

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 XIII**

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Middle District of Florida

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

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

Jacksonville, Florida

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

Plaintiff,

December 13, 2017

vs.

9:01 a.m.

THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,

Courtroom No. 10D

Defendant.

BENCH TRIAL
(VOLUME III OF III - REDACTED)
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

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WITNESSES FOR THE DEFENDANT:

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P R O C E E D I N G S

December 13, 2017 9:01 a.m.

- - -

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

THE COURT: Good morning. How is everybody?

MS. ALTMAN: Good morning, Your Honor.

MR. HARMON: Good morning.

THE COURT: I always subscribe to the view that trial days are like dog years, you feel like even though we've only been in trial two days, doesn't it feel like much longer than that? I'm sure especially for you-all who probably have been working 20-hour days to get ready to go to trial, but I think we're moving along. I would like to see if we can get the evidence done today, but we'll see what happens.

Before we do proceed, though, I wanted to return to one issue from yesterday. Is it Mr. Kostelnik, is that how you say your name?

MR. KOSTELNIK: Kostelnik.

THE COURT: Kostelnik. I wanted to -- and I thought about yesterday whether to say anything to you after -- after the break, but I decided not to at that point. I wanted to talk to you about that -- that question that you asked about

1 the grand jury proceedings.

2 As I said yesterday, I thought it was an unfair
3 question for lots of reasons and irrelevant for lots of
4 reasons.

5 But as I was thinking about it, I also think it was a
6 misreading of the audience. Meaning, to the extent that the
7 question was designed to paint Broward County as the bad guys
8 or incompetent or whatever the point was, that's just a
9 misreading of what I think we're doing here. I don't think
10 there's any bad guys in this case at all.

11 I think everybody is of goodwill, in good faith, and
12 everybody is trying to do the best they can. And I think
13 Mr. Adams, on the stand, was honest, forthright. He struck me
14 as a person who was trying to make his way in a confusing
15 world.

16 And in terms of quality of witnesses, in terms of
17 answers in response to cross-examination, I rate him in the top
18 10 percent of witnesses I've heard, and I've heard hundreds of
19 witnesses.

20 I think the folks from Broward County seemed
21 committed and had the best interest of the students in mind. I
22 thought Dr. Aberli, same way, from Kentucky. I mean, they
23 really impressed me as people who are trying to -- again,
24 anybody who's trying to run a school system in this changing
25 social landscape, dealing with all the issues that

1 administrators have to deal with -- I can't imagine a more
2 difficult job. And I feel exactly the same way about the
3 St. Johns County District.

4 As far as I can tell, and as far as the evidence has
5 shown me, everybody in St. Johns County School District -- now,
6 you know, there may be some outside forces that -- that are not
7 part of this trial that may -- that may have different agendas,
8 but I'm talking about the St. Johns County School District.
9 The administrators -- again, trying to navigate a very
10 difficult social landscape with competing parents having
11 different views about how things ought to go. And I don't have
12 any doubt from hearing this testimony that these folks are
13 doing the best they can in a difficult situation and they have
14 the interest of the students at heart.

15 So this is not going to be a case about who's the
16 good guy and who's the bad guy. As far as I can tell, again,
17 everybody's of good faith and of goodwill.

18 What this case is about, and only what it's about,
19 is -- notwithstanding whatever well-intentioned motives the
20 district has, does the district's policy nevertheless violate
21 Title IX or does it violate the Equal Protection Clause of the
22 United States Constitution.

23 And courts are rightfully reluctant to interfere with
24 a school district's administration of its duties. Federal
25 courts are not designed to run schools or to tell school

1 districts how to do their business. And I am well aware of
2 that.

3 But federal courts are here to enforce statutory and
4 constitutional law. And if the plaintiffs are able to
5 demonstrate that this policy -- even if it be done in good
6 faith and by well-intentioned people -- if they're able to
7 demonstrate to me that it violates either Title IX or the Equal
8 Protection Clause, then it will be my responsibility to say so.
9 If the plaintiffs can't show me that, it will be my
10 responsibility to say so.

11 But none of that -- none of that determination will
12 have anything to do with whether somebody's ill-intentioned or
13 in bad faith. It's just -- that's just not going to be part of
14 the case. And so I think that's why -- in addition, again, to
15 it being an unfair question -- I think that's why I don't think
16 it was a well-placed question.

17 And so what I'm going to be looking for from the
18 lawyers, and from the witnesses, is as much information as I
19 can get to make an informed decision. But that decision will
20 be not based on who -- that decision will be based only on what
21 I think the law requires.

22 Now, the law is informed by the facts. So,
23 obviously, some of these matters we've been discussing are
24 important to inform the legal decision. Otherwise, you
25 don't -- you can't make it in a vacuum. So that's what we're

1 doing, and that's what we'll continue to do. And that's all
2 we're doing.

3 Okay. So, I think what we'll do is we'll go ahead
4 and finish the witness and then we'll see where we are. I want
5 to -- also, I know you -- I did finally get a chance to take a
6 look at the judicial notice issues. I think we can deal with
7 those fairly easily.

8 I know we have the request for admission issues. I'm
9 sure you're ready to talk about that when we get to it. We've
10 got the proffer of Dr. Englestaff [sic] -- if I'm saying her
11 name correctly.

12 MS. ALTMAN: Ehrensaft.

13 THE COURT: Ehrensaft. I knew I didn't have it quite
14 right. But let's go ahead -- let's go ahead and finish this
15 witness so she can get on her way.

16 So where -- is Ms. Mittelstadt here? Where is she?

17 MR. HARMON: I can go get her, Your Honor.

18 THE COURT: Okay. Thanks. Unless -- is there
19 anything else we need to talk about before we get going with
20 that?

21 MS. ALTMAN: No, Your Honor. I assume we can submit
22 the Ehrensaft materials at the same time as the proffer.

23 THE COURT: Yes, yes. Yeah. Let's go ahead and get
24 the witness done. I've already made her come back.

25 (Ms. Mittelstadt enters the courtroom.)

1 THE COURT: All right. Ma'am, your oath doesn't wear
2 off overnight. So you're good to go.

3 THE WITNESS: Yes, sir. Thank you.

4 MR. KAPLAN: Good morning, Your Honor. May I
5 inquire?

6 THE COURT: You may.

7 **CROSS-EXAMINATION**

8 BY MR. KAPLAN:

9 Q. Good morning, ma'am. How are you?

10 A. Good morning. Good, thank you.

11 Q. I want to sort of step back a little bit and go to the
12 direct examination that you gave yesterday and talk to you
13 about some of the things you spoke to your lawyer about, okay?

14 A. Sure.

15 Q. I think one of the things that you discussed yesterday was
16 a policy that predated the best practices guidelines.

17 Do you recall that?

18 A. Yes.

19 Q. And the policy that I'm referring to, ma'am, is I think
20 what -- what has been talked about as a -- a sex-segregated
21 bathroom policy; is that an accurate statement?

22 A. Yes.

23 Q. In other words, I think to use your words, boys go to
24 boys' rooms, girls go to girls' rooms, correct?

25 A. Yes.

1 Q. Do you agree with me, ma'am, that that policy is not
2 written, right?

3 A. It's expected. It is unwritten. It's the way we've been
4 doing our business.

5 Q. It's an unwritten policy, right?

6 A. To use those words, if that's how you choose to, yes, it's
7 unwritten.

8 Q. Which is to say, ma'am, you cannot point to anything in
9 the St. Johns County School District guidelines or policies, or
10 anywhere, where -- what you've articulated; in other words,
11 boys go to boys' rooms, girls go to girls' rooms? That does
12 not appear anywhere, right?

13 A. In writing, no, sir.

14 Q. Okay. And for that matter, you -- you cannot tell us who
15 came up with that policy, right?

16 A. One specific person, no, sir. It's just something -- the
17 way our district has carried out their business over the course
18 of time.

19 Q. I understand that. And the term "biological sex," do you
20 recall using that term, ma'am?

21 A. I do.

22 Q. It's not your testimony that the word "biological sex"
23 applies to the unwritten policy, in other words, that the
24 unwritten policy was that biological boys go to biological
25 boys' rooms and biological girls go to biological girls' rooms,

1 right?

2 A. No, sex-segregated.

3 Q. Okay. You talked about enrollment paperwork.

4 Do you recall that?

5 A. Yes.

6 Q. And enrollment paperwork is a term for the paperwork
7 that's provided to the school district so that a student can
8 enroll in one of the St. Johns County schools; is that fair to
9 say?

10 A. Yes.

11 Q. And that includes a number of documents, right?

12 A. It does.

13 Q. Documents like some background information, where the name
14 of a student appears, right?

15 A. The documents we talked about yesterday, yes.

16 Q. And it includes a box for M and a box for F, male and
17 female; is that right?

18 A. On one of our sheets, yes.

19 Q. It's not your testimony, ma'am, that there's a box for
20 transgender, correct?

21 A. That's correct.

22 Q. All right. Either M or F, right?

23 A. Correct.

24 Q. Now, you feel that once a student fills out that
25 enrollment paperwork and checks off the box M or F, that

1 student's sex is set in stone, right?

2 A. Yes. Yes.

3 Q. In other words, there's not any circumstance that you'd
4 consider changing that M or F designation, right?

5 A. In our student record database, that's correct.

6 Q. So when Drew Adams comes to you with a license that's
7 issued by the State of Florida that says male, the paperwork
8 trumps the license, correct?

9 A. Correct.

10 Q. When Drew Adams comes to you with a birth certificate that
11 says male, the paperwork trumps the birth certificate, right?

12 A. Yes. Yes.

13 Q. You spent some time discussing with us the best practices.
14 Do you recall that?

15 A. I do.

16 Q. And sort of how the best practices came to be, right?

17 A. Yes.

18 Q. You agree with me, ma'am, that you are -- or you were,
19 pardon me -- you were Sallyanne Smith's superior, right?

20 A. Uh-huh (affirmative).

21 Q. In other words, sort of in the chain of command, she
22 reported to you?

23 A. She did.

24 Q. Okay. Now, ma'am, you said that you've worked in the St.
25 Johns County School District for -- I think you said 17 years,

1 right?

2 A. 15.

3 Q. 15. I'm sorry. 15 years; is that correct?

4 A. Yes.

5 Q. 15 years and you're an educator, right, ma'am?

6 A. I am.

7 Q. You've worked a great deal with the students in the St.
8 Johns County School District, correct?

9 A. I have.

10 Q. And the sense that I got both during your deposition that
11 I participated in and yesterday is that you have a strong sense
12 for the students in your school district, right?

13 A. I do.

14 Q. Sitting here, ma'am, you're not aware of a single negative
15 incident involving a transgender student using a restroom that
16 corresponded to that individual's gender identity?

17 MR. HARMON: Object to vagueness.

18 THE COURT: Overruled.

19 THE WITNESS: Will you repeat the question?

20 BY MR. KAPLAN:

21 Q. Ma'am, what I asked you was in your 15 years of working at
22 the St. Johns County School District, you're not aware of a
23 single negative incident involving a transgender student using
24 a restroom that conformed to that individual's gender identity;
25 is that right?

1 A. When you say the word "negative," I think you need to
2 define that. We had an incident at Nease High School where
3 Drew used the restroom, which she was not supposed to. We had
4 two students report that to us.

5 Q. So we'll take that in pieces. Let's put aside Drew Adams,
6 okay? Although just a moment ago I think you referred to Drew
7 Adams as she.

8 Is Drew Adams a boy or a girl, ma'am?

9 A. As I said before, Drew is biologically a female. He is
10 transitioning into a male.

11 Q. Is Drew a transgender boy?

12 A. He is a transgender boy.

13 Q. So let's put aside Drew Adams for a moment. Putting aside
14 Drew Adams, in the 15 years, ma'am, that you've worked at the
15 St. Johns County schools as an educator, are you aware of a
16 single negative incident involving a transgender student using
17 a restroom that conformed to that individual's gender identity?

18 A. No.

19 Q. And we talked a great deal, I think, about the task force
20 work. You were informed of that process through Sallyanne
21 Smith, right?

22 A. That's correct.

23 Q. In other words, Ms. Smith, based on the years of work that
24 she had done, she brought forward to you her findings and the
25 research -- basically how she came to the conclusions and the

1 suggestions she did, right?

2 A. That's correct.

3 Q. All right. Among that material, based on the discussions
4 you had with her and your own review, ma'am, you're not aware
5 of a single negative incident involving a transgender student
6 using a restroom that conformed -- conforms to that student's
7 gender identity anywhere, right?

8 A. Not to my knowledge, correct.

9 Q. But you mentioned Drew Adams, right? And we're all
10 aware -- you're aware, ma'am, that Drew Adams did use the boys'
11 bathroom at Nease High School; is that correct?

12 A. Yes.

13 Q. You're aware, ma'am, because two female students reported
14 it to someone at Nease High School; is that right?

15 A. Correct.

16 Q. You don't know the students' names; is that correct?

17 A. I do not.

18 Q. Or what grade they were in?

19 A. I do not.

20 Q. Or the name of the individual to whom they reported it?

21 A. No, sir.

22 Q. But you do know, ma'am, that they didn't say to whomever
23 they reported it that they feared for their safety, right?

24 A. Not to my knowledge.

25 Q. Or that they feared for their privacy, right?

1 A. Not to my knowledge.

2 Q. And, again, these are girls that we're talking about,
3 right?

4 A. That's what I was told.

5 Q. When they informed whomever they informed at the school,
6 ma'am, to your knowledge, did they say Drew Adams violated the
7 best practices guideline?

8 A. I don't know the words they used, sir. To my knowledge,
9 it was he was seen using the boys' restroom.

10 Q. But, again, ma'am, my question is: Are you aware of
11 whether they said Drew Adams violated the best practices
12 guideline?

13 A. No, I'm not aware of that.

14 Q. But regardless, the reality is that Drew Adams using the
15 boys' bathroom does violate the best practices, right?

16 A. It does.

17 Q. Okay. And it's considered misconduct because it does,
18 right?

19 A. Yes. Yes.

20 Q. And, in fact, ma'am, if a student like Drew Adams were to
21 do that more than once, that would be repeated misconduct,
22 correct?

23 A. Correct.

24 Q. And to use your words, ma'am, that would potentially
25 subject a student to discipline?

1 A. Yes, it would.

2 Q. I want to focus now a little bit more on the best
3 practices, okay? The best practices were created by a task
4 force, right?

5 A. Yes.

6 Q. Ma'am, you're not aware of the task force ever meeting
7 with transgender students prior to formulating the best
8 practices; is that right?

9 A. That's correct.

10 Q. And, ma'am, you're not aware of the task force ever
11 meeting with any parents of any students to discuss their
12 potential concerns, if they existed, about transgender students
13 using a restroom that conformed to their gender identity,
14 right?

15 A. Correct.

16 Q. You're not aware of the task force ever meeting with a
17 peer group of students, pulling them all together in a room and
18 saying, are you concerned -- do you have any concerns about a
19 transgender student using the bathroom that conforms with their
20 gender identity, right?

21 A. That's correct.

22 Q. Because, ma'am, the task force that we're talking about
23 did not consider providing transgender students access to the
24 restrooms that conformed to their gender identity, right?

25 MR. HARMON: Object to lack of foundation.

1 THE COURT: Hold on a second. Let me look at it.
2 What do you mean, lack of foundation?

3 MR. HARMON: Ms. Mittelstadt hasn't testified she was
4 ever at any of the task force meetings.

5 THE COURT: Okay. Well, she can answer the question
6 the best she can.

7 MR. KAPLAN: And I'll ask the question again so it's
8 clear.

9 BY MR. KAPLAN:

10 Q. Ma'am, my question for you is: The same task force that
11 we're discussing that reported directly to you, ma'am, you'd
12 agree that they did not consider providing transgender students
13 access to restrooms that conformed to their gender identity?

14 A. The level of detail as to what was discussed at those task
15 force meetings, I'm not privy to all of that. So I couldn't
16 agree to the way that you're stating that sentence.

17 MR. KAPLAN: Your Honor, may I approach?

18 THE COURT: Please.

19 MR. KAPLAN: Counsel, I'm referring to pages 170,
20 line 4 to 170, line 11 of Ms. Mittelstadt's 30(b)(6)
21 deposition.

22 MR. HARMON: Just one moment, please.

23 MR. KAPLAN: Here, ma'am. Pardon me for reaching.
24 And I'm going to be referring to this portion right here.

25 BY MR. KAPLAN:

1 Q. Ma'am, do you remember giving your deposition --

2 MR. HARMON: One second. I've just got to get it.

3 Sorry.

4 MR. KAPLAN: Your Honor, I have a copy for the court
5 if you'd like it.

6 THE COURT: Why don't you give it to Mr. Harmon.

7 MR. HARMON: That would be helpful. Mr. Wiley
8 exited, so...

9 Can I borrow yours?

10 MR. KAPLAN: Yeah.

11 MR. HARMON: Thank you.

12 BY MR. KAPLAN:

13 Q. Ma'am, do you remember giving your deposition in this
14 case?

15 A. I do.

16 Q. Mr. Harmon was there, I believe, right?

17 A. At the second one. The first one he was not.

18 Q. Do you remember giving a 30(b)(6) deposition in this case,
19 corporate representative deposition?

20 A. Yes.

21 Q. Mr. Harmon was there, right?

22 A. He was.

23 Q. I was there?

24 A. Correct.

25 Q. And at the beginning of the deposition, you were sworn in.

1 Do you recall that?

2 A. I was.

3 Q. You swore to tell the truth, right?

4 A. I was.

5 Q. The whole truth, right?

6 A. Uh-huh (affirmative).

7 Q. And nothing but the truth.

8 Do you remember that?

9 A. I do.

10 Q. Just the same oath that you took yesterday.

11 Do you recall?

12 A. Uh-huh (affirmative).

13 Q. Now in that deposition, I asked you -- and I'm reading on
14 lines -- 170, line 4 -- page 170, line 4. So, ma'am --
15 Question: "So, ma'am, is the answer, then, that the task force
16 did not consider providing transgender student access --
17 students access to restrooms that conform to their gender
18 identity?"

19 The answer was: "To the best of my understanding,
20 that's correct."

21 MR. HARMON: Your Honor, I'm going to object to
22 improper impeachment at this time.

23 THE COURT: Why is that?

24 MR. HARMON: The witness's testimony at deposition
25 was to the best of my understanding. And I think her testimony

1 today was, I wasn't at those meetings and that's my
2 understanding.

3 THE COURT: All right. I think I can parse that
4 through.

5 Go ahead, sir.

6 BY MR. KAPLAN:

7 Q. The next question I asked to follow up with your answer to
8 the best of my understanding was, "They did not, correct?"

9 And your answer was: "Correct."

10 Did I read the questions and answers accurately?

11 A. You did.

12 Q. Okay. In fact, ma'am, you've not come across any
13 documents showing that the task force ever sat down with
14 transgender students and asked them how keeping them from using
15 a restroom that conforms to their gender identity would affect
16 them, right?

17 A. Correct.

18 Q. And since creating the best practices, ma'am, the school
19 district has not met with transgender students to ask them how
20 the best practices affects their day-to-day, right?

21 A. Right.

22 Q. Now, I want to talk a little bit about the best practices
23 on sort of a higher level, okay? The best practices, you say,
24 are guidelines, right?

25 A. Yes. Yes.

1 Q. They were never sent out to the parents at St. Johns
2 County schools; is that right?

3 A. Correct.

4 Q. They were never sent out to the students at St. Johns
5 County schools, right?

6 A. Correct.

7 Q. And, ma'am, they're not anywhere on your website; is that
8 right?

9 A. Correct.

10 Q. So the only way that a student knows about the best
11 practices is if he or she is contacted by a school staff
12 member, an administrator or faculty member, and said -- and
13 told that this is what they have to follow, right?

14 A. Those are our guidelines, correct.

15 Q. Because if they don't follow them, they could potentially
16 be disciplined, right?

17 A. Yes, sir.

18 MR. KAPLAN: Dan, can we bring up DX87? This is in
19 evidence, Your Honor. I think it was put in yesterday.

20 THE COURT: Are you asking -- I'm sorry, are you
21 asking me to do something?

22 MR. KAPLAN: No, no. I'm just -- a little technical
23 difficulty, Your Honor.

24 THE COURT: Okay.

25 MR. KAPLAN: We're warming up the computer.

1 BY MR. KAPLAN:

2 Q. Okay. Do you recall this exhibit, ma'am?

3 THE COURT: What's the exhibit number?

4 MR. KAPLAN: Your Honor, it's Defense Exhibit 87, I
5 believe. And it was put into evidence yesterday by the
6 defendants without objection.

7 THE COURT: All right. Okay. Go ahead.

8 BY MR. KAPLAN:

9 Q. Do you recall this exhibit?

10 A. Yes.

11 Q. I just want to be clear, this was a meeting among the
12 school assistant principals, right?

13 A. Correct.

14 Q. It's not your testimony that this was a meeting that
15 invited the public to come in and discuss the best practices,
16 right?

17 A. No. This is intended for the assistant principals.

18 Q. And to your knowledge, ma'am, has the school district ever
19 invited parents or students to come in and have a discussion
20 about the best practices?

21 A. No, sir.

22 Q. All right.

23 MR. KAPLAN: We can take it down, Dan. Thank you.

24 Your Honor, I'm going to be referring to Plaintiff's
25 Exhibit 113, 114, and 116. I provided some courtesy copies to

1 the court before I began today.

2 THE COURT: Thank you.

3 MR. KAPLAN: Counsel, 113, 114, and 116. These are
4 already in evidence.

5 Dan, can we pull those up?

6 BY MR. KAPLAN:

7 Q. Ma'am, as part of your review of the best practices, you
8 were provided materials, correct?

9 A. I was.

10 Q. These were materials that ostensibly the task force had
11 and reviewed, right?

12 A. Correct.

13 Q. Okay. And one of them, kind of referring to Plaintiff's
14 Exhibit 113, is something called the model school district
15 policy regarding transgender and gender non-conforming
16 students.

17 Do you see that?

18 A. I do.

19 Q. And you recall this document as a document that was
20 obtained and reviewed during the course of creating the best
21 practices, right?

22 A. Yes.

23 Q. Okay. I want to turn --

24 MR. KAPLAN: Dan, can we pull up Bates stamp 1457? I
25 think it's one, two, three, four pages in. And, Dan, can you

1 call out and highlight restroom accessibility, please.

2 BY MR. KAPLAN:

3 Q. All right, ma'am. It says restroom accessibility. I want
4 you to tell me if I'm reading this right. It says, "Students
5 shall have access to the restroom that corresponds to their
6 gender identity consistently asserted at school. Any student
7 who has a need or desire for increased privacy, regardless of
8 the underlying reason, should be provided access to a
9 single-stall restroom, but no student shall be required to use
10 such a restroom."

11 Do you see that?

12 A. I do.

13 Q. Okay. And you're aware that existed as part of the
14 materials that were reviewed by the task force, right?

15 A. Yes.

16 Q. To your knowledge, ma'am, did anybody from the school
17 district reach out to the California school districts, any of
18 them, to discuss implementing this policy?

19 A. To my knowledge, no, sir.

20 Q. And you'd agree with me that California is a pretty large
21 state, right?

22 A. Yes, sir.

23 Q. And it's reasonable to say that's a pretty big school
24 system, right?

25 A. Yes.

1 MR. KAPLAN: Okay. Dan, we can take it down.

2 I want to bring up 114 now, please. Dan, can you
3 call out just the top of the title for us, please? Thank you.

4 BY MR. KAPLAN:

5 Q. This is titled Guidance for Massachusetts Public Schools,
6 Creating a Safe and Supportive School Environment,
7 Nondiscrimination on the Basis of Gender Identity.

8 Did I read that correctly, ma'am?

9 A. You did.

10 Q. This is among the materials that the task force had in
11 creating the best practices; is that right?

12 A. Yes. I think it is, correct.

13 Q. And this is among the materials that you were aware of,
14 correct?

15 A. Yes.

16 MR. KAPLAN: Dan, can we pull up page 8, which is the
17 Bates stamp ending in 1466, please? And call out the paragraph
18 Restrooms, Locker Rooms, and Changing Facilities.

19 BY MR. KAPLAN:

20 Q. Now, I'm going to read the first sentence. Tell me if
21 I've read it correctly. It says, "All students are entitled to
22 have access to restrooms, locker rooms, and changing facilities
23 that are sanitary, safe, and adequate so they can comfortably
24 and fully engage in their school program and activities."

25 Did I read that right?

1 A. You did.

2 Q. Now, ma'am, I'm going to skip down just a little bit to
3 the sentence that begins "In all cases."

4 Can you just read that sentence for us, ma'am,
5 please?

6 A. "In all cases, the principal should be clear with the
7 student and parent that the student may access the restroom,
8 locker room, and changing facility that corresponds to the
9 student's gender identity."

10 Q. And this is one of the policies that the St. Johns County
11 School District was aware existed prior to creating those
12 practices, right?

13 A. Yes.

14 Q. To your knowledge, ma'am, did anybody reach out -- anybody
15 reach out to any of the folks in the Massachusetts public
16 schools to find out about implementing this policy?

17 A. To my knowledge, no, sir.

18 Q. Or to ask about how it impacted on their student body?

19 A. To my knowledge, no, sir.

20 Q. To find out whether students were concerned about their
21 privacy or their safety?

22 A. No, sir.

23 Q. Or if those concerns ever came true?

24 A. Not to my knowledge, no, sir.

25 MR. KAPLAN: All right. We can take that down.

1 Thanks, Dan.

2 And now I want to pull up 116, please.

3 BY MR. KAPLAN:

4 Q. This is Plaintiff's Exhibit 116. And it's entitled
5 Transgender and Gender-Nonconforming Policy, June 2015.

6 Did I read that right?

7 A. Yes.

8 Q. And this, again, is among the various policies that the
9 school district had and reviewed prior to the best practices
10 being created, right?

11 A. Yes.

12 Q. You, yourself, are familiar with it and you've seen it
13 before, right?

14 A. I've seen it, yes.

15 Q. Okay. Now, just so we're clear, this policy, which begins
16 on Bates stamp 1489, ends at 1526. So this is -- this is a --
17 this is a relatively lengthy document, you'd agree, ma'am,
18 right?

19 A. Agree.

20 Q. And I want to pull up, now, page 9 of the document.

21 MR. KAPLAN: And call out the bathroom section,
22 please.

23 BY MR. KAPLAN:

24 Q. I'll read this one. It says, Bathrooms. Having safe
25 access to --

1 THE COURT: I tell you what. I can just read it.

2 MR. KAPLAN: Yes, Your Honor.

3 THE COURT: Is the highlighting in the original or is
4 that something y'all did?

5 MR. KAPLAN: We just did it, Your Honor, for the
6 purposes of calling out the bathroom section.

7 THE COURT: So the black --

8 MR. KAPLAN: Oh, the black, we did not. That's in
9 the original, Your Honor. The bolding.

10 THE COURT: All right. I've read it. Thank you.

11 BY MR. KAPLAN:

12 Q. Ma'am, my question is for you -- just as with the other
13 documents that we've now discussed, these policies, is it
14 accurate to say that the school district did not reach out to
15 anybody at the schools in the District of Columbia to talk
16 about this policy?

17 A. To my knowledge, no, sir.

18 Q. Or to find out how it was implemented?

19 A. To my knowledge, no, sir.

20 Q. All right.

21 MR. KAPLAN: We can take that down. Thank you, Dan.

22 BY MR. KAPLAN:

23 Q. We talked about safety and privacy as being concerns that
24 the school district has, right?

25 A. Yes.

1 Q. And we also talked about the fact that no actual negative
2 incidents involving transgender students using the restroom
3 that conformed to their gender identity have ever been known to
4 the school district, right?

5 A. Right.

6 Q. But, ma'am, regardless, you'd agree with me that St. Johns
7 County School District has a code of conduct, right?

8 A. We do.

9 Q. And that code of conduct enumerates the type of behavior
10 that's acceptable and unacceptable, right?

11 A. Correct.

12 Q. And that's regardless of whether somebody's a boy, a girl,
13 a transgender boy, or a transgender girl, right?

14 A. Correct.

15 Q. Misbehavior is misbehavior, correct?

16 A. It is.

17 Q. And it's going to be treated the same way regardless of
18 where it happens and when it happens, right?

19 A. Given the context of misbehavior, if it's a sensitive
20 situation, we do have the authority for our school leaders to
21 work with the students, correct.

22 Q. Okay. We talked about privacy because we talked about
23 safety. When we talk about privacy, ma'am, you'd agree with me
24 that the bathrooms at Nease High School have stalls, right?

25 A. The group restrooms do, yes.

1 Q. And to the extent that somebody is waiting for one of
2 those stalls and they just can't get in and they want their
3 privacy, that person can go and use the gender-neutral
4 restroom, right?

5 A. Yes.

6 Q. That's because nothing keeps any student from using the
7 gender-neutral restroom, right?

8 A. Correct.

9 Q. But Drew Adams is not permitted like the other boys to use
10 the boys' bathroom, right?

11 A. Correct.

12 Q. You would agree with me that to the extent the urinals do
13 not have partitions at Nease High School, it's certainly
14 possible to add them, right?

15 A. Perhaps, yes.

16 Q. Now, you said -- I think you talked a little bit when you
17 first started about where you lived and your work at St. Johns
18 County schools. And, ma'am, you'd agree with me that community
19 values do play a role in the best practices, right?

20 A. Sure.

21 Q. And to use your words, you don't have a measuring stick,
22 but you'd say that there was influence on best practices based
23 on the community values, right?

24 MR. HARMON: Object to facts not in evidence.

25 THE COURT: Rephrase the question, please.

1 BY MR. KAPLAN:

2 Q. Yes, ma'am. Would you agree with me that while -- while
3 it's difficult to measure, community values did influence the
4 best practices?

5 THE COURT: No, I'll overrule it. She can answer it,
6 if she has an answer.

7 THE WITNESS: Our school direct is very in tune to
8 our community and our families. There's an imminent trust
9 factor that's been built in. And a lot of that has to do, I
10 believe, with our academic success. So those values are truly
11 connected to how we run our school district.

12 BY MR. KAPLAN:

13 Q. But you'd agree with me, ma'am, that those values
14 influenced the best practices?

15 A. Again, as I said before, we didn't have a measuring stick.
16 But, yes, I'd say they influence how we run our business.

17 Q. And Drew Adams is a member of that community, right?

18 A. He is.

19 Q. His values are a member of that community's values, right?

20 A. Yes, they are.

21 Q. But you'd agree with me that Drew Adams is not treated the
22 same as the boys in that community, right?

23 A. In respect to restrooms, there is an accommodation that
24 would be different.

25 Q. Okay.

1 MR. KAPLAN: Your Honor, may I have a moment to
2 confer?

3 THE COURT: Sure.
4 (Counsel confer.)

5 MR. KAPLAN: Thank you for your time, ma'am.

6 MR. HARMON: Redirect, yes, Your Honor.

7 **REDIRECT EXAMINATION**

8 BY MR. HARMON:

9 Q. Good morning, again.

10 A. Good morning.

11 Q. On cross-examination you were asked about the district's
12 unwritten policy that separates students for purposes of
13 bathroom use based on sex.

14 Do you recall that?

15 THE COURT: Mr. Harmon, I'm going to need you to keep
16 your voice up, please. And if you want to move the podium up
17 or whatever you need to do. Thank you.

18 MR. HARMON: Yes, Your Honor.

19 BY MR. HARMON:

20 Q. On cross-examination, do you recall being asked questions
21 about the district's unwritten policy that separates students
22 based on sex?

23 A. The restroom use, yes.

24 Q. In that unwritten policy when we're talking about the word
25 "sex," what does that mean?

1 A. Sex is biologically identified at birth. And when a
2 family enrolls in our district, we utilize that to determine
3 accessibility.

4 Q. You testified that in your 15 years --

5 THE COURT: Can I ask you a question about that? We
6 had evidence in this case -- and, Mr. Harmon, you'll correct me
7 if I'm wrong -- but we had evidence in this case that Mr. Adams
8 was able to change his driver's license and his birth
9 certificate under Florida law to show him to be a male.

10 If a -- if a transgender person matriculated to your
11 school and had a birth certificate listing their gender
12 identity that was different than their biological birth sex,
13 but that's the first document that the school had that
14 showed -- that showed their sex, how would they be
15 characterized by the St. Johns County School District?

16 THE WITNESS: If that student is entering our
17 district for the first time with a birth certificate that
18 indicates male or female -- female, and all the other documents
19 support that's what the student is entering, then that
20 first-time entry would predicate. That's how we would manage
21 that student.

22 THE COURT: And what would that mean vis-à-vis
23 bathroom usage?

24 THE WITNESS: Based on how they enrolled, they would
25 have access to that restroom that corresponded with how we

1 coded it in the system at the time of enrollment.

2 BY MR. HARMON:

3 Q. To your knowledge, has Mr. Adams presented any evidence
4 that he is a biological male in this case?

5 MR. KAPLAN: Objection, Your Honor. Calls for an
6 improper opinion.

7 THE COURT: Overruled.

8 THE WITNESS: No, sir.

9 BY MR. HARMON:

10 Q. If a biological girl went into the biological boys'
11 restroom, would that be misconduct?

12 A. Yes, it would.

13 Q. Would that apply the same way for a biological boy going
14 into a biological girls' restroom?

15 A. Yes, it would.

16 Q. Were you responsible for operating the St. Johns County
17 School District LBGTQ task force in focus group meetings?

18 A. No, sir.

19 Q. Who was that person?

20 A. Sallyanne Smith.

21 Q. I believe in your cross-examination you testified that in
22 your 15 years with the school district, other than the
23 September of 2015 incident with Drew Adams, that there has
24 never been a negative incident involving a transgender student
25 in the bathroom; is that right?

1 A. There has never been a negative incident. There's been
2 incidents where we've worked with transgender students. But to
3 quantify the question that was asked, it was a negative
4 incident.

5 Q. In your 15 years as an employee of the school district,
6 has the school district ever had a policy or practice that
7 permitted transgender students to use a bathroom that was
8 different than their biological sex?

9 A. No, sir.

10 Q. And I -- do you still have the exhibits, plaintiff's
11 exhibits in front of you, or were they all just broadcast?

12 A. No.

13 Q. Okay. I've got some.

14 MR. HARMON: I'm going to use Plaintiff's Exhibit
15 113, 114, and 116. We'll start with 113.

16 BY MR. HARMON:

17 Q. Do you recall being shown this document a few moments ago
18 on cross-examination?

19 A. Yes.

20 Q. I believe you read a paragraph about bathroom use?

21 A. It was read, yes.

22 Q. Okay. Can you read the very first line -- the very first
23 sentence of that document out loud?

24 A. The title?

25 Q. No, just the -- under purpose.

1 A. "The purpose, California law and district policy require
2 that all programs, activities, and employment practices be free
3 from discrimination based on sex, sexual orientation, or gender
4 identity."

5 Q. Is Florida -- is St. Johns County required to follow
6 California law, to your knowledge?

7 MR. KAPLAN: Objection, Your Honor. Improper
8 impeachment.

9 THE COURT: Overruled.

10 BY MR. HARMON:

11 Q. To your knowledge?

12 A. To my knowledge, no, sir.

13 Q. I'm going to approach with Plaintiff's Exhibit 114 that
14 you were also just shown a moment ago. Do you remember
15 speaking to the bathroom provisions in that particular
16 document?

17 A. Yes, I do.

18 Q. Okay. Can you read the first sentence of that exhibit as
19 well?

20 A. "An act relative to gender identity. Chapter 199 of the
21 Acts of 2011, which became effective on July 1st, 2012, amended
22 several Massachusetts statutes prohibiting discrimination on
23 the basis of specified categories to include discrimination on
24 the basis of gender identity."

25 Q. To your knowledge, is St. Johns County School District

1 required to follow Massachusetts state law?

2 A. No, sir.

3 MR. HARMON: I'm going to approach with Plaintiff's
4 Exhibit 116.

5 BY MR. HARMON:

6 Q. That was the District of Columbia document talking about
7 student bathroom use on cross that you looked at.

8 Do you remember that?

9 A. Yes.

10 Q. Do you see on the bottom right where there's -- it says
11 SJCSB/DA?

12 A. Yes.

13 Q. Can you turn to page 1507.

14 A. Okay.

15 Q. About three-quarters of the way down the page, do you see
16 where it says D.C. Laws and Regulations?

17 A. I do.

18 Q. Do you see where there's the D.C. Human Rights Act of
19 1977?

20 A. Yes, sir.

21 Q. Can you read that first sentence?

22 A. "This law prohibits discrimination of individuals on the
23 basis of gender, gender identity, and gender expression among
24 other characteristics."

25 Q. To your knowledge, is the St. Johns County School District

1 required to follow District of Columbia laws?

2 A. No, sir.

3 MR. HARMON: May I have one moment, Your Honor?

4 THE COURT: Yes.

5 MR. HARMON: Thank you.

6 (Counsel confer.)

7 MR. HARMON: No further questions.

8 THE COURT: Anything else, Counsel?

9 MR. KAPLAN: That's not necessary. Thank you, ma'am,
10 for your time.

11 THE COURT: Thank you very much, ma'am. You can go
12 about -- go back to your business. Thank you.

13 THE WITNESS: Thank you, sir.

14 MR. KAPLAN: Your Honor, may I, please, just retrieve
15 the deposition binder?

16 THE COURT: They'll take care of it. Thanks.

17 THE WITNESS: Okay.

18 (Witness excused.)

19 THE COURT: All right. Mr. Harmon, who is your next
20 witness?

21 MR. HARMON: Mr. Upchurch.

22 THE COURT: Okay. It looks like Mr. Upchurch flew
23 the coop.

24 MR. HARMON: Oh, he's definitely here.

25 THE COURT: Just for the record, Mr. Upchurch and I

1 actually were in the same law firm in 1981 or '2, maybe, but he
2 left shortly thereafter. And we've not had any professional
3 relationship since then.

4 (Mr. Upchurch enters the courtroom.)

5 THE COURT: How you doing, sir?

6 THE WITNESS: Good morning, Judge.

7 COURTROOM DEPUTY: Do you solemnly swear that the
8 testimony you are about to give before this court will be the
9 truth, the whole truth, and nothing but the truth, so help you
10 God?

11 THE WITNESS: I do.

12 COURTROOM DEPUTY: Please state your full name and
13 spell your last name for the record, sir.

14 THE WITNESS: Frank Drew Upchurch, III,
15 U-p-c-h-u-r-c-h.

16 COURTROOM DEPUTY: Thank you, sir. Please be seated.

17 THE WITNESS: Thank you.

18 **FRANK DREW UPCHURCH, III, DEFENDANT'S WITNESS, SWORN**

19 **DIRECT EXAMINATION**

20 BY MR. HARMON:

21 Q. Good morning.

22 A. Good morning, Mr. Harmon.

23 Q. Mr. Upchurch, where do you reside?

24 A. 4148 Creek Black Drive [sic], St. Augustine, Florida
25 32086.

1 Q. How long have you resided in St. Augustine?

2 A. I lived in St. Augustine as a child. Went away to school,
3 came back in 1981, and have lived in St. Augustine since then.

4 Q. Okay. Do you mind giving us a little background of your
5 educational experience, where you went to school?

6 A. I went to the University of North Carolina, Chapel Hill,
7 graduated in 1972. Went to University of Florida law school,
8 graduated December '74.

9 Q. Okay. And what about prior to going to get your degree at
10 the University of North Carolina? Where did you live?

11 A. I was born in California where my father ended up -- ended
12 up after serving in the Pacific in World War II. In 1957 or
13 so, he left, took the family, moved to Gainesville to go to law
14 school.

15 So I think I went to grades one through three in
16 California. Third, fourth, and part of the fifth in
17 Gainesville. And then part of the fifth through the eighth in
18 St. Augustine. And then I went off to boarding school in New
19 England.

20 Q. Where do you work now?

21 A. Upchurch, Bailey & Upchurch in St. Augustine.

22 Q. What do you do?

23 A. I'm a lawyer.

24 Q. What kind of areas of law do you practice?

25 A. These days, pretty much school law.

1 Q. Do you -- are you familiar with the St. Johns County
2 School District?

3 A. Very familiar.

4 Q. How are you familiar?

5 A. I have served as the school board attorney since 2007. I
6 did some work for the school board before that because my firm
7 and one of my partners was a school board attorney before me.

8 Q. Okay. So when you're a school board attorney, what are --
9 I guess kind of give us, I guess, a job description of what
10 that means.

11 A. A school board like St. Johns County with 40,000 students,
12 I think 38 schools, 4,000 employees, has a lot of moving parts.
13 And many of those parts have legal repercussions and needs,
14 whether it's -- issues come up in regard to student discipline,
15 employee discipline, compliance with federal, state, local
16 mandates, special education, business services, purchasing and
17 procurement.

18 And so it -- it's a very broad spectrum of legal
19 needs, and they fall under my responsibility.

20 Q. Do you have an occasion to familiarize yourself with the
21 policies of the St. Johns County School Board?

22 A. Yes, sir.

23 Q. What about procedures, best practices?

24 A. Yes, sir.

25 Q. What is the difference, I guess, between a school board

1 policy and a procedure or best practice?

2 MR. KAPLAN: Objection, Your Honor. Foundation.

3 THE COURT: Overruled.

4 THE WITNESS: They're really three different things,
5 in my mind. A policy, per se, is adopted through the statutory
6 rule-making process.

7 A procedure, in my mind, is promulgated
8 administratively by -- under the auspices of the superintendent
9 who's the chief executive officer of the school district.

10 And procedures serve as just that, a directive, a
11 template for conducting business, doing certain things.

12 A best practice is a training guidance tool that is
13 developed and disseminated to assist teachers and staff at the
14 outlying schools in doing their job.

15 BY MR. HARMON:

16 Q. Okay. In your time working with the St. Johns County
17 School Board, have you -- are you familiar with the district's
18 bathroom policy for students?

19 A. Yes, sir.

20 Q. What is the district's student bathroom policy?

21 A. The district follows Title IX -- the Title IX implementing
22 rules and separates bathrooms on the basis of sex.

23 Q. What does "on the basis of sex" mean for purposes of the
24 school board's policy?

25 A. The -- sex is used in the phrase "on the basis of sex" --

1 means the traditional meaning of sex, which is -- I use the
2 term, in this case, "biological sex" to make it clear that I'm
3 not talking about gender identity, which is a -- a definition,
4 which in recent years has -- was brought forward by OCR before
5 it was withdrawn.

6 Q. So would the district's policy that separates bathrooms on
7 the basis of sex, is -- I guess just so I can understand, what
8 does that sex mean for purposes of the district? How is that
9 interpreted?

10 A. It means male and female as traditionally defined. In
11 other words, you can use the current definition contained in
12 the American Psychological Association Dictionary of
13 Psychology, sex is defined as -- classified as male or female
14 based on biological traits, particularly with respect to
15 reproductive, physiology, and function.

16 Q. Now, when it comes to the district's policy that separates
17 bathrooms on the basis of sex, is it written?

18 A. No, it is not.

19 Q. Okay. Why isn't it written?

20 A. There are several reasons. Of course, that was the policy
21 when I went to school in St. Augustine in 1960. And so I was
22 not present at the creation. But I -- the way I look at it, I
23 think it's been part of the school system's DNA as long as
24 anybody can remember.

25 And until Drew Adams -- the Drew Adams situation, it

1 was never questioned. It was not controversial. That is the
2 way all the schools that are still standing in St. Johns County
3 were built, going back into the early '50s, for sure.

4 And so I don't think there was ever any sort of need
5 to clarify the policy, to make a choice that, you know, in
6 recent years, since the -- beginning with the -- OCR's issuance
7 of guidance --

8 MR. KAPLAN: Your Honor, I'm just objecting as to the
9 narrative and nonresponsive to the question at this point.

10 THE COURT: Overruled.

11 Go ahead.

12 THE WITNESS: When OCR came out with its guidance
13 stating that bathrooms should -- or that transgender students
14 should be allowed to use the bathroom conforming with their
15 gender identity, as you know, there were -- around that time,
16 the *Grimm* case was filed, decided at the trial level in
17 Gloucester County, Virginia, went up to the Fourth Circuit.
18 There were cases sort of around the country, and the law was
19 unsettled. It would be very difficult to adopt a rule when you
20 don't know for sure what the law is.

21 And then, of course, when Mr. Adams filed the OCR
22 complaint and then this lawsuit, it was -- that sort of
23 preempted any sort of consideration of a formal rule-making.

24 BY MR. HARMON:

25 Q. Does the school board, to your knowledge, adopt a formal

1 policy -- talking about rule-making now -- for every law that
2 it implements?

3 A. Not for every law that it implements, nor for every law
4 that it's required to follow.

5 Q. To your knowledge --

6 THE COURT: I guess, Mr. Upchurch, what -- and I
7 think the reason he's asking these questions is because I had
8 questions --

9 THE WITNESS: Yes, sir.

10 THE COURT: -- I had questioned what the source of
11 the policy was or what the policy was. And I'm told it's
12 unwritten. And I understand what you're saying, it's
13 essentially reflective of what the historical reality was up
14 until recently.

15 My question really was directed at -- because we're
16 in a federal lawsuit and we're actually -- I'm actually being
17 asked to decide these questions, I wanted to make sure that
18 whatever the policy was that you're telling me, that it
19 actually represented the view of the St. Johns County School
20 District and the St. Johns County School Board.

21 And that's what I was trying to figure out. How do I
22 know that this policy that you're defending in this suit
23 represents the position of the school district or the school
24 board.

25 THE WITNESS: My personal and professional assurance,

1 Your Honor.

2 THE COURT: Okay. All right.

3 MR. HARMON: And I will address -- represent to the
4 court, I will be addressing that more clearly in a little bit.

5 THE COURT: Okay.

6 MR. HARMON: That point specifically.

7 THE COURT: And it may -- if -- I mean, the St. Johns
8 County School District is in federal court defending the
9 policy, so that -- I assume they wouldn't be doing that if the
10 school board was against it --

11 MR. HARMON: You're right, Your Honor.

12 THE COURT: -- against them doing so, or the
13 superintendent was. So I don't want to put too fine a point on
14 it. But I also have to be careful in federal litigation to
15 make sure I have a concrete case in controversy that is born of
16 a specific legal dispute that actually represents the position
17 and policy of the defendant. And so that -- that's what --
18 that's why I keeping asking the question.

19 MR. HARMON: I will get to that exact concern, that
20 this is something that the school board -- the position taken
21 in this case, that it is backed by the board.

22 THE COURT: Okay.

23 MR. HARMON: I will get to that.

24 MR. KAPLAN: Your Honor, I don't mean to do this in
25 the middle of the examination but the question of the policy

1 keeps coming up.

2 THE COURT: Yes.

3 MR. KAPLAN: In light of the fact that the court
4 wants to know about this and the witness is being examined
5 about it, I do think that another witness already spoke to this
6 in other testimony. We can take it up later, but I want to
7 alert the court that I think this issue has been distilled as
8 well in other deposition testimony.

9 THE COURT: Okay. Go ahead, Mr. Harmon.

10 BY MR. HARMON:

11 Q. Mr. Upchurch, to your knowledge, has the school district
12 in St. Johns ever permitted students to use bathrooms that are
13 opposite of their biological sex?

14 A. Not to my knowledge.

15 Q. You said you were general counsel in the school district
16 since 2007?

17 A. School board attorney.

18 Q. School board attorney.

19 A. Semantics.

20 Q. Well, I would be the person that has to get that right.

21 Has that unwritten policy with which you spoke
22 changed during your time as school board attorney?

23 A. No.

24 Q. We talked a little bit about determining the student's
25 sex, right?

1 Do you recall that?

2 A. Yes, sir.

3 Q. Are you familiar with how the district -- the St. Johns
4 County School District determines a student's sex for purposes
5 of bathroom use?

6 A. Yes, sir.

7 Q. Kind of explain what you understand it to be.

8 A. When a student initially enrolls in the St. Johns County
9 School District, they fill out an enrollment package which
10 includes a questionnaire where they are required to provide
11 personal demographic information, you know, name, age, date of
12 birth, address, residence address, parental information, which
13 can be very important at times, who is the custodial parent,
14 are the parents currently married, that sort of thing,
15 emergency contact.

16 There is a -- two boxes on that -- sort of the cover
17 sheet of the form. And it says M/F. And the student checks --
18 the student's parent checks one.

19 As a statutory condition of enrollment, a student is
20 required to have a physical conducted by a doctor. So that
21 report is part of the enrollment package. And, also, a birth
22 certificate or its equivalent is required.

23 Q. Okay.

24 A. And then -- and then going -- that information is uploaded
25 into the student database. The original paperwork is kept at

1 the school. And the school district accepts it at face value.

2 Q. Why does the school district utilize the enrollment
3 materials as the basis to determine biological sex for purposes
4 of the bathroom policy?

5 A. You know, it would -- it's the same reason that they
6 utilize the enrollment data for other purposes, which can be
7 very important. There's really -- it would have never occurred
8 to me that there would be any reason to question a parent or a
9 student's identification of their sex. If there were some
10 incongruity, it would show up, I would think, in the physical.

11 Q. And other than the plaintiff in this case, Drew Adams, are
12 you aware of -- anytime in your working in the district, of
13 there ever being an incongruency with a student's enrollment
14 materials and their represented sex?

15 MR. KAPLAN: Objection. Foundation.

16 THE COURT: Overruled.

17 THE WITNESS: The Drew Adams -- let me back that up.

18 There have been instances where transgender students
19 have identified themselves to school staff as transgender. As
20 I understand it, transgender, by definition, means that the
21 student's gender identity is different than their biological
22 sex.

23 So I have never -- to get around to answering your
24 question, I've never heard of a situation where a student's
25 biological sex was -- where there was some question about it,

1 is this student a boy or a girl, as those terms are
2 traditionally defined. I've never had that come up before.

3 BY MR. HARMON:

4 Q. Is it possible that when a student enrolls in the district
5 and in their enrollment materials, all the information, checks
6 the box for male but may actually be a biological female?

7 A. Sure. It's possible, you know, that someone could check
8 the other box.

9 Q. And is there, to your knowledge, any concern from the
10 district's perspective that there is a possibility that the way
11 the district goes about determining biological sex and that a
12 student may be able to enroll and hold themselves out in
13 enrollment materials as being one sex but in reality is the
14 other sex?

15 A. Are you talking about the transgender situation?

16 Q. Yeah. Let me give -- let me give you a specific example.
17 Student transfers into St. Johns County, transgender student,
18 transgender boy. And in all the enrollment materials puts
19 male, in reality is a biological female, as you've discussed --
20 as you've defined it today.

21 Is there any concern from St. Johns County
22 perspective about that situation happening?

23 A. The school wouldn't know about the incongruity until
24 something occurred to put it on notice. So when that student
25 initially enrolled, he -- he would be required to submit a

1 physical. And I don't know how the -- the physical might
2 disclose an incongruity.

3 Did you ask me to assume that the birth
4 certificate --

5 Q. Yeah. Let's assume -- let's assume, just a hypothetical,
6 a student transfers in. The enrollment form is clicked male.
7 The birth certificate says male. And all the other documents
8 on the papers indicate male. And for purposes of St. Johns
9 County's way of determining biological sex, we have a male, but
10 the student is actually a biological female.

11 Does that raise any concern from the district's
12 perspective, that situation?

13 A. As a practical matter, I would say no. The district does
14 not play bathroom cop. What happened in the Drew Adams case is
15 that the district was put on notice of this set of facts and
16 had to act upon it.

17 I guess it's possible for a transgender student to
18 enroll and fly under the radar until he or she graduates. The
19 district takes the enrollment information at face value until
20 there's a complaint or something else to put it on notice that
21 there's an issue here. And most often, in my experience, it
22 comes up with residence.

23 Q. So using that hypothetical where a student may fly under
24 the radar, meaning biological sex is different than enrollment
25 materials, does that, from the district's perspective, lessen

1 the interest and importance in having a bathroom policy, as you
2 understand it?

3 MR. KAPLAN: Objection to leading, Your Honor.

4 THE COURT: I'm not sure if it's leading, but I'm not
5 quite sure what you're asking. Why don't you rephrase your
6 question?

7 MR. HARMON: I'll try to rephrase it.

8 BY MR. HARMON:

9 Q. You've testified about the district's unwritten policy
10 separating bathrooms based on sex. Does the fact that, using
11 that hypothetical, a student may be able to enroll and
12 matriculate and use the bathrooms different from their
13 biological sex concern the school district that its process for
14 determining biological sex is somehow flawed?

15 A. No, it --

16 MR. KAPLAN: Your Honor, same objection and
17 relevance.

18 THE COURT: I'll overrule it and I'll let
19 Mr. Upchurch answer it as best he can.

20 THE WITNESS: In our experience, for me as a lawyer
21 in St. Johns County School District, the transgender student
22 experience is -- is -- I'm not saying that there's never been
23 transgender students before. But in terms of it emerging as an
24 issue in the public school system that the school board has to
25 deal with, it's fairly new.

1 Now, if -- I would assume if our traditional practice
2 of this -- abiding by the self-identified enrollment data
3 became a problem, then the administration would re-examine it.
4 But it hasn't been a problem, to my knowledge.

5 BY MR. HARMON:

6 Q. In your time in working with the St. Johns County School
7 District, have you ever had any involvement in working on LGBTQ
8 student issues, specifically with respect to bathrooms?

9 A. Except for limited involvement in the development of the
10 best practices, which grew out of the LGBTQ task force, I
11 really have not encountered a legal problem involving a gay or
12 lesbian student, let's say, and the school bathroom.

13 Q. Okay. I'm going to show you what has already been
14 admitted as Exhibit 33. I don't know if it's up there.

15 THE COURT: Oh, come on. We're not going to do this
16 again, are we?

17 MR. HARMON: Take mine.

18 THE WITNESS: I'm pretty familiar.

19 MR. HARMON: Just wanted to keep the same -- same
20 situation.

21 THE COURT: Mr. Upchurch, the history is that this
22 is, like, the key exhibit in the case and nobody can ever find
23 it, but I've got my own copy now.

24 MR. HARMON: I've got mine and the witness has
25 theirs, too.

1 THE WITNESS: All right.

2 MR. HARMON: Do you have a copy?

3 MR. KAPLAN: All set.

4 MR. HARMON: Awesome.

5 BY MR. HARMON:

6 Q. Are you familiar with this document?

7 A. Yes, sir.

8 Q. What is this document?

9 A. This is the -- the -- what we call the best practices.
10 The title is *Guidelines for LBGTQ Students, Follow Best*
11 *Practices*.

12 Q. Were you at all involved in the drafting process of this
13 document before it was finalized?

14 A. Yes. I -- it -- Cathy Mittelstadt sent it to me in
15 mid-August 2015 and said this is the -- these are the best
16 practices that the task force developed and would you please
17 review them. And I read them, and then I forwarded them to you
18 and Rob Sniffen for your input.

19 Q. I'm going to hand you what's been marked as Defendant's
20 Exhibit 120.

21 A. Yes, sir.

22 (Counsel confers with courtroom deputy.)

23 BY MR. HARMON:

24 Q. And specifically if you could take a look at -- do you see
25 those Bates pages on the bottom right?

1 A. Yes, sir.

2 Q. 1384 to 1387?

3 A. Yes, sir.

4 Q. See if you recognize that document.

5 A. I do.

6 Q. What is 1384 to 1387?

7 A. This is what I just referred to in my previous answer
8 where I forwarded the draft to you-all. You-all made some
9 suggestions. I incorporated them and some other, what I'd
10 call, more stylistic proposed revisions. That's what they are.

11 Q. Can you also look at 1397 to 1402?

12 A. Yes, sir.

13 Q. Is that similar to what you just described?

14 A. Yes, sir.

15 MR. HARMON: Your Honor, at this time I'd like to
16 move into evidence a portion of Defendant's Exhibit 120. We
17 will provide these exact Bates pages of 1384 to 1387 and 1397
18 to 1402.

19 THE COURT: I understood there was no objection to
20 those pages; is that correct, Counsel?

21 MR. KAPLAN: Your Honor, just one minute. Can I just
22 have one moment? Because we're pulling out individual pages.

23 THE COURT: Yeah. But I thought -- are these the
24 same pages that were read into the record yesterday, or not?

25 MR. HARMON: There was no objection in the pretrial

1 statement on them.

2 THE COURT: No, I'm asking you a different question.
3 I'm asking you, we went through some exhibits yesterday and
4 some of them just had page numbers. Is this one of those
5 exhibits or not?

6 MR. HARMON: No, this is not from yesterday. This is
7 new.

8 MR. KAPLAN: Your Honor, with respect to those
9 individual pages, I don't have an objection. But I would ask
10 for the purposes of keeping tabs on what we're actually
11 admitting, that this be marked as 120 A or some other way so we
12 know that it's the portion as opposed to the entirety of that
13 exhibit.

14 THE COURT: That's fine. I mean, as far as I'm
15 concerned, 120 should just be the pages you want. We don't
16 need to have the rest of it unless somebody else wants -- wants
17 it all in there.

18 Does anybody want it all in there?

19 MR. HARMON: Just what I identified.

20 THE COURT: All right. So what I'm going to do is
21 I'll conditionally admit 120 and let you conform it to the --
22 only the pages that you are trying to put in evidence and that
23 will be the exhibit that's in evidence.

24 (Defendant's Exhibit 120 received into evidence.)

25 THE COURT: All right. You may proceed.

1 MR. HARMON: I'm going to hand the witness
2 Defendant's Exhibit 71.

3 THE COURT: So it will be your responsibility to give
4 to Ms. Diaz -- and make sure your opponents see it, a 120 that
5 conforms with the pages we just discussed.

6 MR. HARMON: Yes, Your Honor. Of course.

7 THE COURT: All right.

8 BY MR. HARMON:

9 Q. Do you recognize this document? I'm going to say 157 to
10 159.

11 A. Yes. It appears to be a later redline iteration of what
12 I -- the draft, which is the subject of 120. I don't -- I
13 recognize the redline changes, but I don't -- I'm not sure I
14 know whose handwriting that is.

15 Q. That's fine. Aside from the handwriting that's contained
16 on that page, does that appear to be a true and accurate copy
17 in that document of a -- of one of the drafts you had seen?

18 A. Yes, sir.

19 MR. HARMON: Your Honor, at this time I'd like to
20 move in -- specifically in Exhibit 71, Bates pages 157 through
21 159 and Bates pages 6 through 8.

22 MR. KAPLAN: Your Honor, I do object. The witness
23 said he doesn't recognize the redline and he doesn't recognize
24 the handwriting. So I'm not sure how it's been authenticated
25 at this point properly.

1 THE COURT: So what's the point, Mr. Harmon?

2 MR. HARMON: Mr. Upchurch already said that he
3 identified an 8/17 draft, which we've admitted. I think he
4 testified that he recognizes the redline on this as an 8/19
5 draft. So --

6 THE COURT: Well, whose handwriting is it?

7 MR. HARMON: Aside from the handwriting, and I'm not
8 so concerned about any substantive decisions or conclusions of
9 fact being made about the handwriting on the document, just the
10 redline draft of the document.

11 MR. KAPLAN: Your Honor, maybe I misheard. I guess
12 we can look back at the record, I thought the witness said he
13 did not recognize the redline.

14 THE COURT: Let's ask him again.

15 BY MR. HARMON:

16 Q. Do you recognize the redlining on the document?

17 A. The redlining appears to be what I incorporated in the
18 8/18 draft.

19 Q. Okay. Aside from the handwriting on the top --

20 THE COURT: It's fine. I'm going to admit it.

21 Defendant's 71. We'll conform it to the page numbers that
22 counsel indicated. The objection is overruled. Go ahead.

23 (Defendant's Exhibit 71 received into evidence.)

24 BY MR. HARMON:

25 Q. Let's talk about the best practices specifically and try

1 to avoid just handing you a bunch of documents. Did the best
2 practices apply to all students?

3 A. Potentially, yes, provided -- assuming they presented
4 questions or situations that were covered by the best
5 practices.

6 Q. Did the -- specific to restrooms, did the district's best
7 practices -- just let me make sure I give you -- it's Exhibit
8 33. Let me make sure I put the right one in front of you.
9 This one.

10 Looking at Defendant's Exhibit 33, the best
11 practices, did the provision down there for restrooms at all
12 change the unwritten policy that you've testified to earlier?

13 A. No.

14 Q. Why did the district put this language in here?

15 A. In the restrooms section?

16 Q. Yes, yes. Specific to restrooms, why do this?

17 A. During the year, couple years, maybe more, preceding the
18 dissemination of the best practices, principals, teachers,
19 guidance counselors at the schools around the county were
20 inquiring about how to handle questions that came up with
21 transgender students.

22 And so the -- primarily the mental health
23 professionals -- that's what I think of them as, psychologists
24 and counselors in student services -- they -- they felt that
25 there was a need to put out guidance to the teachers and staff

1 in the field so they would know how to respond to this
2 situation in a way that was supportive of the student and --
3 and while at the same time made sense in the -- in terms of the
4 larger school community.

5 Q. So let's talk about that a little bit. Why does this --
6 why does this make sense, as you say it?

7 MR. KAPLAN: Objection, Your Honor. Form.

8 THE COURT: Go ahead.

9 THE WITNESS: Providing a gender-neutral bathroom is
10 a reasonable alternative to requiring a transgender student to
11 use the group bathroom serving the sex that that student does
12 not identify with.

13 BY MR. HARMON:

14 Q. And when you talk about reasonable alternative, what, if
15 any, considerations did the district have -- does it have in
16 doing this, this way?

17 A. This approach reconciles the competing interests of the
18 student, the wishes of the transgender student, and at the same
19 time it complies with the underlying -- it does not violate the
20 underlying long-standing policy of separating bathrooms on the
21 basis of sex. And it protects the bathroom and personal
22 privacy of -- if it's a transgender boy, the other boys who
23 would be using the boys' bathroom.

24 Q. So you talked about --

25 THE COURT: Mr. Harmon, can I get an estimate from

1 you however much longer you have on direct? A little bit --
2 you still got a little bit to go?

3 MR. HARMON: 45 minutes.

4 THE COURT: More on direct?

5 MR. HARMON: 30 to 45.

6 THE COURT: Okay. We'll go ahead and take our break.
7 It's 25 till. We'll take a 15-minute break and be back at ten
8 till. I will tell you that we're going to take a hard break at
9 five minutes to noon today. I have to make a presentation at
10 our clerk's office holiday party. So we'll take a hard break
11 at five to 12:00 and probably be out to 1:15, so just for
12 everybody's planning purposes.

13 All right. We're in recess until ten minutes to
14 eleven.

15 COURT SECURITY OFFICER: All rise.

16 (Recess, 10:36 a.m. to 10:50 a.m.)

17 COURT SECURITY OFFICER: All rise. This Honorable
18 Court is now in session. Please be seated.

19 BY MR. HARMON:

20 Q. Mr. Upchurch, I think where we left off is we were talking
21 about the competing interests with the best practices and why
22 that's in there. You mentioned privacy as one of the
23 interests. Can you explain that a little bit?

24 A. The district and public schools, in general, have an
25 important interest in protecting students' privacy in bathrooms

1 by separating the boys and the girls, as those terms are
2 traditionally defined.

3 That interest is confirmed -- or was confirmed and is
4 supported by the separate bathroom, locker room, shower and
5 living facilities provisions of Title IX and its implementing
6 rules.

7 The same interest that underlies Congress's and the
8 Department of Education's enactment of Title IX and those rules
9 supports the St. Johns County traditional policy, and that is
10 to keep the boys and the girls separate in those facilities.

11 In my view, the district's interest in the privacy of
12 those students in St. Johns County school bathrooms is just as
13 important and more immediate than Congress's was when enacting
14 Title IX.

15 MR. KAPLAN: Objection, Your Honor. Improper
16 testimony.

17 THE COURT: Well, it is kind of what the case is
18 about. And obviously, Mr. Upchurch is a lawyer and he has
19 opinions. If you're asking him -- so what's the context in
20 which you're asking him --

21 MR. HARMON: Yeah. I was asking Mr. Upchurch in
22 terms of privacy -- from the district's perspective, when it is
23 concerned about privacy, what does that mean?

24 MR. KAPLAN: And, Your Honor, my objection, to be
25 clear, is if this witness can articulate as a fact witness,

1 which is how he's designated, or a corporate representative
2 fact witness, what the factual basis is for that interest,
3 that's one thing. But to opine on the law is wholly separate.

4 I'm sure they don't want to waive privilege with
5 their client. And consequentially, I would urge the court to
6 confine the testimony just to the facts that the court is
7 interested in discerning in the case.

8 THE COURT: All right. So, Mr. Harmon, I'll let you
9 ask a specific question and we'll see.

10 MR. HARMON: Yes, Your Honor.

11 THE COURT: I want to understand -- I mean, I --
12 Mr. Upchurch, of course, is a lawyer, and I'm sure could make a
13 legal argument as to your position in this case, but that's not
14 why he's on the stand. So I want to make sure you're asking
15 him questions that are appropriate to his role on the stand in
16 this case.

17 MR. HARMON: But if the law is what drove the
18 district's underlying decision, I think that's certainly
19 relevant.

20 THE COURT: All right. Ask him a question.

21 MR. HARMON: I'm representing I'm not intending to
22 ask Mr. Upchurch legal opinions from his point of view but what
23 is it that the district was looking at with these areas.

24 MR. KAPLAN: And, Your Honor, if I could just have a
25 cumulative objection as to testimony on the law.

1 THE COURT: Yes, sir. You've got that objection.

2 And, Mr. Harmon, you may proceed.

3 MR. HARMON: Yes.

4 BY MR. HARMON:

5 Q. From the district's perspective, when taking bodily
6 privacy into concern with its bathroom policy, can you explain
7 the district's view of that?

8 A. I mentioned that the district's interest is immediate.
9 And what I mean by that is as a basis in fact. These are
10 district schools. These are district bathrooms. The district
11 is responsible for -- for them. The students using them are
12 district students. The school board is responsible and
13 accountable for the welfare of those students.

14 Of course, I'm not going to -- I'm sure the court and
15 the legal teams are familiar with the case law recognizing
16 privacy -- the *VMI* case and so forth.

17 Of course, the Florida Constitution, as well, affords
18 personal privacy, even greater protection than the federal
19 constitution.

20 And I think it's important to understand that schools
21 in Florida and in St. Johns County, in particular, are designed
22 and constructed in accordance with what we call SREF. That's
23 an acronym, S-R-E-F, which is State Requirements for
24 Educational Facilities.

25 And they -- for grades 4 through 12, they require

1 separate bathrooms for male and female, which is why every
2 public school that I've ever been into in Florida have separate
3 male and female bathrooms.

4 THE COURT: I feel like -- I feel like, Mr. Harmon,
5 we're hearing the same thing more than once. And so what --

6 MR. HARMON: I'll move --

7 THE COURT: Do you have another area of inquiry?

8 MR. HARMON: I'm going to move on a little bit.

9 THE WITNESS: I do -- I was getting to a point, I'm
10 sorry, which is factual.

11 BY MR. HARMON:

12 Q. Okay.

13 A. But those -- the long-standing practice in St. Johns
14 County, as a matter of fact, the long-standing custom and
15 practice in public schools everywhere, combine to create an
16 expectation of privacy among students and their parents in
17 public school bathrooms.

18 Based on those facts and the history in St. Johns
19 County, there is an expectation that biological boys will not
20 be in the girls' room and vice versa.

21 Q. Now --

22 A. And --

23 Q. -- when we're talking about privacy, from St. Johns County
24 School District's perspective, when does privacy begin as
25 related to the bathrooms?

1 A. I would, in my view --

2 Q. From the district's perspective.

3 A. From the district's perspective, it begins at the bathroom
4 door. And even, interestingly -- SREF requires screening to
5 prevent -- to obstruct the view of anyone who might look into
6 the bathroom from the hall.

7 Q. Has the district -- does the district have any specific --
8 when we're talking about allowing students of one sex to be in
9 the bathroom -- and when I say "sex," we're talking biological
10 sex -- let me start the question over a little bit.

11 Are there any concerns from the district's
12 perspective with allowing students of one biological sex to be
13 in the same bathroom of students of the opposite biological
14 sex?

15 A. Yes.

16 THE COURT: Hold on a second.

17 MR. KAPLAN: Your Honor, my objection is to relevance
18 and cumulative at this point. There was an administrator that
19 testified to this very fact and was cross-examined on this very
20 fact.

21 THE COURT: I'm kind of agreeing we need to move this
22 along, Mr. Harmon. I'm not -- the specific question is not
23 objectionable, but I do feel like we're kind of in a repetitive
24 mode here, so -- but if you want to ask the question, go ahead
25 and ask it, but I just want to make sure we're advancing, not

1 just saying the same thing over and over again.

2 MR. HARMON: Yeah. I'm trying to move on from
3 privacy to just say as an operating --

4 THE COURT: Just ask the question.

5 BY MR. HARMON:

6 Q. As -- with the responsibility of 40,000 students in the
7 school district, what are the district's concerns about letting
8 students of one biological sex share a bathroom with students
9 of an opposite biological sex?

10 A. In addition to the privacy interests that I mentioned, I
11 think that there is a -- a safety concern that's unrelated to
12 transgender students.

13 Q. What is that safety concern?

14 A. That allowing middle school and high school males and
15 females to mingle in group bathrooms -- in an unsupervised
16 group bathroom is asking for trouble, both in terms of the
17 potential for, you know, illicit consensual activity, and also,
18 you know, the possibility or the potential for a freshman
19 female student to be in the bathroom alone with an 18-year-old
20 male student. I think that there is a risk of harassment or
21 even assault.

22 Q. Did the school district -- from the school district's
23 point of view, does it have to take into consideration a
24 worst-case scenario in things?

25 A. In the post-Columbine, post-Sandy Hook environment,

1 student safety is paramount. It has, you know -- fortunately,
2 St. Johns County has not had that kind of a tragedy, and
3 hopefully it never will. But it is the school board's
4 responsibility to take precautions and do whatever it can
5 within reason to protect its students from foreseeable risks.

6 Q. Do you know what gender fluid means?

7 A. Yes.

8 Q. What do you know it to mean?

9 A. That in the context of transgender students, that a
10 student will -- won't be consistent in their identity or their
11 presentation from day to day.

12 Q. When we talk about consistent in identity, you're
13 referring to gender?

14 A. Yes, gender identity.

15 Q. How does the school district's best practices document
16 accommodate a gender-fluid student?

17 MR. KAPLAN: Your Honor, objection to relevance.

18 THE COURT: Overruled.

19 THE WITNESS: In regard to what?

20 BY MR. HARMON:

21 Q. With a gender-fluid student who may be male and be fluid,
22 male or female, how does the best practices document
23 accommodate that situation from a school district perspective?

24 A. With respect to bathroom?

25 Q. Yes. The bathrooms only.

1 A. Providing the gender-neutral alternative makes an end run
2 around that problem.

3 Q. Is it possible, from a school district's point of view,
4 that a transgender student may not want to use the bathroom of
5 their gender identity, instead choosing to use a bathroom of
6 their biological sex? Is it possible?

7 A. Sure.

8 Q. Okay. How does this policy accommodate that
9 possibility -- or, excuse me, this best practices document?

10 A. It allows students to use either a gender-neutral bathroom
11 or the bathroom designated for their biological sex.

12 Q. Do you know what it means for a person to be non-binary?
13 I'll try to help you out.

14 A. Not really.

15 Q. Hypothetically speaking, if a student did not desire to
16 identify as either a male or female, not that the student is
17 fluid with that regard, but does not want to identify as being
18 a male or female, does the best practices document accommodate
19 that situation?

20 A. Yes. The gender-neutral bathroom provides a reasonable
21 alternative, in the district's view.

22 Q. Do you know what the United States Department of
23 Education's Office for Civil Rights is?

24 A. Yes.

25 MR. KAPLAN: Objection, Your Honor, to relevance.

1 THE COURT: Overruled.

2 BY MR. HARMON:

3 Q. In your working in the district, was there ever a time
4 that you became aware that Drew Adams filed a complaint against
5 the school district that the school district's bathroom policy
6 was violating his rights?

7 A. I got a copy of the complaint on New Year's Eve.

8 Q. Okay. I'm going to hand you a document -- or maybe two --
9 a document that I'm marking -- that's been marked for
10 identification as Defendant's Exhibit 40 and ask you to take a
11 look at that and see if you recognize it.

12 A. Yes, sir.

13 Q. How do you recognize it?

14 A. I wrote it.

15 Q. And why did you write it?

16 A. I wanted to clearly, and hopefully persuasively, state the
17 district's legal position on the transgender bathroom issue.

18 Q. Is that your signature on the last page of it?

19 A. Yes, sir.

20 Q. Does it appear to be a true and accurate copy?

21 A. Yes, sir.

22 MR. HARMON: Your Honor, at this time I'd like to
23 move in Defendant's Exhibit 40.

24 MR. KAPLAN: Your Honor, the plaintiffs object. Your
25 Honor, this document, respectfully, is no more relevant than

1 any of the briefs that the lawyers submitted. It's ripe with
2 legal argument about the St. Johns County School District's
3 legal position. To the extent --

4 THE COURT: Mr. Harmon, what -- what am I supposed to
5 do with this?

6 MR. HARMON: Yes, Your Honor. One of the questions
7 that Your Honor has been asking in this case is, how do you
8 know that the school board -- how do you know the school
9 board's position on this unwritten policy and its best
10 practices document?

11 This is the school district's official response to
12 OCR on those two very issues outlining why the school district
13 is doing what it's doing, and it predates the litigation in
14 this case.

15 THE COURT: All right. I'll overrule the objection
16 and admit it on that basis. I agree with you that to the
17 extent that this is a legal document or legal argument to
18 support the policy, I understand that the court would not use
19 it as such because that will be argued by the parties and the
20 lawyers.

21 But to the extent that it shows the official position
22 of the school district, I will admit it over objection,
23 Defendant's 40.

24 (Defendant's Exhibit 40 received into evidence.)

25 BY MR. HARMON:

1 Q. Mr. Upchurch, were you involved in the fact-gathering
2 process in responding to the Office for Civil Rights
3 investigation, gathering information?

4 A. My involvement in the -- sort of the factual aspect of
5 that initiative was -- primarily consisted of sitting in on
6 interviews conducted by Mr. Mills, who was the OCR attorney, of
7 district staff who dealt with Drew.

8 Q. And if we're looking at this document, it's dated March
9 30th, 2016?

10 A. Yes, sir.

11 Q. Okay. The best practices document that you had looked at,
12 Exhibit 33, was that already in place --

13 A. Yes.

14 Q. -- and implemented at the time this was written?

15 A. Yes, sir.

16 Q. Okay. If we look at that first sentence in this document,
17 "The purpose of this letter is to state the St. Johns County
18 School District's legal position in regard to the DA Title IX
19 investigation."

20 A. Yes, sir.

21 Q. Okay. Was the school board of St. Johns County aware that
22 this was the position that was taken with respect to that
23 investigation?

24 A. Yes. I -- as I recall, I sent school board members
25 copies. And I -- you know, I periodically send them summaries

1 of whatever litigation matters that -- that we may have.

2 Q. Okay. And if -- does this document contain an explanation
3 of why the school district would not permit the plaintiff in
4 this case to use the boys' restroom at Nease High School?

5 A. Well, it really speaks for itself.

6 Q. Yeah.

7 A. It talks about privacy and the same things that we've
8 talked about today.

9 Q. Was this the school district of St. Johns County's
10 response -- formal response to the Title IX investigation being
11 conducted by the Office for Civil Rights?

12 A. Yes, sir.

13 Q. I'm going to hand you a document that I believe has
14 already been admitted at the pretrial conference as Defendant's
15 84.

16 MR. HARMON: I think the court took judicial notice
17 of this one.

18 BY MR. HARMON:

19 Q. Have you seen this document before today?

20 A. Oh, yes.

21 Q. Okay. Is this the United States Department of Justice,
22 United States Department of Education's May 13th, 2016, dear
23 colleague letter?

24 A. Yes, sir.

25 Q. Okay. Did the district -- in your capacity as board

1 counsel for the school district, did you receive this?

2 A. Yes, sir.

3 Q. Did the district -- school district change its unwritten
4 policy or best practices document in response to this letter?

5 A. No, sir.

6 Q. Okay. Are you aware of whether or not the school district
7 made any official statements regarding its response to this
8 letter?

9 A. The superintendent, Dr. Joyner, made a statement.

10 Q. And to your understanding as a -- in response to that
11 letter, what was the position of the St. Johns County School
12 District?

13 A. As I recall, it was that the St. Johns County School
14 District did not agree with OCR's guidance. And in the
15 interest of -- I believe it was privacy and safety -- student
16 privacy and safety, would continue to follow its long-standing
17 policy.

18 Q. Okay. In the official -- the official position of the
19 St. Johns County School Board in response to this letter, do
20 you know whether or not the district made any representations
21 about its -- its intentions with respect to its best practices?

22 A. I remember Dr. Joyner's letter or release. I don't, as I
23 sit here right this moment, remember what it said.

24 MR. HARMON: Your Honor, may I approach just for
25 purposes of refreshing?

1 THE COURT: I'm told, Mr. Harmon, that Defendant's 84
2 is not in evidence. So if you wanted it to be, you probably
3 need to ask for it.

4 MR. HARMON: Oh, okay. I'm sorry. I thought we had
5 judicial notice of that one, but I would definitely like to
6 move that into evidence as Defendant's 84.

7 THE COURT: Any objection?

8 MR. KAPLAN: Your Honor, I have no objection.

9 THE COURT: It will be received, Defendant's 84.

10 (Defendant's Exhibit 84 received into evidence.)

11 BY MR. HARMON:

12 Q. I'm just going to hand you this for the purpose of
13 refreshing your recollection.

14 A. Yes, sir.

15 Q. In reviewing that document -- and I'll ask again: Having
16 reviewed that document to refresh your recollection, do you
17 recall what the position of the district was, along with the
18 school board, with respect to its current practice at that time
19 moving forward?

20 A. Dr. Joyner stated that he believed -- or that we believed
21 our current practice is lawful and reasonable --

22 MR. KAPLAN: Your Honor, I hate to interrupt the
23 witness, but I do object. Because if his recollection is
24 refreshed, he shouldn't be reading from the document itself.

25 MR. HARMON: I'd be happy to do that.

1 THE WITNESS: Okay. As I --

2 THE COURT: I'm not sure -- you're saying he
3 shouldn't be reading from the document, he just should be
4 having his recollection refreshed?

5 MR. KAPLAN: Yes, Your Honor. The document is a
6 newspaper article. So to the extent that it refreshed his
7 recollection, he certainly can testify to it. But plaintiff is
8 objecting to him reading in a newspaper article as evidence.

9 THE COURT: Okay. I think that's right.

10 MR. HARMON: Yeah, and I don't want you to read the
11 newspaper article into evidence.

12 BY MR. HARMON:

13 Q. But I guess my question is: Having reviewed that
14 document, does it refresh your recollection --

15 A. Yes, sir.

16 Q. Okay. What was the position of the school district moving
17 forward in response to the May 2016 joint letter from the
18 Departments of Education and Justice?

19 A. That the district's current practice of providing
20 gender-neutral bathrooms for transgender students was lawful
21 and reasonable and would continue unless a modification became
22 necessary.

23 As I recall, he noted that there had been no decision
24 on the issue by any court that was binding in Florida.

25 Q. Okay. And with respect to -- now that you've had a chance

1 to refresh your recollection, was that, what you just stated,
2 also the position of the school board?

3 A. Yes, sir. The school board has supported maintaining the
4 policy since this issue surfaced.

5 THE COURT: Okay. That's fine. I'm happy with that.

6 MR. HARMON: Okay.

7 THE COURT: So we don't need to do that anymore. All
8 I wanted to do was to make sure I was dealing with a considered
9 decision by the policy-making officials of the school district,
10 that the policy that is being tested here in court does
11 represent, in fact, the policy of the St. Johns County School
12 District.

13 And based on the testimony I've heard today, I'm
14 accepting of that. And so we don't need to do any more on that
15 point.

16 MR. HARMON: Okay.

17 BY MR. HARMON:

18 Q. I'm going to hand you, Mr. Upchurch, what's been marked as
19 Defendant's 237.

20 MR. HARMON: Again, I thought this was one where
21 judicial notice has been taken, but --

22 THE COURT: Well, I guess in my view, judicial notice
23 is a device to get the -- to authenticate a document and make
24 sure that there's no contention that it's not reliable or -- or
25 authentic. But it doesn't necessarily mean it's relevant or

1 get it into evidence.

2 MR. HARMON: Okay.

3 THE COURT: So I think -- that's the distinction I'm
4 drawing.

5 MR. HARMON: Yes, Your Honor.

6 BY MR. HARMON:

7 Q. Do you recognize this document?

8 A. Yes, sir.

9 Q. What is this document?

10 A. That was --

11 THE COURT: Can I just -- I'm sorry -- can I just
12 expand on that a little bit?

13 Some of the judicial notice that was requested of me
14 was medical records and other things or medical issues. And I
15 said at the pretrial I'm not doubting that these are authentic.
16 But in the absence of somebody telling me what they mean or how
17 they fit into the case, I don't really consider them something
18 that I'm going to be putting any weight on. So that's the
19 distinction I'm drawing.

20 All right. Go ahead.

21 MR. HARMON: Yes, Your Honor.

22 BY MR. HARMON:

23 Q. What is this document?

24 A. This was a dear colleague letter from DOJ and OCR dated
25 February 22nd, 2017, which withdrew its -- or their previous

1 guidance, including the letter of May 13 of 2016 that we just
2 discussed.

3 Q. Now, is this -- is this a document that --

4 THE COURT: Any objection to this, Counsel?

5 MR. KAPLAN: Your Honor, only to the extent that this
6 obviously postdates the litigation in this case.

7 THE COURT: Yeah. It's got -- it's part of the case.
8 237 is in. All right. What's next?

9 (Defendant's Exhibit 237 received into evidence.)

10 BY MR. HARMON:

11 Q. 248. Defendant's Exhibit 248.

12 MR. HARMON: We'll go through the same line of
13 questioning, Your Honor, just to ask --

14 THE COURT: I don't know what it is.

15 MR. HARMON: I apologize, Your Honor. Exhibit 248 is
16 an October 4, 2017, letter from the Attorney General to the --

17 THE COURT: It will be admitted, 248. What's next?

18 MR. HARMON: All right.

19 (Defendant's Exhibit 248 received into evidence.)

20 BY MR. HARMON:

21 Q. Mr. Upchurch, are you familiar with the St. Johns County
22 School District's code of conduct?

23 A. Yes, sir.

24 Q. How are you familiar with it?

25 A. Every year I have occasion to work with staff in making

1 and updating it and making revisions. And I also have occasion
2 to deal with it when an issue comes up that it covers, usually
3 in the area of student discipline.

4 MR. HARMON: Your Honor, I'm going to approach the
5 witness with Defendant's Exhibit 65.

6 THE WITNESS: Yes, sir.

7 MR. HARMON: And specifically Bates pages 1168 to
8 1231. And ask that that be admitted into evidence as the
9 school district's code of conduct.

10 THE COURT: Any objection?

11 MR. KAPLAN: No, Your Honor. No objection.

12 THE COURT: Be received, Defendant's 65.

13 (Defendant's Exhibit 65 received into evidence.)

14 BY MR. HARMON:

15 Q. Mr. Upchurch, are you aware that certain parents of
16 students in the St. Johns County School District object to a
17 policy or practice that would allow students to use the
18 bathroom that matches their gender identity as opposed to their
19 assigned -- sex assigned at birth?

20 MR. KAPLAN: Objection, Your Honor. Relevance and
21 there's a stipulation the court entered stating that the
22 parties agree that certain -- I don't want to phrase it to the
23 court, but it's -- it's a stipulation between the parties.
24 This is cumulative.

25 THE COURT: Okay. Where are we going with this,

1 Mr. Harmon?

2 MR. HARMON: Well, Your Honor, when the administrator
3 from Louisville and the two administrators from Broward
4 testified, they spent a lot of time talking about how the
5 community responded to their policies when they adopted them.
6 And I do want to share, since we're talking about St. Johns
7 County, how the community responded to St. Johns County's
8 position when it comes to this issue.

9 MR. KAPLAN: Your Honor, can I just proffer one thing
10 for the court?

11 THE COURT: Yeah.

12 MR. KAPLAN: I'm greatly concerned about the line of
13 inquiry for the following reasons: Putting aside the
14 cumulative nature, what I anticipate Counsel is going to do is
15 try to enter into evidence a series of e-mails from various
16 individuals, none of whom have been authenticated for who they
17 are, to the school district, not as a consequence of an
18 official position, but, Your Honor, as a consequence of a press
19 release that was fairly inflammatory from an individual from
20 the Republican party --

21 THE COURT: Well, when they try to do that, then you
22 should object.

23 MR. KAPLAN: Yes, sir.

24 THE COURT: But I'm not going to -- I'm going to let
25 Mr. Upchurch respond to the general inquiry, and then we'll see

1 where it goes. I understand what you're saying. And, of
2 course, you know, in a case involving the law and the
3 constitution, public opinion is not necessarily what dictates
4 the result. And so I understand that. But I think in the
5 context of this issue, your witnesses did testify that the
6 policies that you're advocating met with community acceptance.

7 I suppose it's -- I should allow the county school
8 district to at least try to elicit testimony to the contrary,
9 if that's what they're trying to do. It might be a little bit
10 different. It might be apples to oranges, because -- it may
11 end up being apples to oranges, but let me -- I'm going to go
12 ahead and let Mr. Harmon proceed. I'm not admitting any
13 e-mails at this point. And if some are -- if he asks me to
14 admit them, then you should object.

15 MR. KAPLAN: Thank you, Your Honor.

16 THE COURT: Go ahead, Mr. Harmon.

17 MR. HARMON: Yes.

18 BY MR. HARMON:

19 Q. Mr. Upchurch, are you aware of -- that parents of students
20 in St. Johns County and students in St. Johns County district
21 schools object to a policy or practice that would allow
22 students to use the bathroom that matches their gender identity
23 as opposed to their sex assigned at birth?

24 A. Yes.

25 Q. Are you aware that parents of students in St. Johns County

1 schools and students in St. Johns County schools, some
2 students, believe that adopting such a policy would violate the
3 bodily privacy rights of students and raise privacy, safety,
4 and welfare concerns?

5 MR. KAPLAN: Objection, Your Honor.

6 THE COURT: First of all, you're leading all over the
7 place and -- I mean, you're just making an argument. So ask a
8 question if you have a question.

9 BY MR. HARMON:

10 Q. Do you know whether or not any parents or any students
11 have objected to a policy that would allow transgender students
12 to use the bathroom of their gender identity? Are you aware of
13 that?

14 A. I am aware of that. And I -- this has been an issue of
15 considerable -- it's drawn considerable public attention.
16 People talk to me about it. So I think I have a pretty good
17 feel for the community's temperature, for what that's worth.

18 MR. HARMON: One moment, Your Honor.

19 (Counsel confer.)

20 BY MR. HARMON:

21 Q. Mr. Upchurch, what is your understanding of the
22 temperature of the community, for what that's worth?

23 MR. KAPLAN: Objection, Your Honor. Vague.

24 THE COURT: I'll go ahead -- I mean, obviously I know
25 what you're asking him. I think Mr. Upchurch knows what you're

1 asking him. I'll go ahead and let him answer it. But I want
2 it to be clear, I'm in a non-jury context. I'm going to listen
3 to Mr. Upchurch's answer, but what weight I give to it and how
4 it fits into the analysis is an entirely different thing. So
5 ask your question.

6 BY MR. HARMON:

7 Q. You said a moment ago that you have a fairly good feel of
8 the temperature --

9 A. St. Johns County is not monolythic, in terms of their
10 political or social beliefs. It is trends conservative. I can
11 tell you without a doubt that this would be very divisive and
12 controversial if it were taken up in a public school board
13 meeting.

14 MR. HARMON: No further questions, Your Honor.

15 THE COURT: All right. Cross-examination?

16 MR. KAPLAN: Thank you, Your Honor.

17 **CROSS-EXAMINATION**

18 BY MR. KAPLAN:

19 Q. Mr. Upchurch.

20 A. Mr. Kaplan.

21 Q. How are you?

22 A. I'm fine.

23 Q. You just commented that it would be divisive and
24 controversial, right --

25 A. Yes, sir.

1 Q. -- if this was taken in public, correct?

2 A. Yes.

3 Q. But, Mr. Upchurch, prior to the best practices being
4 passed down to the principals, it was never taken to the public
5 arena, correct?

6 A. There were -- the district did not conduct community
7 workshops. So I agree with -- yes.

8 Q. So the answer is, it was not made public, right?

9 A. It was all public record and available to the public, but
10 no effort -- overt effort was made to publicize it.

11 Q. I don't want to get ahead of myself, but I do want to ask
12 you a question about Roger Mills.

13 Do you remember talking about Roger Mills?

14 A. Yes, sir.

15 Q. I think it was in the context of OCR, right?

16 A. Yes, sir.

17 Q. OCR stands for what, sir?

18 A. Office of Civil Rights.

19 Q. And you had multiple conversations with Mr. Mills; fair to
20 say?

21 A. I don't know if multiple. I would -- certainly more than
22 one, probably less than ten.

23 Q. And between the one and ten, some of those were
24 substantive conversations, right?

25 A. Yes, sir.

1 Q. Enough for you, sir, to have a feeling -- to have a feel
2 for OCR's perspective on St. Johns County -- on St. Johns
3 County School District's policy with respect to transgender
4 individuals using the restroom that conforms to their gender
5 identity; is that fair to say?

6 A. That's more than fair to say.

7 Q. And why don't you tell us, sir, if you could, what your
8 understanding of what OCR's position was based on your
9 conversations speaking to Mr. Mills?

10 A. I can't speak to their legal position, because he never
11 provided me with any legal authority to support OCR's position.
12 One of the things that I asked him for when we initially
13 responded was a -- legal authority that supported OCR's
14 position.

15 And what he sent us was previous -- was copies of
16 OCR's previous Q and As and other guidance. But politically
17 there was no doubt that OCR was aggressively pursuing its
18 interpretation of the Title IX bathroom regulation.

19 Q. Mr. Upchurch, is it accurate to say that it was clear to
20 you, based on your conversation with OCR, that a gender-neutral
21 bathroom was not an adequate accommodation?

22 A. That was OCR's position.

23 Q. Okay. Mr. Upchurch, you talked about a hypothetical of a
24 transgender male student who came into the school district
25 having filled out all the paperwork consistent with being a

1 male; in other words, checking the M box.

2 Do you remember that?

3 A. Yes, sir.

4 Q. And I think your testimony was, sir, that under those
5 circumstances, that that individual -- that transgender male
6 would be using the boys' bathroom unless some -- unless there's
7 some reason to find out, right?

8 Do you recall that?

9 A. Yes. Until -- until and unless the district received
10 notice that the student was not, in fact, a biological boy.

11 Q. And you'd agree with me that between that point in time,
12 sir, in your hypothetical, when that student enrolled, that
13 boy, the transgender boy, and the point in time when the school
14 was hypothetically notified, actual transgender boys would not
15 be treated the same way as that boy when it came to using the
16 restroom that conformed to their gender identity?

17 A. Can -- I'm not sure I understand what you're getting at,
18 Mr. Kaplan.

19 Q. My question, sir, is: If you had a transgender boy in
20 your hypothetical who came with all the paperwork checked off
21 that's consistent with his gender identity, you would agree
22 with me, sir, that at that point in time the school district
23 would have no reason to question that individual's use of the
24 boys' bathroom, yes?

25 A. I agree with that, yes.

1 Q. If you have a transgender boy who came in but whose
2 documentation was later changed because originally it indicated
3 female, that individual would not be permitted to use a
4 bathroom that conforms with their gender identity, right?

5 A. That's correct. Because the school board would then know
6 that the student was not a biological male who's eligible to
7 use that bathroom.

8 Q. Understood. So during that period of time when they're
9 both in school, both transgender students, they're both not
10 being treated the same way, agreed?

11 A. I agree as far as that goes. The difference is that in
12 one instance, the district would have knowledge of the
13 pertinent facts. Whereas in the other, it wouldn't. It
14 can't -- it can't redirect a student to another bathroom if it
15 doesn't know that that student is not eligible to use the one
16 he's been using.

17 Q. But, Mr. Upchurch, in that example, in that hypothetical,
18 the two transgender boys are not being treated the same way
19 when it comes to using the restroom; yes or no, sir?

20 A. The district is not knowingly treating them differently.
21 That's my answer.

22 Q. So the answer is the district is unknowingly treating them
23 differently?

24 A. I don't see how you can unknowingly discriminate against
25 someone.

1 Q. I didn't ask you about discrimination, sir.

2 A. Okay. Or treat them in an untoward manner.

3 Q. Sir, my question is really a yes or no. It's just using
4 your example, those two transgender students would be treated
5 differently when it came to restroom use, yes or no?

6 A. They would both be --

7 THE COURT: I think he answered the question, they're
8 not knowingly treating them differently. Are they, in fact,
9 having a different experience? Yes.

10 THE WITNESS: Thank you.

11 BY MR. KAPLAN:

12 Q. You would agree with me, sir, that there's no policy that
13 requires transgender individuals to identify themselves, right?

14 A. Correct.

15 Q. On the contrary, correct?

16 A. Yes, sir.

17 Q. Okay.

18 THE COURT: I mean, you're not asking these questions
19 for the purpose of suggesting that the school district should
20 somehow be investigating individuals to see whether they're
21 transgender to then see whether they should be enforcing their
22 policy, are you?

23 MR. KAPLAN: Your Honor, on the contrary. I'm not
24 doing that. What I'm trying to do is show to the court -- ask
25 questions that provide evidence to the court of how this policy

1 is implemented and could be implemented, because I think it
2 goes to the heart of some of the determination that the court
3 is --

4 THE COURT: Well, I think it's an interesting
5 question, which is why I asked Ms. Mittelstadt what happens if
6 a person presents themselves at the beginning in their
7 enrollment papers as -- with official birth certificates and
8 driver's licenses and so forth that says that you're a certain
9 gender. And that was based upon a change in that status in the
10 official records of the State of Florida. I think it's an
11 interesting question how that plays out in the context of this
12 case. I don't deny that.

13 But, I mean, if you keep asking Mr. Upchurch the same
14 question, he's going to keep giving you the same answer. And I
15 think the answer -- I think the answer is that, yes, those two
16 students are having a different experience. But if the school
17 board doesn't know about the one and does know about the other,
18 it wouldn't be surprising that that was so, is it? Would it?

19 MR. KAPLAN: So the court's asking me --

20 THE COURT: Yeah. I'm asking.

21 MR. KAPLAN: Your Honor, I think that one of the
22 things that is problematic, okay -- in other words, incongruous
23 to use, I think, Mr. Upchurch's words.

24 One of the things that's incongruous is the best
25 practices policy that says we will not silence individuals from

1 identifying themselves. But in creating a policy that only
2 facilitates individuals using a bathroom that conforms to their
3 gender identity, they do. I think that's one.

4 And I think, two, this is just -- you know, this is
5 one lawyer's view, Your Honor. I think it's equally
6 problematic that there's a policy that could be in place that
7 will result in disparate treatment among students, all of whom
8 attend the same school, all of whom have the same rights and
9 all of whom deserve education.

10 THE COURT: Is it different from -- and this is not
11 to trivialize it, but let me just -- let me just test the
12 proposition. I'm guessing that it's against the rules to smoke
13 in the bathroom. I'm guessing. Probably against the rules to
14 smoke anywhere on campus, I'm guessing.

15 THE WITNESS: Yeah.

16 THE COURT: If one student smokes and gets caught and
17 is punished and another student smokes but doesn't get caught
18 and isn't punished, is the school district treating them
19 differently? Yes. Are they doing so knowingly? I'm not so
20 sure about that.

21 MR. KAPLAN: Where I would -- where I would
22 distinguish the court's hypothetical is as follows: I think
23 Mr. Upchurch would agree, and I'll ask him questions about
24 this, that in Your Honor's hypothetical, there's a code of
25 conduct that's now in evidence. And it applies to every single

1 student the same way, regardless of whether they're transgender
2 or not.

3 But in my hypothetical, there is a code of conduct in
4 place that wouldn't control what happens to students. And then
5 there's an unpublished and private set of best practices that
6 is enforced and could result in disciplinary action.

7 So I think that they're slightly different, Your
8 Honor.

9 THE COURT: All right. I -- it's a fair point and a
10 fair debate. And I'm sure we're going to have it, but I think
11 if you keep asking him the same thing, he's going to say the
12 same thing.

13 MR. KAPLAN: And, Your Honor, I have no intention of
14 doing that.

15 THE COURT: All right. So let's talk about something
16 else.

17 BY MR. KAPLAN:

18 Q. Mr. Upchurch, you're a lawyer, right?

19 A. Yes, sir.

20 Q. And you've been practicing for years, right?

21 THE COURT: I'll take judicial notice of that, how
22 about that, if it will save time?

23 BY MR. KAPLAN:

24 Q. But suffice it to say, sir, that you have a fiduciary duty
25 to your client as you testify today, right?

1 A. Yes.

2 Q. Now, I think you talked a moment ago about the community's
3 temperature, right?

4 A. Yes, sir.

5 Q. Now, prior to this lawsuit, Mr. Upchurch, you are not
6 aware of the school district having received any -- any
7 concerns regarding Drew Adams using a restroom that conformed
8 to his gender identity other than the two girls who alerted the
9 school to the fact that he was?

10 A. Prior to the filing of the lawsuit?

11 Q. Yes, sir.

12 A. I agree with that.

13 Q. And similarly, sir, you're not aware of any instances of
14 sexual assault in St. Johns County where a transgender student
15 was involved, right?

16 A. No, I'm not.

17 Q. Okay. And you're not testifying, sir, that you believe
18 that transgender students are more prone to sexual assault,
19 correct?

20 A. To committing sexual assault?

21 Q. Yes. Yes, sir.

22 A. Yes, I agree they're not -- to my knowledge, they're not
23 more prone to committing assault.

24 Q. And the court just gave the -- the -- the court's
25 hypothetical about smoking cigarettes.

1 There is a code of conduct that's in place in the
2 St. Johns County school system, right?

3 A. Yes, sir.

4 Q. So when you have an example like the one you provided
5 before of any type of untoward behavior between any students
6 that go on in the bathroom, it's going to be the code of
7 conduct that controls any disciplinary measure, right?

8 A. Correct.

9 Q. To the extent it's not criminal. If it's criminal, then
10 there's a whole 'nother layer of protection out there, agreed?

11 A. That's right.

12 Q. And that is going to be independent, sir, independent of
13 whether you have a transgender student or not, agreed?

14 A. That's correct.

15 Q. Now, we're here, among other reasons, because the school
16 district has a bathroom policy, best practices in place, that
17 says transgender students cannot use a bathroom that conforms
18 to their gender identity.

19 Do you agree with that?

20 MR. HARMON: Object to the mischaracterization of the
21 evidence.

22 MR. KAPLAN: Well, let me rephrase my question.

23 THE COURT: Whoa. We've got three people talking at
24 once. You just ask the question again and then we'll see where
25 we are.

1 Go ahead.

2 MR. KAPLAN: Well, I'm going to have to rephrase it.

3 BY MR. KAPLAN:

4 Q. Do you agree that the best practices prohibits transgender
5 students from using the bathroom that conforms to their gender
6 identity?

7 A. I do not agree with that.

8 Q. Okay.

9 A. It is the underlying, unwritten, long-standing policy that
10 assigns bathrooms on the basis of sex that prevents the
11 transgender student from using the bathroom.

12 Q. Mr. --

13 A. It conforms to their gender identity.

14 Q. I'm sorry. I didn't mean to cut you off.

15 A. Go ahead.

16 Q. Mr. Upchurch, you're referring to this unwritten policy,
17 right?

18 A. Yes, sir.

19 Q. It's a policy you did not participate in creating,
20 correct?

21 A. It predates me.

22 Q. And a subsequent -- or even for the duration of the time
23 that you've worked at St. Johns County School District, other
24 than the best practices, you've never even had a meeting to
25 discuss this unspoken policy, right?

1 A. There is an exception to the government in the Sunshine
2 requirement that collegial bodies meet in public. It's
3 colloquially referred to as a shade meeting. Where, in the
4 context of pending litigation, the school board,
5 superintendent, and their attorneys can meet in private to
6 discuss pending litigation. We had such a meeting in this
7 case.

8 Q. Okay. So I want to put aside this case. And I'm asking
9 you --

10 A. Okay.

11 Q. -- putting aside this case -- and I'm asking you now as a
12 corporate representative, okay?

13 A. Yes, sir.

14 Q. And based on your experience, are you aware of any meeting
15 that's ever taken place where they've gathered the school board
16 and the superintendent and said let's talk about the unwritten
17 policy regarding bathroom use?

18 MR. HARMON: Object to lack of foundation and
19 vagueness as to the question asked.

20 THE COURT: Overruled.

21 THE WITNESS: Until the Drew Adams -- I'll call it a
22 complaint, came up, separate bathroom usage and the underlying
23 policy had never been an issue, and there was never any reason
24 to have a meeting to discuss it.

25 BY MR. KAPLAN:

1 Q. My question, sir, was whether there was a meeting, not
2 whether there was a reason, but just whether there was.

3 I'm asking you, sir, whether there was ever a
4 meeting.

5 A. There was no meeting.

6 Q. Okay. So, again, other than this one incident, the
7 circumstance regarding Drew Adams -- and I'm going to use your
8 date, from 1951 forward -- you're not aware of any meeting that
9 was created or set up so that people could sit down and talk
10 about the unwritten bathroom policy?

11 A. There was no public meeting. I would remind you that it
12 was that separate bathrooms were an SREF requirement.

13 Q. What I'm trying to focus on, sir, respectfully, is just
14 whether there was a dialogue among the school officials about a
15 policy that you're referring to as being unwritten.

16 So my question, sir, is whether there was a meeting
17 from 1951 until Drew Adams brought his -- again, I'm using your
18 word, "complaint" -- to discuss the unwritten bathroom policy?

19 A. Not to my knowledge.

20 Q. All right. The unwritten bathroom policy that you're
21 referring to, because it's not in writing, you can't point us
22 to anywhere where it discusses the term "biological boy" or
23 "biological girl," right?

24 A. I don't believe that I have -- I think the way I've
25 explained it today is that the policy separates boys and girls

1 as those terms have traditionally been defined.

2 Q. Understood, sir.

3 A. And whether -- I'm comfortable with using the term
4 "biological sex" as a placeholder, but I don't think that that
5 term adds anything to the traditional definition of sex.

6 Q. So then, sir, the answer to my question is, no, you're not
7 aware of any document that discusses biological sex predating
8 this lawsuit as it pertains to the unwritten bathroom policy?

9 A. I agree with that. Yes, sir.

10 Q. Now --

11 A. Let me -- I just thought of a couple of things.

12 Q. Well, sir, respectfully --

13 THE COURT: He can finish.

14 THE WITNESS: You asked me about have I seen any
15 documents. I have seen the 1958 blueprints for St. Augustine
16 High School for the original floor plan, separate bathrooms.
17 And I believe I have also seen the original blueprints for
18 Nease, same thing.

19 BY MR. KAPLAN:

20 Q. Okay.

21 A. Those are documents that make that distinction.

22 Q. Well, they don't -- they don't say biological boy or
23 biological girl on them, right?

24 A. That's correct.

25 Q. Now, Mr. Upchurch, am I correct that with respect to the

1 school becoming aware of Drew Adams using the restroom, there's
2 absolutely no documentation of that conversation taking place?
3 In other words, a conversation between two girls who said Drew
4 Adams was using the restroom and the school officials?

5 A. That's my understanding, yes, sir.

6 Q. And so sitting here, you don't know their names, right?

7 A. I do not know their names.

8 Q. Or the grades they were in?

9 A. Not for sure, no.

10 Q. And I --

11 THE COURT: Do we know who they told it to?

12 MR. KAPLAN: I was about to go through and ask, Your
13 Honor.

14 THE WITNESS: My understanding -- I think I said in
15 my deposition that it was a guidance counselor. But then I
16 think Cathy Mittelstadt said it was a dean.

17 THE COURT: So the best --

18 THE WITNESS: Staff member at the high school.

19 THE COURT: So two students -- female students spoke
20 to a school official, possibly a guidance counselor, possibly a
21 dean, and -- and said that Mr. Adams was using the men's room
22 and he shouldn't be, basically.

23 THE WITNESS: Yeah. I don't know if they said that
24 exactly, but, yeah, that's -- that was -- that's how the school
25 officials became aware that he had used the -- quote, the wrong

1 bathroom.

2 THE COURT: And then that triggered the eventual
3 meeting with Mr. Adams and all that.

4 THE WITNESS: That triggered a conversation.

5 THE COURT: Okay. All right. Go ahead.

6 BY MR. KAPLAN:

7 Q. And just to put a finer point on that. As you sit here,
8 Mr. Upchurch, you're not aware of any boys who specifically
9 came forward to any school officials to say that Drew Adams had
10 used the boys' bathroom and that it violated their privacy, it
11 was girls, right?

12 A. The only one that I'm aware of regarding the only instance
13 of his using that bathroom that I'm aware of was girls.

14 Q. So no other complaints, agreed?

15 A. No other complaints.

16 Q. No other reports, right?

17 A. Correct.

18 Q. And specifically what I'm asking is there is no other
19 documentation of individuals coming to the school prior to this
20 lawsuit saying that when Drew Adams used the bathroom, it
21 concerned their sense of privacy, agreed?

22 A. I agree with that.

23 Q. Or concerned their sense of safety, right?

24 A. Agree.

25 THE COURT: I'm going to stop you right there because

1 I need to talk to y'all before I take the hard break. So how
2 much longer do you think you have on cross? A while? Enough
3 that we're going to have to make Mr. Upchurch eat lunch here
4 and come back?

5 MR. KAPLAN: Yes, Your Honor.

6 THE COURT: Okay. All right. Sorry about that,
7 Mr. Upchurch. So I want to get -- because we're -- I'm going
8 to have to leave here at five till, so want to go ahead and
9 find out what the rest of the day is going to look like and
10 make sure we're set up when we come back.

11 So when we finish Mr. Upchurch's testimony, where are
12 we going to go, Mr. Harmon?

13 MR. HARMON: We're going to discuss it at lunch, but
14 I think, as of right now, we're looking at maybe one or two
15 more witnesses.

16 THE COURT: All right. Well, you need to go ahead
17 and tell me because -- because it is -- you know, I need -- I
18 mean, if you -- if you're pretty sure, that's fine, but I don't
19 want these folks having to get ready for things that aren't
20 going to happen.

21 MR. HARMON: Sure. No, of course.

22 THE COURT: So tell me who, for sure, your witnesses
23 are going to be after lunch.

24 MR. HARMON: Lisa Kunze.

25 THE COURT: And who is she?

1 MR. HARMON: The current principal at Nease.

2 THE COURT: Okay.

3 MR. HARMON: Michelle Sterling, who is a guidance
4 counselor, and we're talking three to four questions.

5 THE COURT: Okay.

6 MR. HARMON: Very, very brief.

7 THE COURT: Okay.

8 MR. HARMON: And that's it.

9 THE COURT: Okay. Is it your current thinking you
10 will not call the experts?

11 MR. SNIFFEN: Correct.

12 MR. HARMON: That's correct.

13 THE COURT: Okay. All right. And is that going to
14 be the -- your case, those two witnesses?

15 MR. HARMON: Absent something changing, that's our
16 expectation.

17 THE COURT: Okay. All right. Is the plaintiff
18 contemplating any rebuttal at this time?

19 MS. ALTMAN: Your Honor, we need to discuss. We did
20 have a witness prepared to testify in rebuttal, but we will
21 need to discuss that at lunch.

22 THE COURT: Okay. Can you tell me who the witness
23 is?

24 MS. ALTMAN: Yes. Kim Hutton.

25 THE COURT: Who is that?

1 MS. ALTMAN: And possibly Erica Adams Kasper.

2 THE COURT: So Ms. Kasper, we know who that is. Who
3 is the other witness?

4 MS. ALTMAN: Kim Hutton, she was deposed in this
5 case. She was someone that we actually identified even though
6 she was an impeachment witness. And she is someone that was
7 familiar with Dr. Hruz, which is why we need to discuss over
8 lunch. She's someone that --

9 THE COURT: Well, we wouldn't be having testimony
10 about a witness that's not going to testify, would we?

11 MS. ALTMAN: Well, we need to evaluate whether or not
12 her testimony would be in some way impeachment to another
13 witness, which is why we just need to discuss it, Your Honor.

14 THE COURT: Well, I'm not going to be too interested
15 in hearing impeachment of a witness who's not going to testify.
16 So unless you've got something else, we probably don't need to
17 hear from that witness. So if you can -- you can talk about it
18 at lunch, but that's just --

19 MS. ALTMAN: We will, Your Honor. And I promise we
20 will not intentionally do something to invoke your ire. So I
21 understand.

22 THE COURT: I don't think ire is the right word. I
23 just think -- I don't -- I'm not going to listen to impeachment
24 evidence of a witness that's not before the court. So if they
25 decide not to call them, I don't need to hear your witness say

1 bad things about them.

2 MS. ALTMAN: We understand, Your Honor.

3 THE COURT: All right.

4 MS. ALTMAN: I just don't want to make a statement
5 without discussing it with the entire team, but we will
6 certainly let the court know as soon as we return.

7 THE COURT: Mr. Upchurch, you can enjoy some of the
8 fine downtown dining cuisine, and we will be back at 1:15.
9 Thank you.

10 COURT SECURITY OFFICER: All rise.

11 (Recess, 11:55 a.m. to 1:17 p.m.)

12 COURT SECURITY OFFICER: All rise. This Honorable
13 Court is now in session. Please be seated.

14 BY MR. KAPLAN:

15 Q. Good afternoon, Mr. Upchurch.

16 A. Mr. Kaplan.

17 Q. Before we left, we had covered a number of topics. One of
18 them being transgender students using bathrooms that conform to
19 their gender identity.

20 And so my question for you is, sir, would you agree
21 that there are a total of 16 transgender students in St. Johns
22 County School District that have identified themselves?

23 A. I don't know the exact figure with personal knowledge, but
24 I think I -- that's consistent with what I've heard, I think.

25 Q. And, sir, would you also agree that approximately seven of

1 those individuals have asked to use bathrooms that conform to
2 their gender identity?

3 A. That's what Ms. Mittelstadt testified to, yes, sir.

4 MR. KAPLAN: Okay. Could we pull up Defense Exhibit
5 71, please?

6 BY MR. KAPLAN:

7 Q. While we're doing that, you were involved in the best
8 practices to the extent that you provided certain edits at
9 various times to documents.

10 Do you agree with that?

11 A. Yes, toward the end.

12 Q. And toward the end of it meaning, sir, you didn't attend
13 the task force meetings, correct?

14 A. That's right.

15 Q. You didn't go to conferences that discussed transgender
16 rights; is that right?

17 A. That's correct.

18 Q. Those were all in the purview of the task force, agreed?

19 A. That's correct.

20 Q. And to the extent that somebody has knowledge on it, that
21 would be Cathy Mittelstadt, right?

22 A. Well, she was the district's 30(b)(6) designated
23 representative to testify about the development of those
24 practices.

25 Q. Exactly my point.

1 A. Okay.

2 Q. So what you have in front of you is Defense Exhibit 71?

3 A. Correct.

4 Q. And I believe it's a draft of the best practices that was
5 put into evidence by our lawyer.

6 Do you see it on your screen?

7 A. Yes, sir.

8 MR. KAPLAN: Okay. Can we turn to the next page?

9 BY MR. KAPLAN:

10 Q. Do you see the block, sir?

11 MR. KAPLAN: Let's call out restrooms, the block that
12 says restrooms, if we could, Dan.

13 BY MR. KAPLAN:

14 Q. Do you see the block that says restrooms, Mr. Upchurch?

15 A. Yes, sir.

16 Q. Am I correct that the edit that augmented the statement
17 adding the word "transgender" to students was an edit that you
18 provided, the suggestion that you provided?

19 A. That's correct.

20 Q. And that the struck-out word "forced" was a word that you
21 struck out, right?

22 A. That's correct.

23 Q. And the inclusion of the word "required" was a word that
24 you put in?

25 A. That's correct.

1 Q. And for the record, what I'm referring to is the box on
2 the right, which is restrooms. On the box on the left, which
3 falls under the Florida law section, is the same true, meaning
4 that you struck out the word "gender" and included the word
5 "transgender" in front of the word "identity"?

6 A. Yes, sir.

7 MR. KAPLAN: Dan, can you go to the top where it says
8 8/19/15 draft and call that out for me, please?

9 BY MR. KAPLAN:

10 Q. Is it correct that this draft reflects that you made these
11 revisions on August 19th, 2015?

12 A. That's what that suggests, yes, sir.

13 Q. Okay.

14 MR. KAPLAN: We can take it down. Thank you.

15 BY MR. KAPLAN:

16 Q. I want to talk a little bit about the best practices in
17 more detail and specifically why they exist.

18 Now, you'd agree with me that, based on your
19 testimony, there are primarily two principles that underpin the
20 best practices, right?

21 A. I'm not sure what you mean.

22 Q. Okay. Well, let me be more specific.

23 A. Yeah.

24 Q. You'd agree with me that privacy is one of the reasons why
25 the best practices was created?

1 A. I don't agree with that. Privacy is the interest -- the
2 important government interest that supports the policy of
3 separating bathrooms by sex.

4 Q. Okay. So I'm not quarrelling with you. Let me be more
5 specific.

6 What I'm asking is -- let's start here. Would you
7 agree that privacy and safety are both principles that underpin
8 what you believe to be the legitimate, important or compelling
9 government interest with respect to the restroom portion of the
10 best practices?

11 A. I don't mean to quibble, but language, as this case
12 demonstrates, is important. And this -- what -- I would agree
13 that the best practices serve those interests.

14 In terms of their purpose and why they were created,
15 they were created to provide guidance to teachers and staff out
16 there in the field at district schools so that if a question
17 came up, they would have a reference about how to deal with it.
18 And also -- and importantly, I think there was a -- a
19 recognition that practices from -- should be uniform from
20 school to school. You don't want teachers and staff in one
21 school handling a situation differently than at another school.

22 Q. Would you agree with me, sir, that -- would you agree with
23 me that there are three principles that underpin the school
24 district's position that the restroom use being guided,
25 dictated, enforced, however you'd like to put it, the way it

1 has been is because of safety, privacy, and welfare?

2 A. That -- those are the interests served by the underlying,
3 long-standing policy of separate bathrooms, yes, sir.

4 Q. And when you say those three, I think your testimony
5 previously was really that welfare is the umbrella, right? Is
6 that a "yes"?

7 A. That's fair to say, yes.

8 Q. And then below them, you have privacy and then you have
9 safety, right?

10 A. Yes. I think those are aspects of welfare.

11 Q. Now, when we say safety, sir, Mr. Upchurch, you'd agree
12 with me that the safety concern is primarily actually for the
13 transgender student, right?

14 A. With respect to the underlying policy of separating
15 bathrooms on the basis of sex, that has nothing to do with
16 transgender students. That policy serves the safety interests
17 by assuring that members of the opposite sex aren't in an
18 unsupervised bathroom together.

19 MR. KAPLAN: Your Honor, may I approach?

20 THE COURT: Yes.

21 BY MR. KAPLAN:

22 Q. Mr. Upchurch, do you remember giving a deposition as a
23 corporate representative in this case?

24 A. Yes, sir.

25 Q. And I was there, right?

1 A. Yes, sir.

2 THE COURT: You don't have to do all that. I -- I
3 was there, you were there, you took an oath to tell the truth
4 and all that, just ask him the questions.

5 Go ahead.

6 MR. KAPLAN: Sure, Your Honor.

7 BY MR. KAPLAN:

8 Q. I want to guide you to page 93, line 25.

9 Do you see it?

10 A. 93 or 92?

11 Q. 93, line 25.

12 A. Yes, sir.

13 Q. "Question: So, again, the safety concern is for
14 transgender individuals?"

15 "Answer: Primarily, yes, sir."

16 Do you see that?

17 A. Yes, sir.

18 Q. Did I read it correctly?

19 A. Yes, sir.

20 Q. All right. Now, the secondary concern, Mr. Upchurch,
21 regarding privacy would be a concern that allowing transgender
22 students who use a restroom that conforms to their gender
23 identity may create an opportunity for people with untoward
24 intentions to do things they ought not do?

25 A. That was one of the things I mentioned, yes. That is not

1 the -- my primary point about privacy.

2 Q. It's a secondary issue, right? Secondary concern?

3 A. I think that's a fair description.

4 Q. But, sir, as you sit here, you have never received a
5 complaint of any untoward behavior involving a transgender
6 student using a restroom that conformed to that individual's
7 gender identity, correct?

8 A. That's correct, sir.

9 Q. And based on the work that you've done and the literature
10 you've reviewed, you're not aware of any circumstance that was
11 untoward in a restroom involving a transgender individual using
12 a restroom that conformed to that individual's gender identity?

13 A. In St. Johns County?

14 Q. Yes, sir.

15 A. I -- I think that's a fair statement.

16 Q. We talked about privacy. Privacy was under that umbrella,
17 again, of welfare. Agreed?

18 When you say privacy, sir, you're referring to
19 preserving the privacy for the individuals using the bathroom,
20 right?

21 A. Yes, sir.

22 Q. And I think one of the things that you said to your lawyer
23 during direct examination was privacy starts at the bathroom
24 door, right?

25 A. Yes, sir.

1 Q. But, Mr. Upchurch, you'd agree with me that there are
2 stalls in the bathrooms at Nease High School, correct?

3 A. I agree.

4 Q. There are stalls in the boys' bathroom, right?

5 A. Yeah. I think there's -- I think I heard that there's a
6 total of eight stalls in the boys bathrooms.

7 Q. There are stalls in the girls bathrooms, right?

8 A. Yes.

9 Q. And those stalls that we're discussing have existed for
10 years, right?

11 A. Say for the recent addition -- yes.

12 Q. The recent addition adding gender-neutral restrooms,
13 right?

14 A. I'm not sure I know that there was a substantial recent
15 addition at Nease, whether there were just gender-neutral
16 bathrooms or there were also boys and girls' restrooms, group
17 bathrooms. I'm not sure.

18 Q. You'd agree with me that if somebody walks into the
19 restroom, boy or girl, and they want their privacy, they can go
20 into a stall and close the door, agreed?

21 A. I agree.

22 Q. And if the stalls are all taken, there's nothing to keep
23 any student at any St. Johns County School District school from
24 waiting their turn to go in, agreed?

25 A. Agreed.

1 Q. And if they're impatient and they really need to get
2 moving, again, sir, nothing keeps those same students from
3 using any of the gender-neutral restrooms, right?

4 A. That's right.

5 Q. But St. Johns County School District prohibits Drew Adams
6 from using a boys' bathroom, right?

7 A. That's correct.

8 Q. One of the things that I think you discussed during direct
9 examination was a circumstance that concerned you in terms of
10 safety and privacy regarding a 13-year-old student with an
11 older student in the same bathroom and the risk of danger,
12 right?

13 A. Correct.

14 Q. But you'd agree with me that the code of conduct
15 specifically makes conduct by any student, transgender or not,
16 prohibited? In other words, that type of conduct would be
17 answered by the code of conduct, right?

18 A. The code of conduct prescribes consequences for its
19 violation. It doesn't prevent violations.

20 Q. And, again, when you say prevent violations, sitting here,
21 you're not aware of a single violation that involved a
22 transgender student at any St. Johns County School District
23 restroom, right?

24 A. That is correct.

25 Q. You discussed competing interests, right, Mr. Upchurch?

1 A. Yes, sir.

2 Q. And I just want to be clear, when you say competing
3 interests, you're referring to the interest of a transgender
4 student using a restroom that conformed with that individual's
5 gender identity on one hand, right?

6 A. That's correct, yes.

7 Q. And on the other hand -- well, what is the interest,
8 Mr. Upchurch?

9 A. Excuse me?

10 Q. What's the interest on the other hand?

11 A. The -- in the case of the boys' bathroom, it would be the
12 privacy interest of -- again, I'm going to use the word
13 "biological boys" to make clear what I'm talking about -- who
14 are eligible, under the district's policy, to use that
15 bathroom.

16 Q. And you'd agree with me that none of those biological boys
17 you referenced, prior to this lawsuit being filed, said that
18 they were concerned that Drew Adams using the restroom somehow
19 would compromise --

20 MR. HARMON: Your Honor, I'm going to object to that
21 being a mischaracterization and attempt to contest an already
22 stipulated fact in this case.

23 THE COURT: Repeat the question again, please,
24 Counsel.

25 MR. KAPLAN: It's very simply, Your Honor, that no

1 boy came forward when Drew Adams used the restroom to tell the
2 school that they were concerned that his using the restroom
3 made them feel as though their privacy or safety was put at
4 risk.

5 THE COURT: And how does that contravene a
6 stipulation?

7 MR. HARMON: At the very end if this is limited only
8 to Drew Adams, then I'll withdraw my objection.

9 THE COURT: Go ahead, sir.

10 THE WITNESS: I would say two things in response to
11 your question. First of all, I'm not aware of any complaints
12 about Drew Adams using the boys' restroom other than the two
13 students that we talked about earlier.

14 Secondly, I am not aware that, in fact, Drew Adams
15 used the boys' bathroom on any other occasion.

16 BY MR. KAPLAN:

17 Q. All the students in the St. Johns County School District
18 deserve support from the school district, agreed?

19 A. Excuse me? I didn't quite hear you.

20 Q. I'm sorry. I'll speak up.

21 Mr. Upchurch, would you agree with me that all the
22 students, all the students at the St. Johns County School
23 District deserve support?

24 Do you agree with that?

25 A. I agree with that.

1 Q. That they all deserve to be nurtured, agreed?

2 A. Yes.

3 Q. And that they all deserve to get the support they need in
4 order to go through the school system as successfully as
5 possible?

6 A. I agree with that.

7 Q. You agree that Drew Adams is a member of that school
8 district's community, right?

9 A. Yes.

10 Q. But you'd agree with me as a transgender boy, Drew Adams
11 is not treated the same way as boys -- to use your words
12 "biological boys" -- when it comes to using the restroom?

13 A. I agree with that.

14 MR. KAPLAN: Just a moment to confer, Your Honor.

15 THE COURT: Sure.

16 (Counsel confer.)

17 MR. KAPLAN: Thank you very much for your time,
18 Mr. Upchurch.

19 (Judge confers with court reporter.)

20 THE COURT: Wait, wait. Sorry. I took the court
21 reporter away. Say that again: Thank you very much for your
22 time, Mr. Upchurch.

23 MR. KAPLAN: Thank you very much for your time,
24 Mr. Upchurch.

25 THE COURT: All right. Mr. Harmon.

1 MR. HARMON: Yes, Your Honor. Very brief.

2 REDIRECT EXAMINATION

3 BY MR. HARMON:

4 Q. Mr. Upchurch, does the St. Johns County School Board and
5 school district wait until something happens before they
6 address it?

7 A. Absolutely not.

8 Q. And you were asked questions on cross-examination about
9 something Ms. Mittelstadt testified to as a 30(b)(6)
10 representative.

11 Do you remember that?

12 A. I remember saying that. I can't remember what it was.

13 Q. With respect to Ms. Mittelstadt and calling her a 30(b)(6)
14 representative, are you aware that she was designated as such
15 at a deposition in this case?

16 A. Yes.

17 Q. You were -- were you present in the room today when
18 Ms. Mittelstadt testified in this trial?

19 A. No.

20 Q. During cross-examination, you were asked a lot of
21 questions about whether you had ever seen any examples of any
22 issues involving transgender students being the victims of
23 assault or assaulting anybody -- excuse me, assaulting anybody.

24 Do you remember that?

25 A. Yes. I testified that I was not aware of -- to my

1 knowledge, that transgender students are not more prone to
2 assault than any other students, something like that.

3 Q. To your knowledge, are transgender students, in your
4 review, any more prone to being bullied or assaulted?

5 A. According to the literature that was compiled by the task
6 force and which I reviewed in reviewing the extensive response
7 to the plaintiff's public records request, according to
8 research that I have done since, transgender students are more
9 vulnerable than -- are a vulnerable student population.

10 The statistics or the data indicates that they fear
11 for their safety, they are more prone to be victims of
12 violence, bullying, physical and otherwise, than other
13 students.

14 Q. Is that a safety concern for the bathroom?

15 A. Yes. And I would say that one of the benefits of the
16 gender-neutral bathroom solution or option is that there's only
17 one person in there, there's a lock on the door, and that's the
18 safest bathroom alternative for a transgender student who may
19 be more vulnerable than students at large.

20 MR. HARMON: One moment, Your Honor.

21 (Counsel confer.)

22 BY MR. HARMON:

23 Q. Now, in terms of the research that you reviewed, was that
24 in the context of bullying in a public school system?

25 A. Yes.

1 Q. Okay.

2 MR. HARMON: No further questions, Your Honor.

3 THE COURT: Anything else?

4 MR. KAPLAN: No, thank you, Your Honor.

5 THE COURT: Can I just ask you one set of questions,
6 Mr. Upchurch? In the course of your research, did you -- and
7 your involvement in this issue, did you come to know that there
8 are other school districts, Broward County, others, that have
9 policies that do allow transgender students to use the restroom
10 of their gender identity?

11 THE WITNESS: I know that Broward has -- that that is
12 its practice. I don't believe that it is an adopted written
13 rule.

14 THE COURT: Okay. And I may have used the wrong
15 term. We had testimony -- we had testimony from the Broward
16 folks, I think it was yesterday.

17 In your position both as the attorney and as the
18 corporate representative for the school district, is it -- is
19 it your view that the policy that St. Johns County has
20 developed here, the unwritten policy that you testified to, is
21 that policy compelled by state law? Is it compelled by Title
22 IX? Is it -- in other words, is that what the law requires?

23 THE WITNESS: The -- Title IX authorizes it. And I
24 might say Title IX suggests, but it doesn't require it. The
25 SREF, which promulgates the design and construction

1 requirements for schools, calls for separate male and female
2 bathrooms in grades 4 through 12.

3 It doesn't define male or female. So I guess that
4 there is room for school districts to differ in their -- their
5 criteria they use in that.

6 One thing that is different about St. Johns and
7 Broward is that there is a local nondiscrimination ordinance in
8 Broward County that, as I understand it, expressly prohibits
9 what I would call transgender -- addresses transgender
10 discrimination. It's apples and oranges, I would say.

11 THE COURT: So is it your view or the district's view
12 that a policy -- the policy that St. Johns County has -- and
13 I'll ask you to assume for purposes of my question that Broward
14 County has a policy that allows transgender students to use the
15 restroom of their gender identity -- is it your view that both
16 of those policies are accommodated by Title IX and by state
17 law?

18 THE WITNESS: I read Title IX, because it's not --
19 Title IX is not saying thou shalt do anything. And so it
20 provides leeway for Vermont to do it one way, for St. Johns
21 County to do it another, and so forth.

22 I really -- I think the SREF requirement is
23 significant. I think it's part of the -- the reasonable
24 expectation that people have that there will not be biological
25 boys in the girls bathroom. I think it enforces that.

1 Whether push comes to shove, that would -- I don't
2 think it would -- I don't think -- I'm not going to say that
3 Broward County is in violation of the law. I mean, I think
4 that they're -- there's sort of local sovereignty, for lack of
5 a better word. And if it --

6 THE COURT: And that's really what I'm trying to
7 figure out. Is the district -- is St. Johns County District
8 saying it would be unlawful for us to adopt the policy that
9 Broward County has adopted? Or is St. Johns County saying, We,
10 as a policy choice, are adopting this policy?

11 THE WITNESS: It is the latter. We are -- as a
12 policy choice, we are declining to modify or retreat from our
13 traditional policy at this time.

14 THE COURT: I'll be happy to let counsel piggy-back
15 on my questions just on this area, if you care to. No
16 requirement.

17 MR. KAPLAN: Nothing from the plaintiff, Your Honor.

18 MR. HARMON: No, Your Honor.

19 THE COURT: Mr. Upchurch, thank you for your time.

20 THE WITNESS: Thank you, Judge.

21 MR. KAPLAN: Your Honor, may I just retrieve the
22 deposition binder?

23 THE COURT: Sure.

24 Mr. Harmon, what's next?

25 (Witness excused.)

1 MR. HARMON: Your Honor, I believe we have one
2 witness left.

3 THE COURT: All right.

4 MR. HARMON: Ms. Kunze at this time.

5 THE COURT: All right. Okay. Let's get her in here.

6 (Ms. Kunze enters the courtroom.)

7 COURTRROOM DEPUTY: Do you solemnly swear that the
8 testimony you are about to give before this Court will be the
9 truth, the whole truth, and nothing but the truth, so help you
10 God?

11 THE WITNESS: I do.

12 COURTRROOM DEPUTY: Please state your full name and
13 spell your last name for the record.

14 THE WITNESS: Lisa Kunze, K-u-n-z-e.

15 COURTRROOM DEPUTY: Thank you.

16 THE COURT: They're going to finally let you do
17 something.

18 MR. SNIFFEN: I know.

19 THE COURT: All right. You may proceed.

20 MR. SNIFFEN: I like to think they saved the
21 best-looking one for last.

22 THE COURT: You go with that.

23 **LISA KUNZE, DEFENDANT'S WITNESS, SWORN**

24 **DIRECT EXAMINATION**

25 **BY MR. SNIFFEN:**

1 Q. Good afternoon, Ms. Kunze. How are you?

2 A. I'm good. Thanks.

3 Q. Are you employed, ma'am?

4 A. Yes, sir.

5 Q. By whom?

6 A. St. Johns County School Board.

7 Q. And how long have you been employed by the St. Johns
8 County School Board?

9 A. This is my seventh, eighth -- 13th year.

10 THE COURT: Ma'am, would you do me a favor, I know
11 it's a little -- but can you scoot up and just try to keep your
12 voice up a hair. Thank you, ma'am. Appreciate it.

13 MR. SNIFFEN: And, Your Honor, I assume my -- since
14 this is my first time at the mic, everyone can hear me okay.

15 THE COURT: I can hear you fine. Yeah.

16 MR. SNIFFEN: Thank you.

17 BY MR. SNIFFEN:

18 Q. Can you describe for the court your educational
19 background?

20 A. I went to Indiana State, majored in science education. I
21 taught for seven years at Mandarin High. Went back to school
22 to get my master's in educational leadership at University of
23 North Florida, and then became the assistant principal.

24 I was assistant principal and vice principal for a
25 few schools in Jacksonville and then transferred to St. Johns

1 County.

2 Q. And I'm sorry, did you say what master's degree you
3 received from the University of North Florida?

4 A. It's in educational leadership.

5 Q. And are you licensed by the State of Florida as an
6 educator?

7 A. Yes, sir.

8 Q. In what areas?

9 A. I have -- teaching biology, general science, and then
10 principalship, like K through 12 is on there.

11 Q. What is the total number of years you have spent working
12 in education?

13 A. This is my 25th year.

14 Q. And when did you begin working at Nease High School?

15 A. As a principal? Last January of -- this past January,
16 2017.

17 Q. How about before then?

18 A. I was an assistant principal there when I first moved to
19 St. Johns County.

20 THE COURT: And I bet when you became principal, you
21 weren't thinking you would have to sit here and answer
22 questions like this.

23 THE WITNESS: No, sir, I was not.

24 THE COURT: It wasn't in the job description?

25 THE WITNESS: No.

1 THE COURT: All right. Go ahead.

2 BY MR. SNIFFEN:

3 Q. Ms. Kunze, do you know Drew Adams?

4 A. Yes, sir.

5 Q. How do you know Mr. Adams?

6 A. He's a student at Nease. So I know him from seeing him
7 around campus. And then when I first started, he had made
8 an -- e-mailed and made an appointment to see me, or his friend
9 did, and he and a friend came to meet with me.

10 Q. And are you familiar with Mr. Adams' academic performance
11 at Nease?

12 A. Yes, sir.

13 MR. SNIFFEN: May I approach, Your Honor?

14 THE COURT: Please.

15 MS. RIVAUX: What exhibit?

16 MR. SNIFFEN: I'm sorry. 41.

17 THE COURT: 41. He's going to hand you a copy.

18 MS. RIVAUX: I'm going to object on relevance
19 grounds. And we have a motion in limine on this, on academic
20 records.

21 THE COURT: Counsel, what's the relevance of the --
22 of Mr. Adams' attendance?

23 MR. SNIFFEN: I believe one of the allegations in the
24 case, Your Honor, has been that Mr. Adams has suffered loss
25 of -- or has had less than perfect attendance, in part because

1 of the actions of the school district. And we just want to put
2 into evidence what his attendance in school has been.

3 THE COURT: All right. I'm going to go ahead and let
4 you do it over the objection. I'll put it under seal so it
5 won't be in the public record.

6 Go ahead, sir.

7 MR. SNIFFEN: And, Your Honor, to that point, I was
8 just about to mention the seal -- the next two exhibits, as
9 well, which I'll go ahead and identify so you can get going,
10 are Exhibit 42, his course and grade information, and Exhibit
11 43, his class schedule. And, of course, we would actually
12 recommend that they be put under seal as well. But we'll get
13 to them as we go.

14 THE COURT: Same objection, Ms. Altman?

15 MS. RIVAUX: Ms. Rivaux. But, yes, Your Honor.

16 THE COURT: Oh, I'm sorry. I apologize.

17 MS. RIVAUX: I know, we look alike.

18 THE COURT: All right. I'm going to admit it. I
19 understand what you're saying. And I'm not sure how much it's
20 going to matter one way or the other but I'm not so sure about
21 it that I want to exclude it. So I'll go ahead and admit those
22 documents as well.

23 So it's 41, 42, and 43, and I'll put them all under
24 seal.

25 (Defendant's Exhibits 41, 42, and 43 received into

1 evidence under seal.)

2 MR. SNIFFEN: Would you like me to approach the clerk
3 with 42 and 43 as well?

4 THE COURT: Yeah. That's fine.

5 So 42 is essentially a report card, at least that's
6 what we used to call them. And --

7 MR. SNIFFEN: 43 is --

8 THE COURT: 43 is a schedule. And this is his
9 schedule this year, or what --

10 MR. SNIFFEN: Yes, sir.

11 THE COURT: All right. They're all received over
12 objection and under seal. Go ahead.

13 MR. SNIFFEN: And I'm going to go ahead and give
14 these to the witness, Your Honor.

15 THE COURT: That's fine.

16 BY MR. SNIFFEN:

17 Q. Ms. Kunze, looking at Exhibit 42, the plaintiff's course
18 and grade information, you've seen that document before today,
19 I assume?

20 A. Yes, sir.

21 Q. Has plaintiff been -- well, are you familiar with the
22 academic performance of Mr. Adams?

23 A. Yes.

24 Q. What kind of student is he?

25 A. He's in the International Baccalaureate program, so he's

1 taking the most rigorous classes that we offer at Nease. He is
2 a very good student. He was just inducted into the National
3 Honor Society.

4 Q. And --

5 THE COURT: So he's got some serious game here,
6 right?

7 THE WITNESS: Correct.

8 BY MR. SNIFFEN:

9 Q. And looking at Exhibit 43, the class schedule for this
10 year, looking at the courses that Mr. Adams is taking, do they
11 comport with the description of academic rigor that we just
12 discussed a moment ago?

13 A. Yes.

14 Q. In other words, he's taking hard courses?

15 A. This is an IB -- International Baccalaureate schedule,
16 again, which is the most rigorous schedule that a junior could
17 take at Nease.

18 Q. Have you noticed any deteriorating academic performance in
19 the plaintiff since the beginning of the 2017/2018 school year?

20 A. No, not that I have noticed.

21 Q. Have you had an occasion to observe the plaintiff in
22 social situations in or around school?

23 A. During lunch, mainly. So, yes.

24 Q. Does he seem to be -- does he have friends that he is with
25 at lunch and any other time that you may have seen him?

1 A. Yes. He has a group of friends that I see him with on a
2 regular basis.

3 Q. Now, I would like for you to look at Defendant's Exhibit
4 43 for a moment. And take a look at where the rooms are for
5 the classes in the plaintiff's schedule for this -- this year.

6 A. Uh-huh (affirmative).

7 Q. His Honor is going to take a tour of the facility, so I'm
8 not going to steal that thunder, if you will, or get into the
9 weeds on it -- he may have questions for you. I don't know.

10 But just as a general matter, do you recognize those
11 classrooms, those rooms listed on the exhibit to be first-floor
12 or second-floor rooms?

13 A. Every class is on the ground floor.

14 Q. Before the 2017/2018 school year, the current one --

15 A. Uh-huh (affirmative).

16 Q. -- how many gang-style, sex-segregated restrooms were
17 there on the Nease campus total?

18 A. Four. Five if you include the ones in the locker room,
19 but those are only accessible for students in PE.

20 So, like, to the general public, if someone had to
21 leave class to go to the restroom, there's four that they would
22 be able to go to.

23 Q. Are IB students required to take PE as part of their
24 curriculum?

25 A. They are not.

1 Q. And so four gang-style, sex-segregated bathrooms. How
2 many stalls in the boys' room of those sex-segregated four
3 gang-style bathrooms?

4 A. In all of the designated boy restrooms, there's two
5 stalls.

6 Q. So a total of eight stalls in those four restrooms?

7 A. Yes, sir.

8 Q. How many students at Nease?

9 A. 2450.

10 Q. Did that vary at all from last year to this year?

11 A. Yes, we increased about 150.

12 Q. I want to take you into this school year. Has the number
13 of sex-segregated boys' room/girls' room bathrooms, changed at
14 all from last school year?

15 A. Yes. With the addition of the new building, which we call
16 Panther Hall, there's a new boys and girls' restroom.

17 Q. That's Panther Hall. I don't know if the court reporter
18 got that. So that's the new building?

19 A. Yes, sir.

20 Q. What people call the new building at Nease?

21 A. Yes.

22 Q. How many stalls in the boys' room -- how many stalls are
23 located in the boys' room of that new sex-segregated,
24 gang-style bathroom at Nease?

25 A. There are two in there as well.

1 Q. What is -- excluding the locker room, what are the total
2 number of bathroom stalls available to boys throughout the
3 campus at Nease, presently?

4 A. It would be ten.

5 Q. How many -- are you aware of the term "gender-neutral
6 bathroom"?

7 A. Yes, sir.

8 Q. And are you aware of the existence of gender-neutral
9 bathrooms at Nease High School?

10 A. Yes, sir.

11 Q. And can you describe what those bathrooms are like? We
12 talked about the sex-segregated, gang-style bathrooms. What
13 are the gender-neutral bathrooms?

14 A. The ones in the older part of Nease, in the pods, are
15 formally faculty restrooms that were converted to student use
16 for gender-neutral.

17 Q. Can more than one person use that restroom?

18 A. Not at a time.

19 Q. Does the person who uses that restroom have the ability to
20 remain private while in that restroom?

21 A. Yes.

22 Q. In the same manner they would in a stall?

23 A. Yes.

24 Q. In fact, arguably more so given that they are separated by
25 themselves. Would you agree with that statement?

1 MS. RIVAUX: Objection. Leading.

2 MR. SNIFFEN: It is leading. I'm sorry.

3 BY MR. SNIFFEN:

4 Q. Do they have the ability to lock the door in the
5 gender-neutral bathrooms?

6 A. Yes.

7 Q. Okay. On the first floor of the Nease campus, how many
8 gender-neutral bathrooms are there total this school year going
9 forward?

10 A. There are 11.

11 Q. So 11 first-floor.

12 And if we take away the -- well, the two gang-style
13 bathrooms that have been added this year, did I understand you
14 to say that those are upstairs in Panther Hall?

15 A. Yes, sir.

16 Q. So downstairs at Nease High School, how many total either
17 stalls or gender-neutral restrooms are there? Compare them, if
18 you would, one to the other, on the first floor. How many are
19 there?

20 A. On the first floor, the gender-neutral would be 11. And
21 on the sex-designated restrooms, it would be eight.

22 Q. And you were with -- were you with Mr. Adams when the
23 video tour was conducted of the different restrooms and his
24 walkthrough to the different classes a couple of weeks ago?

25 A. Yes, sir.

1 Q. And did you walk from classroom to restroom along with
2 Mr. Adams?

3 A. Yes, sir.

4 MR. SNIFFEN: Thank you. I have nothing further,
5 Your Honor.

6 THE COURT: Ms. Rivaux.

7 **CROSS-EXAMINATION**

8 BY MS. RIVAUX:

9 Q. Good afternoon, ma'am. How are you?

10 A. Good. Thanks.

11 Q. And you mentioned that you're the current principal at
12 Nease High School?

13 A. Yes, ma'am.

14 Q. And are you responsible for implementing the current
15 policy at the school for bathroom use?

16 A. For implementing it or following the current policy?

17 Q. Yeah. Is there a difference?

18 A. Well, it's -- was already in place. We have guidelines in
19 place. And I'm continuing to follow what was in place.

20 Q. Okay. So would you say that you're enforcing it?

21 A. Yes.

22 Q. Okay. And in terms of -- you mentioned there's about --
23 over 2,000 students at Nease High School?

24 A. Yes, ma'am.

25 Q. Big high school?

1 A. Yes, ma'am.

2 Q. And how many transgender students are you aware of at the
3 high school?

4 A. I'm aware of five.

5 Q. Five.

6 Do you agree that the transgender students are a
7 minority at the school?

8 A. Yes, ma'am.

9 Q. Would you agree, also, that all non-transgender students
10 can use bathrooms that correspond with their gender identity?

11 MR. SNIFFEN: Object as beyond the scope.

12 THE COURT: It is kind of beyond the scope, but I'm
13 going to allow it anyway. You can follow up, if you want to.

14 THE WITNESS: Can you repeat, please?

15 MS. RIVAUX: Sure.

16 BY MS. RIVAUX:

17 Q. You would agree that all non-transgender students at your
18 school can use the bathroom that corresponds with their gender
19 identity?

20 A. Yes.

21 Q. Okay. And you would agree that all non-transgender
22 students can also use the gender-neutral bathrooms?

23 A. That is correct, yes.

24 Q. And you would also agree that none of the transgender
25 students can use the bathroom that corresponds with their

1 gender identity?

2 A. That is correct.

3 Q. Okay. In implementing the policy or -- I'm sorry,
4 enforcing the policy, to use your word, did you speak to any
5 students about the policy?

6 MR. SNIFFEN: Your Honor, I'm going to object again.
7 Beyond the scope. We were very narrow --

8 THE COURT: Yeah. I think -- I think they are kind
9 of getting beyond the -- beyond the scope here because you
10 already had Ms. Smith and Mittelstadt. I'm not sure -- I don't
11 know that going through the whole deal with the policy and how
12 it was put together with this witness is the right way to go,
13 if that's what you're getting ready to do.

14 MS. RIVAUX: I don't intend, Your Honor, to go into
15 how the practice was put in place, but only how the principal
16 at the school enforces it.

17 THE COURT: Well --

18 MS. RIVAUX: As specific to Drew.

19 THE COURT: Well, that's not really what your
20 question was.

21 Go ahead and ask the question and let me listen to
22 your question.

23 MS. RIVAUX: Okay.

24 BY MS. RIVAUX:

25 Q. Well, do you feel that you have any discretion in

1 enforcing the rule -- the policy that you have at the school
2 in -- for the -- from prohibiting the transgender students from
3 entering the -- let me start over.

4 Do you feel that you have any discretion in enforcing
5 the policy at the school regarding the bathrooms?

6 A. No. Because it's the district policy, and it's my job to
7 enforce the district policy.

8 Q. And when you refer to the policy, you are referring to the
9 best practices, right?

10 A. Yes.

11 Q. How many gender-neutral bathrooms were there when Drew
12 started school in August of 2015?

13 A. '15? Honestly, I don't know because I wasn't the
14 principal, so I don't know. All that was in existence last
15 year when I started were all of the ones that they started
16 with. Or if they added more, you know, through the year --
17 through the two years, I'm not sure of that.

18 Q. So you're not aware that there was only one bathroom at
19 the time when Drew started in August of 2015?

20 A. No.

21 Q. And is it fair to say that one of the reasons that you
22 added additional bathrooms was because some of the bathrooms --
23 the gender-neutral bathrooms that you had were faculty
24 bathrooms that were converted to student bathrooms and then you
25 didn't have any more faculty bathrooms?

1 A. You mean adding more --

2 Q. Gender-neutral bathrooms.

3 A. With the construction of the new building?

4 Q. Correct.

5 A. Yes.

6 Q. Okay. It's fair to say as an educator that you care about
7 your students, right?

8 A. Yes, ma'am.

9 Q. You care about their safety?

10 A. Yes, ma'am.

11 Q. You care about their well-being?

12 A. Yes, ma'am.

13 MR. SNIFFEN: Objection. Beyond the scope, Your
14 Honor.

15 THE COURT: I'm going to allow it. I'll see. Okay.
16 Those are probably obvious answers to obvious questions. So
17 what's your real question?

18 BY MS. RIVAUX:

19 Q. And you mentioned that you met with Drew --

20 A. Yes.

21 Q. -- at one point. When you met with Drew, did you ask him
22 how he felt about having to use a gender-neutral bathroom?

23 A. No, ma'am.

24 Q. So you didn't ask him whether the fact that no matter how
25 many gender-neutral bathrooms there are, that he feels

1 marginalized by not having access to the boys' restroom?

2 MR. SNIFFEN: Objection, Your Honor.

3 THE COURT: Sustained.

4 BY MS. RIVAUX:

5 Q. You just don't know how Drew feels?

6 A. I do not.

7 THE COURT: Same objection, same -- sustained. She
8 said she didn't ask him, and I don't know that -- how she would
9 know how he felt, so...

10 (Counsel confer.)

11 BY MS. RIVAUX:

12 Q. Ma'am, do you consider Drew a boy?

13 A. Do I personally? That's what you're asking me? Do I --
14 no, I do not.

15 Q. Do you understand what Drew's gender identity is?

16 A. I do.

17 Q. And what is Drew's gender identity?

18 A. He identifies as a boy.

19 Q. But in your -- you do not find him to be a boy?

20 MR. SNIFFEN: Objection. Asked and answered.

21 THE COURT: I think we're done.

22 MS. RIVAUX: All right. Thank you, Your Honor.

23 THE COURT: Thank you. I'll let you follow up, if
24 you care to.

25 MR. SNIFFEN: No questions, Your Honor.

1 THE COURT: All right. Can I ask you --

2 THE WITNESS: Yes, sir.

3 THE COURT: -- a question, ma'am. And it is beyond
4 the scope of direct, but I'm going to do it anyway.

5 So you said, I think, that you are aware of five
6 transgender students at Nease currently?

7 THE WITNESS: Uh-huh (affirmative).

8 THE COURT: How do you become aware of that? How
9 does that happen?

10 THE WITNESS: Two of them have approached me to
11 introduce themselves when I first started and told me. The
12 other two I was told by guidance counselors. So when they
13 enrolled, they had shared with the counselor.

14 THE COURT: And knowing that, have there been -- I'm
15 not asking for any specifics because I'm not trying to violate
16 anybody's privacy -- but have you, as a principal, had to deal
17 with issues involving those five students because they're
18 transgender?

19 THE WITNESS: No, sir. Huh-uh (negative).

20 THE COURT: Based on your observations and knowledge,
21 do you think the fact that -- obviously, Mr. Adams is a
22 different case because he's chosen to go public and so forth,
23 and so that's -- I understand that.

24 Do you think that the average student in Nease knows
25 who those other four students are and that they're transgender,

1 or do you not? Do you know?

2 THE WITNESS: I don't think that the population knows
3 who they are.

4 THE COURT: How would you -- let's take Mr. Adams out
5 of it. These other four, how -- do you understand those other
6 four individuals to be abiding by the policy of bathroom usage?

7 THE WITNESS: Yes, sir.

8 THE COURT: And do you feel like you would know if
9 they weren't?

10 THE WITNESS: Unless someone told, no, I wouldn't. I
11 see the two that I know going in and out of the gender-neutral
12 restrooms occasionally, so I know they're following the policy.

13 THE COURT: Have you had any reports of any of the
14 students violating the policy, other than Mr. Adams?

15 THE WITNESS: No, sir.

16 THE COURT: Does counsel want to follow up based on
17 my questions?

18 MR. SNIFFEN: No, Your Honor.

19 MS. RIVAUX: No, Your Honor. Thank you.

20 THE COURT: Thank you, ma'am.

21 So can I just ask you a question?

22 THE WITNESS: Yes.

23 THE COURT: Better or worse than going to the
24 dentist?

25 THE WITNESS: Worse. By far.

1 THE COURT: All right. Thank you so much.

2 (Witness excused.)

3 THE COURT: Okay. Mr. Harmon, where are we in your
4 case? Are you -- does that complete your evidentiary
5 presentation?

6 MR. HARMON: With respect to witnesses, yes, but I
7 think there's still two other -- before there's any close of
8 the evidence, two other matters to bring up.

9 THE COURT: Okay. And I think the plaintiffs have
10 some, too, but I'll go ahead and listen to yours and then make
11 sure -- I've got a couple that I know are here, but let's go
12 ahead and sort through that.

13 MR. HARMON: Okay. The first, Your Honor, is with
14 respect to Dr. Adkins, who had the trial testimony moved into
15 evidence already. I believe that the exhibits that were
16 provided to the court from the depositions are only the
17 plaintiff's exhibits. So we want to make sure that we submit
18 to the court the defendant's exhibits as well.

19 THE COURT: Sure. Well, I'll tell you what, let
20 me -- so what I have here are -- these were, I guess,
21 deposition exhibits, except -- oh, I see, they're marked -- is
22 it the -- so Plaintiff's Exhibit 30, 47 --

23 MS. RIVAUX: And 43, Your Honor.

24 THE COURT: -- and 43, those are actual trial exhibit
25 numbers?

1 MS. RIVAUX: They were -- yes, correct.

2 THE COURT: Okay. So you have exhibits that go with
3 this deposition, too?

4 MR. HARMON: And I think we would mark them as
5 Court's Exhibits 2D and 2B, from what I understand.

6 THE COURT: I don't know about that. Why would we do
7 that? What did we do the other day? Did we call them court
8 exhibits?

9 MS. RIVAUX: Yes, Your Honor.

10 THE COURT: I think what I'll do is go ahead and
11 break them out. In other words, the court exhibit really is
12 the deposition and the video.

13 I think if you've got exhibits and they've already
14 got numbers for the trial, we should just use those numbers.
15 So -- so I've got -- so, for example, unless there's an
16 objection, I'll admit 30 -- Plaintiff's 30, Plaintiff's 47,
17 Plaintiff's 43.

18 (Plaintiff's Exhibit 30, 47, and 43 received into
19 evidence.)

20 THE COURT: And then, Mr. Harmon, what -- what
21 defendant's exhibits -- had you marked those as defendant's
22 exhibits, the ones you want to --

23 MR. HARMON: Not at the time, no.

24 THE COURT: You did not?

25 MR. HARMON: Not at the time of the

1 cross-examination.

2 THE COURT: All right. Why don't you do this, just
3 go back to the back of your exhibit list and --

4 MR. HARMON: Sure. These would be Defendant's
5 Exhibits 254 and 255.

6 THE COURT: All right. Show them to Ms. Rivaux and
7 then see where we are.

8 MS. RIVAUX: I do object on relevance and foundation
9 grounds on these.

10 THE COURT: All right. Let me take a look at them.
11 (Counsel confers with courtroom deputy.)

12 MR. HARMON: I believe the second one is already in
13 as an exhibit.

14 THE COURT: Then we don't need it again, do we?

15 MR. HARMON: I mean, for purposes of her testimony, I
16 would like it to be --

17 THE COURT: I see.

18 MR. HARMON: Yeah.

19 THE COURT: Okay.

20 MR. HARMON: And then the first one was -- I think
21 that was brought out during testimony.

22 THE COURT: And your objection, Ms. Rivaux, is what?

23 MS. RIVAUX: On that -- the first one is a -- it's a
24 relevance objection. The informed consent form is also
25 incomplete because there is a follow-up consent form that is on

1 our exhibit list as well and that was not included.

2 And on the second document, I understand that it's in
3 evidence, but there was no foundation in that the -- the
4 witness had ever reviewed that document or what that document
5 actually was in questioning the witness.

6 THE COURT: Okay. That's -- fair enough. What I'll
7 do is this -- I mean, I don't really know, because I don't know
8 what the witness says about these things, and that will dictate
9 to me whether I'm going to admit them or not. So I'll go ahead
10 and take them in.

11 So I've taken in Plaintiff's 30, Plaintiff's 43, and
12 Plaintiff's 47. I'll admit them subject to reading the Adkins
13 deposition. I'll go ahead and take -- I'm not sure which one
14 is which, but I'll go ahead and take -- did you say 254 and
15 255?

16 MR. HARMON: Yes, Your Honor.

17 THE COURT: All right. You'll need to provide one to
18 the clerk that's got exhibit tags and so forth. I'll go ahead
19 and admit them conditionally over objection subject to me
20 actually reading the deposition and figuring out what -- you
21 know, what these exhibits are.

22 You know, in a non-jury setting, typically I will be
23 overinclusive in what I admit. And then when I get ready to
24 sit down and write the findings of fact, sometimes I just won't
25 use -- use something. I just won't consider it. And the way

1 you'll know that is I don't talk about it.

2 And so -- so just because I'm taking them in doesn't
3 necessarily mean I'll be utilizing them. But I wouldn't really
4 be in a good position to know until I read the Adkins
5 deposition, which I don't think I'm going to do right now. So
6 I will admit them conditionally.

7 (Defendant's Exhibits 254 and 255 received into evidence.)

8 MS. ALTMAN: And, Your Honor, just one -- one thing.
9 If you are to consider the exhibit with the informed consent, I
10 would only ask that Your Honor also consider another
11 informed --

12 (Counsel confer.)

13 THE COURT: Did she --

14 MS. RIVAUX: 128, which is -- Plaintiff's 128 as
15 well.

16 THE COURT: I will. Did Dr. Adkins talk about both
17 of them?

18 MR. HARMON: No.

19 MS. RIVAUX: No. She only talked about one of them.

20 MR. HARMON: That's -- I'm sorry, Your Honor.

21 MS. RIVAUX: That's right. It's a completeness --
22 she doesn't -- she didn't have it in front of her, but she does
23 reference the corrections that were made that is then reflected
24 in Plaintiff's 128.

25 MR. HARMON: Your Honor, may I please provide a

1 response to that?

2 THE COURT: Yeah.

3 MR. HARMON: That exhibit -- the informed consent
4 form was provided in -- during a deposition and was used at
5 trial.

6 THE COURT: Right.

7 MR. HARMON: There was a subsequent consent form
8 obtained by Dr. Adkins that was available to the plaintiff that
9 could have been used as an exhibit at the deposition.
10 Plaintiff did not use it as an exhibit at the deposition. And
11 I think it would be improper at this time to attach an exhibit
12 that wasn't used for trial testimony.

13 THE COURT: Well, is 128 in evidence?

14 MS. RIVAUX: No, Your Honor. I don't believe it is.

15 THE COURT: How -- well, how would I -- how would I
16 put it into evidence if nobody's -- I don't get it.

17 MS. RIVAUX: Well, I would just ask Your Honor to
18 take it for purposes of completeness.

19 MR. HARMON: It's also an incomplete document because
20 it's only one page of the document.

21 THE COURT: All right. I'll take a look at it, but
22 unless somebody has identified it or authenticated it, I'm not
23 sure exactly how it gets into evidence.

24 So I hear what you're saying, Ms. Rivaux. But, you
25 know, I assume there was a reason y'all didn't ask Dr. Adkins

1 about it. I mean, it was a trial deposition, right?

2 MS. ALTMAN: Yes, Your Honor. And both Ms. Kasper
3 and Mr. Adams testified to the informed consent that they said
4 that they both signed, so --

5 THE COURT: Say it again.

6 MS. RIVAUX: Both Ms. Kasper and Mr. Adams testified
7 about signing the informed consent for treatment.

8 THE COURT: All right. Thank you.

9 (Judge confers with courtroom deputy.)

10 THE COURT: Okay. All right. So that takes care of
11 that. What else?

12 MR. HARMON: Yes, Your Honor. I had two things.
13 That was the first. The tail end of that, though, just to make
14 sure, is the transcript and the video from Dr. Adkins' trial
15 deposition, I believe was provided by plaintiff. And I just
16 want to make sure that it includes the cross-examination --

17 THE COURT: Oh, gosh, I'm sure it does.

18 MS. RIVAUX: Absolutely.

19 MR. HARMON: Well, I just wanted to hand it to you if
20 we didn't put that in there. Just making sure.

21 MS. RIVAUX: No. We included the entire video.

22 MR. HARMON: I hadn't seen it. So I'm just making
23 sure.

24 The other part was Dr. Ehrensaft. I believe Your
25 Honor wanted a proffer of --

1 THE COURT: That's fine. You want to do that now?

2 MR. HARMON: Yeah. That would be great, Your Honor.

3 THE COURT: All right. Let's do it.

4 MS. ALTMAN: Your Honor, can we also hand up to you
5 the actual exhibit?

6 THE COURT: Sure.

7 All right. So let me see what I've got here now. Do
8 I only have the plaintiff's exhibits?

9 MR. GONZALEZ-PAGAN: No, Your Honor. You actually
10 have the entire video.

11 THE COURT: All right. So that's good. So what I
12 have is a declaration of Diane Ehrensaft, Ph.D., which is going
13 to be Court Exhibit 3. And that will, in effect, constitute
14 the plaintiff's version of Dr. Ehrensaft's testimony.

15 And then I've got the deposition taken on November
16 17th, which I take it was taken primarily by the defendants,
17 but it will be -- both of them will be put together and
18 constitute her testimony before the court.

19 I've also got a video in case I want to watch a
20 little of that.

21 And then there's a bunch of exhibits attached to it.
22 Have these been marked as trial exhibits, or is this the only
23 way in which they are marked at present?

24 MR. GONZALEZ-PAGAN: Your Honor, we marked them as
25 Court exhibits. Those are all defendant's exhibits used during

1 Dr. Ehrensaft's deposition.

2 THE COURT: Okay.

3 MR. GONZALEZ-PAGAN: I'm happy to renumber them to
4 defense exhibit numbers, if the court prefers.

5 THE COURT: Okay. I don't know.

6 MR. GONZALEZ-PAGAN: We marked them --

7 THE COURT: Yeah, that's fine. I know what you did
8 here, but I don't know.

9 (Judge confers with courtroom deputy.)

10 THE COURT: So Ms. Diaz tells me it's okay to keep
11 them as court exhibits, which will be just part of the
12 deposition. So they will be Court Exhibit 5B, 5C, and so on,
13 and we'll just keep it as an integrated whole. I will utilize
14 them as exhibits to Dr. Ehrensaft's deposition.

15 MR. GONZALEZ-PAGAN: Thank you, Your Honor.

16 THE COURT: All right. So we got that going.

17 MR. GONZALEZ-PAGAN: Your Honor, if I may, I would
18 just like to offer our brief proffer about Dr. Ehrensaft's
19 testimony.

20 THE COURT: Sure.

21 MR. GONZALEZ-PAGAN: And, Your Honor, we also want to
22 thank you for your flexibility for making this proffer in this
23 way. We understand that it's unusual. As a way of update, we
24 were communicating with Dr. Ehrensaft to --

25 THE COURT: Well, all due respect to experts, but any

1 case where I don't have to actually listen to experts is a good
2 case, so anyway. Don't tell him I said that. But I will, of
3 course, read them carefully, but I'm happy to hear your
4 five-minute proffer. Go.

5 MR. GONZALEZ-PAGAN: Thank you, Your Honor. As for
6 Dr. Ehrensaft, plaintiff's retained expert, I just want to go
7 briefly through her qualifications.

8 Dr. Ehrensaft is a developmental clinical
9 psychologist. She began practicing in 1976 and has more than
10 35 years as a gender specialist. She's an adjunct associate
11 professor at the department of pediatrics at the University of
12 California, San Francisco, and the director of mental health of
13 the Child and Adolescent Gender Center in the San Francisco
14 area.

15 Since its inception in 2009 --

16 THE COURT: What is a gender specialist? Is that a
17 discipline or a subspecialty? Or what does gender specialist
18 mean?

19 MR. GONZALEZ-PAGAN: Dr. Ehrensaft's specialty is
20 limited to issues regarding people's gender identity -- not
21 limited, but her specialty is with regards to transgender
22 children, gender nonconforming children and adults.

23 THE COURT: All right. Hold on one second.

24 And I think I saw her name in some of the other cases
25 that I read. Is this something she does with some frequency,

1 or what?

2 MR. GONZALEZ-PAGAN: This would be the first case,
3 Your Honor, that she has been an expert in federal cases
4 involving restroom access for transgender children.

5 The other two cases in which she was cited actually
6 by the court were the *Highland Local School District*, in the
7 Southern District of Ohio, and the *Evancho v Pine-Richland*
8 *School District*, in the Western District of Pennsylvania.

9 THE COURT: And I apologize, I know you probably said
10 this. But you said she's a gender specialist. But what's her
11 actual medical discipline or psychological -- what --

12 MR. GONZALEZ-PAGAN: She's a development and clinical
13 psychologist, Your Honor.

14 THE COURT: Psychologist. Okay.

15 All right. Go ahead.

16 MR. GONZALEZ-PAGAN: She -- along with being the
17 director of mental health at the Child and Adolescent Gender
18 Center in San Francisco, which is a multidisciplinary center
19 that includes the University of California San Francisco Child
20 Gender Clinic --

21 THE COURT: You're talking a little too fast.

22 MR. GONZALEZ-PAGAN: My apologies, Your Honor.

23 THE COURT: Okay.

24 MR. GONZALEZ-PAGAN: She's also a faculty member at
25 the Psychoanalytic Institute of Northern California, has a

1 private practice as a clinical psychologist, and was a tenured
2 professor at the Wright Institute in California, a graduate
3 school for psychology.

4 She has provided consultation, therapy, and
5 evaluations for over 500 transgender and gender nonconforming
6 children and adolescents and their families.

7 She has also consulted with approximately 200 mental
8 health and related providers regarding the treatment of
9 transgender youth. She has over 30 peer-reviewed articles,
10 including articles on transgender children, gender identity,
11 and the appropriate treatment and care for trans children in
12 scientific journals and has published a number of books on the
13 topic. Her most recent --

14 THE COURT: You're going to use up all your five
15 minutes on her qualifications.

16 MR. GONZALEZ-PAGAN: I will, Your Honor --

17 THE COURT: Which is one of my problems with experts.
18 They spend about 45 minutes telling everybody how great they
19 are.

20 MR. GONZALEZ-PAGAN: I would just note that she --
21 along with that, she actually is a co-investigator in a
22 five-year NIH-funded study regarding the effects and mental
23 health outcomes of puberty blockers on transgender youth.

24 With regards to her specific testimony in this case,
25 Your Honor, Dr. Ehrensaft specifically talks about the medical

1 and scientific understanding of gender identity and how it
2 relates to sex, as well as the access to restroom -- the
3 importance of access to restrooms consistent with one gender's
4 identity as a part of social transition.

5 She talks about how gender identity is a deeply felt
6 core component of human identity, that it cannot be changed or
7 altered, the testimony that is relevant to plaintiff's equal
8 protection arguments and Title IX claims.

9 She identifies how efforts to change that person's
10 gender identity are unethical and contrary to medical
11 consensus, how sex is multifactorial, and gender identity is a
12 primary determinative of a person's sex.

13 And Dr. Ehrensaft provides specific testimony about
14 how transgender people form a small and discrete minority whose
15 ability and talents to make contributions to society are no
16 different than any other persons regardless of the
17 discrimination they have suffered and do suffer today.

18 THE COURT: Does she address -- because your
19 opponents have addressed it a couple of times and it's kind of
20 an interesting idea, but I don't think I have any real evidence
21 on it one way or the other.

22 They reference so-called gender fluidity. They
23 reference -- what's the other terminology?

24 MR. GONZALEZ-PAGAN: Nonbinary, I believe, is the
25 other term.

1 THE COURT: Yeah. Does she address that in her
2 testimony or not?

3 MR. GONZALEZ-PAGAN: Well, she does address it, Your
4 Honor, in the way that -- I think this is a conflation of
5 issues. We're talking here about transgender children. And
6 she defines transgender children as people -- as individuals
7 who consistently, persistently and insistently continue to
8 assert one gender identity. So it is not a situation of a
9 gender-fluid child.

10 While we would quibble with the definitions that have
11 been provided to the court regarding gender fluidity and
12 nonbinary individuals, I don't believe that those are relevant
13 or pertinent to this case.

14 THE COURT: Yeah, I don't know. I guess I don't know
15 because I guess I don't have any evidence on it, and nobody's
16 given me any.

17 But, you know, if you're trying to formulate a
18 bathroom policy that's fair to everybody and treats everybody
19 well and you're a school district -- what if you have --
20 apparently there are persons, I take it -- although I don't --
21 again, I don't have any evidence on it. So maybe I shouldn't
22 be worrying about it -- who don't actually -- maybe the only
23 way to say this -- I don't know what the right way to say it
24 is, because I don't really know exactly what I'm saying, but
25 who don't have a unified gender identity or don't have a

1 consistent gender identity --

2 MR. GONZALEZ-PAGAN: Yes, Your Honor.

3 THE COURT: -- and if you -- if you had such persons,
4 it would be hard to know what a good bathroom policy would be.

5 MR. GONZALEZ-PAGAN: Your Honor, my only quibble with
6 that is -- and, unfortunately, I guess there's a bit of
7 classification of issues here. Gender-fluid individuals are
8 not necessarily transgender individuals. You can be
9 non-transgender and be gender fluid.

10 And I know that this may be a little bit outside the
11 scope of what we have talked about, but the reality is that a
12 gender-fluid individual is somebody who is -- is not somebody
13 who fluctuates day in and day out on their identity. It's
14 somebody who adopts different masculine and feminine traits as
15 to their identity.

16 I can specifically point to Plaintiff's Exhibit 66
17 and the definition of nonbinary and gender fluid included
18 within the Broward County public schools support guide, which
19 is a comprehensive document that has been admitted before the
20 court.

21 THE COURT: All right. And I didn't mean to get you
22 off of your -- you know, it's just something, because the
23 defendants have kind of obliquely raised it but not really done
24 anything with it. I don't know if they're going to try to do
25 anything with it or not, but I just wanted to -- I wondered if

1 Dr. Ehrensaft addressed that. But, I guess, maybe she really
2 wouldn't have.

3 MR. GONZALEZ-PAGAN: She didn't at the time of the PI
4 hearing, Your Honor. And would have hoped to be able to do
5 that on -- actual better circumstances.

6 THE COURT: All right.

7 MR. GONZALEZ-PAGAN: Your Honor, I would just
8 finalize that Dr. Ehrensaft's expert testimony talks about how
9 social transition, which includes access to restrooms
10 consistent with gender identity, is a critical component of the
11 treatment of transgender people, and that research and clinical
12 experience have shown that consistent respect and inclusive
13 acknowledgement of a transgender youth identity improves the
14 mental health outcomes for that child, reduces the risk that
15 the child would engage in self-harming and suicidal behaviors,
16 and that prohibiting them from using the restroom actually
17 exposes -- endangers their safety and well-being by exposing
18 them to anxiety, distress, depression, self-esteem and
19 self-harming behaviors.

20 And, finally, I would note that Dr. Ehrensaft
21 testifies about how the provision of gender-affirming
22 treatment, and -- including social position is the consensus of
23 the medical and scientific community.

24 This includes the American Medical Association, the
25 Endocrine Society, which Your Honor accepted the clinical

1 guidelines from Dr. Adkins' deposition, and the American
2 Psychiatric Association and the American Psychological
3 Association.

4 So, in conclusion, Your Honor, I believe that her
5 testimony, while being proffered for an affidavit for the PI,
6 does cover a lot of the areas that are helpful to the court,
7 and I believe that this summary of the -- of Dr. Ehrensaft's
8 testimony shows the relevance to this case.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 Dr. Barden.

12 DR. BARDEN: Thank you, Your Honor. I've got my
13 stopwatch.

14 THE COURT: All right.

15 DR. BARDEN: Dr. Ehrensaft, much like Dr. Adkins,
16 offered only ipse dixit testimony. She failed to provide
17 peer-reviewed documentation of reliable methodologies for her
18 impressions. She actually told us she had no opinions in this
19 case, which we'll get to.

20 She offered no error rates. She offered lots of
21 association guidelines. But like Dr. Adkins, she had no idea
22 what methodology was used in creating them, no idea who voted
23 for them.

24 Voting is not a scientific methodology.

25 She had no idea what percentage of the association

1 membership does not agree with them. Her testimony thus fails
2 minimal *Daubert* standards.

3 At page 24, line 24, Dr. Ehrensaft admitted that she
4 failed, pursuant to a subpoena, to produce her contract to
5 serve as an expert in this matter. She claimed that she relied
6 upon the plaintiff's attorneys to draft her contract and that
7 she had no copy of the alleged contract.

8 At page 27 to page 31, Dr. Ehrensaft admitted she did
9 not obtain informed consent to interview Drew Adams. She
10 claimed that she relied upon the plaintiff's attorneys to draft
11 her informed consent form and that she relied upon the
12 plaintiff's attorneys that hired her and that represent Drew
13 Adams to conduct the informed consent discussion and to obtain
14 informed consent for Dr. Ehrensaft's forensic psychology
15 interviews with Drew Adams, thus seemingly oblivious to
16 potential conflicts of interest, professional role conflicts,
17 and violations of her duty as a licensed psychologist.

18 Dr. Ehrensaft further admitted that she,
19 Dr. Ehrensaft, has never seen the claimed informed consent form
20 for her interviews with Drew.

21 Dr. Ehrensaft further admitted she did not speak to
22 Drew's parents to obtain informed consent for her forensic
23 interview of Drew.

24 She, again, claimed that she relied upon the lawyers
25 that hired her to obtain informed consent from Drew's mom and

1 dad.

2 Dr. Ehrensaft stated she did not review the claimed
3 informed consent forms because she said she had, quote, perfect
4 confidence, unquote, in the plaintiff's lawyers. But she then
5 admitted she did not know the names of the lawyers who drafted
6 her contract, who drafted the consent form. She did not know
7 the names of the lawyers who conducted the informed consent
8 discussion. She did not know the names of the lawyers who
9 supposedly conducted the discussion with the parents.

10 The alleged contract and the alleged consent forms
11 have never been produced.

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 At page 36, line 13 and 14, Dr. Ehrensaft admitted
19 she did not review any of Drew's educational records. At page
20 37, she said, I was not provided any educational records. At
21 page 43, we learned that as a psychologist licensed in the
22 state of California, Dr. Ehrensaft, from her office in
23 California, forensically interviewed Drew Adams via the
24 internet while Drew was sitting in the state of Florida,
25 apparently violating the State of Florida laws on health care

1 fraud.

2 On page 44, Dr. Ehrensaft failed to record her
3 forensic interviews with Drew thus preventing any analysis of
4 whether the interviews were properly conducted.

5 On page 56, Dr. Ehrensaft stated that she formed no
6 opinions.

7 Question: "So you have no opinion whatsoever as to
8 the plaintiff's mental status?"

9 The witness: "What I would say is the following: I
10 had clinical impressions, but that's not enough data for an
11 evaluation or even an opinion. So I would say that I would not
12 have enough information to form a consolidated opinion."

13 Page 57, the witness said: "Once again, I would say
14 that it would not be ethical for me to testify on the clinical
15 impressions in a situation where I was not asked to do that,
16 which is to do a clinical evaluation of a client, or in this
17 case the plaintiff. I would be able to report on clinical
18 observations."

19 I have no idea what that term means or how she was
20 using it.

21 Page 58, "Did you generate any opinions about the
22 plaintiff's level of anxiety in this case?"

23 Answer: "I would answer the same, that based on
24 three interviews, I was able to report on my observations from
25 the interviews of the plaintiff's presented levels of stress."

1 Again, no opinions.

2 The Florida statute she may have violated is
3 456.0635.

4 At page 88 she said -- "have you ever been licensed
5 in any state other than California?"

6 Answer: "I have only been licensed in the state of
7 California."

8 Dr. Ehrensaft, at page 64.

9 "Did you review the deposition of the plaintiff in
10 this case."

11 "I did not."

12 The plaintiffs didn't provide it. The lawyers.

13 At page 95, she is an adjunct professor who never had
14 tenure, has no tenure. She's a licensed psychologist. She
15 claims to be a gender specialist. I'm not aware of what that
16 means or any peer-reviewed publications that even says there is
17 such a thing.

18 At page 97, we learn that Dr. Ehrensaft has not been
19 trusted with research dollars from -- "with that in mind,
20 what's the total dollar amount that you've received from the
21 National Institute of Health?

22 "At this point, zero."

23 "What's the total dollar amount in research grant
24 money you received from the National Science Foundation?"

25 "Zero."

1 "What's the total amount of dollars from the State of
2 California?"

3 "Zero."

4 "What's the total research dollar amount from private
5 foundations?"

6 "Zero."

7 She's only testified in three cases, which may help
8 explain some of the mistakes in forensics.

9 Here's an essential part, page 130.

10 "Are you aware of any study in the world that has
11 that focus, that is, the use of public school bathrooms as part
12 of a treatment that has a published error rate?"

13 Answer: "I'm aware of some studies in process now,
14 but, therefore, I cannot give you outcomes or the error rates."

15 Question: "Are you aware" -- she claimed to have
16 seen hundreds of transgender patients.

17 "Are you aware of any research that indicates that
18 having seen 500 patients would not" -- because she's a
19 clinician and gets no accurate feedback -- "would not improve
20 the reliability and validity of your opinions on such matters?"

21 The witness: "I am aware of that research."

22 And, again, in context, we'll add that there are
23 counterpoints to that research.

24 The deposition is filled with Dr. Ehrensaft
25 disagreeing with peer-reviewed published studies, which I

1 repeatedly questioned her about, and her claiming that she
2 disagreed with the peer-reviewed research in her field claiming
3 she has other research but such research was never provided in
4 case after case after case after case.

5 She admits that the DSM has no published error rates
6 or methodology within the DSM.

7 At page 146, she admits that she did not review the
8 full medical or psychological records, only the ones the

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 At page 152, she offered no alternative hypothesis in
13 this case, kind of an eighth grade science level.

14 THE COURT: I'll ask you to start wrapping up,
15 please.

16 DR. BARDEN: Okay. Yes, sir, Your Honor.

17 At several points in her early reports, Dr. Ehrensaft
18 gave opinions, she claimed to be able to determine cause and
19 effect. She explained what's going to happen in the future.
20 But after finding out that she may have violated the statutes
21 in Florida and that she would be faced with peer-reviewed
22 evidence, she backed off all her opinions. You'll see that
23 throughout the deposition.

24 In fact, she said in her report that events plummeted
25 Drew into a state of depression.

1 And when I asked her what's the probability you were
2 wrong and that other things plummeted Drew into a state of
3 depression, she admitted, I cannot predict the probability of
4 that number.

5 So -- and time and time again -- this is important.
6 Because it's the first time, Your Honor, you're actually going
7 to read peer-reviewed, published science in the field that
8 talks about methodology and it talks about error rates.

9 So I think you'll find that of great help. Thank
10 you.

11 THE COURT: Thank you very much.

12 All right. Dr. Ehrensaft's testimony is submitted
13 via proffer and via the video and paper deposition, along with
14 the exhibits as previously discussed.

15 All right. What else do we need to talk about? I've
16 got a couple of things, but I want to make sure that I --

17 MS. ALTMAN: Your Honor, we have the request for
18 admissions and the request for judicial notice.

19 THE COURT: All right. Let's take up the request for
20 admissions.

21 You tendered me yesterday a piece of paper that had
22 the ones that you were interested in. Do you have -- is that
23 what you're going to give to me now?

24 MS. DOOLITTLE: Yes, Your Honor. They've already
25 been marked -- have been marked exhibit -- Plaintiff's Exhibit

1 138.

2 THE COURT: Okay.

3 MS. DOOLITTLE: And we've conferred with defendants
4 and with no objection, we can provide the actual admissions by
5 number in that document.

6 THE COURT: Okay. Do I have that or -- 138, Mari, do
7 we have it?

8 MS. DOOLITTLE: I have a copy for the court.

9 THE COURT: Do we have 138?

10 (Judge confers with courtroom deputy.)

11 THE COURT: All right. Is this highlighted like it
12 was last time?

13 MS. DOOLITTLE: I've highlighted the correct numbers
14 that we are seeking.

15 THE COURT: Okay. So I'm understanding that
16 Plaintiff's 138, responses -- questions and responses 1, 2, 3,
17 4, 5, 6, 7, 8, 19, 20, 21, 25, 26, 28, 30, 31, 32, 49, 50, 51,
18 52, 56, 57, 58, 59, 60, 62 through 69, 77 and 78 --

19 MS. DOOLITTLE: That's it, Your Honor.

20 THE COURT: -- are deemed to be admitted into
21 evidence at this time without objection.

22 MS. DOOLITTLE: Thank you, Your Honor.

23 THE COURT: There you go, Mari.

24 (Plaintiff's Exhibit 138 received into evidence.)

25 THE COURT: And the ones I read out are actually

1 highlighted on the exhibit so we'll be able to -- that will be
2 able to be carried with the file.

3 All right. So that's the admissions. And the
4 judicial notice. I went back and looked at it with Ms.
5 Weisman's help, and if I can find my -- so at the pretrial
6 conference, I took judicial notice of certain EEOC decisions,
7 and that was granted at the final pretrial conference without
8 objection. And I assume I can consider those as part of my
9 decision-making.

10 On doc 113, I denied the judicial notice because
11 there were citations to authority, cases and so forth. And I
12 basically said that you could cite the cases in your briefing
13 and I would read them like I would any other precedent, but I
14 didn't need to take judicial notice of them.

15 So I think that leaves us with doc 106, which is a
16 defendant's motion, doc 114 and 115, which are the plaintiff's
17 motions.

18 On doc 106, the only issues in play -- there was no
19 objection to me considering A, B, C, and D of doc 106,
20 various -- various materials. There was objection to me
21 considering E, F, and G, which, as I recall it, were proposed
22 bills that had been put in -- put into the hopper in Congress
23 but had not been passed.

24 So, Mr. Harmon, are you still seeking admission of
25 those?

1 MR. HARMON: I guess it would only be for legal
2 argument purposes, but I did not, for any substantive evidence
3 purpose, have any witness review those, so...

4 THE COURT: I'm just wondering -- you're wanting to
5 use that to show that -- that the current definition of Title
6 IX doesn't include gender identity because why would they be
7 putting laws in to change it if it had already -- if it already
8 included it? Is that pretty much it?

9 MR. HARMON: Yeah, but I believe Your Honor addressed
10 that and said at the pretrial that that wasn't really of much
11 help because people introduce laws all the time. So, yeah,
12 we're not really pushing that.

13 THE COURT: I'm not going to admit E, F, and G, but I
14 will take notice of A, B, C, and D.

15 All right. With respect to doc 114, that's the
16 plaintiff's motion regarding certain government reports. You
17 told me, Ms. Altman, at the -- at the final pretrial that
18 Dr. Ehrensaft would talk about these.

19 Did she?

20 MS. ALTMAN: Well, she certainly talks about it, in
21 substance, in her declaration. So I would say, yes, to your
22 question. But we think they're admissible -- or, I'm sorry,
23 that the court can take judicial notice of them for other
24 reasons.

25 THE COURT: All right. Go ahead.

1 MR. HARMON: I'm sorry. I thought you were asking
2 me.

3 THE COURT: Do you have any objection, Mr. Harmon?
4 If you don't have any objection --

5 MR. HARMON: Yes, Your Honor. None of these exhibits
6 were referred to in any of the bibliography from Dr. Ehrensaft,
7 they were not addressed at the deposition of Dr. Ehrensaft,
8 there's been no foundation at all.

9 THE COURT: So you are objecting?

10 MR. HARMON: Absolutely.

11 THE COURT: Let me see what we're talking about here.

12 MS. ALTMAN: Thank you, Your Honor. And I'm going to
13 present to you Mr. William Miller from Pillsbury who is going
14 to do his argument today.

15 THE COURT: All right. Well, good, you came all the
16 way here. You might as well get to --

17 MR. MILLER: Yes, Your Honor, cutting my chops, as
18 they say.

19 THE COURT: -- join the party.

20 MR. MILLER: I believe you have a copy with you, Your
21 Honor.

22 THE COURT: I do. I'm looking at it right now.

23 MR. MILLER: I also have copies of the items, if
24 you'd like them.

25 THE COURT: I've got them, too.

1 MR. MILLER: Okay. Great. Just very briefly, we
2 request judicial notice regarding the specific -- these are a
3 series of government reports, an item of state legislation, and
4 a directive from the executive branch, the purpose of which
5 is -- is, as you know, plaintiff asserts in this case the
6 school board has discriminated against him based on his
7 transgender status.

8 And in evaluating the plaintiff's equal protection
9 claim, one of the factors the court will consider is whether
10 there's a history of discrimination against individuals who
11 identify as transgender.

12 So the existence of these reports, we are just
13 requesting the court to notice their existence to speak to
14 that -- that criteria. And if you'd like me to briefly
15 outline --

16 THE COURT: So are you -- so I'm looking here,
17 presidential memorandum, right?

18 MR. MILLER: Yes, Your Honor.

19 THE COURT: And then a copy of House Bill 2 from up
20 in North Carolina.

21 MR. MILLER: Yes, Your Honor.

22 THE COURT: And then Civil Rights Statement, April
23 18th, 2016. Civil Rights Commission, I guess, right?

24 MR. MILLER: Yes, Your Honor.

25 THE COURT: And another statement by the Civil Rights

1 Commission.

2 MR. MILLER: Yeah, there are a series of three press
3 release statements by the Civil Rights Commission, and then one
4 official report issued by the U.S. Commission on Civil Rights
5 as well.

6 THE COURT: Okay. And -- and then -- what's this,
7 Exhibit 6?

8 MR. MILLER: That's the report, Your Honor, regarding
9 LGBT discrimination in the workplace.

10 THE COURT: If I take judicial notice of them, and as
11 I said, I don't really have much doubt about their authenticity
12 or they say what they say they are.

13 What use should I be making of them? I mean, no
14 witness has talked about them. What am I supposed to do with
15 them?

16 MR. MILLER: Certainly, Your Honor. But as
17 self-authenticating government documents, just to speak to that
18 specific criterion, I believe we've had other testimony from
19 the Broward County officials about the sort of discrimination
20 issues that transgender individuals face.

21 These would simply go to show the national scene as
22 far as discrimination against transgender individuals. Your
23 Honor, of course, can apply whatever weight you see fit to.

24 THE COURT: For example, can I cite and rely upon
25 them in an order or not?

1 MR. MILLER: Your Honor, these are official
2 government documents that are appropriate for judicial notice.
3 And there's a series of opinions from the Eleventh Circuit and
4 from this district noticing these types of documents.

5 THE COURT: Okay.

6 MR. MILLER: So I certainly believe you could rely on
7 them.

8 THE COURT: All right. Thank you, sir, I appreciate
9 it.

10 MR. MILLER: Thank you, Your Honor.

11 THE COURT: Do you have the next one, too?

12 MR. MILLER: No, Your Honor.

13 THE COURT: Somebody else has that?

14 MR. MILLER: No, I just got this little one.

15 THE COURT: That was your moment in the sun.

16 MR. MILLER: My moment in the sun and it was a
17 wonderful moment.

18 THE COURT: I guess you have to go back in the
19 shadows now.

20 MR. MILLER: I'll slink away very quietly now.

21 THE COURT: Well, I think you did a fine job.

22 MR. MILLER: Thank you.

23 THE COURT: And you ought to ask for a raise. All
24 right. Mr. Harmon.

25 MR. HARMON: Yes, Your Honor, just a couple of

1 things. It was a request to take judicial notice and there --
2 in terms of authenticity, if it's being offered as a
3 self-authenticating government document, I believe it requires
4 some type of certification, which hasn't been provided.

5 Aside from any of those procedural issues, what Your
6 Honor was advised was that these were being offered in through
7 Dr. Ehrensaft who did not review -- there's no evidence that
8 she's even seen these documents before, and through Broward
9 County. And their testimony, there's no evidence that they
10 saw --

11 THE COURT: How are these different in substance
12 from -- I'm looking at your 106. And your 106 is the Civil
13 Rights, DOJ guidance under the Obama administration, and then
14 the DOJ guidance under the Trump administration. And then a
15 couple of letters from the attorney general, Revised Treatment
16 of Transgender, October 4th of 2017.

17 How is this -- how is what Mr. Miller is talking
18 about -- it's Miller, right?

19 MR. MILLER: Yes, sir.

20 THE COURT: Mr. Miller is talking about, how are
21 these documents any different than those documents which you
22 are asking me to consider?

23 MR. HARMON: Because we had testimony on those
24 documents.

25 THE COURT: You had testimony that they had them,

1 but, I mean, there's not -- yeah.

2 MR. HARMON: But I can't cross-examine a witness on
3 these documents. They had -- plaintiff's counsel had an
4 opportunity to cross-examine Mr. Upchurch.

5 THE COURT: Who would they cross-examine about a --
6 official policy statement of the Department of Justice? I
7 mean, there wasn't -- the attorney general wasn't here.

8 I mean, they cross-examined -- if you're saying --
9 all the witness was able to say is, we got this guidance, we
10 didn't agree with it, and now we got this new guidance and we
11 agree with this guidance.

12 I mean, that doesn't really tell me anything about
13 the underlying substance, but -- all right, go ahead and
14 finish.

15 MR. HARMON: I was just going to say first -- number
16 two is the same as the draft legislation that we attempted to
17 introduce. But with the rest of it, these are -- these are not
18 official positions of governmental entities as to how a
19 regulation is interpreted. These are various commissions who
20 are condemning things or making position statements that I
21 can't cross-examine.

22 THE COURT: Okay. So I see what you're saying.
23 You're saying -- to call them official government documents is
24 true, but it's not -- it doesn't constitute the position of the
25 United States, I guess, because it -- it constitutes the

1 position of the commission that is rendering the report.

2 MR. HARMON: It's not related to Title IX. It's not
3 related -- which is what our documents -- were shown. The only
4 other one was the Attorney Sessions memorandum, but that was,
5 again, going to the issues in this case.

6 These are various commissions saying we don't like
7 certain things that are happening around the country. And I
8 don't think that that can be taken as substantive evidence in
9 the case.

10 THE COURT: Okay. And, Mr. Miller, I'll give you a
11 brief last word, sir.

12 MR. MILLER: Yes, Your Honor, if I may. First, under
13 Title IX --

14 THE COURT: I'll tell you what, will you come on up
15 so we can hear you better?

16 MR. MILLER: Yes. Happily.

17 THE COURT: You definitely ought to get a raise now.

18 MR. MILLER: Well, first I would say, Your Honor,
19 under Federal Rule of Evidence 902, I believe it's paragraph 6,
20 Official Publications, there's no necessary certification for
21 those. If they're official publications by a government
22 entity, then they can come in as self-authenticating.

23 Next I would just point out that I believe the point
24 of judicial notice, Your Honor, is that -- that it can be
25 noticed as a fact that can't be reasonably disputed. The fact

1 that these government agencies and --

2 THE COURT: And I understand that. Nobody's
3 disputing that the Civil Rights Commission issued these or that
4 they are official documents of the Civil Rights Commission.

5 To the extent that they take legal positions about
6 issues which are in play here or to the extent they have
7 opinions about that, it seems a little less clear to me that I
8 ought -- that I'm able to just notice that and --

9 MR. MILLER: Certainly, Your Honor.

10 THE COURT: -- use it.

11 MR. MILLER: I don't believe that's our request. Our
12 request is simply to note their existence, speaking only on the
13 equal protection claim to that specific criteria of the history
14 of discrimination against transgender individuals as a class.
15 This simply is a national context showing that point. And,
16 again, I believe we've had other testimony come in that speaks
17 to that point. This is merely just requesting the court notice
18 this in the context of that specific factor on the equal
19 protection claim.

20 THE COURT: All right. I'll take that under
21 advisement. And I'll -- I will -- I will think about that, and
22 I appreciate the arguments.

23 MR. MILLER: Thank you, Your Honor.

24 THE COURT: All right. So doc 115 is the plaintiff's
25 motion re: clinical guidelines, standards of care and so forth.

1 Who's -- Ms. Altman?

2 MS. ALTMAN: Yes, Your Honor. And we do have copies
3 of them here.

4 THE COURT: I've got them.

5 MS. ALTMAN: Your Honor, so I think this is really
6 quite intuitive. We're asking for judicial notice of things
7 that I don't think even the defendants dispute. These are
8 medical and mental health organizations that have promulgated
9 guidelines and standard of care with respect to the treatment
10 of transgender and nonconforming individuals.

11 These go directly to the issues in this case. And in
12 particular, whether or not it's within the appropriate standard
13 of care or promulgated guidelines with respect to restroom use
14 and restroom use associated with transgender individuals.

15 And so we believe these are things that Courts
16 routinely accept into evidence for purposes of judicial notice.
17 There's no question with regard to their authenticity or their
18 reliability. There's no question that these are, in fact,
19 things that are promulgated by either the AMA, the APA. We
20 don't think there's any dispute with respect to their
21 reliability. And so we think that the court should take these
22 into judicial notice.

23 And I think, in fact, there are numerous witnesses in
24 this case that have been questioned about it without any
25 dispute as to their authenticity or reliability.

1 THE COURT: Thank you. All right.

2 MS. ALTMAN: You're welcome, Your Honor.

3 THE COURT: Mr. Harmon, are you arguing?

4 MR. HARMON: Yes, Your Honor. I was scribbling down
5 a few things. I apologize.

6 Your Honor, one thing I would say is I'm trying to be
7 mindful of the integrity of this record and all of the evidence
8 that's coming in. And I just want to point out that plaintiff
9 had two experts in this case that, over our relevance
10 objection, have been offered to talk to Your Honor about
11 standards of care.

12 One was from North Carolina. One was from
13 California. If there are certain standards of care or
14 guidelines or issues that should have been considered by the
15 court, those are the avenue to do that, through two expert
16 witnesses.

17 This is simply trying to introduce hearsay in the
18 form of opinions of committees. They've been represented to
19 Your Honor as being accepted, peer-reviewed guidelines.

20 These are committee position statements that I can't
21 cross-examine. I can't hand an expert witness the pediatric --
22 you know, the World Medical Association's statement on
23 transgender people. I can't hand that to Dr. Ehrensaft or
24 Dr. Adkins and cross-examine them on that.

25 This is just an opportunity to pepper the record with

1 hearsay, with documents that should have been introduced
2 through witnesses in the case. And they're being represented
3 as being statements of care when they're nothing more than
4 committee positions on certain topics.

5 To the extent they're being offered to this Court to
6 show that there's a certain standard of care, then I would say
7 that that's an undisclosed expert opinion that plaintiff should
8 have had to have introduced through an actual witness and not
9 through paper that I can't confront.

10 THE COURT: So while you're here, you kind of have
11 the same position, I think, with respect to the amicus briefs I
12 received, right?

13 MR. HARMON: Absolutely, Your Honor.

14 THE COURT: I noticed, though, in reading the cases,
15 a number of the courts are accepting those same briefs that are
16 being filed -- I assume they're probably even the same brief,
17 you're just thinking those Courts shouldn't be doing that?

18 MR. HARMON: Well, what I would say, without honestly
19 having the -- all of the records, I believe those were all in
20 the context of appeals, meaning at the circuit court level.

21 If -- I'm not sure if they were introduced at the
22 trial court level and introduced into a record where one of the
23 parties had no chance to confront a witness with those.

24 Obviously, a briefing at the appellate level is
25 different because you have a confined trial court record that

1 the appellate court can rely on.

2 Here what we're trying to do is, you're going to get
3 findings of fact after this case citing to all of these
4 documents to show that we did something wrong. I can't
5 confront these documents, and that's my concern with that. And
6 with the amicus briefs coming in, is it the chance to pile on
7 to a trial court record information that should not be coming
8 in?

9 THE COURT: Okay.

10 MR. HARMON: Thank you.

11 THE COURT: Thank you. I'm going to think about
12 that.

13 So to the extent -- I really am going to think about
14 it, but I don't think I'm going to try to make a ruling -- did
15 you want to say something else, Ms. Altman?

16 MS. ALTMAN: Yes.

17 THE COURT: Okay. Go ahead.

18 MS. ALTMAN: If I may? I just want to correct the
19 record. Certain of the briefs have, indeed, been admitted
20 in -- at the district court level as opposed to the --

21 THE COURT: I'm aware of that, but I know Mr. Harmon
22 was just -- he thought he was right, but I know they have been
23 admitted at district court level as well. And that's why I was
24 asking him what I should do with it, but -- but I'll take a
25 look at it.

1 MS. ALTMAN: Fair enough. And I also just wanted to
2 note two other points for the record. One, that many of these
3 documents are, indeed, referenced in Dr. Ehrensaft's
4 bibliography, which is now into the record as well, and so we
5 believe there's support for that.

6 The defendants certainly were aware of all of these
7 standards of care guidelines. They have been bandied about
8 between the parties throughout the litigation, had the
9 opportunity to cross-examine Dr. Adkins on them as well as
10 Dr. Ehrensaft and you now have their cross-examination --

11 THE COURT: In the affidavit of Dr. Ehrensaft or
12 Dr. Adkins, are these types of guidelines and guidance
13 referenced specifically or not?

14 MS. ALTMAN: So in Dr. Adkins' preservation
15 deposition, I believe it's my understanding that certain
16 guidelines, including like the endocrine guidelines, by
17 example, which I think are already in evidence here in any
18 event, were utilized with her.

19 They also cross-examined -- or deposed, I should say,
20 Dr. Ehrensaft. And you have her deposition. And they chose to
21 cross-examine her on whatever they deemed appropriate at the
22 time.

23 But these -- the standards of care, whether it
24 be WPATH or otherwise, were referenced in her bibliography and
25 they had the opportunity to cross-examine her on whatever they

1 wanted in her deposition and they deposed her on whatever they
2 wanted to.

3 So to suggest that there's some prejudice because
4 they would have raised these issues with her here in court,
5 they had the opportunity to do so in her deposition. And, in
6 fact, did so where they deemed appropriate.

7 And then finally I would just bootstrap on what the
8 court already noted, which is that these are, indeed, part of
9 the amicus brief and the court would have the opportunity and
10 the benefit to have the full context from the actual
11 authoritative bodies that have promulgated these policies in
12 the first instance.

13 Thank you, Your Honor.

14 THE COURT: All right. I'm going to think about
15 that. To the extent that -- did you want to say something
16 else?

17 MR. HARMON: If I could.

18 THE COURT: I mean, we could play tennis all day.

19 MR. HARMON: I don't want to play tennis, but it's
20 just something I think is important.

21 THE COURT: All right. Go ahead.

22 MR. HARMON: Dr. Ehrensaft didn't come in here and
23 testify. We took a discovery deposition. So to say that we
24 had an opportunity to cross-examine her and use all these
25 documents, it's not defendant's fault that Dr. Ehrensaft is not

1 here. And I just think it's unfair to try to admit into the
2 record a bunch of documents to put to Ehrensaft when, for no
3 fault of our own, Dr. Ehrensaft is not here to confront on this
4 stuff.

5 So it's, again, showing evidence this is going to
6 tried to be used as substantive evidence through a witness I --
7 we have not had an opportunity to confront in a trial setting.

8 THE COURT: Okay. I got it. I got it.

9 All right. Is the evidence now closed, Ms. Altman,
10 from the plaintiff's point of view?

11 MS. DOOLITTLE: Your Honor, there was one other
12 request for judicial notice that you had asked us to prepare
13 for you, and that dealt with the authority in Florida for
14 changing one's --

15 THE COURT: I did ask you for that. Yeah. Do you
16 have it?

17 MS. DOOLITTLE: It is in draft, and we can have it
18 filed very shortly. I can represent that the authority for the
19 changes to the birth certificate is set forth in the Florida
20 Administrative Code. We are having some difficulty drilling
21 down on the changes to the driver's license.

22 THE COURT: Okay. Well, yeah, I would like to see
23 that. And then I'll, of course, give the defendant a chance to
24 respond to it. So I tell you what -- I was trying to think if
25 I could just fold that into your briefing schedule, but --

1 MS. DOOLITTLE: Your Honor, we're happy to have it
2 filed by Monday.

3 THE COURT: Okay.

4 MS. DOOLITTLE: We're pretty close to it.

5 THE COURT: Okay. Well, I know y'all have all been
6 working hard. I was trying to -- all right. Well, if you file
7 it on Monday, I guess -- a week from then will be Christmas
8 Day, and I don't think I'm going to make -- so I'll -- I'll let
9 the defendants respond by January 4th to the request for
10 judicial notice.

11 Just on -- just on the -- I asked you about the birth
12 certificate and the driver's license because, as I understood
13 it, those were the official enrollment documents that are used
14 when somebody matriculates, right?

15 MS. DOOLITTLE: Yes, Your Honor.

16 THE COURT: Okay. All right. Anything else from the
17 plaintiff's point of view in terms of the evidence?

18 MS. ALTMAN: No, Your Honor.

19 THE COURT: Okay. Mr. Harmon?

20 MR. HARMON: I was just going to say, I'm not sure if
21 driver's license is required at enrollment, but I don't know
22 the answer to that.

23 THE COURT: Well --

24 MR. HARMON: I just don't know the answer.

25 THE COURT: Okay. Yeah, that might be right, because

1 probably a lot of high school students don't have their
2 driver's license --

3 MR. HARMON: Yeah. They're not --

4 THE COURT: I'd still be interested to know,
5 because -- to be honest with you, it's interesting to me what's
6 the official State of Florida position on how to handle gender
7 identity and gender reclassification.

8 I just -- I think that's a -- a relevant inquiry in
9 trying to figure this whole thing out. And so -- so I'm going
10 to go ahead and ask for that. And I'll, of course, give you
11 opportunity to tell me why I shouldn't worry about that or tell
12 me whatever you want to tell me.

13 MR. HARMON: Sure.

14 THE COURT: All right?

15 MR. HARMON: Yes, Your Honor.

16 THE COURT: So other than that, Mr. Harmon, is the
17 evidence closed?

18 MR. HARMON: Yes, at this time, Your Honor, defense
19 has no more evidence. And I was just going to ask from a
20 procedural perspective in terms of renewing our --

21 THE COURT: Whether you needed to renew your motion?
22 I never know whether you do or not, but I --

23 MR. HARMON: I need to do that.

24 THE COURT: Since I'm not the -- since I'm not the
25 appellate court, it's probably -- probably in your best

1 interest to renew it.

2 MR. HARMON: Okay.

3 THE COURT: And I'm going to make the same ruling
4 which I made the other day, but go ahead and renew it.

5 MR. HARMON: Yes, Your Honor. We'd just like to
6 renew the motion for judgment on the record and/or motion for
7 involuntarily dismissal, not only based on the arguments that
8 were made at the close of plaintiff's case, but we would
9 forward to the court that in light of the evidence that came
10 out during defendant's case in chief, that plaintiff has still
11 failed in this case to prove a violation of Title IX and that
12 he was discriminated against on the basis of sex or a violation
13 of the equal protection clause.

14 THE COURT: Thank you. Pursuant to Rule 52 of the
15 federal rules of civil procedure, specifically 52(c), the court
16 declines to render judgment at this time. And the court will
17 enter judgment by making findings of fact and conclusions of
18 law as required by Rule 52(a).

19 All right. So the evidence is closed. And now the
20 question is how -- where do we go from here? And I'm going to
21 make a proposal to you, and then I'll hear from the parties how
22 we're going to proceed here.

23 Excuse me one second.

24 (Judge confers with court reporter.)

25 THE COURT: So I asked Ms. Bishop when she would be

1 able to produce the transcript, because I am going to
2 require -- and I know this is -- I know people have spent a lot
3 of time, effort and money on this, and I apologize for that.

4 But, you know, y'all have given me a pretty hard
5 problem here and I need to -- I need to -- to have it lined up
6 and everybody do what we need to do in order for me to try to
7 come up with a -- what hopefully is a thoughtful and
8 comprehensive decision, so I'm going to need all the help I can
9 get.

10 Part of that help is, I'm going to need for y'all to
11 have the transcript so that when you're writing your findings
12 of fact, you can actually annotate it to the transcript.

13 And I asked Ms. Bishop when she would have the
14 transcript available to the parties, and she told me she'll
15 have it by Monday. I don't know how she's going to do that,
16 but that's what she says. I was prepared to give her more time
17 but that's what she said.

18 So then it becomes a question of, when do you want to
19 file the findings? I am cognizant of the efforts that
20 everybody has been making and I know everybody's been working
21 very hard and I am not -- and I'm also cognizant we've got
22 holidays coming up. So I am not interested in having some kind
23 of sprint here. And so I'm -- I'm inclined to give you into
24 January to complete your findings. And I -- here's -- here's
25 where I am.

1 I -- pursuant to Ms. Altman's request and -- and my
2 overall view of the matter, I do think that -- and recognizing
3 that -- that I need to get as much guidance and help from
4 you-all as I can and even though it will involve more time and
5 more money, I just feel like it's the right thing to do.

6 Once I get your findings of fact, I'm going to
7 conduct an oral argument or a closing argument, whatever you
8 want to call it, but I'll be -- I'll be utilizing your proposed
9 findings of fact as my -- as my jumping-off point for the
10 argument. And I had set aside February 16th at 9:30, February
11 16th at 9:30, which is a Friday. And I am -- as long as I have
12 some time to review the findings of fact before the oral
13 argument, I -- you know, I can go into that.

14 I am certainly not promising an opinion from that --
15 from the bench that day, nor anytime -- I'm going to have to
16 write an opinion. And I understand that -- I expedited this
17 case because I was hoping to get an answer from Mr. Adams as
18 soon as I could, and for the school board in terms of the
19 policy going forward, but I don't want to rush it. And I -- I
20 know Mr. Adams is -- does have his senior year coming up.

21 So I'm hoping to get help from you-all, and then I'm
22 going to have to go off and write an opinion. And I can't
23 quite predict how long that's going to take. But it won't --
24 it probably won't be quick.

25 So I was going to have an argument on February 16th

1 at 9:30 unless somebody had a huge problem with that date. And
2 so, then, it's just a question of when do I make you file your
3 findings by?

4 And if Ms. -- Ms. Bishop is going to have the
5 transcript by the 18th of December -- I do know that,
6 obviously, people may be off for holidays and so forth. I'm
7 thinking -- excuse me one second. We're looking at some
8 calendar issues here. So hold on.

9 (Judge confers with court reporter.)

10 THE COURT: So I'm thinking if Ms. Bishop is going to
11 have the transcripts to you by the 18th, even taking the
12 holidays and so forth, how about January 24th for filing of --
13 simultaneous filings of findings of fact and conclusions of
14 law, and then we'll go to oral argument on February 16th at
15 9:30 a.m.?

16 Anybody want to be heard on those dates?

17 MS. ALTMAN: No, Your Honor. Other than -- we're
18 fine with the dates, other than to inform you in case it
19 matters to the court, it's my understanding that that's
20 President's Day weekend, for what that's worth. But we're fine
21 with the date. It's a Friday -- as I understand it, that's the
22 Friday before President's Day Weekend. So to the extent the
23 court has any desire to --

24 THE COURT: My President's Day eve plans might be
25 foiled.

1 MS. ALTMAN: I hear it's always an exciting time of
2 year.

3 THE COURT: I guess. Okay. Mr. Harmon, do you have
4 any big President's Day eve plans that will keep you from being
5 here?

6 MR. HARMON: Valentine's Day is the 14th. No, those
7 dates sound great for defendant.

8 THE COURT: So January 24th is when findings of fact
9 will be due, and I'll talk to you more about that in a second.
10 February 16th, 9:30 a.m. in this courtroom will be closing
11 argument, oral argument.

12 MS. ALTMAN: Could the court give us some guidance in
13 terms of, do you have a -- what you have in mind in terms of
14 how long each side will have? I understand that you're going
15 to ask questions as well, I'm sure. But do you have any sense
16 for how long you'll provide to each side to argue?

17 THE COURT: No, I never do. I'll let you talk. When
18 I'm ready to ask questions, I'll ask questions and it goes as
19 long as it goes.

20 MS. ALTMAN: Fair enough. And, Your Honor, with
21 respect to --

22 THE COURT: And it's very likely that it will not be
23 a unified -- in other words, I don't really consider it a true
24 closing argument. I consider it more of an oral argument. And
25 what generally happens is you start talking and then I start

1 asking questions. And then you don't really ever get back, we
2 just kind of go around and -- I try to give you a chance at the
3 end if I -- but, I mean, it really is designed for me to test
4 out and think about it through the questions and so forth.

5 So, for example, sometimes people try to bring
6 PowerPoints in. You can do that if you want, but I've never
7 gotten through one. That doesn't mean if you've got some key
8 exhibits or you've got something you really want me to see,
9 that's fine, but it's not that kind of an argument.

10 MS. ALTMAN: Fair enough. I do have just one -- I
11 guess it's not even a question. It's more of -- in the line of
12 a favor. You have page limitations in the rules. And although
13 it's only been three days of testimony and evidence, it's 21 --

14 THE COURT: We're going to --

15 MS. ALTMAN: -- 21 in dog years.

16 THE COURT: Why don't you let me tell you what I'm
17 thinking about before you ask me. Okay?

18 So what I'm looking for -- and I thought y'all both
19 did good jobs on your proposed findings before, and so you can
20 use those as your starting point. You don't have to start all
21 over again, but I want you to conform the findings of fact and
22 conclusions of law and I want it all to be in a unified
23 document. In other words, don't just reference what you did
24 before. It has to be a unified document.

25 And I want you to annotate it with specific citations

1 to the record and exhibits. I want you to capture the evidence
2 that actually came in, in trial as opposed to what you thought
3 it was going to be.

4 I want you to address and distinguish, if you can,
5 testimony that came in from your opponents that you feel like
6 you need to address, all of that. But all of it should be very
7 heavily tied to the transcript and to exhibits. I want to be
8 able to go look -- if you tell me something, I want to be able
9 to go look and see what you're talking about. And -- so that's
10 real important.

11 Case citations also are very important. There's a
12 lot of developing law in this area. And we are actually -- Ms.
13 Weisman is going to help me prepare an actual list of cases
14 that we're going to send to you -- we don't have it right now,
15 we'll send it to you next week -- that I want -- I want
16 specifically to be addressed in the -- in the findings of fact
17 and conclusions of law, either why it supports you, why it
18 doesn't, why it's distinguishable, but I need to be -- I need
19 to be addressing, in the proposed findings, the emerging case
20 law that has come not only from the circuit courts but district
21 courts.

22 And, you know, we have -- I saw there was just a
23 decision regarding the military the other day that may or may
24 not have any impact in this case. I have no idea. I haven't
25 had a chance to read it, but -- but I want -- you know, this is

1 a dynamic area of the law and I want to try to at least capture
2 what's happened before and -- in terms of -- of what I'm
3 looking at.

4 So I -- I'm -- we're going to give you a list of
5 cases that we definitely want to be addressed in some way.
6 They don't -- you know, not all of them have to be addressed
7 with two pages, but they all need to be accounted for in some
8 way.

9 Obviously, if you have additional cases or even if
10 new cases come out between now and then, feel free. I'm not --
11 the list I'm going to send you is not a limitation on which
12 cases you can cite, it's just a requirement that you -- that
13 you address those cases.

14 And I know, for example, some of the district court
15 opinions came out and then they -- the Department of Justice
16 changed their guidance. And does that change the result? Does
17 it change the reasoning? These are all things that I'm
18 interested in having you address as part of your work.

19 Now, I was thinking 50 pages.

20 MS. ALTMAN: (Sneezes) Sorry.

21 THE COURT: I'm sorry?

22 MS. ALTMAN: I sneezed. I apologize.

23 THE COURT: Okay. All right. I thought you were
24 reacting to the 50 pages.

25 MS. ALTMAN: No.

1 THE COURT: Let me try that again. I'm thinking 50
2 pages. I'm willing to listen, but I'm -- that's -- that's what
3 I'm thinking. And I -- and, by the way, you know, I -- it
4 needs to be -- what's our type?

5 LAW CLERK: 13.

6 THE COURT: It needs to be at least 13. And the
7 footnotes need to be 13, not the little scrawny little things
8 that you're trying to eat up the pages -- I mean, to get pages
9 in. So that's what I'm thinking. I'm willing to entertain any
10 other thoughts.

11 I think that should be a reasonable amount of pages
12 that gives you enough pages but doesn't bury me. But going
13 once, going twice.

14 MR. HARMON: I think that's perfect, Your Honor.

15 MS. ALTMAN: Plaintiff agrees.

16 THE COURT: Okay. 50 pages it is.

17 All right. So that's what I'm expecting on the
18 findings of fact and conclusions of law.

19 Does anybody have any questions? Any issues with
20 that?

21 (No response.)

22 THE COURT: Okay. I had proposed -- and, of course,
23 we cited a couple -- we cited in our case management order a
24 findings of fact I did in a religion -- religious act case. We
25 just cited that as an example of what one of mine look like.

1 I am not wedded to -- you know, in the old days, you
2 had to go one, two, three, finding of fact. And then when you
3 got to conclusions of law, you had to go one, two, three -- I'm
4 not -- if you want to do it that way, that's fine, but I am not
5 wedded to that at all. I want it to be in whatever way makes
6 sense to be persuasive and to be helpful because I'm going to
7 have to go write my own findings of fact and conclusions of
8 law.

9 To the extent that you've written something that's
10 appropriate for the court, meaning I'm going to be the one
11 entering it and you've provided me good information and you
12 buttoned up your citations and your case citations, then maybe
13 your document will be persuasive and help me to reach a
14 decision in the case.

15 I am not going to just pick one or the other, of
16 course. I'm going to write my own. But I'm going to be
17 heavily influenced by the arguments of counsel, both orally and
18 in writing.

19 I think we gave you a tentative date for a visit.
20 And I wanted to see if we could finalize that right now.
21 January 3rd, maybe like -- like, 11:30, something in the
22 morning? Is that possible to do it on that day?

23 And, again, what I'm envisioning is -- I was trying
24 to do it when the students weren't there. And I'm envisioning
25 one lawyer from each side, that's all I need. I'm envisioning

1 some school official, whether it be the principal or somebody
2 that can just show us around. And -- and I'm envisioning
3 myself and Ms. Weisman and that's really all we need. We don't
4 need an entourage. And I hope there won't be duelling press
5 conferences or anything like that. I'm just going to get in,
6 look at the stuff and leave.

7 So -- and, really, what I'm primarily obviously
8 looking at is just the physical layout, looking at where the
9 bathrooms are and so forth, just so I can have it in my mind's
10 eye.

11 I agree with Ms. Altman, the video was helpful. But
12 I just would feel better if I had actually seen what we're
13 talking about here, and just get a little better feel for the
14 layout of the school and the various places we've been talking
15 about in this case.

16 Is that date acceptable -- let me start with you,
17 Mr. Harmon, because this is really your client's deal. Is that
18 date acceptable to your client?

19 MR. HARMON: Yes, Your Honor.

20 THE COURT: Okay. And, Ms. Altman, can you have a
21 representative of the plaintiff's team available at that time
22 out at Nease?

23 MS. ALTMAN: Yes, Your Honor.

24 THE COURT: Okay. So what we'll do is -- because I
25 don't know -- I suppose that Ms. Weisman -- and maybe she'll

1 give you her contact information -- there may be -- need a
2 little bit of coordination just to know where to go and all
3 that, so we may be talking to you-all.

4 But what I'm envisioning is Ms. Weisman and I will
5 just drive out there to Nease. We would go meet wherever we
6 were told to meet, and we'd be meeting one lawyer from each
7 side and some school official that would be able to show us
8 around.

9 And so to the extent logistics, we need to figure out
10 those logistics, Ms. Weisman will give you her contact
11 information.

12 What else?

13 (Judge confers with courtroom deputy.)

14 THE COURT: I'm being asked to clarify the Ehrensaft
15 situation. Apparently, I made a little bit of a mash of it.
16 So let me try it again.

17 The Ehrensaft declaration will be Court Exhibit 3.
18 The Ehrensaft video deposition will be Court Exhibit 4. And
19 the Ehrensaft deposition transcript will be Court Exhibit 5.
20 And the exhibits which are attached to it will range from 5A
21 through --

22 MS. ALTMAN: P, Your Honor.

23 THE COURT: P, as in Paul?

24 MS. ALTMAN: Yes, Your Honor.

25 THE COURT: 5P. Is that good?

1 COURTROOM DEPUTY: Yes, sir.

2 (Court's Exhibits 3, 4, and 5 received into
3 evidence.)

4 THE COURT: The other thing is -- I'm going to leave
5 in a minute. I promise. But before you do leave, you and
6 Ms. Diaz need to get right with each other about making sure
7 the exhibits are properly -- in other words, I think it would
8 be worth the time to go through the exhibits and make sure
9 what's in and what's not and that all our ducks are in a row,
10 because I know we had a little bit of uncertainty yesterday.

11 And so I'm going to direct the lawyers, before they
12 leave to -- certainly, you can take a quick break. But before
13 you leave, Ms. Diaz needs to be feeling like she's got all the
14 exhibits and they're in proper format and order so that when I
15 ask her about them, she's going to be able to tell me she's got
16 them. So we will do that.

17 All right. Ms. Altman, is there anything else from
18 the plaintiff at this time?

19 MS. ALTMAN: No, Your Honor. Just we would express
20 our appreciation for your -- everyone's time and patience.
21 Thank you. It's been a pleasure.

22 THE COURT: Mr. Harmon, anything from the school
23 board?

24 MR. HARMON: Not -- not at this time, Your Honor.
25 And I do want to say I really appreciate your staff. They've

1 been really nice folks to work with during this time. So thank
2 you very much.

3 THE COURT: They do a good job. I will say on the
4 record that today at lunchtime, one of the reasons I had to go
5 was because it's my -- I'm the -- I'm the senior judge in the
6 building, believe it or not, I still can't believe that, senior
7 active judge. And one of my pleasant responsibilities is to
8 hand out recognition for people who have been with the court
9 for certain periods of time.

10 And today I was pleased to award a distinguished
11 service certificate to Shannon Bishop for her 15 years with the
12 court and to Mari Diaz for her 10 years with the court.

13 (Applause.)

14 THE COURT: And so as you see, these folks,
15 Ms. Parks, Ms. Weisman -- you know, they -- they are all
16 professionals. They really are. And I couldn't -- I couldn't
17 do any of this without them. And we -- I have to say, we've
18 been kind of -- kind of working hard these days and -- and all
19 of them deserve your appreciation. So...

20 And I will say that you-all have been very
21 professional, and I think the case was tried very
22 professionally. And I -- I appreciate that because that's --
23 you know, these -- the good thing about -- when you're -- in my
24 view, when you're talking about contentious issues -- when
25 you're talking about sensitive issues, lawyers can go one of

1 two ways. They can kind of start to make it personal and
2 contentious among themselves, or they can act professionally
3 and kind of keep the temperature down on everything.

4 And, to me, that's what civil litigation is. And I
5 think you-all have done a fine job with that. And I
6 appreciate -- I appreciate all your good work.

7 All right. With all that to be done, I'm going to
8 take my leave. I will ask you-all to remain with Ms. Diaz to
9 make sure the exhibits are -- are in good order. And we will
10 issue a brief scheduling order that captures all of the dates
11 that we've just discussed. And I wish you all good holidays.

12 MS. ALTMAN: Thank you. Happy holidays, Your Honor.

13 COURT SECURITY OFFICER: All rise.

14 (The proceedings concluded at 3:35 p.m.)

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