support?

Submitted by archerb on Wednesday, June 21, 2017 - 12:52

Why are the effects on transgenders the only concern?"Prejudice and discrimination affect transgender individuals in many ways throughout their daily lives, often in the form of physical or verbal abuse or bullying" may certainly be a concern, but where is the report of the effects on six year old girls coming out of swim practice at the local YMCA who have to share a shower with a grown man? I'm all for protecting the dignity and privacy of the transgender individuals who make up 0.03% of our population, but I'm even more concerned about privacy, dignity and innocence of those that make up the other 99.97%. The only excuse I can find is that that AMA lacks the ability to perform basic math or this is a political report rather than a medical one. Bathrooms, locker rooms, showers and all other separated facilities where privacy is expected are not separated by identity. Claiming that they are separated by "gender identity" is denying the very reason these facilities were separated in the first place. They are separated by genitalia. Locker rooms are not a gender social club where men and women separate to relax among people of their own kind. They are separated so that people don't have to expose their genitals to members of the opposite sex and they don't have to have genitals from members of the opposite sex exposed to them. The keyword is SEX and sex is defined by genitalia, not identity or personal preference.

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Exhibit E

Exhibit E to Borelli Decl.: American Academy of Family Physicians, *Resolution No. 508 (Washington C): Transgender Use of Public Facilities* (2015)

RESOLUTION NO. 501 (California A): Endorse Access Without Age Restriction to Over-the-Counter Oral Contraceptive Pills
RESOLVED, That the American Academy of Family Physicians write to the U.S. Food and Drug Administration (FDA) to encourage that all adolescents, regardless of age, be included in the over-the-counter (OTC) oral contraceptives studies required by the FDA (e.g., label comprehension study, actual use study) to determine whether OTC access is appropriate for this population.

RESOLUTION NO. 508 (Washington C): Transgender Use of Public Facilities
RESOLVED, That the American Academy of Family Physicians support existing state and federal laws that protect people from discrimination based on gender expression and identify, and oppose laws that compromise the safety and health of transgender people by failing to provide this protection, and be it further
RESOLVED, That the American Academy of Family Physicians support the ability of transgender people to use the public facilities of the gender with which they identify and actively oppose any legislation which would infringe upon that ability.

RESOLUTION NO. 502 (California B): Medicaid Coverage of Over-the-Counter (OTC) Emergency Contraception (EC)
RESOLVED, That the American Academy of Family Physicians advocate that emergency contraception, whether over-the-counter or by prescription, be a covered benefit under all Medicaid programs for all women of reproductive age.

RESOLUTION NO. 503 (New York A): Increase Access to Comprehensive Reproductive Health Care Services for Incarcerated Women
RESOLVED, That the American Academy of Family Physicians advocate that comprehensive and appropriate health care be provided to incarcerated women in federal detention facilities including but not limited to reproductive health.

RESOLUTION NO. 402 (Colorado A): Diversity Support
RESOLVED, That the American Academy of Family Physicians (AAFP) establish an “Office of Diversity" that will serve as the official AAFP repository for policies and information related to discrimination, diversity, and cultural proficiency that will coordinate active promotion of messaging related to same, and that will work to support members and efforts towards non-discrimination in education, training, and practice, and be it further
RESOLVED, That the American Academy of Family Physicians reaffirm and proclaim its support for its members through newly created Office of Diversity through the use of press releases and messaging to members, public, and elected officials restating its strong position against discrimination towards students, residents, members, staff, patients, community directed at them because of their religious, cultural, ethnic, racial, national, gender, or sexual identify, and be it further,
RESOLVED, (Through the newly created Office of Diversity), that the American Academy of Family Physicians, support the development and implementation of anti-discrimination and hate crime laws and public policies that seek to support and protect victims of discrimination targeted at their refugee, immigration, gender-identity, race, color, religion, gender, sexual orientation, or disability status.

RESOLUTION NO. 405 (Oregon C): Gun Violence as a Public Health Issue

Exhibit F

Exhibit F to Borelli Decl.: APA and NASP, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015)

AMERICAN PSYCHOLOGICAL ASSOCIATION

Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools

Adopted by the Council of Representatives, August 2014. Amended by the Council of Representatives, February 2015. (Suggested citation is included with references.)

WHEREAS people express and experience great diversity in sexual orientation and gender identity and expression;

WHEREAS communities today are undergoing rapid cultural and political change around the treatment of sexual minorities and gender diversity;

WHEREAS all persons, including those who are sexual or gender minority children and adolescents, or those who are questioning their gender identities or sexual orientations, have the right to equal opportunity and a safe environment within all public educational institutions;

Sexual Orientation and Gender Identity

WHEREAS some children and adolescents are aware of their attraction to members of the same gender or of their status as lesbian, gay, or bisexual persons by early adolescence (Remafedi, 1987; Savin-Williams, 1990; Slater, 1988; Troiden, 1988), although this awareness may vary by culture and acculturation (Morales, 1990; Rosario, Schrimshaw & Hunter, 2004);

WHEREAS sexual orientation and gender identity are separate, but related, aspects of the human experience (Bockting & Gray, 2004; Chivers & Bailey, 2000; Coleman, Bockting, & Gooren, 1993; Docter & Fleming, 2001; Docter & Prince, 1997);

WHEREAS some children and adolescents may experience a long period of questioning their sexual orientations or gender identities, experiencing stress, confusion, fluidity or complexity in their feelings and social identities (Hollander, 2000; Remafedi, Resnick, Blum, & Harris, 1992);

WHEREAS there are few resources and supportive adults available and little peer support individually or within student groups for gender and sexual orientation diverse children and adolescents, particularly those residing in rural areas or small towns, (Kosciw, Greytak, Diaz, & Bartkiewicz, 2010; Robinson & Espelage, 2011);

Gender Diversity

WHEREAS a person's gender identity develops in early childhood and some young children may not identify with the gender assigned to them at birth (Brill & Pepper, 2008; Zucker, 2004);

WHEREAS it may be medically and therapeutically indicated for some transgender and other gender diverse children and adolescents to transition from one gender to another using any of the following: change of name, pronoun, hairstyle, clothing, pubertal suppression, cross-sex hormone treatment, and surgical treatment (Coleman et al., 2011; Forcier & Johnson, 2012; Olson, Forbes, & Belzer, 2011);

Consequences of Stigma and Minority Stress

WHEREAS minority stress is recognized as a primary mechanism through which the notable burden of stigma and discrimination affects minority persons' health and well-being and generates health disparities (Hatzenbuehler, Nolen-Hoeksema, & Erickson, 2008; Meyer, 2003; Meyer, Schwartz, & Frost, 2008; Mirowsky & Ross, 1989);

WHEREAS many gender and sexual orientation diverse children and adolescents have reported higher rates of anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes (Austin et al., 2009; Corliss, Goodenow, Nichols,& Austin, 2011; Gibson, 1989; Gipson, 2002; Gonsiorek, 1988; Grossman & D'Augelli, 2007; Harry, 1989; Hetrick & Martin, 1988; Mustanski, Garofalo, & Emerson, 2010; Poteat, Aragon, Espelage, & Koenig, 2009; Russell, Ryan, Toomey, Diaz, & Sanchez, 2011; Ryan, Huebner, Diaz, & Sanchez, 2009; Ryan, Russell, Huebner, Dias, & Sanchez, 2010; Savin-Williams, 1990; Schutzmann, Brinkmann, Schacht, & Richter-Appelt, 2009).

WHEREAS many transgender and gender diverse children and adolescents experience elevated rates of depression, anxiety, self-harm, and other health risk behaviors (American Psychological Association, 2009; Coleman et al., 2011; McGuire, Anderson, Toomey, & Russell, 2010);

WHEREAS some gender and sexual orientation diverse adolescents are at an increased risk for pregnancy (Goodenow, Szalacha, Robin, & Westheimer, 2008; Russell et al., 2011; Ryan et al., 2010; Saewyc, Poon, Homma, & Skay, 2008; Savin-Williams, 1990;

WHEREAS, some gender and sexual orientation diverse adolescent sub-populations, including young men who have sex with men, homeless adolescents, racial/ethnic minority adolescents, transgender women of color, and adolescents enrolled in alternative schools, are at heightened risk for sexually transmitted infections, including HIV (Center for Disease Control and Prevention, 2012; Markham et al., 2003), due to complex and interacting factors related to stigma, socioeconomic class and minority stress (Hatzenbuehler, Phelan & Link, 2013; Link & Phelan, 1995; Meyer, 2003; Phelan, Link, & Tehranifar, 2010);

WHEREAS some children and adolescents with intersex/DSD[1] conditions report rates of self-harm and suicidality comparable to individuals who have experienced physical or sexual abuse (Schutzmann, et al., 2009);

WHEREAS individuals with intersex/DSD conditions often report a history of silence, stigma, and shame regarding their bodies and medical procedures imposed on them (MacKenzie, Huntington, & Gilmour, 2009; Wiesemann, Udo-Koeller, Sinnecker, & Thyen, 2010);

WHEREAS invasive medical procedures that are not medically necessary in nature (e.g., genital surgery for purposes of 'normalization') continue to be recommended to parents of intersex/DSD children, often proceed without the affected individual's assent, and lack research evidence on long-term quality of life, reproductive functioning, and body satisfaction (Wiesemann et al., 2010);

WHEREAS adults with intersex/DSD conditions report negative emotional, psychological and physical consequences that result from repeated and often questionable medical exams and procedures that lack research evidence to support their purported long-term reduction of distress (MacKenzie et al., 2009; Wiesemann et al., 2010);

WHEREAS gender and sexual orientation diverse young people with intersecting identities face additional challenges to their psychological well-being as a result of the negative consequences of discrimination based on sexual orientation and ethnic/racial minority status, religious identity, and country of origin, among other characteristics (Garnets & Kimmel, 1991; Herek, Gillis, & Cogan, 2009; Moradi et al., 2010; Poteat et al., 2009; Russell et al., 2011; Ryan et al., 2009; Szymanski & Gupta, 2009);

WHEREAS gender and sexual orientation diverse children and adolescents who come from impoverished or low-income families may face additional risks (Gipson, 2002; Gordon, Schroeder, & Abramo, 1990; Russell et al., 2011);

WHEREAS gender and sexual orientation diverse children and adolescents in rural areas and small towns experience additional challenges, such as living in typically more conservative and less diverse communities (compared to those in urban settings) and having limited access to affirming community-based supports, which can lead to greater feelings of social isolation (Cohn & Leake, 2012; O'Connell, Atlas, Saunders, & Philbrick, 2010);

WHEREAS gender and sexual orientation diverse children and adolescents with physical or mental disabilities are at increased risk of negative health outcomes due to the consequences of societal prejudice toward persons with mental and physical disabilities (Duke, 2011; Hingsburger & Griffiths, 1986; Pendler & Hingsburger, 1991);

[1] Intersex refers to a range of conditions associated with atypical development of physical sex characteristics (American Psychological Association, 2006). Intersex individuals may be born with chromosomes, genitals, and/or gonads that do not fit typical female or male presentations (Organization Intersex International in the United States of America, 2013). Since 2006, the medical and research community has used the term Disorders of Sex Development. This term refers to congenital conditions characterized by atypical development of chromosomal, gonadal, or anatomical sex (Houk, Hughes, Ahmed, Lee, & Writing Committee for the International Intersex Consensus Conference Participants, 2006). An alternate term "Differences of Sex Development" has been recommended to prevent a view of these conditions as diseased or pathological (Wisemann, Udo-Koeller, Sinnecker, & Thyen, 2010). In order to be inclusive of various terminology preferences, this document will use intersex/DSD when referring to individuals who are part of this community.

Concerns and Issues in the Context of Schools

WHEREAS many gender and sexual orientation diverse children and adolescents experience harassment, bullying, and physical violence in school environments (Brooks, 2000; Fineran, 2002; Greytak, Kosciw, & Diaz, 2009; Kosciw et al., 2010; McGuireet al., 2010; Poteat & Rivers, 2010; Russell, Franz, & Driscoll, 2001; Sausa, 2005);

WHEREAS low numbers of school personnel intervene to stop harassment or bullying against transgender and other gender diverse students in school settings and may even participate in harassment of transgender and gender diverse students (Greytak et al., 2009; McGuire et al., 2010; Sausa, 2005);

WHEREAS gender and sexual orientation diverse children and adolescents who are victimized in school are at increased risk for mental health problems, suicidal ideation and attempts, substance use, high-risk sexual activity, and poor academic outcomes, such as high level of absenteeism, low grade point averages, and low interest in pursuing post-secondary education (Birkett, Espelage, & Koenig, 2009; Bontempo & D'Augelli, 2002; D'Augelli, Pilkington, & Hershberger, 2002; Kosciw et al., 2010; O'Shaughnessy, Russell, Heck, Calhoun, & Laub, 2004; Russell et al., 2011);

WHEREAS some studies suggest that transgender and other gender diverse students experience even poorer educational outcomes compared to lesbian, gay and bisexual students, including low achievement levels, higher likelihood of being "pushed out" of high school prior to graduation, low educational aspirations, and high incidences of truancy and weapons possession (Greytak et al., 2009; Toomey, Ryan, Diaz, Card, & Russell, 2010);

WHEREAS recent research has identified a number of school policies, programs, and practices that may help reduce risk and/or increase well-being for gender and sexual orientation diverse children and adolescents (Blake et al 2001; Eisenberg & Resnick, 2006; Goodenow, Szalacha, & Westheimer, 2006; Graybill, Varjas, Meyers, & Watson, 2009; Heck, Flentje, & Cochran 2011; Murdock & Bolch, 2005; Szalacha, 2003; Toomey et al., 2010; Walls, Kane, & Wisneski, 2010; Watson, Varjas, Meyers, & Graybill, 2010);

WHEREAS gender and sexual orientation diverse students report increased school connectedness and school safety when school personnel intervene in the following ways: (1) addressing and stopping bullying and harassment, (2) developing administrative policies that prohibit discrimination based on sexual orientation, gender identity and gender expression, (3) supporting the use of affirming classroom activities and the establishment of gender and sexual orientation diverse-affirming student groups, and (4) valuing education and training for students and staff on the needs of gender and sexual orientation diverse students (Case & Meier, 2014; Greytak et al., 2009; Kosciw et al., 2010; McGuire et al., 2010; National Association of School Psychologists, 2011; Sausa, 2005);

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WHEREAS school psychologists, school counselors, and school social workers advocate for inclusive policies, programs and practices within educational environments (NASP, 2010a; NASP 2010b; NASP, 2011), and

WHEREAS the field of psychology promotes the individual's healthy development of personal identity, which includes the sexual orientation, gender expression, and gender identity of all individuals (APA, 2002; APA, 2012; Coleman et al., 2011; NASP, 2010a; NASP, 2011);

THEREFORE BE IT RESOLVED that the American Psychological Association and the National Association of School Psychologists affirm that same-sex sexual and romantic attractions, feelings, and behaviors are normal and positive variations of human sexuality regardless of sexual orientation identity;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists affirm that diverse gender expressions, regardless of gender identity, and

diverse gender identities, beyond a binary classification, are normal and positive variations of the human experience;

Policies

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists will advocate for local, state and federal policies and legislation that promote safe and positive school environments free of bullying and harassment for all children and adolescents, including gender and sexual orientation diverse children and adolescents and those who are perceived to be lesbian, gay, bisexual, transgender or gender diverse;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists recommend schools develop policies that respect the right to privacy for students, parents, and colleagues with regard to sexual orientation, gender identity, or transgender status, and that clearly state that school personnel will not share information with anyone about the sexual orientation, gender identity, intersex/DSD condition, or transgender status of a student, parent, or school employee without that individual's permission;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists recommend that school administrations and mental health providers, in the context of schools, develop partnerships and networks to promote cross-agency collaboration to create policies that directly affect the health and wellbeing of gender and sexual orientation diverse adolescents and children;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists encourage state educational agencies to collect data on sexual orientation, taking care to ensure student anonymity, as part of efforts to monitor and study adolescents' risk behaviors in the CDC Youth Risk Behavior Survey, and to develop and validate measures of gender identity for inclusion in the Youth Risk Behavior Survey, as well;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists recommend that inclusive data collection be incorporated into the Department of Education's Mandatory Civil Rights Data Collection, another important measurement of youth experiences in schools that could help inform effective interventions to better support gender and sexual orientation diverse children and adolescents in schools;

Programs and Interventions

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists support efforts to ensure the funding of basic and applied research, and scientific evaluations of interventions and programs, designed to address the issues of gender and sexual orientation diverse children and adolescents in the schools;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists recommend the continued development and evaluation of school-level interventions that promote academic success and resiliency, that reduce bullying and harassment, that reduce risk for sexually transmitted infections, that reduce risk for pregnancy among adolescents,

that reduce risk for self-injurious behaviors, and that foster safe and supportive school environments for gender and sexual orientation diverse students;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists recommend that special sensitivity be given to the diversity within the population of gender and sexual orientation diverse students, with new interventions that incorporate the concerns of sexual minorities often overlooked or underserved, and the concerns of racial/ethnic minorities and recently immigrant children and adolescents who are also gender and sexual orientation diverse students;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists support affirmative interventions with transgender and gender diverse children and adolescents that encourage self-exploration and self-acceptance rather than trying to shift gender identity and gender expression in any specific direction;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists encourage school-based mental health professionals to advocate for efforts to educate and train school professionals about the full range of sex development, gender expression, gender identity, and sexual orientation;

Training and Education

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists will encourage education, training, and ongoing professional development about the needs and the supports for gender and sexual orientation diverse students for educators and trainers of school personnel, education and mental health trainees, school-based mental health professionals, administrators, and school staff, and such training and education should be available to students, parents, and community members;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists will encourage school-based mental health professionals to learn how strictly binary notions of sex, sex development and gender limit all children from realizing their full potential, create conditions that exacerbate bullying, and prevent many students from fully focusing on and investing in their own learning;

Practices

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists encourage school-based mental health professionals to serve as allies and advocates for gender and sexual orientation diverse children and adolescents in schools, including advocacy for the inclusion of gender identity, gender expression and sexual orientation in all relevant school district policies, especially anti-bullying and anti-discrimination policies;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists encourage school staff to support the decisions of children, adolescents, and families regarding a student's gender identity or expression, including whether to seek treatments

and interventions, and discourage school personnel from requiring proof of medical treatments as a prerequisite for such support;

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists recommend that administrators create safer environments for gender diverse, transgender, and intersex/DSD students, allowing all students, staff, and teachers to have access to the sex-segregated facilities, activities, and programs that are consistent with their gender identity, including, but not limited to, bathrooms, locker rooms, sports teams, and classroom activities, and avoiding the use of gender segregation in school uniforms, school dances, and extracurricular activities, and providing gender neutral bathroom options for individuals who would prefer to use them; and

BE IT FURTHER RESOLVED that the American Psychological Association and the National Association of School Psychologists will work with other organizations in efforts to accomplish these ends.

Suggested Citation

American Psychological Association & National Association of School Psychologists. (2015). Resolution on gender and sexual orientation diversity in children and adolescents in schools. Retrieved from http://www.apa.org/about/policy/orientation-diversity.aspx

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DE 49

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, etc.,

Plaintiff,

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

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA, et al.,

Defendants.

ORDER

Upon review of Plaintiff's Notice of Voluntary Dismissal Without Prejudice as to Defendants Tim Forson and Lisa Kunze Only (Doc. 45), and in accordance with Federal Rule of Civil Procedure 41(a)(1)(A)(i), defendants Tim Forson, in his official capacity as Superintendent of Schools for the St. Johns County School District, and Lisa Kunze, in her official capacity as Principal of Allen D. Nease High School, are **dismissed without prejudice**. The Clerk shall terminate those two defendants and the case shall proceed against The School Board of St. Johns County, Florida, only. The motion to dismiss filed by these defendants (Doc. 34) is **moot**.

DONE AND ORDERED at Jacksonville, Florida this 8th day of August, 2017.

TIMOTHY J. CORRIGAN
United States District Judge

s.
Copies:
counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, etc.,

Plaintiff,

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

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA, et al.,

Defendants.

ORDER

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DONE AND ORDERED at Jacksonville, Florida this 8th day of August, 2017.

TIMOTHY J. CORRIGAN
United States District Judge

s.
Copies:
counsel of record

DE 50

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, etc.,

Plaintiff,

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

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.

ORDER

This case is before the Court on a motion for preliminary injunction filed by plaintiff, Drew Adams, through his next friend and mother, Erica Adams Kasper. Doc. 22. The School Board responded (Doc. 42), plaintiff replied (Doc. 48), and both parties filed exhibits. The Court held a hearing on the motion today, the full record of which is incorporated by reference. For the reasons stated at the hearing, it is hereby

ORDERED:

1. Plaintiff's motion for preliminary injunction (Doc. 22) is **denied**.

2. Defendant's response to plaintiff's complaint shall be filed no later than **August 18, 2017**. If defendant moves to dismiss any claims, plaintiff shall respond by **September 8, 2017**.

3. The Court is intending to set the case for a three day non-jury trial on the **December 2017** trial term, subject to the parties confirming the availability of their witnesses. The parties are directed to confer and file a joint proposed case management schedule no

later than **August 18, 2017**.

DONE AND ORDERED at Jacksonville, Florida this 10th day of August, 2017.

TIMOTHY J. CORRIGAN
United States District Judge

s.
Copies:

counsel of record

DE 54

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

Plaintiff,

Case No.: 3:17-cv-00739-TJC-JBT

DISPOSITIVE MOTION

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 12(b)(6) and M.D. Fla. Loc. R. 3.1, hereby moves to dismiss Count II of the Complaint with prejudice. [Doc. 1].[1] In support hereof, Defendant states as follows:

BACKGROUND

1. Plaintiff filed his Complaint on June 28, 2017, alleging Defendant violated his rights under the Equal Protection Clause of the Fourteenth

[1] Defendant will be filing a separate Answer addressing Count I of the Complaint by no later than August 22, 2017.

Amendment (Count I) and Title IX of the Educational Amendments of 1972 ("Title IX")(Count II) by discriminating against him based on his gender identity. [Doc. 1 at pp. 19-23, ¶¶65-83].

2. This Motion seeks dismissal of Plaintiff's Title IX claim.

3. Based solely on the four corners of the Complaint, Plaintiff is unable as a matter of law to state a cause of action under Title IX. Further, the Court's dismissal should be with prejudice, because Plaintiff is unable to plead a cause of action as a matter of law or allege facts sufficient to state a cause of action under Title IX.

WHEREFORE, Defendant respectfully requests the entry of an Order dismissing Count II of Plaintiff's Complaint with prejudice, the return of Defendant's costs and attorneys' fees if determined appropriate, together with any other relief this Court deems just and proper.

MEMORANDUM OF LAW

A. Motion to Dismiss Standard

Since the Court is well-versed in the standards applicable to a motion to dismiss, Defendant will only provide a brief overview. To evaluate the merits of Defendant's Motion, this Court must view the allegations of the Complaint in the light most favorable to Plaintiff, consider the factual allegations of the

Complaint as true, and accept all reasonable inferences. See, Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Fourth Tee, LLC v. Axis Surplus Ins. Co., Case No. 8:12-CV-1249-T-17TGW, 2013 WL 593832, at *1 (M.D. Fla. Feb. 15, 2013).

B. Summary of Allegations

Plaintiff is a minor student at Allen D. Nease High School ("Nease") located in the St. Johns County School District. [Doc. 1 at ¶¶1, 4]. Plaintiff's birth certificate identifies him as a female, and he is biologically a female. [Doc. 1 at ¶¶20, 34]. However, Plaintiff self-identifies as a male (i.e. his "gender identity" as opposed to his sex). [Doc. 1 at ¶¶20, 22-23].

Plaintiff claims he has been discriminated against by Defendant, because he has not been given access to boys' bathrooms at Nease. [Doc. 1 at ¶¶2, 81-82]. He claims this violates Title IX because, under his theory, the term "sex" in Title IX "includes, but is not limited to discrimination based on gender, gender nonconformity, transgender status, gender expression, and gender transition." [Doc. 1 at ¶¶3, 78].[2]

[2] Plaintiff fails to explain what "but is not limited to" means in his proposed definition of "sex" under Title IX, thereby leaving his definition ambiguous.

C. Argument and Authority - Sex Under Title IX Does Not Mean Gender Identity

To state a cause of action under Title IX, Plaintiff must allege as follows: "(1) that []he was excluded from participation in, denied benefits of, or subjected to discrimination in an educational program; (2) that the exclusion ***was on the basis of sex***; and (3) that the [D]efendant receives federal financial assistance." Palmer ex rel. Palmer v. Santa Rosa County, Fla., Sch. Bd., Case No. 3:05CV218/MCR, 2005 WL 3338724, at *4 (N.D. Fla. Dec. 8, 2005)(emphasis added).

Plaintiff claims he has been subjected to discrimination on the basis of sex, because Defendant has refused to allow him to use the boys' bathrooms at Nease. He has advanced a theory that "on the basis of sex," as used in Title IX and its implementing regulations includes, among several other things, "gender identity." According to Plaintiff, "sex" is based on an adolescent's individual feelings, feelings that are not immutable and may be fluid.[3]

Plaintiff's claim that sex under Title IX also means gender identity effectively asks that this Court ignore precedent requiring courts to look at the intent behind a statute at the time it was created. See, Thomas Jefferson Univ. v.

[3] Plaintiff's position that "sex" is determined by a person's internal feelings is also at odds with individuals who may not identify as any sex, thus further obliterating the intent of Title IX and §106.33.

Shalala, 512 U.S. 504, 512 (1994). Title IX was created because Congress was concerned about discrimination against women in education. Neal v. Bd. of Trustees of California State Universities, 198 F.3d 763, 766 (9th Cir. 1999). That is precisely why Title IX expressly prohibits discrimination ***on the basis of sex*** in educational programs receiving federal financial assistance. 20 U.S.C. §1681; 34 C.F.R. §106.31; see also, Palmer ex rel. Palmer v. Santa Rosa County, Fla., Sch. Bd., Case No. 3:05CV218/MCR, 2005 WL 3338724, at *4 (N.D. Fla. Dec. 8, 2005)(emphasis added).

There is no question that "sex" under Title IX and §106.33 does not encompass "gender identity" or an individual's feeling of their gender. See, Texas v. United States, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016), order clarified, 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (holding, "the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth."); Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (holding, "the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex").

With respect to separating bathrooms under Title IX, there is a regulation implementing Title IX directly on point that permits Defendant to separate bathrooms based on sex. Specifically, §106.33, which was adopted by the United States Department of Education ("DOE"), expressly permits educational institutions to provide "***separate toilet***, locker room, and shower ***facilities on the basis of sex***…" 34 C.F.R. §106.33 (emphasis added).

The DOE's current interpretation of Title IX and §106.33 also refutes Plaintiff's argument that "on the basis of sex" includes "gender identity." On February 22, 2017, DOE issued a Dear Colleague letter stating that its prior guidance equating gender identity to sex under Title IX and §106.33 failed to "explain how the position is consistent with the express language of Title IX." [Doc. 41-7 at Ex. 10]. As such, DOE concluded, "in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy." [Id.]. Thus, not even the federal agency responsible for enforcing Title IX and §106.33 supports Plaintiff's theory that "gender identity" means "sex" under Title IX and §106.33.

Plaintiff's approach to defining "sex" effectively abolishes any recognition that biological males and females are different and adds language to the regulation that does not exist. See, Carcaño v. McCrory, 203 F. Supp. 3d

615, 642 (M.D.N.C. 2016). See also, United States v. Virginia, 518 U.S. 515, 550 n.19 (1996)("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements…"); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981)("this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.").

In sum, Title IX does not say what Plaintiff wants it to say. There is no binding case law supporting Plaintiff's position under Title IX, and DOE has specifically refused to extend the definition of "sex" in Title IX and §106.33 in the manner with which Plaintiff seeks to do through his claim. To the contrary, the greater weight of the case law, legislative intent, and recent DOE guidance make clear that "sex" under Title IX and §106.33 does not encompass "gender identity." This Court should decline Plaintiff's invitation to expand existing law under Title IX and §106.33 in order to allow him to state a cause of action in this case.[4]

[4] Allowing Plaintiff's Title IX claim to proceed based on his definition of "sex" would result in a complete dismantling of §106.33. Specifically, students in educational institutions would also be permitted to use locker rooms and showering facilities based on their own self-identified sex. This was clearly not the intent behind Title IX and §106.33 at the time they were passed and is counter to DOE's current guidance.

D. Conclusion

Based on the foregoing, Plaintiff is unable to state a cause of action under Title IX. As such, Count II of the Complaint should be dismissed with prejudice.

Dated this 18th day of August, 2017.

Respectfully submitted,

/s/ *Terry J. Harmon*
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Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of August, 2017, a true and correct copy of the foregoing was electronically filed in the United States District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ *Terry J. Harmon*
TERRY J. HARMON

DE 56

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

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

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.
_____/

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant, **THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA**, by and through its undersigned counsel, hereby answers Plaintiff's Complaint [Doc. 1] in correspondingly numbered paragraphs as follows:[1]

INTRODUCTION

1. Defendant admits Plaintiff attends Allen D. Nease High School ("Nease") and started his junior year in August of 2017. Defendant admits Plaintiff self-identifies as a transgender male. Defendant denies it subjected Plaintiff to discrimination at Nease. Defendant is without knowledge regarding all other allegations in Paragraph 1 and therefore denied.

[1] On August 18, 2017, Defendant filed a Motion to Dismiss Plaintiff's Complaint. [Doc. 54]. The Motion only sought dismissal of Plaintiff's Title IX claim (Count II). As such, this Answer will only address all general allegations and Count II. To the extent the Motion is denied, Defendant will amend its Answer and Affirmative Defenses to address the allegations in Count I and to include any applicable affirmative defenses.

2. Defendant admits Plaintiff is a student. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 2.

3. Defendant admits Plaintiff is seeking a declaratory judgment, preliminary and permanent injunctive relief, and nominal damages. Defendant denies the Superintendent and Principal are parties to this action. [Doc. 49]. Defendant denies that Plaintiff is entitled to injunctive relief [Doc. 50] or any of the relief sought. Defendant denies all other allegations in Paragraph 3.

PARTIES

4. Defendant admits Plaintiff is a 16-year-old, self-identified transgender male who attends Nease. Defendant admits Plaintiff is subject to Defendant's policies that apply equally to all students in the District. Defendant admits Plaintiff is seeking to bring an action through his friend and mother under Rule 17(c) of the Federal Rules of Civil Procedure. Defendant denies all other allegations in Paragraph 4.

5. Defendant admits it derives power, in part, from the Florida Constitution and Florida Statutes sections cited in Paragraph 5. Defendant admits it establishes policies for the effective operation of the District. Defendant admits it is a "person" for purposes of §1983. Defendant denies all other allegations in Paragraph 5.

6. Defendant admits Tim Forson is the Superintendent of the District and that he was appointed to the position effective January 4, 2017. Defendant admits the Superintendent derives authority, in part, from the Florida Statutes sections cited in Paragraph 6. Defendant admits the Superintendent has authority and responsibility to enforce policies of the District.

Defendant admits Superintendent Forson was preceded in office by Dr. Joyner. Defendant denies all other allegations in Paragraph 6.

7. Defendant admits Lisa Kunze is the Principal at Nease and that she was appointed to the position effective January 2017. Defendant admits Principal Kunze derives authority, in part, from the Florida Statutes sections cited in Paragraph 7. Defendant admits Principal Kunze is employed by Defendant and is subject to the direction and authority of Superintendent Forson. Defendant admits Principal Kunze has the authority and responsibility to enforce policies of the District. Defendant admits Principal Kunze was preceded in office by Mr. Dresback. Defendant denies all other allegations in Paragraph 7.

8. Defendant denies the allegations in Paragraph 8.

9. Defendant admits Plaintiff is prohibited from using the boys' bathrooms at Nease but denies all other allegations in Paragraph 9.

JURISDICTION AND VENUE

10. Defendant admits the allegations in Paragraph 10 for jurisdictional purposes only.

11. Defendant admits the allegations in Paragraph 11 for jurisdictional purposes only.

12. Defendant admits the allegations in Paragraph 12 for venue purposes only.

13. Defendant submits that Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202 speak for themselves.

14. Defendant admits the allegations in Paragraph 14 as to the School Board only.

FACTUAL ALLEGATIONS

15. Defendant admits the allegations in Paragraph 15.

16. Defendant admits Plaintiff is an honor student, enrolled in AP classes, and participates in the International Baccalaureate program. Defendant is without knowledge as to Plaintiff's future plans and therefore denied.

17. Defendant admits Plaintiff participates in at least one school-based extracurricular activity. Defendant is without knowledge regarding the remaining allegations in Paragraph 17 and therefore denied.

18. Defendant is without knowledge as to Plaintiff's future plans and therefore denied.

19. Defendant denies the allegation in Paragraph 19.

20. Defendant admits Plaintiff has informed Defendant that he is transgender. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 20.

21. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 21.

22. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 22.

23. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 23.

24. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 24.

25. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 25.

26. Defendant admits gender dysphoria is a condition recognized in the DSM-V. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 26.

27. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 27.

28. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 28.

29. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 29.

30. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 30.

31. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 31.

32. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 32.

33. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 33.

34. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 34.

35. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 35.

36. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 36.

37. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 37.

38. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 38.

39. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 39.

40. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 40.

41. Defendant admits Plaintiff wanted to be treated as a boy at Nease by the time he began his freshman year. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 41.

42. Defendant admits that Plaintiff emailed certain school personnel and asked they use male pronouns when referring to him. Defendant admits Plaintiff continues to use the first name "Drew." Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 42.

43. Defendant admits Plaintiff's teachers used male pronouns when referring to him. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 43.

44. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 44.

45. Defendant admits a meeting was held with Plaintiff, Kim Hollis, and Holly Arkin at Nease in September of 2015. Defendant admits Plaintiff was advised that someone complained that he used the boys' bathroom at Nease. Defendant admits Plaintiff was reminded of gender-neutral bathroom options. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 45.

46. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 46.

47. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 47.

48. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 48.

49. Defendant denies the allegations in Paragraph 49.

50. Defendant admits the gender-neutral bathroom in the H-pod was closed at different times during the the 2016-2017 school year due to bomb threats and student conduct issues. Defendant admits Plaintiff and other students requested that the bathroom be reopened to students. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 50.

51. Defendant denies the allegations in Paragraph 51.

52. Defendant admits the pass time between classes is five minutes. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 52.

53. Defendant denies Nease is a discriminatory environment. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 53.

54. Defendant admits Plaintiff enrolled in art class last year and had access to a gender-neutral bathroom in the art classroom. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 54.

55. Defendant admits Plaintiff's mother attempted to address her child's grievances before filing this action and that she sent a letter to Mr. Dresback. Defendant admits a meeting was held with Plaintiff, Plaintiff's mother, Ms. Arkin, Christy McKendrick, Sallyanne Smith, and Mr. Dresback. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 55.

56. Defendant admits that in the fall of 2015, Plaintiff's mother met with Cathy Mittelstadt and Brennan Asplen. Defendant admits the discussion included concerns about privacy issues. Defendant admits Plaintiff's mother brought documents to the meeting. Defendant denies Mr. Asplen made the comments alleged in Paragraph 56. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 56.

57. Defendant admits Plaintiff filed a complaint with the Office for Civil Rights ("OCR") in November of 2015 and that Defendant declined to participate in mediation with

OCR. Defendant admits a meeting was held on April 8, 2016, involving Plaintiff's mother, Ms. Mittelstadt, and Ms. Arkin. Defendant admits Plaintiff and Plaintiff's mother met with Ms. Mittelstadt in May of 2016. Defendant denies Plaintiff's allegation regarding the comments made by Ms. Mittelstadt during the April 8, 2016, meeting as alleged in Paragraph 57. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 57.

58. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 58.

59. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 59.

60. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 60.

61. Defendant denies the allegations in Paragraph 61.

62. Defendant denies the allegations in Paragraph 62.

63. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 63

64. Defendant denies the allegations in Paragraph 64.

CLAIMS FOR RELIEF

COUNT I
Denial of Equal Protection
U.S. Const. Amend. XIV

65. Defendant incorporates paragraphs 1 through 64 as though fully set forth herein.

66. Defendant admits Plaintiff is seeking declaratory and injunctive relief as well as nominal damages. Defendant admits Plaintiff is seeking to challenge Defendant's bathroom policy. Defendant denies Plaintiff is entitled to any of the relief sought.

67. Defendant admits the allegations in Paragraph 67.

68. Defendant admits the allegations in Paragraph 68.

69. Defendant submits that the Fourteenth Amendment of the U.S. Constitution is a written document that speaks for itself.

70. Defendant denies the allegations in Paragraph 70.

71. Defendant admits the Fourteenth Amendment prohibits discrimination based on sex and that sex-based classifications are subject to intermediate scrutiny. Defendant denies the remaining allegations in Paragraph 71.

72. Defendant admits discrimination based on "sex stereotyping" in the Eleventh Circuit is subject to intermediate scrutiny. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 72.

73. Defendant denies the allegations in Paragraph 73.

74. Defendant denies the allegations in Paragraph 74.

75. Defendant denies the allegations in Paragraph 75.

COUNT II
Violation of Title IX
20 U.S.C § 1681, *et seq.*

76-83. Plaintiff's Title IX claim is subject to a Motion to Dismiss currently pending before the Court. [Doc. 54]. To the extent the Motion is denied, Defendant will amend its

Answer and Affirmative Defenses to address the allegations in Count II and include any additional affirmative defenses.

PRAYER FOR RELIEF

Defendant denies Plaintiff is entitled to any of the relief sought in the Prayer for Relief section of the Complaint.

Defendant denies all allegations not expressly admitted herein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiff fails to state a cause of action for a violation of the Equal Protection Clause as guaranteed by the Fourteenth Amendment. Specifically, Plaintiff is unable to demonstrate that the policies at issue are based on impermissible sex stereotyping or discriminatory on the basis of sex. Likewise, Plaintiff is unable to allege that he is treated differently than any other similarly situated individuals.

Second Affirmative Defense

Plaintiff is unable to demonstrate that he is a member of a suspect class.

Third Affirmative Defense

Defendant submits that the policies at issue are substantially related to the furtherance of an important government interest.

Fourth Affirmative Defense

Defendant submits there is no evidence to support the existence of any policy, custom, or practice created or maintained by Defendant which in and of itself deprived Plaintiff of any

civil or constitutional right, or which was the moving force behind any unconstitutional conduct of Defendant and its employees and agents.

Fifth Affirmative Defense

Defendant submits the alleged injuries, if any, and damages, if any, of the Plaintiff and the derivative injury and damages, if any, of the Plaintiff were proximately caused by actions of others or events separate, distinct, unrelated and remote to any action or inaction of the Defendant, which said separate, distinct, unrelated actions of others or events or accidents were the sole proximate or contributing cause of Defendant's alleged injuries and damages, if any, for which Defendant cannot be liable, or were such separate intervening and superseding causes thereof as to absolve Defendant of any responsibility or liability therefore.

Sixth Affirmative Defense

Defendant's policies and actions complied (and continue to comply) with applicable laws, including Title IX, and the Constitution of the United States of America.

Dated this 22nd day of August, 2017.

Respectfully submitted,

/s/ *Terry J. Harmon*
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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of August, 2017, a true and correct copy of the foregoing was electronically filed in the United States District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ *Terry J. Harmon*
TERRY J. HARMON

DE 59

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

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.

CASE MANAGEMENT AND SCHEDULING ORDER

Upon review of the file, including the parties' Case Management Report (Doc. 55), it is hereby

ORDERED:

1. Defendant's motion to dismiss Count II of plaintiff's complaint (Doc. 54) will be carried with the case and decided as part of the Court's Findings of Fact and Conclusions of Law following trial. Instead of filing a separate response to the motion, plaintiff shall incorporate his response in his proposed findings of fact and conclusions of law.

2. The Court will allow the parties to perpetuate testimony of the witness who is unavailable during the week of December 11, 2017.[1]

3. The parties state in their Case Management Report (Doc. 55) that they wish to mediate by December 1, 2017 and will work together to identify a mediator. If the parties

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[1]At trial, the parties will be permitted to read the relevant portions of the deposition testimony or, if the deposition is videotaped, they may play it in open court.

are interested, the undersigned will ask a Magistrate Judge to conduct a settlement conference. No later than **September 15, 2017** the parties shall file a notice of their selected mediator or a request for a settlement conference with a Magistrate Judge.

4. In all other respects, the following schedule shall govern these proceedings:

Mandatory Initial Disclosures (pursuant to Fed.R.Civ.P. 26(a)(1))	**September 8, 2017**
Certificate of Interested Persons and Corporate Disclosure Statement	**completed**
Motions to Add Parties or to Amend Pleadings	**September 15, 2017**
Disclosure of Expert Reports — Affirmative Experts: / Rebuttal Experts:	**October 2, 2017** / **November 3, 2017**
Fact and Expert Discovery Deadline	**November 22, 2017**
Joint Final Pretrial Statement	**November 29, 2017**
All Other Motions Including Motions In Limine[2]	**November 29, 2017**
Final Pretrial Conference — Date: / Time:	**December 1, 2017** / **3:00 P.M.**
Preliminary Findings of Fact and Conclusions of Law (limited to 35 pages)	**December 7, 2017**
Trial Term Begins (Date Certain) Non-Jury, 3 days	**December 11, 2017** **9:00 A.M.**
Post-trial Findings of Fact and Conclusions of Law (page limit to be established at the conclusion of the trial)	**To be established at the conclusion of the trial**

5. With respect to discovery matters, the date set forth above is the final date discovery shall be completed. All requests and motions pertaining to discovery shall be filed

[2]Because this is a non-jury trial and the case is being scheduled on an expedited basis, the Court does not intend to decide any Daubert motions in advance of trial. Parties may file Daubert motions by November 29, 2017 to alert the Court to objections to experts they will raise at trial.

promptly so that the discovery desired will be due prior to the completion date. Specifically, motions to compel brought pursuant to Rule 37 must be filed no later than the close of discovery. The parties should be aware that a stipulation to the continuance of discovery anticipates no discovery disputes. Therefore, the Court will not hear discovery disputes arising during the stipulated continuance. The parties are further advised that any extension of discovery will not result in an extension of the other deadlines except upon order of the Court.

6. The parties are reminded of their obligation to comply with the redaction requirements set forth in Fed.R.Civ.P. 5.2.

7. Pursuant to Local Rule 3.01(a), any motion and memorandum in support must be in a single document not to exceed 25 pages absent leave of Court. Responses to motions may not exceed 20 pages absent leave of Court. Please deliver a courtesy copy of all filings, including copies of all relevant exhibits and depositions, to the chambers of the undersigned.

8. Except as otherwise ordered, the parties are directed to meet the pretrial disclosure requirements in Fed.R.Civ.P. 26(a)(3) and to timely adhere to all requirements in Local Rule 3.06 concerning Final Pretrial Procedures. While counsel for the Plaintiff shall be responsible for initiating the pretrial compliance process, all parties are responsible for assuring its timely completion.

9. A pretrial statement in compliance with Local Rule 3.06 shall be filed with the Clerk on or before the date noted in this Order with two courtesy copies to be provided to the Court. The parties are required to identify the depositions to be read at trial in the

pretrial statement but are not required to designate the pages of depositions to be read at trial until a date to be established by the Court at the final pretrial conference.

10. The final pretrial conference and trial will be held before the undersigned in Courtroom 10D, 10th Floor, United States Courthouse, 300 North Hogan Street, Jacksonville, Florida. The pretrial conference shall be attended by counsel who will act as lead counsel and who are vested with full authority to make and solicit disclosures and agreements touching on all matters pertaining to the trial.

11. In preparing their Proposed Findings of Fact and Conclusions of Law, the parties may wish to review the Court's published non-jury decisions, such as Church of Our Savior v. City of Jacksonville Beach, 69 F.Supp.3d 1299 (M.D. Fla. 2014).

12. The parties are advised (and should advise their witnesses) that photo identification is required to enter the United States Courthouse. Although cell phones, laptop computers, and similar electronic devices generally are not permitted in the building, attorneys may bring those items with them upon presentation to Court Security Officers of proof of membership in The Florida Bar or an Order of special admission pro hac vice.[3]

DONE AND ORDERED at Jacksonville, Florida, this 4th day of September, 2017.

TIMOTHY J. CORRIGAN
United States District Judge

s.
copies to:
counsel of record

[3] Cell phones must be turned off while in the courtroom.

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

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

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.

Civil Action No. 3:17-cv-00739-TJC-JBT

FIRST AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

INTRODUCTION

1. Drew Adams ("Drew" or "Plaintiff")[1] is a 16-year-old boy who attends Allen D. Nease High School ("Nease High School") in Ponte Vedra, Florida. Drew entered his junior year in August of 2017. Drew is active in his local community, having received an award for his volunteerism, and is preparing for a future career as an adolescent psychiatrist by volunteering at the Mayo Clinic in Jacksonville. Drew plays four musical instruments, and like many other kids his age, enjoys video games. Drew also is transgender. As a result, unfortunately, he has been subjected to discrimination at his school on a daily basis beginning in 2015.

[1] Pursuant to Fed. R. Civ. P. 5.2(h), Drew Adams waives the privacy protections afforded by Fed. R. Civ. P. 5.2(a).

2. Although Drew is a hard-working, high-achieving student, the school has discriminated against him by refusing him access to and use of the boys' restrooms. This conduct has a negative and harmful impact on Drew, branding him as unfit to share the communal restrooms that all other boys use simply because he is transgender. Drew simply wants to be treated like other boys so that he too can focus on school, rather than the humiliation of being denied access to the facilities all others use for one of life's most basic functions. The discriminatory policy at issue characterizes Drew as different and stigmatizes him because he is transgender. This sends a powerful signal to others not to treat Drew as any other boy.

3. Drew seeks a declaratory judgment that his exclusion from the boys' restroom by Defendant The School Board of St. Johns County, Florida ("Defendant," "Defendant School Board," or "School Board") violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. ("Title IX"). Drew also seeks injunctive relief enjoining Defendant from denying him equal access to the boys' restroom, and compensatory, as well as nominal, damages against Defendant School Board for the violation of Drew's rights under the Fourteenth Amendment to the U.S. Constitution and Title IX.

PARTIES

4. Plaintiff Drew Adams is a 16-year-old boy who attends Nease High School within the St. Johns County School District (the "District"). Drew is transgender. As a student enrolled at Nease High School, Drew is subject to the policies of Defendant, including Defendant's policy, custom, or usage of barring transgender students from using

restrooms that match their gender identity, while allowing non-transgender students to use the restrooms that match their gender identity. Drew sues pursuant to Federal Rule of Civil Procedure 17(c) by and through his next friend and mother Erica Adams Kasper ("Erica").

5. Defendant The School Board of St. Johns County, Florida, in accordance with the provisions of section 4(b) of Art. IX of the State Constitution and Fla. Stat. § 1001.32(2), operates, controls, and supervises all public schools in the District, including Nease High School. The School Board is empowered to determine the policies necessary for the effective operation of the school system, including the policy, custom, or usage challenged here that bars transgender students, and only transgender students, from using restrooms that match their gender identity. As a political subdivision of the State of Florida, the School Board is subject to civil suits pursuant to Fla. Stat. § 1001.41(4) and is a "person" acting under color of state law within the meaning of 42 U.S.C. § 1983.

6. Defendant, through its duties and obligations, is responsible for the exclusion of Drew from the boys' restrooms within the school district. The School Board, and those subject to its direction, supervision, or control, have or intentionally will perform, participate in, aid and/or abet in some manner the acts alleged in this complaint, have or will proximately cause the harm alleged herein, and have or will continue to injure Plaintiff irreparably if not enjoined. Accordingly, the relief requested herein is sought against Defendant and its officers, agents, servants, employees, and attorneys, as well as any other persons who are in active concert or participation with them.

JURISDICTION AND VENUE

7. This action arises under 42 U.S.C. § 1983 to redress the deprivation under

color of state law of rights secured by the United States Constitution and under Title IX.

8. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because the matters in controversy arise under the Constitution and laws of the United States; and pursuant to 28 U.S.C. §1343(a)(3) and (4) because the action is brought to redress deprivations, under color of state authority, or rights privileges and immunities secured by the U.S. Constitution and seeks to secure damages and equitable relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights.

9. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) and Local Rule 1.02(c) because Defendant resides within this judicial district and division, and within the State of Florida; and because a substantial part of the events that gave rise to the Plaintiff's claims took place (or will take place going forward through continued enforcement of the unlawful policy) within this judicial district and division.

10. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

11. This Court has personal jurisdiction over Defendant because it is domiciled in Florida.

FACTUAL ALLEGATIONS

12. Drew is 16 years old, and began his junior year at Nease High School on August 10, 2017.

13. Drew hopes to attend medical school. He is an honor student, is enrolled in a number of Advanced Placement classes in school, and participates in the International Baccalaureate ("IB") Pre-IB/IB Diploma Program.

14. Drew is also active in a number of extra-curricular, volunteer and community service activities. He is on the Board of Leaders of Nease High School's Gay Straight Alliance, which works to improve the school climate for lesbian, gay, bisexual, and transgender ("LGBT") students. Drew previously served on the Student Council for the Gay, Lesbian, and Straight Education Network ("GLSEN"), which educates people about LGBT youth and does anti-bullying work. He currently serves on the Youth Ambassador Council for the Trevor Project, which provides suicide prevention services to LGBT youth. Drew helps raise money each year for the Jacksonville Area Sexual Minority Youth Network ("JASMYN"), which provides programs and services to support local LGBT youth. Starting the summer before high school, Drew has volunteered each summer at a local hospital. In May of 2017, Drew received the HandsOn Youth in Action Award from HandsOn Jacksonville, a non-profit that encourages volunteerism in the local community. He plays four musical instruments and also really enjoys playing video games. And, like lots of other kids his age, Drew wants to be treated equally and accepted for who he is.

15. After high school, Drew hopes to attend the University of Florida to study pre-medicine. Ultimately, he would like to attend medical school and become an adolescent psychiatrist.

16. Drew is a boy.

17. Drew also is transgender. At birth, Drew was incorrectly designated "female" on his birth certificate, even though he is, in fact, a boy.

18. Each person has multiple sex-related characteristics, including hormones, external and internal morphological features, external and internal reproductive organs, chromosomes, and gender identity. These characteristics may not always be in alignment.

19. The phrase "sex assigned at birth" refers to the sex recorded on a person's birth certificate at the time of birth. Typically, a person is assigned a sex on their birth certificate solely on the basis of the appearance of external reproductive organs at the time of birth. Other sex-related characteristics (such as a person's chromosomal makeup and gender identity, for example) are typically not assessed or considered at the time of birth.

20. Gender identity—a person's core internal sense of their own gender—is the primary factor in determining a person's sex. Every person has a gender identity. There is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health and well-being.

21. Transgender persons are people whose gender identity diverges from the sex they were assigned at birth. A transgender boy's sex is male (even though he was assigned the sex of female at birth) and a transgender girl's sex is female (even though she was assigned the sex of male at birth).

22. Cisgender persons are people whose gender identity aligns with the sex they were assigned at birth. A cisgender boy's sex is male (matching his assigned sex of male at birth) and a cisgender girl's sex is female (matching her assigned sex of female at birth).

23. The incongruence between a transgender person's gender identity and sex assigned at birth can sometimes be associated with gender dysphoria. Gender dysphoria is a serious medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (2013) ("DSM-V"), and by the other leading medical and mental health professional groups, including the American Medical Association and the American Psychological Association.

24. Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth. If left untreated, gender dysphoria may result in psychological distress, anxiety, depression, and even suicidal ideation or self-harm.

25. Treatment of gender dysphoria is usually provided pursuant to the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("Standards of Care"), published by the World Professional Association of Transgender Health. The Standards of Care are recognized as authoritative by major medical and mental health professional organizations.

26. Treatments for gender dysphoria align the transgender person's body and lived experience with the person's true sex. Steps that transgender people may take to treat their gender dysphoria pursuant to the Standards of Care include: (1) social transition; (2) hormone therapy; and/or (3) gender-affirming surgery. These treatments do not change a transgender person's sex, which is determined by their gender identity.

27. Social transition entails a transgender person living in accordance with the person's gender identity. For example, for a transgender boy, social transition can include,

among other things, changing his first name to a name typically associated with boys, using male pronouns, changing his identity documents to indicate a male gender, wearing clothing and adopting grooming habits stereotypically associated with boys, using restrooms and other facilities for boys, and otherwise living as a boy in all aspects of life.

28. Social transition requires that a transgender boy be recognized as a boy and treated the same as all other boys by family members, educators, and others in the community.

29. The ability to live in a manner consistent with one's gender identity is critical to the health and well-being of all transgender people.

30. Living in a manner consistent with one's gender identity, including the use of restroom facilities that match one's gender identity, also is a key aspect of treatment for gender dysphoria for those who suffer from it.

31. Even though Drew's sex assigned at birth was female, and even before he was aware that transgender people existed, Drew knew that his body did not feel like it fit him. Erica saw that he was having a difficult time too. She saw that he was becoming increasingly anxious, depressed, and withdrawn as he went through female puberty.

32. Drew first began to understand why he felt the way he did when he was 14 years old, and saw a transgender man interviewed on television. When Drew heard the man describe what it meant to be transgender, everything clicked for Drew, and he immediately realized that he felt the same way. Erica was watching television with Drew at the time, and noticed right away how mesmerized he was by the interview; she felt like she could see the wheels turning in his head.

33. Erica had a moment of dread, and thought to herself, "things are about to get really hard." But she also knew that Drew was profoundly unhappy, so she waited for Drew to become ready to talk to her. Not long after, her son came out as transgender.

34. Drew began researching what it meant to be transgender, and in 2015 began taking steps toward aligning his lived experience with his gender identity, *i.e.*, living as a boy. Drew cut his hair short, and began wearing a binder on his chest to minimize the appearance of his breasts. Each step brought him a sense of relief and happiness, and he felt like he was finally starting to live the way he was meant to live. This confirmed for Drew that transitioning was the only way he would ever feel fully comfortable in his own skin.

35. Drew has since been diagnosed with gender dysphoria, and that diagnosis has been confirmed by multiple providers.

36. Drew is receiving medical treatment through the Duke Child and Adolescent Gender Care ("Duke Clinic") in North Carolina. Drew began taking testosterone in June 2016, and he remembers thinking that was the happiest day of his life. When Drew learned that he could get "top surgery" (a double mastectomy to masculinize his chest), he was so overcome with joy that he cried. Erica also saw a dramatic change in Drew's happiness and wellbeing. As he continued to transition, Drew became an increasingly confident and positive kid. As a result, Erica quickly realized that transitioning was the only way Drew could ever be truly happy and reach his full potential as a person.

37. Along with taking these medical steps to relieve his gender dysphoria and bring his body into alignment with his gender identity, Drew also began taking other steps to

live fully as the boy that he is. For example, Drew updated the gender marker on his driver's license from female to male, in order to have his identification accurately reflect who he is.

38. By the time Drew began his freshman year at Nease High School, he was living full-time as a boy, and wanted to start school as a boy too. This was especially important to him because relatively few of the kids who knew him before his transition in middle school would be attending this high school, which gave him a chance for a fresh start.

39. Before the 2015-2016 school year started, Drew emailed his teachers to explain that the female gender marker on his school records was wrong, and to ask them to use male pronouns for him instead. He continued using the gender neutral name "Drew" that his parents had given him at birth.

40. When Drew began his freshman year, he was generally perceived by students and staff alike as a boy. His peers and teachers generally used male pronouns, and he was generally treated as a boy in every respect.

41. When Drew first started at Nease High School in August of 2015, he did not even imagine that anyone would try to prevent him from using the boys' restroom, so he used those restrooms along with all the other boys. On every occasion, he used one of the stalls.

42. Drew used the boys' restrooms at school without any incident until on or around September 22, 2015, when he was pulled out of class to meet with three guidance counselors, including IB Program guidance counselor Kim Hollis. The guidance counselors informed him that someone had anonymously reported that he was using the boys' restroom. Drew was instructed to use a gender neutral restroom from that point forward.

43. Drew was shocked and confused. He asked if he had done anything wrong, and was told "no." That answer was frustrating, because it made Drew feel like he was being punished even though he had not done anything to deserve it.

44. Drew did not want to get in trouble or have any disciplinary reports on his school record, so he reluctantly began using gender neutral restrooms at the school, and has not used the boys' restroom since. But doing so has had a negative emotional and social impact on Drew, who simply wants to be treated like all of the other boys at the school.

45. Using the gender neutral restrooms immediately felt like an insult to Drew's identity. He felt humiliated having to walk halfway across the school, passing several boys' restrooms, to find one of the gender-neutral restrooms to use. His transgender status was not widely known among the school administrators, and he was anxious about encountering staff in the hallway who would have thought he was skipping class if he had said he was going to the restroom – while he was walking past right past a boys' restroom. It also created an inaccurate and discriminatory distinction between Drew as a boy and all other boys. Rather than treat Drew equally and in all material respects like a boy, he is singled out as different from the other boys at the school, which interferes with treatment for his gender dysphoria.

46. This discriminatory environment has resulted in Drew's avoiding using the restroom at all, whenever he could physically manage it, so as not to subject himself to this demeaning treatment. He began restricting his fluid intake and planning his day around when he might have to use the restroom. He worried about what other students would think if they saw him going to the gender neutral restrooms. Despite the fact that this meant missing class, Drew would sometimes attempt to go to the restroom in the middle of the

class, so that fewer students in the hallways would see him walking past the boys' restrooms to a special restroom instead. Drew also held his bladder as much as he could, which was extremely – at times, excruciatingly – uncomfortable. Erica recalls Drew needing to rush home to use the restroom at the end of the school day after trying to hold his bladder for hours.

47. In addition, unlike the boys' restrooms located throughout the school, the gender neutral restrooms on the campus are far fewer in number and often far less accessible. For example, during Drew's current class schedule, he does not have access to a gender neutral restroom in any of the buildings where his classes are held before lunch. When he needs to use a restroom during, or in between, any of those classes, he must walk much farther than his classmates to reach a gender neutral restroom. It is not feasible to do so based on the location of his classes without missing some class time. This is extremely stressful, given that every minute of class time in his advanced classes matters. It forces Drew to weigh the importance of the information that he would miss in class, against the anxiety, stress, and distraction that come with trying to hold one's bladder. This creates a Hobson's choice for Drew, one that forces him to choose between the importance of learning and being present in class, with the physiological need to use the restroom. Ignoring that physiological need can be incredibly uncomfortable, and when Drew holds his bladder that makes it difficult to concentrate or participate equally in class. Equally as bad is the constant reminder that he is being treated differently and not accepted for who he is, something important for anyone, much less a young man in Drew's situation. No cisgender boy at the school has to cope with this kind of discriminatory burden.

48. Given the importance of living as a boy in all respects, this distinction creates an emotional and social hardship on Drew. Defendant's policy creates a false and discriminatory distinction by separating Drew from other boys; this differential treatment causes Drew to feel anxious by reinforcing a message that he is "different," rather than simply allowing him to live as he is: a boy. The policy is a constant reinforcement by Defendant that it does not view Drew as a real boy and believes he should be treated differently. This creates and nurtures a stigma that has no place in the school system and telecasts to others that Drew should not be treated as a boy in all respects.

49. Defendant's policy also caused Erica to feel hurt and angry as she observed the enormous toll that the policy took on Drew. She tried to address it with school officials in an effort to avoid taking legal action. Erica sent letters to Principal Dresback and Superintendent Joyner right after Drew was first instructed on September 22, 2015 not to use boys' restrooms, requesting that he be treated as equal to all other boys in the school. Superintendent Joyner never responded to her letter. Erica and Drew then met with Principal Dresback, social workers Holly Arkin and Christy McKendrick, and Director of Student Services Sallyanne Smith in early October 2015. Erica and Drew were told during the meeting that this was "a District issue," and that the school's hands were tied.

50. Erica met with District officials on or around November 23 or 24, 2015, including Associate Superintendent Cathy Mittelstadt and Assistant Superintendent Brennan Asplen. Mr. Asplen repeatedly raised the issue of "biology" during the meeting, which he used to refer to genitals. Erica had brought an assortment of studies, articles, and other materials about transgender students to help the District officials understand how important

equal treatment is, but Mr. Asplen explained his view that "98% of the people in this District would not understand" if Drew were allowed to use the boys' restroom. Mr. Asplen said he was more concerned about legal action by the parent of a cisgender child than legal action by Drew. Erica offered during that meeting, and later via email, to help educate other parents in the district about transgender children, but was rebuffed. Mr. Asplen again focused his attention on the issue of genitals and asked what would happen if a transgender girl were to come out of a stall and "wave her penis around." Erica said words to the effect of, "Sir, I don't know what kind of bathrooms you've been in, but I've never seen a naked person in a bathroom." Erica pointed out that lewd behavior by *any* student is already against the law. Unfortunately, Mr. Asplen's comments are precisely the type that foster negative stereotypes and misperceptions, all of which are both discriminatory and unsupported by any evidence, meaning that there is no evidence that a transgender child is any more likely to engage in inappropriate behavior. Comments like these highlight the discriminatory nature of the policy itself, one predicated on others' unsupported fears, rather than actual evidence.

51. Erica contacted the U.S. Department of Education's Office for Civil Rights ("OCR") in November 2015 to file a complaint, and OCR opened an investigation. OCR offered District officials an opportunity to mediate the matter, but the District declined. OCR's assigned investigator conducted a full investigation, later suggesting that Erica meet with officials again to see if the issue could be resolved. On April 8, 2016, Erica met with Ms. Mittelstadt, Ms. Arkin, and Ms. McKendrick. Ms. Mittelstadt described this as a "civil rights issue," but said that the district is "too conservative" and "not there yet." Erica pointed out that other Florida school districts, like Broward County Public Schools, treat their

transgender students equally in restrooms. Unfortunately, the meeting too yielded no progress. Erica and Drew met again with Ms. Mittelstadt on May 4, 2016, but they were once again unsuccessful in securing a policy change that would allow Drew equal access to the boys' restrooms.

52. Throughout the summer of 2016 and the 2016-2017 school year, and still hoping to avoid taking legal action, Erica reached out to OCR officials on other occasions to ascertain the status of their investigation into Defendant's discriminatory policy. Her efforts were in vain. Following the rescission on February 22, 2017 of prior guidance clarifying the scope of Title IX's protections of transgender students by OCR and the U.S Department of Justice, Erica and Drew came to the conclusion that they OCR would no longer be able to address their plight. As a result, Erica and Drew sought legal representation to take legal action against Defendant's discriminatory policy.

53. At no point has any school or District official ever provided Erica or Drew with information suggesting that his use of the boys' restroom harms anyone else. When Drew is in all other settings outside of school, he uses the men's restroom. To Drew's knowledge, there has never been an incident or complaint by others with his restroom use outside of school. Drew has never, and would never, invade anyone else's privacy in a restroom. He just wants to use the restroom, wash his hands, and leave like everyone else does. He wants to be treated as the normal boy that he is and blend in.

54. Access to the boys' restroom is important to Drew because he wants to interact with his peers like an equal. Drew is recognized as the boy that he is in every respect by peers and teachers, except at the moment he needs to enter a restroom. It does not work

for him to be a boy in every other part of his school life, but not when he needs to perform one of life's most basic functions. And, more particularly, it suggests to others a false distinction: that a transgender boy is not a "real" boy. Such stigma is not only deleterious for Drew, it is a harmful statement to others, creating a stigma associated with being transgender.

55. Being banned from the boys' restrooms is humiliating to Drew. It sends a signal to other students that Drew is not a real boy, and treats him as if he is unfit to share a communal space with others. It also creates a negative perception and reinforces stereotypes—all of which are unfounded—that transgender children are more likely to behave inappropriately or that they are inferior to other children. Drew feels like he has enough to manage in a world that is still learning to understand transgender people without his school making the situation worse, and teaching his peers that he is not worthy of the same dignity and respect as all other boys.

56. By mandating and relegating Drew to use single-stall gender neutral restrooms, a condition not imposed on cisgender students, Defendant isolates and separates Drew based on his sex and transgender status.

57. By barring Drew from the restrooms consistent with who he is, Defendant refuses to recognize Drew's gender identity even as it recognizes the gender identity of all of his cisgender peers. Indeed, through its policy, Defendant effectively seeks to erase and invalidate Drew's gender identity.

58. As a result, Drew has experienced and continues to experience the harmful effects of being separated from, and treated differently than, his cisgender classmates of the

same gender identity at Nease High School, including emotional distress, lowered self-esteem, embarrassment, humiliation, social isolation, and stigma. All of these harmful effects have also heightened the symptoms, including depression and anxiety, of the gender dysphoria suffered by Drew.

59. Through its actions, Defendant has purposefully disrupted Drew's education.

CLAIMS FOR RELIEF

COUNT I

Denial of Equal Protection
U.S. Const. Amend. XIV

60. Plaintiff incorporates paragraphs 1 through 59 as though fully set forth herein.

61. Plaintiff challenges, both facially and as applied to him, Defendant's policy of excluding transgender students from the single-sex facilities that match their gender identity.

62. Defendant is a person acting under color of state law for purposes of 42 U.S.C. § 1983.

63. Defendant is the final policy maker for Nease High School within the St. Johns County School District.

64. The Fourteenth Amendment to the U.S. Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

65. Defendant's exclusion of transgender students such as Drew from the single-sex facilities matching their gender identity treats transgender students differently from cisgender students who are similarly situated. Under Defendant's discriminatory policy, cisgender students are able to access restrooms and other single-sex facilities consistent with

their gender identity, but transgender students are banned from single-sex facilities consistent with their gender identity.

66. **Discrimination based on sex:** Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

a. Discrimination based on sex includes, but is not limited to, discrimination based on gender, gender nonconformity, transgender status, gender expression, and gender transition.

b. Defendant's exclusion of Drew from boys' restrooms in the school district discriminates against him on the basis of sex.

c. Defendant's policy also discriminates against Drew based on gender nonconformity and sex stereotyping. For example, although Drew is a boy, is perceived as a boy in public, and has had medical treatment to bring his body into alignment with his male gender identity, he does not conform to Defendant's sex-stereotyped expectations for boys because his sex assigned at birth was female.

67. **Discrimination based on transgender status:** Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on transgender status is presumptively unconstitutional and subject to strict, or at least heightened scrutiny.

a. Transgender people have suffered a long history of extreme discrimination in Florida and across the country, and continue to suffer such discrimination to this day.

b. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit state and federal protections to protect them against discrimination.

c. A person's gender identity or transgender status bears no relation to a person's ability to contribute to society.

d. Gender identity is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

e. Gender identity generally is fixed at an early age and highly resistant to change through intervention.

68. Defendant's discrimination against Drew is not narrowly tailored or substantially related to any compelling or important government interest. Indeed, it is not even rationally related to any legitimate government interest. The discriminatory policy does not promote the safety, privacy, security, or well-being of any students, including cisgender students, but it does undermine the safety and privacy of transgender students such as Drew, who is publicly marked as different and inferior every time he has to access a different restroom from other boys.

69. Defendant's discriminatory policy deprives Drew and other transgender students of their right to equal dignity, liberty, and autonomy by branding them as second-class citizens. Defendant thus denies Drew equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment.

70. Defendant School Board has conduct is wrongful and violates the Equal Protection Clause of the Fourteenth Amendment, for which Drew is entitled to compensatory, as well as nominal, damages against Defendant School Board.

COUNT II

Violation of Title IX
20 U.S.C. § 1681, *et seq*.

71. Plaintiff incorporates paragraphs 1 through 59 as though fully set forth herein.

72. Title IX provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

73. Under Title IX, discrimination on the basis of sex includes, but is not limited to, discrimination based on gender, gender nonconformity, transgender status, gender expression, and gender transition.

74. Defendant School Board is a recipient of federal financial assistance from the United States Department of Education, and therefore subject to Title IX.

75. Under Defendant School Board's discriminatory policy, cisgender students are able to access restrooms and other single-sex facilities consistent with their gender identity, but transgender students are banned from single-sex facilities consistent with their gender identity.

76. By banning Drew from access to and use of boys' restrooms consistent with his gender identity, Defendant School Board excludes Drew from participation in, denies him the benefits of, and subjects him to discrimination in educational programs and activities within the District, particularly at Nease High School, on the basis of sex, in violation of

Title IX. For example, Drew's being forced to access far away gender neutral restrooms means that Drew must sometimes miss classroom time simply to relieve himself; and when Drew attempts to hold his bladder so as not to miss instruction time, he struggles to concentrate on the teacher's material instead of the significant discomfort of holding his bladder.

77. Defendant's discriminatory exclusion of Drew from boys' restrooms because he is transgender harms Drew by stigmatizing him and treating him as lesser than other boys, which causes Drew to experience emotional distress, anxiety, embarrassment, humiliation, and pain and anguish.

78. Defendant School Board has intentionally violated and continues to violate Title IX, for which Drew is entitled to compensatory, as well as nominal damages, against the School Board.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor and against Defendant on all claims, as follows:

A. Enter a declaratory judgment that Defendant's exclusion of Drew from boys' restrooms within the District violates Drew's rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

B. Enter a declaratory judgment that Defendant School Board's exclusion of Drew from boys' restrooms within the District violates Drew's rights under Title IX;

C. Issue injunctive relief enjoining Defendant (i) from treating Drew differently from other boys in any respect, including but not limited to by denying Drew equal access to

boys' restrooms within the District on the same terms as all other boys, and (ii) from denying any students, including those who are transgender, from using single-sex multi-user facilities in accordance with their gender identity;

E. Award Drew, by and through his next friend Erica Adams Kasper, compensatory, as well as nominal, damages against Defendant School Board in an amount that would fully compensate Drew for the emotional distress and suffering, embarrassment, humiliation, pain and anguish, violation of his dignity, and other damages that have been caused by Defendant's conduct in violation of Drew's rights under the Fourteenth Amendment to the U.S. Constitution and Title IX;

F. Award Drew his costs, expenses, and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and

G. Grant such other and further legal and equitable relief as the Court deems appropriate, just, and proper.

H. The declaratory and injunctive relief requested in this action is sought against Defendant and its officers, agents, servants, employees, and attorneys, as well as any other persons who are in active concert or participation with them.

* * *

Dated: September 7, 2017

Respectfully submitted,

/s/ Tara L. Borelli

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing and all attachments to be served on all counsel of record.

/s/ Tara L. Borelli
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DE 63

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

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

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.
_____/

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S AMENDED COMPLAINT

Defendant, **THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA**, by and through its undersigned counsel, hereby answers Plaintiff's Amended Complaint [Doc. 60] in correspondingly numbered paragraphs as follows:[1]

INTRODUCTION

1. Defendant admits Plaintiff attends Allen D. Nease High School ("Nease") and started his junior year in August of 2017. Defendant admits Plaintiff self-identifies as a transgender male. Defendant denies it subjected Plaintiff to discrimination at Nease.

[1] On August 18, 2017, Defendant filed a Motion to Dismiss Plaintiff's Complaint. [Doc. 54], specifically seeking dismissal of Plaintiff's Title IX claim (Count II). In its Case Management and Scheduling Order [Doc. 59] issued September 4, 2017, the Court ordered that the Defendant's Motion will be carried with the case and decided as part of the Court's Findings of Fact and Conclusions of Law following trial. As such, this Answer will only address the general allegations and Count I of the Amended Complaint, and is, contemporaneous with this filing, filing a Notice that it reincorporates its arguments in the Motion to Dismiss.

Defendant is without knowledge as to, and therefore denies, the remaining allegations in Paragraph 1.

2. Defendant admits Plaintiff is a student. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 2.

3. Defendant admits Plaintiff is seeking a declaratory judgment, preliminary and permanent injunctive relief, and compensatory as well as nominal damages. Defendant denies the Superintendent and Principal are parties to this action. [Doc. 49]. Defendant denies that Plaintiff is entitled to injunctive relief [Doc. 50] or any of the relief sought, and denies the remaining allegations in Paragraph 3.

PARTIES

4. Defendant admits Plaintiff is a 16-year-old, self-identified transgender male who attends Nease. Defendant admits Plaintiff is subject to Defendant's policies that apply equally to all students in the District. Defendant admits Plaintiff is seeking to bring an action through his friend and mother under Rule 17(c) of the Federal Rules of Civil Procedure. Defendant denies the remaining allegations in Paragraph 4.

5. Defendant admits it derives power, in part, from the Florida Constitution and Florida Statutes sections cited in Paragraph 5. Defendant admits it establishes policies for the effective operation of the District. Defendant admits it is a "person" for purposes of §1983. Defendant denies the remaining allegations in Paragraph 5.

6. Defendant admits Plaintiff is prohibited from using the boys' bathrooms at Nease but denies the remaining allegations in Paragraph 6.

JURISDICTION AND VENUE

7. Defendant admits the allegations in Paragraph 7 for jurisdictional purposes only.

8. Defendant admits the allegations in Paragraph 8 for jurisdictional purposes only.

9. Defendant admits the allegations in Paragraph 9 for venue purposes only.

10. Defendant submits that Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202 speak for themselves.

11. Defendant admits the allegations in Paragraph 11.

FACTUAL ALLEGATIONS

12. Defendant admits the allegations in Paragraph 12.

13. Defendant admits Plaintiff is an honor student, enrolled in AP classes, and participates in the International Baccalaureate program. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 13.

14. Defendant admits Plaintiff participates in at least one school-based extracurricular activity. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 14.

15. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 15.

16. Defendant denies the allegation in Paragraph 16.

17. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 17.

18. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 18.

19. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 19.

20. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 20.

21. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 21.

22. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 22.

23. Defendant admits gender dysphoria is a condition recognized in the DSM-V. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 23.

24. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 24.

25. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 25

26. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 26.

27. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 27.

28. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 28.

29. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 29.

30. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 30.

31. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 31.

32. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 32.

33. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 33.

34. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 34.

35. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 35.

36. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 36.

37. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 37.

38. Defendant admits Plaintiff requested to be treated as a boy at the beginning of his freshman year at Nease. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 38.

39. Defendant admits that Plaintiff emailed certain school personnel and requested they use male pronouns when referring to him. Defendant admits Plaintiff continued to use the first name "Drew." Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 39.

40. Defendant admits Plaintiff's teachers used male pronouns when referring to him. Defendant is without knowledge as to and therefore denies the remaining allegations in Paragraph 40.

41. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 41.

42. Defendant admits a meeting was held with Plaintiff, Kim Hollis, and Holly Arkin at Nease in September of 2015. Defendant admits Plaintiff was advised that someone complained that he used the boys' bathroom at Nease. Defendant admits Plaintiff was reminded of gender-neutral bathroom options. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 42.

43. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 43.

44. Defendant is without knowledge as to and therefore denies the allegations in Paragraph 44.

45. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 45.

46. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 46.

47. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 47.

48. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 48.

49. Defendant admits Plaintiff's mother sent a letter to Mr. Dresback and further admits a meeting was held with Plaintiff, Plaintiff's mother, Ms. Arkin, Christy McKendrick, Sallyanne Smith, and Mr. Dresback. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 49.

50. Defendant admits that in the fall of 2015, Plaintiff's mother met with Cathy Mittelstadt and Brennan Asplen. Defendant admits the discussion included concerns about privacy issues. Defendant admits Plaintiff's mother brought documents to the meeting. Defendant denies Mr. Asplen made the comments alleged in Paragraph 50. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 50.

51. Defendant admits Plaintiff filed a complaint with the Office for Civil Rights ("OCR") in November of 2015 and that Defendant declined to participate in mediation with OCR. Defendant admits a meeting was held on April 8, 2016, involving Plaintiff's mother, Ms. Mittelstadt, and Ms. Arkin. Defendant admits Plaintiff and Plaintiff's mother met with Ms.

Mittelstadt in May of 2016. Defendant denies Plaintiff's allegation regarding the comments made by Ms. Mittelstadt during the April 8, 2016, meeting as alleged in Paragraph 51. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 51.

52. Defendant without knowledge as to and therefore denies the allegations in Paragraph 52.

53. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 53.

54. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 54.

55. Defendant is without knowledge as to and therefore denies or denies outright the allegations in Paragraph 55.

56. Defendant denies the allegations in Paragraph 56.

57. Defendant denies the allegations in Paragraph 57.

58. Defendant denies the allegations in Paragraph 58.

59. Defendant denies the allegations in Paragraph 59.

CLAIMS FOR RELIEF

COUNT I
Denial of Equal Protection
U.S. Const. Amend. XIV

60. Defendant incorporates paragraphs 1 through 59 as though fully set forth herein.

61. Defendant admits Plaintiff is seeking to challenge Defendant's bathroom policy, but denies Plaintiff's claim has any merit.

62. Defendant admits the allegations in Paragraph 62.

63. Defendant admits the allegations in Paragraph 63.

64. Defendant submits that the Fourteenth Amendment of the U.S. Constitution is a written document that speaks for itself.

65. Defendant denies the allegations in Paragraph 65.

66. Defendant admits the Fourteenth Amendment prohibits discrimination based on sex and that sex-based classifications are subject to intermediate scrutiny. Defendant denies the remaining allegations in Paragraph 66.

67. Defendant admits discrimination based on "sex stereotyping" in the Eleventh Circuit is subject to intermediate scrutiny. Defendant is without knowledge as to and therefore denies or denies outright the remaining allegations in Paragraph 67.

68. Defendant denies the allegations in Paragraph 68.

69. Defendant denies the allegations in Paragraph 69.

70. Defendant denies the allegations in Paragraph 70.

COUNT II
Violation of Title IX
20 U.S.C § 1681, *et seq.*

71-78. As noted in footnote 1, *supra*, Defendant is filing a Notice adopting its Motion to Dismiss [Doc. 54] in response to Count II of the Second Amended Complaint.

PRAYER FOR RELIEF

Defendant denies Plaintiff is entitled to any of the relief sought in the Prayer for Relief. Defendant denies all allegations not expressly admitted herein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiff fails to state a cause of action for a violation of the Equal Protection Clause as guaranteed by the Fourteenth Amendment. Specifically, Plaintiff is unable to demonstrate that the policies at issue are based on impermissible sex stereotyping or discriminatory on the basis of sex. Likewise, Plaintiff is unable to allege that he is treated differently than any other similarly situated individuals.

Second Affirmative Defense

Plaintiff is unable to demonstrate that he is a member of a suspect class.

Third Affirmative Defense

Defendant submits that the policies at issue are substantially related to the furtherance of an important government interest.

Fourth Affirmative Defense

Defendant submits there is no evidence to support the existence of any policy, custom, or practice created or maintained by Defendant which in and of itself deprived Plaintiff of any civil or constitutional right, or which was the moving force behind any unconstitutional conduct of Defendant and its employees and agents.

Fifth Affirmative Defense

Defendant submits the alleged injuries, if any, and damages, if any, of the Plaintiff and the derivative injury and damages, if any, of the Plaintiff were proximately caused by actions of others or events separate, distinct, unrelated and remote to any action or inaction of the Defendant, which said separate, distinct, unrelated actions of others or events or accidents were

the sole proximate or contributing cause of Defendant's alleged injuries and damages, if any, for which Defendant cannot be liable, or were such separate intervening and superseding causes thereof as to absolve Defendant of any responsibility or liability therefore.

Sixth Affirmative Defense

Defendant's policies and actions complied (and continue to comply) with applicable laws, specifically including, but not limited to, Title IX, and the United States Constitution.

Dated this 21st day of September, 2017.

Respectfully submitted,

/s/ *Michael P. Spellman*

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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on this 21st day of September, 2017, a true and correct copy of the foregoing was electronically filed in the United States District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ *Michael P. Spellman*
MICHAEL P. SPELLMAN

DE 64

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

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

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.
_____/

DEFENDANT'S NOTICE ADOPTING MOTION TO DISMISS IN RESPONSE TO COUNT II OF PLAINTIFF'S AMENDED COMPLAINT

Defendant, **THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA**, by and through its undersigned counsel, hereby gives notice pursuant to Rule 10(c), Federal Rules of Civil Procedure, of its intention to adopt by reference and otherwise incorporate the Motion to Dismiss filed August 18, 2017 [Doc. 54] in response to Count II of Plaintiff's Amended Complaint [Doc. 60].

Count II of both the Complaint and the Amended Complaint alleges a cause of action under Title IX, 20 U.S.C. §1681, et seq. Defendant's motion specifically sought dismissal of Count II only. The main difference between the Complaint and the Amended Complaint is that, in addition to nominal damages (pled in the Complaint), Plaintiff is now claiming entitlement to compensatory damages for "emotional distress and suffering, embarrassment, humiliation, pain and anguish, violation of his dignity, and other damages." [Doc. 60 at p. 22,

¶ E] Defendant's arguments in support of its motion remain applicable, and rather than restate them in an identical motion, Defendant instead adopts its previously-filed motion herein.[1]

Dated this 21st day of September, 2017.

Respectfully submitted,

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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on this 21st day of September, 2017, a true and correct copy of the foregoing was electronically filed in the United States District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ *Michael P. Spellman*
MICHAEL P. SPELLMAN

[1] In its Case Management and Scheduling Order [Doc. 59] issued September 4, 2017, the Court ordered that the Defendant's Motion will be carried with the case and decided as part of the Court's Findings of Fact and Conclusions of Law following trial.

DE 106

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,

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

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendants.
_____/

DEFENDANT'S MOTION FOR JUDICIAL NOTICE

Defendant, **THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA** ("Defendant"), by and through its undersigned counsel and pursuant to Federal Rule of Civil Procedure 201, hereby request this honorable Court to take judicial notice of certain documents, and in support states as follows:

1. On May 13, 2016, the U.S. Department of Education ("DOE") and Department of Justice ("DOJ") jointly released a statement of guidance and best practices ("Joint Guidance") explaining how federal laws which prohibit discrimination based on sex with regard to transgender students. Included with the joint guidance was a statement that schools must allow transgender students to participate in and access sex-segregated facilities. See Exhibit A.

2. On February 22, 2017, DOE and DOJ withdrew the Joint Guidance and a prior guidance, noting that it is the role of the States and school districts to create education policy. See Exhibit B.

3. On December 15, 2014, the former U.S. Attorney General issued a memorandum stating that Title VII of the Civil Rights Act of 1964's ("Title VII") prohibition of sex discrimination encompasses gender identity. See Exhibit C.

4. On October 4, 2017, the acting U.S. Attorney General issued a memorandum declaring that Title VII's prohibition on sex discrimination does not, *per se*, include gender identity and withdrew the former U.S. Attorney General's December 15, 2014 memorandum. See Exhibit D.

5. The Joint Guidance, its withdrawal letter, and the Attorney General Memoranda are published on DOE's or DOJ's websites.[1]

6. Additionally, several bills have been introduced and proposed over the last several years making a distinction between sex and gender identity. These bills include S.1006 "Equality Act" (Exhibit E); S.1858 "Equality Act" (Exhibit F); and S.439 "Student Non-Discrimination Act of 2015" (Exhibit G).

7. All of these bills are published on the U.S. Congress's Website.[2]

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[1] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
https://www.justice.gov/crt/guidance-and-resources
https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-
https://www.justice.gov/ag/page/file/1006981/download

[2] https://www.congress.gov/bill/115th-congress/senate-bill/1006/text?q=%7B%22search%22%3A%5B%22%5C%22Title+VII%5C%22+AND+%5C%22gender+identity%5C%22%22%5D%7D&r=1%20https://www.congress.gov/bill/115th-congress/house-bill/2282/text?q=%7B%22search%22%3A%5B%22%5C%22Title+VII%5C%22+AND+%5C%22gender+identity%5C%22%22%5D%7D&r=2
https://www.congress.gov/bill/114th-congress/senate-bill/1858/text?q=%7B%22search%22%3A%5B%22114hr3185%22%5D%7D&r=2https://www.congress.gov/bill/114th-congress/house-bill/3185/text?q=%7B%22search%22%3A%5B%22114hr3185%22%5D%7D&r=3
https://www.congress.gov/bill/114th-congress/senate-bill/439/text?q=%7B%22search%22%3A%5B%22114s439%22%5D%7D&r=1https://www.congress.gov/bill/114th-congress/house-bill/846/text?q=%7B%22search%22%3A%5B%22114s439%22%5D%7D&r=2

8. Counsel for Plaintiff has been contacted regarding this motion and does not oppose the Court taking judicial notice of **Exhibits A**, **B**, **C** and **D**. Plaintiff does oppose the Court taking judicial notice of **Exhibits E**, **F**, and **G**.

MEMORANDUM OF LAW

A court may take judicial notice of a fact if it can be accurately and readily determined from sources whose accuracy cannot be reasonable questioned. Stanifer v. Corin USA Ltd., Inc., 2014 WL 5823319, *3 (M.D. Fla. Nov. 10, 2014). Facts and documents found on government websites are the proper subjects for judicial notice. See Sec. of Labor v. American Bronze Foundry, Inc., 2013 WL 5720146, *3, fn. 4 (M.D. Fla. Oct. 21, 2013); Setai, Hotel Acquisition, LLC v. Miami Beach Luxury Rentals, Inc., 2017 WL 3503371, *7 (S.D. Fla. Aug. 15, 2017); Turbyfill v. Scottsdale Indemnity Co., 2016 WL 741657, *2 (N.D. Fla. Feb. 24, 2016); Paralyzed Veterans of America v. McPherson, 2008 WL 4183981, *5 (N.D. Cal. Sept. 9, 2008).

Accordingly, because the Joint Guidance, its withdrawal letter, the Attorney General Memoranda, and the proposed bills are published on government websites, they are proper subjects for judicial notice.

WHEREFORE, Defendant respectfully requests that the Court enter an order taking judicial notice of the May 13, 2016 DOE and DOJ Joint Guidance letter and the February 22, 2017 DOE and DOJ withdrawal of that Joint Guidance, the December 15, 2014 U.S. Attorney General Memorandum, and the October 4, 2017 U.S. Attorney General Memorandum, and the proposed bills titled S.1006 “Equality Act”; S.1858 “Equality Act”; and S.439 “Student Non-Discrimination Act of 2015” attached hereto as **Exhibits A, B, C, D, E, F, & G**.

Dated this 29th day of November 2017.

Respectfully submitted,

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Counsel for St. Johns County School Board

CERTIFICATE OF SERVICE

The undersigned certifies that on this 29th day of November, 2017, a true and correct copy of the foregoing was electronically filed in the U.S. District Court, Middle District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Kevin C. Kostelnik
KEVIN C. KOSTELNIK

CERTIFICATE OF CONFERRAL

Pursuant to Local Rule 3.01(g), I hereby certify that on November 29, 2017, Defendant's Counsel conferred with Plaintiff's counsel. Plaintiff's counsel indicated that they do not oppose the Court taking judicial notice of **Exhibits A**, **B**, **C** and **D**. Plaintiff does oppose the Court taking judicial notice of **Exhibits E**, **F**, and **G**.

/s/ Kevin C. Kostelnik
KEVIN C. KOSTELNIK

DE 106-1

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter on Transgender Students
Notice of Language Assistance

If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語，或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX

requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms**. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own

sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations**. Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules**. Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records**. FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may

violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

  - Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
  - Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/	/s/
Catherine E. Lhamon	Vanita Gupta
Assistant Secretary for Civil Rights	Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Education	U.S. Department of Justice

[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] *See G.G.*, 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

[9] *See, e.g.,* Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist*., *CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] *See, e.g.*, OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] *See, e.g.*, Resolution Agreement, *In re Cent. Piedmont Cmty. Coll., NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id*. § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially

equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.,* Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).

DE 106-2

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter
Notice of Language Assistance

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Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

February 22, 2017

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and

- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination "on the basis of sex" in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term "sex" in the regulations is ambiguous and deferred to what the court characterized as the "novel" interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term "sex" unambiguously refers to biological sex and that, in any event, the guidance was "legislative and substantive" and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice

DE 106-3

Office of the Attorney General
Washington, D. C. 20530

December 15, 2014

MEMORANDUM

TO: UNITED STATES ATTORNEYS
HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate in the employment of an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by private employers and by state and local governments); 42 U.S.C. § 2000e-16(a) (providing that personnel actions by federal agencies "shall be made free from any discrimination based on … sex"). Title VII's prohibition of sex discrimination is a strong and vital principle that underlies the integrity of our workforce. In a variety of judicial and administrative contexts, however, questions have arisen concerning the appropriate legal standard for establishing claims of gender identity discrimination, including discrimination claims raised by transgender employees.[1]

Many courts have recognized that gender identity discrimination claims may be established under a "sex-stereotyping" theory. Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), courts have interpreted Title VII's prohibition of discrimination because of "sex" as barring discrimination based on a perceived failure to conform to socially constructed characteristics of males and females. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *see also Glenn v. Bromby*, 663 F.3d 1312 (11th Cir. 2011). But courts have reached varying conclusions about whether discrimination based on gender identity in and of itself—including transgender status—constitutes discrimination based on sex. *Compare Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), *with Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2005).

The federal government's approach to this issue has also evolved over time. In 2006, the Department stated in litigation that Title VII's prohibition of discrimination based on sex did not cover discrimination based on transgender status or gender identity *per se*; the district court rejected that position. *See Schroer*, 577 F. Supp. 2d at 293. Subsequently, in 2011, the Office of

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[1] Guidance from the Office of Personnel Management states that "[t]ransgender individuals are people with a gender identity that is different from the sex assigned to them at birth," and defines "gender identity" as an individual's "internal sense of being male or female." *See* http://www.opm.gov/diversity/Transgender/Guidance.asp.

Personnel Management issued guidance announcing that the federal government's policy of providing a workplace free of discrimination based on sex includes a prohibition against discrimination based on gender identity. In 2012, the Equal Employment Opportunity Commission ruled that discrimination on the basis of gender identity is discrimination on the basis of sex. *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). More recently, the President announced that discrimination based on gender identity is prohibited for purposes of federal employment and government contracting. *See* Executive Order 13672 (July 21, 2014); *see also* U.S. Dep't of Labor Directive 2014-02 (August 19, 2014).

After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination "because of . . . sex" includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex. As the Court explained in *Price Waterhouse*, by using "the simple words 'because of,' . . . Congress meant to obligate" a Title VII plaintiff to prove only "that the employer relied upon sex-based considerations in coming to its decision." 490 U.S. at 241-242. It follows that, as a matter of plain meaning, Title VII's prohibition against discrimination "because of . . . sex" encompasses discrimination founded on sex-based considerations, including discrimination based on an employee's transitioning to, or identifying as, a different sex altogether. Although Congress may not have had such claims in mind when it enacted Title VII, the Supreme Court has made clear that Title VII must be interpreted according to its plain text, noting that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

For these reasons, the Department will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination).[2] This memorandum is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case. The application of Title VII to any given case will necessarily turn on the specific facts at hand. My hope, however, is that this clarification of the Department's position will foster consistent treatment of claimants throughout the government, in furtherance of this Department's commitment to fair and impartial justice for all Americans.

If you have questions about this memorandum or its application in a case, please contact your Civil Chief or your Component's Front Office.

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[2] "Sex-stereotyping" remains an available theory under which to bring a Title VII claim, including a claim by a transgender individual, in cases where the evidence supports that theory.

DE 106-4

Office of the Attorney General
Washington, D. C. 20530

October 4, 2017

MEMORANDUM

TO: UNITED STATES ATTORNEYS
HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate in the employment of an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by private employers and by state and local governments); 42 U.S.C. § 2000e-16(a) (providing that personnel actions by federal agencies "shall be made free from any discrimination based on . . . sex"). Title VII's prohibition of sex discrimination is a strong and vital principle that underlies the integrity of our workforce.

The question of whether Title VII's prohibition on sex discrimination encompasses discrimination based on gender identity *per se*, including discrimination against transgender individuals, arises in a variety of contexts. In a December 15, 2014, memorandum, Attorney General Holder concluded that Title VII does encompass such discrimination, based on his view that Title VII prohibits employers from taking into account "sex-based considerations." Memo. at 2; *see also id.* at 1 n.1 (defining "gender identity" and "transgender individuals").

Although federal law, including Title VII, provides various protections to transgender individuals, Title VII does not prohibit discrimination based on gender identity *per se*. This is a conclusion of law, not policy. The sole issue addressed in this memorandum is what conduct Title VII prohibits by its terms, not what conduct should be prohibited by statute, regulation, or employer action. As a law enforcement agency, the Department of Justice must interpret Title VII as written by Congress.

Title VII expressly prohibits discrimination "because of . . . sex" and several other protected traits, but it does not refer to gender identity. "Sex" is ordinarily defined to mean biologically male or female. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, "gender identity" discrimination, which Congress lists in addition to, rather than within, prohibitions on

discrimination based on "sex" or "gender." *See, e.g.*, 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A). Furthermore, the Supreme Court has explained that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment [or other employment actions] to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Although Title VII bars "sex stereotypes" insofar as that particular sort of "sex-based consideration[ ]" causes "disparate treatment of men and women," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, 251 (1989) (plurality op.), Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex, *see, e.g.*, *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc).

Accordingly, Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status. Therefore, as of the date of this memorandum, which hereby withdraws the December 15, 2014, memorandum, the Department of Justice will take that position in all pending and future matters (except where controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential further review).

The Justice Department must and will continue to affirm the dignity of all people, including transgender individuals. Nothing in this memorandum should be construed to condone mistreatment on the basis of gender identity, or to express a policy view on whether Congress should amend Title VII to provide different or additional protections. Nor does this memorandum remove or reduce the protections against discrimination on the basis of sex that Congress has provided all individuals, including transgender individuals, under Title VII. In addition, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act and the Violence Against Women Reauthorization Act prohibit gender identity discrimination along with other types of discrimination in certain contexts. 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A). The Department of Justice has vigorously enforced such laws, and will continue to do so, on behalf of all Americans, including transgender Americans.

If you have questions about this memorandum or its application in a case, please contact your Civil Chief or your Component's Front Office.