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 XV

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.

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

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PLAINTIFF'S PROPOSED FINDINGS OF FACT

A. Parties.

Plaintiff Drew Adams ("Drew"), a minor, by and through his mother, Erica Adams Kasper, sued Defendant The School Board of St. Johns County, Florida (the "School Board" or "Defendant"). Drew is 17 years old, and a junior at Allen D. Nease High School ("Nease"), in the St. Johns County School District (the "District").[1] TTI 78:9-10; *id.* 78:23-79:3. Drew is a boy (TTI 82:17-24; TTII 87:7-8; Ct.'s Ex. 2, 49:14-17), as recognized by the State of Florida on his driver's license and birth certificate. TTI 109:9-20; *id.* 110:4-9; *id.* 283:6-11; Pl.'s Exs. 3-4. Drew also is transgender. Ct.'s Ex. 2, 13:10-25; TTI 216:23-217:19. Although Drew has undergone masculinizing

[1] Plaintiff abbreviates the three trial transcript volumes as "TTI," "TTII," and "TTIII."

medical treatment, and is treated by peers and school officials as a boy, he is denied access to the boys' restrooms at Nease because he is transgender. TTIII 97:4-13.

The School Board operates, supervises, and controls all public schools within the District, including Nease. Pl.'s Ex. 138, RFA 5-7. Defendant is authorized to establish policies for the effective operation of the public schools in the district. *Id.* RFA 8. Defendant is a "person" acting under color of state law within the meaning of 42 U.S.C. § 1983 (Pl.'s Ex. 138, RFA 1), and is subject to civil suits. *Id.* RFA 2. Defendant receives federal financial assistance from the U.S. Department of Education ("ED"), and certain of its education programs and activities benefit from that assistance, making it subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"). Pl.'s Ex. 138, RFA 3-4; Dkt. 116 at 22 ¶ 2.

B. Drew's Gender Identity and Transition.

Like all boys, Drew has a male gender identity. TTI 83:18-21; Ct.'s Ex. 2, 14:18-15:3. From early childhood, he eschewed more feminine clothes and toys, and identified with typically masculine clothing and activities. TTI 84:16-88:18. When Drew reached puberty he began to strongly dislike the aspects of his body that were becoming more feminized. *Id.* 89:4-20. He experienced depression and anxiety, and began treatment with a therapist in 2015. *Id.* 90:9-11; *id.* 90:22-91:6; *id.* 215:24-216:22. Drew's therapist and endocrinologist both confirmed that Drew is transgender (*id.* 93:12-94:1; *id.* 97:8-12; *id.* 193:15-194:5; Ct.'s Ex. 2, 13:10-25; Def.'s Ex. 22),

which Defendant does not dispute. TTIII 15:11-12; TTI 246:3-5; *id.* 255:14-23.

The standard of care for treatment of a transgender person includes living consistently with one's gender identity in all aspects of one's life. Ct.'s Ex. 2, 22:25-23:12; *id.* 27:12-20; Ct.'s Ex. 3 ¶ 41. To accomplish that transgender people undertake a process that includes social, legal, and medical transition. Ct.'s Ex. 2, 22:25-24:5; Ct.'s Ex. 3 ¶¶ 33-37. With support from his mental health and medical providers, Drew began transitioning to align his body and life with his male gender identity. TTI 92:17-93:10; *id.* 109:4-8. Drew's social transition included cutting his hair short, wearing clothing typically associated with males, using male pronouns, and using male restrooms. TTI 95:7-12; *id.* 96:1-21; *id.* 228:20-25; *and see generally* Ct.'s Ex. 2, 27:12-20. Until he later received surgery, Drew also wore a garment called a "binder" which reduced the appearance of his breasts; he recalls the day he received his binder in the mail as one of the "happier moments of [his] life." TTI 101:5-24.

The goal of medical transition is for the body to "completely appear [as] the gender that matches their gender identity." Ct.'s Ex. 2, 27:21-28:9; *see also* Ct.'s Ex. 3 ¶¶ 36-37, 39. Drew's medical transition began with hormone therapy in the summer of 2016 to masculinize his body. TTI 99:12-19; *id.* 237:22-238:1. He also underwent a mastectomy in 2017 to create a masculine chest, and to eliminate the need to wear his binder. TTI 100:25-101:4; *id.* 105:7-11; *id.* 238:2-6. Drew's hormone therapy will continue deepening his voice, and cause him to grow facial hair. Ct.'s Ex. 2, 30:7-21.

Drew's legal transition included correcting his driver's license and birth certificate to reflect his gender as male (TTI 109:9-20; *id.* 110:4-9; Pl.'s Exs. 3-4), pursuant to procedures established by Florida state agencies. *See* Req. for Judicial Notice, ECF No. 147; *see id.* Ex. A at 2 (Florida Department of Highway Safety and Motor Vehicles' gender change policy, which follows "standards established by the World Professional Association for Transgender Health (WPATH), recognized as the authority in this field by the American Medical Association"). Drew testified that updating his birth certificate "corrected a mistake that has been impacting my life since I was born," and means that the State "recognizes me as who I am, a boy, and that means everything to me." TTI 109:15-20; *id.* 110:21-25.

Drew knows "with every fiber of [his] being that every step [he has] taken so far has been the right one," and that the milestones in his transition have been "the happiest moments of [his] life." TTI 106:4-11; *id.* 106:24-107:9; *id.* 237:18-21 (Ms. Kasper's testimony that Drew was "ecstatic" about beginning hormone therapy, and that he "said it was one of the happiest days of his life").

Drew is widely known and accepted as a boy in all aspects of his life. TTI 109:21-23. This includes at Nease, where he has experienced support and respect from other students as a boy. Pl.'s Ex. 138, RFA 52; TTI 111:23-112:8; *id.* 127:11-14. Nease staff refer to Drew with male pronouns, and treat him as male in every respect except access to restrooms. TTI 170:16-25; *see also* Pl.'s Ex. 138, RFA 55.

When Drew first came out to his parents, both Mr. Adams and Ms. Kasper had already suspected that he might be transgender. TTI 219:5-15; TTII 87:13-24. As they learned more about what it means to be transgender, a number of cues from Drew's childhood started to make more sense, *e.g.*, Drew's strong aversion to clothing and activities stereotypically associated with girls. TTI 217:5-218:20; *id.* 217:7-9 (Ms. Kasper's testimony that "in retrospect, there were a million tiny things that we probably should have picked up on"); TTII 87:13-24 (Mr. Adams' testimony that "over the years from the earliest memories, really, of Drew," he simply "wasn't acting like a girl"; he would "pitch a fit" about wearing dresses, and Mr. Adams is not aware of a single family photo of Drew wearing one).

Ms. Kasper and Mr. Adams secured evaluation and assessment by numerous mental health and medical professionals, who prescribed treatment for Drew's social and medical transition. Pl.'s Ex. 134; TTI 89:25-90:7; *id.* 91:7-23; *id.* 93:12-94:8; *id.* 98:25-100:18; *id.* 105:7-106:3; *id.* 220:21-222:4; *id.* 227:25-228:16; *id.* 230:9-233:5; *id.* 238:7-18; TTII 88:6-12. Ms. Kasper testified that an "important" part of the recommended treatment was that Drew "be allowed to live as a boy" because "living as the gender that you identify as ameliorates a lot of the negativity" and "the depression, anxiety" that one can experience without treatment. TTI 228:6-11.

Once Drew began treatment, his mood and quality of life improved dramatically. TTI 216:23-217:4; *id.* 220:3-11 (Ms. Kasper's testimony that, "it was

absolutely remarkable the change in him. He went from this quiet, withdrawn, depressed kid to this very outgoing, positive, bright, confident kid. It was a complete 180."); TTII 91:2-92:2 (Mr. Adams' testimony that Drew was "super excited" to begin school as the boy that he is, and about getting involved with the school's academic and extra-curricular programs).

C. Defendant's Policies, Customs, and Practices Relating to Restrooms and Other Sex-Designated Facilities and Activities.

All individuals, regardless of whether they are transgender, need access to restrooms that match their gender identity. Drew began using the boys' restrooms at Nease at the beginning of his freshman year in August 2015, and continued to use them for approximately six weeks. TTI 112:22-113:3; *id.* 113:16-18. Drew uses the boys' restroom in every setting outside Nease, always using a stall, without any problems. TTI 118:10-13; *id.* 202:18-22; *id.* 229:11-15. In every material way, Drew's restroom use is just like that of other boys; he enters the restroom, relieves himself, washes his hands, and leaves. *Id.* Drew is not aware of any problems with his restroom use during his first six weeks at Nease and no student complained. *Id.* 113:19-24. No one was unclothed, and no evidence was introduced at trial of any misconduct by Drew while he was using the boy's restroom. *Id.* 113:25-114:9.

On or around September 23, 2015, the school received a report from two female students that they had seen Drew entering the boys' restroom. TTIII16:19. The students—who again, are female—did not report that they feared for their safety or

privacy, nor report any misconduct. TTIII 16:22-17:1. The school does not have any documentary evidence of this alleged report, nor did Defendant's corporate representative know the girls' grade level or names. TTIII 100:25-101:9. Before Drew filed suit, not a single boy, or boy's parent, complained about Drew's restroom use. TTIII 95:2-12; *id.* 102:7-24. Apart from Drew's mere presence in the boys' restroom, no one, male or female, ever complained that Drew had engaged in any misconduct while in the restroom. Pl.'s Ex. 138, RFA 25-26, 31-32; TTI 113:19-114:9.

On or around September 23, 2015, Drew was pulled out of class to meet with three school staff after the report about his restroom use. TTI 114:10-115:9; *id.* 253:6-25; TTII 36:10-17. Drew was instructed during that meeting that he was banned from the boys' restroom, and was limited to use of the gender neutral restrooms or girls' restrooms. TTI 115:10-15; *id.* 117:22-25; *id.* 253:6-25. School staff informed him he had done nothing wrong. *Id.* 115:21-116:10.

Drew later learned that this instruction was pursuant to an unwritten policy (TTIII 11:8-13), and guidelines entitled "St. Johns County School District Guidelines for LGBT Students—Follow Best Practices" (the "guidelines"). Def.'s Ex. 33.

Defendant's policy.[2] The District's policy requires students to use restrooms that match their "biological sex" (TTII 149:8-12; *id.* 166:21-23; *id.* 185:8-18; TTIII

[2] "Defendant's policy" as used herein refers to its policy, custom, or usage, as these terms are used in 42 U.S.C. § 1983, barring transgender students from the restrooms consistent with their gender identity.

45:16-18), which according to the District and School Board refers to one's sex "biologically identified at birth." TTIII 34:24-35:1; *see also id.* 45:6-15. Drew, however, is a boy, and testified that using the girls' restroom would be demeaning and intolerable for him. TTI 118:1-5. It would also violate his privacy by indiscriminately disclosing his transgender status to the girls in the restroom or by forcing him to use a gender neutral restroom when all other boys use the boys' restroom. While Defendant claims that its policy treats all students equally based on "biological sex," its witnesses conceded that Drew is treated differently (i) from other boys, who can use restrooms that match their male gender identity; and (ii) from non-transgender students, since the policy in effect relegates him to a gender neutral restroom. TTIII 32:6-11 (Ms. Mittelstadt's testimony that any student can use a gender neutral restroom but, as a transgender boy, Drew cannot use the boys' restroom); *id.* 33:21-24 (Ms. Mittelstadt's admission that as compared to other boys in the school community, Drew is given an "accommodation" that is "different"); *id.* 118:10-13; *id.* 136:17-137:2 (Principal Kunze's testimony that all non-transgender students can use restrooms matching their gender identity *and* gender neutral restrooms, but transgender students cannot use the restroom corresponding to their gender identity); *cf.* TTII 140:21-22; *id.* 208:19-209:12 (Ms. Smith's concession that the gender neutral restroom is "safer" for Drew than the girls' restroom).

Defendant's guidelines. Defendant's guidelines, which were approved by the

District's executive cabinet and Superintendent (TTII 168:22-169:3; *id.* 246:7-20), offer transgender students the option of using gender neutral restrooms, in addition to restrooms matching birth-assigned sex. Def.'s Ex. 33; TTII 171:22-172:5; *id.* 247:21-248:1.[3] Although Defendant's guidelines do not respect transgender students' gender identity for restroom use, the guidelines recognize gender identity in a variety of other ways, providing that schools will use the pronouns matching a student's consistently-asserted gender identity upon request of a student or parent (Pl.'s Ex. 138, RFA 51; Def.'s Ex. 33 at 1); update student records to reflect a transgender student's name and gender upon receipt of a court order (Def.'s Ex. 33 at 1); use a student's chosen name on unofficial school records even without a court order or birth certificate (*id.* at 1); allow transgender students to wear clothing in accordance with their consistently-asserted gender identity (*id.* at 2); not unnecessarily disclose a student's transgender status to others (*id.* at 1); and allow students to publicly express their gender identity (*id.*). The guidelines also cite the Florida High School Athletic Association ("FHSAA") policy requiring that students be allowed to participate in athletics

[3] Lest there be any question about whether the guidelines target transgender students specifically, Defendant introduced two exhibits showing that Mr. Upchurch had redlined the section about restrooms to refer to "transgender students." Def.'s Exs. 71, 120 (both exhibits change "gender identity" to "transgender identity," and "students" to "transgender students"); TTIII 56:12-60:23; *id.* 108:16-109:6. When asked whether the guidelines apply to "all students," Mr. Upchurch responded that they applied to "questions or situations that were covered by the best practices" (TTIII 61:1-5)—which, of course, he had redlined to refer specifically to transgender students.

consistent with their gender identity. *Id.* at 2.[4]

Designation of sex at enrollment. As a practical matter, Defendant accepts as a student's "biological sex" the gender designated in their enrollment paperwork, on the student's birth certificate, and in other school records. TTII 205:11-206:8; *id.* 233:12-234:23; TTIII 50:3-22. This information is accepted "at face value." TTIII 50:24-51:1. The District's enrollment form allows an enrolling student to check "M" or "F" for their "gender," and does not include any other information identifying a student's sex. Def.'s Ex. 142; TTIII 12:3-23. There is no reference to whether the student is transgender or that would require a student to self-identify as transgender, or to "biological sex." Def.'s Ex. 142; TTIII 12:19-21. The school entry health exam form similarly includes one blank box for the student's "sex," and makes no other reference to one's sex or transgender status (Def.'s Ex. 144), as is true for the other enrollment documents (Def.'s Ex. 143).[5] The District does not track students' chromosomes, external sex organs, internal sex organs, or whether students are

[4] The FHSAA policy requires that transgender students be permitted to participate in athletic teams in accordance with their gender identity (TTII 103:6-19; *id.* 105:12-23; Pl.'s Ex. 68 at 48), and constitutes another way in which the State recognizes gender identity—in addition to the State's protocols for correcting gender markers on birth certificates and driver's licenses (Req. for Judicial Notice, ECF No. 147). The FHSAA is the "governing nonprofit organization of athletics in Florida public schools," such as the schools in the District. *See* Fla. Stat. Ann. § 1006.20(1).
[5] Mr. Upchurch speculated that if there were incongruence between a child's gender identity and their sex assigned at birth, it might show up in the physical. TTIII 51:10. But the health exam form speaks for itself, and contains no indicator of a child's transgender status; it simply includes a blank box for the child's sex. Def.'s Ex. 144.

intersex. Pl.'s Ex. 138, RFA 62-68. Nor does the District inspect students' anatomy before they use school restrooms. Pl.'s Ex. 138, RFA 69. Indeed, the District does not learn about the presence of transgender students in its schools unless it is reported, such as by self-disclosure (TTII 235:15-18; TTIII 53:18-21), and no policy requires transgender students to identify themselves to school officials. TTIII 91:12-16.

Once a transgender student indicates their birth-assigned sex on their enrollment forms, that gender is "set in stone," and that student cannot access restrooms matching their gender identity under any circumstances. TTII 235:10-14; TTIII 12:24-13:12. But if a transgender student enrolls with paperwork already corrected to match their gender identity, "they would have access to that restroom that corresponded with how [the District] coded it in the system at the time of enrollment." TTIII 35:5-36:1; *id.* 89:19-25 (Mr. Upchurch's agreement that in such a situation, the District would have no reason to question that student's use of the restroom); *see also* TTII 204:8-15; TTIII 52:4-8; *id.* 53:17-18. When asked whether this raises any concern from the District's perspective, Mr. Upchurch answered, "As a practical matter, I would say no. The district does not play bathroom cop." TTIII 53:5-14.

According to School Board witnesses, if transgender students use restrooms that match their gender identity that would be considered misconduct, with a range of potential consequences as punishment. TTII 228:5-16; TTIII 17:20-18:1.

Defendant is aware of at least 16 transgender students in its schools. TTIII

106:20-24. At least seven of them have asked to use restrooms matching their gender identity. *Id.* 106:20-107:3. Principal Kunze is aware of five transgender students at Nease, including Drew. *Id.* 136:2-4. Of the other four, the general school population does not know that they are transgender. *Id.*141:24-142:3.

Ms. Kasper, contacted Nease and District officials to try to resolve this issue informally, through written communications and meetings. TTI 254:7-257:20; *id.* 265:16-266:24; *id.* 273:19-276:21; Def.'s Ex. 14; Def.'s Ex. 36; Pl.'s Ex. 12. When her efforts were unsuccessful, she filed a complaint with ED's Office for Civil Rights ("OCR") in November 2015. TTI 259:16-260:1. After the OCR complaint languished, Drew filed the instant suit in June of 2017. *Id.* 260:20-261:11; *id.* 277:8-13.

D. The Harms Visited on Drew by Defendant's Restroom Policy.

Drew testified that being able to use the boys' restroom at Nease was profoundly important for him because, "It's a statement to everyone around me that I am a boy. It's confirming my identity and confirming who I am, that I'm a boy. And it means a lot to me to be able to express who I am with such a simple action because I'm just—I'm just like every other boy . . ." TTI 107:18-25. In other words, having equal access to the boys' restroom made him feel like he "belonged." *Id.* 113:4-7.

In contrast, being barred from the boys' restroom felt "humiliating" and "like a slap in the face." TTI 116:14; *id.* 117:4; *id.* 277:25-278:4. Drew testified that being prohibited from the boys' restroom causes him anxiety and depression, including

when he has to walk past the boys' restroom to access the gender neutral restroom. *Id.* 117:4-7; *id.* 204:10-12 (it feels "like a walk of shame," because "I know that the school sees me as less of a person, less of a boy, certainly, than my peers"). Mr. Adams testified that Drew was "devastated" after the school barred him from the boys' restroom, and he returned to the depression and anxiety he had experienced before he transitioned. TTII 92:13-22; *id.* 92:20-22 ("every day after that, it's like he's being called out and being treated differently and it hurts him"); *see also* Ct.'s Ex. 2, 38:17-25 (Drew reported the restroom ban during his first appointment with Dr. Adkins, and appeared very distressed about it).

When Drew is misgendered (*i.e.*, referred to or treated as a girl rather than a boy), it is harmful to him, and can cause him to feel anxious and depressed. TTI 118:1-5 (Drew's testimony that just thinking about using the girls' restroom at school caused him anxiety, and feels like an insult to his identity and to him as a person); TTII 93:8-21 (Mr. Adams' testimony about how deeply upsetting it was for Drew when he was misgendered during a jiu-jitsu class).

The expert testimony established that failing to recognize and support a transgender student's gender identity sends a message—both to the transgender student and to others—that the transgender student is different from his or her peers and needs to be segregated, causing the transgender student to experience shame, and potentially other harms as well. Ct.'s Ex. 3 ¶¶ 41-48; TTI 116:21-24 (Drew's

testimony that the restroom exclusion "made a statement to the rest of the student body that the school did not accept who I was"); *id.* 117:17-21; *id.* 204:5-206:6; *id.* 204:19-20 ("it feels like the school doesn't think I'm even worthy of occupying the same space as my classmates"); *id.* 205:2-4 ("because I'm using a special bathroom and I'm oftentimes passing a men's bathroom, everybody knows I'm different, and I just want to fit in"); *see also id.* 56:8-14.

Additionally, the expert testimony established that refusing to allow a transgender person to fully transition—or deciding that he or she cannot be affirmed in a particular area, such as restroom use—is detrimental and interferes with social transition. Ct.'s Ex. 2, 33:3-15; Ct.'s Ex. 3 ¶ 41; TTI 116:11-16 (Drew felt shocked, confused, and angry after being barred from the boys' restroom because, "I was living in every aspect of my life as a boy and now they're taking that away from me."); *id.* 278:14-17 (Ms. Kasper's testimony that the restroom exclusion "brings that social transition to sort of a screeching halt"; "everywhere else and every other aspect in his life he can be a normal boy. At school, he can't."). As Drew's endocrinologist, Dr. Adkins prescribed that Drew complete his social transition by living consistent with his gender identity in all aspects of life, including restroom use. Ct.'s Ex. 2, 28:10-17; *id.* 33:8-11. Denying Drew access to the boys' restroom thus interferes with that prescribed medical treatment. *Id.* 33:12-15; *id.* 38:17-39:21. Being relegated to a gender neutral restroom does not reduce the harm or stigma of being banned from the

restroom matching one's gender identity. Ct.'s Ex. 2, 33:22-34:13; Ct.'s Ex. 3 ¶ 47.

Drew thinks about his access to restrooms every day from the moment he wakes up, planning his liquid consumption so that he can limit his need to use the restroom and avoid the stigmatization of a gender neutral restroom or missing class time. TTI 119:6-10; *id.* 277:20-22. At various points during his time at Nease, Drew would hold his bladder to avoid having to use the gender neutral restroom, making it harder for him to concentrate in class. TTI 173:16-174:5; *id.* 277:16-18.

Nease does not have a gender neutral restroom adjacent to each boys' restroom. Pl.'s Ex. 138, RFA 77-78. At least a couple of the gender neutral restrooms —including those nearest Drew's second and fourth period classes—are considerably farther away and more inconvenient than the boys' restrooms, and Drew must sometimes walk past boys' restrooms from which he has been banned to reach the gender neutral restrooms. TTI 117:8-16; *id.* 124:7-11; *id.* 171:1-10; Pl.'s Ex. 69. This sometimes requires him to miss class time, and to divert his attention to figuring out which class is the best one to miss. TTI 118:20-119:2; *id.* 214:21-215:12. Additionally, Drew is deprived of ready access to gender neutral restrooms three days a week during the lunch hour, when the school restricts students to a specific, limited area of the campus, with no gender neutral restroom. *Id.* 279:15-19. The area is bounded either by closed doors or administrators standing guard, so Drew cannot leave the area without asking permission. *Id.* 279:20-280:3.

E. Defendant's Purported Governmental Interests.

Defendant failed to introduce evidence supporting the purported governmental interests in its policy, consisting of an umbrella interest in student welfare and, in particular, privacy and safety. TTIII 110:22-111:10; TTII 172:13-15; *id.* 173:1-22.[6]

1. Privacy: Despite Defendant's claim that privacy interests support its policy, Defendant offered no evidence of any concrete concerns beyond an objection to the mere presence of a transgender student in the restroom. *See, e.g.*, TTII 251:7-15. All boys' and girls' restrooms at Nease contain stalls with locking doors. TTIII 31:22-25; *id.* 114:1-8; Pl.'s Ex. 138, RFA 57. Where Defendant has not yet installed partitions between the urinals in all boys' restrooms, Ms. Mittelstadt conceded that Defendant could do so. TTIII 32:12-15. All students who use a girls' restroom at Nease do so by using a stall. Pl.'s Ex. 138, RFA 58. Any student wanting additional privacy in the boys' restroom can use a stall, and all students can use gender neutral restrooms. TTIII 31:22-32:8; *id.* 114:18-115:4; Pl.'s Ex. 138, RFA 59.

Ms. Smith, who oversaw the task force's development of recommendations for the guidelines (TTII 200:6-9), characterized the task force's research, and her own personal research, as extensive. *Id.* 147:6-7 ("We tried to gather every bit of information we could"). Nonetheless, both she and Ms. Mittelstadt conceded that they had learned of no incident involving a violation of privacy in schools with respect to

[6] Defendant disclaimed any interest in cost. TTII 67:25-68:5.

students' gender identity. *Id.* 219:18-220:10; TTIII 15:13-16:8 (in Ms. Mittelstadt's 15 years with the District, she was not aware of a single negative incident involving a transgender student using a restroom conforming to their gender identity); *id.* 31:1-5 (as a general matter, no negative incidents involving transgender students using restrooms that match their gender identity were known to the District). When pressed by the Court as to how Drew's restroom use, which always includes the use of a stall, could implicate privacy concerns, Ms. Smith conceded "that would work," pivoting immediately to an argument that Drew needed to be excluded because other students might bully, assault, or make fun of him. TTII 217:7-22. As explained below, this purported hypothetical concern is unsupported by the evidence.

2. ***Safety:*** Defendant's purported interest in safety is two-fold. First, Defendant recognizes that transgender children are vulnerable to bullying and believes that separating them from other students in restrooms will keep them safe. TTIII 120:3-19. Second, Defendant suggests that under a rule treating transgender students equally, a student with bad intentions could access a restroom to engage in misconduct. *Id.* 112:20-25. But Defendant conceded that the second concern is not the "primary point" of its argument and certainly did not identify any incident where this had occurred. *Id.* 112:25-113:1. Rather, Defendant's concern is "[p]rimarily" for the safety of transgender individuals. *Id.* 112:13-19. Notably, the record reflects that lesbian and gay students also are at disproportionate risk for bullying (Pl.'s Ex. 66 at

8-9), but Defendant does not segregate lesbian and gay students from the restrooms their peers use. TTII 214:22-215:10; TTIII 55:6-12.

Defendant also suggests that the policy and guidelines are intended to prevent "a safety concern that's ***unrelated*** to transgender students": the risk of "allowing . . . males and females to mingle in group bathrooms," which might result in "illicit consensual activity," a "freshman female student to be in the bathroom alone with an 18-year-old male student," or "harassment or even assault." TTIII 69:6-21. Drew's claims are unrelated to those concerns indeed, since his claims have nothing to do with males and females mingling in the same restroom. Additionally, the District has a code of conduct which prohibits any kind of misconduct or crime (*id.* 96:1-8; Def.'s Ex. 65 at 27-28, 31-38 (District's Student Code of Conduct); Pl.'s Ex. 138, RFA 28), and Florida's criminal laws apply to criminal conduct on campus and provide an additional layer of protection. TTIII 96:9-14; *see, e.g.*, Def.'s Ex. 65 at 27-28; Pl.'s Ex. 138, RFA 30. Thus, there are policies in place to address this concern. TII 214:10-14; *see also* TTIII 31:6-21.

Notably, Defendant is not aware of any instances of sexual assault in the District involving a transgender student, and acknowledged that transgender people are not more prone to committing assault than any other person. TTIII 95:13-23.[7]

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[7] Ms. Smith offered a vague concern about students who identify as "gender fluid," suggesting this might allow a "football quarterback" to "come in and say I feel like a girl today and so I want to be able to use the girls' room." TTII 213:10-18; *id.* 214:1-

The school has a duty to protect the safety of all students, including transgender students. *Cf. Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996). After a student transitions, and is living consistent with their gender identity, it can be dangerous for them to continue to use restrooms that match their sex assigned at birth, as they would be at risk of bullying and injury. Ct.'s Ex. 2, 32:2-33:2. This notwithstanding, one of the only two options for a transgender student is to use the restroom associated with their sex assigned at birth. TTII 207:22-208:4. Ms. Smith conceded that a gender neutral restroom is "safer" (TTII 140:21-22; *id.* 208:19-209:12), and that using the restroom of one's birth-assigned sex does raise "safety or security or privacy issues," such that Defendant's real "solution" is for transgender students to use only gender neutral restrooms. *Id.* 218:16-219:4.

4; *id.* 216:15-17; TTIII 70:6-14. But Ms. Smith conceded twice that—despite her purportedly robust research—neither she nor the task force were aware of any such situations. TTII 213:19-23; *id.* 216:18-20. She also conceded that any student who misbehaved "certainly would" be subject to discipline. *Id.* 214:10-14; *see also* TTIII 31:6-21. As the Court noted, it was given no actual evidence on this point (TTIII 155:18-156:16); nonetheless, a simple response can be found throughout the record. This case is about transgender students, who medical experts recognize as being "*insistent, persistent, and consistent* over time in their cross-gender identification," Ct.'s Ex. 3 ¶ 27, a definition that appears throughout the model policies that the task force examined. Pl.'s Exs. 113 at 4 ("consistently asserted" gender identity); 66 at 4 (same); 114 at 4 ("consistent and uniform assertion" of gender identity); 115 at 4 ("exclusively and consistently asserted" gender identity). Perhaps most importantly, this definition appears in Defendant's own guidelines. Def.'s Ex. 33 ("consistently asserted transgender identity"). Thus, even under Defendant's own guidelines, its far-fetched "football quarterback" scenario is a non-issue. *See also Doe v. Boyertown Area Sch. Dist.*, No. 17-cv-1249, 2017 WL 3675418, at *55 (E.D. Pa. Aug. 25, 2017) (rejecting arguments about gender fluidity as a basis for discrimination).

3. Discomfort/community values: Ms. Smith testified that the task force was concerned about the fact that girls may use the restroom to change clothes, "refresh [] makeup," and "talk to other girls," and that they may feel "uncomfortable" doing so in the presence of a transgender girl. TTII 213:1-9. No explanation was offered as to why a female student could not change clothes in a stall, or why girls might feel uncomfortable socializing in the same space as a female transgender student—indeed, such socializing is indicative of the opportunities for a normal adolescence denied transgender students by Defendant's policy. The evidence suggests that these are illusory, theoretical concerns as Defendant offered no evidence that these concerns have actually been expressed by any student at the school.

Defendant also conceded that local "community values," which "trend[] conservative," influenced the task force's development of the guidelines. TTIII 32:16-20; *id.* 33:2-16; *id.* 67:13-20; *id.* 86:10. In other words, the task force's work was shaped by private views in the community about transgender students. Although the task force uncovered no incidents of harm with inclusive policies, it nonetheless chose to deny transgender students use of restrooms matching their gender identity.

Plaintiff introduced the testimony of three school administrators with experience implementing inclusive policies for transgender students. Dr. Thomas Aberli served as Principal at Atherton High School in Louisville, Kentucky, for approximately 1,500 students, when the school adopted a policy in 2014 that respects

students' gender identity. TTI 20:4-15, *id.* 21:1-4, *id.* 22:11-21; Pl.'s Exs. 146-47. Michaelle Valbrun Pope is the Executive Director for Student Support Initiatives for Broward County Public Schools ("BCPS") in Florida, which adopted an inclusive policy several years ago. TTII 51:12-20; Pl.'s Exs. 65, 66. BCPS is the sixth largest district in the nation, with more than 271,000 students, or 340,000 students if one includes off-campus learning centers. TTII 53:2-21. Michelle Kefford is the Principal of the Charles W. Flanagan High School, within BCPS. *Id.* 97:11-13. Ms. Pope and Ms. Kefford helped develop BCPS's non-discrimination policy and guidelines regarding transgender students (*id.* 54:5-6; *id.* 99:5-16), and Principal Kefford helps train educators within BCPS on the policy and serves as a point person for administrators and staff with questions about the policy (*id.* 100:14-20). All three of the witnesses' policies extend to restrooms and locker rooms, and Broward's detailed guidelines also explain how to apply its requirement of equal treatment to overnight trips and other gender-separated activities and facilities. Pl.'s Ex. 147 at 2; Pl.'s Ex. 66 at 40-44.

Dr. Aberli, Ms. Pope, and Principal Kefford (collectively, the "School Administrators") each testified that their policies treat all students equally based on their gender identity, and were neither difficult nor costly to implement. TTI: 48:20-49:2; *id.* 53:6-11; TTII 67:8-16; *id.* 101:14-22; *id.* 102:18-103:5. None has experienced problems under their policies with privacy or safety. TTI 26:2-4; *id.* 45:6-

14; *id.* 46:22-47:15; *id.* 51:8-52:8; *id.* 54:8-23; *id.* 73:18-74:14; TTII 64:4-65:20; *id.* 69:11-70:3; *id.* 105:24-107:5; *id.* 119:13-120:16. *See also Amicus Curiae* Br. of Sch. Administrators From 29 States and the District Of Columbia, ECF No. 124-1.

F. Expert Testimony about Drew and Transgender Adolescents.

Plaintiff offered testimony from two experts, Dr. Deanna Adkins and Dr. Diane Ehrensaft. Dr. Adkins is a Pediatric Endocrinologist at Duke University School of Medicine ("Duke"), where she is also a clinician educator and Assistant Professor of Pediatrics. Ct.'s Ex. 2, 6:1-8. Dr. Adkins is Drew's treating endocrinologist and has been licensed to practice medicine in North Carolina since 2001. Ct.'s Ex. 2, 9:8-13; *id.* 11:19-24. Dr. Adkins is Director of the Duke Center for Child and Adolescent Gender Care (the "Clinic"), which she founded in 2015. *Id.* 6:9-22. The Clinic engages a multidisciplinary team to treat patients with disorders of sex development (also known as intersex patients), and transgender patients. Since 2015, Dr. Adkins has treated more than 220 transgender patients at the Clinic, in addition to her prior experience with both transgender and intersex populations. *Id.* 7:14-8:4. Dr. Adkins has been called upon to assist with sex assignments in infants whose sex-related characteristics are not completely aligned as male or female. *Id.* 8:2-4; *id.* 8:17-22. In addition to her time in Clinic each week, Dr. Adkins is the Fellowship Program Director for pediatric endocrinology at Duke and mentors fellows on treatment of intersex and transgender patients; she also lectures on these issues throughout the

medical school. *Id.* 9:17-11:10. Dr. Adkins has the qualifications and experience to testify on these topics and the Court found her testimony reliable and relevant.

Dr. Ehrensaft is a practicing developmental and clinical psychologist with 35 years of experience; she specializes in working with children and adolescents experiencing gender dysphoria and their families. Ct.'s Ex. 3 ¶¶ 3-4. Dr. Ehrensaft has provided consultation, therapy, and evaluations to more than 500 transgender and gender nonconforming children, and has consulted with more than 200 mental health and related providers across the United States to assist them in treating this patient population. *Id.* ¶¶ 4-5. Dr. Ehrensaft helped found the Child and Adolescent Gender Center ("CAGC") at the University of California, San Francisco Benioff Children's Hospital, where she has served as the Director of Mental Health since CAGC's inception. *Id.* ¶ 6. Dr. Ehrensaft facilitates a group of approximately 175 local mental health providers who work with transgender youth, which meets monthly to discuss emerging practice issues, and which has developed training and assessment materials. *Id.* ¶ 7. Dr. Ehrensaft is co-investigator on a five-year study funded by a National Institute of Health grant to study the health outcomes of gender nonconforming youth receiving puberty blockers and/or cross-sex hormones. *Id.* ¶ 11. Dr. Ehrensaft also sits on the subcommittee of WPATH tasked with drafting the new version of the Standards of Care. *Id.* ¶ 13. She has published numerous books and articles, including peer-reviewed articles, on issues relevant to this case and participated directly in

studies relating to medical and mental health outcomes of gender nonconforming youth. *Id.* ¶ 12. Dr. Ehrensaft has the qualifications and experience to testify on these topics and the Court found her testimony reliable and relevant.

Everyone has a gender identity, which is a person's inner sense of belonging to a particular gender, such as male or female. Ct.'s Ex. 2, 14:1-9; Ct.'s Ex. 3 ¶ 21-22. Gender identity is a deeply felt and core component of a person's identity. Ct.'s Ex. 2, 14:1-4; Ct.'s Ex. 3 ¶ 21. Gender identity is not a choice and cannot be voluntarily altered; it is widely considered unethical to attempt to change the gender identity of others. Ct.'s Ex. 2, 14:10-13; Ct.'s Ex. 3 ¶¶ 21-22, 26.

At birth, infants are generally classified as male or female based solely on observation of their external genitalia. Ct.'s Ex. 2, 39:22-40:23; Ct.'s Ex. 3 ¶ 19. But for some individuals, such as those who are intersex or transgender, an examination of external genitalia will not accurately determine their sex, and current medical understanding recognizes that external genitalia are not an accurate proxy for a person's sex, which is composed of a number of components.[8] Ct.'s Ex. 2, 39:22-40:23; *id.* 12:15-22; Ct.'s Ex. 3 ¶¶ 19-20. Where there is divergence between these components, gender identity is the determinative factor of a person's sex. Ct.'s Ex. 3

[8] The components include, for example, chromosomal sex, gonadal sex, fetal hormonal sex (prenatal hormones produced by the gonads), internal morphologic sex (internal genitalia, *i.e.*, ovaries, uterus, testes), external morphological sex (external genitalia, *i.e.*, penis, clitoris, vulva), sexual differentiations in brain development and structure, and pubertal hormonal sex. Ct.'s Ex. 3 ¶ 20.

¶ 20; Ct.'s Ex. 2, 43:12-44:14.

Intersex individuals have helped medical experts better understand the significance and role of gender identity. Ct.'s Ex. 2, 41:2-20. Dr. Adkins explained that perhaps the clearest example of the importance of gender identity is a condition called cloacal exstrophy. *Id.* 41:22-42:18. Individuals with this condition have little or no development of abdominal structures relating to sex, genitals, and sometimes hormones. *Id.* Where the birth-assigned sex does not match one's gender identity, these individuals often experience depression and may become suicidal. *Id.* 42:22-43:11. This has helped medical professionals understand that, for both patients who are intersex or transgender, physical characteristics cannot override one's gender identity, which is the key component in determining one's sex. *Id.* 43:12-44:14.

For transgender individuals, the lack of alignment between their gender identity and their sex assigned at birth can cause significant distress. Ct.'s Ex. 2, 15:8-12; *id.* 15:24-16:5; *id.* 19:21-21:15 (Dr. Adkins' testimony about Drew's distress regarding the aspects of his body that did not match his male gender identity); Ct.'s Ex. 3 ¶¶ 27-28.[9] Authoritative standards provide treatment protocols to help relieve this distress and care for individuals who are transgender. Ct.'s Ex. 2, 24:6-25:5.

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[9] The clinical diagnosis for this distress is gender dysphoria. Ct.'s Ex. 2, 15:8-12; Ct.'s Ex. 3 ¶ 28. Drew testified about his diagnosis of gender dysphoria. TTI 93:12-94:1; *id.* 97:8-12; *id.* 193:15-194:5. Ms. Kasper also testified Drew was diagnosed with gender dysphoria by multiple providers, which guided his treatment. TTI 222:1-4; *id.* 227:11-24; *id.* 236:2-20; Pl.'s Ex. 134; Def.'s Ex. 22.

These standards have been published by multiple medical organizations and include, for example, the Standards of Care Version 7 by WPATH (Ct.'s Ex. 3 ¶ 13), and Endocrine Treatment of Gender Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline (hereinafter the "ES Guidelines") (Ct.'s Ex. 2, 17:17-24; Pl.'s Ex. 30).[10]

The goal of treatment is to alleviate the distress by aligning the adolescent's lived experience and body with his or gender identity. Ct.'s Ex. 2, 22:12-15; Ct.'s Ex. 3 ¶ 39. Like all children, when loved, supported, and affirmed by their caretakers, and by their social environment, transgender children can thrive, grow into healthy adults and have the same capacity for happiness, achievement, and contribution to society as others. Ct.'s Ex. 3 ¶ 32; TTII 60:12-19. An important part of that affirming treatment is restroom access in accordance with one's gender identity. Ct.'s Ex. 3 ¶¶ 34, 46.

Dr. Adkins offered testimony that "biological sex"—the term Defendant's policy relies upon to assign restroom use—is not a medically precise or accurate term (Ct.'s Ex. 2, 48:9-49:12), since each individual has multiple sex-related characteristics, which may or may not all be aligned. Pl.'s Ex. 30 at 7 (ES Guidelines

[10] The ES Guidelines were co-sponsored by the American Association of Clinical Endocrinologists, the American Society of Andrology, European Society for Pediatric Endocrinology, European Society of Endocrinology, Pediatric Endocrine Society, and WPATH. Ct.'s Ex. 2, 26:12-23; Pl.'s Ex. 30 at 1. *See also* Br. of *Amici Curiae* Medical, Nursing, Mental Health and Other Health Care Organizations, ECF No. 119-1, and Req. for Judicial Notice, ECF No. 115 (clinical guidelines, standards of care, and statements supporting gender-affirming care for transgender people from major medical and mental health organizations).

explaining that "biological sex" is "imprecise and should be avoided"). When those characteristics are not all aligned, the most important determinant of sex is gender identity. Ct.'s Ex. 2, 43:12-44:14; Ct.'s Ex. 3 ¶ 20.

G. The Level of Scrutiny for Transgender Status Discrimination.

Transgender people have suffered a long history of discrimination that continues today. Dkt. 114-6 at 71 (finding that transgender Americans have faced a "long, serious, and pervasive history of official and unofficial . . . discrimination by both federal, state, and local governments and private [entities]"); *id.* at 86 (noting "transphobia ha[s] long permeated the American worldview"). This history of discrimination includes recent state legislation targeting them for discrimination in public restrooms, Ct.'s Ex. 2, 32:2-33:2; Dkt. 114-2, and a ban imposed by this administration on their military service. Dkt. 114-1. Being transgender does not impair one's ability to be a fully productive and contributing member of society. Ct.'s Ex. 3 ¶ 32; TTII 60:12-19. Additionally, gender identity is innate, generally fixed, and not subject to voluntary change. Ct.'s Ex. 2, 14:10-13; Ct.'s Ex. 3 ¶¶ 21-22, 26. Transgender people also are relatively politically powerless. Dkt. 114-6 at 85 ("For members of the . . . transgender community, the struggle to receive recognition, to be given the same rights and treatment as other Americans, has been difficult.").

II. PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

A. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Where a governmental entity, like Defendant, by its conduct intentionally treats . . . one group of people differently from another group, when they are similarly-situated in all other material respects, the governmental classification must be justified by a standard related to its nature." *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285 (W.D. Pa. 2017). Here, Defendant's policy facially discriminates against transgender students in violation of the equal protection guarantee of the Fourteenth Amendment. While all individuals need to use restrooms that match their gender identity, only transgender students are prohibited from doing so. *Evancho*, 237 F.Supp.3d at 285 (holding policy, like Defendant's, discriminates based on "transgender status" because "Plaintiffs are the only students who are not allowed to use the common restrooms consistent with their gender identities"). In a "typical discrimination case, the comparator and the subject must be aligned in all *material* respects." *Church of Our Savior v. City of Jacksonville Beach*, 108 F. Supp. 3d 1259, 1266 (M.D. Fla. 2015) (emphasis added). Plaintiff introduced testimony that he is similarly situated for purposes of restroom use in every *relevant* respect (TTI 118:10-13; *id.* 202:18-22; *id.* 229:11-15), which Defendant did not rebut.

Defendant concedes that heightened scrutiny applies to its differential treatment of Drew. ECF No. 138-1 at 26. Indeed, it is difficult to see how Defendant could do otherwise given that in the last three months alone, four additional district courts weighed the issue, and uniformly imposed heightened scrutiny on the administration's recently-announced ban on military service by transgender people.[11] Defendant thus admits that it bears the heavy burden of demonstrating—at a minimum—an exceedingly persuasive justification that is substantially related to its classification. Plaintiff nonetheless explains the multiple reasons that Defendant's policy must be viewed as sex discrimination, and why discrimination based on transgender status requires strict or at least heightened scrutiny.

1. Discrimination on the Basis of Sex.

Defendant's exclusion of Drew from the boys' restroom constitutes sex discrimination for at least three reasons. ***First, discrimination against transgender people inherently relies on sex stereotypes*.** It is settled law in the Eleventh Circuit that discrimination against transgender people necessarily relies upon sex stereotypes, because "[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender appropriate appearance and behavior." *Glenn v.*

[11] *See Doe 1 v. Trump*, No. 17-1597, 2017 WL 4873042, at *27-28 (D. D.C. Oct. 30, 2017); *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *15 (D. Md. Nov. 21, 2017); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7 (W.D. Wash., Dec. 11, 2017); *Stockman v. Trump*, No. 5:17-cv-01799, ECF No. 79 at 19 (C.D. Cal. Dec. 22, 2017) (*available at* https://perma.cc/MX8R-ZFHY).

Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011); *id.* ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 884 (11th Cir. 2016) (per curiam) (affirming *Glenn*'s holding); *Doe 1*, 2017 WL 4873042, at *28 ("The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look."); *Evancho*, 237 F. Supp. 3d at 285-86; *Valentine Ge v. Dun & Bradstreet, Inc.*, No. 6:15-cv-1029-ORL-41GJK, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017).

Eleventh Circuit courts have uniformly applied this instruction. Seven opinions in this Circuit have discussed *Glenn* in the context of transgender plaintiffs' claims, and *all* have recognized without exception that *Glenn* protects transgender plaintiffs from sex-stereotyping discrimination.[12]

[12] *Chavez v. Credit Nation Auto Sales, Inc.*, 966 F. Supp. 2d 1335, 1348 (N.D. Ga. 2013); *Chavez v. Credit Nation Auto Sales*, 49 F. Supp. 3d 1163, 1173-74 (N.D. Ga. 2014), aff'd in part, rev'd in part sub nom., 641 F. App'x 883 (11th Cir. 2016); *Williamson v. Trump*, No. 7:17-cv-01490-LSC, 2017 WL 4536419, at *2 (N.D. Ala. Oct. 11, 2017); *Parris v. Keystone Foods, LLC*, 959 F. Supp. 2d 1291, 1303 (N.D. Ala. 2013); *Taschner v. Freeman Decorating Servs.*, No. 614-cv-1622-ORL-22DA, 2014 WL 5472536, at *3 n.4 (M.D. Fla. Oct. 23, 2014); *Diamond v. Allen*, No. 7:14-

Despite admitting that heightened scrutiny applies, ECF No. 138-1 at 26, Defendant attempts to distinguish *Glenn* by arguing that Defendant is making a distinction based on the "fact" or "reality" of Plaintiff's anatomy, and *Glenn* only prohibits stereotypes based on "demeanor." *Id.* at 26-28. This is incorrect. Impermissible gender stereotyping is not immunized because a policy purports to regulate genital characteristics rather than sex. *See Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756, at *9 (E.E.O.C. Apr. 1, 2015) (finding it unlawful to bar a transgender woman from the restroom based on the belief that she was not "truly female" without genital surgery); *Roberts v. Clark Cty, Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) ("Although CCSD contends that it discriminated against Roberts based on his genitalia, not his status as a transgender person, this is a distinction without a difference here.").[13] *Glenn* itself answers Defendant's argument: the employer found it "unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing"—and far from excusing the discrimination, *Glenn* found that to be *direct evidence* of gender stereotyping. Ms.

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cv-124 HL, 2014 WL 6461730, at *3 n.2 (M.D. Ga. Nov. 17, 2014). *See also Valentine Ge*, 2017 WL 347582, at *4.

[13] *See also Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065-66 (9th Cir. 2002) (explaining that any focus on sex-related anatomy, such as genitalia or breasts, "is inescapably 'because of . . . sex'") (citation omitted). For example, non-transgender individuals who have lost external genitalia in an accident have not somehow had their sex changed, or eliminated. *Cf.* Ct.'s Ex. 2, 41:22-44:14. Instead, gender identity continues to be the primary determinant of their sex; so too for transgender people. *Cf. Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006) (noting that sex "is not a cut-and-dried matter of chromosomes").

Glenn's anatomy had no relevance to her ability to perform her job; here too, Plaintiff's anatomy has no relevance to his ability to use the boys' restroom.

Second, Defendant's policy ***classifies on its face on the basis of sex.*** The central inquiry is whether "the discrimination is related to [] sex." *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *accord Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 525-26 (D. Conn. 2016) (the dispositive inquiry is whether discrimination is "related to sex"). Whether one describes this case as about which gender-specific restroom Drew can use, or about how Defendant views Drew's sex for purposes of restroom use (so-called "biological" or otherwise), it is inescapably about sex. Nothing more is required to invoke the heightened scrutiny Defendant concedes applies. ECF No. 138-1 at 26; *see also Whitaker*, 858 F.3d at 1051 (the district's "policy cannot be stated without referencing sex," and thus is inherently "based upon a sex-classification" such that "heightened review applies.").[14]

Third, discrimination based on gender transition is impermissible sex discrimination. Discrimination based on gender transition is necessarily based on sex, just as discrimination based on religious conversion is necessarily based on religion.

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[14] Any argument that Defendants' policy can evade review because it classifies *both* boys and girls based on a sex-based characteristic (such as one's so-called "biological sex") ignores the key question of whether one's sex has been taken into account, as is clearly the case here. *See Whitaker*, 858 F.3d at 1051 (rejecting school district's claim that its exclusion treated boys and girls equally). *Cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting "the notion that the mere 'equal application' of a statute containing racial classifications" removes it from scrutiny under the Fourteenth Amendment).

Firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion,'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *accord Fabian*, 172 F. Supp. 3d at 527; *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012). Similarly, Defendant may treat boys and girls equally as a general matter but nonetheless discriminate against those who undertake gender transition. By burdening transgender students based on expectations about how "real" boys or girls behave, Defendants' policy discriminates based on sex. *Schroer*, 577 F. Supp. 2d at 306.

Accordingly, there are multiple ways to view Defendant's policy, but all lead to the conclusion that excluding Drew from the boys' restroom constitutes differential treatment "on the basis of sex." *Whitaker*, 858 F.3d at 1051; *Evancho*, 237 F. Supp. 3d at 285-86; *Bd. of Educ. of the Highland Local Sch. Dist.* v. United States Dep't of *Educ.*, 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016).

The small handful of outlier decisions holding otherwise—issued by courts not bound by *Glenn*—should not persuade this Court. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016), is unpersuasive for multiple reasons—including that it inappropriately relied on pre-*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), case law that has since been abrogated, leaving it with "little persuasive value." *Highland*, 208 F. Supp. 3d at 875. Indeed, *Johnston*'s

narrow analysis and contrived view about the scope of sex discrimination prohibitions under federal law have been rejected by two different courts within the *same* district, *Evancho*, 237 F. Supp. 3d at 288-89; *E.E.O.C. v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841-42 (W.D. Pa. 2016) (holding that Title VII's sex discrimination prohibition extends broadly to sexual orientation), as well as others.[15]

At least two reasons counsel against following *Texas v. United States*, 201 F. Supp. 3d 810, 832-33 (N.D. Tex. 2016), *order clarified*, No. 7:16-cv-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016). First, other courts grappling with claims like the ones in this case have found that the *Texas* analysis "can charitably be described as cursory." *Highland*, 208 F. Supp. 3d at 863; *Students and Parents for Privacy*, 2016 WL 6134121, at *18, n.19 (the decision's "relatively conclusory analysis" renders it "unpersuasive").[16] More important, however, is that *Texas* did not even purport to decide any of the issues in this case, looking instead at jurisdiction over claims by schools who disagreed with the prior administration's guidance under Title IX. *Texas* baldly asserted, without support, that the Constitution assigns the questions

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[15] *See also A.H. v. Minersville Area Sch. Dist.*, No. 3:17-cv-391, 2017 WL 5632662, at *5 (M.D. Pa. Nov. 22, 2017) (compared to *Johnston*, "the Court finds the analysis in the more recent decisions of *Evancho* and *Whitaker* persuasive"); *Students and Parents for Privacy* v. United States Dep't of Educ., No. 16-cv-4945, 2016 WL 6134121, at *18, n.19 (N.D. Ill. Dec. 29, 2017) (*Johnston* "is of limited persuasive value in this case").

[16] Similarly, this Court should not be persuaded by Defendant's reference to older decisions already rejected by *Glenn* as outliers. *Compare* ECF No. 138-1 at 27 (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007)), *with Glenn*, 663 F.3d at 1318 n.5 (*Etsitty* is out-of-step with the vast majority of decisions in this area).

in a case like this one to elected officials. *Texas*, 201 F.Supp.3d at 815. Not so—the Constitution sets a floor beneath which no government action may fall.

Finally, while *Carcaño v. McCrory*'s decision to grant transgender individuals preliminary injunctive relief under Title IX supports Drew's claim here, its denial of preliminary relief on equal protection grounds falls short. 203 F. Supp. 3d 615 (M.D.N.C. 2016). *Carcaño*'s equal protection holding flowed from the Court's "assum[ption] that the sexes are primarily defined by their differing physiologies," *id.* at 642—which is not compatible with *Glenn*. Of the only three cases to cite *Carcaño*—*i.e.*, *Evancho*, *Highland*, and *Students*—none follow that analysis.

2. Discrimination Based On Transgender Status.

Defendant's restroom policy separately requires strict, or at least heightened, scrutiny because it discriminates on the basis of transgender status. The Supreme Court consistently has applied some form of heightened scrutiny where the classified group has suffered a history of discrimination, and the classification has no bearing on a person's ability to perform in society. *See, e.g.*, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). The Supreme Court has also sometimes considered whether the group is a minority or relatively politically powerless, and whether the characteristic is defining, or "immutable" in the sense of being beyond one's control or not one the government has a right to insist that an individual try to change. *See, e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). While not all considerations need be

present, *see Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012), all four point in favor of at least heightened scrutiny for transgender status discrimination.

Transgender people "satisf[y] these criteria." *Doe 1*, 2017 WL 4873042, at *27; *see also Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); *Stone*, 2017 WL 5589122, at *15; *Stockman*, *supra*, at 19. Transgender people have experienced a long history of discrimination. *See Whitaker*, 858 F.3d at 1051; *Doe 1*, 2017 WL 4873042, at *27; *Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139; *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014). There is also "obviously no relationship between transgender status and the ability to contribute to society." *Highland*, 208 F. Supp. 3d at 874; *see also Doe 1*, 2017 WL 4873042, at *27; *Evancho*, 237 F. Supp. 3d at 288; *Adkins*, 143 F. Supp. 3d at 139. A person's gender identity is an innate, effectively immutable characteristic that cannot be voluntarily altered or be expected to change as a condition of equal treatment. *See Doe 1*, 2017 WL 4873042, at *28; *Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139-40; *see also Hernandez-Montiel, v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000); Ct.'s Ex. 2, 12:23-13:1; Ct.'s Ex. 3 ¶ 26. Finally, there can be little dispute that transgender people are relatively powerless politically. *Doe 1*, 2017 WL 4873042, at *2; *Evancho*, 237 F.

Supp. 3d at 288.[17]

3. Defendant Fails to Carry its Heavy Burden.

Although Defendant's policy cannot survive any level of scrutiny, Defendant has failed to carry the heavy burden required here. Under the heightened scrutiny applicable to all sex-based classifications, the government "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Under strict scrutiny, a law must be narrowly tailored to advance compelling state interests. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Under both, "[t]he burden of justification is demanding and it rests entirely on the State. . . . [It] must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Moreover, constitutionality is judged based on the "actual state purposes, not rationalizations for actions in fact differently grounded." *Id.* at 535-36. Defendant fails to carry its burden under either standard.

[17] Defendant claims incorrectly, ECF No. 138-1 at 25, that this argument is foreclosed by *Kirkpatrick v. Seligman & Latz, Inc.*, 475 F. Supp. 145, 147 (M.D. Fla. 1979), *aff'd*, 636 F.2d 1047 (5th Cir. 1981). But *Kirkpatrick* upheld the firing of an employee because she was transgender—a result that could not stand under *Glenn*—and, far from endorsing the district court's level-of-scrutiny holding, the Fifth Circuit held on review that it "need not reach this issue." 636 F.2d at 1049-50. The level of scrutiny remains an open question in this Circuit.

a. ***Privacy:*** Numerous courts have rejected the argument that allowing transgender students to share multi-user restrooms affects the privacy of other students. *See, e.g.*, *Whitaker*, 858 F.3d at 1052 ("This policy does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how [plaintiff], as a transgender boy, uses the bathroom: by entering a stall and closing the door."). As in other similar cases, there is no evidence that Drew ever did "anything to actually invade the physical or visual privacy of anyone else." *Evancho*, 237 F. Supp. 3d at 280; *see also Highland*, 208 F. Supp. 3d at 874 ("There is no evidence that Jane herself . . . would infringe upon the privacy rights of any other students"). The boys who shared a restroom with Drew for six weeks would seem to agree, since Drew's restroom use was reported by two *female* students and no one else. TTIII 16:9-15.

The evidence shows that Defendant's purported concern about privacy is unfounded, including Defendant's admissions about the private nature of restrooms (TTIII 31:22-25; TTIII 114:1-8; Pl.'s Ex. 138, RFA 57-58), and Plaintiff's unrebutted expert and fact witness testimony refuting the notion that transgender children might expose themselves to others—as the witnesses explained, doing so would conflict directly with the goal of transition, which is to help others see a transgender boy, for example, as the boy that he is. Ct.'s Ex. 3 ¶ 49; TTII 65:8-20; *id.* 108:3-9.

Defendant's own research uncovered no instances of privacy violations

through the extensive investigation of its task force. TTII 219:18-220:10; TTIII 15:13-16:8; *id.* 31:1-5. To the extent that Defendant's privacy interest is based on an objection to the "mere presence" of a transgender student in the restrooms, that argument fails where "the record demonstrates" that it "is based upon sheer conjecture and abstraction." *Whitaker*, 858 F.3d at 1053; *Boyertown*, 2017 WL 3675418, at *55 (rejecting privacy violation claims based on sharing sex-separated facilities with transgender students); *Students and Parents for Privacy*, 2017 WL 6629520, at *6 (same); *Karnoski*, 2017 WL 6311305, at *8 (defendant fails to meet its burden by relying on concerns that are hypothetical and overbroad).[18]

Defendant also failed to show any relationship between excluding transgender students from restrooms and protecting the privacy of others, let alone the "exceedingly persuasive" fit "between the means and the important end" required to carry its burden. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 70 (2001) (quotation omitted). Defendant's policy punishes transgender students to avoid purported privacy violations that have not, and do not occur in the enclosed setting of school restrooms. This, coupled with the fact that Defendant does not monitor any non-transgender student's sex-related characteristics, and metes out discriminatory treatment to

[18] Ms. Mittelstadt's testimony that a student might need to disrobe in the restroom to wash stained clothing is similarly unpersuasive. TTII 248:8-12. Given Defendant's position that gender neutral restrooms should suffice for *all* restroom-related needs for transgender students, it is unclear why such restrooms should not also suffice on the hypothetical occasion that a student might need to disrobe to wash a stain from their clothing.

transgender students who disclose their status—but not those who quietly enroll with documents matching their gender identity—underscores the lack of any meaningful tailoring between the governmental interest and the challenged classification.

Indeed, Defendant's policy not only fails to *further* any interest in privacy, but actually *undermines* it instead. Defendant's own guidelines acknowledge transgender students' right to privacy (Def.'s Ex. 33 at 1), but Defendant's policy nonetheless risks disclosure of students' transgender status to others—as would occur if Drew used the girls' restroom—by separating transgender students from their peers in noticeable ways. *Compare* TTI 279:15-208:3 (three days a week students are corralled in an area for lunch with no gender neutral restrooms; a transgender student would have to get permission to leave the area for restroom access, while all their peers must stay behind), *with* TTIII 141:24-142:3 (some transgender students, like the four others at Nease besides Drew, are not widely known in school as transgender).

Defendant cited various cases in its proposed conclusions of law, ECF No. 138-1, to suggest that physiological differences justify the differential treatment of Drew in the name of privacy, but those cases all share a different theme: Where the government can provide equal access, it must, regardless of whether physiological differences might warrant accommodation. As here, the defendants in *Virginia* argued that privacy justified excluding women from the Virginia Military Institute ("VMI"). 518 U.S. at 522, 524-25. They claimed that admitting women to VMI would destroy

any sense of decency between men and women. *Id.* at 528. Rather than accept privacy as a reason to discriminate, the Supreme Court instead ended VMI's exclusion of women and required that privacy be addressed through any necessary alterations. *Id.* at 550 n.19. "[P]hysiological differences," *id.*, could not trump the obligation to provide "genuinely equal protection," *id.* at 557. The same result followed in *Faulkner v. Jones*, a challenge to the male-only policy at South Carolina's military college. 10 F.3d 226, 228-29 (4th Cir. 1993). *Bauer v. Lynch*, 812 F.3d 340, 342 (4th Cir.) involved a male FBI Academy trainee's challenge to the Academy's requirement of fewer pushups for female trainees than male trainees. *Id.* at 342. Bauer recognized, however, that the Academy had adopted those standards so that more women, of equivalent fitness to men, could qualify, and thus upheld the gender-normed fitness requirements because they *furthered* rather than *hindered* equal access by women.

Nguyen v. INS is not to the contrary. *Nguyen* examined differing requirements for men and women to prove parentage of children born abroad, finding them permissible because women can demonstrate parentage through giving birth. 533 U.S. at 64. *Nguyen* held that the ability of women to prove parentage through birth is not a stereotype, *id.* at 68, but Defendant's notion here that Drew cannot use the boys' restroom because of his sex assigned at birth clearly *is* based on stereotype, rather than the reality of his restroom use.

Defendant attempts to distinguish *Whitaker*, *G.G.*, *Highland*, *Evancho*, and

Boyertown by arguing that its privacy obligations under the Florida Constitution are higher, but even if there were "an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Notably, Defendant has not even explained why it believes that Florida's general privacy protections conflict with Drew's claims, and Defendant's corporate representative conceded that Florida schools who respect students' gender identity are not violating any law. TTIII 122:11-123:13.

b. ***Safety:*** Courts also have repeatedly rejected the notion that treating transgender students equally raises any safety concerns for others. *See, e.g.*, *Evancho*, 237 F. Supp. 3d at 291 (noting the lack of any evidence that an inclusive policy would encourage improper behavior in restrooms); *Highland*, 208 F. Supp. 3d at 877 n.15 (rejecting the argument that equal access to facilities by transgender students will "lead to disruption or safety incidents"). Notably, there has been no suggestion that Drew poses any safety concerns (Pl.'s Ex. 138, RFA 25-26, 31-32), and as Defendant acknowledges, transgender students tend to be the vulnerable ones. TTIII 120:3-19. Drew experienced no safety issues while he used the boys' restroom, but regardless, nothing in the law suggests that Defendant can segregate a group of students from their peers purportedly for their own protection.

Defendant's other concerns for safety, including the possibility of assault, are wholly untethered to its discrimination against transgender students, who Defendant

admits are not more prone to misconduct. TTIII 95:13-23; *see also* TTII 119:13-16. In fact, Defendant uncovered no safety concerns in its research of other school districts who treat their transgender students equally, and characterized the lack of foundation for its interest as a desire to be "proactive" for tomorrow. TTII 214:5-21. But a "classification must substantially serve an . . . interest *today,* for in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1684 (2017).

c. Discomfort/community values: Shunting transgender students out of communal spaces simply to accommodate their non-transgender peers' discomfort is illegitimate as a matter of law. Such unfounded concerns amount to nothing more than "mere negative attitudes [and] fear," which are not "permissible bases for" differential treatment, even under rational basis review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1305 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 ("avoiding the anticipated negative reactions of others cannot serve as a sufficient basis for discrimination and does not constitute an important government interest"); *Lusardi*, 2015 WL 1607756, at *9 ("Some co-workers may be . . . embarrassed or even afraid [to share restrooms with a transgender colleague], [but] . . . co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment.").

Defendant's admission that community values—*i.e.*, the "conservative" views of local residents—shaped the task force's recommendations underscores that the policy is motivated by impermissible private bias or misunderstanding, rather than a valid governmental interest. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also Open Homes Fellowship, Inc. v. Orange Cty., Fla.*, 325 F. Supp. 2d 1349, 1358 (M.D. Fla. 2004) ("'the City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic'") (quoting *Cleburne*, 473 U.S. at 448).

B. Title IX

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "Access to the bathroom is [] an education program or activity under Title IX." *Highland*, 208 F. Supp. 3d 850, 865. To prove a Title IX violation, Plaintiff must show that (1) he experienced discrimination in an education program or activity on the basis of sex, (2) the institution received federal financial assistance at the time the discrimination occurred, and (3) the discrimination caused Plaintiff harm. *See Highland*, 208 F. Supp. 3d at 865. As a federal financial recipient,

Defendant is governed by Title IX. Pl.'s Ex. 138, RFA 3-4; Dkt. 116 at 22 ¶ 2.

Defendant's intentional exclusion of Drew from boys' restrooms discriminates based on his sex under Title IX for all the reasons explained above. Courts rely upon a common body of law in analyzing discrimination claims, regardless of whether a claim arises under the Equal Protection Clause or a particular anti-discrimination statute. *Glenn* decided an Equal Protection claim, but relied interchangeably on Title VII authorities to find that "the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." 663 F.3d at 1316 (quotation omitted). The courts have looked both to Title VII, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 (1999), and Equal Protection, *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000), aff'd sub nom. Johnson v. Bd. of Regents of Univ. of Georgia, 263 F.3d 1234 (11th Cir. 2001), to interpret Title IX's prohibition on sex discrimination. *See also Bigge v. Dist. Sch. Bd. of Citrus Cty., Fla.*, No. 5:13-cv-49-OC-10PRL, 2015 WL 1138472, at *10 (M.D. Fla. Mar. 13, 2015). Accordingly, the instruction in *Glenn* and its progeny about the ways in which discrimination against transgender people must be understood as sex discrimination governs here as well.

"Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Defendant suggests that the plain meaning of

"sex" in Title IX, and in dictionaries at the time of enactment, comport with its reliance solely on genitalia. ECF No. 138-1 at 16. But Title IX does not define sex, and certainly does not reduce its protections to the sum of students' reproductive organs. The dictionary definitions Defendant points to arise from the *G.G. v. Gloucester Cty. Sch. Bd. dissent*, while the *majority* was persuaded that some definitions at the time did indeed recognize variance in sex-related characteristics, and certainly should not foreclose claims by transgender students. 822 F.3d 709, 721-722 (4th Cir. 2016). Courts that have carefully evaluated and considered definitions of the word "sex," including at the time of Title IX's enactment, have correctly concluded that a reasonable interpretation includes a host of sex-related characteristics, including gender identity. *See*, *e.g.*, *Students and Parents for Privacy*, 2016 WL 6134121, at *17-18; *Highland*, 208 F. Supp. 3d at 866, n.4; *Fabian*, 172 F. Supp. 3d at 526. Thus, by enforcing its policy, Defendant discriminates on the basis of sex.

Defendant makes much of a regulatory exception under Title IX permitting the provision of "separate toilet, locker rooms, and shower facilities on the basis of sex," 34 C.F.R. § 106.33, and some comments from the Title IX Congressional debate—stating that both of these things make clear that a school is not required to allow girls to go into the boys' restroom and vice versa. ECF No. 138-1 at 17. But Drew seeks no such thing; to the contrary, *he is a boy*, and he is simply asking that, as all other boys, he be permitted to use the boys' restroom.

The fact that the current administration recently withdrew the prior interpretation of Title IX by ED is entitled to no weight. While some courts accorded *Auer* deference to the previous administration's non-binding guidelines interpreting Title IX to protect transgender students, *see, e.g.*, *G.G.*, 822 F.3d at 723, the rescission did not propound any new rule. *Minersville*, 2017 WL 5632662, at *4. Regardless, the one constant has been the ongoing obligation to follow Title IX, and a statutory claim is not foreclosed by the current lack of an agency position on the issue. "Contrary to Defendant's argument, a specific practice need not be identified as unlawful by the government before a plaintiff may bring a claim under Title IX." *Id.* at *6. Since the rescission, courts have found that policies like the Defendant's violate Title IX or, at the motion to dismiss stage, have found that such claims should be allowed to proceed. *Id.* at *6; *Whitaker*, 858 F.3d at 1046-50 (7th Cir. 2017); *Evancho*, 237 F. Supp. 3d at 283 n.23.

"A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Whitaker*, 858 F.3d at 1049. As such, Defendant's policy subjects Drew, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX." *Whitaker*, 858 F.3d at 1049-50. This treats Drew differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity

with sex stereotypes, denying Drew full and equal participation in educational opportunities in violation of Title IX.

C. Declaratory and Injunctive Relief, and Damages.

Plaintiff satisfies the requirements for declaratory relief, because his ongoing expulsion from the boys' restroom creates an "actual controversy," making it ripe for this Court to "declare the rights" of the "interested party seeking such declaration." 28 U.S.C. § 2201(a). Additionally, Drew will undoubtedly suffer several forms of serious and irremediable harm if a permanent injunction is not granted. He is subjected to unequal treatment with each passing day, and accompanying humiliation, anxiety, depression. "Courts have long recognized that disparate treatment itself stigmatizes members of a disfavored group as innately inferior . . . ." *Evancho*, 237 F. Supp. 3d at 294; *Stockman*, *supra*, at 20 ("A few strokes of the legal quill may easily alter the law, but the stigma of being seen as less-than is not so easily erased."); *cf. J.S., III v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 987 (11th Cir. 2017) (describing the "intangible consequences" that may result from isolation, including stigmatization).

Second, Defendant's policy also interferes on a daily basis with Drew's medically prescribed social transition, a serious harm that Defendant has utterly failed to justify. Ct.'s Ex. 2, 28:10-17; *id.* 33:8-11 Third, Drew has had to miss class to use the gender neutral restroom, and has struggled to concentrate while holding his bladder and worrying about when he can use the restroom. TTI 173:16-174:5; *id.*

277:16-18. Courts have long recognized that interference with a student's education constitutes irreparable harm meriting injunctive relief. *See Ray v. Sch. Dist. of DeSoto Cty.*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987); *Alejandro v. Palm Beach State Coll.*, 843 F. Supp. 2d 1263, 1270-71 (S.D. Fla. 2011); *Daniels v. Sch. Bd. of Brevard Cty.*, 985 F. Supp. 1458, 1461-62 (M.D. Fla. 1997) (holding that various unequal facilities for girls' softball team versus boys' baseball team warranted preliminary injunctive relief; "[e]qual access to restroom facilities is such a clearly established right as to merit no further discussion"); *Whitaker*, 858 F.3d at 1045.

The balance of the equities also tips sharply in Drew's favor because Defendant introduced no evidence that any student is harmed when Drew uses the boys' restroom, but the harms inflicted on Drew from the exclusion are profound. Additionally, the "public has no interest in enforcing an unconstitutional" policy, like the one here. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Similarly, "the overriding public interest lay[s] in the firm enforcement of Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir.1993).

Plaintiff is also entitled to emotional distress damages under Title IX and the Equal Protection Clause. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255, (2009); *K.M. v. Sch. Bd. of Lee Cty. Fla.*, 150 F. App'x 953, 957 (11th Cir. 2005). "As a matter of both common sense and case law, emotional distress is a predictable, and thus foreseeable, consequence of discrimination." *Sheely v. MRI Radiology Network,*

P.A., 505 F.3d 1173, 1199 (11th Cir. 2007). As such, the Eleventh Circuit has "long found that violations of . . . antidiscrimination statutes frequently and palpably result in emotional distress to the victims." *Id.*; *see also*, *e.g.*, *Bogle v. McClure*, 332 F.3d 1347, 1354, 1359 (11th Cir. 2003); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 476 (11th Cir. 1999); *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985). Plaintiff seeks garden variety emotional distress damages, and is entitled to them for the humiliation, pain, and loss of dignity caused by Defendant's intentional conduct barring him from the boys' restroom.

In conclusion, this Court (i) denies Defendant's motion to dismiss Plaintiff's Title IX claim; (ii) declares that Defendant's blanket exclusion of transgender students from sex-separated facilities matching their gender identity violates the Equal Protection Clause of the Fourteenth Amendment and violates Title IX; (iii) permanently enjoins Defendant, its officers, employees, and agents, and all persons acting in active concert or participation with Defendant, or under Defendant's supervision, direction, or control, from enforcing any policy, practice, or custom of the St. Johns County School District that denies transgender students access to and use of restrooms that match a student's gender identity; (iv) and awards Drew $25,000 in damages, or whatever amount the Court deems appropriate based on the evidence presented at trial.

Dated: February 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing and all attachments to be served on all counsel of record.

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DE 184

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

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

Plaintiff,

vs.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.

Jacksonville, Florida

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

Friday, February 16, 2018

9:32 a.m.

Courtroom No. 10D

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

COURT REPORTER:

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1 P R O C E E D I N G S
2 Friday, February 16, 2018 9:32 a.m.
3 - - -
4 COURT SECURITY OFFICER: All rise. United States
5 District Court in and for the Middle District of Florida is now
6 in session, the Honorable Timothy J. Corrigan presiding.
7 Please be seated.
8 THE COURT: Good morning.
9 Before we tend to the matter at hand today, I want to
10 make a statement.
11 It is not usually appropriate for a judge to speak
12 from the bench about a matter of public interest unrelated to
13 the case before the Court. However, there are exceptions, and
14 this is one of those times.
15 I think it particularly appropriate, given that the
16 case that is before the Court involves a school district which
17 is tasked with educating 40,000 students, young persons who are
18 the future of our community and nation.
19 While words are inadequate, they are all that I have.
20 I join all Americans in feeling a profound sense of sadness and
21 anger over the senseless deaths of 14 students and 3 heroic
22 adults in Broward County.
23 These young people, cut down just as they were
24 finding themselves and transitioning to becoming the
25 responsible adults our society so desperately needs, have now

1 been robbed of their opportunity to live full and long lives.
2 I grieve for them and for their families, now
3 deprived of a loved one who helped define their very existence.
4 As a soon-to-be first-time grandfather, I think how these young
5 people will never have the opportunity to have children, and
6 their parents will never get to know the grandchildren they
7 would have had.
8 As an American I find this entirely unacceptable. No
9 parent should have to worry, when they send their child to
10 school, that their child will be murdered in a random spasm of
11 violence. No student should have to be concerned for their
12 safety while they are in school, and no teacher or
13 administrator should ever have to explain to a parent how their
14 child was lost to a hateful and evil act while under their
15 care.
16 A society cannot call itself civilized if it cannot
17 protect its children. We Americans have to do better than
18 this. We just have to.
19 God bless those who are lost and their families,
20 those who are wounded that they may recover, and God bless the
21 United States of America.
22 And I'll ask you to observe a moment of silence,
23 please.
24 (Pause in proceedings.)
25 THE COURT: Thank you.

1 This case before the Court is Adams versus The School
2 Board of St. Johns County, Florida, 3:17-cv-739.
3 I'll go ahead and get appearances. I've got a
4 written list of appearances but I'll go ahead.
5 Ms. Borelli, if you want to make your appearance and
6 have your co-counsel do as well, please.
7 MS. BORELLI: Good morning, Your Honor. Tara Borelli
8 with Lambda Legal on behalf of plaintiff Drew Adams.
9 I'll also mention that we're joined by Erica Adams
10 Kasper, Drew Adams' representative. Thank you.
11 MR. GONZALEZ-PAGAN: Good morning, Your Honor. I'm
12 Omar Gonzalez-Pagan on behalf of the plaintiff.
13 MS. RIVAUX: Good morning, Your Honor. Shani Rivaux
14 with the law firm Pillsbury Winthrop Shaw Pittman on behalf of
15 Drew Adams.
16 THE COURT: And, Ms. Kasper, welcome this morning.
17 Mr. Harmon, if you'll make your appearances and those
18 of your co-counsel, please.
19 MR. HARMON: Yes, Your Honor. Terry Harmon from
20 Sniffen & Spellman, PA, on behalf of the defendant.
21 And, Your Honor, Superintendant Forson may be running
22 a little bit late. His wife was in a minor fender-bender, but
23 he will be here.
24 The board chair, at the request of Your Honor, is
25 also present, Bill Mignon. He's in the gallery.

1 THE COURT: All right. Thank you.
2 MR. SPELLMAN: Good morning, Your Honor. Michael
3 Spellman, Sniffen & Spellman, on behalf of the defendant,
4 School Board of St. Johns County.
5 MR. KOSTELNIK: Good morning, Your Honor. Kevin
6 Kostelnik of Sniffen & Spellman on behalf of the defendant.
7 MR. SNIFFEN: Good morning, Your Honor. Rob Sniffen,
8 Sniffen & Spellman, PA, on behalf of the school board.
9 MR. SLANKER: Your Honor, Jeff Slanker on behalf of
10 the school board.
11 MR. WILEY: Trae Wylie, paralegal, Sniffen &
12 Spellman.
13 THE COURT: And welcome to all.
14 As we begin this morning -- and I appreciate
15 Mr. Mignon being here, and I apologize for the short notice,
16 and I apologize for having him have to drive up from St. Johns
17 County.
18 But it's an important issue. It's an issue that I
19 have thought important. I think maybe more -- I think I think
20 it's more important than the parties do, but here's why.
21 There was some indication in the plaintiff's briefing
22 on this issue -- and here's what happened.
23 After the trial, you know, I kept asking is this an
24 official policy of The School Board of St. Johns County,
25 Florida? Because if it's not, then I had a concern as to

1 whether I was being asked to adjudicate a constitutional issue
2 without the highest policy-making body of the institution being
3 on record as to what the policy was.
4 And so I -- and I also had the trial testimony of
5 Mr. Upchurch, who testified, quote, "I can tell you without a
6 doubt that this issue" -- the bathroom issue -- "would be very
7 divisive and controversial if it were taken up in a public
8 school board meeting."
9 And I wrote in my order, "But deciding divisive and
10 controversial issues affecting the St. Johns County schools is
11 precisely the function of the elected school board," and I
12 asked this question.
13 "Before asking a federal court to potentially insert
14 itself into matters of school district policy, should not the
15 school board be required to take a formal position on the
16 matter?"
17 And, of course, the testimony at trial was that the
18 school board, per se, had never actually considered the
19 unwritten policy that is being put forward by the lawyers for
20 the school board as being the policy that prohibits Mr. Adams
21 from using the boys' restroom at Nease High School.
22 And especially since the policy was unwritten, it
23 made me wonder whether this represented the official policy of
24 the school board or not. So I asked the parties to brief that
25 question, and they did a good job. And I'm -- I was relatively

1 persuaded by the briefing from the parties.
2 Both parties said that the case was at issue. They
3 both had a little different slant on it, but they both said
4 that it's something I should go ahead and decide.
5 And any implication that I'm somehow trying to weasel
6 out of this or that I'm shirking my responsibility by trying to
7 avoid a constitutional decision is a misreading of the
8 situation. In fact, what I am doing is fulfilling my
9 responsibility.
10 My responsibility, and it's a very well settled
11 principle of law, is that a court should avoid deciding a
12 constitutional question if it can do so and still do justice to
13 the cause.
14 And one of the ways that we know whether a
15 constitutional issue is really teed up and appropriate for the
16 Court to decide is whether or not the ultimate decision maker
17 has made the decision, and the ultimate decision maker in
18 St. Johns County is the school board.
19 And since I had what was a, quote, best practices
20 policy that was not decided by the school board and, in fact,
21 the best practices policy doesn't actually address prohibiting
22 Mr. Adams from using the boys' restroom -- I was repeatedly
23 told that it was an unwritten policy that prohibited him from
24 using the boys' restroom -- I felt it was important to know for
25 sure that The School Board of St. Johns County has taken the

1 position that Mr. Adams cannot use the boys' restroom at Nease
2 High School.
3 And so what I've decided to do -- and I appreciate
4 Mr. Mignon being here. I sent out an order the other day that
5 asked him to be here, and the question I'm intending to ask him
6 is this: Is the rule that prohibits Drew Adams from using the
7 boys' bathrooms at Nease High School the official policy of The
8 School Board of St. Johns County, Florida?
9 And depending upon what Mr. Mignon's answer to that
10 question is, this matter will either be resolved in my mind, or
11 we'll have some more discussion about it.
12 But that -- I thought it was important for me to put
13 on the record why I've been making such a big deal about this.
14 I'm not trying to get out of doing it. We decide
15 constitutional questions all the time, but we're not supposed
16 to do it unless it's required.
17 And a lot of the briefing from the school board,
18 rightfully so, keeps telling me that federal courts shouldn't
19 get involved in the business of schools, and the school
20 district should run its own affairs, and the local control of
21 schools is important, all of which I agree with.
22 And isn't that precisely the point? The point is
23 until and unless The School Board of St. Johns County can tell
24 the Court, "Yes, this is the policy we're enforcing," then I
25 was concerned that I might not have a proper controversy in

1 front of me.
2 If the school board chair tells me, "Yes, this is the
3 rule. This is our policy," then -- then my job then becomes
4 not to decide whether it's a good rule or a bad rule. That's
5 not my job. My job is to decide whether that rule, as
6 enforced, violates either Title IX, the education law, or the
7 Fourteenth Amendment Equal Protection Clause of the United
8 States Constitution.
9 And so you will never hear me and you will never read
10 an opinion from me whether I think this was a good rule or a
11 bad rule. That's not my job. That's the school board's job.
12 Setting policy -- setting policy for the school is the school's
13 job.
14 But my job is to decide whether the law has been
15 violated or the Constitution has been violated. And if it has,
16 it's my further job to say so, and if it hasn't, that's also my
17 job to say so. So that's what we're going to be doing here
18 today.
19 Now, Mr. Harmon, is Mr. Mignon prepared to answer the
20 direct question that the Court put in the order? And I put it
21 in the order because I wanted him to know exactly what I was
22 going to be asking him.
23 Is he prepared to answer that question?
24 MR. HARMON: Yes, Your Honor.
25 THE COURT: All right. Mr. Mignon, would you mind

1 just coming forward to the podium, and Mr. Harmon can come up
2 with you.
3 Good morning.
4 MR. MIGNON: Good morning. Good morning, Your Honor.
5 THE COURT: I really appreciate you coming up. I
6 know it was short notice, but it's kind of important.
7 MR. MIGNON: I understand.
8 THE COURT: Sure.
9 So you understand why I'm asking you this question?
10 MR. MIGNON: Yes.
11 THE COURT: Okay. And are you prepared to answer it?
12 MR. MIGNON: Yes, sir.
13 THE COURT: Okay. So, Mr. Mignon, can I just
14 establish for the record, are you the current chair of The
15 School Board of St. Johns County, Florida?
16 MR. MIGNON: Yes, I am, Your Honor.
17 THE COURT: Okay. And this is just my understanding,
18 but you tell me.
19 You actually are elected to the school board. Is
20 that correct?
21 MR. MIGNON: That is correct.
22 THE COURT: And then the school board members
23 themselves elect the chair? Is that right?
24 MR. MIGNON: Yes. That's correct.
25 THE COURT: Okay. All right. So you're elected by

1 your other members to be the chair.
2 MR. MIGNON: Right.
3 THE COURT: And when did you become the chair?
4 MR. MIGNON: I've been chair three different -- on
5 three different occasions. I'm in my twelfth year as a board
6 member.
7 THE COURT: Okay. Good. All right. Well, thank
8 you, sir. I appreciate you being here.
9 May I ask you this direct question: Is the rule that
10 prohibits Drew Adams from using the boys' bathrooms at Nease
11 High School the official policy of The School Board of
12 St. Johns County, Florida?
13 MR. MIGNON: Yes, it is, Your Honor.
14 THE COURT: Okay. Thank you very much, sir.
15 MR. MIGNON: Thank you.
16 THE COURT: Mr. Harmon, do you want to do anything
17 else for the record with regard to Mr. Mignon?
18 MR. HARMON: No, Your Honor. I think that was the --
19 the Court wanted to question him.
20 THE COURT: Ms. Borelli, do you have anything else I
21 need to do on that score?
22 MS. BORELLI: No, Your Honor. Nothing further.
23 THE COURT: All right. Mr. Mignon, you are, of
24 course, welcome to stay and I'd be delighted to have you stay,
25 but I appreciate you being here. And as far as I'm concerned,

1 you're free to go about your business, but I'm also happy to
2 have you stay and watch the argument.
3 I hope -- I hope it will be educational for all. I
4 know it will be for me. And thank you again for being here.
5 MR. MIGNON: Thank you.
6 THE COURT: All right. The Court -- and I know the
7 parties have been there way before I have been, but the Court
8 is satisfied that there is a controversy before the Court that
9 needs adjudication, and the Court will proceed to adjudicate
10 that controversy.
11 And so here's what I've done. I have -- of course, I
12 attended the trial and presided over it, and I didn't hesitate
13 to ask questions if I had them.
14 And let me just say something about questions. I
15 asked a lot of questions at trial, and I had that luxury
16 because it was a nonjury trial and I'm the one that's going to
17 be deciding the case. And so I didn't hesitate to ask
18 questions if I had them.
19 And I'm going to do the same thing today. And some
20 of the questions I'm going to ask, I think I already know the
21 answer to but I want to hear what your answer is. Some of the
22 questions I ask, I don't know the answer to.
23 Some of the questions -- because of the subject
24 matter, some of the questions are sensitive questions, and some
25 of them may touch on sensitivities.

1 But I can't worry about that. I just have to ask the
2 questions I'm going to ask, and I don't mean to be insensitive
3 to anybody. I don't mean to be ignorant. I don't mean to be
4 any of that. But this is an area that, just because of the
5 nature of it, anytime you're talking about sex-based issues,
6 there are sensitivities involved.
7 And -- but I've got to be able to ask the questions
8 that I need to ask, and I hope everybody will understand they
9 are only questions, and the answer from the Court will come in
10 the form of the Court's opinion.
11 So just because I ask a question doesn't mean I think
12 a certain thing or that I have a preordained idea about it.
13 The truth of it is I have none of that.
14 So what I did was I read all of the findings of fact
15 that y'all submitted, and I appreciate that. Of course, I'm
16 familiar with the trial record.
17 I've also read, probably over the last couple of
18 days, maybe -- I don't know, a lot of cases. There's a fair
19 amount of case law in this area already. And there's some
20 Supreme Court guidance, there's some Eleventh Circuit guidance,
21 and then there's circuit and district guidance from around the
22 country about how these matters have been handled in other
23 situations.
24 And one of the things I asked the parties to do in
25 their briefing was to tell me why a certain case that's been

1 handled a certain way in another part of the country, why that
2 should be -- why either that should be influential to me or it
3 shouldn't be influential to me, and the parties have attempted
4 to do that in their briefing. And I've read associated other
5 documents and things that came with the trial.
6 So I think I'm fairly conversant with the issues. I
7 also have prepared a list of questions to ask the plaintiff and
8 questions to ask the defendant and some of my own notes here.
9 And so what I'm going to do is this. Since the
10 plaintiff brought the case, has the burden of proof in the
11 case, and is seeking to change the status quo, I'm going to --
12 meaning the status quo of the rule, which is -- right now the
13 rule is that Mr. Adams cannot use the boys' restroom at Nease
14 High School.
15 And the plaintiff's suit is seeking to change that,
16 and they're the -- they brought the suit. So I'm going to let
17 them go first.
18 And what I'm going to do is -- one thing that you
19 didn't have when you wrote your findings of fact, you didn't
20 have the other side's findings of fact. And so one of the
21 things I'm going to be interested in hearing from you by way of
22 oral argument is some of the issues raised by your opponents
23 and why you are not persuaded by them, if that's your position.
24 So what I'm going to do is let you just start
25 talking, making your argument, making points you think are

1 important, and then I will not hesitate to interrupt you. And
2 in the course of that, I'm guessing I'm going to ask most of
3 the questions that I had.
4 At some point I'll take a break. I'll look at my
5 notes and see -- to make sure that I've covered the areas that
6 I want to cover, and I'll try to give you opportunity to make
7 sure that if there's some key point that I've left out, that
8 you get an opportunity to make that point.
9 So is it you, Ms. Borelli? Are you going to speak
10 for the plaintiff?
11 MS. BORELLI: Yes, Your Honor.
12 THE COURT: Come on up.
13 MS. BORELLI: Thank you.
14 Good morning, Your Honor. I'd like to begin today by
15 making some observations about some core areas of agreement
16 between the parties, because I think those areas of agreement
17 actually help focus the questions.
18 THE COURT: Stop right there.
19 MS. BORELLI: Yes, sir.
20 THE COURT: Can everybody -- can everybody hear me?
21 (Affirmative response.)
22 THE COURT: Can everybody hear Ms. Borelli?
23 (Negative response.)
24 THE COURT: Not so much. I don't know. We just had
25 our courtroom reconfigured, and we're still -- all right. Try

1 again.
2 MS. BORELLI: Thank you, Your Honor. I appreciate
3 that.
4 THE COURT: Can everybody hear better now, a little
5 better?
6 If we can bump -- is that it? Is it bumped up?
7 COURTROOM DEPUTY: Raise the podium just a little.
8 THE COURT: Thank you.
9 MS. BORELLI: Absolutely.
10 THE COURT: All right. And try to keep your voice
11 up, if you will.
12 MS. BORELLI: Thank you, Your Honor. I will.
13 So I was saying that I'd like to begin with some
14 observations about core areas of agreement between the parties
15 because I believe that those help focus the questions in front
16 of the Court.
17 First, one very key agreement between the parties is
18 that defendant agrees that its classification here is a
19 sex-based classification. And so defendant also agrees that
20 that means intermediate scrutiny must be applied to its
21 classification.
22 And under that level of review, defendant agrees that
23 it bears the burden of showing that the classification
24 substantially serves an important governmental interest today
25 and at the time that the classification was adopted.

1 The weight of the case law tells us how to conduct
2 this analysis. So we represented -- on the Court's list of
3 cases the Court wished to have addressed, there were three
4 military cases. There's a fourth one we cited in our brief
5 that hadn't yet been published on Westlaw.
6 But those four military cases all say very clearly,
7 under intermediate scrutiny, which they all applied, that when
8 the government tries to satisfy its burden under heightened
9 scrutiny, it cannot produce an interest that's hypothetical and
10 overbroad.
11 So, for example, in those cases it wasn't sufficient
12 for the government to say deployability. The Court said that
13 concept applies to every servicemember. That doesn't explain
14 why we should exclude transgender soldiers and servicemembers.
15 Similarly here, it isn't enough to say privacy, and
16 this is precisely what the second set of cases tells us, and
17 that's *Boyertown* and *Students and Parents for Privacy*.
18 Those are the two cases where plaintiffs sued seeking
19 to attack positive inclusive policies at schools. And those
20 decisions said your government interest has to be specifically
21 defined. There's no generic right of privacy, per se.
22 And when we look really carefully at what the parties
23 are asking for here, they're asking simply for the right of
24 privacy, purportedly, to be able to exclude transgender kids
25 from communal spaces like restrooms, and that's not a

1 recognized privacy right in any case.
2 And then, of course, we have --
3 THE COURT: Well, it is a recognized privacy right, I
4 think, to -- you and I could agree, I think, that it's
5 perfectly fine for Nease High School to say that boys should
6 use the boys' restroom and girls should use the girls'
7 restroom, right?
8 MS. BORELLI: Yes, Your Honor, and this case doesn't
9 challenge that norm in the slightest.
10 THE COURT: Right. So there is a privacy component
11 to restroom usage.
12 MS. BORELLI: Title IX allows for restrooms to be
13 separated.
14 THE COURT: Right.
15 MS. BORELLI: Yes, Your Honor.
16 THE COURT: So when you get to the core of it, I
17 think -- this is what I've been trying to think about --
18 isn't -- isn't the answer to this question as simple as this:
19 Drew says he's a boy. Nease High School says he's a girl?
20 Isn't that really what this is about? Because if
21 he's -- if he's a boy, he should be able to use the boys'
22 bathroom, but if he's a girl, he shouldn't be.
23 MS. BORELLI: Your Honor, on this record the Court
24 should find that he is a boy. The actual question in front of
25 the Court is whether there's a sex-based classification, but on

1 this record it's absolutely appropriate. We think the only
2 appropriate conclusion is that he's a boy.
3 THE COURT: So tell me how it's different than what I
4 just said. When you're talking about sex-based classification,
5 what -- how is that saying something different than what I just
6 said?
7 MS. BORELLI: The Court doesn't necessarily have to
8 decide what is sex writ large. That's not a question the Court
9 has to answer.
10 The Court simply has to ask is there discrimination
11 based on sex and can defendant produce an adequate government
12 interest to sustain it.
13 But on this record, it's more than appropriate. We
14 think the only --
15 THE COURT: You're going to have to say that again,
16 because I -- I understand you're going to say that on this
17 record I can find he's a boy, but you're saying I don't really
18 have to do that.
19 Why don't I have to do that? Because if I -- if I --
20 is there a -- is there a third category or -- I mean, I thought
21 the whole point of transgender is that you are -- you are, in
22 effect, a boy trapped in a girl's body.
23 Isn't that -- isn't that what we're talking about?
24 MS. BORELLI: I'm afraid I've confused the issues.
25 Let me distill it, Your Honor.

1 Yes. Drew is a boy. That's the only conclusion that
2 can be reached on this record based on the medical consensus,
3 based on the State of Florida's recognition of him, based on
4 his own testimony, the testimony of his parents, based on the
5 standards of care, the uncontested --
6 THE COURT: He's got a birth certificate that says
7 he's a boy. He's got a driver's license that says he's a boy.
8 The Florida High School Athletic Association says he's a boy.
9 He uses the boys' restroom when he comes in here to the federal
10 courthouse.
11 So -- but you heard the principal of Nease High
12 School say that she thinks he's a girl. And doesn't the best
13 practices policies and the other things -- don't they view
14 him -- and it's difficult to talk about pronouns with -- I
15 mean, we're talking -- but don't they -- isn't that what we're
16 talking about? That Nease High School and The School Board of
17 St. Johns County say that he's a girl, and if he's a girl, he
18 shouldn't be in the boys' bathroom?
19 MS. BORELLI: The evidence in this case shows that
20 he's a boy, however.
21 Your Honor, let's look for a moment at the *Glenn*
22 case.
23 THE COURT: Yeah.
24 MS. BORELLI: Mr. Sewell Brumby, in that case, viewed
25 Vandy Beth Glenn -- he didn't see her as a woman.

1 And the Court rejected that and said, "That's sex
2 stereotyping, and in fact, the supposed differences that you're
3 pointing to, those are actually evidence of sex stereotyping.
4 She just isn't the proper kind of woman, in your view. That is
5 sex discrimination, and you don't have an adequate interest to
6 justify that."
7 It's a similar concept here, Your Honor. Another way
8 to think of it is the school board has attempted to argue that
9 they can point to differences here.
10 They've argued in their findings of fact and
11 conclusions of law that Drew is not similarly situated. But,
12 of course, the crux of that inquiry is not can a person point
13 to any difference between two groups. That would defeat every
14 equal protection claim. It has to be relevant.
15 And here, the unrebutted evidence shows that in every
16 respect, in every material, relevant respect, Drew is a boy:
17 lives as a boy, acts as a boy, is recognized as a boy by
18 experts in the field, by the State of Florida, by the Florida
19 High School Athletic Association. They can't point to any
20 relevant difference, Your Honor.
21 So the only -- the only conclusion that can be
22 reached on this record, we respectfully submit, is that Drew is
23 a boy.
24 THE COURT: And do I -- is that a finding I need to
25 make? You were trying to tell me before that it wasn't, that

1 all I have to do is find, under equal protection analysis, that
2 it's a sex-based classification -- that being a transgender
3 person is a sex-based classification that deserves intermediate
4 scrutiny.
5 What am I saying when I say that? What am I -- how
6 is that different than saying he's a boy? That's what I'm
7 trying to understand.
8 MS. BORELLI: Well, that simply marches through the
9 prima facie analysis, Your Honor. But we do believe on this
10 record that the Court can and should make that finding, that
11 it's the only appropriate finding based on the evidence.
12 THE COURT: All right. And this is -- we'll probably
13 get back to that because the more I've been thinking about it,
14 I think -- it seemed like -- the more I thought about this, the
15 more I thought it just depends -- I mean, answers to all these
16 questions depend on whether he's a boy or a girl, because
17 nobody is saying that girls ought to be allowed to be in the
18 boys' restroom --
19 MS. BORELLI: Correct.
20 THE COURT: -- and nobody is saying that boys ought
21 to be allowed to be in the girls' restroom. So a transgender
22 person who has -- what's the word, trans- --
23 MS. BORELLI: Transitioned.
24 THE COURT: Transitioned, that's the word I was
25 trying to look for -- in the eyes of the law, is that person a

1 male then, a boy?
2 MS. BORELLI: Drew certainly is. That is the
3 position of the State of Florida.
4 And, Your Honor, I really believe, given the
5 unrebutted testimony and the reality of Drew's existence, that
6 there is no way to find that he is anything other than a boy.
7 He might be viewed as a certain subset, a certain type of boy,
8 but there is no way to make a finding that he is anything other
9 than a boy.
10 They've had their opportunity to try to rebut the
11 evidence, all of the evidence we've produced on that point in
12 this case, and they've failed because, in fact, it's not
13 possible to contest this evidence.
14 The State of Florida's position is what the State of
15 Florida's position is. The standards of care and the medical
16 consensus is what it is. And under any of those angles, Your
17 Honor, Drew is a boy. It is the only way he can be viewed.
18 An example of that, Your Honor, is we had testimony,
19 unrebutted testimony, about the standards of care. They are
20 preeminent. They are well recognized. They are uncontested.
21 And those standards of care recognize that when you
22 have someone with -- you know, sex is a multifaceted concept.
23 There are multiple sex-related characteristics for any
24 individual.
25 For a majority of us --

1 THE COURT: Let me ask you this. Mr. Adams testified
2 that he feels with every fiber of his being that he's a boy --
3 MS. BORELLI: Uh-huh.
4 THE COURT: -- and he also has taken physical -- he
5 has done things to his body to become, for lack of a better
6 term, more male, right?
7 MS. BORELLI: (Nods head up and down.)
8 THE COURT: I mean, he's had -- I think he's had
9 surgeries, right?
10 MS. BORELLI: Correct.
11 THE COURT: And he's done other things to -- and
12 before he did that, he bound himself up in order to look less
13 like a female, because he didn't want to look like a female,
14 was his testimony.
15 Is that a necessary incident of transitioning? What
16 I mean by that is this. Could Mr. Adams, in his -- still
17 testify, "In every fiber of my being, I'm a boy," but if he
18 looked and -- didn't do anything to change his looks and looked
19 like a prototypical female, if there is such a thing -- I
20 apologize if I'm --
21 MS. BORELLI: Not at all, Your Honor.
22 THE COURT: I'm just trying to do the best I can
23 here.
24 MS. BORELLI: Of course, Your Honor.
25 THE COURT: -- and he walked into the boys' bathroom

1 and he looked for all the world like what a girl would look
2 like, is that -- first of all, is that -- does that mean he's
3 not transitioned fully to being a boy? Is changing your
4 physical appearance a required incidence of transitioning?
5 What if you don't and you still think you're a boy?
6 Talk to me about that.
7 MS. BORELLI: Your Honor, the population of
8 transgender people that we're talking about do indeed
9 transition.
10 The testimony that we have from the experts is that
11 this is a population of people whose persistent, insistent, and
12 consistent experience of their gender identity is that they are
13 male or female, as their gender identity may be.
14 And the standard of care and what's involved in
15 aligning one's life to live in every respect as the male or
16 female that you are does indeed involve social, medical, and
17 legal transition. Gender identity and expression often go hand
18 in hand.
19 And, Your Honor, I would refer to some of the
20 testimony that we heard from Principal Kefford and Ms. Pope and
21 also Dr. Ehrensaft, which is that the entire point is to help
22 other people see you as the boy that you are, for a transgender
23 boy, and that involves transition. It involves cutting one's
24 hair and wearing stereotypically male clothing.
25 The medical transition might vary a bit. Some people

1 might not be ready for surgery before the age of 18. That's
2 why we have skilled medical professionals following these
3 established standards of care to provide individualized care.
4 But in every respect the goal is to align one's lived
5 experience and one's appearance. That is the goal of
6 transition, our experts testified, so that other people can
7 understand you to be the boy that you are.
8 THE COURT: Does -- and this is a question. And I
9 apologize. I had my microphone off.
10 This is a question. If you transition -- let's say
11 in this case you transition from being a female to a male and
12 you are -- so you're transgender, you transition, and now
13 you -- just as Mr. Adams testified, he considers himself with
14 every fiber of his being to be a boy, and he's gone to physical
15 lengths to conform his body to that. Does that have anything
16 to do with your sexuality?
17 In other words, can you be transgender -- can you
18 transition to become a boy and then you're homosexual? Are you
19 always heterosexual? Is there -- does one thing have to do
20 with the other? How does that work?
21 MS. BORELLI: They're not necessarily related in any
22 way, Your Honor. So, of course, everyone has a gender
23 identity. Everyone has a sexual orientation, the type of
24 person that they might form romantic attachments to and have
25 relationships with.

1 So it could be, for example, that if a person was a
2 female and was attracted to females -- and I'm also not being
3 very precise, Your Honor, so I'll ask for your indulgence.
4 If someone who sex assigned at birth was female and
5 that individual knew they had an attraction to females until
6 they understand and come to accept their gender identity, until
7 they realize that they have permission in society to live as
8 the gender that they truly are, they might think of that as
9 same-sex attraction.
10 At the point that that person understands "This is
11 why I've been depressed. This is why I've been suicidal. I'm
12 male and I haven't been able to live as who I am," once that
13 person transitions, they may continue to be attracted to
14 females and then they identify as heterosexual.
15 The bottom line is sexual orientation really is
16 distinct from gender identity.
17 THE COURT: And I recognize there wasn't a whole lot
18 of testimony about this at trial, but it's something that --
19 because what we haven't talked about yet -- we're going to --
20 is the privacy issues.
21 And the -- we've focused on Mr. Adams transitioning
22 and so forth, but we haven't focused on the stated reason that
23 the school board has its policies, and that has to do with the
24 interest of others who come in contact with Mr. Adams. And so
25 we'll talk about that.

1 But one thing that I heard a little bit about at
2 trial, and I didn't -- I don't -- and there wasn't much record
3 on it and I wanted to see if it has anything to do with this
4 case, and that's the concept of gender fluidity.
5 What is gender fluidity?
6 MS. BORELLI: Your Honor, there's a definition in
7 Plaintiff's Exhibit 66, which is the Broward guide. And the
8 definition provided in that guide is simply that it's somebody
9 who might have a more expansive concept of their gender
10 identity.
11 Frankly, Your Honor, this is not a new idea. The
12 label might be new. We've had tomboys forever. And so
13 although there was some innuendo about it at trial, as the
14 Court remarked during trial, "I haven't been given any evidence
15 on this point." And the findings of fact and conclusions of
16 law from defendants actually underscore that because the only
17 evidence that they point to is our exhibit, the Broward
18 guidelines.
19 And we had not one but two witnesses from Broward
20 testify there are no issues. That is exactly what the task
21 force found. Ms. Smith was pressed twice, when she raised this
22 idea, "And did the task force uncover any issues, any -- any
23 problem with this concept?" And she said no, after two years
24 of very robust research.
25 And the last point I'd like to make sure that I make

1 is this is not the population that we're talking about, however
2 one reads that definition. Transgender people are persistent,
3 insistent, and consistent in their gender identity. All of
4 the --
5 THE COURT: So you're saying that this -- because
6 just to the untrained ear, which is mine, the concept of gender
7 fluidity might lead one to believe that you -- your gender may
8 not always be -- your gender identity may not always be the
9 same, and therefore, that would raise issues about which
10 bathroom he's supposed to use.
11 I mean, that's what -- that's what the -- that's what
12 I hear or that's what I conjure up in my mind when I think
13 about gender fluidity. You're saying to me that's not exactly
14 what it is, and you're also saying to me that has nothing to do
15 with this case.
16 MS. BORELLI: Precisely right. And I do think
17 defendant knows that because in all of the sample policies that
18 the task force looked at, there's a definition of individuals
19 with a consistently asserted gender identity.
20 We heard testimony from Dr. Aberli -- and I think
21 this is true of every policy in the record -- when a person has
22 a consistent gender identity and they transition and they get
23 permission to use the restroom matching their gender identity,
24 that is the restroom they must use under these policies. And,
25 indeed, St. Johns County's guidelines for LBGT students already

1 incorporates that definition.
2 The *Boyertown* case was presented with sort of similar
3 innuendo about this and said -- on a record that looks much
4 like this one except without a trial, just an evidentiary
5 hearing for a preliminary injunction, the Court said there is
6 no suggestion here that that has anything to do with
7 transgender students -- for example, like Drew -- or that that
8 provides any reason whatsoever to discriminate against him.
9 It's simply a nonissue. If it were one, they would
10 have produced evidence, and they didn't.
11 THE COURT: All right. And I'm -- I don't know why.
12 I'm sorry. My microphone keeps clicking on and off here, so I
13 apologize.
14 I don't know if this -- two other questions about
15 that. And I recognize that there's not a lot of evidence on
16 this, but it's kind of important for me to -- as I'm thinking
17 about this, to make sure I'm either understanding or separating
18 out what I'm not understanding.
19 And there were two other references during trial that
20 are in the same genre of fluidity or -- what does the term
21 "intersex" mean? What is that?
22 MS. BORELLI: So, Your Honor, this is a population
23 that Dr. Adkins treats regularly and has for years. And she
24 testified at her trial preservation deposition about this
25 population being helpful because it helps us understand the

1 primacy of gender identity in understanding what a person's sex
2 is.
3 So people who are intersex, it's really a collection
4 of conditions. It can be something like roughly two dozen
5 different conditions where the very sex-related components of a
6 person's body may not line up and so somebody whose chromosome
7 is XXY, a set of chromosomes, or somebody who might have
8 certain internal structures that don't necessarily match their
9 gender identity or their external structures.
10 And she said in her testimony there's actually an
11 example of one particular intersex condition that's especially
12 helpful here because it makes so stark how critical gender
13 identity is and that gender identity can't be ignored or
14 overridden, and indeed it's unethical to try to do so.
15 And that is a condition called cloacal extrophy.
16 These are individuals who may be born really without any
17 genital structures, external or internal in their abdomen, and
18 even sometimes without a hormonal profile that doctors might
19 use to try to make a best guess at birth.
20 And she said when these individuals have had their
21 sex assigned at birth in a way that didn't match their gender
22 identity, there's documented, you know, depression, extreme
23 psychological harm, and suicidality. So that tells us that
24 gender identity is core.
25 In the same way, Your Honor, if somebody had an

1 accident and no longer had the same genital structures or any
2 genital structures after an accident, they wouldn't suddenly
3 become genderless. They would continue to be the same gender
4 that they always were.
5 THE COURT: All right. Last question in this area.
6 It is -- and, again, I don't even recall if there was evidence
7 about this, but it's just something I want to understand
8 because when you're talking about -- when you're talking about
9 bathroom usage, I think you and I could agree it's good to
10 know -- I mean, it's appropriate that we know which bathroom
11 somebody should be using -- right? --
12 MS. BORELLI: Yes.
13 THE COURT: -- unless we go to gender neutral and I
14 want to ask you about that.
15 But first I want to -- and, again, I apologize for my
16 relative ignorance on this, but I just want to understand.
17 It is in the lexicon, or at least in some lexicons
18 these days, that there are certain people who are asking that
19 they not be addressed by pronouns that identify them as either
20 male or female, right?
21 MS. BORELLI: Uh-huh.
22 THE COURT: I don't exactly know how it works, but
23 I -- and so tell me what that is and tell me how that would
24 bear on an issue like we have in this case.
25 MS. BORELLI: So, Your Honor, somebody who might ask

1 to be addressed by gender-neutral pronouns might be a person
2 who, you know, has a gender identity but recognizes -- for
3 example, if this is a person whose gender identity is female,
4 they might feel like there are aspects of their presentation or
5 their expression that are a little bit more masculine.
6 Again, in some ways I keep going back to the idea
7 that these concepts aren't new, necessarily. We've had tomboys
8 for a really long time. But that's somebody who feels like,
9 "There are aspects of me that are feminine, there are aspects
10 of me that are masculine, and I'm comfortable with
11 gender-neutral pronouns."
12 That person may still have a core gender identity,
13 and if they have a core gender identity, that is the restroom
14 that they should use, and that is straightforward and clear.
15 And this goes back to where you started, which is we have
16 agreement that we should be clear on which restrooms people
17 should use.
18 Somebody who might not be comfortable using gendered
19 restrooms could choose to use gender-neutral restrooms, and the
20 school has said, "We have plenty of those, and that's an option
21 for any student."
22 Regardless, Your Honor, that is very different from
23 transgender kids like Drew, and that's all this case is about.
24 THE COURT: You know, I understand that, and I'm not
25 trying to overplay this.

1 But, you know, if I'm running the school system
2 and -- and I -- and this is all kind of new to the school
3 system, because the questions I'm asking you are questions that
4 people of good faith are asking, of goodwill.
5 These aren't necessarily -- these aren't hostile
6 questions. These are just trying to understand in a world that
7 does appear to be changing, right?
8 MS. BORELLI: (Nods head up and down.)
9 THE COURT: And so -- and so the school system,
10 though, they don't get to sit around and think about the great
11 thoughts. They've got to run a school system, and they've got
12 to decide what we're going to do.
13 And they've got -- and not only that, they're not
14 dealing with adults; they're dealing with children. And so
15 they've kind of got to know what the rules are.
16 And so I guess the question is -- I understand that
17 Mr. Adams is transgender. I understand that you want to limit
18 it to what this case is, and I appreciate that.
19 But would relief in this case ipso facto or lead to
20 what sometimes in the law is referred to as a slippery slope
21 where we rule -- we make a ruling, and then all of a sudden
22 we're on this slope and we're just -- we've just got to keep
23 going and there's no principled way to stop?
24 MS. BORELLI: Let me be as emphatic as I can. The
25 answer is absolutely not.

1 As the witnesses in this trial testified, and as the
2 school amicae on the amicus brief have all said, "This
3 reifies -- Drew's claim reifies the concept of sex-separated
4 restrooms. It doesn't challenge that norm. It is based on
5 that norm."
6 And the amicae and the witnesses said, "This is about
7 having all the boys go to the boys' restroom and all the girls
8 go to the girls' restroom." If anything, this reifies the
9 concept. It's actually defendant's policy that I think really
10 blurs things in very odd ways.
11 The defendant has been very unequivocal that they
12 think it's perfectly appropriate for a transgender boy to go
13 into the girls' restroom, even if, as Mr. Adams has, that child
14 has had every form of medical care available to them at their
15 age, even if they're -- they have a deep voice, if they have
16 facial hair, if all of their peers recognize them as male,
17 they're just fine with that individual going into the girls'
18 restroom.
19 Our view is simply all boys go into the boys'
20 restroom, all girls go into the girls' restroom, simple as
21 that.
22 THE COURT: All right. And let me ask you and then
23 I'm going to let you talk for a little bit, because I know
24 I've -- but obviously -- two other questions I want to ask.
25 One is, is the scientific evidence -- and I don't

1 know what I have at trial. I guess I've got the experts.
2 But is transgender transitioning -- if a person has
3 transitioned, is that immutable? Is that what they are going
4 to be the rest of their lives?
5 MS. BORELLI: That is the expert testimony. Gender
6 identity is immutable. It is not something subject to
7 voluntary change, and that's precisely why the medical
8 consensus is that it is unethical to try to force conversion on
9 transgender youth, to try to force them to live as their
10 birth-assigned sex.
11 That's been tried, with great psychological harm and
12 damage to these young people. And so that practice isn't even
13 tolerated in the medical community any longer. So indeed,
14 being transgender is immutable.
15 THE COURT: Let me ask you about accommodation for a
16 moment. And I thought -- I've been thinking about this in
17 terms of -- and this really gets to the state's interests and
18 how the state implements its interests.
19 But if -- there are certain disabilities or --
20 disabilities is the wrong word. There are certain categories
21 of persons, and disabled is what I'm thinking of, where we say,
22 under the law, "We want to accommodate you in a way that gives
23 dignity to your situation, but we can't give you exactly what
24 other people have." And I'm thinking of persons who are
25 physically disabled.

1 People who are physically disabled, the remedy for
2 that has been to create a separate or different bathroom
3 situation for them than the average person in order to
4 accommodate their disability. It's either a bigger stall --
5 well, you know what it is.
6 I mean, and in many places there's men's room,
7 women's room, and in the middle disabled, right? And that's
8 where disabled people can go and have the proper grab bars and
9 all that.
10 And so the reason I'm bringing all that up is that
11 there is a concept that, even if we recognize that a person has
12 a situation that we need to address, sometimes we can address
13 that lawfully by an accommodation. And in this case the
14 accommodation that Nease has made is that it created all these
15 gender-neutral bathrooms.
16 And as you probably know, I went out there with
17 Ms. Doolittle and Mr. Harmon, and I may -- I don't know if I'm
18 the only person that has ever done this, but I have now been in
19 every single bathroom in Nease High School, every single one of
20 them. And we made sure nobody was in there before we went in,
21 and we went in. I looked at all of them.
22 And what they've done is -- and I think -- I don't
23 know the evidence says this exactly, but in response to this
24 issue, they have expanded pretty greatly the number of
25 gender-neutral bathrooms. They're all new, or most of them are

1 new. They're really nice. They are arguably much nicer than
2 the existing boys' and girls' restrooms, which frankly are
3 showing their age.
4 And, yes, do you have to walk another minute or so to
5 get to one of them from some places? And most of that -- most
6 of that was because they're in these portables, which I don't
7 think they really want to be in, but I guess they don't have
8 the funds to actually build buildings.
9 And so most of the walking is from the portables to
10 the more centrally located to get a gender-neutral bathroom.
11 But frankly, when you're out at the portables, even if you're
12 using the boys' and the girls' bathrooms, it's no great shakes
13 out there. The portables is -- you get worse bathroom service
14 across the board if you're in the portables than if you're in
15 the central campus, no matter what -- no matter who you are.
16 And so I guess I found myself wondering why isn't
17 that -- Drew has -- Drew wants to be treated as a boy. The
18 school district has these concerns. Other students and parents
19 have expressed those concerns. Here's a way to accommodate
20 everybody's interest in a reasonable way. That's a -- there's
21 a question mark on the end of that.
22 Why is that not sufficient?
23 MS. BORELLI: Because we are governed by not a
24 separate but equal clause but the Equal Protection Clause. And
25 let me go back for a moment to where the Court began, which was

1 with the example of accommodations for people who are disabled.
2 Sometimes separate spaces are created because it
3 isn't possible to include the accommodations necessary in a
4 girls' restroom or a boys' restroom, for people who are
5 wheelchair users, for example. Plenty of times that is
6 possible, and that's exactly what's done.
7 What could never be done under the law would be to
8 say, "Some people don't like you, and even though you're fully
9 capable of using these facilities just like everyone else,
10 because some people don't like you, you can't go in there any
11 longer. And we'll make sure that the place that you can go is
12 nice and comfortable, but you can't -- you don't belong in
13 there."
14 The law would not allow that, Your Honor. There's
15 no --
16 THE COURT: I don't know that that's quite a fair way
17 to say it, that they don't like Mr. Adams. I think that they
18 would say that they have safety and privacy concerns.
19 Now, whether they -- whether those concerns are valid
20 or whether they actually have any evidence of them, that's a
21 different question, and Mr. Harmon and I are going to be
22 talking about that. But I don't think -- I think it's probably
23 not a fair characterization to say, "We don't like you."
24 In fact, and this is another thing I'm going to talk
25 to Mr. Harmon about, Mr. Adams seems to be a well regarded and

1 popular student, who is well known and well liked by faculty
2 and students alike. That was my impression, anyway.
3 Am I wrong about that?
4 MS. BORELLI: No, I don't think you are, Your Honor.
5 Let me restate. I take the Court's point. Let me put it a
6 different way.
7 Ms. Smith testified that there was a concern that
8 girls might want to put on makeup in the girls' restroom and
9 might feel uncomfortable. There might be a sense of
10 discomfort. So let's talk about that concept for a moment.
11 An unfounded private fear of the unknown or sense of
12 discomfort isn't even a legitimate government basis, and the
13 law is relatively clear on that.
14 But what we have here is a record that actually shows
15 that Drew used the boys' restroom for six weeks with no issues,
16 no complaints from any boy who shared the restroom with him.
17 And Principal Kefford said, "I've never seen a child
18 with an objection. It tends to be the adults who have a fear
19 of the unknown." She said, "We fear what we don't know."
20 But that, in and of itself, can never form the basis
21 for separating or segregating a group of children out from
22 their peers. That's covered by the amicae as well which said,
23 "It tends to be the grownups for whom this might seem a little
24 bit newer."
25 But as these policies operate and people can see that

1 there are no privacy concerns, there are no safety concerns,
2 things just work smoothly and it's fine.
3 THE COURT: All right. I'm going to -- because we're
4 going to -- I'm going to give you five minutes just to talk,
5 because I need to make sure I give Mr. Harmon equal time, and
6 I'm sure there's something you want to say that I have not let
7 you say.
8 So I'm just going to let you talk for five minutes,
9 and then we'll see where we are. Okay?
10 MS. BORELLI: Thank you, Your Honor.
11 So let me pick up where I left off earlier. Again,
12 there's agreement between the parties. This is sex
13 discrimination. Intermediate scrutiny applies, at a minimum.
14 The government bears the burden for producing, you
15 know, an adequate safety or privacy interest. The military
16 cases say can't be hypothetical, can't be overbroad, can't be a
17 broad concept that applies to everyone. Can't be
18 deployability. That applies to everyone.
19 *Students and Parents for Privacy* and *Boyertown* say
20 it's got to be specifically identified. Privacy isn't enough.
21 What kind of privacy interest? Really what you're asking for
22 is a privacy right to exclude this group of kids. That's not
23 adequate. That's not recognized in any of the cases.
24 And, Your Honor, we would submit it's certainly not
25 in any of the cases in the defendant's findings of fact and

1 conclusions of law. None of those recognize some right of
2 privacy to exclude transgender people just because we think
3 that they're different or we don't understand them.
4 So, Your Honor, on this record defendant has not
5 carried its burden to produce any specifically defined,
6 adequate interest, let alone one that's supported by the record
7 evidence.
8 We talked briefly about privacy. I think it bears
9 emphasis again that they testified that they had a task force
10 study these issues robustly for at least two years and could
11 find zero problems with any school, any district that treats
12 their transgender students equally.
13 So for the right to privacy, I think when we
14 carefully define what it is that they're seeking here, that's
15 not a recognized right of privacy. But even setting that
16 aside, there is no adequate tailoring between whatever that
17 privacy interest is and this classification.
18 We have admissions in the record about the private
19 and enclosed nature of restrooms. We have admissions -- or I
20 should say we have unrebutted testimony that transgender
21 students tend to be very modest by their nature because, again,
22 the entire point of this very extensive, in some instances
23 quite burdensome process of transitioning is to help people see
24 you as the girl or boy you are.
25 So the last thing any transgender child is going to

1 do is engage in misconduct or expose themselves in a way that
2 contradicts that gender identity.
3 And finally, we have evidence, actually, that not
4 only does the classification not -- it's not furthered by any
5 privacy interest, it actually undermines privacy because we
6 have a singling out of these students. They can't go into the
7 restrooms with their peers.
8 Let's take Ms. Smith's example of going into the
9 restroom to put on makeup. Now no transgender girl can do that
10 with her friends, and when she can't go in with them, she has
11 to explain why.
12 In the lunchtime hour, we have all of these students
13 corralled three days a week. No gender-neutral restrooms was
14 what the testimony was. Any transgender student who wants to
15 go to the bathroom during lunch has to get special permission
16 and leave the area. No one else can. That doesn't further
17 privacy. It undermines it.
18 On safety, Your Honor, the testimony was that the
19 primary interest in safety -- primary interest -- is to protect
20 transgender students because they can be a vulnerable
21 population. And the testimony was we want to protect them from
22 bullying or being made fun of, I think, was how one witness put
23 it.
24 I think it's really important to note that
25 Defendant's Exhibit 65, which is their student code of conduct,

1 has a very specific section that covers bullying. And
2 absolutely nothing in that section says, "When you are the
3 victim of bullying or when we are afraid that you will be, you
4 must be segregated from their peers." To the contrary, it
5 specifies a range of discipline for bullying activity.
6 So coming up with a special rule for transgender
7 kids, I would say, Your Honor, I think it dresses this
8 exclusion up to give it the appearance of concern for these
9 students, but, again, there's no evidence Drew was bullied or
10 faces any risk of that.
11 As the Court noted, he's well liked. He's popular.
12 And so safety isn't an interest here that's served by this
13 classification.
14 And finally, I would just add that Title IX -- the
15 Title IX claim succeeds here for all of the same reasons that
16 *Glenn* tells us, that this is a Fourteenth Amendment violation
17 as well.
18 THE COURT: All right. Three questions and I'm going
19 to let you sit down.
20 Title IX. Interestingly, your opponents led with
21 Title IX and then followed up with equal protection. You led
22 with equal protection and then went to Title IX.
23 I get the feeling that they think they've got the
24 better deal on Title IX and are a little worried about equal
25 protection, and you think you've got a better deal on equal

1 protection and you're a little worried about Title IX.
2 And the reason you'd be worried about it is because
3 the Obama administration came out with its guidance, and then
4 the Trump administration has now come out with essentially
5 contrary guidance, and now what's a court to do?
6 And I guess the Court goes back to just looking at
7 the statute and deciding what it -- you know, whether it's
8 covered, but I have to say that any Title IX ruling now seems
9 fraught.
10 MS. BORELLI: So I will say, Your Honor, actually,
11 for us, the reason we structured our briefs the way we do is
12 because we take a lesson from *Glenn*. We think the statutory
13 claim is actually much easier.
14 THE COURT: Okay.
15 MS. BORELLI: *Glenn* said --
16 THE COURT: So I misread why -- I just thought it was
17 interesting that -- I would have thought both of you would have
18 been talking about it in the same order, but you weren't.
19 MS. BORELLI: I understand why they don't want to
20 talk about a constitutional claim, Your Honor.
21 But *Glenn* actually says relying interchangeably on
22 equal protection and Title VII authorities -- towards the end
23 of the opinion the Court says, "If this were a Title VII case,
24 the analysis would end here," because there isn't any analysis
25 of government interest. It's a sex-based classification. We

1 think that's more straightforward.
2 As for the guidance and the rescission and all of
3 that, I would point the Court towards *Minersville* because I
4 think it has a particularly clear distillation of these issues.
5 The Court looked at that question and said, "Well,
6 there was a substantive set of interpretive guidance under the
7 Obama administration, then it was rescinded." The decision
8 doesn't take any substantive position. It doesn't even
9 affirmatively contradict it. It simply says, "We withdraw
10 further study."
11 And what remains is what's always been there, which
12 is the statutory claim.
13 THE COURT: All right. I'm going to have to stop you
14 right there on that point. I apologize.
15 Your opponent says if I rule in your favor on the
16 Equal Protection Clause that I'm necessarily having to find
17 Title IX and the implementing regulation -- I guess it's
18 106.33 that says you can have sex-segregated bathrooms, I'm
19 necessarily finding those unconstitutional.
20 True or false?
21 MS. BORELLI: False.
22 THE COURT: Why?
23 MS. BORELLI: I can't see why that would be, Your
24 Honor. The regulation --
25 THE COURT: I'm not sure I see it either, but I

1 wanted to ask you.
2 MS. BORELLI: I appreciate that, Your Honor.
3 The regulation that allows sex-separated restrooms
4 and locker rooms and showers is permissive, and *Students and*
5 *Parents for Privacy* points this out and draws it up in a
6 particularly clear way, I think.
7 That case says the regulation is permissive. All it
8 says is schools may have sex-separated spaces. They're not
9 even required to. Title IX doesn't even require it. So --
10 THE COURT: All right. I appreciate that answer.
11 Last question. Your opponents also say that because
12 we're in Florida, the rulings in other courts around the
13 country are different because in Florida we have a
14 Constitution, a Florida Constitution, that specifically
15 protects the right of privacy.
16 That right of privacy protects the rights of students
17 to use a bathroom of their sex without having a person who they
18 deem to be not of their sex in the same bathroom. And so
19 Florida -- so a ruling under Florida -- a ruling with Florida
20 involved should be different than a ruling in Pennsylvania or
21 the other -- the Seventh Circuit or anyplace else.
22 Talk to me about that for about a minute.
23 MS. BORELLI: Okay. Notice, Your Honor, that they
24 haven't articulated why they even believe that there would be
25 such a conflict, and I think it's the same error that carries

1 through the other analysis, which is they'd like to project
2 biological sex on to this provision of law.
3 Of course, the uncontested testimony in this case is
4 that that's -- that's not a medically coherent term. It's not
5 something medical professionals think is even accurate. But I
6 very much doubt it's in the Florida Constitution.
7 More importantly, even if there were a conflict, and
8 I'm skeptical, the supremacy clause, of course, would control.
9 The Florida Constitution can't opt St. Johns County out of the
10 Fourteenth Amendment or Title IX.
11 THE COURT: Thank you.
12 MS. BORELLI: Thank you, Your Honor.
13 THE COURT: So, Mr. Harmon, we're going to go ahead
14 and get started with you, but I'll probably take a break about
15 11:00 o'clock to let everybody stretch their legs, but let's go
16 ahead and get started.
17 I'll let you just start talking, and then, as you
18 see, I don't have any hesitancy to interrupt.
19 MR. HARMON: Thank you, Your Honor.
20 Good morning.
21 THE COURT: Good morning.
22 MR. HARMON: We meet again --
23 THE COURT: Yes.
24 MR. HARMON: -- all here in the same place.
25 THE COURT: The last time that you and I were

1 together with Ms. Doolittle, we were touring bathrooms.
2 MR. HARMON: Yes.
3 THE COURT: So go ahead.
4 MR. HARMON: It does seem like *déjà vu*.
5 I just want to make one observation before I jump
6 into really addressing some of the key issues, and it's
7 something just to consider as we work through today and in the
8 Court's analysis.
9 When we did the tour of the bathrooms at Nease, every
10 bathroom that we went into, single stall, boys or girls, we
11 knocked to make sure nobody was in there. We had -- even in
12 the girls' bathroom, I think, we had Principal Kunze go in
13 first to make sure there were no girls in there.
14 And why is that? Because when you go into a bathroom
15 of the opposite sex, there's a privacy concern. There's a
16 hesitation that when you walk into that bathroom, there
17 shouldn't be women in there with you.
18 So I just want that to kind of resonate as I work
19 through a little bit and we get to the privacy issues and we
20 get to the different arguments that the school board has made
21 as to why separating bathrooms on sex and -- why sex and what
22 it means is necessary.
23 But I do want to address one other thing, the
24 elephants in the room, in this case. It was briefly touched on
25 by plaintiff in oral argument today, emphasized a little more

1 in written argument, and that's *Glenn v. Brumby* and what that
2 means and what the implication of that is in this particular
3 case.
4 *Glenn v. Brumby* is an Eleventh Circuit opinion that
5 involved, as Your Honor knows, a transgender female who worked
6 for a legislator, Brumby. And in that case the Eleventh
7 Circuit came out with this statement, that the very act of
8 being transgender goes against gender norms, against gender
9 stereotypes.
10 And plaintiff has taken that single sentence and
11 argued to Your Honor that simply being transgender means you're
12 protected from sex stereotyping, regardless of how you look,
13 how you talk, how you walk. Just being transgender means
14 you're protected from sex stereotypes. That's the extension
15 that they have made with *Brumby*.
16 That's what *Whitaker* did, and I believe that's also
17 what *Minersville* did, is they take this statement that the
18 Eleventh Circuit quoted from a law review article.
19 What is ignored, and I think what plaintiff has not
20 addressed and what I think needs to be emphasized, is
21 regardless of that quote, the *Glenn Brumby* court, when it goes
22 through, in the opinion it says, you know, "Here's the facts.
23 Here's what being transgender means. Here's why being
24 transgender goes against typical norms."
25 But the Court still looked at the facts of the case

1 to say, "Okay. Do we have a scenario here where there was
2 impermissible sex stereotyping?" And it happened in that case.
3 The Court said that the plaintiff in *Glenn* was
4 discriminated against because of failure to adhere to gender
5 stereotypes.
6 THE COURT: Well, they say, and I'm looking at page
7 1317: "Accordingly, discrimination against a transgender
8 individual because of her gender nonconformity is sex
9 discrimination, whether it's described as being on the basis of
10 sex or gender."
11 So what's the ambiguity there --
12 MR. HARMON: Yes.
13 THE COURT: -- or what's the difference there that
14 you're talking about?
15 MR. HARMON: Looking at page 1320 on to 1321 --
16 THE COURT: Okay.
17 MR. HARMON: -- the Court says, "We now turn to
18 whether Glenn was fired on the basis of gender stereotyping."
19 So it still looked at the case. Despite what Your
20 Honor just quoted, it still said, "Okay. Here's this concept.
21 Let's actually look in this particular case whether there was
22 an issue of gender stereotyping." And they said yes, there
23 was, because there was direct evidence of it.
24 The legislator said, "I don't like the way you talk.
25 I don't like the way you dress. Your appearance bothers

1 people." There was direct evidence of actual discrimination in
2 that case. That's not the facts here.
3 THE COURT: Well, isn't it -- isn't it kind of the
4 facts?
5 MR. HARMON: In our particular case?
6 THE COURT: I mean, isn't it that -- isn't it that
7 The School Board of St. Johns County doesn't want Drew Adams in
8 the boys' bathroom because they view him as not being a boy,
9 and there's fear, safety, and privacy concerns that flow from
10 that?
11 Isn't that -- I mean, that's the reason for the rule,
12 such as it is. Mr. Mignon has now told me it's the official
13 policy of the St. Johns County School Board, so I'm glad to
14 hear that. Of course, it's not written down anywhere.
15 But isn't that what is happening here?
16 MR. HARMON: That's the issue, but look at the facts
17 of this case. *Glenn* said there was sex stereotyping --
18 THE COURT: Right.
19 MR. HARMON: -- because of all of these direct
20 comments attributable to the defendant in the case: The way
21 you walk, the way you talk, the way you act.
22 Even the *Glenn* court, when it found there was gender
23 stereotyping, cited to other opinions where it was based on
24 walk, talk, act.
25 Looking at the facts of our case, plaintiff does not

1 dispute that the school board treated Mr. Adams as a male in
2 all respects other than the bathroom, and I know there's been a
3 dispute about the official records.
4 So we're looking in this particular case. The only
5 evidence plaintiff has presented on their sex stereotyping
6 theory is that we have not permitted plaintiff to use the
7 bathroom.
8 So the question is why? And the why is what the
9 school board argued is the physiological differences between
10 males and females, and that's not discrimination.
11 I mean, the *VMI* court, the *INS* court all said that
12 there are differences that are enduring and were different.
13 THE COURT: I'm not an expert on sex change, but I've
14 had actually a number of criminal defendants in my court over
15 the years who transitioned from being men to women, and some of
16 them actually had surgery to remove their male sexual organ and
17 create -- I'm not sure what the name of the surgery is, but you
18 know what I'm talking about.
19 So when you're talking about physiological
20 differences, in a situation like that, if such a surgery had
21 occurred, would the policy still require -- what would the
22 school district's policy require for a transgender female
23 who's -- no, it would be a male transitioned to a female.
24 How would that work --
25 MR. HARMON: I follow you.

1 THE COURT: -- if you're really talking about
2 physiological differences?
3 MR. HARMON: I follow Your Honor. I mean, when we're
4 looking at physiological differences, that's the why are we not
5 letting the sexes share bathrooms?
6 THE COURT: Right.
7 MR. HARMON: It's based purely on physiological
8 differences. That has nothing to do with sex stereotyping.
9 But to your question, what if a biological male has
10 the penis removed and goes through full -- I know we use it
11 informally, top and bottom surgery, right?
12 THE COURT: Right.
13 MR. HARMON: Changes into that, into a female by
14 appearance.
15 I would represent that there's been no evidence that
16 that's ever happened in a school system that's before your
17 court. None. But let's assume that's the case.
18 The policy that is before Your Honor is not perfect,
19 and to survive intermediate scrutiny, it doesn't have to be.
20 So picking one hypothetical of a minor who may go
21 through full sex-change surgery -- which I believe plaintiff's
22 evidence is that that's generally not something that's looked
23 at before the age of 18 -- could happen. How would the school
24 board react to that? I can't tell you because the school board
25 would have to make that call.

1 And that's why I say this policy is not perfect. And
2 I understand plaintiff and everyone is highlighting the
3 imperfections in it. What if there's a sex change?
4 But in terms of the intermediate scrutiny, I still
5 think it survives that.
6 THE COURT: Well, if -- remind me what the term
7 that's used -- and I apologize. I don't have your best
8 practice and policy right in front of me. I should have.
9 What's the term used in the best practices policy?
10 Is it biological sex? Is that right?
11 MR. HARMON: I think that's correct, yes.
12 THE COURT: And what does that mean? Is that the
13 same as physiological?
14 MR. HARMON: Yes, because I think the testimony and
15 the evidence presented to Your Honor was -- this is going from
16 plaintiffs, is sex is generally determined at birth by what
17 doctors look at. I think that's even what Dr. Adkins said.
18 THE COURT: Right.
19 MR. HARMON: It's based on the reproductive organs,
20 and in, you know, the overwhelming majority of cases, that is
21 accurate.
22 So when the school board says, "We -- our policy is
23 based on biological sex," it is based on that iden- -- what a
24 doctor decides the sex is.
25 THE COURT: So this is a question that, as I was

1 preparing -- I want to -- and I just want to make sure I get to
2 it because it's kind of been bothering me a little bit.
3 So I read a regulation from the State of Florida that
4 permits somebody -- specifically talks about gender change and
5 specifically allows somebody to submit documentation to have
6 their birth certificate changed from the sex they were assigned
7 at birth to their transitioned sex. And, in fact, the evidence
8 in this case is that Mr. Adams did that.
9 And if I also recall the evidence, his driver's
10 license, under Florida law, was changed to reflect male. And
11 so the State of Florida not only recognizes the ability to do
12 this, they allowed Mr. Adams to do it. The State of Florida
13 allowed him to change his driver's license.
14 Why does The School Board of St. Johns County get to
15 contradict what the State of Florida has done in terms of the
16 gender of Mr. Adams?
17 MR. HARMON: Couple of responses to that. Title IX
18 is one reason. We have a regulation on point that says we can
19 do this, the 106.33.
20 But on the State of Florida part, I would disagree
21 that the State of Florida recognizes Drew Adams as a male.
22 You've got two agencies, the Department of Health, who --
23 from -- again, they're not before us. I've not deposed them.
24 It appears violated their own rule when they changed Drew
25 Adams' birth certificate.

1 I believe what their rule said is within seven years,
2 you have to make that change. Drew Adams was born far greater
3 than seven years ago, so I don't think they even followed their
4 own rule on that.
5 The other one is getting a driver's license. The
6 Division of Highway and Motor Vehicles applied their internal
7 policy manual, which has not been subject to rulemaking, to
8 make that decision. That's their agency discretion to go ahead
9 and do so.
10 But there's no statute that says --
11 THE COURT: Well, is there any other -- I'm trying to
12 think. Is there any other official Florida record that would
13 now characterize Mr. Adams other than being a male?
14 MR. HARMON: I have no idea.
15 THE COURT: Yeah.
16 MR. HARMON: I don't know the answer to that.
17 THE COURT: So you're just saying -- you're saying
18 the health people didn't know what they were doing, and the
19 driver's license people didn't know what they were doing.
20 MR. HARMON: Not so much that they didn't know what
21 they were doing, but it appears on its face, without being able
22 to talk to them, that they did not follow their own rule.
23 THE COURT: And the other question that I've been
24 thinking about is this. As I understand it, the Florida High
25 School Athletic Association does recognize -- does allow an

1 athlete to compete under their gender identity and provides
2 that they should be given whatever accommodations are needed in
3 order to make that happen, right?
4 MR. HARMON: Sure.
5 THE COURT: And what about that? Why is that not an
6 indicia of -- the fact that a regulating authority that Nease
7 is a member of and that governs all athletic contests in the
8 state of Florida apparently recognizes Drew Adams as a boy?
9 MR. HARMON: I don't think it has. There's been no
10 testimony that the FHSAA recognizes Drew Adams as a boy.
11 Their -- the policy was filed in the court. Drew
12 Adams doesn't play sports, so I don't know that that's fair,
13 that the FHSAA does that.
14 THE COURT: All right. Well -- okay. I agree. They
15 don't put out a press release that says, "Drew Adams is a boy."
16 MR. HARMON: Right.
17 THE COURT: I agree with that.
18 But if he were to participate in any FHSA- -- if he
19 was a basketball player or a football player or any FH- -- he
20 would be -- they with be -- Nease would be under those rules,
21 wouldn't they?
22 MR. HARMON: Yes. I think there's --
23 THE COURT: Or, more to the point, if there was a
24 visiting team visiting Nease that had a transgender student on
25 it, would they not be required by FHSAA regulations to treat

1 that individual according to their gender identity?
2 MR. HARMON: I believe that the FHSAA -- and, again,
3 I'm going off memory and the regs have a committee that is
4 formed to make that decision. And, yes, it's certainly
5 possible that -- if that was the facts of the issue.
6 There are a lot of distinguishing, though, pieces
7 about the Department of Health, Department of Motor Vehicles,
8 and the FHSAA's local decision to define sex the way that they
9 do. It's completely different from --
10 THE COURT: Did you ever see that movie *Miracle on*
11 *34th Street*?
12 MR. HARMON: I will admit, Your Honor, I get chided a
13 lot because I don't watch a lot of movies, and so the answer's
14 probably no to that one.
15 THE COURT: So what happened in that case is the
16 question was whether the defendant in the dock was the real
17 Santa Claus or not. And at the end of the movie, somebody gets
18 the bright idea to have the post office divert all the letters
19 that are sent to Santa Claus to the courthouse.
20 And so the big scene in the movie is that all these
21 letters that are just addressed to Santa Claus have been
22 delivered to the defendant in the dock. And so they bring them
23 in and they pile them up on the judge's desk.
24 And the judge says, "Since the United States Post
25 Office, an official branch of the government of the United

1 States, says that this person is Santa Claus, this Court will
2 not dispute it. Case dismissed."
3 And I find myself a little bit thinking driver's
4 license, birth certificate, FHSAA -- and I probably could find
5 some more -- why isn't that an indicia that official government
6 agencies recognize Mr. Adams as a boy, and if that's so, why
7 doesn't the St. Johns County School Board?
8 MR. HARMON: Because we have a regulation on point
9 that uses the word "sex," and case law and agency
10 interpretation define that word "sex" not to mean what somebody
11 at the driver's license office, under their internal policy
12 manual, thinks sex is. This is what sex is.
13 I would also say what keeps Drew Adams from going to
14 the highway agency and changing his driver's license back to
15 female? Nothing. There's nothing that keeps that from
16 happening.
17 The reason why, under Title IX, that we've had a
18 regulation in place since 1972 is to separate boys and girls.
19 You can't change that. You can't mesh that. Boy is this and
20 girl is this.
21 The fact that an agency wants to do that, that's
22 fine. It --
23 THE COURT: Am I right in -- I asked -- I started
24 with Ms. Borelli and said, "Isn't this case about whether Drew
25 Adams is a boy or a girl?

1 MR. HARMON: You have to --
2 THE COURT: I mean, if he's a boy, then you'd let him
3 use the boys' bathroom, and if he's -- but you think -- you
4 think he's a girl, or your client thinks he's a girl.
5 MR. HARMON: For purposes of the bathroom, yeah. I
6 think you have to make that decision. I don't think you can --
7 THE COURT: And the principal thinks he's a girl.
8 MR. HARMON: I think that in -- in fairness to her, I
9 think the question was, "Do you personally believe . . ."
10 THE COURT: That he's --
11 MR. HARMON: That he's a girl, and Principal Kunze
12 said yes.
13 THE COURT: Yeah.
14 MR. HARMON: But I think in order for Your Honor to
15 conclude that the school district violated Title IX and the
16 Equal Protection Clause --
17 THE COURT: Right.
18 MR. HARMON: -- you have to find that under those two
19 analyses that Drew is a boy.
20 THE COURT: And so that's really the case.
21 MR. HARMON: I --
22 THE COURT: If he's a boy, he gets to use the boys'
23 bathroom, and if he's a girl, he doesn't.
24 MR. HARMON: That's why the sex stereotyping
25 argument, it really doesn't apply in this case.

1 The qualifications to use the bathroom, under Title
2 IX, based on your sex, is what Title IX says it is. And
3 frankly, what -- it's always been defined as the word "sex."
4 But I don't think Your Honor can make the call that
5 there's been a violation of Title IX or equal protection
6 without making that finding.
7 THE COURT: So let me ask you this. If -- I read the
8 other day about a state representative, I believe, from
9 Virginia who is a transgender and -- and this is really just a
10 way to ask the question. It really doesn't matter.
11 If a transgender adult were to visit the campus of
12 Nease High School, would the regulation, the rule that
13 Mr. Mignon says applies, would that require that transgender
14 adult to use the restroom of their assigned sex at birth?
15 MR. HARMON: That's a great question.
16 THE COURT: Well, what's the answer to it?
17 MR. HARMON: I'm going to try to answer it. I'm not
18 a school administrator.
19 But I would first think that they're not allowed to
20 use the group stalls. I don't think a visiting adult is
21 permitted to go into a group bathroom on school campus where
22 students may be going. They probably, and I'm guessing here --
23 THE COURT: I don't think that's right. Okay.
24 Let's --
25 MR. HARMON: No. I think they have to use the front

1 bathrooms.
2 THE COURT: Well, hold on a second. We went to the
3 gym. Let's say they're at a basketball game. You're not
4 telling me they can't use those bathrooms, are you?
5 MR. HARMON: They could probably use those in the
6 very front of the gym, yes.
7 THE COURT: Well, but they're boys' and girls',
8 right?
9 MR. HARMON: I think --
10 THE COURT: I'm asking you whether the regulation,
11 the rule that Mr. Mignon says is the official policy of The
12 School Board of St. Johns County -- does it apply to adult
13 transgenders who are on campus? Does it apply to a teacher?
14 Does it apply to a transgender adult? If this state
15 representative from Virginia is visiting Nease High School,
16 does the rule apply to her?
17 MR. HARMON: My belief would be yes --
18 THE COURT: Okay.
19 MR. HARMON: -- that anybody visiting our campus
20 going into the girls' bathroom is a girl --
21 THE COURT: Okay.
22 MR. HARMON: -- as the school defines it.
23 THE COURT: And let me ask you this. Is The School
24 Board of St. Johns County -- does it have its own building?
25 MR. HARMON: Yes.

1 THE COURT: It's not on school property, right?
2 We -- it's like on School District Way or something, right?
3 MR. HARMON: Yeah. It's on 40 Orange Street. It has
4 its own district office.
5 THE COURT: Okay.
6 MR. HARMON: Yes.
7 THE COURT: Does the policy apply there? In other
8 words, if a transgender either student or adult walked into
9 that building and is attending -- let's say -- is that where
10 the school board meets?
11 MR. HARMON: The school board sometimes meets on
12 school campuses, and it sometimes meets at the school board
13 building.
14 THE COURT: Okay. So let's say we're having a school
15 board meeting and Drew Adams wants to speak. And he comes, and
16 he speaks to the school board, and then he has to go to the
17 bathroom.
18 Where does he go?
19 MR. HARMON: I don't know where Drew goes, and I --
20 it's a tough question, Your Honor, because I don't know the
21 school board's position on that. I can only go based on what I
22 believe it is from the evidence in the case.
23 And I think that that is when you are using a school
24 board bathroom, whether you're a child, which is the issue in
25 this case, or an adult visiting, that it's not ambiguous, that

1 if you are going into the girls' bathroom that you're a girl,
2 not a transgender girl or somebody who internally -- let me
3 rephrase that.
4 Not transgender, that when you go into the girls'
5 bathroom, you don't get to internally make that call, that
6 you're going in the girls' bathroom because you're -- you are
7 biologically a girl. I don't think that's an ambiguous concept
8 whatsoever.
9 THE COURT: So your understanding -- and I'm just
10 trying to understand what we're doing here.
11 Your understanding would be that any visitor to the
12 building of The School Board of St. Johns County would be under
13 the same rule that is applied to Drew Adams in this case.
14 MR. HARMON: I think. I just -- I don't know the
15 answer to that question.
16 THE COURT: Okay. Are you aware of any other
17 bathroom in St. Johns County where this rule would be applied
18 other than on school board property?
19 MR. HARMON: Well, the school board can only regulate
20 its own property, so I can't think that that's --
21 THE COURT: For example, I don't know, is there a
22 county commission building or something?
23 MR. HARMON: The -- St. Johns County doesn't have an
24 ordinance, to my knowledge, protecting individuals based on
25 gender identity.

1 THE COURT: Right. But is there any prohibition?
2 Because we're talking about a prohibition here, right? We're
3 talking about a rule that prevents Mr. Adams from going into
4 the boys' restroom.
5 Is there any other building in St. Johns --
6 governmental building in St. Johns County that has the same
7 rule as the school board does?
8 MR. HARMON: I don't know that, and I also don't know
9 whether any of those governmental buildings or businesses have
10 a federal regulation that would allow them to have that
11 prohibition --
12 THE COURT: Okay.
13 MR. HARMON: -- which maybe distinguishes the school
14 from all of those other examples.
15 THE COURT: And then the other -- the last question I
16 have on this genre, and then I'll let you talk for a little
17 while, Nease High School has really gone out of its way to
18 accommodate Mr. Adams regarding his transition to a male gender
19 identity in the way they address him, in the way that they
20 treat him, in really every other way except this one way, and
21 I'm wondering why they're doing that.
22 If they're willing to treat him like a boy in all
23 other aspects of his interaction at Nease High School, why not
24 in the bathroom?
25 MR. HARMON: Because there's no privacy interests in

1 being called "he" or "she." There's no privacy interest in
2 wearing a dress or jeans.
3 The bathroom is completely different from all of
4 those other ways in which the school treats Drew Adams as a
5 boy. And I think that's supported by case law.
6 THE COURT: Okay. You know what? Let's go ahead and
7 take a break because I know people probably need one.
8 And we'll just take -- I'm going to try to limit it
9 to about five minutes just to give a comfort break to
10 everybody.
11 And we'll get you back up here, and then I'm going to
12 try to let you talk for a little while. I've got some other
13 questions for you, but I want to make sure you get to say some
14 things you want to say.
15 So we are in recess for five minutes.
16 COURT SECURITY OFFICER: All rise.
17 (Recess from 11:11 a.m. until 11:18 a.m.; all parties
18 present.)
19 COURT SECURITY OFFICER: All rise. This Honorable
20 Court is now in session.
21 Please be seated.
22 THE COURT: I always know, when I say five minutes,
23 that that's impossible, but I try to -- try to do it, but I
24 think we have all the key players, looks like.
25 Okay. So, Mr. Harmon, you may proceed.

1 MR. HARMON: Yes, Your Honor.
2 Following up on a couple of topics that we had talked
3 about a little bit, when it comes to the FHSAA, the Department
4 of Health, the Division of Highway and Motor Vehicles, they
5 don't control what the St. Johns County School District does.
6 The St. Johns County School District is its own sovereignty.
7 It is permitted to establish its own policy and its own rules.
8 So what those agencies and what that association says
9 don't have to drive the decisions of the school district.
10 In looking at those particular issues, how
11 students -- or how people in this state drive and whether you
12 are identified as a male driver or a female driver, has nothing
13 to do with going to the bathroom in a school of kids.
14 The same issue goes for FHSAA. It's a competition.
15 The FHSAA doesn't talk about privacy. It doesn't talk about
16 bathrooms or locker rooms. It regulates competition between
17 individuals. There's no privacy concern there.
18 Same thing with the Department of Health.
19 THE COURT: I'm not sure about that because you have
20 locker rooms and facilities and so forth, and I'm not as sure
21 about that, but I take your point.
22 Go ahead.
23 MR. HARMON: What I think needs to be considered when
24 Your Honor is writing an order really hits home on what are we
25 doing with this case? What's the outcome of it? And I know I

1 say that in such a general scope. But we're talking about a
2 school district, this governmental entity, that stands *in loco*
3 *parentis* with the people walking around its campus. It's not
4 the case with Department of Health or any of those groups.
5 It stands *in loco parentis* to make decisions that
6 aren't in the abstracts that we can talk about, "Well, what
7 about if somebody is born this way or that way?" That's --
8 those are great hypotheticals. They're great examples.
9 But a school -- the school board in this case has to
10 regulate 40,000 kids. It has to adopt policies. It has to
11 implement procedures that will, in its best way possible,
12 accommodate the needs of all of its kids.
13 The evidence before Your Honor is that one student
14 out of 40,000 students disagrees with the way the school board
15 is doing business when it comes to this one policy. One out of
16 40,000 students is a pretty low hit rate in terms of whether or
17 not this policy is perfect, whether or not it's got holes,
18 or --
19 THE COURT: Well, let me ask you about that.
20 The evidence is that Mr. Adams used the restroom for
21 six weeks, I guess, in his freshman year, unnoticed and
22 uncomplained about. And then either one or two female
23 students, who, of course, weren't using the men's room in the
24 first place, I would assume, under the longstanding norms you
25 put forward -- they complained.

1 And based on those two students' complaints, the
2 Nease folks created this prohibition for Mr. Adams that now the
3 school board has had to affirm in order to have a case in
4 federal court, even though they never really actually addressed
5 it, right? It's not ever come up to them to that level, but
6 now they've -- now they've said, "Yep, that's our policy."
7 So, I mean, really, the evidence shows me that we've
8 got Mr. Adams on one side and two girls on the other side.
9 That's all -- that's all the complaining I know about.
10 I guess you gave me some -- I guess there were some
11 people that you told me early on in the case were -- did want
12 to complain or did want to take this position, but they didn't
13 want to be identified, and I wasn't too psyched about that.
14 I was willing to protect the children's identities,
15 but I wasn't so interested in protecting the identities of
16 adults who wanted to take a position against Mr. Adams but
17 weren't willing to be identified in doing so.
18 And so the way that got resolved is you-all agreed
19 among yourselves that you'd just be able to say that there are
20 some people that don't agree with Mr. Adams being able to use
21 the restrooms.
22 But -- so I guess I'm -- I hear what you're saying.
23 I don't know that it's Mr. Adams against 40,000 though.
24 MR. HARMON: No. My --
25 THE COURT: And so --

1 MR. HARMON: My point wasn't to say that it's 39,999
2 against one. It's just that if this policy is so violative of
3 the Constitution and runs such afoul of the laws, the evidence
4 is, is we've got one student who's got a concern about it.
5 That's the evidence.
6 THE COURT: I don't know, Mr. Harmon. You're not
7 quite as old as I am. I grew up when blacks and whites
8 couldn't use the same bathrooms in some places, and it only
9 takes one person to file a lawsuit and have the Constitution be
10 interpreted. So I'm not sure that's -- I'm not really sure
11 that's it, but I hear you.
12 I don't know that I'm going to be able to take a roll
13 call as to -- because I'm sure that if we took a vote -- which
14 we're not going to, of course, because that's not what
15 constitutional law is, but I'm sure there would be a lot of
16 people that supported the school board's policy, and I'm sure
17 there would be some that didn't, and so I'm not sure what
18 that's doing for me.
19 MR. HARMON: Okay. Another issue --
20 THE COURT: I mean, isn't that what constitutional
21 law is, to a large extent, protecting the rights of minorities?
22 MR. HARMON: Yeah. Your Honor, maybe I'm not stating
23 it the best way.
24 What I'm trying to get at with pointing that out is
25 when you're looking at the government's way that it goes about

1 protecting its governmental interest -- in the *Carcaño* case,
2 you have to look at what is it doing? Is it substantially
3 related to protecting that interest?
4 And I only bring that out -- this point out because
5 what the law says, it doesn't need to be a perfect fit. It
6 just needs to be reasonable. And the way that we've gone about
7 doing this with the various accommodations that we have
8 provided, with the various gender-neutral bathrooms, it seems
9 to be working just fine but for one person who disagrees.
10 I'm not saying -- that's the analysis that I'm trying
11 to make, Your Honor.
12 THE COURT: Okay.
13 MR. HARMON: But I do want to again emphasize under
14 *Glenn* that plaintiff has a burden in this case to show --
15 THE COURT: Are there any other -- you've told me
16 that -- you said in your brief that only nine districts have
17 adopted the Broward County policy in Florida, which I take to
18 mean a policy that specifically allows persons to use the --
19 students to use the bathroom of their gender identity, right?
20 That's what you said?
21 MR. HARMON: Well, what I said was that only nine of
22 the 69 districts have adopted pieces of the manual.
23 THE COURT: Okay.
24 MR. HARMON: There may be more than nine that
25 provide --

1 THE COURT: All right.
2 MR. HARMON: -- provide the same protection.
3 THE COURT: Are you aware of any other school
4 district in the state of Florida that has adopted the St. Johns
5 County School Board's policy that prohibits persons like
6 Mr. Adams from using the restroom of their gender identity?
7 MR. HARMON: Yes.
8 THE COURT: What are they?
9 MR. HARMON: I believe Volusia County is one.
10 THE COURT: They actually have a policy?
11 MR. HARMON: There's a complaint that was filed in
12 the Middle District of Florida about two weeks ago trying to
13 argue the same stuff that's before Your Honor.
14 THE COURT: Are you handling that?
15 MR. HARMON: No.
16 THE COURT: Okay.
17 MR. HARMON: Volusia County is one.
18 THE COURT: So Volusia County actually has a -- is it
19 a written school board policy, or is it a --
20 MR. HARMON: I don't know if it's a written policy.
21 I think, ballparking it, that where this issue arises
22 is that -- there are -- and I'm aware there are many school
23 districts in Florida that, in their discrimination protection
24 language, specifically say, "We protect individuals' gender
25 identity." That's what Broward did. That's what Kentucky did.

1 That's what -- there's other school districts.
2 Others school districts in the state say, "We protect
3 people based on sex," and they don't put gender identity. So
4 there are school boards in Florida that are accommodating
5 students on a case-by-case basis, but I don't know the ratio of
6 districts that have adopted a formal policy.
7 I know Marion County adopted a board resolution -- I
8 don't know if you want to call it policy, but adopted a board
9 resolution specifically rejecting what the Obama administration
10 said and took the position that students are to use the
11 bathroom of their biological sex.
12 I know Clay County went public with that as well, and
13 there are others that I -- I am aware of that are following in
14 the path of St. Johns County.
15 THE COURT: Okay.
16 MR. HARMON: A couple of points, Your Honor. Again,
17 under the *Glenn* analysis -- and I don't want to lose sight of
18 this, trying to make this point to Your Honor, is there needs
19 to be evidence of actual discrimination in this case. I just
20 think that the case law that provides that separating --
21 THE COURT: So when you're saying that, are you
22 meaning that -- are you meaning that just the fact that they
23 won't let him use the bathroom is not enough? There has to be
24 some evidence that they're doing so because they want to
25 discriminate?

1 Or what -- what are you -- are you likening it to the
2 *Glenn* case where there was actual comments made by the employer
3 that were deemed to be direct evidence of discrimination? Is
4 that what you're saying?
5 MR. HARMON: What I'm saying is if you look at
6 plaintiffs' brief -- let me see -- they say, under the equal
7 protection analysis, discrimination on the basis of sex.
8 Argument 1, bolded and italicized: "Discrimination against
9 transgender people inherently relies on sex stereotypes."
10 What sex stereotype evidence has plaintiff put
11 forward that the district engaged in? We have a policy that
12 separates biological boys, biological girls in the bathroom, as
13 those terms have been known.
14 There's nothing to do with how a person walks, talks,
15 acts, conforms to the expected behavior of gender. It's purely
16 based on the physiological differences between men and women
17 that the Supreme Court says exist.
18 We are different. It has nothing to do with gender
19 nonconformity or sex stereotyping. And what plaintiff is
20 arguing in *Glenn* is that, "Look, *Glenn* said that the very act
21 of being transgender means you don't conform to gender
22 stereotypes. Therefore, if you treat me different in any way,
23 it's sex discrimination."
24 That's not what *Glenn* says, and that's not what the
25 Court in *Glenn* actually did. And the problem with cases like

1 *Whitaker* is -- which was also argued, I believe, by the same
2 counsel in this case -- they're taking one sentence in *Glenn*,
3 they're running to *Whitaker*, and then *Whitaker* -- and then
4 *Evancho* is taking what *Whitaker* said.
5 It's a big house of cards on this one statement
6 attributed to a law review article, all the while ignoring that
7 you actually have to show evidence of sex stereotyping.
8 THE COURT: So is that what I will say in my opinion
9 if I'm ruling for you, that all these other courts -- and there
10 are starting to be a few of them now, and I know there's a
11 couple cases that go the other way, but that all these other
12 courts just didn't understand what they were doing?
13 MR. HARMON: I think the other courts misapplied the
14 *Glenn Brumby*. *Glenn Brumby* didn't say the very act of being
15 transgender means it's a sex stereotyping issue, because *Glenn*
16 actually went into a factual analysis to say, "Look" -- I
17 mean --
18 THE COURT: Well, isn't stereotyping -- why is it not
19 stereotyping to say to Mr. Adams, "I know you say you are a
20 boy, but because of your sexual organs given to you at birth,
21 we say you're a girl"?
22 MR. HARMON: Uh-huh.
23 THE COURT: Why is that not a form of sex
24 stereotyping?
25 MR. HARMON: Because it's based on physiological

1 differences. It's not an expectation that the school board is
2 saying that, you know, "We expect that you will walk, talk,
3 act, look, and behave like a girl because that's how girls
4 behave."
5 I mean, look at *Price Waterhouse*. That's what *Price*
6 *Waterhouse* was. It wasn't about biological parts. *Glenn*
7 *Brumby* wasn't about biological parts. It was about looking at
8 a person and saying, "You're not conforming to your gender in
9 the way that we expect you to."
10 And if you look at the cases that were cited by
11 plaintiff in the brief following *Glenn Brumby*, they're all
12 employment cases. They're all Title VII employment cases that
13 look at this issue of not conforming to your gender. Even
14 *Glenn* says a plaintiff can show discriminatory intent through
15 direct or circumstantial evidence.
16 The only issue that plaintiff has put before Your
17 Honor in evidence that they -- they argue consists of
18 discriminatory intent is a bathroom policy that separates
19 students on the basis of sex, something that has been
20 permissible under Title IX.
21 So I don't understand how it could be considered
22 discriminatory or invidious discrimination if it's permitted,
23 and there are other courts that have said this is not
24 discrimination, doing this.
25 *Whitaker* relied on *Glenn* in that one statement. And

1 if you look, too -- I'd like to point out in the *Whitaker* case,
2 they completely sidestep the argument that I'm making to Your
3 Honor. It is -- here it is. The Court in *Whitaker*, when it
4 goes to *Glenn*, says the following: "The school dis-" -- or it
5 says -- let me get to it.
6 "Following *Price Waterhouse*, the Court and others
7 have recognized a cause of action under Title VII when an
8 adverse action is taken because of an employee's failure to
9 conform to sex stereotypes.
10 "The school district argues that even under a sex
11 stereotyping theory, Ash cannot demonstrate a likelihood of
12 success on his Title IX claim because its policy is not based
13 on whether the student behaves, walks, talks, or dresses in a
14 manner that is consistent with any preconceived notions of sex
15 stereotypes.
16 "Instead, it contends that as a matter of law" -- and
17 here's the key -- "requiring a biological female to use the
18 women's bathroom is not sex stereotyping." And what the Court
19 said there is, "However, this view" -- this is *Whitaker*.
20 ". . . this view is too narrow."
21 The question is why did they conclude that? In the
22 very next paragraph they say, "By definition, a transgender
23 individual does not conform to sex-based stereotypes of the sex
24 that he or she was assigned at birth.
25 "We are not alone in this belief. In *Glenn* the

1 circuit court noted, 'A person is defined as transgender
2 precisely because of the perception that his or her behavior
3 transgresses gender stereotypes.'"
4 That's the quote that plaintiff is taking and
5 throwing at *Whitaker*, *Evancho*, and Your Honor, that the mere
6 act of being transgender means you transgress gender
7 stereotypes. That is not what *Glenn* said, so *Whitaker* is
8 misapplying that, *Evancho* is misapplying that, and it's getting
9 circulated.
10 Eleventh Circuit requires evidence of actual
11 sex-stereotype discrimination against an individual.
12 THE COURT: So give me an example, under your view of
13 the Eleventh Circuit, what would have had -- what extra thing
14 would have had to happen in Mr. Adams' case for this to be a
15 proper claim? What kind of evidence of discrimination would
16 you be looking for?
17 MR. HARMON: "Go into the girls' bathroom" -- or go
18 in -- "You're not allowed to go into the boys' bathroom because
19 you look too much like a girl and you'll make all of the boys
20 uncomfortable because you look like a girl."
21 That's sex stereotyping. "You're not conforming to
22 your sex. You look like a girl. You" --
23 THE COURT: But isn't that type of thinking, whether
24 it's said out loud -- doesn't that undergird the safety/privacy
25 type concerns that are being expressed by the school board *sub*

1 *silentio* for its policy?
2 I mean, isn't -- when we're talking about safety and
3 privacy and all that, isn't -- isn't that what we're talking
4 about, that we're uncomfortable? We don't want to see somebody
5 that looks to us like a boy in the girls' bathroom or vice
6 versa? Isn't that what is undergirding the policy?
7 MR. HARMON: No, not at all. The policy is
8 undergirded by a basis of physiological differences between men
9 and women. It has nothing to do with how a person dresses,
10 whether you wear a dress -- it's why we don't mind, in school
11 districts, if girls wear tuxedos to prom. It has no bearing on
12 physiological differences.
13 I mean, courts -- the *Faulkner* case -- I'll point out
14 to Your Honor -- which was cited by plaintiff. It's a Fourth
15 Circuit case, and it said, "The Court recognized, quote,
16 society's undisputed approval of separate public restrooms for
17 men and women based on privacy concerns and observing that the
18 need for privacy justifies separation, and the differences
19 between the genders demand a facility for each gender that is
20 different."
21 *Carcaño* said the same thing. *Virginia* said the same
22 thing. There are -- courts recognize there are physiological
23 differences. Has nothing to do with stereotyping.
24 Under our policy, if you're born a boy -- there's no
25 stereotyping done. It's purely based on physiological issues.

1 THE COURT: But I thought that the testimony at trial
2 from the best practices folks and Smith and -- I can't remember
3 the other person's name.
4 I thought that when they were asked what the reason
5 for the policy was, I thought they cited things like safety,
6 privacy. "We don't want our other students to have to go to
7 the bathroom with a person that they view as being of the
8 opposite sex." "We're concerned that there could be incidents
9 in the restrooms between a transgender person and a
10 nontransgender person." "We're concerned that Mr. Adams might
11 be bullied if he were in the boys' bathroom."
12 I thought that was what underlay the best practices
13 and then this unwritten rule that the school board has today,
14 in open court, adopted.
15 Isn't that what we're talking about?
16 MR. HARMON: The testimony from the task force and
17 the focus group -- best practices is in one bucket; the
18 unwritten policy is in another.
19 The unwritten policy has nothing to do with
20 transgender students. It has to do with a boy and what
21 bathroom a boy can use and a girl and what bathroom a girl can
22 use. It has nothing to do -- because some transgender
23 students --
24 THE COURT: But it does in this sense, because a
25 value judgment has to be made that Drew Adams is not a boy,

1 right?
2 In other words, in order for -- if you're saying the
3 whole policy is boys have to use the boys' restroom and girls
4 have to use the girls' restroom, the St. Johns County School
5 Board has to be making a value judgment, based on something,
6 that Drew Adams is a girl, because otherwise they'd let him use
7 the boys' bathroom, right?
8 MR. HARMON: Yeah, and the value judgment comes in
9 the form of the enrollment materials, which is, what are you
10 when you enroll in the school district?
11 THE COURT: All right. Well, let's talk about that.
12 I think the evidence was that -- I think Mr. Upchurch was asked
13 about it: "What happens if the person's already transitioned
14 before they come to your school and so the paperwork says boy?"
15 So you're telling -- and I think he said, "Well, then
16 we would treat him like a boy until we had reason not to," or
17 something like that.
18 MR. HARMON: Yeah. That's correct.
19 THE COURT: But I'm not exactly sure what that means.
20 So if the value judgment is made at the time of the
21 enrollment -- and what is it based on? It's based on --
22 MR. HARMON: The enrollment material.
23 THE COURT: I know, but remind me specifically --
24 MR. HARMON: Yeah.
25 THE COURT: -- what that is.

1 MR. HARMON: There's a school entry form where the
2 student identifies all their background --
3 THE COURT: Okay.
4 MR. HARMON: -- that has a box for gender or sex.
5 THE COURT: Okay.
6 MR. HARMON: There's a home language survey that also
7 has a box for gender or sex. There's a requirement for birth
8 certificate and birth identification card --
9 THE COURT: Okay.
10 MR. HARMON: -- and I think there was a fourth
11 document that also had a box --
12 THE COURT: Okay.
13 MR. HARMON: -- to check.
14 THE COURT: And so if all those boxes got checked
15 male and he'd gotten a birth certificate, which you know he can
16 do because he did it, that said male, he would be a male
17 according to the St. Johns County School District until what
18 happened? Until when?
19 MR. HARMON: Well, I think what Mr. Upchurch said,
20 until information was presented that suggested maybe that's not
21 right.
22 THE COURT: And how would that come to your
23 attention?
24 MR. HARMON: I don't know. I mean, in -- this
25 particular case is an example. I mean, sometimes students may

1 come and say that. Sometimes --
2 THE COURT: No, no, that's different, because Drew --
3 because Mr. Adams, when he enrolled in your school, said he was
4 a female, right?
5 MR. HARMON: Yes.
6 THE COURT: Okay. So that's different.
7 MR. HARMON: I guess the way I can illustrate it is
8 with an example.
9 St. Johns County is a high-performing school district
10 in the state, very high-performing. It's not out of the realm
11 of possibility that students that may live in surrounding
12 counties may want to enroll as a student in St. Johns County
13 and provide residential information showing that they live at a
14 particular address.
15 And if they do that, we admit them and we enroll them
16 based on that address, and we put them at Nease because they
17 live in the Nease zone. And we treat them as our student, and
18 they go to our classes.
19 And then three months later we find out, for one
20 reason or another, Mom may have lied on the admission
21 certificate and the student doesn't live at that home and is
22 not a student in this zone.
23 What would we do in that particular circumstance? We
24 would act on it and potentially not let that student attend our
25 schools.

1 THE COURT: So when Drew Adams, hypothetically, has
2 already transitioned, got a birth certificate that -- got his
3 birth certificate, under Florida regulations, changed to show
4 that he's a male, checked all the boxes that says he's a male,
5 considers himself a male, and has taken physical steps to try
6 to create a more male appearance, when he enrolls in Nease
7 under those circumstances and then later somebody figures out
8 that he actually transitioned to become a male, you treat that
9 as if he'd lied?
10 MR. HARMON: It would be based on -- well, again, no
11 policy is perfect. We know in this particular case that Drew
12 is not a male.
13 So in that hypothetical, I assume, just like
14 Principal Kefford said and just like Broward's policy says,
15 that it would be treated on a case-by-case basis. They would
16 meet with the student and try to accommodate that.
17 THE COURT: So you would -- but you would -- under
18 your analogy he would be treated as if he had lied just like
19 the person who said that they lived in the district when they
20 really didn't.
21 MR. HARMON: Yes. If he -- if he enrolled and
22 identified as a male but was not born a male, then there would
23 probably --
24 THE COURT: Even though he had a birth certificate,
25 even though he could check off all the boxes, even though he

1 had doctors that say he's a male, he'd still by lying.
2 MR. HARMON: Under our policy he would not be treated
3 as a male for the bathrooms.
4 And if I could tack on to that this issue, Your
5 Honor. You have a neat case to work with here in terms of the
6 facts, and what I mean by that is you've got a student who has
7 gone to all these lengths and has doctors coming in to say
8 there's -- you know, he's socially transitioning. It's a neat
9 box.
10 Everybody knows Drew Adams is a transgender male. He
11 goes on social media. So when he walks into the school, it's a
12 pretty simple issue. Everybody knows.
13 But this -- what plaintiff is asking you to do is to
14 invalidate a policy that won't just impact Drew Adams. And
15 under plaintiff's argument -- you asked about the slippery
16 slope question, and plaintiff emphatically said no, but that
17 is -- could not be further from what will happen.
18 What will happen, if Your Honor invalidates the
19 school board's policy, is Your Honor will be saying, under
20 Title IX, sex is how an individual identifies. That impacts
21 bathroom use. That impacts who showers with who at schools,
22 who sees who in a state of undress in bathrooms. It's not just
23 Drew Adams wanting to use a multi-stall bathroom.
24 So while the facts of this case are neat in that Drew
25 Adams has done all these things to transition, there is

1 nothing -- nothing preventing -- and, again, schools have to
2 look for privacy and safety on a -- not on an abstract basis
3 but on a -- I mean, we're responsible for the privacy and
4 safety of students.
5 THE COURT: Absolutely, and I fully appreciate that.
6 I guess the problem I have with the argument is that
7 there is zero evidence.
8 MR. HARMON: But does there have to be evidence?
9 THE COURT: Well, you would think that, because I've
10 got an amicus brief from 29 school districts. I've got
11 Kentucky. I've got Broward County, and I've got all these
12 other places that are doing this and have reported zero
13 problems. None of the things that people who are worried about
14 this worry about have ever happened.
15 And you were not able to adduce any evidence that it
16 had ever happened, nor were any of the people that worked on
17 the task force or anything, who had actually looked at all the
18 policies all over the country, were they able to identify any
19 of these bad things that could happen having ever happened
20 before.
21 And while I agree with you that you don't always have
22 to have a demonstrated problem before you can create a policy,
23 it does make one wonder whether the fear, the safety concerns,
24 the privacy concerns are based on things that are not the
25 reality on the ground.

1 MR. HARMON: Okay. So if the Court were to require
2 defendant to put on actual evidence of a problem before the
3 Court is going to actually find that there's a privacy issue
4 here, that the government has a legitimate governmental
5 interest in doing what it's doing, think of this scenario and
6 pose this question.
7 If there's no privacy concern, there's no issue,
8 there's no demonstrated legitimate issue with allowing a male
9 student, biological male student, to identify as female out of
10 the blue -- and I understand that's just a -- that's a
11 possibility.
12 But if there's no privacy issue and there's no
13 legitimate governmental interest in keeping a biological male
14 out of the girls' bathroom because he thinks he's a girl, why
15 do we put -- is Your Honor -- is it going to require us
16 removing "men" and "women" signs from the bathroom doors?
17 Because there's no privacy issue.
18 If a person can just internally decide what gender
19 they are and there's nothing to worry about, just go and do
20 what you need to do in the public school, why don't we just
21 take it off the bathroom doors? Why do we have "men" and
22 "women"? Just let people go to the bathroom.
23 The reason we have "men" and "women" on the doors is
24 because there is an expectation of privacy. There doesn't need
25 to be a violation of that expectation to justify putting a

1 policy in place to protect it. But that slippery slope, why
2 don't we just put "men" on the bathroom stall door -- and
3 that's another point.
4 The plaintiff has argued that our means to achieve
5 protecting privacy is undercut by the fact that there are
6 stalls in the bathrooms. If that is the case, then in the
7 girls' bathroom, why don't we just put the "girl" logo on the
8 stall door and just let men walk into the multi-stall bathroom
9 and do whatever they want to do in front of the mirror and just
10 not go into the stall with the female student?
11 Now, administrators can't protect that. They can't
12 watch that. They stand outside the bathroom doors, but --
13 THE COURT: See, I don't really think that's -- I
14 mean, I hear you, but I don't think your opponents are saying
15 there can't be boys' bathrooms or girls' bathrooms. The
16 question is who gets to go in them.
17 And I guess I'm -- so I'm imagining Mr. Adams, who
18 has transitioned -- and I -- you know, I understand. This
19 is -- I mean, I'm having to learn a lot in this case because I
20 didn't know lots of things, and I'm trying to learn. I'm
21 trying to understand.
22 But Mr. Adams, who by the accounts that I have -- and
23 I don't think it's un- -- I think it's unrebutted, has
24 transitioned from female to male, both in his way of looking at
25 himself -- which I guess is really how you get a gender

1 identity: How do you identify yourself?
2 But he's taken the extra step of physically changing
3 his appearance so that he looks -- if I may say, and I hope I
4 can -- like a more prototypical boy than he does a prototypical
5 girl now. And so -- and he testified that he considers himself
6 a boy. He doesn't want to be a girl.
7 And so what I'm imagining is if he were in using the
8 boys' bathroom at Nease High School and a girl came in, I'm
9 imagining he would not want a girl in the boys' bathroom, just
10 like the other boys wouldn't.
11 And I'm imagining that if he walked into the girls'
12 bathroom at Nease High School right now, which your policy
13 tells him he can do -- right?
14 MR. HARMON: Right. He can go to the girls' bathroom
15 or the gender-neutral bathroom.
16 THE COURT: He can walk into the girls' bathroom,
17 looking all the world like a boy, and that's perfectly fine
18 with St. Johns County.
19 MR. HARMON: Yeah, because it would be sex
20 stereotyping to do otherwise.
21 THE COURT: Okay.
22 MR. HARMON: There's no -- on your --
23 THE COURT: And you don't think that -- you don't
24 think girls -- talking about safety and privacy and all that,
25 you don't think girls at Nease High School who had a person who

1 looked for all the world like a boy and speaks like a boy,
2 walked into their bathroom, you don't think they'd have
3 something to say about it?
4 MR. HARMON: Well, we would have a problem if they
5 had something to say about that. That's not permitted. We
6 don't let students -- I don't know. It's a great hypothetical.
7 There's no facts to support that happening, but we --
8 THE COURT: Well, it's not hypothetical that -- it's
9 not -- you're right. My hypothetical about a girl walking into
10 the boys' bathroom and Drew Adams being in there, that's a
11 hypothetical. No evidence of that.
12 There actually is no evidence of Drew Adams walking
13 into the girls' bathroom either as -- after he's transitioned.
14 I agree with that. But that's exactly what your policy tells
15 him that he can do.
16 MR. HARMON: Uh-huh.
17 THE COURT: And what I'm saying to you is, if he
18 walks into a girls' bathroom looking like a boy, what about
19 safety? What about privacy? What about all the things that
20 St. Johns County says it's concerned about as a reason to keep
21 him out of the boys' bathroom?
22 Aren't those concerns either equally or even more
23 important in that scenario?
24 MR. HARMON: No, Your Honor, because we can't -- we
25 can't enforce privacy concerns and get to protecting student

1 privacy by regulating how students look and what type of
2 clothes they wear and how they cut their hair. That would be
3 an improper means to achieve protecting student privacy, by
4 regulating that type of appearances. That's sex stereotyping.
5 That's why I argue again that our way of protecting
6 privacy is the -- is substantially related to protecting
7 privacy and the least intrusive way to do it, birth sex.
8 One of the things that Your Honor mentioned was if
9 Drew Adams -- Drew Adams doesn't want a girl in the bathroom
10 with him. I think Your Honor said that. But if you accept
11 plaintiff's argument, Drew Adams will have no idea whether
12 there is a girl or a boy in the bathroom with him because
13 students --
14 THE COURT: So it really does --
15 MR. HARMON: -- will get to make that call.
16 THE COURT: -- just get back -- it really does just
17 get back to the fact that the St. Johns County School Board
18 thinks that Drew Adams is a girl.
19 MR. HARMON: For purposes of the bathroom, yes.
20 THE COURT: Right.
21 And he thinks he's a boy?
22 MR. HARMON: Yes.
23 THE COURT: And that's what makes the world go round,
24 I guess, right? I've got to -- I mean --
25 MR. HARMON: But that goes back to one of the

1 questions you posed to plaintiff which was, how is the
2 defendant going to argue to me that if I find an equal
3 protection violation, I also have to find that 106.33 is
4 unconstitutional?
5 And I think the argument there is if you have to make
6 the decision of whether plaintiff is a boy or a girl for
7 purposes of the equal protection, you're going to have to make
8 that call basically, under Title IX, whether sex means gender
9 identity or something different.
10 You have -- I think you have to make that call.
11 THE COURT: To what -- and this will be my last
12 question, I think, of you because I need to -- we need to kind
13 of wrap this up.
14 But to what extent does -- because Mr. Upchurch
15 testified that if this matter actually ever did go before the
16 school board, it would be very controversial.
17 And to what extent does public opinion or public
18 belief about what the policy should be -- to what extent does
19 that bear on the legal issues in the case?
20 MR. HARMON: Well, whether or not a policy is
21 constitutional or discriminatory has no bearing on public
22 opinion, no question.
23 Public opinion becomes a relevant piece of the puzzle
24 only in that the school board, by law, is required to elicit
25 public input on issues before it takes action.

1 THE COURT: Which, by the way, didn't happen here, we
2 already know, right?
3 MR. HARMON: From what I know, in terms of an
4 adoption of this policy, no. There was a meeting where the
5 public did attend and state its position, but not in the formal
6 adoption process.
7 THE COURT: Well, there were like five people. They
8 were all actually in favor of Mr. Adams' position.
9 MR. HARMON: Yes.
10 THE COURT: I'm confident they could find more than
11 five people that were against it, I bet. But the school board
12 never actually debated it or voted on it or anything.
13 MR. HARMON: No.
14 THE COURT: I did get Mr. Mignon to come in today and
15 tell me this is their policy, so I'm going to take his word for
16 it, but -- but anyway. Okay. I digress. What -- let me just
17 tell you why I'm asking and then you can . . .
18 In the *Minersville* case in Pennsylvania, the
19 superintendent, I believe, or somebody just came out and said,
20 "*Minersville* isn't ready for this."
21 And is St. Johns County just saying, "St. Johns
22 County just isn't ready for this"? Is that really what this
23 policy is?
24 MR. HARMON: No. I think the policy is protecting
25 privacy. Whether -- I mean, school boards make decisions every

1 day that run afoul of sometimes what communities think is best.
2 I mean, there's arguments about what content should
3 be in a textbook. There's arguments about whether students
4 should have to stand for the pledge. And the school board
5 makes -- school board members make unpleasant decisions every
6 day when it promulgates a policy.
7 But the school board has to look out for its 40,000
8 students, and I'm sure public input drives some
9 decision-making. But at the end of the day, whether or not the
10 public is or is not opposed and whether there's more in favor
11 or more against, I don't think, drives the decision.
12 THE COURT: Okay. Anything else you wanted to say?
13 Because you're about to run out of time here.
14 MR. HARMON: Yes, Your Honor. I'll just be -- I'm
15 not going to repeat my brief. I'm just going to be real brief
16 on --
17 THE COURT: Sure.
18 MR. HARMON: -- maybe a couple of points, Your Honor.
19 THE COURT: Sure.
20 MR. HARMON: One was the gender fluidity issue.
21 THE COURT: Yeah.
22 MR. HARMON: I do think it was fleshed out a little
23 bit more than maybe plaintiff is representing. I think the
24 testimony was that gender fluidity was addressed several times
25 during the meeting. I think Ms. Smith said that.

1 The Broward County policy, which is in evidence, that
2 actually plaintiff cited, has a real interesting take on that,
3 Your Honor. It says, at Bates page 1587, under gender
4 identity -- which is -- again, plaintiff's position in this
5 case is that sex means gender identity.
6 Broward County, which plaintiff wholeheartedly
7 supports and had come in here, said that "Gender identity
8 refers to a person's internal, deeply felt sense of being male
9 or female, boy or girl or other, for example, a blending of the
10 two."
11 So are we supposed to adopt a bathroom policy that is
12 specific for students who have a blended gender? That's taking
13 it a little bit too far, I think.
14 I think the policy that St. Johns County has in place
15 accommodates a wide range of students, whether they're
16 biological boy, biological girl, gender fluid. I think
17 plaintiff's testimony, through his YouTube video, was that
18 gender nonbinary individuals are neither.
19 So if we're going to treat sex -- if we're going to
20 treat sex as meaning gender identity, then we need to have
21 boys' room, girls' room, a blended gender fluid room, gender
22 nonbinary bathroom, and the list is just going to keep going on
23 and on.
24 I submit that that's a -- that's the slippery slope
25 we're going to go down if we find that sex means gender

1 identity. We're going to have to create bathrooms for people
2 who walk into school and go, "I'm uncomfortable being a boy or
3 girl. I'm a blending of the two. I want that bathroom."
4 And I understand that these are extensions and
5 arguments and whatnot, but that's the slippery slope, and that
6 may end happening.
7 It's why I would submit that the policy of separating
8 bathrooms based on biological sex is appropriate. It's an
9 appropriate way to protect the privacy rights of students.
10 That's exactly what *Carcaño* says. It doesn't need to be
11 perfect. It just needs to be reasonable.
12 I understand this case is about one student, but when
13 we're talking about a policy change in a school district, we
14 have to look at how this may apply on 40,000 students.
15 And that highlights the reason why I say we don't
16 have to wait for there to be a privacy violation to make
17 policy. We don't have to wait for a transgender student to
18 assault somebody in a bathroom to go, "See, I told you. Let's
19 make a policy now." We have to think these things out, about
20 what could happen.
21 And the reason plaintiff wants to avoid the slippery
22 slope is because then you're starting to get into policy-making
23 concerns. That's why the school board did what it did and why
24 plaintiff just wants to focus on Drew Adams, going -- who is,
25 by all means, a good student. There's no evidence against

1 that.

2 Wants to focus the issues in this court solely on

3 Drew Adams going into a multi-stall bathroom. But the reality

4 is, the decision, if plaintiff's argument is accepted, is we

5 will have biological females that when they identify as male,

6 they will be in the locker room showering in the presence of

7 boys. That's what happens.

8 So I think that's all I've got, Your Honor, and I

9 appreciate your indulgence.

10 THE COURT: Thank you, Mr. Harmon.

11 MR. HARMON: Thank you.

12 THE COURT: Appreciate it.

13 Ms. Borelli, I'm going to call you back up. I've got

14 a couple of questions for you, and then I'll give you just a

15 few minutes, and then we're going to shut it down.

16 We could, I'm sure, talk about this for a long time,

17 but probably two-and-a-half hours is going to be about enough.

18 My question for you is, following along the lines of

19 what Mr. Harmon just said, when I visited the Nease High

20 School, there are -- I did go into the locker rooms. There are

21 bathrooms -- if I'm recalling, bathrooms in the locker rooms.

22 There are showers in the locker rooms.

23 And in the boys' bathroom or locker room, kind of

24 consistent with custom, there is much less privacy. The shower

25 stall is just one big, long thing, and you just stand there and

1 take a shower in front of God and everybody, and there's no
2 privacy at all. There are bathrooms in there.
3 Is this ruling about that? Would Mr. Adams -- just
4 so I'm understanding, would Mr. Adams be -- under a ruling that
5 was favorable to him, would he be permitted to go into the
6 boys' locker room? Would he be permitted to take showers in
7 the shower? Would he be able to use the bathrooms in the
8 locker room?
9 What is the -- and the answer to that could either be
10 "No, that's not what the case is about," or "Yes, it is, and
11 here's why it's fine."
12 I don't know what the answer is, but I need to
13 understand what a ruling for Mr. Adams in this case would mean
14 for that scenario.
15 MR. HARMON: The relief that we're asking for is
16 simply that this blanket policy can't be sustained. There
17 shouldn't be a blanket exclusion of transgender students from
18 the facilities that match their gender identity.
19 What a policy actually looks like -- I mean, we would
20 love the opportunity to sit down with opposing counsel and
21 discuss what a policy might look like. Broward has a terrific
22 one. But the record is actually full of many examples of
23 variations of policies adopted across the country by schools
24 addressing each of these spaces.
25 What cannot stand is the blunt, unsupported rule that

1 never can a transgender student use a facility that matches
2 their gender identity.
3 THE COURT: One other question that occurred to me.
4 The judge in North Carolina, Judge Schroeder, who had to
5 address the so-called bathroom bill in North Carolina, he wrote
6 an opinion which was favorable to the plaintiff on Title IX but
7 was unfavorable to the plaintiff on equal protection.
8 I'm interested -- and it's really probably the
9 most -- I guess *Johnston* a little bit but it really was the --
10 probably the clearest explication of why Judge Schroeder didn't
11 think equal protection applied to this scenario.
12 What fault -- I assume you find fault with that.
13 What distinguishing factors in *Carcaño* or what -- why do you
14 think Judge Schroeder got it wrong on equal protection?
15 MS. BORELLI: I don't believe that that case could
16 have been decided the way it was in a circuit with authority
17 like *Glenn*, and the Fourth Circuit doesn't have that authority.
18 And so Judge Schroeder explained that the crux of his
19 decision was the assumption that men and women are different
20 because of physiology, and we can sort of reduce protection
21 from sex discrimination to that.
22 I don't believe that's the law since *Price*
23 *Waterhouse*, but the unanimous panel in *Glenn* certainly makes
24 clear that we protect -- yes, Your Honor.
25 THE COURT: Now, your opponent -- you raised the

1 question I wanted to ask next anyway.
2 Your opponent says that courts have taken *Glenn* out
3 of context and run with it and that *Glenn* only stands for the
4 proposition that sex stereotyping of a transgender person is
5 unlawful, but that's not what's going on here and that the
6 other courts have just misunderstood or misapplied *Glenn*.
7 Can you give me a minute or two on that, please?
8 MS. BORELLI: Yes, Your Honor. Let me start by
9 saying I am actually puzzled by why defendant wants to spend
10 quite so much time contesting whether this is sex stereotyping
11 or not, because what sex stereotyping is, is simply one of
12 several theories to determine whether there is sex
13 discrimination at play.
14 Defendant has already conceded that. It's explicitly
15 stated in their findings of fact and conclusions of law, along
16 with the concession that that means intermediate scrutiny and
17 it means that they carry the burden to show actual, concrete
18 interest, on this record, that justify excluding Drew from the
19 boys' restroom. So I'm a little puzzled at the amount of
20 energy the defendant is spending on it, to be totally frank.
21 But we do think that theory is absolutely correct.
22 *Glenn* doesn't make any distinction in its opinion about what we
23 sometimes call status versus conduct. You're protected if
24 you're discriminated against because you're acting in some way
25 but not if it's just because you are something.

1 We've seen those arguments actually a number of times
2 before in the law. It came up frequently in sexual orientation
3 cases, and the courts have rejected that, and *Glenn* certainly
4 doesn't make any distinction.
5 There was no suggestion that maybe Vandy Beth Glenn
6 would get protection if she was discriminated against because
7 she wasn't skillful enough in putting on her makeup but not if
8 it was about the fact that she's transgender.
9 What defendant is trying to say here is, "We're just
10 relying on a so-called fact about physiological differences.
11 That has nothing to do with sex." And I think there are two
12 answers to that.
13 Number 1, there was evidence that Mr. Brumby in that
14 case was unsettled by the thought of Vandy Beth Glenn's sexual
15 organs under her dress, and the Court said, "That's direct
16 evidence of sex stereotyping, if this is the reason or a reason
17 that you think she's not a proper woman or a real woman."
18 That's exactly what's going on here.
19 We also have a number of other cases that have
20 addressed that argument head on -- the *Roberts versus Clark*
21 case, *Lusardi*, and *Rene versus MGM* -- where the courts
22 confronted the argument, "This isn't about stereotyping or sex.
23 It's just physiological fact."
24 And the courts all said, "You can't point to
25 sex-related anatomy and claim it has nothing to do with sex.

1 That's exactly what it has to do with."
2 So, again, I'm not sure what the contest is here
3 because they've already admitted this is sex discrimination.
4 But at any rate, we think that this record shows that the
5 assumptions here are premised entirely on sex stereotypes.
6 THE COURT: All right. I'm going to just give you a
7 couple minutes or so because we really are kind of over budget
8 here, but I -- I know it's important, but we could talk about
9 it forever.
10 But if there's a point or two you really -- or three
11 that you really want to make in response, do it as concisely as
12 you can, and I'll let you go.
13 MS. BORELLI: Thank you, Your Honor.
14 I would underscore what the Court pointed out, which
15 is it's really notable under this policy that Drew is treated
16 as a boy by the school in every respect except for facilities
17 use. In other words, they just deem him not to be sufficiently
18 masculine or boy enough for a facility's use. That, again, is
19 evidence this is based on sex stereotyping.
20 But they did nonetheless admit, Ms. Mittelstadt
21 admitted, that he is a transgender boy. And we have
22 uncontested, unrebutted evidence from the medical experts and
23 the medical amicus brief that that means that he has to be
24 treated -- his medical care, his medical course of treatment,
25 that means that he has to be treated as a boy in every respect.

1 And it's very damaging to young transgender people to
2 be treated as if there's something shameful about them or to
3 have this specter raised of assault when there's absolutely no
4 evidence of anything like that.
5 Drew testified, "It makes me feel like I'm not fit to
6 be with my peers." It's profoundly damaging, and they have not
7 produced any evidence whatsoever, Your Honor, to carry their
8 burden to show that this is justified by privacy or justified
9 by safety interests.
10 Perhaps the last point I'll make, Your Honor, is they
11 mentioned that Drew is just one out of 40,000. We do have
12 testimony that seven transgender students have asked to use
13 restroom facilities using their -- matching their gender
14 identity or consistently held gender identity.
15 So Drew is not alone. It is a small group of
16 students. That's precisely the moment when the courts are
17 supposed to be especially skeptical of government
18 discrimination and to require that the interests produced be
19 specific and that they be backed up with actual evidence.
20 Defendant has simply failed to carry that burden
21 here.
22 Thank you, Your Honor.
23 THE COURT: Thank you, ma'am.
24 Mr. Harmon, I'll give you about a minute or so if
25 there's something that -- I just want to make sure people don't

1 leave here saying, "I didn't get to say the one thing I wanted
2 to say," but we do need to shut it down.
3 But let me hear from you if you care to be heard.
4 MR. HARMON: Your Honor, I almost said I didn't have
5 anything to say, but as a lawyer, when the judge gives me an
6 opportunity to say something, I have to say something.
7 THE COURT: All right.
8 MR. HARMON: I would just point out that plaintiff
9 mentioned that the exclusion of plaintiff from the bathroom is
10 based on masculinity. There's no evidence of that whatsoever.
11 The other thing is, again, plaintiff is trying to
12 take *Glenn Brumby*, skip the part about where you have to show
13 discrimination, and jump right into the burden on the
14 governmental entry -- governmental entity to meet the
15 intermediate scrutiny test.
16 *Glenn* still requires evidence of discrimination, and
17 we have not conceded that we have engaged in sex-based
18 discrimination in this case. So that needs to be satisfied
19 first before we even get to the legitimate governmental
20 interest part.
21 Thank you, Your Honor.
22 THE COURT: Thank you.
23 All right. The case is submitted.
24 Let me thank counsel for their well done
25 presentations this morning. I think they were very

1 professional and very helpful to me. I am in the mode of
2 searching, and I'm trying to understand, and I think -- I think
3 you-all helped me with that today.
4 And so I'm now satisfied that the school board has
5 this policy, and therefore that issue is not something I'm
6 going to spend a lot of time thinking about, so now I've got to
7 decide the case on its merits. I will do that. I will write
8 an opinion. It will not be quick for me to do that.
9 And I want it to be -- if I do it like I want to do
10 it, it will not only be able to be read by lawyers but will be
11 able to be read by other people who might be interested in a
12 way that hopefully I can explain what I'm doing.
13 And I'm going to have to think about it some more,
14 and then I'm going to have to start writing an opinion, and
15 then I will issue it just as soon as I can.
16 I have said in the past that by expediting the case
17 the way we have, my hope is to have an opinion out in advance
18 of Mr. Adams' senior year so that -- so that whatever the
19 decision is will be applicable, subject, of course, to any
20 appeal or whatever, wherever that might go.
21 So I'm going to do the best I can to get it out to
22 you just as soon as I can, but it will not be -- it will not be
23 quick. I'm sure of that, especially given the press of other
24 business in the court.
25 I will say this. I know this is a developing area,

1 and I would put upon the parties the obligation to file notices
2 of supplemental authority and other -- anything that you think
3 is relevant and, you know, not beyond the pale of what I'm able
4 to consider, I would be grateful if you would do it.
5 I would always ask you to let the other side know,
6 either an unopposed filing of notice of supplemental authority
7 or a conference, and if the -- I wouldn't be asking,
8 necessarily, for additional argument, but I want both sides to
9 be aware of what's happening and be able to feel like they've
10 been treated fairly in whatever way makes sense for them.
11 So I will not put a prohibition from hearing from you
12 again, but keep me informed as to what's going on so that I
13 have the latest information before I make a final ruling.
14 So with all that, is there anything else from the
15 plaintiff, Mr. Adams, at this time?
16 MS. BORELLI: No, Your Honor.
17 THE COURT: From the school board?
18 MR. HARMON: No, Your Honor.
19 THE COURT: All right. Thank you again for all your
20 good work, and we will be in recess.
21 COURT SECURITY OFFICER: All rise.
22 (The proceedings were concluded at 12:15 p.m.)
23 - - -
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1 CERTIFICATE OF OFFICIAL COURT REPORTER

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4 UNITED STATES DISTRICT COURT)

5 MIDDLE DISTRICT OF FLORIDA)

6

7 I hereby certify that the foregoing transcript is a

8 true and correct computer-aided transcription of my stenotype

9 notes taken at the time and place indicated therein.

10

11 DATED this 21st day of March, 2018.

12

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

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, a minor, by and
through his next friend and mother,
Erica Adams Kasper,

Plaintiff,

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

THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parents of St. Johns County, along with teachers and administrators of the St. Johns County School District, have a solemn obligation to guard the well-being of the children in their charge. As recent events from around the country have tragically demonstrated, this is a very challenging job. Recognizing the difficulty of this task and that local school boards, answerable to the citizens of their community, are best situated to set school policy, federal courts are reluctant to interfere. Nevertheless, the federal court also has a solemn obligation: to uphold the Constitution and laws of the United States. That is why federal courts around the country have recognized the right of transgender students to use the bathroom matching their gender identity.

Drew Adams is a rising senior at Allen D. Nease High School. He is transgender, meaning he "consistently, persistently, and insistently" identifies as a

boy, a gender that is different than the sex he was assigned at birth (female).[1] At trial, Adams testified: “I am a boy and I know that with every fiber of my being.”[2] However, when the principal of Nease was asked whether she considered Adams to be a boy, she replied, “I do not.”[3] That’s what this case is about. Everyone agrees that boys should use the boys’ restroom at Nease and that girls should use the girls’ restroom. The parties disagree over whether Drew Adams is a boy.

I can only answer that question with the evidence given to me at trial. Drew Adams says he is a boy and has undergone extensive surgery to conform his body to his gender identity; medical science says he is a boy; the State of Florida says so (both Adams’ Florida birth certificate and Florida driver’s license say he is a male); and the Florida High School Athletic Association says so. Other than at his school, Adams uses the mens’ bathroom wherever he goes, including in this federal courthouse during trial. Even the St. Johns County School Board regards Adams as a boy in every way, except for which bathroom he can use.

When confronted with something affecting our children that is new, outside of our experience, and contrary to gender norms we thought we understood, it is natural that parents want to protect their children. But the evidence is that Drew Adams

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[1]Doc. 119, Ex. A at 7.

[2]Doc. 160-1 at transcript page (“Tr.”) 83.

[3]Doc. 162 at Tr. 140.

poses no threat to the privacy or safety of any of his fellow students. Rather, Drew Adams is just like every other student at Nease High School, a teenager coming of age in a complicated, uncertain and changing world. When it comes to his use of the bathroom, the law requires that he be treated like any other boy.

The Court recognizes that some will disagree with this decision, for religious and other reasons. I respect their point of view. However, as a judge, my job is to determine what the law requires and apply it faithfully to the facts. I have done that to the best of my ability.

I. Procedural History

Through his next friend and mother, plaintiff Drew Adams, a minor,[4] filed suit in June 2017 (when he was a rising junior at Nease) under 42 U.S.C. § 1983, alleging that the School District violated his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, § 2, and Title IX, 20 U.S.C. § 1681, by refusing to let him use the boys' bathroom at school. See Doc. 1 (and as amended, Doc. 60). Soon thereafter, he filed a motion for preliminary injunction seeking to enjoin the School Board (the School District's governing body) from continuing its policy during the pendency of the case. Although the Court denied his motion, it set an expedited schedule so the matter could quickly

[4]Ordinarily, minors' names are redacted from court files, but Adams elected to waive those privacy protections. See Doc. 1 at 1, n.1; Doc. 60 at 1, n.1.

be brought to trial.[5] See Docs. 50, 57 (Order and hearing transcript). The Court held a three day non-jury trial on December 11, 12, and 13, 2017, hearing testimony from ten witnesses[6] and admitting numerous exhibits.[7] Two witnesses were unable to appear live and the Court agreed to accept their videotaped deposition testimony and a declaration from one.[8] The parties also stipulated to certain facts that are deemed admitted.[9] A month after the trial (and while school was out of session), the

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[5]Along the way, plaintiff dismissed two school officials he had sued in their official capacities, leaving the School Board of St. Johns County, Florida, as the only defendant. See Docs. 45, 49, 60.

[6]One of those witnesses was Frank D. Upchurch, III, the long-time School Board Attorney who advised the School Board on its Best Practices Guidelines (discussed below) and who is well familiar with School Board policies and the facts described herein. References to testimony by "the School Board Attorney" are references to Mr. Upchurch's testimony and should not be confused with statements or argument by the School Board's outside counsel who have represented it throughout this litigation and at trial.

[7]The minutes of the bench trial are of record (Docs. 148, 149, and 150), as are the parties' exhibits (Docs. 151 & 152), and Court exhibits (Doc. 166). Additional exhibits containing sensitive medical or personal identifying information were filed under seal (Docs. 167, 168, 169, 170, 171). References to exhibits admitted at trial are denoted herein as Pl. Ex. __ (for plaintiff's exhibit), Def. Ex. __ (for defendant's exhibit), or Ct. Ex. __ (for Court exhibits). The public record includes redacted versions of the trial transcripts (Docs. 160-1, 161, 162) which the Court cites throughout this opinion. The unredacted transcripts are under seal at Docs. 143, 144, 145. The Court has had no need to cite to the unredacted transcripts in this decision.

[8]See Doc. 166, Ct. Ex. 1, 2, 3, 4, 5. In accepting the video depositions, the Court agreed to rule on the numerous objections contained therein. See Doc. 160-1 at Tr. 147. To the extent the Court relies on testimony to which an objection was lodged, the objection is overruled.

[9] See Doc. 116 at § I (p. 22).

undersigned toured Nease High School with the school principal and counsel for both sides, visiting every restroom on campus. Thereafter, the parties submitted proposed findings of fact and conclusions of law and supplemental briefs addressing the School Board's bathroom policy. <u>See</u> Docs. 172, 173-1,[10] 174, 175. The Court heard closing arguments on February 16, 2018. Doc. 184. While the Court has adopted portions of each party's submission, the Court's findings of fact and conclusions of law are its own. Several pending motions were carried with the case, and those rulings are incorporated herein.

II. Findings of Fact[11]

A. Defining Transgender/Gender Identity/Sex Assigned at Birth

As explained by Dr. Diane Ehrensaft, a developmental and clinical psychologist who studies and specializes in treating transgender children and adolescents, there are a number of components that determine a person's gender: external genitalia, internal sex organs, chromosomal sex, gonadal sex, fetal hormonal sex, hypothalamic sex, pubertal hormonal sex, neurological sex, and gender identity and role. Doc. 166,

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[10]An unredacted version of defendant's brief is in the record at Doc. 180.

[11]Pursuant to Federal Rule of Civil Procedure 52(a)(1), the Court makes these findings upon evaluation of the evidence, including the stipulations in the parties' joint pretrial statement and the testimony and exhibits admitted at trial. Where the evidence to support a relevant finding was in dispute, the Court has weighed the evidence on both sides to determine what facts are "more likely true than not." Pattern Jury Instructions, Civil Cases, Eleventh Circuit (2013 revision, last revised Jan. 2018) 1.1 Gen. Prelim. Instr.

Ct. Ex. 3 at ¶ 20.[12] Among these markers, external genitalia, the most physically obvious one, has historically been used to determine gender for purposes of recording a birth as male or female. Id. at ¶ 19. In most people, all the markers, including external genitalia, lead to a singular conclusion that an individual is either a male or a female. Doc. 166, Ct. Ex. 3 at ¶ 19. Sometimes, though, they are not congruent, with some indicators suggesting the individual is female, and others male.[13] Id. at ¶ 20. In this situation, neurological sex and related gender identity are the most important and determinative factors. Id.

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[12]Defendant filed a Daubert motion to exclude certain testimony of Deanna Adkins, M.D. and Diane Ehrensaft, Ph.D. Doc. 129. To the extent the motion seeks to exclude portions of their testimony regarding matters of school policy creation and implementation, or links between the school bathroom policy and Adams' purported emotional distress and damages, the motion is moot because the Court has not relied on that testimony. To the extent the motion seeks to exclude portions of their testimony related to understanding the nature of gender, the protocols for addressing gender transitioning, and the treatment of gender dysphoria, the motion is denied, the Court finding they are qualified to testify on those matters (and others not challenged by this motion), the methodologies upon which they rely for these limited matters are sufficiently reliable, and their testimony assists the Court in understanding the evidence.

[13]Because the "physical aspects of maleness and femaleness" may not be in alignment (for example, "a person with XY chromosomes [could also] have female-appearing genitalia), the Endocrine Society guidelines disfavor the term "biological sex." Doc. 151, Pl. Ex. 30 at 7.

The Medical Amici[14] explain that "'[g]ender identity' refers to a person's internal sense of being male, female, or another gender." Doc. 119, Ex. A at 6. A transgender individual is someone who "'consistently, persistently, and insistently' identifies as a gender different than the sex they were assigned at birth." Id. at 7. A 2016 publication estimated that 1.4 million transgender adults are living in the United States, 0.6 percent of the adult population. Id. at 4. "Gender identity is distinct from and does not predict sexual orientation; transgender people, like cisgender [non-transgender] people, may identify as heterosexual, gay, lesbian, bisexual, or asexual." Id. at 4-5.

"[M]any transgender individuals are diagnosed with gender dysphoria, a condition that is characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex." Id. at 7. Gender dysphoria is recognized by the Diagnostic and Statistical Manual of Mental

[14]Upon review, and over defendant's objection (Doc. 118), the motion for leave to file an amicus brief by the American Academy of Nursing, the American Academy of Pediatrics, the American Association of Child & Adolescent Psychiatry, the American College of Physicians, the American Medical Association, the American Medical Women's Association, the Association of Medical School Pediatric Department Chairs, the American Nurses Association, the GLMA-Health Professionals Advancing LGBT Equality, the Endocrine Society and the Pediatric Endocrine Society, (hereinafter, "the Medical Amici") (Doc. 119), is granted to the extent that the Court will rely on its brief (Doc. 119, Ex. A) for helpful explanations of biological and medical terminology. Additionally, the position of these medical associations as to the appropriate standard of care for gender dysphoria is useful to understanding that diagnosis. Defendant's motion to strike their brief (Doc. 118) is denied.

Disorders. Id. at 8. According to the Medical Amici, the World Professional Association for Transgender Health ("WPATH") has established the accepted standard of care for transgender persons suffering from gender dysphoria, and it "includes assessment, counseling, and, as appropriate, social transition, puberty-blocking drug treatment, hormone therapy, and surgical interventions to bring the body into alignment with one's gender identity." Id. at 10-11.

Social transition "typically includes publicly identifying oneself as that gender; adopting a new name; using different pronouns; grooming and dressing in a manner typically associated with one's gender identity" (Id. at 11); changing sports teams to be consistent with one's gender identity (Doc. 166, Ct. Ex. 2 at Tr. 23); "and using restrooms and other single-sex facilities consistent with that identity." Doc. 119, Ex. A at 11. Transgender students typically seek privacy and discreteness in restroom use and try to avoid exposing any parts of their genitalia that would reveal sex characteristics inconsistent with their gender identity. Doc. 166, Ct. Ex. 3 at ¶ 49. The Pediatric Endocrine Society states that not allowing students to use the restroom matching their gender identity promotes further discrimination and segregation of a group that already faces discrimination and safety concerns.[15] Doc. 151, Pl. Ex. 47.

[15]Other evidence further supports the contention that there is a documented history of discrimination against transgender individuals. See, e.g., Doc. 114 (Plaintiff's request for Judicial Notice as to governmental actions, policies and reports documenting discrimination against transgender people) (the objection to this filing is overruled); Doc. 151, Pl. Ex. 66 at iv, v, and 4 (Broward County Public Schools

The Endocrine Society Clinical Practice Guideline considers the standard of care for some adults and adolescents with gender dysphoria or who seek gender affirmance to include hormone treatment which, for a transgender male, will alter the appearance of the genitals, suppress menstruation, and produce secondary sex characteristics such as increased muscle mass, increased body hair on the face, chest, and abdomen, and a deepening of the voice. Doc. 151, Pl. Ex. 30 at 18-19. Surgical interventions (including a double mastectomy and chest reconstruction for transgender men (sometimes referred to as "top surgery") and/or genital surgery) may be appropriate and medically necessary for some patients, but may be delayed until the age of legal majority because, unlike the other treatments, they are largely irreversible. Id. at 26; Doc. 119, Ex. A at 13. Before the medical profession gained its current understanding of gender identity, some practices involved attempts to force transgender people to live in accordance with the sex assigned to them at birth, but

LGBTQ Critical Support Guide (citing Florida school survey data showing most LGBTQ students have been either verbally or physically harassed, discussing "pervasive safety concerns" of LGBTQ students, and stating that "[t]ransgender students are disproportionately targeted for harassment and violence" resulting in more than 50% of transgender students reporting a suicide attempt)). The School Board Attorney also testified that in reviewing the literature compiled by the task force that studied the school policies and in conducting other research, transgender students "are a vulnerable student population" who "fear for their safety," and "are more prone to be victims of violence, bullying [and] physical [harm] than other students." Doc. 162 at Tr. 120; see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (citing "alarming" statistics which document the "discrimination, harassment, and violence" faced by transgender individuals because of their gender identity).

those attempts failed and caused significant harm. Doc. 119, Ex. A at 5.

B. Drew Adams

When Adams was born in 2000, he had the external genitalia of a female, and indeed, his parents had been told they were expecting a girl. Doc. 160-1 at Tr. 84; Doc. 161 at Tr. 31. His Florida birth certificate recorded his sex as "female." Doc. 160-1 at Tr. 83; Doc. 170, Def. Ex. 145 (under seal). From a young age, Adams' parents noticed that Adams rejected what they describe as stereotypically feminine behaviors and attributes, such as playing with dolls, favoring the color pink, or wearing dresses; instead, Adams preferred playing with toy race cars and dinosaurs, and going to the science center. Doc. 160-1 at Tr. 217-18; Doc. 161 at Tr. 87. Nonetheless, Adams was a happy and smart child. Doc. 160-1 at Tr. 81, 189. In middle school, however, as Adams started going through puberty, he "hated" the developing feminine parts of his body. Id. at Tr. 89-91. Adams began to show signs of depression and anxiety and in early 2015, Adams' parents brought him to a mental health therapist as well as a psychiatrist. Id. at Tr. 89-91, 215-16.

At the end of eighth grade, a few months after he began his therapy, Adams realized that he was transgender and came out to his parents, who already suspected as much. Doc. 160-1 at Tr. 219; Doc. 161 at Tr. 87. Adams and his parents met with Adams' therapist seeking guidance. Doc. 160-1 at Tr. 220-21. Adams' therapist confirmed that Adams was transgender, and Adams began implementing the social

transition to present as a male, which included cutting Adams' hair short, wearing a chest binder (a garment which flattens the breast tissue) and masculine clothing, asking people to switch to male pronouns when referring to him, and using the men's restrooms when in public.[16] Id. at Tr. 95, 101. When Adams uses the men's restroom, he walks in and enters a stall, closes and locks the door, relieves himself, exits the stall, washes his hands, and leaves. Id. at Tr. 202.

Adams' psychologist determined he met the criteria for gender dysphoria, and in May 2016, she supported his request to begin treatment with an endocrinologist for his medical transition, which included taking birth control to halt menstruation and testosterone to make his body more masculine. Id. at Tr. 98-100; Doc. 151, Pl. Ex. 134. In May 2017, Adams had a double mastectomy.[17] Doc. 160-1 at Tr. 105.

Adams has also worked on the legal transition. The Florida Department of Highway Safety and Motor Vehicles follows the recommendations of the WPATH in establishing procedures for changing gender on Florida driver's licenses, requiring a statement from a medical provider that the applicant is undergoing clinical treatment for gender transition. See Doc. 147, Ex. A (Florida Driver License Operations Manual) at LR07.2b. Within certain guidelines, the Florida Department of Health,

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[16]Adams' given first name (Drew) is commonly used for boys and for girls so he did not change his first name.

[17]Adams is not yet old enough for any additional surgeries that would medically further his transition. Doc. 160-1 at Tr. 106; Doc. 166, Ct. Ex. 2 at Tr. 29.

Office of Vital Statistics accepts supporting authenticated medical documentation to amend the sex designation on birth certificates.[18] See Fla. Admin. Code Ann. R. 64V-1.003(2) (2004). Adams followed these procedures, and his Florida driver's license and Florida birth certificate both now record his gender as "Male" or "M." See Doc. 151, Pl. Ex. 3; Doc. 169, Pl. Ex. 4 (under seal).

According to Adams' mother, coming out brought on "an absolutely remarkable" change in Adams. Doc. 160-1 at Tr. 220. "He went from this quiet, withdrawn, depressed kid to this very outgoing, positive, bright, confident kid. It was a complete 180." Id. As Adams testified, with every step of the transition, he feels even better: "I don't hate myself anymore. And I don't hate the person I am. I don't hate my body anymore. There are some parts I don't like, of course, but I don't look at myself and think all those negative thoughts anymore." Id. at Tr. 106. Adams only sees his therapist now on an as-needed basis, less often than he previously did, and he is not taking any medications for anxiety or depression. Id. at Tr. 131, 188.

Adams is excelling academically in high school, is enrolled in the International Baccalaureate program, and is a member of the National Honor Society. Id. at Tr. 214-15; Doc. 162 at Tr. 129-130. He spends his summers volunteering at area hospitals and is involved in a number of organizations that serve the LGBT

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[18]Plaintiff's request for Judicial Notice of these Florida law provisions (Doc. 147) is granted without objection, though defendant contends that the state failed to follow its own procedures when changing Adams' birth certificate. See Doc. 156 at 1, n.1.

community.[19] Doc. 160-1 at Tr. 124-25. Adams plans to attend college upon graduation and aspires to become a doctor. Id. at Tr. 81.

C. The St. Johns County School District and Its Transgender and Bathroom Policies

The St. Johns County School Board is responsible for providing "proper attention to [the] health, safety, and other matters relating to the welfare of students." Fla. Stat. § 1001.42(8)(a). The St. Johns County School District educates approximately 40,000 students in 36 different schools, serving grades K-12. Doc. 161 at Tr. 254-55. An enrollment packet is assembled for each new student. Id. at Tr. 229. Part of that packet is the School District's student information/entry form, which includes a box to check whether the student's gender is "male" or "female," as does the Home Language Survey form. Doc. 170, Def. Ex. 142 & 143 (under seal). The paperwork includes a state health form, which has a space to indicate a student's "sex." Doc. 170, Def. Ex. 144 (under seal). The enrollment packet also includes a copy of a student's birth certificate, which, for Florida, lists the student's "sex." Doc.

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[19] "LGBT" is an abbreviation for lesbian, gay, bisexual, transgender. See, e.g., Doc. 152, Def. Ex. 203 at 1 (U.S. Dep't of Health and Human Services website). "LGBTQ" is an abbreviation for lesbian, gay, bisexual, transgender and questioning (and/or queer). See, e.g., Doc. 115, Ex. 3 at 2 (American Academy of Pediatrics Policy Statement); Doc. 152, Def. Ex. 85 at 56 (District of Columbia Public Schools Policy Guidance). To the limited extent that the Court has relied on the materials included in plaintiff's Request for Judicial Notice of Clinical Guidelines, Resolutions, Standards of Care, and Statements by Major Medical and Mental Health Organizations, that request (Doc. 115) is granted.

170, Def. Ex. 145 (under seal). The School District uses these documents to record a student's gender in its files. Doc. 161 at Tr. 205. If a student later presents a document, such as a birth certificate or driver's license, which lists a different gender, the original enrollment documents control. The School District will not change the official school records. Doc. 162 at Tr. 12-13. But, if a transgender student initially enrolls with documents listing the gender that matches the student's gender identity, the School District will accept the student as being of that gender. Id. at Tr. 35. The School Board is aware of approximately sixteen transgender students in its schools, some of whom would like to use restrooms which match their gender identity. Id. at Tr. 106-07. The principal at Nease is aware of five transgender students at Nease, including Adams. Id. at Tr. 136.

According to the School Board Attorney, and as affirmed by the School Board Chair, for as long as anyone can remember, the unwritten School District bathroom policy was that boys will use the boys' restrooms at school and girls will use the girls' restrooms at school, using those terms as traditionally defined based on biological traits. Id. at Tr. 45-46; Doc. 184 at Tr. 11-12. As a long-time school official explained, students of one "biological sex" have never been permitted to use the restroom of the opposite "biological sex." Doc. 161 at Tr. 149-50. The school bathroom policy has been enforced through the student code of conduct, and a student could be subject to discipline for failing to abide by the bathroom policy. Id. at Tr. 227-28; Doc. 162 at

Tr. 17-18; Doc. 152, Def. Ex. 65 (St. Johns County School District student codes of conduct, 2015-2018).[20]

Beginning in 2012, the (now retired) Director of Student Services worked with LGBTQ students, attended and sent staff to LGBTQ conferences, and researched school policies in other school districts in Florida and elsewhere to educate herself and the School District about emerging LGBTQ issues. Doc. 161 at Tr. 146-47. She formed a task force which consulted with district administrators, principals, attorneys, guidance counselors, mental health professionals, parents, students, members of the public, and LGBTQ groups in St. Johns County and elsewhere. Id. at Tr. 150-52, 158-59, 161-62, 174-80. The result was a set of Best Practices Guidelines adopted by the School Superintendent's Executive Cabinet and introduced to school administrators in September 2015. Id. at Tr. 242-45.

The Best Practices Guidelines were formed with the community's values in mind (described by the School Board Attorney as trending conservative), and they provide guidance to faculty and staff to address numerous issues related to LGBTQ students. Doc. 162 at Tr. 32-33, 86. Under the Best Practices Guidelines, upon request by a student or parent, students should be addressed with the name and gender pronouns corresponding with the student's consistently asserted gender

[20]Historically, the School District accommodated the occasional student who needed additional privacy because of a physical disability or for other reasons by making a gender-neutral single-stall bathroom available. Doc. 161 at Tr. 149.

identity; school records will be updated upon receipt of a court order to reflect a transgender student's name and gender; unofficial school records will use a transgender student's chosen name even without a court order; transgender students are allowed to dress in accordance with their gender identity; students are permitted to publicly express their gender identity; and the school will not unnecessarily disclose a student's transgender status to others. Doc. 152, Def. Ex. 33; Doc. 151, Pl. Ex. 138 at Request for Admission # 51.[21] The Best Practices Guidelines also provide that "[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex."[22] Doc. 152,

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[21]Defendant's motion to withdraw and amend two responses to plaintiff's request for admissions (Doc. 103) is granted. The Court will deem defendant's responses to request # 45 and request # 54 to be amended as stated in the motion.

[22]The Best Practices Guidelines also provide that "[t]ransgender students will not be forced to use the locker room corresponding to their biological sex" and will instead be provided with other accommodations. Doc. 152, Def. Ex. 33 at 2.

As to students participating in interscholastic sports, the Florida High School Athletic Association ("FHSAA") (of which Nease is a member) does not have any policies regarding restroom or locker room access, but it does provide that students shall be given the opportunity to participate in school sports in a manner consistent with their gender identity, regardless of the gender listed on a student's birth certificate or school records. Doc. 151, Pl. Ex. 68 (FHSAA Administrative Policies, 2017-18 edition) at § 4.3; Doc. 152, Def. Ex. 65 (St. Johns County School District Student Code of Conduct 2017-2018) at § 8 (referencing student athletes' mandatory compliance with FHSAA rules and by-laws). Schools which fail to abide by the FHSAA Policies are subject to monetary penalties. Doc. 151, Pl. Ex. 68 at 1. The Best Practices Guidelines acknowledge the FHSAA policy. Doc. 152, Def. Ex. 33 at 2.

Def. Ex. 33 at 1. The document further states that "[t]here is no specific federal or Florida state law that requires schools to allow a transgender student access to the restroom corresponding to their consistently asserted transgender identity." Id.

In formulating their recommendations for the Best Practices Guidelines, the LBGTQ task force was aware that some other school districts, including in Florida, have adopted policies permitting transgender students to use the restrooms consistent with their gender identity. Doc. 161 at Tr. 215-16. However, the task force did not recommend that alternative for the St. Johns County School District due at least in part to concerns about how to handle gender-fluid students (those whose gender changes between male and female) or those pretending to be gender-fluid, although the task force had not heard of any such incidents.[23] Id. at Tr. 215-17.

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[23]There is not a scientific or medical definition of "gender-fluid" in the record. The Broward County Public Schools support guide for LGBTQ issues references gender fluidity within its definition of "genderqueer," saying individuals who are genderqueer "typically reject notions of static categories of gender and embrace a fluidity of gender identity and often, though not always, sexual orientation." Doc. 151, Pl. Ex. 66 at 10. The District of Columbia Public Schools defines gender fluidity as conveying "a wider, more flexible range of gender expression, with interests and behaviors that may change, even from day to day. Gender fluid children do not feel confined by restrictive boundaries of stereotypical expectations of girls or boys . . . . [A] child may feel they are a girl some days and a boy on others, or a combination, or possibly feel that neither term describes them accurately." Doc. 151, Pl. Ex. 116, Pt. 2 at 25. In Doe v. Boyertown Area School District (a transgender school bathroom case discussed further below), the court defined "gender fluid" as a person who "identifies as male in some situations and female in other situations." 276 F. Supp. 3d 324, 344 (E.D. Pa. 2017), aff'd, 890 F.3d 1124 (3d Cir. 2018) (affirming), 893 F.3d 179 (opinion). That court also cited an expert (Ohio psychiatrist Dr. Scott Leibowitz) who explained that "'gender fluid' is not a clinical term, but it describes kind of feeling a

According to the School Board Attorney, the gender-neutral bathroom option was added to the Guidelines and is now part of the school policy as a reasonable alternative for transgender students so they would not be required to use the bathroom of their sex assigned at birth. Doc. 162 at Tr. 61-62. The School Board's position is that this approach reconciles the interests of transgender students without violating the School Board policy of having separate bathrooms for boys and girls. Id. at Tr. 62. The retired Director of Student Services also explained that the Best Practices Guidelines accommodate gender-fluid students while protecting against the possibility that students might claim to be gender-fluid to gain access to the bathroom of the opposite sex. Doc. 161 at Tr. 216.

Several months after the School District implemented the Best Practices Guidelines, the United States Departments of Education and Justice issued guidance ("the 2016 Guidance") that the term "sex" under Title IX included gender identity. Doc. 152, Def. Ex. 84. The 2016 Guidance directed that schools that provide sex-segregated restrooms, locker rooms and shower facilities must allow transgender students to use those facilities consistent with their gender identity. Id. at 3. In response, the School District issued a statement through its Superintendent that it

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certain gender at a certain moment in time, and . . . then switching, perhaps, back." Id. at 365.

Adams is not gender-fluid. Other than discussing defendant's contentions about gender-fluidity, the Court's opinion does not address how schools should handle this complicated issue.

disagreed with that guidance and intended to continue following its long-standing bathroom policy as supplemented by the Best Practices Guidelines, which it believed to be lawful and provided a reasonable accommodation. Doc. 162 at Tr. 75-78. In February 2017, the Departments of Education and Justice withdrew the 2016 Guidance, explaining that it had not undergone any formal public process and had been issued without extensive legal analysis or explanation as to how it was consistent with Title IX. Doc. 152, Def. Ex. 237.

Incorporating both the long-standing unwritten School Board bathroom policy and the Best Practices Guidelines, the current policy in St. Johns County public schools for grades four and up is that "biological boys" may only use boys' restrooms or gender-neutral single-stall bathrooms and "biological girls" may only use girls' restrooms or gender-neutral single-stall bathrooms, with the terms "biological boys" and "biological girls" being defined by the student's sex assigned at birth, as reflected on the student's enrollment documents.[24] Doc. 162 at Tr. 45-46, 62, 71; Doc. 161 at

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[24] Although the Best Practices Guidelines supplement the earlier policy by providing a gender-neutral single-stall bathroom option, the policy that only "biological boys" may use the boys' restroom and that only "biological girls" may use the girls' restroom is not written anywhere. The Court had questions about whether it had been adopted as the official policy of the School Board, such that the challenge to it created a ripe controversy requiring decision by a federal court. At the Court's direction, the parties filed supplemental briefs on the issue after trial and the School Board Chair affirmed that the School Board policy prohibits Adams from using the boys' bathrooms at Nease High School. See Docs. 159, 172, 174, 178, 184 at Tr. 6-13. The Court is satisfied that this matter presents a real and substantial controversy that is ripe for juridical review. See Nat'l Adv. Co. v. City of Miami, 402 F.3d 1335, 1338-39 (11th

Tr. 248. The School Board Attorney explained that the bathroom policy comports with the Board's overall responsibility for student welfare, which, in the case of bathrooms, principally involves concerns for privacy and safety.[25] Doc. 162 at Tr. 110-11.

With regard to privacy, the School Board seeks to preserve the privacy of individuals using the restroom facilities, but admits that the bathroom stall doors provide privacy for anyone inside a stall. Id. at Tr. 114. The retired Director of Student Services who led the LGBTQ task force explained the privacy concerns:

> [W]hen a girl goes into a girls' restroom, she feels that she has the privacy to change clothes in there, to go to the bathroom, to refresh her makeup. They talk to other girls. It's kind of like a guy on the golf course; the women talk in the restrooms, you know. And to have someone else in there that may or may not make them feel uncomfortable, I think that's an issue we have to look at. It's not just for the transgender child, but it's for the other.

Doc. 161 at Tr. 213. The School District's Deputy Superintendent for Operations raised similar points, saying a student may want privacy to undress or clean up a stain on her clothing. Id. at Tr. 248. The School Board Attorney also explained that allowing a transgender student to use a restroom that conformed to his or her gender identity could create opportunities for students "with untoward intentions to do things they ought not to do," although the School Board has never received any complaints

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Cir. 2005) (explaining the constitutional and prudential concerns that must be satisfied to invoke the federal court's limited jurisdiction).

[25]The School Board did not argue that cost was a factor in arriving at a bathroom policy. See Doc. 161 at Tr. 67-68.

of untoward behavior involving a transgender student. Doc. 162 at Tr. 112-13.

As for the safety aspect, the School Board seeks to assure that members of the opposite sex are not in an unsupervised bathroom together, citing as an example the risks of danger posed to a female freshman student who might find herself alone in the restroom with an 18-year old male student. Id. at Tr. 69, 111, 115. A related concern raised by the retired Director of Student Services was that under a relaxed policy, a student–a football player for example–could pose as being gender-fluid for the purpose of gaining access to the girls' restroom, but the school would have no way to know whether his belief that he is gender-fluid is sincere. Doc. 161 at Tr. 213. However, the task force's research did not reveal any actual situations where a problem like that occurred. Id. at Tr. 213.

The retired Director of Student Services also expressed concern for the safety of transgender students, worrying that they might be bullied or assaulted or ridiculed by other students if they are in the bathroom that matches their gender identity. Id. at Tr. 217. While the School Board's code of conduct would address any violations, by keeping boys and girls separate in the unsupervised restrooms, the School Board seeks to minimize the opportunity for any such violation to occur. Doc. 162 at Tr. 115. However, the School Board is not aware of any bullying violations involving a transgender student in any St. Johns County School District restroom, id. at Tr. 115, nor did the task force hear of any such incidents in other school districts involving

transgender students using the restroom that aligned with their gender identity. Doc. 161 at Tr. 219-20. Moreover, the retired Director of Student Services acknowledged that for a transgender student who has made the social transition and whose appearance is consistent with his or her gender identity (for example, a transgender girl whose hair is long, whose breasts are enhanced, who is wearing lipstick), there may be safety, security, and privacy concerns if that student used the restroom that is consistent with the sex the student was assigned at birth; thus, she thought it would be preferable if such a student used a gender-neutral single-stall bathroom. Id. at Tr. 207-09; 217-18.

Additionally, if a transgender student enrolled in the St. Johns County School District having already changed their legal documents to reflect their gender identity, the student's school records would reflect that gender as well. Doc. 162 at Tr. 35. The school district has no process to determine if a student is transgender. Doc. 161 at Tr. 235. As the School Board Attorney said, "[t]he district does not play bathroom cop," and it accepts the information on the enrollment documents at face value. Doc. 162 at Tr. 53. Thus, unless there was a complaint, a transgender student could use the restroom matching his or her gender identity until he or she graduated and the school would be none the wiser. Id. at Tr. 35-36, 53. The School Board Attorney testified that he thought that scenario would be a rare occurrence and, if it became a problem, the School Board could re-examine the practice of using self-identifying

enrollment documents to determine gender.[26] Id. at Tr. 54-55. However, he agreed that at this point, the School District would have no occasion to question a student who used a restroom consistent with the gender recorded on the student's enrollment documents. Id. at Tr. 89.

The Nease campus is spread over several buildings. There are four sets of multi-stall, sex-segregated bathrooms available during class time to the school's 2,450 students. Id. at Tr. 131-32. An additional set is available in the locker rooms for use by students while taking physical education classes. Id. at Tr. 131. Discounting the locker room, there are a total of ten bathroom stalls available in the boys' restrooms on the Nease campus. Id. at Tr. 133. All of the boys' restrooms have a set of urinals and stalls with doors. The urinals in the boys' restrooms are not divided by partitions, although a school official said perhaps they could be. Id. at Tr. 32. The campus additionally has eleven gender-neutral single-stall bathrooms in various locations which are open to any student or staff member. Id. at Tr. 134. A multi-stall boys' restroom and a multi-stall girls' restroom are accessible to students in the cafeteria area, but there is not a gender-neutral bathroom in that area and during certain lunch periods, students who wish to use a gender-neutral bathroom

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[26]The School Board Attorney did not testify as to what a revised practice might be. The retired Director of Student Services testified it would be "totally inappropriate" to conduct physical inspections of students to determine what genitalia they had, and the school would "never" do that. Doc. 161 at Tr. 204.

must ask permission to leave the area. Doc. 160-1 at Tr. 279-80.

The undersigned visited Nease and toured all of the bathrooms on campus. While they were clean, most of the multi-stall single-sex restroom facilities were dated and there were not nearly enough bathrooms for boys or girls considering the number of students at Nease. The school principal said there are often lines to use those bathrooms. The gender-neutral bathrooms were generally more modern than the multi-stall single-sex bathrooms. Some of Nease's classrooms are in portable buildings. There are no gender-neutral bathrooms or faculty bathrooms near those classrooms, and the multi-stall single-sex bathrooms there have very few stalls. The principal said that faculty assigned to teach in the portable classrooms sometimes use the multi-stall single-sex bathrooms. The undersigned observed that the boys' locker room is an open space with no room for privacy while changing. There is a bathroom available in the coach's office, but the principal said it is not available to use for changing. The boys' locker room shower is an open space with several shower heads and no curtains or dividers. The showering space is visible to other areas of the locker room.

D. Adams' Experience with the Bathroom Policy at Nease High School

School enrollment documents show that Adams enrolled in the St. Johns County School District as a female entering the fourth grade at PV/PV Rawlings Elementary in 2010. See Doc. 170, Def. Ex. 142, 143, 144 (under seal). During the

summer of 2015, before Adams began high school at Nease, Adams' mother informed the student services department that Adams was transitioning and would be attending high school as a boy. Doc. 160-1 at Tr. 251-52. When Adams began school in August, he presented as a boy and used the boys' restroom when needed without incident. Id. at Tr. 253. One day in September approximately six weeks after school started, Adams was called out from his classroom and told by his guidance counselor that someone had complained about him using the boys' restroom and that, going forward, he could use the gender-neutral bathroom in the school office. Id. at Tr. 114-15, 253. Adams was also advised that he could use the girls' restroom, something he found insulting. Id. at Tr. 117-18. It was not a boy or a boy's parents who had complained. Rather, it was two unidentified female students who reported that they had seen Adams entering the boys' restroom. Doc. 162 at Tr. 16-17.

To Adams, the school's refusal to let him use the boys' restroom meant that the school did not see him as a boy, and refused to accept who he was. Doc. 160-1 at Tr. 116. As Adams testified, "I was living in every aspect of my life as a boy and now they're taking that away from me." Id. Adams said he was confused, shocked, and angered by the school's reaction. Id. at Tr. 115-16. The school agreed to provide gender-neutral restrooms which Adams has used as necessary. Id. at Tr. 172-73. Adams would be subject to disciplinary action if he used the boys' bathroom. Doc. 162 at Tr. 17-18. Over the course of Adams' freshman and sophomore years, Adams'

mother met with various school and District personnel, sent them letters and emails, and pursued a complaint with the U.S. Department of Education's Office of Civil Rights; by the end of his sophomore year when those efforts had not resulted in any change to the school bathroom policy, Adams, through his mother, filed this lawsuit. Doc. 160-1 at Tr. 254-60.

For some of Adams' classes during his junior year, the gender-neutral bathrooms were considerably further away than the boys' restrooms.[27] Id. at Tr. 117, 119, 122-24, 176-79. Adams monitors his fluid intake to minimize his need to use the restroom and he now uses the school bathroom only once or twice a day.[28] Id. at Tr. 118-19, 172. Adams thinks ahead about where his classes are and which bathrooms he can access, worrying he will miss valuable class time if a gender-neutral bathroom is not nearby.[29] Id. at Tr. 118-19. Adams' has not registered for any physical

[27]Nease has increased the number of gender-neutral single-stall restrooms available for student use since Adams started as a student there. Originally, only one was available, in the school office. By the time Adams finished his junior year in the spring of 2018, eleven were available. Doc. 160-1 at Tr. 120; Doc. 162 at Tr. 133-34.

[28]Pediatric endocrinologist Dr. Adkins testified that limiting fluid intake to avoid bathroom use increases the risk of urinary tract infections and dehydration (Doc. 166, Ct. Ex. 2 at Tr. 32-33), but Adams has never complained to school officials about those issues (Doc. 160-1 at Tr. 179), and there is no evidence in the record of him having suffered from those problems.

[29]Having visited the Nease campus and toured the routes Adams took from his classes to the nearest gender-neutral bathroom, the Court did not find those distances to be so far as to disrupt Adams' class schedule.

education classes while at Nease (students enrolled in the International Baccalaureate program are not required to take physical education classes), and Adams did not testify about the school policy with respect to the locker rooms, which are only available to students taking physical education classes. Doc. 171, Def. Ex. 42 & 43 (under seal); Doc. 162 at Tr. 131.

Adams testified that he feels alienated and humiliated, and it causes him anxiety and depression to walk past the boys' restroom on his way to a gender-neutral bathroom, knowing every other boy is permitted to use it but him. Doc. 160-1 at Tr. 116-17. Adams thinks it also sends a message to other students who see him use a "special bathroom" that he is different, when all he wants is to fit in. Id. at Tr. 205.

There were no reported instances of privacy breaches during the time Adams used the boys' restroom at Nease. Although no one other than the two female students ever complained about Adams' use of the boys' bathroom at Nease, the parties stipulated that certain parents and students in the School District object to a policy or practice that would allow students to use bathrooms in accordance with their gender identity as opposed to their sex assigned at birth, because they believe such a practice would violate the bodily privacy rights of students and raises privacy, safety and welfare concerns. Doc. 116 at § I, ¶ 3 (p. 22). The School District has agreed to treat Adams as a boy in all other respects, but its position is that Adams' enrollment documents and official school records identify him as a female, and he has not

presented any evidence that he is a "biological male." Doc. 161 at Tr. 229-36, 253; Doc. 162 at Tr. 12-13, 35-36; Doc. 173-1 at ¶¶ 42-43. The School District maintains that Adams is welcome to use the gender-neutral bathrooms or the girls' bathroom.[30] Doc. 161 at Tr. 250-51. But he cannot use the boys' bathroom.

E. Schools With Policies Permitting Transgender Students To Use The Bathroom that Aligns With Their Gender Identity

The Court heard testimony from three school administrators familiar with other schools that have adopted the transgender bathroom policy that Adams is advocating.[31] Broward County, also in Florida, has a public school policy that permits students to use gender-neutral restrooms as well as the restrooms that match their gender identity. Doc. 151, Pl. Ex. 66 at 40-41. Unlike St. Johns County, Broward County also has a human rights ordinance that prohibits discrimination based on

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[30]That latter position seems disingenuous. Adams presents as a boy and continues to exhibit more masculine physical features as his medical treatment continues. It would seem that permitting him to use the girls' restroom would be unsettling for all the same reasons the School District does not want any other boy in the girls' restroom.

[31]A group of school administrators, school districts, and educators from 29 states and the District of Columbia sought leave to file an amicus brief in support of Adams' position. Doc. 124. The School Board objected that their brief was filed just three business days before trial, it deprived counsel of an opportunity to cross-examine their positions, and would be cumulative of other evidence. Doc. 136. Two of the school administrators who testified are among the members who sought to file the brief. For the reasons raised by the School Board, and finding that the testimony of the three administrators ameliorates any prejudice to Adams, the Court will deny the amicus' motion (Doc. 124) (and finds their counsel's motion for leave to appear pro hac vice (Doc. 125) to therefore be moot).

gender identity. Id. at 16. Michaelle Valbrun-Pope, the Executive Director of the Student Support Initiatives for Broward County Public Schools (the sixth largest school district in the nation), testified that she is aware of nine other Florida school districts that have implemented some of their policies with regard to transgender students.[32] Doc. 161 at Tr. 65-66. Valbrun-Pope testified that Broward County Schools' transgender bathroom policy, which has been in effect for about five years, has not caused any issues related to safety or privacy. Id. at Tr. 64-65. She testified that she has never heard of a transgender student exposing himself or herself in the restroom and that doing so would be inconsistent with aligning themselves with their gender identity and being accepted as that gender. Id. at Tr. 65.

Michelle Kefford, a principal at a high school in Broward County who also works district-wide answering questions about the district's LGBTQ policies, has worked with about a dozen transgender students over the years, and her high school presently has two transgender students out of a population of about 2,600. Id. at 106, 109-110,

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[32]At closing arguments, counsel for the School Board noted a few other counties within the Middle District whose school boards he believed have policies similar to St. Johns County's, and remarked that the Volusia County School Board was involved in similar litigation. But apparently the Volusia County School Board accepts a birth certificate as proof of "sex" and, as the transgender plaintiff in that case has now obtained "an amended State of Florida birth certificate identifying his sex as male," the Volusia County School Board now permits him to use the boys' restrooms and locker rooms at his school. See Doe v. Volusia Cnty. Sch. Bd., No. 6:18-cv-102-Orl-37GRK, Doc. 57 at ¶ 2 (filed June 19, 2018).

117. Once a transgender student comes forward to identify herself or himself, an adult staff member meets with the student to discuss a variety of issues, including whether the student wants to be called a different name, whether the student's family is aware of the situation, whether a referral to any outside resources would be helpful to the student or the family, whether the student has disclosed his or her gender identity to others, whether the student is engaged in extracurricular activities or sports where support may be needed, and what restroom the student wants to use. Id. at Tr. 111-12; Doc. 151, Pl. Ex. 66 at 49-51. Broward County Public Schools do not require any legal documentation such as a birth certificate to permit students to be treated consistent with their gender identity, and students need only identify themselves as transgender to have access to the restroom that corresponds to the gender identity they assert at school. Doc. 151, Pl. Ex. 66 at 35-36, 40-41.

Kefford testified that no students or parents have complained about transgender students in the bathrooms, although in the training sessions she conducts within the school district, she has encountered other adults who do not agree with the district's transgender policies. Doc. 161 at Tr. 106, 118-19. Based on her experience in meeting with these adults, Kefford's opinion is that "people are afraid of what they don't understand . . . [and] a lot of that fear [is because] they haven't experienced it, they don't know enough about it, and the first thing that comes to mind is this person wants to go into this bathroom for some other purpose. That's

not the reality. The reality is this child . . . just want[s] to be accepted" as a member of the gender with which they identify. Id. at Tr. 120-21.

Kefford also testified that there has never been a problem involving a transgender student in the bathroom, and any problem that did arise would be dealt with in accordance with the school's disciplinary guidelines. Id. at Tr. 106-07. Kefford said that any child who was uncomfortable with the policy or wanted additional privacy beyond that already afforded by a bathroom stall would have the option of using a gender-neutral single-stall bathroom. Id. at Tr. 120. She also testified that some transgender students who are in the early stages of their transition prefer to use a gender-neutral bathroom instead of the bathroom that matches their gender identity. Id. at Tr. 111-12. Kefford has never heard of a transgender student (or adult) going into a restroom for the purpose of engaging in any inappropriate predatory behavior and has never heard of a cisgender student pretending to be transgender to gain access to a bathroom opposite of their true gender identity. Id. at Tr. 107, 119.

Dr. Thomas Aberli, a principal with the Jefferson County Public Schools in Kentucky testified about his experience at a high school during the time that it adopted a policy to permit transgender students to use bathrooms and locker rooms that aligned with their gender identity. Doc. 160-1 at Tr. 22-23. That high school does not have any gender-neutral bathrooms but does have one single-stall girls' bathroom and one single-stall boys' bathroom in the front office. Id. at Tr. 25. Aberli

testified that the school had no problems implementing the policy, which was occasioned by a student who transitioned during the school year. Id. at Tr. 26-27. Aberli explained that this was his first encounter with a transgender student and he had a steep learning curve but ultimately concluded that "being transgender was a real thing that the school would have to respond to." Id. at Tr. 31. Although many parents initially had concerns about safety and privacy, the school has disciplinary procedures to address any violations, and none have occurred. Id. at Tr. 45-54.

III. Conclusions of Law

To prevail, Adams must prove by a preponderance of the evidence that the School Board violated his rights under the Equal Protection Clause and/or Title IX.[33] If Adams does so, it is also his burden to prove (again by a preponderance of the evidence) how this violation caused him damage.[34] See Pattern Jury Instructions,

[33]Adams filed suit under 42 U.S.C. § 1983. The School Board is a "person" acting under color of law within the meaning of 42 U.S.C. § 1983. Doc. 151, Pl. Ex. 138 at Request for Admission 1.

[34]The evidence at trial was that Adams has no occasion to use the locker room at Nease (the use of which is limited to students taking physical education classes, which he does not) and none of his testimony related to those facilities or any desire to access them. Likewise, when discussing the School Board's concerns, the testimony was about the multi-stall single-sex restrooms on campus that students use during class time, on the short breaks between classes, or during lunch. While the Court viewed the locker room and showers as part of its tour of Nease, Adams did not attempt to show that the School Board policy as it relates to locker rooms and shower facilities has caused him any harm. Thus, the Court's analysis of Adams' claims does not include consideration of his use of the boys' locker room or shower facilities and the Court's rulings do not apply to those spaces. Outside of case citations, references

Civil Cases, Eleventh Circuit (2013 revision, last revised Jan. 2018) 1.1 Gen. Prelim. Instr.; Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (explaining that even in burden shifting cases, plaintiff bears the ultimate burden of persuading the trier of fact).

The Supreme Court has long recognized that the state has broad authority to protect the physical, mental, and moral well-being of its youth. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72-74 (1976). The Court is mindful that schools are traditionally locally controlled and that a federal court should tread lightly when asked to contravene a policy established by a local school board. Minor children are involved here and the concerns of their parents and school administrators charged with their safety cannot be minimized. Moreover, of all the areas in a school, bathrooms are where privacy considerations are at their peak. So, even if a school is otherwise prepared to accept a student as transgender, it is not surprising that allowing transgender students to use restrooms aligned with their gender identity is not an easy step. But neither was it easy when public restrooms were racially integrated. To be sure, what the law requires and what some are comfortable with are not always the same. Nonetheless, "[a]n individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public

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to "restrooms" or "bathrooms" within this section of the opinion do not include those located in the locker room or shower facilities.

disagrees and even if the legislature refuses to act." Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

A. Equal Protection Clause Claim

The Equal Protection Clause of the Fourteenth Amendment provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Accordingly, the St. Johns County School Board, a political subdivision of the State of Florida,[35] must "treat all persons similarly situated alike or, conversely, [must] avoid all classifications that are 'arbitrary or irrational' and those that reflect 'a bare desire to harm a politically unpopular group.'" Glenn v. Brumby, 663 F.3d 1312, 1315 (11th Cir. 2011) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985)). Generally, state action will be upheld "if it is rationally related to a legitimate governmental purpose." Id. However, classifications based on "sex or gender" are subject to intermediate scrutiny. Id. at 1315-17; see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858

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[35] See Fla. Const. art. IX, § 4 (establishing governance of Florida's public education system in each county by elected members of district school boards); Fla. Stat. 1.01(8) (defining political subdivision to include "all other districts in this state"); Fla. Stat. § 120.52(1)(a) and (6) (defining state agency to include local school districts); Fla. Stat. Title XLVIII (Florida's K-20 Education Code, Ch. 1000-1013); NLRB v. Nat. Gas Util. Dist. of Hawkins Cty, 402 U.S. 600, 604-05 (1971) (explaining that an entity is a "political subdivision" under federal law if it is either "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate").

F.3d 1034, 1050-52 (7th Cir. 2017) (determining school district decision to exclude transgender students from bathrooms matching their gender identity was based on sex stereotyping, and thus subject to heightened scrutiny[36]); M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F.Supp. 3d 704, 718-19 (D. Md. 2018) (reviewing Glenn and Whitaker and determining that heightened scrutiny applied in transgender school bathroom case); A.H. v. Minersville Area Sch. Dist., 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017) (holding intermediate scrutiny applied in transgender school bathroom case); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (applying intermediate scrutiny to decision to exclude transgender individuals from the military); Doe 1 v. Trump, 275 F. Supp. 3d. 167, 210 (D.D.C. 2017) (same).

The School Board's bathroom policy cannot be stated without referencing sex-based classifications, as it requires what it terms "biological boys"--intended by the School Board to mean those whose sex assigned at birth is male--to use the boys' bathrooms or gender-neutral bathrooms, and it requires "biological girls"--intended by

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[36]As explained by the Eleventh Circuit in Glenn, "heightened" scrutiny includes both intermediate and strict scrutiny. Glenn, 663 F.3d at 1316, n.4 (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)). The "heightened" scrutiny test applied in Whitaker is the same as the "intermediate" scrutiny test applied in Glenn. Though Adams argued that strict scrutiny might apply here, the Court is not aware of any transgender bathroom case that has applied strict scrutiny, reserved for "classifications pertaining to race or national origin or to those affecting certain fundamental rights." Id. (citing Clark, 486 U.S. at 461).

the School Board to mean those whose sex assigned at birth is female--to use the girls' bathrooms or gender-neutral bathrooms. But Adams identifies as a boy, is identified by others as a boy, is legally deemed by the state of Florida to be a boy, lives as a boy, uses the men's restroom outside of the school setting, and is otherwise treated as a boy--except when it comes to his use of the school bathrooms. The School Board Attorney agreed that as a transgender boy, Adams is not treated the same as "biological boys" when it comes to using the restroom. Doc. 162 at Tr. 118. Thus, although the policy treats most boys and girls the same, it treats Adams differently because, as a transgender boy, he does not act in conformity with the sex-based stereotypes associated with the sex he was assigned at birth (female). "This policy is inherently based upon a sex-classification and heightened review applies." Whitaker, 858 F.3d at 1051 (explaining that school bathroom policy which relied on sex listed on students' birth certificates did not treat all boys and girls the same (and therefore violated the Equal Protection Clause) because transgender students, who fail to conform to sex-based stereotypes associated with their sex assigned at birth, are treated differently). As the Eleventh Circuit explained in Glenn, "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype," which includes "perceived gender-nonconformity," "a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause." 663 F.3d at 1318-19. The School Board does not dispute that its bathroom

policy makes distinctions based on sex and is subject to intermediate scrutiny;[37] that

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[37]To the extent the School Board contends Adams must make a threshold showing of discriminatory intent to state an Equal Protection claim (Doc. 173 at 34), that may be a misreading of the circumstances here. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273-74 (1979) (explaining that if a statute is neutral on its face and its classifications are not based on gender, the court must inquire whether its effect nonetheless reflects invidious gender-based discrimination); see also Morrissey v. United States, 871 F.3d 1260, 1268-72 (11th Cir. 2017) (examining facially neutral tax law and finding homosexual taxpayer could not show that different treatment was motivated by an intent to discriminate). Here, by contrast, defendant agrees that its bathroom policy makes distinctions based on sex and is subject to intermediate scrutiny. Doc. 173-1 (Defendant's proposed findings of fact and conclusions of law) at 37. Although the School Board did not have transgender students in mind when it originally established separate multi-stall restrooms for boys and girls, it has since become aware of the need to treat transgender students the same as other students and does so in all other respects, except when it comes to the bathroom policy: A student whose sex assigned at birth is female is subject to discipline if the student identifies as a male and uses the boys' restroom, whereas the same student would be free to use the boys' restroom if his sex assigned at birth was male or if he agreed to act in conformity with the School Board's expectations and use the girls' restroom. Thus, even if it started out that way, the school bathroom policy is no longer a neutral rule because it applies differently to transgender students, as the School Board itself acknowledges. See Romer v. Evans, 517 U.S. 620, 634 (1996) (noting that class separation raises an "inevitable inference" of animosity toward the affected class); Doe 1 v. Trump, 275 F. Supp. 3d at 209-10 (applying intermediate scrutiny to Equal Protection Claim brought by current and aspiring transgender military service members because the policy to exclude them "inherently discriminates" against them); Stone, 280 F. Supp. 3d at 768 (finding transgender service members met threshold of showing "intentional or purposeful discrimination" because there was "no doubt" that policy set apart transgender service members for different treatment). See also A.H., 290 F. Supp. 3d at 331, n.5 (finding that to the extent plaintiff was required to allege intentional discrimination, she had done so by alleging that the principal said the school wasn't ready to handle transgender students in bathrooms and that his job was to protect other students from plaintiff). The School Board's positions here echo those pled in A.H. and, to the extent it's necessary, the Court finds Adams has made the threshold showing of intentional discrimination.

is the standard the Court will apply.[38]

Under the intermediate scrutiny standard, the School Board must show that "'its gender classification is substantially related to a sufficiently important government interest.'" Glenn, 663 F.3d at 1316 (quoting Cleburne, 473 U.S. at 441). The justification for its policy must be "exceedingly persuasive." United States v. Virginia, 518 U.S. 515, 532-33 (1996). "Moreover, the classification must substantially serve an important governmental interest today, for in interpreting the equal protection guarantee, [the Supreme Court has] recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and

[38]Because of the School Board's concession and the Eleventh Circuit's clear statement in Glenn, the Court has no occasion to engage in the further analysis many other transgender bathroom cases have which additionally considered whether transgender people are a quasi-suspect class, deserving of heightened scrutiny per se. See, e.g., Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730, 749-50 (E.D. Va. 2018) (concluding transgender individuals are a quasi-suspect class) M.A.B., 286 F. Supp. 3d at 719-22 (same); Bd of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 872-74 (S.D. Ohio 2016) (same); Evancho, 237 F. Supp. 3d at 288-89 (finding "all the indicia" supported application of intermediate scrutiny to classification involving transgender status); cf., Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (declining to recognize transgender status as a quasi-suspect class because neither the Supreme Court nor the Third Circuit had yet done so). The Third Circuit's recent decision in Doe v. Boyertown Area School District, though not an Equal Protection Clause case, suggests the Third Circuit would likely accord quasi-suspect class status to transgender individuals. 893 F.3d 179, 184 (3d Cir. 2018) (finding policies that exclude transgender individuals from facilities consistent with their gender identity have detrimental effects on their physical and mental health, safety and well-being, citing high rates of suicide, homelessness, and other problems afflicting transgender people).

unchallenged." Sessions v. Morales-Santana, 137 S. Ct. 1678, 2690 (2017) (internal quotation and alterations omitted, emphasis in original) (citation omitted). The School Board contends its bathroom policy is substantially related to its important interests in student privacy and student safety, both of which fall within its statutory responsibility for student welfare.

1. Privacy

The School Board claims that its long-standing policy of having separate boys' and girls' bathrooms has created an expectation of privacy for students and parents who do not expect students of the opposite sex to share the bathroom space. Doc. 162 at Tr. 67. The Court agrees that the School Board has a legitimate interest in protecting student privacy, which extends to bathrooms. But allowing transgender students to use the restrooms that match their gender identity does not affect the privacy protections already in place. When he goes into a restroom, Adams enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves. Adams has encountered no problems using men's restrooms in public places, and there were no reports of problems from any boys or boys' parents during the six weeks of his freshman year when Adams used the boys' restrooms at Nease. Nor was there any evidence that any school official associated with the St. Johns County School District, including members of its LGBTQ task force, had ever heard of any incident anywhere where a transgender student using a restroom acted in a

manner that invaded another student's privacy.

Likewise, the research and experience of the school officials from Broward County and Jefferson County Public Schools in Kentucky revealed no privacy concerns when transgender students used the restroom that matched their gender identity. While St. Johns County School personnel said girls may want privacy in the restrooms while talking to their peers, changing clothes (which can be done in a stall), putting on make-up, or removing stains from their clothing, none of that requires them to expose their anatomy to other students such that having a transgender student in the restroom would invade their bodily privacy. And, any student who wants additional privacy for any reason is permitted to use the gender-neutral single-stall bathrooms.

Admittedly, the boys' restrooms at Nease– which Adams would use if he could– have urinals without dividers, so if someone chose to be a voyeur, there is the potential that a boy's genitals could be viewed. But this is not a real concern for several reasons. First, Adams cannot use a urinal and always uses a stall. Second, there is no evidence that a transgender boy is more likely to be curious about another student's anatomy than any other boy. Third, any student engaging in voyeurism in the bathroom would be engaging in misconduct which is subject to discipline through the School District's code of conduct. Fourth, any boy who is concerned about other students seeing his anatomy can use a gender-neutral bathroom or a stall in the boys'

restroom (as Adams would when using the boys' restroom).

Nor was there any evidence that transgender students might expose themselves to other students in the restroom; in fact, the evidence was to the contrary– transgender students want to be discrete about their anatomy so other students do not recognize them as anything but the gender with which they identify. Indeed, as the School Board admitted, there could be transgender students whose enrollment documents are consistent with the students' gender identity, and no one would know they are using restrooms that are different from the ones that match their sex assigned at birth.

Based on the evidence at trial, the Court concludes that the School District's bathroom policy "does nothing to protect the privacy rights of each individual student vis-a-vis students who share similar anatomy and it ignores the practical reality of how [Adams], as a transgender boy, uses the bathroom: by entering a stall and closing the door." Whitaker, 858 F.3d at 1052; see also Boyertown, 893 F.3d at 193 (rejecting cisgender students' argument that transgender students in school locker rooms and multi-stall restrooms violated their constitutional right to privacy, noting "appellants are claiming a very broad right of personal privacy in a space that is, by definition and common usage, just not that private"). Thus, when the School District's stated privacy interest is "weighed against the facts of the case and not just examined in the abstract," Whitaker, 858 F.3d at 1052, it fails to provide an "exceedingly

persuasive justification" for the School Board's bathroom policy.[39] Virginia, 518 U.S. at 556. See also Grimm, 302 F. Supp. 3d at 751 (finding School Board's privacy argument "[rang] hollow" and was based on conjecture given that the only complaints came from adults, not students (who had shared a restroom with the transgender student for weeks) and because a "'transgender student's presence in a restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex'") (quoting Whitaker, 858 F.3d at 1052); Evancho 237 F. Supp. 3d at 289-90 (acknowledging school's obligation to protect student privacy but finding "facts on the ground" revealed school bathroom layout (composed of stalls with locking doors and partitioned urinals) did not pose any

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[39]The School Board also relied on the privacy rights accorded under the Florida Constitution (Article I, Section 23), but did not explain how those rights would be infringed by the presence of a transgender student in a restroom conforming to his or her gender identity, nor why those rights should be given more weight than the Equal Protection rights at stake. Moreover, the School Board Attorney acknowledged that the Broward County School District (also in Florida) was not violating any Florida law by following its policy, which permits transgender students to use the restroom that accords with their gender identity. See Doc. 162 at Tr. 122-23. For the same reasons cited above, the privacy rights guaranteed under the Florida Constitution are not endangered when transgender students use multi-stall school restrooms that match their gender identity, particularly where all students have the option to avail themselves of the privacy afforded by the multi-stall and gender-neutral single-stall bathrooms. The persuasiveness of the cases relied on in the above analysis is not diminished merely because their states do not have a constitutional right of privacy similar to Florida's. Nor is their analysis less persuasive because a state law may have prohibited discrimination on the basis of gender identity.

actual risk of invasion of a student's personal privacy).[40]

2. Safety

The School Board also cites student safety as a basis to uphold its bathroom policy, expressing concern for transgender students who may be bullied or harassed in the bathroom matching their gender identity and for cisgender students who may not feel safe if a person with genitalia of the opposite sex is in the restroom with them. There was no evidence that Adams encountered any safety concerns during the six weeks he used the boys' restroom at Nease or when he does so in other public places. Likewise, there was no evidence that Adams presents any safety risk to other students or that transgender students are more likely than anyone else to assault or molest another student in the bathroom. Any incidents of misconduct are subject to the school's code of conduct and, if necessary, Florida criminal law.

None of the school officials who testified had ever heard of an incident where student safety was compromised by the presence of a transgender student in the restroom that matched his or her gender identity. Again, any student with safety concerns–including a transgender student–can use a gender-neutral single-stall bathroom. Consistent with a number of other courts that have considered the issue,

[40]The School Board relies on numerous cases for the general proposition that students have an interest in protecting their bodily privacy (see Doc. 173-1 at 37-40). The Court does not disagree, but the evidence at trial established that student privacy will not be infringed by permitting Adams to use the boys' restrooms.

this Court finds concern for student safety is not an "exceedingly persuasive justification" for upholding the school bathroom policy. Virginia, 518 U.S. at 556; see, e.g., Evancho, 237 F. Supp. 3d at 291 (finding safety concerns were unfounded given availability of disciplinary code and lack of record of any threat that a student would pose as transgender to gain access to a restroom); Highland, 208 F. Supp. 3d at 876-77 (finding testimony from other districts showed parents' safety concerns to be "wholly unfounded in practice" and noting that any worry about sexual activity in the bathrooms was "logical[ly] flaw[ed]" given that gay males were not excluded from boys' restrooms and gay females were not excluded from girls' restrooms).

3. Additional Considerations

Although the Court has found that the School Board's concerns about privacy and safety are only conjectural (and therefore insufficient to survive intermediate scrutiny), the School District says it creates policy with an eye toward minimizing the risk of future problems, even if none have ever occurred. With that in mind, the Court has carefully considered whether the eleven gender-neutral single-stall bathrooms on campus (which are open to all students) provide an appropriate accommodation for Adams such that more is not required. They do not. While there are more stalls available in gender-neutral bathrooms (eleven) than in the multi-stall boys' restrooms (ten), some of them are further away from Adams' classes. More importantly, however, Adams testified to the stigma that attaches to his use of gender-neutral

bathrooms, especially when he has to walk right past an available boys' restroom to find one. See Doc. 160-1 at Tr. 204 (describing the walk from his class to a gender-neutral single-stall bathroom as "feel[ing] almost like a walk of shame").

He also testified about the message it sends to other students that the school does not view him as a real boy. Using his words: "[B]ecause I'm using a special bathroom and I'm oftentimes passing a men's bathroom, everybody knows I'm different, and I just want to fit in. So it's the opposite of what I want." Id. at Tr. 205. In Boyertown, the Third Circuit rejected the suggestion from cisgender students that the school should offer transgender students the opportunity to use gender-neutral single-stall facilities, finding that policy "invite[s] more scrutiny and attention" from the transgender students' peers, "very publicly brand[ing] all transgender students with a scarlet "T" [which] they should not have to endure . . . as the price of attending their public school." 893 F.3d at 192 (quoting Whitaker, 858 F.3d at 1045).[41] The Court

[41]Though not raised here, the court in M.A.B. rejected the argument that the use of a gender-neutral single-stall bathroom would cause cisgender students the same humiliation and embarrassment experienced by transgender students, finding, among other reasons, that requiring the transgender students to use that restroom was entirely different from providing cisgender students the option of using it if they wanted greater privacy. 286 F. Supp. 3d at 724-25. The court in Grimm adopted M.A.B.'s reasoning, finding an important difference between a boy who uses a gender-neutral single-stall bathroom because he has been singled out for differing treatment by the school because he is transgender and fails to conform to sex-based stereotypes, and a boy making a personal choice to change clothes in or use a single-stall restroom. 302 F. Supp. 3d at 752. While the St. Johns County School Board does not actually require Adams to use the gender-neutral single-stall bathrooms, in reality he is not welcome to use the girls' restrooms (and he does not) so his use of the gender-

finds the placement of the numerous gender-neutral single-stall bathrooms on campus, while useful and well-intentioned, does not remedy the Equal Protection violation.

The retired Director of Student Services testified that the task force was concerned about what to do about "gender-fluid" students if the School District strayed from its long-standing policy of only permitting "biological boys" to use the boys' restroom and only permitting "biological girls" to use the girls' restroom. The general point is well-taken, but merely hypothetical given where we are. This case does not raise the issue of what to do about gender-fluid students; rather, the question here is whether to permit a transgender boy who has taken significant social, medical and legal measures to present as a boy (and who never intends to use a girls' restroom) to have access to the boys' restroom. Thus, to the extent school officials are worried that gender-fluid students might be using a boys' restroom one day and a girls' restroom the next, that would not happen if relief is granted here because this case is only about permitting one transgender boy to use the boys' restroom.[42] For this

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neutral single-stall bathrooms is not the same "option" provided to cisgender students.

[42]There was no evidence that any St. Johns County gender-fluid students have come forward requesting access to any particular restroom. The Court notes that the Broward County School District's LGBTQ guidelines(touted by Adams as an example worth following) do not include any specific restroom accommodation for gender-fluid students. Doc. 151, Pl. Ex. 66. See also Boyertown, 276 F. Supp. 3d at 344 (noting that the school district was not aware of any gender-fluid students enrolled at the high school, and did not yet have a plan to consider how to accommodate them).

same reason, the hypothetical worry that cisgender students might pose as gender-fluid for the purpose of gaining access to the restroom of the opposite sex is not a valid concern here.[43] This case is not about eliminating separate sex bathrooms; it is only about whether to allow a transgender boy to use the boys' bathroom.

The Court likewise rejects the contention that permitting Adams to use the boys' restroom is just the beginning of a "slippery slope" which will result in the elimination of separate sex restrooms. As explained by the Medical Amici, a transgender individual "'consistently, persistently, and insistently' identifies as a gender different than the sex they were assigned at birth." Doc. 119, Ex. A at 7. Transgender individuals are not gender-fluid and their sense of who they are is settled. Adams does not want to use the girls' restroom. The undisputed evidence is that he is a transgender boy and wants to use the boys' restroom. There is no evidence to suggest that his identity as a boy is any less consistent, persistent and insistent than any other boy. Permitting him to use the boys' restroom will not integrate the restrooms between the sexes.

Even so, the School Board contends that its policy is simply based on the realistic physical differences between the sexes. The School Board cites Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), in which a plurality of the

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[43]There was no evidence of a student having ever posed as being gender-fluid at any school to gain entry to the bathroom of the opposite gender. Any such behavior could be addressed through disciplinary means.

Supreme Court noted that it "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Id. at 469. The statute in Michael M. (which criminally punished males for engaging in sexual intercourse with females under the age of eighteen to whom they are not married, but did not similarly punish females) was based on the physiological fact that women can get pregnant and men cannot. Id. at 469, 471. As the plurality opinion explained, California sought to prevent illegitimate teenage pregnancies (the harmful consequences of which fall disproportionately on the teenage female and often result in costs to the state when unwanted illegitimate children become its wards) by deterring men from having sex with underage women to whom they are not married. Id. at 470-73. The Court agreed with California that having a gender-neutral statute would frustrate its effective enforcement because women would not report the crime if they, too, would be prosecuted. Id. at 473-74.

The bathroom policy here is distinguishable–everyone is subject to the same rule–both boys and girls must use the bathroom that aligns with their sex assigned at birth (or a gender-neutral one), and both boys and girls would be subject to discipline for disobeying the policy. The school bathroom policy does not depend on something innately different between the bodies of boys and girls or what they do in the bathroom. Michael M., by contrast, "upheld . . . the gender classification" because the

statute there aimed to prevent teen pregnancy and "realistically reflect[ed] the fact that the sexes were not similarly situated" because only women could become pregnant. Id. at 469. Nguyen v. I.N.S., 533 U.S. 53 (2001) is distinguishable for the same reason. 533 U.S. at 59-64 (upholding statute that set different requirements for proving parenthood for men and for women because giving birth is inherent proof of motherhood). No such difference is relevant here.[44] Rather, it is his failure to act in conformity with his sex assigned at birth that is causing the School District to treat Adams differently. See Glenn, 663 F.3d at 1316 (holding in transgender employment case that "discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause").

The School Board also relies on Johnston v. University of Pittsburgh, 97 F. Supp. 3d 657 (W.D. Pa. 2015), one of a minority of cases to reject an Equal Protection claim by a transgender student regarding bathroom use, and Carcano v. McCrory, 203 F. Supp. 3d 615 (M.D. N.C. 2016), which likewise rejected an Equal Protection challenge brought by transgender students and an employee of a state

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[44]As further support for their position that separating boys and girls based on "biological sex" is permissible, the School Board also points to language in the Supreme Court's Virginia decision, which recognized that [p]hysical differences between men and women . . . are enduring" and "the two sexes are not fungible." See Doc. 173-1 at 35, 38 (quoting Virginia, 518 U.S. at 533). But here, as in Virginia, those differences are not relevant to the question before the Court. See Virginia. 518 U.S. at 519 (holding the Constitution's equal protection guarantee required Virginia Military Institute (which had been a male-only institution) to admit female cadets).

university subject to North Carolina's "bathroom bill." But Johnston and Carcano are distinguishable. Their construction of the meanings of and relationship between the terms "sex" and "gender" are out of step with the Equal Protection analysis in Glenn (an Eleventh Circuit decision), the weight of other decisions which have construed those terms in this context, and with the medical community whose opinions were admitted in this case.[45] According to Glenn, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." 663 F.3d at 1316 (quotation and citations omitted). Thus, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." Id. at 1317.

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[45]Johnston recognized that "the legal landscape is transforming as it relates to gender identity, sexual orientation, and similar issues" and that other courts had declined to adopt the definitions articulated in the thirty year old Seventh Circuit case upon which it relied, but determined that without Supreme Court or Third Circuit precedent, it would follow that earlier decision. See Johnston, 97 F. Supp. at 668, 671, n.14 (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)). Both the Seventh Circuit and the Eleventh Circuit have found Ulane's analysis no longer tenable following the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which held that Title VII's reference to "sex" encompasses both biological differences and gender discrimination. See Whitaker, 858 F.3d at 1047; Glenn, 663 F.3d at 1318, n.5. Moreover, the Third Circuit's Boyertown decision is precedent that would likely affect the outcome if Johnston were decided today. See Boyertown, 893 F.3d at 183-84 (providing definitions of "sex," "gender," "social gender transition" and related terms based on testimony of expert in gender dysphoria and gender-identity issues).

Though not an Equal Protection Clause case, the Third Circuit's recent Boyertown decision (which rejected claims by cisgender students that transgender students in the restrooms violated Title IX and Pennsylvania privacy law), likely eviscerates any persuasive value Johnston retained. Boyertown, 893 F.3d 179. Likewise, the Equal Protection analysis in Carcano (which cites Nguyen and other authorities which permitted different treatment based on meaningful differences in physiology, 203 F. Supp. 3d at 642-45) is not persuasive in light of Glenn, the other authorities that have considered this issue, and the evidence in this case (which reveals that the multi-stall school bathrooms at Nease have individual stalls with doors that afford privacy and that all students have access to gender-neutral single-stall bathrooms for those who want additional privacy).[46]

Although there was no testimony on the issue, the parties stipulated that some parents and students in the St. Johns County School District object to a policy permitting transgender students to use a restroom matching their gender identity, believing the policy "would violate the bodily privacy rights of students and raise[s] concerns for their privacy, safety and welfare." Doc. 116 at § I (p. 22). There are cases where parents have removed their children from public school and/or have sued a school district over a transgender bathroom policy. See, e.g., Boyertown, 893

[46]The privacy interests in Carcano were also implicated by shower and locker room facilities which are not at issue in this case. Carcano, 203 F. Supp. 3d at 642.

F.3d 179 (suit filed by cisgender students objecting to the presence of transgender students in the school restrooms and locker rooms); Evancho, 237 F. Supp. 3d at 291-92 (noting that some parents had or intended to withdraw their children from school over transgender bathroom policy).

But the Court has addressed why privacy and safety concerns, though perhaps understandable, simply aren't realized when transgender students use school bathrooms aligned with their gender identity. See Doc. 161 at Tr. 64-65, 106-07 (testimony of Broward County school officials); see also Whitaker, 858 F.3d at 1052; Boyertown, 893 F.3d at 193. Moreover, while the Court finds that the gender-neutral bathrooms are not an adequate remedy for the breach of Adams' rights, they remain an alternative for any cisgender student who is uncomfortable sharing a restroom with Adams. Thus, while the School Board must take into account the concerns of cisgender students and their parents, it may not do so at the expense of Adams' right to equal protection under the law. "If adopting and implementing a school policy or practice based on [the] individual determinations or preferences of parents–no matter how sincerely held–runs counter to the legal obligations of the [School] District, then the District's and the Board's legal obligations must prevail." Evancho, 237 F. Supp. 3d at 292.[47]

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[47]The School Board also contends that its policy cannot be held to violate the Equal Protection Clause when they are merely following distinctions between the sexes permitted by Title IX and its implementing regulations. As further discussed

The School Board has not shown that 'its gender classification is substantially related to a sufficiently important government interest,'" Glenn, 663 F.3d at 1316 (quotation omitted), let alone that the justification for its policy is "exceedingly persuasive." Virginia, 518 U.S. at 556. Nor has it shown a "foundation for the conclusion that allowing [Adams to use the boys' restroom] will cause the harmful outcomes they describe." Obergefell, 135 S. Ct. at 2607. Adams has therefore proven that the School Board has violated his rights under the Equal Protection Clause through its enforcement of the school bathroom policy.

B. Title IX

Adams also claims that the School Board bathroom policy violates his rights under Title IX of the Education Amendments Act of 1972. Under Title IX, no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). The statute's implementing regulations provide that a covered institution cannot provide different aid, benefits, or services; cannot deny aid, benefits, or services; and cannot subject any person to separate or different rules, sanctions, or treatment, "on the basis of sex." See 34 C.F.R. § 106.31(b)(2)-(4); Whitaker, 858 F. 3d at 1046-47. However, a covered

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below, the Court finds this argument unavailing.

institution "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

To prove his claim here, Adams must demonstrate that (1) he was subjected to discrimination in an educational program or activity; (2) the discrimination was "on the basis of sex;" (3) the School Board receives federal funding; and (4) the discrimination caused him harm. See Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996); Highland, 208 F. Supp. 3d at 865. The St. Johns County School Board receives federal financial assistance and is subject to Title IX. Doc. 116 at § I, ¶ 2; Doc. 151, Pl. Ex. 138 at Request for Admission # 3 & 4. The School Board does not contest that the use of the school restrooms is an "education program or activity" within the meaning of Title IX. See Highland, 208 F. Supp. 3d at 865 ("Access to the bathroom is . . . an education program or activity under Title IX."). The Court's consideration in the Equal Protection analysis of harm to Adams caused by the School Board policy excluding Adams from the boys' restrooms applies here too. Thus, as in a number of other cases where transgender students have raised Title IX challenges to their school's bathroom policies, the issue here is whether the bathroom policy which excludes Adams from the boys' restroom based on his transgender status is discrimination "on the basis of sex" as used in Title IX and its implementing regulations.

Title IX does not define the term "sex," nor do its regulations. There is no Eleventh Circuit or Supreme Court authority directly on point. Adams argues the term "sex" includes gender identity, whereas the School Board contends the term "sex" means "biological sex." Given the lack of definition within the statute or regulation, and recognizing that a number of courts have struggled with this exact question, this Court finds the term "sex" as used in Title IX is ambiguous as applied to transgender students. Cf. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (Thomas, J., for the unanimous court) (explaining that statutory interpretation is unnecessary "if the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case") (emphasis supplied).

The School Board raises four main arguments in support of its interpretation: first, the meaning of the word "sex" as based on dictionary definitions at the time Title IX was enacted and its legislative history support a conclusion that "sex" means "biological sex;" second, Title IX permits schools to provide separate boys' and girls' bathrooms so it cannot be a violation to separate the sexes in the restrooms; third, the Department of Education's current interpretation of Title IX refutes the argument that "sex" includes "gender identity;" and fourth, court decisions that have utilized Title VII principles to glean a definition of sex (cases upon which plaintiff relies for his

interpretation) are inapplicable.[48]

Citing Judge Niemeyer's dissent from the affirmance of entry of a preliminary injunction in G.G. v. Gloucester County School Board, 822 F.3d 709, 736 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239 (2017), the School Board contends that contemporaneous dictionary definitions of the word "sex" at the time Congress passed Title IX reveal it was "universally understood as referring to the biological or physiological characteristics that constitute a person's sex, and not an internal identification with one gender or the other." Doc. 173-1 at 27. However, the majority in G.G. did not find the meaning to be so universally clear, noting, for example, that a 1970 dictionary defined "sex" as "the character of being either male or female." G.G., 822 F.3d at 721 (quoting the American College Dictionary 1109 (1970)); see also Highland, 208 F. Supp. 3d at 866 (considering the parties' debate about the dictionary definition of "sex" at the time Title IX was enacted, stating "dictionaries from that era defined 'sex' in myriad ways" and did not reflect "a uniform and unambiguous meaning of 'sex' as biological sex or sex assigned at birth"); Students and Parents for Privacy v. United States, No. 16-cv-4945, 2016 WL 6134121, at *17-18 (N.D. Ill. Oct.

[48]The first three of these arguments were initially raised in the School Board's motion to dismiss (Doc. 54, adopted as to the amended complaint by notice, Doc. 64). The Court carried the motion with the case, determining that the evidence at trial on the Equal Protection claim would essentially be the same regardless of whether the Title IX claim remained, and that it would be preferable to decide the motion on a full record. For the reasons stated here, the motion is denied.

18, 2016) (finding dictionary definitions of "sex" included room for "gender identity"). The Court does not find the plain meaning of the word "sex" as used in Title IX to be apparent from contemporaneous dictionary definitions.

Nor is the Court persuaded that the legislative history relied on by the School Board provides a definitive answer, as it merely emphasized that Title IX was not intended to integrate the sexes (something no one is advocating here). See Doc. 173-1 at 28-29 (relying on statements of Title IX's sponsor, Senator Birch Bayh). Subsequent uses of the terms "gender" and "gender identity" in other statutes likewise fail to convince the Court that the omission of those terms in Title IX was intentional. The presumption that terms are used consistently by Congress is "entitled to less force where, as here, the [School Board] points to terms used in different statutes passed by different Congresses in different decades." Zarda v. Altitude Express, Inc., 883 F.3d 100, 129 (2d Cir. 2018); see also Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174-75 (2005) (holding that Title IX's use of broad term "discrimination" included retaliation, notwithstanding that Title VII showed Congress' ability to provide express prohibitions against specific kinds of discrimination, including retaliation); Robinson, 519 U.S. at 340-44 (holding that Title VII's use of the term "employee" included "former employee" even though later statutes specifically used "former employee" when describing category of persons covered by term "employee"); United States v. Wise, 370 U.S. 405, 414 (1962) (finding subsequent Congress' interpretation

of term used in earlier-enacted statute was not relevant in construing term's meaning); Whitaker, 858 F.3d at 1049 (rejecting argument that Congress' failure to add transgender status as a protected characteristic to Title IX signaled an intentional omission). As the Supreme Court has explained, "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (quotation and citation omitted).

The School Board also argues that because Title IX explicitly allows "separate living facilities for the different sexes," 20 U.S.C. § 1686, and its implementing regulations permit schools to provide "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33, it cannot be a violation of the statute to provide school restrooms which are separated based on "biological sex." The Court is unpersuaded. Because neither Title IX nor the regulation define "sex" or "on the basis of sex," the statute and regulation cannot be presumed to mean "biological sex."[49] Adams is not contending that the school cannot provide separate restrooms for the sexes–he just wants the school to recognize that, interpreting sex to include

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[49]The FHSAA (which governs competitive interscholastic sports at Florida high schools (including Nease) and allows students to play on teams based on their gender identity) apparently finds Title IX's use of the word "sex" includes "gender identity." See 34 C.F.R. § 106.41(b) (Title IX regulation governing athletics, stating that schools may operate "separate teams for members of each sex").

gender identity, he is a boy and should be permitted to use the boys' restrooms.[50]

In 2017, the Department of Education withdrew earlier guidance which had instructed that the term "sex" under Title IX included gender identity and that schools must allow transgender students to use sex-segregated restrooms, locker rooms and shower facilities consistent with their gender identity. Doc. 152, Def. Ex. 84, 237. The School Board contends that the withdrawal of that guidance signifies that the Department of Education disagrees with an interpretation of "sex" that includes gender identity for purposes of Title IX. But the 2017 Guidance stated it was withdrawing the earlier guidance because it had not undergone any formal public process and had been issued without extensive legal analysis or explanation as to how it was consistent with Title IX. Doc. 152, Def. Ex. 237. Thus, the rescission of the old guidance without issuing new guidance does not provide any interpretation of Title IX from the Department of Education. See A.H., 290 F. Supp. 3d at 326-27 (rejecting contention that withdrawal of previous guidance meant that school could

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[50]The School Board argues that a finding that its policy violates the Equal Protection Clause renders Title IX unconstitutional. But even if the Court agreed with the School Board that "sex" as used in Title IX meant "biological sex" (using the term as the School Board defines it), Title IX does not mandate separate facilities, so a contrary Equal Protection ruling would not affect its constitutionality. See Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 259 (2009) ("Title IX exempts from its restrictions several activities that may be challenged on constitutional grounds;" some of which "may form the basis of equal protection claims.") (citations omitted); see also Boyertown, 893 F.3d at 195 (noting that "Title IX does not require [schools to] provide separate privacy facilities for the sexes").

rely on Title IX to prohibit transgender students from accessing bathrooms consistent with their gender identity). But see Evancho, 237 F. Supp. 3d at 297-301 (finding the uncertain legal landscape created by the 2017 withdrawal of the 2016 Guidance, coupled with the Supreme Court's decision to stay its consideration of the Fourth Circuit's G.G. decision in light of that withdrawal,[51] meant plaintiffs could not demonstrate a likelihood of success on their Title IX claim at that time to support entry of a preliminary injunction (which the court nevertheless granted on their Equal Protection claim)).

It is true, as the School Board notes, that some of the transgender school bathroom decisions which considered Title IX relied on the now rescinded guidance in reaching a result. See, e.g., G.G., 822 F.3d at 721 (applying Auer[52] deference to agencies' interpretation of ambiguous term "sex" to find transgender student alleged violation of Title IX), vacated and remanded, 853 F.3d 729 (4th Cir. 2017); Highland, 208 F. Supp. 3d at 869-70 (entering preliminary injunction on Title IX claim after giving Auer deference to ambiguous term "sex"). However, cases examining the question

[51]The Supreme Court subsequently remanded G.G. for further consideration of the Title IX claim, 137 S. Ct. 1239 (2017), and, as noted below, the district court recently denied the school board's motion to dismiss the transgender student's Title IX claim. Grimm, 302 F. Supp. 3d at 748.

[52]Auer v. Robbins, 519 U.S. 452 (1997) (requiring that an agency's interpretation of its own ambiguous regulation be given controlling weight unless plainly erroneous or inconsistent with the statute or implementing regulation).

subsequent to that withdrawal have found a likelihood (or permitted cases to proceed on a claim) that a policy that prohibits transgender students from using a bathroom matching their gender identity have separated students "on the basis of sex" within the meaning of Title IX. See Whitaker, 858 F.3d at 1049-50 (affirming entry of preliminary injunction in favor of transgender student on Title IX claim); Grimm, 302 F. Supp. 3d at 742-48 (noting withdrawal of earlier guidance, but holding transgender student had stated a Title IX claim for sex discrimination); A.H., 290 F. Supp. 3d at 329 (same); Evancho, 237 F. Supp. 3d at 283, n.23 (denying school district's motion to dismiss on transgender students' Title IX claim, finding plaintiffs had crossed the pleading threshold despite not meeting the "extraordinary" standard needed to secure a preliminary injunction based on Title IX).

Finding that Title IX does not define the ambiguous terms "sex" and "on the basis of sex" for purposes of their application to transgender students, many courts have looked to decisions interpreting other anti-discrimination statutes, particularly Title VII, which prohibits employment discrimination based on, among other things, sex. 42 U.S.C. §§ 2000e et seq. See, e.g., Boyertown, 893 F.3d at 195, n.103 ("Courts have frequently looked to Title VII authority for guidance with Title IX cases."); Whitaker, 858 F.3d at 1047-49 (reviewing Title VII and Equal Protection Clause case law to decide Title IX transgender school bathroom issue); M.A.B., 286 F. Supp. 3d at 713-15 (same); Grimm, 302 F. Supp. 3d at 744-47 (same); see also

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616, n.1 (1999) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX." (collecting cases)).

In looking for Title IX guidance, the transgender school bathroom decisions inevitably consider Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which held in a Title VII case that discrimination on the basis of gender stereotype is sex-based discrimination. The transgender school bathroom cases also look to Price Waterhouse's progeny, including the Eleventh Circuit's Glenn decision which, though an Equal Protection case, turned to Title VII precedent for guidance and stands as authority for the proposition that "discrimination against a transgender individual because of [ ] gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[53] Glenn, 663 F.3d at 1317; see, e.g., Boyertown, 893 F.3d at 199 ("We are not alone in reaching th[e] conclusion" that "Title

[53]The Court rejects the School Board's crimped interpretation of Glenn, which it attempts to distinguish by claiming that, unlike Glenn, the School Board does not engage in gender or sex stereotyping when it excludes Adams from the boys' bathroom. As explained in Glenn, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." 663 F.3d at 1316 (quotation and citations omitted). This is borne out by the facts of this case. Adams' desire to use the boys' bathroom stems from his gender identity, which is not in accordance with the sex he was assigned at birth. The School Board policy that excludes Adams is based on its belief that he is not acting in conformity with the sex he was assigned at birth.

IX prohibits discrimination against transgender students in school facilities just as Title VII prohibit[s] discrimination [against a gender non-conforming employee in the workplace]") (citing, inter alia, Glenn and Whitaker); Whitaker, 858 F.3d at 1048 (citing Glenn as support for the proposition that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth"; thus, when a person is punished for their gender non-conformity by refusing them use of a bathroom that accords with their gender identity, Title IX is violated); Grimm, 302 F. Supp. 3d at 746 (concluding a transgender student can state a claim of sex discrimination under Title IX by extension of the analysis of numerous Title VII and federal civil rights cases, including Glenn, which recognize that "claims of discrimination on the basis of transgender status are per se sex discrimination"); Parents for Privacy v. Dallas Sch. Dist. No. 2, ___ F. Supp. 3d ___, 2018 WL 3550267, *22-23 (D. Ore. July 24, 2018) (citing, inter alia, Glenn, Boyertown, Whitaker, M.A.B., and Grimm for support in concluding that "to require students to use only facilities that match their biological sex or to use gender-neutral alternative facilities would violate Title IX").

This Court likewise follows the guidance of Glenn and other authorities cited above to conclude that the meaning of "sex" in Title IX includes "gender identity" for purposes of its application to transgender students. See Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964, 965, n.2 (11th Cir. May 10, 2018) (unpub.) (per

curiam) (citing Glenn for proposition that in an equal protection claim, "discrimination based on gender nonconformity [is] sex discrimination"), reh'g en banc denied, ___ F.3d ___, 2018 WL 3455013 (11th Cir. July 18, 2018); Evans v. Georgia Reg. Hosp., 850 F.3d 1248, 1254 (11th Cir. 2017) (same);[54] Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883 (11th Cir. 2016) (unpub.) (per curiam) (reversing entry of summary judgment in Title VII case where transgender employee created a triable issue of fact as to whether gender bias was a motivating factor in employer's decision to fire her); Valentine Ge v. Dun & Bradstreet, Inc., No. 6:15-cv-1029-Orl-41GJK, 2017 WL 347582 (M.D. Fla. Jan. 24, 2017) (citing Chavez, 641 F. App'x at 884, for proposition that "[s]ex discrimination includes discrimination against a transgender person for gender nonconformity," but finding employee failed to show employer terminated her because she transitioned to be a woman); see also Jackson, 544 U.S.

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[54]While acknowledging Glenn's authority regarding claims of gender non-conformity, both Evans and Bostock held that Title VII does not recognize a claim for sexual orientation discrimination, which the Eleventh Circuit distinguishes from gender nonconformity. See Evans, 850 F.3d at 1255-57; Bostock, 723 F. App'x at 964. As explained by Judge William Pryor, "[d]eviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation[;] . . . [b]ut under Title VII, we ask only whether the individual experienced discrimination for deviating from a gender stereotype." Evans, 850 F.3d at 1259 (Pryor, William, J., concurring) (citations omitted). But see Bostock, 2018 WL 3455013, *4 (Rosenbaum, J., dissenting from denial of reh'g en banc) (arguing that the Eleventh Circuit should take the issue en banc to explain why, in the majority's view, "gender nonconformity claims are cognizable except for when a person fails to conform to the 'ultimate' gender stereotype by being attracted to the 'wrong' gender") (citation omitted).

at 175 (explaining that "broad" language of Title IX evidenced Congress' intent to give the statute a "broad reach").[55]

Adams has proven a Title IX violation because the School Board, a federally funded institution, prohibits Adams, a transgender boy, from using the boys' restroom "on the basis of sex," which discrimination caused him harm.

III. Remedy

Having found that the School Board's bathroom policy violates Adams' rights under the Equal Protection Clause and Title IX, the Court must now consider the remedy. In his proposed findings of fact and conclusions of law, Adams has narrowed the scope of his requested injunctive relief from that requested in his amended complaint, and seeks to permanently enjoin the School Board "from enforcing any

[55]The School Board argues the Court's reliance on Title VII to inform the meaning of Title IX is misplaced because the Attorney General recently issued guidance rejecting an interpretation of "sex" to include "gender identity" in Title VII cases. See Doc. 152, Def. Ex. 248 (October 4, 2017 Attorney General Memorandum). But the EEOC, the agency responsible for the enforcement of Title VII, has acknowledged the Attorney General's contrary view and still maintains its position that Title VII prohibits discrimination based on gender identity. See https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited July 25, 2018). Moreover, the Attorney General's position is based on an analysis of precedent that is contrary to Glenn and other authorities cited above. See also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (Scalia, J., for the unanimous court) (holding Title VII covered same-sex harassment, explaining "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). The Attorney General's October 4, 2017 Memorandum does not persuade the Court to change course.

policy, practice, or custom of the St. Johns County School District that denies transgender students access to and use of restrooms that match a student's gender identity."[56] Doc. 175 at 50.

The evidence has established that Drew Adams is a transgender boy. Adams has undergone social, medical, and legal transitions to present himself as a boy. Adams wears his hair short; he dresses like a boy; his voice is deeper than a girl's; his family, peers, classmates and teachers use male pronouns to refer to him; he takes hormones which suppress menstruation and make his body more masculine, including the development of facial hair and typical male muscle development; he has had a double mastectomy so his body looks more like a boy; the state of Florida has provided him with a birth certificate and driver's license which state he is a male; and when out in public, Adams uses the men's restroom. As a transgender boy, Adams must be permitted to use the boys' restroom at school.

However, the Court has had no occasion in the context of this case to determine what threshold of transition, if any, is necessary for the School Board to accommodate other transgender students, nor did the parties ask the Court to do so. The Court received no evidence concerning any other transgender student. Thus, the

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[56]While his amended complaint sought access to "multi-user facilities" (Doc. 60 at 21-22), there was no testimony or argument at trial about locker rooms or showers, and the Court's ruling does not address access to those spaces.

injunction that will enter in this case will be limited to the plaintiff, Drew Adams.[57]

"[D]amages for emotional distress or mental anguish are at best difficult to measure." Benton v. Rousseau, 940 F. Supp. 2d 1370, 1379 (M.D. Fla. 2013) (quotation and citation omitted). The School Board argued that Adams is in therapy only as needed, he is not taking medications for anxiety or depression, and he suffered from pre-existing medical conditions, so it is hard to say that not using the boys' restroom is really the cause of his distress. See, e.g., Doc. 160-1 at Tr. 90, 131, 188. The Court also finds that Nease faculty and staff have operated in good faith and tried to accommodate Adams' situation, lessening the emotional trauma. Nevertheless, while there was no expert testimony about a diagnosis of gender dysphoria for Adams, the Court is persuaded by the evidence that he suffered

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[57]Of course, nothing prevents the School Board from using this decision as guidance for future situations involving other transgender students. Notably, for some transgender students, the policy the school currently has may be sufficient, as the evidence revealed that not every transgender student is prepared to use the restroom corresponding to their gender identity. Boyertown may be instructive. Permission for transgender students to use gender-specific facilities consistent with their gender identity at Boyertown Area Senior High School is granted on a case-by-case basis only after a student meets with trained and licensed counselors, and other school administrators as needed. Once a transgender student is granted permission to use the facilities matching his or her gender identity, that student is no longer permitted to use the facilities corresponding to his or her sex assigned at birth. 893 F.3d at 185. See also Doc. 151, Pl. Ex. 68 (FHSAA) at § 4.3.2 (listing documentation needed for a student athlete to participate on a team consistent with his or her gender identity, including a statement from the student, other individuals such as parents, teachers, or friends, and a health care professional, affirming the student's consistent gender identity and expression).

emotional damage, stigmatization and shame from not being permitted to use the boys' restroom at school. See Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199 (11th Cir. 2007) ("As a matter of both common sense and case law, emotional distress is a predictable, and thus forseeable, consequence of discrimination."); "Humiliation and insult are recognized, recoverable harms, and a plaintiff's own testimony of embarrassment and humiliation can be sufficient to support an award for compensatory damages." Bogle v. McClure, 332 F.3d 1347, 1359 (11th Cir. 2003) (quotation and citation omitted) (upholding awards of punitive and compensatory damages in § 1983 race discrimination case); see also Goodin v. Bank of Amer., N.A., 114 F. Supp. 3d 1197, 1213 (M.D. Fla. 2015) (awarding emotional distress damages based on plaintiffs' testimony, even though they did not seek medical attention and no expert or doctor testified); Adams proposes $25,000 but that seems too high. After all, as Adams himself has argued (through counsel), the point of this case is not money. Based on the evidence, the Court will award Adams $1,000.00 in compensatory emotional distress damages.[58]

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[58]This $1,000.00 award will compensate Adams for his injuries arising out of the violations of the Equal Protection Clause and Title IX (the injuries from which are identical). See Fitzgerald, 555 U.S. at 254-55 (explaining that damages may be awarded for violations of both the Equal Protection Clause and Title IX). Adams is not entitled to double recovery so the total damages award remains $1,000.00.

IV. Conclusion

There is no doubt that the teachers and administrators of Nease High School and the St. Johns County School District are caring professionals who have the best interests of their students at heart. Likewise, Drew Adams presented himself as a polite, forthright individual who is, without rancor, seeking to vindicate his civil rights. The lawyers for both sides have also conducted themselves professionally. All involved are to be commended for the way they have handled a difficult and sensitive situation.

Accordingly, it is hereby

ORDERED:

1. By separate entry, the Court will enter Final Judgment, finding in favor of plaintiff, Drew Adams, a minor, by and through his next friend and mother, Erica Adams Kasper, and against the defendant, St. Johns County School Board, on Counts I (Equal Protection Clause) and II (Title IX) of Adams' Amended Complaint (Doc. 60). The Court's Final Judgment will incorporate an injunction preventing the St. Johns County School Board from enforcing its policy which prohibits Drew Adams from using the boys' restrooms at Nease High School;[59] and a compensatory damages award of $1,000.00.

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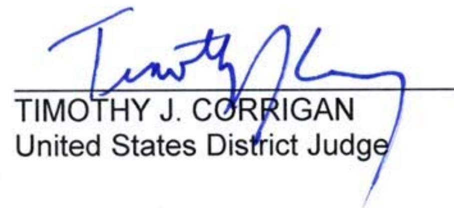
[59]For the reasons previously stated, the injunction will not apply to locker rooms and showers.

2. The Court will retain jurisdiction to enforce the injunction and to address the matter of attorney's fees and costs.

3. No later than **September 4, 2018**, plaintiff shall file his motion for attorney's fees and costs under 42 U.S.C. § 1988. No later than **October 1, 2018**, the School Board shall respond. Any motion for bill of costs should follow this briefing schedule.

DONE AND ORDERED at Jacksonville, Florida this 26th day of July, 2018.



TIMOTHY J. CORRIGAN
United States District Judge

s.
Copies:

counsel of record

DE 193

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, a minor, by and through his next friend and mother, Erica Adams Kasper,

Plaintiff,

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

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant.

FINAL JUDGMENT

It is **ORDERED AND ADJUDGED** that:

Pursuant to the Court's Findings of Fact and Conclusions of Law (Doc. 192), which are hereby incorporated by reference, and in accordance with Federal Rules of Civil Procedure 52(a)(1), 54, and 58, Final Judgment is hereby entered in favor of plaintiff, Drew Adams, a minor, by and through his next friend and mother, Erica Adams Kasper, and against defendant, the School Board of St. Johns County, Florida, on Counts I and II of plaintiff's Amended Complaint (Doc. 60).

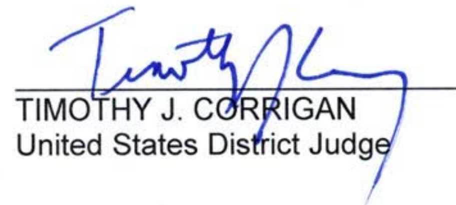
In accordance therewith,

1. The School Board of St. Johns County, Florida, is **ENJOINED** from enforcing the St. Johns County School District bathroom policy which prohibits Drew

Adams from using the boys' bathrooms at Allen D. Nease High School. Drew Adams must be permitted to use any of the boys' bathrooms at Nease High School that are available to any other male student, except within locker room and shower facilities, so long as Adams is a student enrolled at Nease High School. The Court retains jurisdiction to enforce this injunction.

2. Compensatory damages are awarded to plaintiff Drew Adams, a minor, by and through his next friend and mother, Erica Adams Kasper, and against defendant, the School Board of St. Johns County, Florida, in the total amount of $1,000.00 (one thousand dollars), with post-judgment interest to accrue as provided by law.

ORDERED AND ADJUDGED at Jacksonville, Florida this 26th day of July, 2018.



TIMOTHY J. CORRIGAN
United States District Judge

s.
copies to:
counsel of record
(with Civil Appeals Checklist)

DE 193-1

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

(a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

(b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

(d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

(a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

(e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).