

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a Minor; a Minor;	.
By and Through His Guardians	. Case No. 5:17-cv-01249-EGS
John Doe and Jane Doe,	.
MACY ROE,	.
MARY SMITH,	.
JACK JONES, a Minor; By and	.
Through His Parents John Jones	.
and Jane Jones,	.
	.
Plaintiffs,	. 601 Market Street
	. Philadelphia, PA
vs.	.
	.
BOYERTOWN AREA SCHOOL DISTRICT,	.
DR. RICHARD FAIDLEY, in His	. July 17, 2017
Capacity as Superintendent of	.
The Boyertown Area School	. 9:27 a.m.
District; DR. BRETT COOPER,	.
in His Official Capacity as	.
Principal; DR. E. WAYNE FOLEY,	.
In His Official Capacity as	.
Assistant Principal,	.
	.
Defendants,	.
	.
AIDAN DESTEFANO,	.
Terminated: 07/06/2017;	.
PENNSYLVANIA YOUTH CONGRESS	.
FOUNDATION,	.
	.
Movants.	.
.

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE HONORABLE EDWARD G. SMITH
UNITED STATES DISTRICT JUDGE

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1 THE CLERK: All rise. The United States District Court
2 for the Eastern District of Pennsylvania is now in session, the
3 Honorable Edward G. Smith presiding.

4 THE COURT: Good morning.

5 IN UNISON: Good morning, Your Honor.

6 THE COURT: You may be seated.

7 The Court is called to order in the matter of Joel
8 Doe, a Minor, by and through his guardians John Doe and Jane
9 Doe; Mary Smith; Jack Jones, a Minor, by and through his parents
10 John Jones and Jane Jones; and Macy Roe, Plaintiffs vs.
11 Boyertown Area School District; Dr. Richard Faidley in his
12 official capacity as Superintendent of the Boyertown Area School
13 District; Dr. Brett Cooper, in his official capacity as
14 Principal; and Dr. E. Wayne Foley in his official capacity as
15 Assistant Principal as Defendants; and the Pennsylvania Youth
16 Congress Foundation as Defendant Intervenor.

17 This is Civil Action Number 17-1249. And if Counsel
18 would please note their appearances for the record.

19 MS. GORDON: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MS. GORDON: Cathy Gordon on behalf of Plaintiff.

22 MR. WENGER: Randall Wenger on behalf of the
23 Plaintiffs.

24 MR. SAMEK: Jeremy Samek on behalf of the Plaintiffs.

1 MS. HOLCOMB: Christiana Holcomb on behalf of the
2 Plaintiffs.

3 MR. McCALEB: Gary McCaleb on behalf of Plaintiffs.

4 THE COURT: Thank you, sir.

5 MR. LEVIN: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. LEVIN: I'm Mike Levin on behalf of the
8 Defendants.

9 MR. BROWN: David Brown on behalf of Defendants.

10 THE COURT: Good morning.

11 MS. ROPER: Good morning, Your Honor. Mary Catherine
12 Roper on behalf of Intervenor, Pennsylvania Youth Congress.

13 MS. MAR: And Ria Mar also on behalf of Intervenor,
14 Pennsylvania Youth Congress. Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. SELDIN: Harper Seldin also on behalf of
17 Intervenor.

18 THE COURT: Good morning, sir. Thank you very much.

19 The court convenes today for purposes of an
20 evidentiary hearing with respect to the preliminary injunction
21 petition that has been filed by the Plaintiffs. Counsel have
22 moved very expeditiously to develop the factual record in this
23 matter, and I do commend you for how quickly you have conducted
24 the depositions and exchanged all the discovery.

25 And I believe you are prepared to proceed forward

1 today. I have received your findings of fact and conclusions of
2 law.

3 Are there any issues we need to address before we
4 address the issue of trying to preserve the anonymity of two of
5 the Plaintiffs who will be testifying here today?

6 UNIDENTIFIED MALE SPEAKER: No, Your Honor.

7 THE COURT: Very well. Attorney Gordon, with respect
8 to the issue of maintaining the anonymity, there have been
9 several proposals that have been put forth as to how we can both
10 meet the interests of the public and their First Amendment right
11 of access to civil trials, at the same time meeting the interest
12 of preserving the anonymity of the, certainly of the Minor, but
13 they're both high school students. What is your proposal?

14 MS. GORDON: Your Honor, on behalf of the Plaintiffs,
15 we would propose that both Mary Smith and Joel Doe, as the Court
16 recognized, Mary Smith is a high school student, although not a
17 minor. Joel Doe is a minor. We propose in camera testimony by
18 both of these individuals.

19 We would also propose to involve our own court
20 reporter we would pay for obviously, and have that court
21 reporter involved in the in camera proceedings for the purpose
22 of expediting the transcripts of both Smith and Doe. It would
23 be our plan and expectation that we would then at the end of the
24 hearing, be it later today or tomorrow, actually present the
25 testimony in open court. And by doing so, we would not be

1 depriving public or the press of access to their testimony.

2 Clearly, the public has an interest in the evidence
3 that is presented here. And by providing that to them in an
4 expeditious fashion, we believe that it can protect the
5 interests of our clients, and yet serve the public interest in
6 having access in open courts.

7 THE COURT: Okay. And I -- my understanding is that
8 the Defendants and the Intervenor's Defendants are not opposed
9 to that with the exception of how quickly a transcript can be
10 provided?

11 MS. ROPER: Yes, Your Honor. Mary Catherine Roper for
12 the Intervenor. We do not have any problem with the testimony
13 in camera. And as you say, as long as that testimony is
14 promptly available to the public, we don't actually insist that
15 it be read out in open court. We're happy to figure out some
16 other accommodation. Perhaps just posting it or filing it so
17 that -- it as an exhibit or something so that it is available to
18 anyone who wants it.

19 THE COURT: Counselor?

20 MR. LEVIN: Your Honor, on behalf of the Defendants,
21 we have no position one way or the other with respect to in
22 camera testimony. We would object to having to come back to
23 court to have someone read it. I would join with what the
24 Intervenor suggested if Your Honor's inclined to do it that way.

25 THE COURT: I think I might have a proposal. Does

1 anyone in the audience wish to be heard regarding this matter?

2 (No response)

3 THE COURT: There's been no response.

4 Do any Counsel believe that a factual hearing has to be
5 conducted first where I make the determination that, in fact, the
6 unique interests of these minor children -- the one minor
7 children, the other student -- that their physical and
8 psychological wellbeing might be impacted by having to testify in
9 open court, or is everyone satisfied that that is a finding I can
10 accept based on your representations and, in fact, it would be
11 very difficult and damaging to these two children to have to
12 testify in open court?

13 MS. GORDON: We don't believe that that procedure's
14 necessary.

15 MR. ROPER: Your Honor, we don't believe that
16 procedure's necessary, but I don't think that that needs to rise
17 to the idea that it would be traumatic or damaging for them to
18 testify in open court. The Judge has already found -- the Court
19 has already found that there is good reason for them to remain
20 anonymous and there's certainly good reason to believe that if
21 they testified in open court, even under pseudonym, they would
22 not remain anonymous and that is why we have no opposition to
23 the in camera testimony.

24 THE COURT: Mr. Levin.

25 MR. LEVIN: We have no position on that, Your Honor.

1 THE COURT: Okay, here's what I propose, and see if
2 this is an acceptable alternative. I am very concerned always
3 about the First Amendment Right of access to both civil and
4 criminal trials, and it's only in the rarest circumstance that I
5 will close a courtroom. This appears to be such an instance
6 because of the age of the children and the nature of what their
7 testimony is going to involve.

8 But in trying to protect that interest and weighing
9 that against the important Governmental interest of protecting
10 the anonymity, what I propose is, that we have everyone who's
11 interested in hearing the testimony adjourn from the courtroom
12 and proceed into my chambers. The individual witness will be
13 brought to the witness stand once the courtroom has been cleared
14 and everybody is in my chambers. They'll be sworn. They'll
15 state their name without any -- it will be muted it in here, and
16 it will turned off -- the sound will be turned off in my
17 chambers.

18 Once they have given their name and any other
19 identifying information that might identify them, then we will
20 turn on the sound. We will not mute. Everyone in the courtroom
21 will be able to hear the testimony in the courtroom. You simply
22 will not know the name of the person testifying, nor will you be
23 able to see the person so that you'll be identify the person
24 testifying.

25 I think that's far better than having to read a

1 transcript after the fact. And it is the least -- the absolute
2 least intrusive way I could think of to allow the press and any
3 individual who was interested in this matter to hear the
4 testimony without identifying the individual who was testifying.

5 From the Plaintiff's standpoint, do you think that
6 will work?

7 MS. GORDON: Your Honor, from the perspective of our
8 clients, yes, I think that that protection would be sufficient.
9 However, we did raise the concern of the identification of other
10 minors. There are approximately 34 minors who have been
11 identified in the course of discovery conducted here.

12 And we have assigned pseudonyms to those children, but
13 we cannot be certain in eliciting testimony from the Plaintiffs
14 that names of children will not be used. And obviously, once
15 the toothpaste is out of the tube, we can't put it back in. So
16 there is a concern that I must bring to the Court's attention
17 that it would put at risk the anonymity and confidentiality of
18 other minors who are not even parties to the case.

19 THE COURT: And do I need to know the names of these
20 other children, or is pseudonyms sufficient?

21 MS. GORDON: We have a student list that actually we
22 could provide Your Honor that identifies their actual names, or
23 sometimes only first names.

24 THE COURT: And if the witness was cautioned that they
25 are not to mention anybody else's name, but only their initials,

1 and we were also vigilant as the questioning was taking place
2 and the answers are being provided, and my Courtroom Deputy
3 Jaime Kulick was prepared also to mute as necessary if, in fact,
4 you deemed it appropriate to bring out the name for one reason
5 or another, would that be sufficient? I understand there's
6 still a risk, but do you believe that would be sufficient?

7 MS. GORDON: I believe with those precautions, yes,
8 that would be sufficient.

9 THE COURT: Okay. Mr. Levin.

10 MR. LEVIN: Your Honor, we have no objection to that
11 procedure. But rather than using the students' initials, if the
12 witness could have the list of pseudonyms and use the moniker
13 that has previously been given in place of the actual name, that
14 way I think the record will be consistent with the deposition.

15 THE COURT: Very well. Does that sound like a --

16 MS. GORDON: Plaintiffs have no objection to that.

17 THE COURT: -- further protection?

18 Attorney Roper?

19 MS. ROPER: I think it sounds quite workable. Thank
20 you.

21 THE COURT: Okay. Then we're going to try that. I
22 believe the -- Counsel all wanted an opportunity to make an
23 opening statement; is that correct?

24 MS. GORDON: Yes, Your Honor.

25 MR. WENGER: Yes, Your Honor.

1 THE COURT: Very well. Plaintiffs may proceed.

2 MR. WENGER: May it please the Court.

3 This case involves an issue great public concern. Our
4 longstanding expectation of privacy in the most intimate
5 settings like locker rooms, showers and bathrooms. We've long
6 maintained separate spaces for men and women based on our
7 biological differences that express themselves and our
8 anatomical differences.

9 We have these spaces not merely because of our anatomy
10 that's often revealed in those places, as their record will
11 reflect, but also because of the vulnerability and embarrassment
12 we feel in the presence of the opposite sex when engaged in very
13 private functions.

14 This isn't the first time that these issues have
15 arisen. In 1975, when writing a commentary for the Washington
16 Post, now Justice Ginsberg stated with regard to the contention
17 that restrooms would be opened up to both men and women, quote,
18 "Separate places to disrobe, sleep, perform personal bodily
19 functions are permitted, in some situations required, by regard
20 for individual privacy. Individual privacy, a right of
21 constitutional dimension, is appropriately harmonized with the
22 equality principle," unquote.

23 The universality of this expectation is reflected in
24 Pennsylvania law that requires separate privacy facilities in
25 all kinds of settings, including in our public schools for the

1 benefit of our children.

2 And the societal norm is reflected in our court cases
3 across the country in the Third Circuit with regard to the
4 constitutional right of bodily privacy, sexual harassment, and
5 the tort known as invasion of seclusion. This is such a deeply
6 expected and experienced norm that we expect the right of bodily
7 privacy even for those who are incarcerated or in cases dealing
8 with searches. How much more in a situation like this dealing
9 with our children that we entrust to the schools.

10 And I want to be clear that we don't have the same
11 expectation of privacy with persons of the same sex. That's why
12 we have locker rooms, showers, and restrooms designated for men
13 and women because we expect privacy from the opposite sex that
14 we don't expect from the same sex.

15 But despite this shared experience and these
16 constitutional and statutory principles, the evidence will
17 reflect that my client, Joel Doe, then a 17-year-old junior at
18 Boyertown Area High School, found himself in the boys' locker
19 room with a girl. As he was changing, standing in his
20 underwear, he looked behind him to see a girl wearing nothing
21 above her waist other than a bra.

22 Shocked and embarrassed, he and some fellow students
23 went to see the assistant principal, Dr. Wayne Foley. The
24 principal explained to the boys that the school was now allowing
25 girls who identify as boys to use the boys' facilities.

1 When Joe; asked if there was any way to be separated
2 out of the situation, he was told to tolerate it and told to
3 make it as natural as he possibly could.

4 There's nothing natural about telling our boys and
5 girls to change together for gym class. The evidence will
6 reflect that students change in both locker rooms and in the
7 restrooms, and that not only do they take off their shirts and
8 their pants, but their underwear and their bras.

9 Telling someone that they have to change with a person
10 of the opposite sex is sexual harassment. And it's similarly
11 sexual harassment to fail to protect students when the school
12 knows that pursuant to its stated practice, students' bodily
13 privacy is being violated.

14 Prior to the past school year, the 2016-2017 school
15 year, the Boyertown Area School District separated out the
16 privacy facilities on the basis of biological sex. That changed
17 at this past school year.

18 Now any student who identifies with the opposite sex
19 may use the bathroom and the locker room of the opposite sex.
20 There's no requirement that the student's anatomy change before
21 using such facility. In fact, the record will reflect that
22 Dr. Cooper, the high school principal who enforces this practice
23 at the high school stated that he's not aware of any student
24 that has altered their reproductive anatomy.

25 There's no criteria other than the desire of the

1 student. In fact, students who identify with the opposite sex
2 may continue using the private facilities of their own
3 biological sex, and the school board ratified this practice in
4 May of this year.

5 In light of the school's practice, it should come as
6 no surprise that Joel Doe's experience is not the only example.
7 Joel stopped using the locker room. But a week after he did so,
8 another student, Jack Jones, found himself in the same locker
9 room with no pants on standing next to the same girl.

10 Mary Smith walked into a bathroom to find a boy. And
11 all of the Plaintiffs have needed to make some kind of
12 adjustment. Joel has stopped using the locker room. They all
13 limit their bathroom use so that a person of the opposite sex
14 doesn't walk in on them. And Mary Smith has decided that she is
15 not returning to Boyertown High School next year if this policy
16 stands.

17 Intervenors intend to put on expert testimony that the
18 school privacy facilities must be used to affirm an individual's
19 perception of their gender. Intervenor's expert is not taking
20 to account the effect on other students who suffer their loss of
21 privacy or ridicule for seeking privacy.

22 And as the science behind this is controversial and
23 not well settled, it's not at all clear what the effect is even
24 going to be on those who it's intended to help.

25 We plan to put on evidence through our own expert that

1 suggests that it's not in the best interest of either the
2 transgender students or the remaining students to share privacy
3 facilities in this way.

4 Of course we all want to show respect to all of our
5 students, regardless of what sex they identify with. But the
6 solution is not to subject our children to sexual harassment or
7 to force them to waive their right to bodily privacy in order to
8 use locker rooms or bathrooms that are designated for their sex.
9 They shouldn't have to undress together in order to show
10 respect. We can do better than this.

11 Plaintiffs seek a preliminary injunction to return to
12 the school's former practice of separating the bathrooms and
13 locker rooms on the basis of biological sex. Thank you.

14 THE COURT: Thank you very much, sir.

15 Mr. Levin.

16 MR. LEVIN: Good morning, Your Honor.

17 THE COURT: Good morning, sir.

18 MR. LEVIN: I'll try to be brief.

19 This case is not a case about privacy. There are
20 privacy facilities available to Plaintiffs or anybody else who
21 may feel uncomfortable using the same bathroom or locker room as
22 a transgender student.

23 What this case is about is the Plaintiffs want to keep
24 transgender students out of the bathrooms and locker rooms
25 consistent with the identity with which they -- consistent with

1 the gender with which they identify, rather than privacy.

2 With respect to the evidence that you will hear in
3 this case -- and by the way, most of it is already in the can --
4 it's in the can in several different ways.

5 First, the Plaintiff has already taken the trial
6 depositions of two of the student Plaintiffs. That will be
7 presented to you, the transcripts.

8 We have made an agreement with the Plaintiffs that we
9 would use the deposition -- the discovery deposition transcripts
10 in lieu of an extensive cross-examination. So those four
11 transcripts are already in the can, and they will be presented
12 to you.

13 In addition, it's my understanding that all three
14 parties, so to speak -- Plaintiffs, Defendants, and Intervenors
15 -- have agreed on a number of other exhibits to be entered into
16 the record without objection.

17 So we know what the evidence is, and it's largely
18 undisputed, as far as the facts. You will hear that the two
19 female plaintiff students have not been in any state of undress
20 and have not seen anybody else who's a transgender person in any
21 state of undress.

22 One of the female plaintiffs has already graduated,
23 and she admitted that she has not seen any transgender student
24 in either the locker room or the bathroom. I'm not sure why
25 she's a plaintiff in this case.

1 The other transgender female -- excuse me -- the other
2 Plaintiff female, as Counsel told you, testified that she walked
3 into a bathroom and saw a transgender girl by the sink, and
4 that's the extent of that situation.

5 With respect to the two boys, Counsel generally
6 described what they testified to in the locker rooms. But both
7 boys have the opportunity to use other facilities. And when the
8 Superintendent spoke with the parents of one of them and said
9 there are other places, like single-user bathrooms that can be
10 used, the parents rejected that.

11 The Superintendent is going to testify today. He's
12 going to testify about the significant renovations being made
13 and that have been made to the high school. There are what are
14 called team locker rooms that have generally been closed during
15 the school day, but will be opened up to anybody who wants to
16 use them and avoid using a gym locker room where a transgender
17 student may be present.

18 You will hear that there are an increased number of
19 single-user bathrooms, and they can all be used by any student
20 who feels uncomfortable going into the bathroom, multi-user, or
21 in the lingo of architects, gang bathrooms.

22 In addition, with respect to the multi-user bathrooms,
23 it appears that everybody agrees that they're individual stalls
24 with doors that lock. In the locker rooms, you will see
25 evidence that there are individual showers on the days of the

1 open multi-user showers, they're individual showers with privacy
2 curtains. And I don't think anybody disputes that.

3 So most of the record is in existence. The two
4 incidents with the two male Plaintiffs that Counsel told you
5 about, that's the only instances that took place last year. The
6 Plaintiffs in their discovery depositions that you'll receive the
7 transcript of, are all unaware of this practice causing any
8 problems, any disruptions, any commotions of any sort in the
9 school district.

10 Although openings are usually reserved for talking
11 about the facts that will be presented, Counsel for the
12 Plaintiffs did briefly talk about the law, so I will indulge.
13 And the law for a preliminary injunction requires that the
14 Plaintiffs' right be clearly established. And when talking
15 about the rights of transgender students in public schools, I
16 think that anybody who has looked at it will agree nothing is
17 clearly established and we're all learning and will continue to
18 learn in the next several years as this important issue winds
19 its way through the various courts.

20 Thank you very much.

21 THE COURT: Thank you very much, sir.

22 And, Attorney Roper.

23 MS. ROPER: Thank you, Your Honor.

24 Mary Catherine Roper for Intervening Defendant,
25 Pennsylvania Youth Congress.

1 Jason Goodman, the executive director of the
2 Pennsylvania Youth Congress is attending today. He won't be
3 testifying, as I'll explain in a moment, but he is certainly
4 here and quite eager to see the proceedings.

5 As Your Honor is of course well aware, this hearing on
6 Plaintiff's motion for preliminary injunction is going to focus
7 on whether Plaintiffs meet the heavy burden for that relief.

8 There are very -- there certainly are disputes of fact
9 about who said what in the past. As the attorney for the School
10 District has said, I don't think there are any disputes of fact
11 about the facilities available at the school going forward.
12 There are lots of spaces available for people who want to change
13 privately, want to use a bathroom privately, the school is able
14 to accommodate all that.

15 So the question is, given the availability of many
16 private spaces, are the Plaintiffs facing irreparable harm when
17 they have the option of either going into a private space or
18 using a multi-user facility in which there may or may not be a
19 transgender student.

20 The additional factual issues that the Court will hear
21 about today relate to the other, of course, requirements for a
22 preliminary injunction. And specifically from our point of
23 view, the balancing of the hardships and the public interest.
24 That is, of course, why Pennsylvania Youth Congress sought to
25 intervene here, so -- because in this case where the injunction

1 sought is to exclude other students from these facilities, it is
2 important for the Court to understand what the effect on those
3 students will be.

4 And so in -- with respect to that, we will be
5 presenting both the testimony of Aidan Destefano, who is a now
6 graduated transgender student from Boyertown Area -- I'm sorry,
7 they call it Boyertown Area Senior High, or BASH, you're going
8 to hear about BASH today -- as well as our expert who will talk
9 about the process that transgender adolescents in particular go
10 through and what the effect on them is of access to gender-
11 designated facilities, such as bathrooms and locker rooms in the
12 school.

13 I will, of course, reserve any legal argument for the
14 time allotted for legal argument. I -- and we look forward to
15 that time, as well as this presentation this morning. Thank you.

16 THE COURT: Very well. Thank you very much,
17 Counselor.

18 And the Plaintiff is prepared to call your first
19 witness, and this is one of the anonymous witnesses; is that
20 correct?

21 MS. GORDON: It is, Your Honor. We would call Mary
22 Smith.

23 We do have a question --

24 THE COURT: Certainly, Counselor.

25 MS. GORDON: -- and that is with respect to

1 technology. With both of the Plaintiffs, we will be using
2 video. And I don't know what the capabilities are back in your
3 chambers, so --

4 THE COURT: That is a problem. I do not believe we're
5 able to send the video back to chambers. So they would
6 basically be -- and I assume that has to do with the pictures of
7 the facilities, et cetera?

8 MS. GORDON: It does, Your Honor, yes. So if we could
9 have one of our counsel bring a laptop back so that they can
10 view the video.

11 THE COURT: That would be great.

12 MS. GORDON: All right.

13 THE COURT: That would be great. Anything to ensure
14 that the public as full and complete a picture of the testimony,
15 it would be very much appreciated.

16 MS. GORDON: What isn't clear is if we are back there,
17 I don't know that it will be protected here in the courtroom.

18 MR. LEVIN: Your Honor, I don't know that Plaintiffs
19 need to actually authenticate the video. I would have no
20 objection if the video is shown out here after Plaintiff's
21 testimony.

22 MS. GORDON: Your Honor, we intend to have our
23 Plaintiffs describe what Your Honor will be viewing --

24 THE COURT: Understood.

25 MS. GORDON: -- on the video. And so simply playing

1 the video after the fact really does not suffice with us.

2 THE COURT: And because I'm not certain -- we want to
3 make sure, obviously, the video is playing here in the courtroom.
4 And I assume it's hooked through these monitors here?

5 MS. GORDON: At this time, Your Honor, yes. Perhaps
6 we could bring yet another laptop back for people and person in
7 the courtroom, and then bring another laptop back.

8 THE COURT: All right. I mean, it's kind of --

9 MS. GORDON: They resolved it.

10 THE COURT: -- trying to make it work on the fly, but
11 we'll see if it works.

12 UNIDENTIFIED FEMALE SPEAKER: If it makes it any
13 easier, Your Honor, we have a laptop on which we could play the
14 video simultaneously in one or another room.

15 THE COURT: Okay.

16 UNIDENTIFIED FEMALE SPEAKER: We can manage this.

17 MS. GORDON: We'll be able to work out?

18 UNIDENTIFIED FEMALE SPEAKER: Yes.

19 MS. GORDON: Okay, very good.

20 THE COURT: All right. Then what we'll do at this
21 time is, I will have my law clerks to direct everyone other than
22 attorneys and parties into my chambers, and we'll try to make
23 this all work. We'll have the doors secured and anybody else
24 that comes through security will be directed to my chambers
25 during the testimony of these first two witnesses.

1 So if you would see to that. Anyone who wishes to
2 hear the testimony. You don't have to go to my chambers; you
3 just can't be in the courtroom.

4 UNIDENTIFIED SPEAKER: I go to the men's room.

5 THE COURT: Oh, certainly, sir.

6 MS. GORDON: Your Honor, would you like us to engage
7 the court reporter so that we can turn around the transcript? I
8 know that your court reporter will be involved in these
9 proceedings and recording. We will be getting a transcript from
10 your reporter, a daily. But this will allow for an expedited
11 turnaround, and we can get it --

12 THE CLERK: (Indiscernible) two transcripts.

13 THE COURT: Yeah, there's a problem with having two
14 transcripts. We really can only have one.

15 MS. GORDON: Okay.

16 THE COURT: And that has to be the official court
17 transcript.

18 MS. GORDON: Very good, Your Honor. And if everyone
19 is interested in this -- in the testimony is going to be able to
20 hear it, it looks like that resolves the issue. Thank you.

21 THE COURT: Very well. And I do want to make sure the
22 CSOs know to secure that door.

23 THE CLERK: Okay. Is that everyone that needs to come
24 out?

25 THE COURT: Is everyone out of the courtroom now that

1 needs to leave the courtroom?

2 (No response)

3 THE CLERK: (Indiscernible.)

4 THE COURT: Yeah. Make sure they know that the doors
5 should be secured. And anybody that comes through security
6 should be taken to my chambers.

7 (Pause)

8 THE CLERK: Is that everyone?

9 UNIDENTIFIED MALE SPEAKER: I'm plugged into the HDMI.
10 Are the TV screens on?

11 UNIDENTIFIED FEMALE SPEAKER: (Indiscernible.)

12 THE COURT: Does anyone need to take a five-minute
13 recess before we begin?

14 MS. GORDON: It might be convenient to do so, Your
15 Honor, simply so we can get the technology set up and not
16 further delay --

17 THE COURT: Certainly. We'll stand in recess for five
18 minutes.

19 MS. GORDON: Thank you.

20 THE CLERK: All rise.

21 (Recess taken from 9:59 a.m. to 10:08 a.m.)

22 (Audio muted.)

23 THE CLERK: All rise. The United States District
24 Court is again in session, the Honorable Edward G. Smith
25 presiding.

1 THE COURT: You may be seated. Thank you.

2 MS. ROPER: Thank you.

3 THE COURT: The Court is called to order. All parties
4 previously present are once again present. All Counsel are
5 present. The courtroom has been cleared and is adjourned, if
6 they chose to listen to testimony, to my chambers. And we also
7 have counsel who has reported there with a laptop to show
8 whatever videos might be shown here in court.

9 And right now, we are muted with respect to the
10 chambers. You may call your first witness.

11 MS. GORDON: Thank you, Your Honor. I call Plaintiff
12 Mary Smith. May I address her from the lectern?

13 THE COURT: Certainly. And is someone retrieving her
14 from the jury room?

15 MS. GORDON: I think Christiana is. Is Christiana --

16 UNIDENTIFIED MALE SPEAKER: Yeah.

17 (Witness summoned)

18 MS. ROPER: Do you mind if we move the lectern over a
19 little bit so I can see the witness?

20 THE COURT: And you should feel free to move about the
21 courtroom --

22 MS. ROPER: Oh, thank you.

23 THE COURT: -- as you need.

24 MS. GORDON: I don't know that this is --

25 THE COURT: I don't think you'll be able to move it

1 very much.

2 MS. GORDON: I guess it can be moved, but I'm not
3 going to be able to see my witness over the monitor.

4 MS. ROPER: Okay. I will let you adjust it then, and
5 I will just -- I'll just sit (indiscernible).

6 THE COURT: Feel free to move back.

7 MS. GORDON: I will -- yes, I'll just (indiscernible).

8 MR. LEVIN: (Indiscernible).

9 MS. GORDON: Now --

10 MS. ROPER: Just go ahead. I'll move.

11 MS. GORDON: All right. I'll tell you what. I will
12 just --

13 MS. ROPER: Put it back where it was; I'll move.

14 MS. GORDON: No, I'll -- I'll address from counsel
15 table. It's going to be easier that way.

16 Is this in your way? Or is it just me?

17 UNIDENTIFIED MALE SPEAKER: (Indiscernible).

18 MS. GORDON: Go ahead and put it wherever you would
19 like.

20 MS. ROPER: Yes, that's better.

21 THE COURT: And, ma'am, if you would please approach
22 the witness stand.

23 MS. SMITH: Yes.

24 MS. GORDON: Your Honor?

25 THE COURT: Yes, Counselor.

1 MS. GORDON: Will she be muted when she introduces
2 herself by her real name and then --

3 THE COURT: She will be mooted. And then once she has
4 been introduced and stated her name and spelled her name for the
5 record, after she's been sworn, then we're going to turn it back
6 on. I don't expect there will be any questions that might lead
7 to revealing her identity. But if you think something like that
8 might occur, we'll be careful.

9 MS. GORDON: There are some identifying -- yeah --

10 THE COURT: During those questions, if you would
11 request that we would moot the chambers, we will moot the
12 chambers.

13 MS. GORDON: All right, very good.

14 THE COURT: And if you would please raise your right
15 hand to be sworn.

16 THE CLERK: Do you swear or affirm that the testimony
17 you're about to provide, an issue now before this Court, shall
18 be the truth, the whole truth, and nothing but the truth so help
19 you God?

20 MS. SMITH: I affirm.

21 THE COURT: Thank you very much, ma'am. Ma'am, you
22 may be seated.

23 And, ma'am, we have cleared the courtroom, and right
24 now, it is on moot so that the participants, the public and
25 press who wish to hear your testimony, can't hear you right now.

1 So I'd like you to please state your full name, spelling your
2 last name for the record.

3 MS. SMITH: My name is [REDACTED], and I go
4 by the name Mary Smith.

5 THE COURT: Very well. Thank you very much.

6 Counselor, you may proceed. And at this time, can we
7 now allow the chambers to hear the testimony?

8 MS. GORDON: Yes.

9 THE COURT: Very well.

10 Attorney Kulick, you may --

11 MS. GORDON: Mary, could you pull the microphone
12 closer to you, or come closer to the microphone?

13 MS. SMITH: Yeah.

14 MS. GORDON: And is your computer screen working?

15 MS. SMITH: Yes.

16 THE COURT: But how do they know?

17 THE CLERK: (Indiscernible) testing, testing.

18 UNIDENTIFIED FEMALE SPEAKER: Testing, testing.

19 THE CLERK: Okay, thanks.

20 THE COURT: Very well.

21 Counselor, you may proceed.

22 MS. GORDON: Thank you, Your Honor.

23 (Audio unmuted.)

24

25 ///

1 MARY SMITH,
2 a witness, having been first duly sworn, was examined and
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MS. GORDON:

6 Q Mary, how old are you?

7 A I'm 18 years old.

8 Q And we will need to mute this answer.

9 THE COURT: Very well. Please mute this.

10 (Audio muted.)

11 Q When did you turn 18?

12 A [REDACTED].

13 THE COURT: And we can unmute now?

14 MS. GORDON: Yes.

15 THE COURT: Very well.

16 (Audio unmuted.)

17 BY MS. GORDON:

18 Q Where did you attend school during the 2016-2017 school
19 year?

20 A Boyertown High school.

21 Q Do the students commonly refer to the high school as BASH?

22 A Yes.

23 Q And that's Boyertown Area Senior High, correct?

24 A Correct.

25 Q Were you a junior at BASH last year.

1 A Yes.

2 Q Where will you attend high school for your senior year?

3 A Hopefully at BASH, but it depends how this turns out.

4 Q Mary, have you begun to think about life after high school?
5 Have you made any plans?

6 A Yes. Sorry.

7 MS. GORDON: I would ask that this be muted as well.

8 THE COURT: Very well. It is muted.

9 (Audio muted.)

10 THE WITNESS: After high school, I'm planning on

11

12 [REDACTED]. And then I'm planning on moving down to

13 Florida. I wanted to become a [REDACTED], but I've decided

14 that I'll just go with my [REDACTED], which I absolutely love.

15 I've been [REDACTED] and everything for many years.

16 THE COURT: Yeah.

17 MS. GORDON: Unmute.

18 THE COURT: And we can now turn off the mute.

19 (Audio unmuted.)

20 BY MS. GORDON:

21 Q Mary, are you currently working?

22 A Yes.

23 Q Where do you work?

24 A I work at a [REDACTED] and (indiscernible) a [REDACTED].

25 Q How many hours a week do you work during the school year?

1 A I would say seven to ten hours.

2 Q And how about in the summer now that school is out?

3 A It's --

4 Q How many hours?

5 A It's about the same.

6 Q What do you enjoy about the work that you do?

7 A I get to -- as a hostess, I get to host parties. And
8 there's a lot of young children, so I get to interact with
9 people. It's fun.

10 Q What do you do when you are not working or in school?

11 MS. GORDON: And I'd ask that this be muted as well.

12 THE COURT: Very well. It's been muted.

13 (Audio muted.)

14 THE WITNESS: When I'm not in school, I'm hanging out
15 with my friends. I go to my [REDACTED]. I'm spending
16 time with my family. I have a very large family, so we do a lot
17 of family events together.

18 MS. GORDON: Unmute.

19 THE COURT: Okay.

20 (Audio unmuted.)

21 BY MS. GORDON:

22 Q How long have you attended school in the district?

23 A Since fourth grade.

24 Q What types of school-related activities have you been
25 involved in while attending school in the Boyertown Area School

1 District?

2 MS. GORDON: This needs to be muted.

3 THE COURT: Very well. We will mute this as well.

4 You may proceed.

5 (Audio muted.)

6 THE WITNESS: In elementary school, I was like the

7 [REDACTED]. I was

8 in [REDACTED], which helped the community. I did [REDACTED] for

9 many years. I loved it. Okay.

10 MS. GORDON: Continue to mute.

11 THE COURT: Continue to -- no. Keep the mute on.

12 Mute.

13 BY MS. GORDON:

14 Q How many years have you played [REDACTED] at BASH?

15 A One year.

16 MS. GORDON: We can unmute.

17 (Audio unmuted.)

18 BY MS. GORDON:

19 Q Is that a fall sport that you participate in?

20 A Yes.

21 Q And do you have a uniform?

22 A Yes, we do.

23 Q Where do you change for your games?

24 A We either change in the 700s bathroom beside the LGI or the

25 800s bathroom, which is right above the -- it's on the second

1 floor of the building -- and also in the locker room.

2 Q About how often do you change for your games in the
3 bathrooms?

4 A It's about 50/50. It depends on how far away the games are
5 from our actual school. The farther away -- you know, it
6 depends.

7 Q All right. You mentioned LGI. What is LGI? What does
8 that stand for?

9 A It stands for large group instruction.

10 Q And did I understand you to say that the bathroom that is
11 near LGI or large group instruction is the 700s bathroom?

12 A Correct. Yep.

13 Q Do any of your teammates change into their uniforms in the
14 700s bathroom?

15 A Yes.

16 Q How about girls competing in other sports at BASH? Do you
17 see them changing in the bathrooms also?

18 A Yes, I do.

19 Q And on average, how many girls are changing to get ready
20 for their games or their practices in the bathroom when you're
21 in there?

22 A It varies, but about three to four or five people tops, I
23 would say.

24 Q Mary, I would like to refer you to Exhibit P-7. It is an
25 annotated floor plan.

1 A Okay.

2 Q P-37. I apologize.

3 A Okay.

4 Q Do you see that in front of you?

5 A Yes. I need to put my glasses on. Okay.

6 Q And I will represent that this is a floor plan that was
7 produced to us by the Defendants in this case. The numbers that
8 are reflected on Exhibit P-37, both on the front page and on the
9 second page, identify the locations where photographs and
10 videotape was taken. Okay?

11 A Okay.

12 Q Now, looking at Exhibit P-37, can you please identify for
13 Judge Smith the location of the LGI room that you referred to
14 earlier?

15 A Okay. So you would go to Number 18. And where it says
16 existing girls and boys gang toilet rooms, you would go right
17 next to that. Like if you go to the yellow rectangle, you go
18 down one and it's right there.

19 Q Is that the white rectangular-shaped room that we see
20 directly below the existing girls and boys gang toilets again
21 identified as Number 18?

22 A Yes.

23 Q The bathrooms that we were just speaking about, are those
24 the 700 bathrooms?

25 A Yes.

1 Q I would now like to direct your attention to four exhibits.
2 They are marked as Exhibits P-33, P-34, P-58, and P-59.

3 A Okay.

4 Q And we will just take them in that order. All right?

5 A Okay.

6 Q Beginning with P-33, do you recognize that picture?

7 A Yes, I do.

8 Q What are we looking at in P-33?

9 A You're looking at the entrance to the women's bathroom.

10 Q And I'm sorry. I couldn't hear your answer. To the what
11 bathroom?

12 A Women's bathroom.

13 Q All right. And which bathroom is that?

14 A That is the bathroom directly next to the LGI.

15 Q Also known as the 700s bathroom?

16 A Correct.

17 Q All right. Moving on to P-34. What do we see in that
18 picture, Mary?

19 A You see the five stalls that are in the 700s bathroom.

20 Q What do we see in the very last stall in that picture?

21 A You see a towel dispenser and also a tampon dispenser.

22 Q Moving on to the photograph which is marked as Exhibit P-58.
23 Can you describe what we see in this photograph?

24 A Yes. If you were standing at the entrance to the bathroom,
25 you are looking at the sink, the tampon dispenser, the paper

1 towel dispenser. There's a -- the stall door wide open. And
2 this is like the common area of the bathroom, of the 700s.

3 Q And then moving on to P-59 --

4 A Okay.

5 Q -- the last photograph that we have there of the 700s
6 bathroom. Describe what we are seeing there.

7 A In this picture, you're standing approximately at the
8 tampon dispenser and you're looking at the sink of the bathroom
9 in the 700s. And you see the big mirror. There's a mirror
10 above the sink. But also in the reflection of the mirror you're
11 looking at a smaller full-body mirror that you can look at
12 yourself in. And there's a trash can and the paper towel
13 dispenser.

14 Q What do we see at the left of the picture there? It's
15 brown.

16 A That is the entryway, the door walking into the 700s
17 bathroom.

18 Q Where is the full-length mirror that we see reflected in
19 the mirror behind the sink? Where is that located in
20 relationship to the door?

21 A That's located -- if you walk right in, the door's right
22 here. It's located directly to the right of the entryway on the
23 wall.

24 Q I'd like to return to Exhibit P-58, if we could. All
25 right. Is this the common area of the 700s bathroom?

1 A Yes.

2 Q Is this one of the bathrooms in which you would change for
3 games and practices?

4 A Yes, it is.

5 MR. LEVIN: Objection. Leading question, Your Honor.

6 THE COURT: I'm going to overrule the objection.

7 BY MS. GORDON:

8 Q Could you please describe for the Judge what is involved in
9 changing into your uniform for games?

10 A Usually when I'm changing, I'm in regular clothing. So I
11 like to take off my top. I put on a sports bra because usually
12 I'm not wearing a sports bra for -- during the day. And then I
13 have to take off my pants. And depending on what time of the
14 month it is, if it's my period or not, I like to change my
15 underwear. And I have a skirt that I slip on on top of that.
16 And that usually includes my [REDACTED] uniform.

17 Q Have you done these things that you just described for the
18 Court in this 700s bathroom that we're looking at here in P-58?

19 A Yes.

20 Q Have you seen other girls do these same things in the
21 common area of the 700s bathroom?

22 A Yes, I have.

23 Q When they are getting dressed, have you seen intimate parts
24 of those girls in the common area of the 700s bathroom?

25 A Yes. I've seen their bras, when they take off their bra

1 sometimes their chests are hanging out. Some girls have to
2 change underwear just like me. I see their backsides, their
3 butts. And it's very private areas that I see on the daily when
4 I'm changing.

5 Q In what other bathrooms besides the 700 bathroom, if any,
6 have you changed your clothes to get ready for a game?

7 A Besides the 700s bathroom, I've changed in the one -- it's
8 exactly pretty much like this bathroom. It's right above the
9 700s. It's in the 800s hallway. Same size. I changed in the
10 common area of that bathroom.

11 Q If you would look at Exhibit P --

12 THE COURT: And, Counsel, I'm going to interrupt for
13 just one moment.

14 Could you please call the chambers and make sure
15 they're hearing all this? The last thing I'd want is not to
16 confirm that the sound is going through.

17 THE CLERK: (Indiscernible).

18 THE COURT: They're hearing it?

19 THE CLERK: (Indiscernible).

20 THE COURT: Very well. Excuse my interruption.

21 Counsel, you may proceed. You may proceed, Counsel.

22 MS. GORDON: Thank you, Your Honor.

23 BY MS. GORDON:

24 Q Mary, I would like to direct your attention to the second
25 page of Exhibit P-37. Tell us what we are looking at there.

1 A You're looking at the second floor of the high school.
2 This is the layout of it. The second actually and third floor
3 because the third floor's in the corner.

4 Q Are you able to identify the location of the 800s bathroom
5 in which you changed on that second page of Exhibit P-37?

6 A Yes. It's -- well, from the 700s, it's right above that.
7 So it's the rectangle -- yellow rectangle where -- number 31, it
8 says -- I can't really read it because it's really tiny, but
9 it's Number 31. It's right there.

10 Q Thank you.

11 A Yep.

12 Q Mary, when you are using these bathrooms to change for your
13 games, do you always change in the common area or do you
14 sometimes use the stalls?

15 A I always change in a common area.

16 Q Is there any time that you feel the need to change in a
17 stall?

18 A Yes. If I'm on my period, I change in a stall just because
19 I don't really want my pad or tampon hanging out in the open for
20 anyone to just see. It's kind of disgusting. Sorry.

21 Q Why don't you always change in the stalls in the bathroom?

22 A These stalls are not very big. They're kind of tiny,
23 actually. And typically there's paper towel rolls and feces on
24 the ground and it's kind of disgusting. It's not a sanitary
25 place. I don't want my clothes on the floor. It's like -- it's

1 tiny and it's disgusting. And I would prefer a bigger location
2 to move around in, especially since I have my [REDACTED] and
3 my school outfit and stuff with me.

4 Q Besides changing clothes, what else do girls do in the
5 bathrooms at BASH?

6 A They use the bathrooms. They -- they'll -- you saw like
7 the tampon dispenser. They get tampons out. They wash their
8 hands, interact with each other.

9 Q Thinking back to the time that you started attending
10 Boyertown in elementary school and all the way through tenth
11 grade, did you ever see a boy in any of the girl's bathrooms?

12 A I have never.

13 MS. GORDON: Your Honor, if I may approach the
14 witness? I would like to provide her with a copy of the
15 pseudonym list.

16 THE COURT: Certainly, Counselor.

17 BY MS. GORDON:

18 Q And, Mary, the Judge has instructed that it's very
19 important for you not to refer to any of the individuals on this
20 list by their actual names --

21 A Okay.

22 Q -- but to use the pseudonyms that have been associated with
23 them. All right?

24 A Okay. Thank you. Thank you.

25 MS. GORDON: Thanks, Your Honor.

1 THE COURT: Certainly.

2 BY MS. GORDON:

3 Q I believe you just testified, Mary, that in the time that
4 you had been attending school in the Boyertown School District
5 all the way through the tenth grade, you had not seen a boy in
6 the girl's bathroom; is that right?

7 A That's correct.

8 Q How about last year?

9 A Yes.

10 Q Where did this happen?

11 A This happened in the 700s bathroom on the first floor next
12 to the LGI.

13 Q I'd like you to tell the Judge what happened. It may be
14 helpful to refer to some of the pictures that you have been
15 looking at --

16 A Yeah.

17 Q -- of the 700 bathroom, P-33, P-34, P-58, and P-59.

18 A Okay. Okay. So LGI is large group instruction. I wanted
19 to go to my locker, so I made my way from my LGI room upstairs
20 to the second floor. And I went to my locker because it's on
21 that row on the second floor. After I was done with my locker,
22 I decided to go to the bathroom. I had to go. So it was on the
23 way because the bathroom is right next to the LGI.

24 So I went downstairs and I walked into the bathroom.
25 And I was standing at this entryway. And right directly on the

1 right is a mirror, a full-length mirror. I turned. I looked at
2 that. And I saw a reflection of a male student in -- at the
3 sink of the bathroom, washing their hands. And I didn't know
4 what to do, in all honesty. I never experienced a male student
5 in my bathroom. And I've been going to this school since fourth
6 grade. So I was just kind of in shock for a moment.

7 I ran away. I ran directly out. I didn't belong
8 there. I knew I didn't because this had never happened before
9 so it was like this is not for me. I ran directly to my LGI,
10 which is right next to it. I ran in. And I'm telling my LGI
11 administration about the situation, that I had just witnessed a
12 male student in the bathroom. And at that moment, another male
13 student who was also in LGI with me came right in and he's like
14 I --

15 MR. LEVIN: Objection. Hearsay, Your Honor.

16 THE COURT: I am not sure what she's going to testify.
17 I can't tell whether it's hearsay or not. And it's probably not
18 being offered to prove the truth of the matter asserted
19 necessarily, but rather the impact it might have had on her
20 hearing it.

21 So do you wish to respond to the hearsay objection?

22 MS. GORDON: Yes, Your Honor. I mean, the testimony
23 that the witness is about to give is not being used to prove the
24 truth of what was said, but simply to establish her state of
25 mind in hearing --

1 THE COURT: Okay.

2 MS. GORDON: -- what the student said.

3 THE COURT: I'll overrule the objection in the first
4 instance. We'll see what the answer is.

5 Do you remember the question?

6 THE WITNESS: Yes, I believe I do.

7 THE COURT: Very well. If you can answer it --

8 THE WITNESS: Okay.

9 THE COURT: -- you can answer it now.

10 THE WITNESS: Okay. A male student came into LGI. He
11 was like I just witnessed a male leaving the girl's bathroom.
12 And he's like -- and I turned to him and I said -- and the
13 teacher and I said this is what I was just saying, this confirms
14 my story. And the LGI administration said this is important, we
15 need to go report this to the office right away, this is an
16 important matter, it needs to be discussed. So we went out and
17 she escorted me down to the office where I met with Mrs.
18 Levingood (phonetic) at the front desk.

19 BY MS. GORDON:

20 Q I'd like to direct your attention, Mary, to Exhibit P-62.

21 MS. GORDON: And I will identify that for the record.

22 (Pause)

23 MS. GORDON: If I may approach the witness, Your
24 Honor?

25 THE COURT: Certainly, Counselor.

1 THE WITNESS: Thank you.

2 BY MS. GORDON:

3 Q Mary, for purposes of the record, could you identify or
4 read the letters and numbers at the bottom right-hand corner of
5 that document?

6 A Sure. It says, "BASD1512."

7 Q All right. And I will represent to you that this is a
8 document that was produced by the Defendants in this case. You
9 can see that it is an email from Gregory Miller to Wayne Foley.
10 The date of the email is April 19, 2017. It appears to be a
11 report of an incident on March 22, 2017. I would like you to
12 read into the record, Mary --

13 A Okay.

14 Q -- the contents in the right-hand column, being very
15 careful to not mention any of the actual names --

16 A Okay.

17 Q -- in the document.

18 MR. LEVIN: And, Your Honor, I would ask that this
19 document have the name of another student redacted before it's
20 officially in the record.

21 THE COURT: Is there any objection?

22 MS. GORDON: No. No objection, Your Honor.

23 THE COURT: Any objection from the Intervenor?

24 MS. ROPER: No.

25 THE COURT: Very well. We will ensure that that is

1 redacted.

2 MS. GORDON: Thank you.

3 THE WITNESS: I have a question. It's all right if I
4 take a pause to read? I -- because I have to try to find the
5 list of names on her. I want to be sure that I don't say
6 anyone's name, so I'll be referring to this other sheet --

7 MS. GORDON: May I give her a pen to use --

8 THE COURT: Certainly.

9 MS. GORDON: -- so that she can just put --

10 THE WITNESS: Thank you.

11 THE COURT: Thank you, Counselor.

12 MS. GORDON: That might help her as she's reading.

13 THE WITNESS: Thank you.

14 THE COURT: Thank you.

15 THE WITNESS: I just don't want to -- okay. I'm
16 ready. Should I just start?

17 BY MS. GORDON:

18 Q Yes. Go ahead and read the content in the email.

19 A Okay. "The main office had a girl stop by and report a boy
20 in the girl's lav washing hands. Gamin (phonetic) determined
21 through video that it was Student B, who Student B identifies as
22 a female now. Mary spoke to Student B. Further video work
23 revealed the reporting student as Mary Smith, who can be seen
24 hurriedly exiting the lav back to the LGI. Back in the LGI, she
25 is addressed by O'Conno (phonetic), who escorts her to the

1 office where she is seen by Levingood at the front desk.

2 Levingood is the person who called security about the unknown
3 female reporter. All video clips are on file by SRO."

4 Q Mary, is that an accurate summary of your experience on
5 March 22, 2017, at Boyertown High School?

6 A Yes, it is.

7 Q How do you know the student that you saw in the 700s
8 bathroom that day was a boy?

9 A Because I've been going to the school for a good two years.
10 And it states clearly on the document that we got that the
11 school itself knew this was a boy when it said that they
12 identify as a female now. So they obviously had to be a boy.
13 The school said this itself.

14 Q Did you ever talk to Dr. Foley that day?

15 A No.

16 Q Did you ever talk to Dr. Foley about this incident?

17 A Yes, I have.

18 Q Who is Dr. Foley?

19 A He is the eleventh grade principal.

20 Q Would you tell us about the conversation you had with
21 Dr. Foley the day after this incident in the 700s bathroom?

22 A Sure. The day after I reported the initial incident, I --
23 I don't know how I got called down to the office, but I know I
24 ended up there. And I was waiting in the main like lobby area.
25 And I was sitting there waiting and Dr. Foley came out and he

1 kept asking me how long this would take. And I kept saying I
2 don't know, like I don't know what's going on, I -- this never
3 happened before so I don't know how long this will take. And he
4 kept asking me, five to ten minutes? And I was like I don't
5 know, like I don't know. He's like, okay, we'll see how long
6 this takes.

7 I was like okay, like I'll follow you, like -- and so
8 we go into his office and I sit down. And I describe to him the
9 situation that occurred yesterday with the fact that I saw a boy
10 in my bathroom. And then I told him how Ms. Levingood said that
11 she would get back to me on the situation on -- in -- because
12 she said that he was in a meeting. And I was like, okay, I
13 understand.

14 So I told him all of this. And he says -- and he said
15 that we have a policy at BASH that anyone who identifies as the
16 opposite sex, they are allowed to use the bathrooms that they
17 identify with. And I was like, okay, I've never heard of this
18 policy. And so -- and I know my parents haven't heard of this
19 policy, so what is this policy. And he says we are in the
20 process of communicating that to the public. And then he just
21 left it at that. He was writing it down on a sticky note and he
22 said he will get back to me.

23 Q Did Dr. Foley ever get back to you?

24 A No, he didn't.

25 Q Mary, is that the only time last year that you noticed a

1 boy who identifies as a girl in a bathroom that you were using?

2 A As I know of, yes.

3 Q Do you know whether you were ever in a bathroom with a boy
4 identifying as a girl other than on this occasion?

5 A I do not know.

6 Q What is it about sharing a bathroom with a boy who
7 identifies as a girl that bothers you?

8 A They're not the same sex as me. It's uncomfortable.

9 Q How often did you use the bathrooms at BASH before
10 March 22nd?

11 A I used it about three to four times a day.

12 Q And how about after this incident with the boy in the
13 bathroom?

14 A It significantly declined. I've avoided using the main
15 bathrooms. And because of this, my friends -- I have a group of
16 friends -- it's high school -- that I hang out with, and they
17 knew that I was uncomfortable doing this so instead of --
18 because we would meet every day in the bathroom. We would all
19 be on different busses, so we would all meet in a main bathroom.
20 And because of this, we started meeting in the library. They
21 knew that I was uncomfortable so they just started going to the
22 library with me and that's where we met up.

23 Q So after you had this experience with a boy in your
24 bathroom, from March 22nd through the end of the year, how often
25 did you use the bathrooms at BASH?

1 A About three to four times a -- it was -- yeah, about three
2 to four times a week. Like it was significantly less. Because
3 during the day it would be about three to four times a day.
4 Like I'd be in the bathroom and like --

5 Q And on those three or four occasions a week on average,
6 how did you feel when you were using the bathrooms?

7 A I felt like I needed to protect myself more. I was more
8 cautious. I didn't use the main bathrooms, the big ones,
9 because it was more open area, more chance for exposure.

10 Q Mary, I want to turn now to the girl's locker room at BASH.
11 How many girl's locker rooms are there in the high school?

12 A There's one.

13 Q You told us that you sometimes changed for your games in
14 the locker room in the fall; is that right?

15 A That's correct.

16 Q Did you use the girls' locker room at all during the second
17 semester of the year?

18 A Yes.

19 Q And why would you need to be in the locker room during the
20 second semester?

21 A Second semester -- so first semester, the first two
22 quarters of the year, I had health, which we met in a classroom.
23 And the second two semesters of the last part of the year, we
24 had gym every single day. So I would need to be in the locker
25 room every single day.

1 Q We have a video that was taken during an inspection by
2 counsel in this case. The video is of the girls' locker room.
3 I would like to play the video and have you describe for Judge
4 Smith --

5 A Okay.

6 Q -- what he is seeing. All right?

7 A Yep.

8 (Whereupon, the video recording was played in open
9 court while the witness is testifying:)

10 BY MS. GORDON:

11 Q So we're starting here at the very beginning. What are we
12 looking at?

13 A Right now, you're looking at the -- it's called the bare
14 gym where basically main sports meet like basketball for
15 basketball season. It's the main area.

16 Q And then we will stop it at 08. What do we see there?

17 A This is the entrance to the girls' locker room.

18 MS. GORDON: And, Your Honor, if I could just -- just
19 pause the video for a moment. We have some markings on the
20 screen. I think they probably came from Mary as she was
21 touching the screen.

22 THE WITNESS: Oh.

23 MS. GORDON: Is there any way to erase those so we
24 know or do we just need to do this on a break?

25 THE WITNESS: I didn't know.

1 MS. GORDON: I don't want to delay things
2 unnecessarily, but --

3 THE WITNESS: I didn't know I controlled the screen.

4 THE COURT: And Attorney (sic) Kulik is seeing to this
5 to see if we can delete that.

6 MS. GORDON: Thank you very much. Thank you.

7 THE COURT: And I believe she was successful. Very
8 well.

9 You may proceed, Counselor.

10 THE WITNESS: Thank you.

11 MS. GORDON: You can continue the tape. And we will
12 stop it at lapse time 25 seconds.

13 (Whereupon, the video recording continued to play in
14 open court while the witness is testifying:)

15 BY MS. GORDON:

16 Q Mary, what are we seeing in this picture?

17 A This is where the teachers -- the administrative area. I'm
18 really unfamiliar with this area. I've never been in it. We're
19 not -- students aren't allowed in it, so I wouldn't know
20 anything about this area.

21 Q We'll continue the tape then.

22 MS. GORDON: Let's stop it at 51 seconds.

23 (Whereupon, the video recording continued to play in
24 open court while the witness is testifying:)

25 ///

1 BY MS. GORDON:

2 Q Mary, can you describe what we are seeing there?

3 A Yes. If you're standing at the entrance of the locker
4 room, you're looking directly in front of you. And it's like
5 the -- it's going to the common area.

6 Q What do we see to the right?

7 A We see the teachers -- that's like the window for -- so the
8 administration can look out into the locker room.

9 MS. GORDON: Start the tape again and stop it at 56
10 seconds.

11 (Whereupon, the video recording continued to play in
12 open court while the witness is testifying:)

13 BY MS. GORDON:

14 Q What do we see here?

15 A This is the common area of the locker room where all the
16 girls change for gym class.

17 Q Were the locker rooms, including the girls' locker room,
18 recently renovated, within the last two years?

19 A Yes, they were.

20 Q Were you ever in the locker room here before those changes
21 were made?

22 A Yes, I was.

23 Q Can you describe -- using this picture, can you describe
24 for the Judge how the layout was different in the old locker
25 room before the construction was done?

1 A Yes. So if you're standing at the administration window,
2 so the window is right here, if you're looking in there were
3 lockers going like this. So you could only technically -- well,
4 basically see the first level of students. But after that, you
5 couldn't see anything. It was divided by different lockers.

6 Q So, Mary, as we look at this picture -- and you said the
7 lockers were going like this.

8 A Uh-huh.

9 Q And we need to be a little more descriptive --

10 A Yeah.

11 Q -- for the record, all right?

12 A Yeah.

13 Q The lockers in the old locker room, were they running in
14 the same direction as the lockers that are on the left side of
15 that picture or were they running perpendicular to those
16 lockers?

17 A Perpendicular. Perpendicular. And I can't -- I don't know
18 how many rows there were. I just know it divided --

19 Q When you were in the locker room getting dressed for your
20 games, about how many girls would be in the locker room with you?

21 A It would be around 30 to 40. It was a pretty packed area.

22 Q And how about when you were getting ready for gym in the
23 second semester? How many girls would be in that common area?

24 A About the same.

25 Q Are you able to -- well, let me ask you this. Was there a

1 particular locker or area in the locker room that you commonly
2 went to to change your clothes?

3 A Yes. In the corner where you have the straight locker room
4 lockers and then you have the ones perpendicular, I was in that
5 little corner right there. And I would just be surrounded by
6 different people. I would go there commonly.

7 Q So is that the corner that we see in the far right --

8 A Yes.

9 Q -- side of the photo?

10 A Yes.

11 Q When you were in the locker room, describe how you would go
12 about changing for gym class.

13 A I would sometimes -- it depended on what I was wearing
14 again. But I would have to take off my shirt. I would have to
15 change bras if I needed to. I would sometimes have to take off
16 my pants depending if I was wearing gym shorts, if it was like a
17 lazy day or not. Change my underwear sometimes. I try not to
18 do that as much, but sometimes I have to change my underwear.
19 But that's about it.

20 Q How about the other girls in the common area that you saw
21 getting ready for gym class? Describe how they would go about
22 changing their clothes.

23 A I think girls are very comfortable around other girls, so I
24 would walk in and I'd be able to see girls just bare butts out,
25 chests out, just changing. Most wore thongs, so it was kind of

1 like they -- their butts were out, exposed. They would have to
2 take off their tops, change bras just like me.

3 MS. GORDON: We'll continue with the video. We will
4 stop at 1:12.

5 (Whereupon, the video recording continued to play in
6 open court while the witness is testifying:)

7 BY MS. GORDON:

8 Q Describe this area in the locker room, Mary.

9 A Sure. This is the bathroom area of it. There's three
10 stalls. There's a hand dryer, sinks, soap, various --

11 Q Did you ever change -- or have you ever changed in those
12 toilet stalls?

13 A No. I chose not to change in the toilet stalls because
14 again it's a really tight fit. It's -- and you have girls going
15 in and out all the time. And it was just -- it was just
16 disgusting, to be honest. It's a bathroom. There was a hand
17 dryer. There was water all over the floors because girls did
18 not want to just dry their hands. It was a fast-paced moving
19 place. I was just not about changing in the stalls.

20 Q You said it was fast paced. About how long did you have to
21 change clothes for gym?

22 A I would say about four minutes. It was just non-stop
23 moving. You had to get to class.

24 Q How about after gym? How much time did you have?

25 A It was about the same.

1 MS. GORDON: Let's continue the video and we will stop
2 it at 1:17.

3 (Whereupon, the video recording continued to play in
4 open court while the witness is testifying:)

5 BY MS. GORDON:

6 Q What is this area, Mary?

7 A This is the shower area of the locker room. There is
8 curtains dividing. There is a bench, showerheads.

9 Q Did you ever shower after gym class?

10 A Never.

11 Q Have you ever seen any girls shower in the locker room
12 using these stalls?

13 A Never.

14 Q Have you ever changed your clothes in those shower stalls?

15 A Yes, I have.

16 Q And when would you do that?

17 A Again, only really when I had my period. It was based on
18 that because no one wants again to be changing a tampon or
19 anything. You want a little bit more privacy. But it wasn't
20 completely private because I would have instances when females
21 would rip open curtains to try to get in. Again, it was a
22 fast-moving pace. There was no real privacy from that. Like
23 they would peek in to try to see. It was a hectic situation.
24 Curtains were being ripped open. It's happened plenty of times
25 that you just kind of have to deal with it in the moment.

1 MS. GORDON: Let's continue with the videotape.

2 (Whereupon, the video recording continued to play in
3 open court:)

4 MS. GORDON: We will stop the video at 2:42.

5 (Whereupon, the video recording continued to play in
6 open court while the witness is testifying:)

7 BY MS. GORDON:

8 Q Mary, what do we see there?

9 A This is the exit to the girls' locker room.

10 Q Where does that exit lead?

11 A That exit leads into the hallway where there's a staircase
12 leading up to the next hallway.

13 Q So there are two doors to get into and out of the locker
14 room?

15 A Yes. But this door is typically locked to get in, so I
16 don't use this door to get in. I use the one inside the gym.

17 (Video recording ends.)

18 Q Okay. Thank you, Mary, for walking us through that video.
19 When did you first find out that the school district was
20 permitting boys who identify as girls to use the girls'
21 bathrooms and the locker room at BASH?

22 A I found out the second day I met with Dr. Foley.

23 Q And this was after you had already encountered a boy in the
24 girls' bathroom?

25 A Yes.

1 Q Mary, do you have any objections to lesbians using the
2 girls' bathroom or locker room with you?

3 A Absolutely not.

4 MS. GORDON: If we could mute?

5 THE COURT: Certainly.

6 (Audio muted.)

7 MS. GORDON: And go off the record?

8 (Counsel confer.)

9 MS. GORDON: I just needed to clarify whether the name
10 of this next student could be used and it can be. It's been
11 confirmed.

12 THE COURT: Very well. You may go back on the -- oh,
13 you may -- no more mute.

14 (Audio unmuted.)

15 BY MS. GORDON:

16 Q Mary, last year, would you have had any problem if Aidan
17 DeStefano used the girls' locker room or bathrooms?

18 A Absolutely not.

19 Q Do you have any problem sharing the girls' bathrooms or
20 locker room with a transgender student?

21 A As long as they're the same sex as me.

22 Q Mary, are you aware of any single user bathrooms that were
23 available to students at BASH last year?

24 A No, I'm not.

25 Q If you were told a single-user bathroom was available to

1 you, wouldn't that solve your privacy concerns?

2 A No, it wouldn't. I should be allowed to use any bathroom
3 that has the sign that a female can, a girl. I shouldn't have
4 to go to different bathrooms. I should be able to use the ones
5 they -- that say girls and know that there are only girls in
6 there.

7 Q But even in the multi-user bathrooms there are stalls.
8 Don't they give you the privacy you need?

9 A No. That's the only protection from the same sex, a female.
10 When I'm in the bathroom, I'm opening up pads. I'm using
11 tampons. My pants are on the floor. You can see my underwear.
12 Girls peek in. You can -- there's a gap between the door and the
13 side of the stall where I've made awkward eye contact with
14 people. It's weird, uncomfortable. But I know there's a female
15 on the other side, hopefully.

16 Q Why did you bring this lawsuit?

17 A Because my privacy was violated. I wasn't -- the school
18 didn't protect me. My -- I have [REDACTED] who go to this
19 school. I don't want them coming up and not feeling safe and
20 not knowing who's walking in and out of their bathrooms. I felt
21 like the school didn't protect me.

22 MS. GORDON: This next answer needs to be muted.

23 (Audio muted.)

24 BY MS. GORDON:

25 Q What do you say to those who say it's discriminatory not to

1 let a boy who identifies as a girl into your locker room?

2 A I say as an African American, it's offensive for you to
3 compare race and sex. They don't equal out. It's offensive to
4 compare those.

5 Q What do you want the Court to do, Mary.

6 THE COURT: And we can unmute now?

7 MS. GORDON: I'm sorry. Yes.

8 THE COURT: You may unmute.

9 (Audio unmuted.)

10 BY MS. GORDON:

11 Q What do you want the Court to do, Mary?

12 A I want the Court to allow only girls to be in the bathrooms
13 and the locker rooms.

14 MS. GORDON: Thank you. Those are all the questions I
15 have.

16 THE COURT: Thank you very much, Counselor.

17 Mr. Levin, you may --

18 THE WITNESS: Thank you.

19 THE COURT: -- cross-examine the witness.

20 MR. LEVIN: Yes.

21 CROSS-EXAMINATION

22 BY MR. LEVIN:

23 Q Mary, you're going to be very lucky. I have very few
24 questions because of the agreement with Counsel to use your
25 discovery deposition. Is that okay with you?

1 A That's perfectly fine. Thank you.

2 Q A couple of things. You testified about the administrators
3 of the AGI and the administrative office in the locker room. Do
4 you remember that testimony?

5 A Yes. And it's the LGI.

6 Q Excuse me. I stand corrected.

7 A I'm sorry. I was --

8 Q Those aren't administrators. Those are teachers in both
9 places, right?

10 A Well, in the LGI, they're not really teaching us. I don't
11 consider them teachers. I don't know if they have a teaching
12 degree or not. I don't know. So I just called them
13 administration because that's what I know them as.

14 Q Okay. The school -- the high school has a principal and
15 three assistant principals, right?

16 A That's correct.

17 Q And they have a school resource officer. In one of the
18 floor plan exhibit, I believe, there was the -- no, it was a
19 different exhibit. Exhibit 62 there was the acronym SRO. That
20 stands for school resource officer, right?

21 A Correct. I guess so. I don't know.

22 Q Other than the principal and the three assistant principals
23 and perhaps the SRO, there are no other administrators assigned
24 to the high school, right?

25 A I guess so. I wouldn't know.

1 Q Okay. You testified that there was only one girls' locker
2 room in the high school; is that correct?

3 A That's correct.

4 Q There are gym locker rooms and there are team locker rooms,
5 aren't there?

6 A I have never used a team locker. I don't know what that
7 is, to be honest. I've only used the locker rooms.

8 Q All right. So there may be team locker rooms and you're
9 just not aware of that?

10 A Yes.

11 Q Okay. And there are single-user bathrooms that you could
12 use, right?

13 A Yes.

14 Q And just to make sure the record is clear, the one time
15 that you saw a transgender girl in the bathroom, she was fully
16 clothed, wasn't she?

17 A Yes.

18 Q And the one time that you saw the transgender girlfriend in
19 the bathroom, you were fully clothed, right?

20 MS. GORDON: Object to the form of the question. She
21 didn't indicate that it was a girlfriend.

22 MR. LEVIN: Did I say girlfriend? I'm sorry. I
23 said -- I thought I said --

24 THE COURT: I didn't hear --

25 MR. LEVIN: -- transgender girl in the bathroom.

1 THE COURT: Okay. Well, I didn't hear it as
2 girlfriend either.

3 MR. LEVIN: Yeah.

4 BY MR. LEVIN:

5 Q The one time --

6 THE COURT: Do you understand the question?

7 THE WITNESS: Uh-huh.

8 BY MR. LEVIN:

9 Q -- you saw a transgender girl in the girls' bathroom, you
10 were fully clothed, right?

11 A That's correct, yes.

12 Q And you've never seen a transgender girl in the locker
13 room; is that correct?

14 A I don't know if I have.

15 MR. LEVIN: Okay. I have nothing further.

16 (Court and Clerk confer.)

17 THE COURT: Counsel, the -- I apologize for the
18 interruption, but Aidan DeStefano is out in the hallway and the
19 issue was he wanted to go back and listen to the testimony. But
20 I believe he's been sequestered, is that correct, as a --

21 MS. GORDON: We would ask that he be sequestered, yes.

22 THE COURT: Okay. And as a result of that, he would
23 not --

24 (Court and Clerk confer.)

25 THE COURT: Attorney Roper, would you like to talk

1 with him for a moment?

2 MS. ROPER: I would. And I was going to ask for just
3 a moment's -- a couple of moments' break to prepare so that my
4 questioning is short and to the point.

5 THE COURT: You'd like to take a brief recess?

6 MS. ROPER: I would, if you don't mind.

7 THE COURT: All right. Why don't we stand in recess
8 for five minutes.

9 THE WITNESS: Okay. Thank you.

10 THE BAILIFF: All rise.

11 (Break taken from 11:00 a.m. until 11:06 a.m.)

12 THE BAILIFF: -- again in session. The Honorable
13 Edward G. Smith presiding.

14 THE COURT: You may be seated. Thank you.

15 MS. ROPER: Thank you.

16 THE COURT: The Court is called to order. All parties
17 previously present are once again present. The --

18 Would notify Mr. Seldin that he can turn up the
19 volume?

20 THE CLERK: (Indiscernible). Thank you.

21 THE COURT: It's take care of? Very well.

22 The Court is called to order. All parties previously
23 present are once again present. The witness is on the witness
24 stand.

25 Mr. Levin, we interrupted your cross-examination. You

1 can proceed.

2 MR. LEVIN: I'm finished.

3 THE COURT: Very well. Attorney Roper, are you
4 prepared to cross-examine?

5 MS. ROPER: I am, Your Honor.

6 THE COURT: You may proceed, Counselor.

7 MS. ROPER: Do you mind if I proceed from counsel
8 table?

9 THE COURT: Not at all.

10 CROSS-EXAMINATION

11 BY MS. ROPER:

12 Q Ms. Smith, can you see and hear me if I speak to you from
13 here?

14 A Yes.

15 Q Okay. Thank you.

16 A Yep.

17 Q Ms. Smith, you said that you don't mind anyone using the
18 same facilities that you use, whether it's a bathroom or a
19 locker room, as long as that person is the same sex as you; is
20 that correct?

21 A That's correct.

22 Q And how is it that you define someone who is the same sex
23 as you?

24 A Whether they were born male or female, if they have a
25 vagina or a penis, if they are able to reproduce as a female.

1 Q Okay. So to use the same bathroom as you, do you expect
2 someone to be able to reproduce?

3 A I expect them to have a vagina and be the same sex as me.

4 Q Okay. And you -- I assume that you are aware, but if not
5 then please correct me, that some people who are born with
6 vaginas have surgery later --

7 A Yep.

8 Q -- to alter that feature and instead have a -- I think what
9 they call a neopenis installed. You're familiar with that
10 concept, right?

11 A I'm familiar that it can be done. However, I don't know
12 any procedures. I'm not that medically --

13 Q I will not ask you any questions --

14 A Okay.

15 Q -- about the procedure, I assure you.

16 A Okay.

17 Q All I wanted to establish was that you understood that that
18 was a possibility.

19 A Yeah.

20 Q If someone had had that done, had had their vagina
21 surgically removed, are you still fine with that person using
22 the same facilities that you use?

23 MS. GORDON: Objection, Your Honor. Relevance.

24 There's not going to be any evidence in this case that any
25 student at Boyertown, a transgender student, has gone through

1 that type of surgery.

2 THE COURT: Attorney Roper?

3 MS. ROPER: Your Honor, what this line of questioning
4 is intended to establish is the uncertainty as to the definition
5 of sex. It is not intended to be about what she's going to
6 encounter at Bash.

7 THE COURT: I think the answer has some relevance and
8 I am going to overrule the objection and allow the witness to
9 answer the question.

10 THE WITNESS: Could you repeat the question, please?

11 BY MS. ROPER:

12 Q Certainly.

13 A Thank you.

14 Q If there were a student who had had a surgical procedure to
15 remove their vagina, is that some -- a student you would still
16 feel comfortable using the same facilities that you use?

17 A This is about privacy. And I don't know, to be honest.
18 Because as long as they're the same sex as me. Like, I don't
19 understand the procedural part of this. I just know that I want
20 my privacy protected.

21 Q Okay. So the reason I'm asking this question is I'm trying
22 to understand what it is you want the Court to order the school
23 district to do. And you object to people who are not the same
24 sex as you using the same facilities. I'm trying to understand
25 how you then define that.

1 A How I define sex?

2 Q Yes.

3 A I explained that earlier.

4 Q Yes. And you said that it had to do with whether someone
5 had a vagina or a penis?

6 A Yes.

7 Q Do you mean that as of the time that they are using the
8 facilities with you?

9 A Like in the moment? I'm confused what you're asking.

10 Q I'm sorry. I'm sorry. I don't -- I'm not trying to be
11 mysterious. What I'm asking is if a person is born with a
12 vagina but no longer has one, do you consider the -- that person
13 the same sex as you?

14 A So if they put a penis on themselves?

15 Q Yes.

16 A No.

17 Q Okay. I wanted to ask you about your testimony. I believe
18 you testified a few moments ago that you were not aware of --
19 I'm sorry, that you had not used any single-user facilities
20 during the 2016/17 school year; is that right?

21 A That's correct.

22 Q Were you aware that there were such facilities available to
23 you?

24 A I was aware that there were, but the -- it says on most of
25 these like bathrooms that they're staff only. I don't go into

1 staff only bathrooms because, one, I'm pretty sure I'd end up
2 getting in trouble if staff knocked on the door and heard, hi,
3 I'm a student, I'm in here. So I was like -- I -- every
4 bathroom I saw was staff only, so I didn't use any of them.

5 Q Ms. Smith, have you previously testified that you had in
6 fact used the single-user restroom in the nurse's office at BASH?

7 A Yes.

8 Q Okay. So you have used a single-user facility?

9 A Yes. I'm sorry.

10 Q Okay. And you were aware that that was available for your
11 use, right?

12 A I only used that when I was filling up my cup of water to
13 get like Tylenol and stuff for like headaches.

14 Q Are you saying that you never relieved yourself in the
15 bathroom?

16 A I would get pads and stuff, yes. Yes.

17 Q Okay. So you used that bathroom?

18 A Yes.

19 Q Okay. Thank you.

20 A When you meant single user -- I'm sorry. When you meant
21 single user, I thought you meant like around the school like in
22 like the hallways and stuff. Most kids do have to use the
23 nurse's bathroom for particular reasons, some for medication
24 purposes, some because of their periods and stuff. And that's
25 the only place you can go to get like supplies besides like the

1 tampon things. But you can get them free at the nurse's office.

2 So, yeah.

3 Q And you -- based on your prior testimony, you expressed
4 some -- perhaps some embarrassment or discomfort in terms of
5 other people being around when you were using the restroom
6 during your period, right?

7 A What do you mean? I'm sorry.

8 Q Well, you stated that if you were changing, you would
9 change in a private place if you had your period, right?

10 A More private.

11 Q More --

12 A Yeah.

13 Q I'm sorry.

14 A Yeah.

15 Q Okay. And you talked about being in a multi-user bathroom
16 and people being able to hear the opening of a --

17 A Yeah. Yeah.

18 Q -- of a tampon container or something?

19 A Yeah.

20 Q It sounded like it -- I'm sorry. Did that make you
21 uncomfortable or self-conscious?

22 A Yeah. I'm just a -- like I know you were a teenager also,
23 like a young girl. You know? We all have our periods, females.
24 Sometimes I would cough, you know, to cover up the fact that
25 like I'm ripping open stuff. Because I don't want anybody

1 really to know that I'm bleeding.

2 Q Would it be -- would you be less self-conscious if you used
3 the nurse's -- the bathroom in the nurse's office for that?

4 A No. It would just --

5 Q No?

6 A It would just kind of be the same. Because sometimes I get
7 self-conscious when people like -- when I'm leaving and then
8 someone else comes in and it's like -- I don't know. Everyone
9 kind of leaves a smell behind, though, when they do their stuff.
10 So it's like, well, you're on your period.

11 Q Okay. Would you agree that if you went into the bathroom
12 in the nurse's office and closed the door, at least no one could
13 hear what you were doing in there?

14 A It's a pretty thick door so I would agree.

15 Q Okay. You testified that after the day in March when you
16 walked in and saw the transgender student in the girls' restroom
17 that you felt more cautious about using restrooms at the high
18 school; is that correct?

19 A That's correct.

20 Q And I believe you testified that you would try to avoid
21 using the main restrooms at the high school?

22 A Yes, I would.

23 Q What would you use instead?

24 A There is -- right beside the nurse's office -- because
25 in -- because of the renovations, the nurse's office was moved

1 in a weird position. So right beside the nurse's office is this
2 like door. And it's women's. And I opened it and there's two
3 stalls in there. There's literally two stalls. It is the
4 tiniest bathroom, very tight. But I would use that one.

5 Q Okay. Ms. Smith, you have defined -- you have stated that
6 you believe someone's sex is determined by whether they have a
7 vagina or a penis, right?

8 A What they're born with, yes.

9 Q Okay. How is it that you would want the school to
10 distinguish between who can use the girls' room and who can use
11 the boys' room?

12 A Honestly, like who can -- like who -- what do you mean by
13 that? Like who can -- how would I get them to distinguish that?

14 Q Right. How is the school to know whether someone is male
15 or female by your definition? Do you expect them to check a
16 student's genitalia?

17 A Well, you keep saying my definition. I don't know if --
18 like how you would define sex. However, that is up to the
19 school to decide. All I know is my privacy was violated. I saw
20 a male student in my bathroom. I don't know what the school
21 needs to do. That is up to them. However, I know what happened
22 to me.

23 Q Okay. And how did you know that that student was male?

24 A I went to the school for two years. And on this paper it
25 states that identifies as a female now. If someone identifies

1 as a female now, they had to have been a male.

2 Q No. I'm asking on the day that you walked in there, before
3 you saw the exhibit that you've referred to. When you first saw
4 the student, you immediately identified that student as male,
5 right?

6 A Yes.

7 Q And why did you at that moment believe that student was
8 male?

9 A Because I had gone to the school for two years and I saw
10 that person around the halls.

11 Q Okay. But you've never seen that student's genitalia,
12 right?

13 A I've gone for the two years and I've seen that person
14 around the halls. No, I did not see their genitalia.

15 Q Okay.

16 A Yeah.

17 Q Ms. Smith, would it be correct to say that you are also
18 self-conscious when you are using public restrooms?

19 A Yes. I'm always cautious.

20 Q Okay.

21 A You don't leave your purse alone without watching it.

22 Q I didn't mean worried about your belongings. I meant
23 worried about your privacy when you're in public restrooms.

24 A All the time, yeah.

25 Q And why is that?

1 A Because you don't know who's entering or exiting.

2 Q Do you believe that you would be able to tell if someone
3 was transgender if you did not -- had not known that person for
4 a long time?

5 A No. Not by just their looks, no. I don't know.

6 MS. ROPER: Okay. Ms. Smith, thank you very much.

7 I'm finished, Your Honor.

8 THE WITNESS: Thank you.

9 THE COURT: Thank you, Counselor.

10 MS. ROPER: You're welcome.

11 THE COURT: And, Attorney Gordon, do you have any
12 redirect of your witness?

13 MS. GORDON: Thank you, Your Honor. Just one
14 question.

15 REDIRECT EXAMINATION

16 BY MS. GORDON:

17 Q Mary, did you know who was entering and exiting your girl's
18 bathrooms at Boyertown before the school changed its policy to
19 allow transgender students to come into your bathroom?

20 A No, I didn't.

21 Q Did you know who was in your bathroom, in the girls'
22 bathroom?

23 A I knew -- go ahead.

24 Q Go ahead.

25 A No, you can go. I just --

1 Q What I'm asking is, did you know or have an understanding
2 as to what sex the people were that were coming into the girls'
3 bathroom before the school changed its policy?

4 A From what I thought, it was just females.

5 MS. GORDON: Thank you.

6 THE COURT: Thank you, Counselor.

7 Mr. Levin, anything further?

8 MR. LEVIN: No further questions.

9 THE WITNESS: Thank you.

10 THE COURT: And Attorney Roper, anything further?

11 MS. ROPER: Nothing further. Thank you.

12 THE COURT: Very well. Ma'am, thank you very much for
13 your testimony.

14 THE WITNESS: Thank you.

15 THE COURT: We're going to have you escorted back.

16 THE WITNESS: Okay.

17 (Witness excused)

18 THE COURT: And do Counsel need a brief recess before
19 we call the next witness or are you prepared to proceed?

20 MS. GORDON: Yes, please. Brief recess.

21 THE COURT: All right.

22 MS. GORDON: Thank you.

23 THE COURT: We'll stand in recess for five minutes.

24 MS. GORDON: Thank you.

25 (Break taken from 11:20 a.m. until 11:29 a.m.)

1 (Audio muted.)

2 THE CLERK: All rise. United States District Court
3 for the Eastern District of Pennsylvania is again in session,
4 the Honorable Edward G. Smith presiding.

5 THE COURT: You may be seated. Thank you.

6 The Court is called to order. All parties previously
7 present are again present, with the exception of, I believe it's
8 Attorney Holcomb. And I assume she is with our next witness; is
9 that correct?

10 MS. GORDON: She is with our last witness, Your Honor.
11 So we will call --

12 THE COURT: And we are not -- we are muted now? Okay.
13 We are now muted.

14 (Audio muted.)

15 THE COURT: And you are now calling --

16 MS. GORDON: We will be calling [REDACTED] known by
17 pseudonym Joel Doe.

18 THE COURT: Very well.

19 (Witness summoned)

20 THE COURT: And, sir, if you would please approach the
21 witness stand. And, sir, if you would remain standing and raise
22 your right hand to be sworn by the clerk.

23 THE CLERK: Do you swear or affirm that the testimony
24 you're about to provide, an issue now before this Court, shall
25 be the truth, the whole truth, and nothing but the truth so help

1 you God?

2 MR. DOE: Yes.

3 THE COURT: Thank you very much, sir. Sir, you may be
4 seated.

5 MR. DOE: Thank you.

6 THE COURT: And, sir, right now we have the audio
7 systems muted, so all of the participants in the trial that were
8 in the gallery are now in my chambers but they cannot hear you
9 as you state your name for the record. Then after you've stated
10 your name, we're going to go back on the record. And if counsel
11 asks any questions that they believe may lead to your
12 identification, we're going to mute the system again, as best we
13 can and do our best.

14 MR. DOE: Okay.

15 THE COURT: And, of course, it's important that you
16 not mention any minors' names either during your testimony. If
17 there is an issue about it at all, just let us know and we'll
18 stop it.

19 MR. DOE: Okay.

20 THE COURT: But would you please state your full name,
21 spelling your last name for the record?

22 MR. DOE: Yes. My name is [REDACTED]

23 [REDACTED].

24 THE COURT: Thank you. Thank you very much, sir.

25 Counsel, you may proceed. And we're going to go off

1 of the mute now and also -- or do you have some identifying --

2 MS. GORDON: I just need to address one thing. I want
3 to make sure that the witness has the pseudonym list.

4 MR. DOE: I do.

5 THE COURT: And does he have that?

6 MS. GORDON: You have that in front of you?

7 MR. DOE: Yes.

8 MS. GORDON: And you understand that you need to use
9 the pseudonyms and not the real names --

10 MR. DOE: I do.

11 MS. GORDON: -- of the individuals?

12 MR. DOE: Yes.

13 THE COURT: And are there any preliminary questions
14 that you believe should be muted because they may, in fact, lead
15 to his identification?

16 MS. GORDON: There are just a few, yes.

17 THE COURT: And you will let us know when that
18 question is --

19 MS. GORDON: I will.

20 THE COURT: Very well. If you would call Mr. Seldin
21 and make sure he's got his sound on mute. I can unmute for now,
22 correct? We're going to be unmuted right now?

23 MS. GORDON: Yes, Your Honor.

24 THE COURT: And let me just check with chambers and
25 make sure they can hear us.

1 (Pause)

2 (Audio unmuted.)

3 THE COURT: Very well. Counsel, you may proceed.

4 DIRECT EXAMINATION

5 BY MS. GORDON:

6 Q Good morning, Joel.

7 A Hello there.

8 Q How old are you today?

9 A I'm 17.

10 Q Where do you attend school?

11 A Boyertown.

12 Q Do students at Boyertown refer to that as BASH?

13 A Yes, that's true.

14 Q So if I occasionally refer to BASH, you'll understand what
15 I'm talking about?

16 A Yes.

17 Q So how are you spending your summer when you're not sitting
18 in a courtroom here?

19 A I'm usually working for the most part. I like to read, and
20 I like to hike.

21 Q Where do you work, without identifying the location or the
22 name?

23 A Sure. I'm actually a waiter at a restaurant.

24 Q How long have you worked at a restaurant?

25 A Since December of last year, 2016.

1 Q Were you working there during the school year?

2 A Yes.

3 Q How many hours would you put in a week?

4 A I'd say roughly 20 to 25 hours.

5 Q And has that changed for you at all over the summer?

6 A No, it hasn't.

7 Q What do you enjoy about your job?

8 A I enjoy talking to people. It's probably one of my
9 favorite things to do. I enjoy hearing their stories, their
10 different experiences. I just like talking to people, I guess.

11 Q Do you receive any feedback from your customers?

12 A Oftentimes, yes. I have a lot of people who come in -- I
13 call them "regulars." They come in very often and request me.
14 I have had a few good reviews on Facebook on our -- on the
15 restaurant's Facebook page. And I've had my boss even help
16 train -- has gotten me to help train several new people who have
17 come in.

18 Q So how about when you're not working or going to school;
19 what do you enjoy doing?

20 A I love backpacking a lot for multiple days.

21 Q Anything else?

22 A No.

23 Q So you're 17; what grade were you in last year?

24 A I was in the eleventh grade.

25 Q Are you going into your senior year in high school?

1 A Yes.

2 Q How long have you attended school at the Boyertown School
3 District?

4 A Since the [REDACTED].

5 Q What kinds of school-related activities have you been
6 involved in?

7 MS. GORDON: And the answer needs to be muted.

8 THE COURT: Very well. Please mute the audio. You
9 may proceed.

10 (Audio muted.)

11 THE WITNESS: I was in a program called [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED].

15 BY MS. GORDON:

16 Q How many years did you do that?

17 A Two years at Boyertown, and I had accomplished two years at
18 my previous school.

19 MS. GORDON: Off the record, if I may, Your Honor.

20 This witness attends both BASH, as well as a technical
21 school, Berks Career and Technical School. It could be an
22 identifier. It's not as though he's the only student that
23 attends both of these schools, but it could be an identifier.
24 So I would ask that that be muted as well.

25 THE COURT: We'll keep it muted. We'll keep it muted,

1 yes.

2 MS. GORDON: Okay. Thank you.

3 BY MS. GORDON:

4 Q Joel, during the last school year, did you attend BASH
5 full-time?

6 A No. I also attended Berks Career and Technology Center.

7 Q And explain to us how that worked.

8 A I would arrive at BASH in the morning after getting picked
9 up by the bus from my house, and then I'd board a bus to go to
10 the tech school. I'd go there for about three hours, and I study

11 [REDACTED]
12 [REDACTED]. And then we'd eat lunch after we
13 studied at the tech school, and then we'd board a bus and go back
14 to Boyertown.

15 Q What would you study at Boyertown?

16 A I had gym, I had [REDACTED], I had [REDACTED],
17 [REDACTED], and [REDACTED].

18 MS. GORDON: We can unmute.

19 THE COURT: We can unmute.

20 (Audio unmuted.)

21 BY MS. GORDON:

22 Q How often did you have gym class at BASH last year?

23 A I had gym one day a cycle, and a cycle is six days, so once
24 out of six days.

25 Q Do you plan to return to BASH for your senior year?

1 A I have not decided yet.

2 Q What does it depend on?

3 A This preliminary injunction decision.

4 Q Joel, why did you file this lawsuit?

5 A I filed this lawsuit because a girl viewed me in my
6 underwear in the boys' locker room. I went to administration and
7 I asked if there could be anything done to be separated from the
8 girl, and they said I had to tolerate it and make it as natural
9 as possible.

10 Q And this incident in the locker room, when did it happen?

11 A October 31st of last year, 2016.

12 Q Can you tell us about how many boys were in the locker room
13 when this occurred?

14 A Roughly 15.

15 Q I would like to direct your attention, Joel, to Plaintiff's
16 Exhibit 55. It is a videotape of the boys' locker room. This
17 was taken when all counsel were present for an inspection. I'd
18 like you to use this video to explain to the Judge what he is
19 seeing, all right?

20 A Okay.

21 Q And we're going to start the video and we will stop it at
22 three seconds elapsed time.

23 MS. GORDON: Is that where we are now?

24 UNIDENTIFIED SPEAKER: (Indiscernible).

25 MS. GORDON: Thank you.

1 (Whereupon, the video recording was played in open
2 court while the witness is testifying:)

3 BY MS. GORDON:

4 Q What are we seeing here?

5 A Okay. So this is the gym. This is the main gym in the
6 high school. We had another gym, but this is the only gym we
7 have now due to construction. If you'll notice, there's red
8 mats in the back of the room. The door to the left is where I
9 would enter the gym at the time. It has since been converted
10 into another room, but at the time that's where I would enter
11 the gym.

12 Q Continue the video until 15 seconds.

13 (Whereupon, the video recording continued playing in
14 open court while the witness is testifying:)

15 A So the door you're looking at, this is the door that would
16 lead into the boys' locker room. To the left of that, there is
17 another door on the wall. That exit outs -- exits into a
18 hallway, which some people would use to enter the locker room.

19 Q Continue the tape until 26 seconds.

20 (Whereupon, the video recording continued playing in
21 open court while the witness is testifying:)

22 A That is the weight room.

23 Q Continue and stop the video at one minute.

24 (Whereupon, the video recording continued playing in
25 open court while the witness is testifying:)

1 A So if you'll notice on the left wall, there is windows
2 there. That is where the teacher would be while we were
3 changing, so that way he could see everything that was occurring
4 in the room. It's kind of hard to explain where I was. I think
5 if you proceed with the video, you should -- I should be able to
6 explain it a bit better.

7 Q We'll continue and we will stop at one minute, 12 seconds.

8 (Whereupon, the video recording continued playing in
9 open court while the witness is testifying:)

10 A So if you'll notice, the back wall has an entrance to where
11 -- the bathroom stalls and to the right of the stalls would be
12 the shower stalls. If you go around the corner. If you'll
13 notice, that back wall has a row of lockers with a handicapped
14 symbol on it. I was roughly in that area when I was changing
15 into my gym clothes.

16 On the left side of the screen you'll see a low -- a
17 row of lockers that basically divided the room in half. And on
18 the side that you can see is where the girl was when I was
19 changing.

20 Q Can you describe for us in as much detail as possible --
21 and I'll caution you to use a pseudonym for the student and not
22 the student's real name --

23 A Sure.

24 Q -- describe in as much detail as you can what occurred when
25 you walked into the bathroom and then subsequent thereto.

1 A Okay. When I walked into the locker room to change, I
2 noticed Student A -- okay. I'm sorry. Let me restart. I'm
3 getting ahead of myself.

4 When I walked into the locker room to change, I went to
5 my locker where I usually go and I began to take off my pants, so
6 I could put on my gym shorts. Someone next to me -- let me see
7 if they're on this list. I'm not seeing them. Someone next to
8 me tapped me on my shoulder and said, "Turn around." I turned
9 around and I noticed there was a girl standing there, Student A
10 on the list.

11 Q Can you identify where she was standing in the picture that
12 we see there? Can you see the location where she was standing
13 at that time?

14 A She was around that area in the left of the screen, that
15 row of lockers that's in the middle. It was a little bit
16 further towards the other end, not necessarily this end, but she
17 was in that row.

18 Q So a little bit closer to where the camera person --

19 A Yes.

20 Q -- would be standing?

21 A That is correct.

22 Q Okay. Go ahead and continue.

23 A I turned around and looked, and I scrambled to put
24 everything back in my locker and get the lock on as fast as I
25 could so I could get out of there.

1 Q How did you exit the locker room?

2 A I went around, so that way she couldn't see me and I
3 couldn't see her.

4 Q Can you describe what you mean by "around"?

5 A Okay. If you're looking at the screen right now, you have
6 the back row of lockers, and then you have the row of lockers in
7 the middle. I went in between them and around this side.

8 Q Joel, how do you know the person you saw in the locker room
9 that day was a girl?

10 A I had a few classes with Student A in middle school where
11 she identified as a girl.

12 Q At that time, on that day, did you know her name?

13 A I did.

14 Q How did you feel when you saw the girl in your locker room
15 while you were standing there in your underwear?

16 A I felt embarrassed and humiliated.

17 Q Were there other boys in the locker room when this
18 happened?

19 A Yes.

20 Q Did you say anything to the girl?

21 A I did not.

22 Q What happened next?

23 A I participated in gym class. Eventually, gym class passed
24 and I went back into the locker room to change back into my
25 regular clothes. And when I had entered, I looked initially to

1 see if Student A was still where Student A was the first time,
2 and she was. I proceeded to walk over to my locker and get my
3 clothes and move to an area in the locker room where I -- where
4 I thought she couldn't see me, hoping that she wouldn't walk
5 over there and see me.

6 Q Let me stop you there. Can you describe, using this
7 picture, where you moved from and to?

8 A Sure. The back row of lockers that I had talked about
9 previously with the handicapped symbol, if you would look left,
10 it continued for another probably four or five lockers, and I
11 was at the very end of that row.

12 Q When you got to that other location in the locker room,
13 were you able to see Student A?

14 A I was not able to, no.

15 Q Once you got to that other location, what did you do?

16 A I scrambled as fast as I could to change clothes and leave
17 again.

18 Q And did you say anything to the girl on this occasion?

19 A I did not.

20 Q Did you hear anyone else say anything to or about the girl?

21 A I did, yes.

22 Q What did you hear?

23 A From the other side of the room, I heard someone say, "You
24 don't belong here, you B word."

25 Q Do you know who said that?

1 A I do not know who said that.

2 Q Did you discuss what happened in the locker room with
3 anyone else in your gym class?

4 A Yes.

5 Q What was discussed?

6 A I had planned to go to administration and ask about what
7 had happened in there and try to get to the bottom of it. And I
8 offered to a few of the other students in my gym class to
9 accompany me to speak to administration.

10 Q Can you identify those other students, using the
11 pseudonyms?

12 A Yes, if you'll give me one second to find them. Student C,
13 Student D, Student E, Student F.

14 Q So what arrangements did you make to speak to the
15 administration with this group of boys?

16 A I believe one of the students had a test the following
17 period after gym, so we had planned to meet in an area in the
18 school during eighth period, around 1:25 roughly. We all went
19 to our separate classes and whatnot, and we -- we got passes
20 from our teachers to meet at that area at the specific time we
21 had set up.

22 Q Where exactly did you meet?

23 A The administration entrance at the time.

24 Q I would like you to describe for the Judge, in as much
25 detail as you can, what happened when you went into the

1 administration to talk about what happened in the locker room.

2 A Okay. The five of us went to the guidance counselor's
3 office. That's where I thought we should go, the first place I
4 could think of. We went into the guidance counselor's office,
5 and I said there was an issue in the locker room. She said that
6 if it wasn't academic that we would have to go speak to our
7 grade-level principal.

8 We went over to the -- the regular office where the --
9 all the grade-level principals were, and we told the secretary
10 why we were there. We said there was an issue that occurred in
11 the locker room, and we'd like to speak to a principal. She
12 said okay, and I believe she either called him on the phone or
13 went back and said, "You have students here who want to talk to
14 you."

15 Eventually, he called us back into his office. We
16 went into his office. We introduced ourselves and he introduced
17 himself. He asked us if we wanted the door closed and we said,
18 "No, it doesn't really matter to us." The first thing I asked
19 him was, "Do you know there's -- there's a girl in the locker
20 room?" He said he was aware of it.

21 I questioned the legality of it, and he said, "Any
22 transgender student can use whatever bathroom they mentally
23 identify with."

24 And then I proceeded to ask him again, "Is it a mental
25 thing, or is it a physical thing?" And he said, "It's a mental

1 thing." I said okay.

2 My last question I asked him was, "Is there anything you
3 can do to separate us, the group of boys, from the girl in the
4 locker room?" And he said, "You're going to have to tolerate it
5 and make it as natural as possible." We said our goodbyes, and
6 on the way out of the door he said, "Remember, make it as
7 natural as possible."

8 Q Joel, which administrator did you have this conversation
9 with?

10 A That was Dr. Foley.

11 Q How long did that conversation last, approximately?

12 A Roughly five minutes.

13 Q When you and the other boys met with Dr. Foley, was the
14 door to his office open or closed?

15 A It was open.

16 Q I'd like to refer to what has been marked as Plaintiff's
17 Exhibit 49. It is entitled Boyertown Area School District
18 Frequently Asked Questions About Issues Regarding Doe v. BASD.
19 It is dated March 27, 2017, and I'm going to direct your
20 attention to the second page of that document, paragraph 5. And
21 I'm going to read this to you, and then I'll have a question for
22 you, okay?

23 A Okay.

24 Q This document says, "Regarding the lawsuit, is it correct
25 that an administrator told a male student he had to 'tolerate'

1 changing with a transgender student who identified as male in a
2 boys' locker room?"

3 Answer, "No. The student, who objected to the
4 situation in the high school locker room, was advised of the
5 separate heightened personal privacy alternatives that were
6 available to him. In other words, the district does not force
7 students, and did not force this student, to change into his gym
8 clothes for PE class near a transgender student."

9 Is that accurate?

10 A No.

11 Q I now would like to direct your attention to Exhibit 40,
12 and this is the deposition testimony of Dr. Foley. Joel, I'm
13 going to read some excerpts from this deposition, and then,
14 again, I'll have some questions for you, all right?

15 A Okay.

16 MS. GORDON: For the benefit of Counsel, I will begin
17 on page 43, line 17 through line 20.

18 BY MS. GORDON:

19 Q The question posed to Dr. Foley is this, and this is in
20 reference to the conversation that he had with you and the other
21 group of boys. "Did they indicate to you that it was
22 uncomfortable for them to have a biological girl in their locker
23 room?"

24 Answer, "Not really."

25 Is that accurate?

1 A That is not accurate.

2 Q Continuing on at line 21, page 43, "Did they ask you
3 whether it was legal for the girl to be in their locker room?"

4 Answer, "I wouldn't say 'legal.' They asked if he was
5 allowed."

6 Is that the truth?

7 A That is not the truth.

8 Q Turning to page 44, lines 6 through 9, Dr. Foley is asked,
9 "Did they ask you to explain what a transgender person, or a
10 person who identifies as transgender, what that means?"

11 Answer, "Not really."

12 Is that accurate?

13 A No.

14 Q Moving on to page 56, lines 8 through 12 -- I'm sorry, 46,
15 lines 8 through 12. The question to Dr. Foley is, "Did the
16 students ask you if there was anything you could do to separate
17 them from this situation that they experienced in the locker
18 room with the girl?"

19 Answer, "They did not."

20 Is that the truth?

21 A That is not the truth.

22 Q Continuing on that same page 46, beginning at line 18,
23 continuing through line 22, Dr. Foley is asked, "Did you tell
24 Joel Doe and the others who came with him to meet with you and
25 discuss their concerns about the presence of a girl in their

1 locker room that they, unfortunately, just needed to tolerate
2 it?"

3 Answer, "No."

4 Is that the truth?

5 A No.

6 Q And continuing at line 23 on page 46, continuing through
7 page 47, line 2, the question to Dr. Foley was this, "Did you
8 tell Joel Doe and the others with him in that meeting with you
9 on that day in October of 2016 that they needed to try and make
10 it as natural as they possibly could?"

11 Answer, "No."

12 Is that the truth?

13 A That is not the truth.

14 Q Why are you so certain that those statements are not true?

15 A Because I recorded the conversation.

16 Q Why did you record the conversation with Dr. Foley on that
17 day?

18 A I -- I don't know.

19 Q What did you use to record the conversation?

20 A I used my phone.

21 Q Describe how you recorded the conversation on your phone?

22 A There's an app on my phone that comes standard with every
23 phone out there and that allows you to record conversations, or
24 audio in general.

25 Q So describe for the Judge how you recorded the conversation

1 on your phone.

2 A Before I had went into the room, when all the boys were out
3 in the hallway, I had pressed the record button while we were in
4 the hallway and recorded the entire thing.

5 Q Did you alter this recording in any way?

6 A No. I simply converted it to an MP3 format.

7 Q Did you delete any part of the recorded conversation?

8 A No, I did not.

9 Q Did you record over any part of the conversation?

10 A No, I did not.

11 Q With whom have you shared this recording?

12 A My parents and my attorneys.

13 Q Were you able to identify those speaking on the recording?

14 A The majority of them, yes.

15 Q Were you asked to assist in preparing a transcript of the
16 recorded conversation that you and four other boys had with
17 Dr. Foley on October 31, 2016?

18 A I was, yes.

19 Q I'd like to show you now an eight-page document which has
20 been marked as Plaintiff Exhibit 6. Are you familiar with that
21 document?

22 A I am familiar.

23 Q Have you had an opportunity to review all eight pages of
24 that transcript?

25 A Yes.

1 Q Is it an accurate transcript of the conversation that you
2 recorded?

3 A Yes.

4 Q And, again, did you do your best to identify the speakers?

5 A Yes. But there was a few students I couldn't identify, and
6 they are simply labeled "Student."

7 MS. GORDON: Plaintiffs would move Exhibit 6, which is
8 the transcript, as well as the audio file marked as Exhibit 7,
9 and Plaintiff's demonstrative combined audio and transcript,
10 which is marked as Plaintiff's Exhibit 8.

11 MR. LEVIN: Your Honor, we object --

12 THE COURT: Mr. Levin?

13 MR. LEVIN: -- to the transcript or the audio
14 recording. We believe it's a violation of the Wiretap Act.
15 Dr. Foley did not know it was being recorded. He did not give
16 his consent to it being recorded. And there is even a school
17 rule that students, and I suppose the employees as well, are not
18 allowed to secretly record conversations.

19 THE COURT: Counsel?

20 MS. GORDON: Yes. Your Honor, Counsel for Defendant
21 had advised us a couple of days ago that he intended to file a
22 motion in limine. In response to that, my colleague, Randall
23 Wenger, had prepared to respond to the anticipated motion in
24 limine, and if he may address this issue with the Court?

25 THE COURT: Certainly, Counselor.

1 MS. GORDON: Thank you.

2 THE COURT: Attorney Wenger.

3 MR. WENGER: Your Honor, may I approach? I have --

4 THE COURT: Certainly, sir.

5 MR. WENGER: -- a copy of a memo that we have put
6 together.

7 THE COURT: Thank you very much.

8 MR. WENGER: Your Honor, there can be no wiretap
9 violation if there is no oral communication as defined by the
10 Wiretap Act. The Wiretap Act defines an oral communication as
11 any oral communication uttered by a person possessing an
12 expectation that such communication is not subject to
13 interception under any circumstances justifying such expectation.

14 So, in other words, there is both a subjective and an
15 objective element to the test. And in order for there to be a
16 violation, there must be -- there must be both a subjective and
17 objective side of this.

18 The Defendants claim that the Assistant Principal had
19 an expectation of privacy, but Defendant's transcript, which is
20 Exhibit Number 40, on page 43 -- I think it's toward the top of
21 page 43 -- he was asked -- "Do you recall whether the door to
22 your office was open or closed?"

23 "Open."

24 "Is it your practice to meet with students with your
25 door open?"

1 "Yes."

2 "And you understand that when meeting with students
3 with your door open that there is the possibility that others
4 could hear the conversation going on inside your office?"

5 And then on page 43 the answer is, "Yes."

6 "So you had no expectation that this conversation
7 would remain confidential among those students who were present
8 in your office."

9 The answer is, "No."

10 And so I submit to you that that alone answers the
11 question, if Dr. Foley had no subjective expectation of privacy,
12 which is what he testified to, that alone means there is no
13 wiretap violation.

14 But for the sake of being thorough, I could go on and
15 talk about the objective requirements as well.

16 In Commonwealth v. Helen, which is in the brief that I
17 have presented to you, the Pennsylvania Supreme Court found that
18 there was no reasonable expectation of privacy by an officer who
19 interrogated a prisoner because a third party was present.

20 In Agnew v. Dupler, the Pennsylvania Supreme Court
21 said there was no expectation of privacy in a squad room, which
22 typically had a door open where a conversation could be
23 overheard, as is in the present case. And the police chief
24 opened -- turned on the intercom system on a phone in that
25 office, went back to his -- to his own office, and listened in

1 on the conversation without anybody knowing that he was
2 listening in.

3 But the Court found that there was no wiretap violation
4 because in circumstances like that there is no expectation --
5 there is no objective expectation of privacy, even though he was
6 doing so in secret.

7 So there is really no expectation of privacy in these
8 circumstances, so both -- both subjectively and objectively this
9 can't be a wiretap violation, and we would submit further that
10 there can be no wiretap violation if there is no interception.
11 And the -- the cases here in Pennsylvania have established that
12 someone who is the intended recipient of a communication can't
13 violate -- can't be held liable under the Wiretap Act if they
14 were an intended party to the conversation.

15 So for those reasons, Your Honor, we submit that this
16 is not a wiretap issue.

17 THE COURT: And you don't believe there is a
18 distinction between police officers interrogating a suspect and
19 that suspect recording that interrogation, and students entering
20 an assistant principal's office and bringing a problem to the
21 assistant principal?

22 MR. WENGER: Well, no, I don't. I mean, if we're
23 looking at what the meaning of the statute is, it's not going to
24 be different in those circumstances. You may say that there are
25 policy issues where the school may or may not say that there --

1 that they don't want that to be happening, but the policy
2 reasons why we would not hold that to be a violation of a
3 criminal statute, those are the same.

4 We're not meaning through the Wiretap Act to be able
5 to hold all kinds of communications as -- recording all kinds of
6 communications as illegal. And, in fact, in cases where -- I
7 think particularly in cases where there is sort of a First
8 Amendment element in terms of trying to record a conversation in
9 one's self-defense and in clarification, in order for it to be
10 able to be used in the future, that really cuts against the
11 purposes of considering something to be a wiretap.

12 THE COURT: And I guess more fundamentally, what is
13 the relevance of what the assistant principal said at that
14 particular time when he was being questioned by the students?

15 MR. WENGER: Sure. Sure. It goes both to the state
16 of mind of the assistant principal as well as the students. So
17 if the students are walking away from a conversation like this
18 under the impression that, one, they don't have any other
19 options, and, two, they are supposed to make it as natural as
20 possible, that goes to the state of mind of these students in
21 terms of their understanding of what this new policy and
22 practice is.

23 It also goes to the state of mind of the assistant
24 principal, who is uttering these words in terms of his
25 understanding of what this policy may be.

1 THE COURT: And what effect would it have if the
2 policy has been modified subsequent to this conversation?

3 MR. WENGER: Well, I --

4 THE COURT: In other words, I'm not quite sure --

5 MR. WENGER: Sure.

6 THE COURT: -- who states the policy for the school
7 district. Is it the assistant principal? Is it the school
8 board? Is it the principal? The superintendent? Can the
9 assistant principal -- can a school district be held to a
10 statement by the assistant principal as that being their policy
11 on an issue such as this?

12 MR. WENGER: Well, Your Honor, I think this would be a
13 very different issue if there was a written policy by the school
14 board to begin with.

15 THE COURT: Right.

16 MR. WENGER: And the contention all along through this
17 is we have no policy whatsoever because we have nothing in
18 writing. And so in order to be able to ascertain what in the
19 world is going on here, we're looking to a myriad of different
20 sources. So we have -- we've got an assistant principal, we
21 have the high school principal, we have the superintendent, all
22 giving their impressions in terms of how this is supposed to
23 work. And that bears then an understanding in terms of what is
24 this, and what does it mean for students moving forward.

25 THE COURT: Okay. Mr. Levin, would you like to be

1 heard?

2 MR. LEVIN: Yes, briefly, Your Honor. As counsel
3 correctly noted, the Wiretap Act defines an oral communication
4 "any oral communication uttered by a person possessing an
5 expectation that such communication is not subject to
6 interception under circumstances justifying such expectation."

7 The statute itself does not speak in terms of an
8 expectation of privacy. There are a wealth of court cases that
9 seem to have engrafted that. I'm not sure I understand why
10 because it's not in the statute itself. But in this case, this
11 school district has a policy that you're not recording it, and I
12 think it would create chaos in the schools if people were
13 allowed to secretly record everything that is going on in
14 schools, particularly students recording, secretly recording
15 their teachers, secretly recording administrative conversations,
16 et cetera.

17 We do not know -- there is no evidence as to whether
18 the other students who were with Joel Doe knew that it was being
19 recorded.

20 So for all these reasons, we believe that it is a
21 violation of the Act and that it should not be admitted.

22 Under the rules that require candor by attorneys with
23 the tribunal, we did see a couple of cases where -- I think
24 there are two from the Eastern District -- which have held that
25 the evidentiary rule as to whether to allow it in is procedural

1 rather than substantive, and therefore, the Court could permit
2 it.

3 But my clients believed that it was important to note
4 this objection. There is no Third Circuit that agrees with
5 that, so I'm not sure why a substantive law like the Wiretap Act
6 would be deemed to be unprocedural, but that's the best we can
7 do on this situation.

8 THE COURT: Okay.

9 MR. LEVIN: Oh. One other point.

10 THE COURT: Yes, sir.

11 MR. LEVIN: They correctly pointed out that Dr. Foley
12 admitted that he did not expect this to remain confidential.
13 The law and those cases that talk about privacy use the word
14 "privacy" as opposed to "confidential," and no one asked
15 Dr. Foley if he thought or believed that that was a private
16 conversation.

17 And school administrators -- I've been doing this for
18 42 years -- when you ask them about confidentiality, they're
19 thinking about things like, is the person allowed to talk to
20 others about it? And, obviously, this kind of a conversation
21 with multiple students, they're allowed to talk to others about
22 it. It wouldn't be confidential in that sense. But that
23 doesn't address the issue of privacy, which is those cases
24 addressed.

25 Thank you.

1 THE COURT: And, Attorney Roper, did you wish to be
2 heard on this issue before I turn back to Mr. Wenger?

3 MS. ROPER: Yes, Your Honor. I am sorry. I would
4 have preferred to stay out of this, but there is one thing that
5 requires comment.

6 We believe that Plaintiffs have properly stated the
7 law with respect to the need for an expectation of privacy.
8 That's how the courts have interpreted an expectation of non-
9 interception. And if the Court is going to rule on that basis,
10 I would have nothing else to do but sit down.

11 The alternative statement made by Plaintiff that this
12 is not an interception because it was recorded by a person
13 involved in the conversation we believe misstates the law. And
14 if the Court was inclined to rely on that, we would like an
15 opportunity to address it. But, frankly, I think the first
16 argument is what carries the day.

17 THE COURT: Very well. And I was not expecting this
18 issue to arise. I don't find this -- there is something very
19 troubling about the idea that students can go into an assistant
20 principal's office and record the conversation without him being
21 aware of it. And I have trouble making the analogy with police
22 situations when police are being recorded in public. There is
23 no question that does not violate the Wiretap Act.

24 When someone is being interrogated by the police and
25 they record that conversation, I can certainly see why courts

1 would have excepted that out.

2 That said, Mr. Wenger, I am going to give you an
3 opportunity to further inform me on this issue.

4 MR. WENGER: Thank you, Your Honor.

5 THE COURT: And I think it's especially important
6 because there are two interesting issues that come up. One is
7 the Wiretap Act, it specifically a violation of the Wiretap Act
8 precludes the evidence from coming in. At the same time, as
9 noted by counsel, there have been courts that have held that
10 because this is a procedural rule, not a substantive rule, that
11 I could allow it in, even if I did think it was a violation of
12 the Wiretap Act. What are your thoughts?

13 MR. WENGER: Well, again, first, it isn't a violation
14 of the Wiretap Act because there was no expectation of
15 confidentiality, or privacy for that matter. It's interesting
16 that reference is being made to the administrative rules within
17 the school in terms of whether it was proper to have -- I don't
18 believe, from having looked through the rules of the school,
19 that it actually is a violation of the school's rules to do
20 that.

21 But either way, I don't think -- I don't think the
22 administrative issues within the school can be bootstrapped into
23 the Wiretap Act. It is either a violation of the terms of the
24 Act or it's not a violation of the terms of the Act, which I
25 think very clearly give room for communications like this.

1 And so we are accustomed to understanding, yes, there
2 is the necessity because of often the balance of power that
3 there is between police officers and how do I defend myself;
4 maybe I should record this. Often the police themselves are
5 recording conversations.

6 And so the Third Circuit, of course, has ruled in
7 various cases -- I believe the Kelly case out of the Third
8 Circuit a few years ago, and others since that time -- making it
9 very clear that persons can record conversations with police
10 officers. And I certainly don't want to draw the analogy too
11 close, but clearly there are reasons in other circumstances
12 where you might want the benefit of recording in order to defend
13 yourself.

14 And I would submit this is the sort of circumstance
15 that gives rise to this, and particularly in a circumstance like
16 this where the contention is that the assistant principal really
17 was not telling the truth about the conversation. And this is
18 the kind of thing that for First Amendment reasons, for being
19 able to be able to express later on what actually happened
20 during a conversation, it really cuts against the application of
21 the Wiretap Act.

22 THE COURT: And it's your position there had to be an
23 expectation of privacy --

24 MR. WENGER: Correct.

25 THE COURT: -- before the wire --

1 MR. WENGER: Both subjective and objective, both of
2 those, and neither of them exists in this circumstance.

3 THE COURT: And I believe Attorney Roper agrees there
4 has to be an expectation of privacy before you can have a
5 violation of the Wiretap Act.

6 MS. ROPER: Yes, Your Honor, when it comes to oral
7 communications as opposed to electronic communications. The
8 expectation of non-interception is what is actually written in
9 the statute, but that has been absolutely consistently
10 interpreted by the Pennsylvania courts to mean an expectation of
11 privacy in that conversation.

12 THE COURT: And, Mr. Levin, you don't disagree that
13 there has to be an expectation of privacy, but you believe there
14 was an expectation of privacy or notwithstanding the deposition
15 testimony?

16 MR. LEVIN: The Courts have stated that, yes.

17 THE COURT: All right. I understand the importance of
18 this particular issue. I think it's of limited relevance, but
19 it has some relevance. I am going to defer ruling on that until
20 I take a careful look at the law. It appears that if I go with
21 the actual answer to the question in the deposition, there was
22 no expectation of privacy. But let me take a look at that
23 before I make a definitive ruling.

24 MR. LEVIN: Thank you, Your Honor.

25 THE COURT: Thank you, Counselor. And thank you for

1 this detailed memorandum that I'll have a chance to look over.

2 That being said, we're deferring on the ruling on the
3 admissibility of both 6, 7, and 8, of the Plaintiff's exhibits.
4 Do you have any further questions of this witness?

5 MS. GORDON: Yes, I do. I will continue. Thank you,
6 Your Honor.

7 THE COURT: You may proceed, Counselor.

8 DIRECT EXAMINATION (RESUMED)

9 BY MS. GORDON:

10 Q Joel, before speaking with Dr. Foley, did you know the
11 administration at the school had decided to allow transgender
12 students to use the bathrooms and locker rooms of the sex with
13 which they identify?

14 A No.

15 Q After speaking with Dr. Foley on October 31, what did you
16 understand your options were?

17 A I understood that I had to tolerate it, and that was my
18 only option.

19 Q Did he give you any other options at that time?

20 A No.

21 Q Is gym a required course at BASH?

22 A It is, yes.

23 Q Did you continue to participate in gym after this incident?

24 A Yes.

25 Q Did you continue getting dressed in the boys' locker room?

1 A No.

2 Q Why not?

3 A Because there was a girl in the boys' locker room.

4 Q Did you get dressed in another area?

5 A No.

6 Q Why is that?

7 A I had nowhere to safely secure my belongings.

8 Q Where did you typically secure your belongings during gym
9 class?

10 A Typically, I would put them in the locker given to me in
11 the boys' locker room.

12 Q So why couldn't you just go back into the locker room and
13 just use that locker to secure your possessions?

14 A Because there was a girl in the boys' locker room.

15 Q Did you use the nurse's bathroom to change for gym?

16 A No.

17 Q Why not?

18 A Because there was nowhere to safely secure my belongings.

19 Q Are you required to change your clothes for gym?

20 A Yes.

21 Q What happens if you don't do that?

22 A You lose a good amount of points.

23 Q Did you receive only partial credit for gym because you
24 were not dressed in the right clothing?

25 A Yes.

1 Q Before the incident on March 31st, did you use the boys'
2 locker room before the incident?

3 A Yes. Did you mean October 31st? I believe you said March.

4 Q I'm sorry. October 31st, yes.

5 A Yes. Before October 31st, I did use the boys' locker room.

6 Q Before October 31st, did you change in the boys' locker
7 room?

8 A Yes.

9 Q And in what area of the locker room did you change your
10 clothes?

11 A I guess you could call it the common area.

12 Q Have you been back in the boys' locker room since
13 October 31, 2016?

14 A No, I have not.

15 Q And, again, why is that?

16 A Because there was a girl in the boys' locker room.

17 Q How did that experience affect you, Joel?

18 A I felt really humiliated when I was standing there in my
19 underwear, and I noticed there was a girl behind me. I felt
20 pretty embarrassed as well.

21 Q After the October 31st incident, did you continue to use
22 bathrooms at BASH?

23 A Yes. When emergencies arose.

24 Q How about before this incident; how often would you use the
25 bathrooms at the high school?

1 A Several -- I'd say roughly once a day.

2 Q And after this incident, through the rest of the school year
3 last year, on average how often were you using the bathrooms at
4 BASH?

5 A Roughly two or three times a week.

6 Q At any point, did you -- were you told that you could use
7 the nurse's bathroom?

8 A Yes.

9 Q How did you learn about that?

10 A My parents had told me.

11 Q So when you had to use the bathroom -- again, after the
12 October 31st incident -- was there a particular bathroom that
13 you tended to use more than another?

14 A Obviously, I tried to use the single-user facilities to
15 prevent me from seeing a girl in the bathroom. But when it was
16 an absolute emergency, I'd usually use the 700s hallway
17 bathroom, considering it was closest to my last period class.

18 Q Would you use that bathroom between classes or during
19 class?

20 A I'd use it during class, mainly to prevent me from seeing a
21 girl in there, considering less people are going to be in the
22 bathrooms during class than in between classes.

23 Q Joel, I would like you to look at what has been marked as
24 Plaintiff's Exhibit 30. Do you recognize that bathroom?

25 A Yes, I do.

1 Q What bathroom is that at BASH?

2 A That is the 700s hallway bathroom.

3 MS. GORDON: The next answer needs to be muted.

4 THE COURT: Please mute the sound.

5 (Audio muted.)

6 THE COURT: You may proceed.

7 BY MS. GORDON:

8 Q Joel, how tall are you?

9 A Roughly 6'1".

10 MS. GORDON: Continue to mute, please.

11 THE COURT: Continue to mute. Leave it on.

12 BY MS. GORDON:

13 Q When you are standing in the stall in that bathroom that we
14 see in Plaintiff's Exhibit 30, are you able to see over the
15 sides of the walls of --

16 A Absolutely.

17 Q Okay. And are your shoulders actually above the wall of
18 the stall?

19 A Yeah, they are.

20 Q So if you were standing in the stall and there was a boy
21 next to you outside the stall but standing at the urinal, would
22 you be able to make eye contact with that student?

23 A Yes.

24 MS. GORDON: You can unmute.

25 THE COURT: Very well. Thank you, Attorney Gordon.

1 (Audio unmuted.)

2 BY MS. GORDON:

3 Q How has the high school administration's decision to allow
4 girls who identify as boys to use the boys' bathrooms and the
5 locker room affected you?

6 A The fact that girls are now allowed in the bathrooms means
7 I can't use the bathrooms designated for males. Now I have to
8 use another bathroom. Even though I'm a male and I have every
9 right to use the male bathroom, I can't anymore because the
10 opposite sex are in the male's bathroom.

11 Q When you use the male's bathroom now, do you feel
12 comfortable?

13 A Absolutely not.

14 Q And has the school -- you had indicated the school made a
15 single-user bathroom available to you; is that acceptable?

16 A No, it's not.

17 Q Why not?

18 A I have every right to use the male bathrooms and have an
19 expectation of privacy from the opposite sex viewing me while
20 I'm in the bathroom.

21 Q Joel, do you have any objection to sharing a bathroom with
22 a boy who dresses like a stereotypical girl?

23 A Absolutely not.

24 Q Do you have any problem sharing the locker room or bathroom
25 with a boy who is gay?

1 A No. No.

2 Q Do you have any problem sharing the bathroom with a
3 transgender student?

4 A Assuming the transgender student is a male, absolutely not.

5 Q Do you know who Student B is?

6 A Yes. I'm aware of who they are.

7 Q And is Student B a transgender female?

8 A I believe so.

9 Q In other words, a boy identifying as a girl?

10 A That is correct.

11 Q Do you have any problem having Student B in your bathroom
12 or locker room?

13 A No, none at all.

14 Q What are you asking this Court to do?

15 A I'm asking this Court to grant me this temporary injunction,
16 so I can continue using the locker rooms and bathrooms provided
17 to males.

18 Q Thank you, Joel. That's all I have.

19 THE COURT: Thank you very much, Counselor.

20 Mr. Levin, you may cross-examine the witness.

21 MR. LEVIN: Thank you.

22 CROSS-EXAMINATION

23 BY MR. LEVIN:

24 Q Joel, I'm going to be brief because of the agreement to use
25 your discovery deposition; is that okay with you?

1 A Yep.

2 Q You stated that you used the boys' locker room before
3 October 31, 2016; is that correct?

4 A That is correct.

5 Q And you would use that every sixth school day; is that
6 correct?

7 A Can you -- can you -- could you just say that again,
8 please? I'm sorry.

9 Q I'll withdraw the question and ask a different one. I
10 think you said you had gym one day out of a six-day cycle; is
11 that correct?

12 A That is correct.

13 Q And that was true both the first semester and the second
14 semester of the 2016-2017 school year; is that correct?

15 A That is correct.

16 Q So my question, which may have been poorly phrased is,
17 before October 31st, you would have used the men -- boys' locker
18 room once out of every six school days, right?

19 A That is correct.

20 Q All right. So what was that, maybe five, six, seven times
21 you used it before October 31, 2016?

22 A Roughly that, yes.

23 Q Now, in addition -- well, before I change subjects, isn't
24 it true that the boys' bathroom -- the boys' locker room was
25 under construction and wasn't opened up for use last year until

1 approximately October 31st?

2 A I'm not positive on that, considering I didn't have to
3 change last year for gym.

4 Q Isn't it a fact that you never were in that bathroom until
5 October 31, 2017? Excuse me, that locker room.

6 A That's false.

7 Q Now, you gave your recollection of that conversation that
8 took place with Dr. Foley on October 31, 2017; is that correct?

9 A That is correct.

10 Q Isn't it true that you left out a very important sentence
11 that Dr. Foley stated to you and the other kids when you asked
12 if you could be separated?

13 A I'm not sure.

14 Q Isn't it true that when you asked if you could be
15 separated, Dr. Foley said, "There is nothing that I can do
16 instantaneously"?

17 A That is correct.

18 Q All right. You didn't say that in your direct examination;
19 did you?

20 A No, I did not.

21 Q And Dr. Foley knew that you had gym only once every six
22 school days, right?

23 A I do not know that to be a fact.

24 Q And your parents -- or, excuse me, your guardians met with
25 Dr. Cooper and then Dr. Faidley about this situation; isn't that

1 correct?

2 A That is correct.

3 Q And they reported to you that Dr. Cooper and Dr. Faidley
4 both said that alternative arrangements could be made and you
5 could use a single-user bathroom, right?

6 A That is correct.

7 Q Okay. So before you ever needed to use the gym again, you
8 were told that there would be a private facility made available
9 to you; isn't that correct?

10 A That is correct.

11 Q And you agree that in addition to the gym locker rooms
12 there are also team locker rooms; right?

13 A I believe so, yes.

14 Q Okay. And you never asked anybody if you could use the
15 team locker rooms; did you?

16 A No.

17 Q And, in addition, you have a locker in the hallway like
18 every student has, right?

19 A That is correct.

20 Q And if you used a single-user bathroom to change for gym,
21 you could have locked your belongings in your hallway locker,
22 right?

23 A Yes.

24 MR. LEVIN: I have nothing further.

25 THE COURT: Thank you very much, Counselor.

1 Attorney Roper, do you have any cross-examination of
2 this witness?

3 MS. ROPER: Just briefly. Do you mind if we take a
4 two-minute break before I do that, so I can confer with my
5 co-counsel.

6 THE COURT: Would you like a short recess?

7 MS. ROPER: Yes, Your Honor, if you don't mind. A
8 short recess.

9 THE COURT: Certainly. We'll stand in recess for five
10 minutes.

11 MS. ROPER: Thank you.

12 DEPUTY CLERK: All rise.

13 (Break taken at 12:26 p.m. to 12:30 p.m.)

14 DEPUTY CLERK: All rise. United States District Court
15 is again in session, the Honorable Edward G. Smith presiding.

16 THE COURT: You may be seated. Thank you.

17 The Court is called to order. All parties previously
18 present are once again present. The witness is on the witness
19 stand.

20 Attorney Roper, you may cross-examine the witness.

21 MS. ROPER: Thank you very much, Your Honor.

22 CROSS-EXAMINATION

23 BY MS. ROPER:

24 Q Good afternoon, Mr. Doe.

25 A Hello there. How are you doing?

1 Q All right. Can you see and hear me fine if I question you
2 from here at the table?

3 A Yes.

4 Q Okay. I just have a couple of questions. You talked about
5 your initial meeting and conversation with Assistant Principal
6 Foley. A couple days later, you met with Assistant Principal
7 Foley by yourself, correct?

8 A That is correct.

9 Q And you recorded that conversation as well, right?

10 A I did.

11 Q All right. And in that conversation, he told you that he
12 apologized for any mistake and said that he wanted to offer you
13 two alternative places that you could change in and be private,
14 correct?

15 A That is correct.

16 Q And he told you about the two places, he asked you to make
17 a choice, and you chose one, correct?

18 A That is correct.

19 Q And you did not tell him at that point that that would be a
20 problem because you could not stow your belongings?

21 A I did not tell him that.

22 Q Okay. Now, you've testified that there were times during
23 the 2016-2017 school year that you used a single-user bathroom
24 while you were at the high school, correct?

25 A That is correct.

1 Q And when you did, your privacy was protected, correct?

2 A That is correct.

3 Q And we saw a picture of the 700 boys' bathroom with that
4 low partition, right?

5 A That is correct.

6 Q Okay. There are other boys' bathrooms that have higher
7 partitions in the stalls; is that right?

8 A I've seen a few, yes.

9 Q Okay. And I just want to confirm, I believe you had
10 previously testified that in the times you had used the boys'
11 locker room, you had not ever seen boys strip down such as you
12 saw their genitals, correct?

13 A Can you repeat that for me?

14 Q Yeah. I made that about as complicated as it could be.
15 I'll try to simplify it. When you were using the boys' locker
16 room, isn't it correct that you never saw any other boys'
17 genitals while you were changing before or after gym?

18 A That is correct. I never saw another boys' genitals in the
19 locker room.

20 Q Okay. That's all I had. Thank you.

21 A No problem.

22 THE COURT: Thank you very much, Counselor.

23 Attorney Gordon, do you have any redirect of the
24 witness?

25 MS. GORDON: Yes, Your Honor.

1 REDIRECT EXAMINATION

2 BY MS. GORDON:

3 Q Joel, Attorney Levin had reminded you that you omitted a
4 statement that Dr. Foley made during your conversation with him,
5 and that was that there was nothing that he could do
6 instantaneously. Did you, in that conversation, ask Dr. Foley
7 if he could get back to you when he knew what he would be able
8 to do in response to your request to be separated from that
9 situation?

10 A I did, yes.

11 Q What did he say?

12 A He said he wasn't going to tell us and that we had to wait,
13 see if she was in there. And if she -- if she was allowed to be
14 in there, she'd be in there. And if she wasn't allowed to be in
15 there, she wouldn't be in there. There would be no definite,
16 yes, she's allowed in, or, no, if she's allowed in.

17 Q You would just know if you saw her?

18 A I would just know if I saw her.

19 Q Or didn't see her. And, Joel, why did you use the 700
20 bathroom when you needed to go to the bathroom at BASH?

21 A It was --

22 Q Why that bathroom?

23 A It was right across the hall from my last period class,
24 which is usually when I had to use the bathroom, considering it
25 was the last period of the day and I had been holding it all

1 day.

2 Q Thank you. No further questions.

3 THE COURT: Thank you, Counselor.

4 Attorney Levin, anything further?

5 MR. LEVIN: No further questions.

6 THE COURT: Attorney Roper, anything further?

7 MS. ROPER: Nothing. Thank you.

8 THE COURT: Very well. Sir, thank you very much.

9 THE WITNESS: No problem.

10 THE COURT: You may step down.

11 THE WITNESS: Thank you. Thanks.

12 (Witness excused)

13 THE COURT: And, Counsel, I guess at this juncture --
14 I know you have a very robust and ambitious schedule today.
15 Normally, I would break for an hour now to let you get something
16 to eat. If we break for an hour, will that interfere with your
17 ability to complete the testimony as you've planned?

18 MR. LEVIN: It probably would, Your Honor, because we
19 have, I have just learned today, two witnesses who have time
20 constraints. The Intervenor's expert we are told must be out of
21 here by 3:15, and Dr. Faidley must be out of here by 4:00. And
22 if we break for -- until 1:30, I'm not sure that both witnesses
23 would be able to testify by their time that they need to get out
24 of here.

25 THE COURT: Do you think 30 minutes would give you

1 enough time to get something to eat? I don't want anyone
2 passing out on me during the afternoon.

3 MS. ROPER: That would be fine for us. Your Honor,
4 before we break, I don't know if we want to finish Plaintiff's
5 evidence or not.

6 MS. GORDON: Well --

7 MS. ROPER: I'm just wondering if it would simplify
8 things. I don't mean to dictate --

9 THE COURT: Certainly.

10 MS. ROPER: -- the Court's schedule. It just seems to
11 me that might be short, and then we'd be done.

12 THE COURT: Certainly.

13 MS. GORDON: Your Honor, first, I guess I should ask
14 whether or not Mr. Doe can be excused. I know that you have an
15 outstanding ruling on a piece of evidence, but is there any
16 reason that Mr. Doe --

17 THE COURT: No, he --

18 MS. GORDON: -- needs to stay here?

19 THE COURT: He may be excused.

20 MS. GORDON: Okay. And then, in speaking with counsel
21 leading up to this hearing about some of the constraints, the
22 time constraints that their witnesses had, we were prepared to
23 allow them to put on their witnesses as a convenience to them,
24 and so we proceeded with that in mind, and so we have no problem
25 accommodating the schedule of Dr. Leibowitz and also of

1 Dr. Faidley.

2 And as you know, we took the trial preservation
3 depositions of our clients -- two of our clients, two of the
4 Plaintiffs, and we are still considering presenting those in
5 open court, but obviously have no objection to Intervenor and
6 Defense witnesses proceeding this afternoon.

7 THE COURT: Very well. And what do you think about a
8 30-minute recess; is that sufficient time to get something to
9 eat?

10 MS. GORDON: It certainly is, yes.

11 THE COURT: Okay. Is there any reason we shouldn't
12 stand in recess now?

13 MR. LEVIN: I have one issue, Your Honor.

14 THE COURT: Yes, sir.

15 MR. LEVIN: And that is I didn't learn until this
16 morning when I turned on my computer about the second recorded
17 meeting. Plaintiff's counsel produced it to us I think last
18 night. I could be wrong about that, but I first saw it today.
19 And quite frankly, in light of the broad verbiage of the Wiretap
20 Act, I'm not supposed to even be listening to that, especially
21 since I don't know the circumstances surrounding how it was
22 made, whether there is any expectation of privacy to that
23 meeting. To the extent Joel Doe said anything, I think he said
24 it was only he and the assistant principal.

25 So what is a lawyer to do when he is concerned that

1 listening to a tape may be unlawful?

2 THE COURT: Well, I can't give you advice.

3 MR. LEVIN: Well --

4 THE COURT: And I'm still a little unclear on the
5 relevance of what the assistant principal said, to the extent
6 that there is any disagreement among counsel as to what happened
7 to the last witness at the time he went.

8 I know that subsequently the assistant principal said
9 something differently, but I don't know that there is really any
10 question about what the facts are about what actually was said.

11 And if there are no questions about what was said,
12 then there is no issue about the recording coming in.

13 MS. GORDON: There is a tremendous difference between
14 the account that was given under oath by Dr. Foley concerning
15 what was discussed at that meeting and what our client, the
16 Plaintiff, has testified to. They are in direct conflict with
17 one another, and that would become very apparent if Your Honor
18 were to listen to the audio recording.

19 THE COURT: Okay. And even with that audio recording,
20 the parties aren't able to come to a conclusion as to what
21 actually happened at that meeting?

22 MS. GORDON: Well, if Defendant and Intervenor is
23 willing to stipulate that the transcript is accurate, and that
24 we can move that into evidence, then we don't need to listen to
25 the audiotape. But I don't know --

1 THE COURT: How about the second audiotape? Because
2 that's even more troublesome. I just think there --

3 MS. ROPER: Your Honor, I don't know that there is --
4 I don't think anyone intended to introduce the second audiotape.

5 THE COURT: Okay.

6 MS. ROPER: He testified as to what happened in the
7 meeting, and I have no need to --

8 THE COURT: Okay.

9 MS. ROPER: -- introduce it.

10 THE COURT: Well, that resolves that issue.

11 MS. GORDON: Yes, Your Honor.

12 THE COURT: Then the only issue, Mr. Levin, is if you
13 will agree to the admission of the transcript in this case,
14 Exhibit 6, of that recording, then the recording doesn't need to
15 come in. The Court doesn't need to hear the recording, and
16 we've got the evidence from the recording as to what was said at
17 that meeting. It's no longer in dispute.

18 MR. LEVIN: With respect to the transcript, I believe
19 it does accurately reflect what was said at that meeting. We
20 share your concern, and I would raise a relevancy objection,
21 especially in view of the conversations that took place over the
22 next several days where they obviously made arrangements for a
23 separation.

24 And I should simply note that the deposition where
25 Dr. Foley testified was in June, about seven months after a

1 five-minute conversation. So if he forgot some of the words
2 that were stated, I'm not sure that he was lying about it as
3 opposed to people's memories are faulty. He didn't have a
4 transcript of the recording that the Plaintiff had.

5 THE COURT: And I understand that, and I do appreciate
6 your willingness to have the transcript admitted and recognize
7 your concerns about the relevancy. And the reason I say that is
8 I certainly would not want to, on this limited record, make a
9 conclusion that students can simply take their cell phones into
10 the assistant principal's office and record everything that goes
11 on in there, and what circumstances they can do that, when they
12 can't.

13 I know some schools even have requirements that cell
14 phones be kept in lockers. I guess as the use of cell phones
15 has developed, maybe that's not so enforced the way it once was,
16 but there is a real concern about the cell phones in a school
17 environment, just like there is concerns about cell phones in
18 many environments.

19 That resolves that evidentiary issue, then. I will
20 admit the transcript.

21 (Plaintiff's Exhibit 6 was received in evidence.)

22 THE COURT: There is no effort on the part of the
23 Plaintiff now to admit the other two exhibits; is that correct?

24 MS. GORDON: We will -- yeah, we will withdraw them.

25 THE COURT: Very well. Thank you very much, Counsel.

1 We'll stand in recess for 30 minutes. I hope you can find some
2 food. It's a Monday, so certain restaurants are closed.

3 MS. GORDON: Do you have any suggestions?

4 THE COURT: You'll have to talk to Attorney Coolidge.
5 She is the expert on that.

6 MS. GORDON: Thank you.

7 THE COURT: Thank you.

8 DEPUTY CLERK: All rise.

9 (Lunch recess was taken from 12:42 p.m. to 1:19 p.m.)

10 THE CLERK: All rise. The United States District
11 Court is again in session. The Honorable Edward G. Smith
12 presiding.

13 THE COURT: You may be seated. Thank you.

14 The Court is called to order. All parties previously
15 present are once again present.

16 And I believe, Attorney Gordon, at the time we
17 recessed for lunch, had you closed your case?

18 MS. GORDON: No, Your Honor, we've not closed our
19 case.

20 THE COURT: Very well. You may proceed.

21 MS. GORDON: We were actually deferring to the --

22 THE COURT: Oh, that's right. We're going to try to
23 get --

24 MS. GORDON: -- Intervenor and to the Defendant to
25 permit them to put their witnesses on the stand out of order.

1 THE COURT: Absolutely.

2 Ms. Levin, are you next?

3 Attorney Roper?

4 MS. MAR: Counsel for Defendant has kindly allowed us
5 to go first. So Intervenor will call Dr. Scott Leibowitz to the
6 stand.

7 THE COURT: Very well. Thank you.

8 (Witness summoned.)

9 MS. MAR: Your Honor, is it acceptable if I counsel --
10 question the witness from my seat?

11 THE COURT: Wherever you are most comfortable,
12 absolutely.

13 Sir, how are you?

14 DR. LEIBOWITZ: Good. How are you, sir?

15 THE COURT: Very good. And if you would, just remain
16 standing at the witness stand, and Attorney Kulick will be
17 swearing you.

18 THE CLERK: Do you swear or affirm that the testimony
19 you are about to provide on the issue now before this Court
20 shall be the truth, the whole truth, and nothing but the truth,
21 so help you God?

22 DR. LEIBOWITZ: Yes.

23 THE COURT: Thank you very much, sir. And, sir, you
24 may be seated.

25 DR. LEIBOWITZ: Sure thing.

1 THE COURT: And, sir, would you please state your full
2 name, spelling your last name, for the record.

3 DR. LEIBOWITZ: Sure. It is Scott Leibowitz, and my
4 last name is spelled, L-e-i-b-o-w--i-t-z.

5 THE COURT: Thank you very much, sir.

6 Counsel --

7 DR. LEIBOWITZ: I'm going to just take a little sip of
8 water.

9 THE COURT: Certainly.

10 And, Counsel, as soon as your witness has had just a
11 little bit of water, you may proceed.

12 DR. SCOTT LEIBOWITZ,
13 a witness, having been first duly sworn, was examined and
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MS. MAR:

17 Q Good afternoon, Dr. Leibowitz.

18 A Hi.

19 Q I'm going to ask you some questions about your experience
20 in the area of gender dysphoria and gender identity issues,
21 generally, among children and adolescents.

22 A Okay.

23 MS. MAR: May I approach?

24 THE COURT: Certainly, Counsel.

25 MS. MAR: I'm showing the witness what's been marked

1 for identification as Exhibit I-6. There is a copy in the
2 courtesy binder provided to the Court and both the parties.

3 BY MS. MAR:

4 Q Dr. Leibowitz, do you recognize this document?

5 A The first page of it, yes.

6 Q What is it?

7 A This is my CV.

8 Q Is it a current version of your CV.?

9 A It is.

10 Q Can you please describe for the Court your formal education
11 and training?

12 A Okay. I went to my undergraduate and completed my
13 undergraduate at Cornell University. I went on to medical
14 school at Sackler School of Medicine, which is in Tel Aviv, an
15 American program. I subsequently came back to the States and
16 completed my general adult psychiatry residency training at
17 Einstein at Long Island Jewish Medical Center in New York. I
18 stayed on for an extra year to be chief resident, and then I
19 moved to Boston at Harvard Medical School where I did my child
20 and adolescent psychiatry fellowship.

21 Q And do you have any specific training in the area of gender
22 dysphoria and gender identity issues?

23 A I would say, yes.

24 Q Can you describe that training for us?

25 A As part of my fellowship training, I was fortunate to be in

1 an institution at Boston Children's with Harvard Medical School
2 where the first gender identity, multidisciplinary clinic in the
3 United States was formed. So I joined that team as a fellow, a
4 fellow being in training. During my first year of fellowship, I
5 received training from the psychologist who was a staff
6 psychologist there.

7 Her name is Dr. Edwards-Leeper. Both she and I, at
8 different points in time, had gone overseas to the Netherlands,
9 where we both received training from the Dutch Clinic, which is
10 widely -- widely known in the world as the most leading research
11 and clinical gender identity program, essentially, you know, for
12 anything like -- anything related to gender, the Dutch Clinic
13 leads the way.

14 And then, subsequently, I took a faculty position and
15 stayed on at Boston Children's for a number of years thereafter.

16 And I don't know if you consider -- I consider my
17 current job training, I consider training to be a lifelong
18 venue. So I don't know at what point training ends.

19 Q And you've anticipated my very next question. What is your
20 current position?

21 A Currently, I am the medical director for the THRIVE gender
22 and sex development program for the behavioral health component
23 of it, and it's at Nationwide Children's Hospital in Columbus,
24 Ohio, affiliated with the Ohio State University.

25 Q In that position, do you treat young people with gender-

1 identity issues?

2 A I do.

3 Q When did you first begin treating young people with gender-
4 identity issues?

5 A As I mentioned in my training, my first year. Back in 2008
6 was when I began seeing kids with gender-identity issues.

7 Q And can you walk us through the position that you've held
8 since you began that work in 2008?

9 A Okay. So as a fellow, you're granted time to do elective
10 work in an area that sparks curiosity. So I had a half-a-day
11 clinic throughout my fellowship for about one-and-a-half years.
12 Upon graduation of fellowship, recognizing that there is
13 significant amount of youth in the Boston area that were seeking
14 my services, I expanded to one day of clinic for gender-specific
15 concerns, the remainder for general, psychiatry concerns.

16 Thereafter, it expanded to two days, because more kids
17 were showing up, until I moved to Chicago about almost six years
18 later to participate in the developments of their program.

19 There, I would say a good majority of my clinical experience --
20 clinical work was devoted to kids with gender issues, and then I
21 had the opportunity to be the medical director of a clinic. So
22 I moved and took that opportunity. And now, gender-identity
23 issues, either education, administrative issues, running the
24 clinic, or clinical encompass 100 percent of my time.

25 Q And in your previous positions, approximately, what

1 percentage of your time did you dedicate to young people with
2 gender-identity issues?

3 A Well, it grew from 10 percent to 20 percent to 40 percent
4 to, maybe, 60 percent, to now 100 percent. So it's been an
5 evolution.

6 Q And across those positions, approximately, how many
7 children and adolescents and with gender-identity issues have
8 you treated?

9 A Approximately, directly I've treated face to face 300
10 youth; however, indirectly, as a part of a multidisciplinary
11 team that consists of endocrinologists, pediatric psychologists,
12 social workers, adolescent medical physicians, I've indirectly
13 been involved or heard about hundreds more.

14 Q And those 300 youth that you've treated for gender-identity
15 issues, they're only a fraction of the youth that you've treated
16 for a variety of psychiatric reasons; is that right?

17 A A significant component, yes.

18 Q Do you hold any university faculty positions?

19 A Yes.

20 Q What position do you currently hold?

21 A I'm an associate clinical professor at The Ohio -- The Ohio
22 State -- The Ohio State, one must specify "the," I've learned --
23 College of Medicine.

24 Q Have you published any research or scholarly articles on
25 the subject of gender-identity issues in children and

1 adolescents?

2 A Yes.

3 Q Approximately, how many?

4 A Twenty publications, perhaps, in my CV are listed.

5 Q And were any of those publications subject to peer review?

6 A Yes.

7 Q Approximately, what percentage?

8 A Perhaps, a good 40 percent to 50.

9 Q Have you given any presentations on the topic of gender-
10 identity issues in children and adolescents?

11 A Yes.

12 Q Were those presentations for professional audiences?

13 A A good majority.

14 Q And approximately, how many presentations have you given to
15 professional audiences?

16 A I will spare the audience in counting; over 100, perhaps.

17 Q Are you involved in any professional associations?

18 A Yes.

19 Q Which associations are those?

20 A The two major ones that I'm most involved in are one from
21 my discipline, so child and adolescent psychiatry, and it's
22 called AACAP, the American Academy of Child and Adolescent
23 Psychiatry, where I serve as the co-chairman of the Sexual
24 Orientation and Gender Identity issues Committee for that
25 organization.

1 The other major organization that I am active in is
2 one that serves individuals with gender-identity concerns or
3 professionals who treat those individuals, and that's called the
4 World Professional Association of Transgender Health, WPATH for
5 short.

6 Q And what does the Global Education Initiative Committee for
7 WPATH entail?

8 A So the Global Education Initiative is the education
9 component of WPATH. Approximately two years ago, but it's been
10 an initiative that has been in the works for a long time, but
11 two years ago, it formalized. There was a recognized need that
12 this is an issue that is largely not addressed in medical
13 schools or in other professional organizations and training, and
14 many individuals are coming forward and treating these -- these
15 youth or adults, I should say, and so, therefore, there seemed
16 to be no standardization unless people were specifically pointed
17 to the WPATH standards of care.

18 So the W -- the Global Education Initiative is a
19 worldwide, internationally renowned -- not renowned, I should
20 say -- internationally known subset of WPATH aiming to
21 standardize the approach of individuals with gender-dysphoria
22 and gender-identity concerns.

23 Q So the education component to the Global Education
24 Initiative refers to educating other medical professionals and
25 not members of the general public?

1 A Correct. Correct.

2 Q Have you played any role in developing competencies for
3 medical students regarding gender-identity issues or sexual
4 orientation?

5 A I have.

6 Q What role was that?

7 A So the American Association of Medical Colleges, which is
8 an organization that addresses medical school curricula that
9 runs the MCAT, so the entry and exam into medical school, this
10 organization developed a task force approximately five years ago
11 or so recognizing that medical schools are not addressing issues
12 related to sexual orientation, gender identity and gender
13 expression, and sex anatomy.

14 And so they appointed a task force consisting of nine
15 members across various disciplines; MDs, PhDs, basic scientists,
16 MDs of different backgrounds, people who treated children,
17 people who treated geriatric individuals and came up with the
18 nine people; I was one of them. And over a two-year period, we
19 developed a competency framework that mapped to an existing
20 competency framework how medical schools already address
21 competencies for an MD to graduate. So we mapped gender,
22 sexuality, and sex-anatomy-specific competencies to the existing
23 framework, and there you have it.

24 MS. MAR: All right. I would like to move
25 Dr. Leibowitz's CV into evidence as I6.

1 THE COURT: Is there any objection to the admission of
2 Dr. Leibowitz's CV?

3 MR. LEVIN: No objection, Your Honor.

4 MR. MCCALED: No objection.

5 THE COURT: All right. Without objection, Dr.
6 Leibowitz's CV, which is marked as Intervenor's 6 --

7 MS. MAR: Correct, Your Honor.

8 THE COURT: -- is admitted into evidence.

9 (Intervenor's Exhibit 6 admitted into evidence.)

10 THE COURT: You may proceed, Counselor.

11 BY MS. MAR:

12 Q Dr. Leibowitz, have you ever been retained as an expert
13 witness before?

14 A Yes.

15 Q Have you ever testified in court?

16 A No.

17 MS. MAR: All right. I now move to have Dr. Leibowitz
18 qualified as an expert in gender-dysphoria and gender-identity
19 issues in children and adolescents.

20 THE COURT: Gender dysphoria and the other?

21 MS. MAR: Gender-identity issues in children and
22 adolescents.

23 MR. MCCALED: Your Honor, we would object to that. We
24 think it's appropriate to at least get cross-exam in before he
25 is qualified as an expert.

1 THE COURT: Well, she's just offering it. I'm going
2 to allow voir dire from both you and Mr. Levin on
3 qualifications, if you choose so, and it sounds like you would
4 like.

5 So, Counsel, I will allow, at this point, any
6 questions on qualifications.

7 MR. McCALEB: Yes, Your Honor. I have a fairly
8 extensive cross for him. It's -- I do. I think the cross will
9 show that he is not qualified at any level to be a national
10 expert. We are a little uncertain as to why he is being
11 introduced as an expert. He's not a treating physician. He's
12 not a national expert, and the issues before the Court are
13 really pure matters of law. I'm happy to raise some issues with
14 the witness, but I really think it will come out on cross-exam.

15 THE COURT: So do you have any questions on
16 qualifications?

17 MR. McCALEB: At this point, no, Your Honor.

18 THE COURT: Mr. Levin, do you have any questions for
19 this witness?

20 MR. LEVIN: I have none.

21 THE COURT: And, Counselor, do you object to the
22 expert -- to the witness being accepted by the Court as an
23 expert in gender-dysphoria and gender-identity issues in
24 children and adolescents?

25 MR. McCALEB: Yes, Your Honor, we do. The challenge I

1 have in objecting at this point, without some cross-exam to
2 bring this into the record, is that the science is extremely
3 unsettled, and saying that you are an expert in gender dysphoria
4 is basically saying you're an expert in unsettled science. So
5 the qualifications that he has brought forth are qualifications
6 that are grounded in a series or a grouping of medical
7 schools -- or, excuse me -- medical groups that are uniquely
8 focused on gender identity.

9 They are outside the mainstream of medicine. They are
10 not well-founded in peer-reviewed study. There are a number of
11 Daubert standards that I think would come out on cross-exam that
12 his opinions do not rest on any kind of established error rates;
13 they do not rest on peer-reviewed, controlled, randomized
14 studies. And in that sense, while he may appear to be well-
15 versed in gender identity, we would certainly argue that he is
16 not qualified to speak as a national expert on the validity of
17 gender identity and transgender treatments.

18 THE COURT: Well, as you're aware, the standard of
19 specialized knowledge necessary to be accepted as an expert is a
20 very low threshold, and much of what it sounds you are
21 addressing is the weight to be given to his opinion, but as a
22 courtesy rather than have you question the witness on his
23 qualifications separate and apart from your cross-examination, I
24 will defer accepting the witness as an expert pending the
25 opportunity you have to cross-examine once the direct

1 examination is completed.

2 MR. McCALEB: Thank you, Your Honor.

3 THE COURT: Is that satisfactory to the Intervenor?

4 MS. MAR: It is, Your Honor.

5 THE COURT: Very well. Counsel, you may proceed.

6 BY MS. MAR:

7 Q Dr. Leibowitz, just to get us started, what does the word
8 "transgender" mean?

9 A Transgender is a term, an identity term that people use.
10 Individuals whose sex assigned at birth that does not match;
11 it's not congruent with their gender identity.

12 Q And what is gender identity?

13 A Gender identity is one's subjective, deep-core conviction
14 sense of self as a particular gender. In most situations, male
15 or female, but maybe some aspect of both, or in between.

16 Q You used the phrase sex assigned at birth. How is sex
17 typically assigned at birth?

18 A Typically, sex is assigned at birth when an individual --
19 when a baby is born and most doctors will look at and examine
20 the genitalia of that baby. When those genitalia are clear, as
21 in most cases they are either a penis or a vagina. For penises,
22 male would be the assigned sex; for vaginas, female would be the
23 assigned sex.

24 Q Approximately, how many people identify as transgender?

25 A According to recent publication by a leading institute, The

1 Williams Institute in UCLA, 1.4 million transgender adults
2 identify -- 1.4 million adults identify as transgender,
3 constituting 0.6 percent of the adult population, or the United
4 States population.

5 Q Did the Williams Institute research address the percentage
6 or proportion of transgender people among young people?

7 A They did not. They did not.

8 Q Why not?

9 A Why not? Well, I don't believe that the survey system, the
10 data that they used, looked at children. What I could say,
11 though, is that if you stratify the data that they did look at,
12 so they grouped people into -- from age 18 to 25, from 25 to 65,
13 and 65 plus, in every single state the -- the youngest cohort
14 was -- had the highest percentage. And so, that .06 number --
15 percent number that I give you is really a conglomerate of all
16 of the states and all of the people.

17 But if you were to extrapolate younger, so if you look
18 at each graph and it shows that, you know, the earlier you go,
19 the higher percentage of people identified as transgender, one
20 can conceivably, statistically presume that younger people would
21 have an even higher identification as transgender.

22 Q What is gender dysphoria?

23 A Gender dysphoria is both a clinical phenomena, but, also,
24 recently introduced into the psychiatric DSM, which is our
25 manual that we use to diagnose certain mental health conditions

1 or all mental health conditions. It refers to clinical distress
2 that one experiences when their birth-assigned sex and their
3 gender identity are at odds with one another, with the
4 stipulation that there are no perceived cultural advantages to
5 the gender identity that one experiences.

6 Q When you referred to the DSM just now, what is the DSM?

7 A The DSM is the psychiatric manual for classification of
8 disease. So "Diagnostic and Statistical Manual" for psychiatric
9 mental illness.

10 Q And has the term "gender dysphoria" always appeared as a
11 clinical classification in the DSM?

12 A No, it has not.

13 Q When was it added?

14 A 2013 or '12; whenever the DSM-5 came out, just recently,
15 four years ago.

16 Q And was there another clinical classification that was
17 replaced with gender dysphoria?

18 A Yes. So there was something previously called gender
19 identity disorder, and so I should note that for both gender
20 identity disorder as well as gender dysphoria, the change that
21 exists, there are two subsets of criteria: there is the
22 childhood criteria, and then there's the adolescent and young
23 adulthood lumped together criteria.

24 Q And why did the classification change from gender identity
25 disorder to gender dysphoria?

1 A Okay. So I was not on the committee back then. I would say
2 that I was not someone -- I would agree that I was not an expert,
3 perhaps, five years ago. So I was not really understanding of
4 why nomenclatures existed. I was not understanding of what
5 criteria were decided upon, you know, to include or not.
6 However, my cursory or deeper knowledge of this having read
7 sufficiently about it, is that, in the childhood diagnosis, which
8 I -- which I know is not really the focus today, but the
9 childhood diagnosis didn't accurately capture individuals who
10 experienced gender dysphoria, the insistence of being another
11 gender.

12 It was more capturing kids who were gender
13 nonconforming. So a boy who likes to play with Barbies, for
14 example, or a girl who perhaps like to engage in rough-and-tumble
15 play. The newer diagnosis now refers more to strict -- stricter
16 criteria that allow for an insistence that one is another gender.

17 Another reason why it changed is that the terminology
18 "gender identity disorder," there was a consensus among those who
19 made this -- who are experts in the field -- that the terminology
20 didn't accurately constitute or capture what -- what people were
21 going through.

22 So calling it an identity disorder was being used
23 against individuals as if to say this identity is wrong, and
24 therefore, by changing it to gender dysphoria, it turned it into
25 a situation where it was about the clinical experience, the

1 distress that one experiences, for some individuals who identify
2 as transgender.

3 Q Can you describe for us some of the signs of gender
4 dysphoria among children? Can you tell us the signs of gender
5 dysphoria among adolescents?

6 A So adolescents are different than children, as we know. So
7 their bodies have -- either puberty has emerged, or they have --
8 they're in the midst of puberty, or they're at the end of
9 puberty, and so, for adolescents, the signs of gender dysphoria
10 are different depending on which direction we're talking about.

11 So, for example, take someone who is a male assigned
12 at birth; they would experience a significant, substantial
13 distress from their deepening voice, from their broadening
14 shoulders, from their height, from growing a certain amount of
15 hair, from the enlargement of their genitalia, from being
16 perceived as male.

17 For those who are sex assigned at birth as female, the
18 development of breasts would be of substantial -- would bring
19 substantial distress to them. Menstruation, for example, would
20 bring substantial distress. They would want to be perceived in
21 most situations as another gender, male being that -- on the
22 masculine end of the spectrum of male to female.

23 Q And the clinical experience that you described as gender
24 dysphoria, do all transgender people have gender dysphoria?

25 A No.

1 Q Why not?

2 A There are some transgender individuals who simply the level
3 of distress that they experience, the incongruence that they
4 experience is not sufficient enough for them to feel distressed
5 in a manner that leads them to seek a reassignment of their
6 gender or to transition their genders. So many -- again,
7 transgender is an identity term; it's not a term that I impose
8 on a certain person.

9 A person can come to me and say they are transgender.
10 As a psychiatrist, I am not there to say yes or no, you aren't
11 or are. I am there to evaluate for the criteria for gender
12 dysphoria.

13 Q So when a patient comes in -- comes to you with gender-
14 identity issues, what is that assessment process you go through
15 to determine if they have gender dysphoria?

16 A Well, I -- so I err on the side of comprehensive. I am
17 someone that -- we gather multiple sources of information. We
18 meet with kids over several -- a long period of time, perhaps.
19 Again, you know, it depends on the clinical situation. It
20 depends on their overall psychological functioning. We're not
21 just evaluating what they say. We're also evaluating their
22 entire being. We're doing what we call a biopsychosocial
23 formulation of the patient.

24 So we're looking at family history of psychiatric
25 illness. We're looking at depression, anxiety, psychosis,

1 reality testing. We're looking at their cognitive abilities.
2 We're looking at whether they engage in risk-taking behaviors.
3 We're looking at their psychological functioning; how they
4 interact with people; how they interact with their family
5 members. We're looking at social situations; what's their
6 school like; what's their religions; what's their cultures;
7 what's their relationship with family members?

8 So, again, an assessment can be rather extensive and
9 comprehensive, but we also have to balance what insurance will
10 pay us for an assessment and not burdening families with too
11 much of an invasive assessment, so to speak, but we certainly
12 need to take our time to understand kids and the context in
13 which they may say that their gender differs from their sex
14 anatomy.

15 Q And how long does that assessment process take?

16 A It is different for different kids.

17 Q Would you say it's a matter of days, weeks, months?

18 A Certainly not days. Certainly not days. It's -- you know,
19 by definition, to meet criteria for gender dysphoria, the DSM
20 stipulates one must experience this for at least six months. So
21 that's inherent in the definition of gender dysphoria.

22 Now, how clear that is for a given person is really
23 individual, and therefore, in some situations, it can take many,
24 many months. It can take more than six months for us to have a
25 good sense and understanding that given all of the large picture

1 factors involved in this child or this adolescent's life that
2 we're pretty solid that this person meets the criteria. In
3 certain -- in certain situations, it could be much quicker.

4 Q Now, is there a treatment to alleviate the distress caused
5 by gender dysphoria?

6 A Again, that's a multi-factorial answer. There are
7 treatments that are known, yes.

8 Q And are there treatments appropriate for children and
9 adolescents?

10 A So children are different than adolescents. Children,
11 these are youth who are pre-pubertal, okay? So these are kids
12 whose bodies have not changed. So by definition, if one has not
13 entered puberty, one cannot be treated for a diagnosis that
14 stipulates how one reacts to puberty, okay? So for children,
15 it's a little bit more complex.

16 Q Well, since this case is about high school students, let's
17 -- let's focus on adolescents.

18 A Okay.

19 Q Are there accepted standards in the medical and mental
20 health fields for treating gender dysphoria in adolescents?

21 A There absolutely are.

22 Q And are those standards documented anywhere?

23 A They absolutely are.

24 Q Where are they documented?

25 A One, they were documented in the Endocrine Society

1 Guidelines; they are documented in the World Professional
2 Association of Transgender Health standards of care, which is in
3 its current seventh iteration.

4 Q Focusing on the World Professional Association for
5 Transgender Health, or what we call WPATH, how were the WPATH
6 standards of care developed?

7 A The WPATH standards of care were developed by at least a
8 group of 30 authors, of which I was not one. I will stipulate.
9 The current iteration, again, sometime came out in 2000, I want
10 to say, '12 or '11. These 30 individuals are international
11 researchers, clinicians, experts.

12 The process by which they were chosen is something
13 that I am not entirely familiar with, but let's just say, if you
14 treat one or two kids with gender issues, they're not going to
15 be accepting you onto the committee to revise the standards of
16 care. These are people that across the world have immense
17 experience in research and clinical affairs related to these
18 issues.

19 Q And how are the WPATH standards of care used and accepted
20 in the field?

21 A They're widely used and accepted in the field for
22 individuals, for clinicians who are in these clinics who are
23 treating these youth.

24 Q Medical organizations or mental health organizations have
25 practice parameters that are consistent with the WPATH standards

1 of care?

2 A Absolutely; my own, for example. So the American Academy
3 of Child and Adolescent in Psychiatry has a practice parameter
4 that was also released around the same time, it seems like, 2011
5 or '12 was that big year that publications and guidelines came
6 out, that most certainly stipulates and adheres to and cites the
7 WPATH standards of care. Subsequent to that, the American
8 Psychological Association has also released its own guidelines
9 that I believe I've submitted in a reference, that adhere to and
10 cite the WPATH standards of care.

11 Q Okay. Has the American Medical Association issued any
12 practice parameters that reference that WPATH standards of care
13 or that are consistent with them?

14 A I'm not familiar.

15 Q What are the accepted interventions at use clinically to
16 treat adolescents with gender dysphoria?

17 A So, again, we tailor our intervention to the individual.
18 Essentially, they're for early -- for adolescents who are just
19 into puberty, for example. One intervention that exists -- and
20 these are for younger adolescents because they are not old
21 enough to be able to make decisions that have lifelong effects
22 -- we use what we call "puberty blocking agents" or pubertal
23 suppression, and I can explain that to you, if you would like.

24 And then for older adolescents, once they reach a
25 certain age or a certain level of emotional maturity and their

1 parents are willing to consent for that, and we -- in my clinic,
2 we, of course, make this recommendation or not, we use hormonal
3 interventions, such as testosterone or estrogen that will carry
4 more irreversible effects than the pubertal suppression agents
5 will. And I could talk more about those.

6 Q Are there any clinical interventions you would use with
7 respect to practical aspects of the way a child lives either her
8 life -- her social life?

9 A Absolutely. So prior to even some of those, those are --
10 those are the physical interventions, and I would be remiss to
11 not mention that we also think about adolescents socially
12 transitioning, specifically, just without use of any physical
13 intervention whatsoever. This may involve just simulating what
14 it is like to live as the gender that they present identifying
15 as.

16 Q And what does it entail to simulate living in accordance
17 with one's gender identity?

18 A In which direction?

19 Q Let's say an adolescent who is undergoing social role
20 transition at home; for -- what sorts of changes might that
21 person make about their life?

22 A Okay. Well, for example, one might use an adoption of a
23 different name; one might use an adoption of a different
24 pronoun. For an individual that has already developed breasts,
25 many adolescents will bind their breasts with chest binders,

1 which, of course, the safety of which they have some safety data
2 on, adolescents will, perhaps, even use oral contraception to
3 block their periods. Just -- I know that's a physical
4 intervention, but it's a completely reversible one that many
5 adolescents use just to help them not to go through that monthly
6 reminder of their sex assigned at birth.

7 And in the other situation, some may grow their hair
8 out; some may raise the pitch of their voice; some may wear
9 breast pads; some will also use an adoption of a different
10 pronoun set in a different name. Again, all to really help
11 alleviate the incongruence that is characterized by gender
12 dysphoria.

13 Q And does social-role transition ever involve using sex-
14 segregated spaces consistent with one's gender identity?

15 A It can.

16 Q How does a clinician determine if and when social
17 transition is appropriate treatment for a particular patient?

18 A Again, I don't view my role as a clinician to determine a
19 preset course for a specific individual. Considering we are
20 somewhat comprehensive, and also, we are recognizing the fact
21 that we want to provide evidence-based medicine, and this is an
22 area that let's acknowledge that there is some limited evidence
23 when it comes to that.

24 So we want to be cautious in how we approach these
25 issues. So me saying when to do what is not the answer. The

1 role that the mental health professional plays in a clinical
2 situation is to explore with an individual and a family what is
3 the risk and benefit of an intervention they seek? What is the
4 risk and benefit of an intervention -- of withholding that
5 intervention? Withholding an intervention is not neutral
6 oftentimes. So there's a careful risk-benefit analysis that
7 happens step-by-step, and sometimes it even starts with just a
8 simple change in a home environment, in the privacy of their
9 home.

10 For example, having a parent use a pronoun or a name
11 that the adolescent feels is congruent with their identity,
12 okay? We often use the social transition and those simple steps
13 and simple ways to help see and guide if that will put an
14 adolescent at ease, or if that will not really address the
15 situation, and why.

16 Q Now, you mentioned earlier that one of the clinical
17 interventions that can be used, a physical intervention, is
18 hormone therapy?

19 A Yes.

20 Q What is hormone therapy?

21 A So testosterone is the sex hormone that is used to
22 masculinize an individual whose sex assigned at birth is female.
23 Estrogen is the hormone that is used, the sex hormone used to
24 feminize an individual whose sex assigned at birth as male.

25 Q And how does administering hormone therapy help patients

1 with gender dysphoria?

2 A Well, it produces the secondary sex characteristics of the
3 gender that they -- that's consistent with their gender
4 identity, and therefore, helps others to perceive them in a
5 certain way. It helps them feel internally a sense of
6 congruence, whether or not the world sees them a certain way.
7 It is just a matter of harmonizing one's body with one's mind.

8 Q Are there any potential side effects or risks of hormone
9 therapy?

10 A Yes.

11 Q What are some of those side effects or risks?

12 A Well, so with any intervention that we have, side effects
13 can be broken down into more-likely-to-happen side effects, less
14 likely to happen, or slight possible likeliness of happening.
15 So I would say that the more likely side effects of the hormonal
16 treatments include cardiovascular risks. So, you know,
17 increased hypertension; diabetes, for example; acne in a
18 testosterone -- in an individual taking testosterone. Balding
19 patterns, male-balding patterns can happen. There could be a
20 thromboembolic venous -- venous thromboembolism, which is a
21 clotting in the blood for certain people on estrogen.

22 Of course, now, you are pre-dispositioned genetically
23 to certain disorders. For example, if you have a family history
24 of diabetes, that heightens your risk for diabetes. So, again,
25 I'm not the one that treats with these hormone agents. My

1 knowledge is more -- far more cursory than the endocrinologist
2 who would be sitting down point-by-point and going through more
3 details of the risk.

4 Q How does your clinic manage those risks?

5 A Well, we have detailed discussions beforehand to ensure
6 that all members of the team on the same page. We also do
7 baseline lab work to look at risks. We, of course, do a
8 thorough assessment of the family history of medical risk. We
9 monitor throughout.

10 There's standardized protocols that exist among the
11 medical teams that do the hormone part of the treatment that I
12 don't do as to what to monitor when. So do they monitor the
13 bone growth? Do they monitor the liver enzymes, for example?
14 There's various things that they do that -- that -- to mitigate
15 the risks.

16 Q Why do you use hormone therapy at all if those risks exist?

17 A So, again, we are here to talk about the risks and benefits
18 of moving forward with an intervention, and the risks and
19 benefits of not.

20 We have -- take bipolar disorder, for example, a well-
21 agreed upon diagnosis that exists in the DSM. If you were to
22 prescribe any of the first-line treatments for bipolar disorder
23 to an individual, you are certainly going to see a very high
24 likelihood of weight gain, cardiovascular effects, and in some
25 situations, I just read the other day, clozapine medication for

1 psychotic patients can cause a life-threatening condition, some
2 gastric motility defect that they had not even known about; it's
3 not even on the insert in the medication.

4 So there's a lot of unknown risks, and a lot of
5 unknown causal mechanisms in mental health in general, and so,
6 would we withhold a bipolar treatment for an individual who is
7 manic or for an individual who is psychotic? So I ask not to
8 equate individuals with gender dysphoria to those individuals,
9 but to say there are risks involved in every treatment in
10 medicine, for the most part, and some carry tiny risks, some
11 carry large risks.

12 The risk of not treating has significant ramifications,
13 and there is plenty of data to suggest that not treating -- an
14 untreated gender dysphoric adolescent has significant and
15 substantially higher psychiatric outcomes, poor psychiatric
16 outcomes.

17 Q And when you say "poor psychiatric outcomes," are you
18 referring, in part, to thoughts of suicide?

19 A Suicide being one, yes; self-injury, suicidal ideation,
20 suicidal behavior. I can provide statistics or you could read
21 the studies on your own; randomized controlled or not, there are
22 many associations, plenty of evidence to suggest that youth with
23 gender dysphoria have a much higher rate of suicidal ideation
24 across development, children and adolescents. And not only
25 that, there are factors that are associated with not being

1 perceived as one's gender implied -- implicit or complicit in
2 the development of suicidal ideation in certain studies.

3 Q Now, you mentioned both puberty blockers and hormone
4 therapy as physical interventions. Do the standards of care
5 recommend surgical interventions for adolescents?

6 A I would say that they're very cautious about using surgical
7 interventions in adolescents. What we call bottom surgery,
8 which is referring to anything that is about surgery on the
9 genitals, is deferred until someone is 18 and able to make their
10 own decisions, okay?

11 Gaining in more clinics, however, in the country and
12 across the world and according to the standards of care, top
13 surgery, which is referring to a mastectomy that is used for
14 individuals who identify as male, so transgender males who have
15 breasts, removing the breast tissue, is a surgery that is being
16 used in minors more and more.

17 Q What is the goal of treatment of gender dysphoria in
18 adolescents?

19 A The goal of treatment in gender dysphoria in adolescents is
20 to help one not experience that internal sense of chaos that
21 they live day-to-day, being and feeling as though they were born
22 with a sex assigned at birth that differs from their core sense
23 of self, that deep conviction of who they are.

24 Q And is the goal ever to align a person's gender identity
25 with the sex assigned at birth?

1 A Could you repeat that?

2 Q Is the goal of treatment of gender dysphoria ever to align
3 a person's gender identity, so to change their gender identity,
4 to be congruent with the sex assigned at birth?

5 A Absolutely not.

6 Q Why not?

7 A It is considered unethical to do so.

8 Q Is there any evidence that it's possible to change someone's
9 gender identity to align with the sex they were assigned at
10 birth?

11 A There is not.

12 Q Is there any evidence that it can, in fact, be harmful to
13 try and change someone's gender identity to align with the sex
14 they were assigned at birth?

15 A The evidence is -- you know, again, it's hard -- this is
16 hard evidence to come by because the people who have, in fact,
17 committed suicide, many have never declared that their gender
18 identity differed, okay? So I'm going to make that stipulation.

19 Is there evidence to suggest harm? According to the
20 document that was a consensus document on defining conversion
21 therapy and how gender identity fits into that, the evidence is
22 that, yes, consensus among different disciplines suggests that
23 it is harmful to try and change someone's gender identity,
24 gender expression, and/or sexual orientation for that matter.

25 Q I would like to ask about some of the effects on the

1 interventions you mentioned on an adolescent's body.

2 A Okay.

3 Q So let's take, for example, a transgender boy, someone who
4 was assigned the sex of female at birth but whose gender
5 identity is male, that boy has been provided with puberty
6 blockers and hormone therapy, would he physically resemble, you
7 know, other kids who were assigned the sex of female at birth?

8 A Could you -- okay. We're talking about an individual
9 that's sex assigned at birth. Their gender identity is male.
10 What is their appearance?

11 Q Yes. A transgender boy who has been treated with puberty
12 blockers and hormone therapy --

13 A Yep.

14 Q -- could you describe that appearance?

15 A A transgender boy who has been treated with puberty
16 blockers and with testosterone treatment could potentially be
17 virtually indistinguishable when clothed from a -- from a boy --
18 we call it cisgender or a non-transgender boy.

19 Q And the same question about a transgender girl. Would a
20 transgender girl who has being treated with puberty blockers and
21 hormone therapy, could you describe her appearance?

22 A A transgender girl who has been treated with pubertal
23 suppression, so it's prevented the development of typical, what
24 we would say, male secondary sex characteristics, okay? She
25 would -- she would not have the broadening shoulders. She would

1 not have a deepened voice. She would not have facial hair, and
2 then if she were provided with estrogen, she would develop
3 breasts and should no one know, she would be virtually
4 indistinguishable when clothed from a cisgender girl.

5 Q And would a transgender girl who has been treated with
6 puberty blockers and hormone therapy, is it possible for that
7 girl to develop breasts?

8 A A transgender girl with puberty blockers and estrogen
9 therapy, yes.

10 Q Would she then be virtually indistinguishable from a non-
11 transgender girl from the waist up?

12 A From a non-transgender -- correct.

13 Q And what about a transgender boy who might have had the
14 double mastectomy we talked about?

15 A Correct.

16 Q Might he be virtually indistinguishable from a non-
17 transgender boy from the waist up?

18 A Correct.

19 Q Dr. Leibowitz, you testified earlier about the fact that
20 social transition can involve using sex-segregated spaces
21 consistent with one's gender identity.

22 A Correct.

23 Q Why is that important?

24 A I think people tend to brush over this issue as though it's
25 like something very simple. We all take for granted, just now I

1 went to the bathroom three times in the course of this morning,
2 and, you know, I looked for the men's room. I think that, you
3 know, over the course of a lifetime, every single time we go to
4 a bathroom, it -- if your gender identity and that which is your
5 sex and anatomy and sex assigned at birth are congruent, you
6 don't think twice as to the impact as to just using the men's
7 room or using the female -- or using the women's room. But for
8 an individual where their gender identity and their sex anatomy
9 are incongruent, particularly, of course, those who meet
10 criteria for gender dysphoria, it chips away and it erodes at
11 your psychological wellbeing and your wholeness.

12 It chips away at just feeling as though you are a
13 sense of who you -- that the world does not appreciate or
14 understand who you are, okay? That the world is designed for
15 who the genitals at birth -- you know, who you are based on the
16 genitals you are born with, and it doesn't really just account
17 for an identity. And I think that bathroom use or locker room
18 use, sex-segregated spaces, is only one aspect of what it's like
19 for a kid experiencing that. Kids experience such discomfort
20 walking around in society constantly on edge and wondering to
21 what degree am I -- who -- how am I being perceived? Who am I
22 being perceived by, as how by when, where, who, what, and why.

23 So I think that -- I know on went on and on about
24 this, but I really think that the bathroom issue, we use the
25 bathroom many, many times over the course of many years. So

1 that's another reminder each time chipping away at one's sort of
2 personal sense of dignity and self-worth.

3 Q And conversely, how does it affect an adolescent with
4 gender dysphoria if they are prohibited from using the
5 facilities that match their gender identity?

6 A Again, it sends a message to them that what they're
7 experience is, who they are is not -- it's not valid. It's not
8 an identity that is appreciated. It is society reducing them to
9 their genital.

10 Q And if an adolescent is barred from using facilities that
11 match their gender, are there any practical aspects that -- or
12 practical effects on that person's routine life?

13 A If -- can you repeat the question, please?

14 Q If an adolescent is barred from using facilities that match
15 their gender identity, might we see any effects on the practical
16 aspects of that person's routine life?

17 A Absolutely. So, for example, an adolescent who is barred
18 from -- who is essentially told, no, you cannot use this sex-
19 segregated space more frequently will hold their urine in. I
20 think certain data suggests that there are much higher rates of
21 not going to school, leaving school, cutting class, leaving the
22 school to find a bathroom that they can go -- that they feel
23 comfortable using where nobody knows them. So educational
24 effects, self-esteem and depression are, perhaps, not a direct
25 effect, but all part of the general gestalt of not being able to

1 use any type of facility that's consistent with your deep
2 conviction and sense of self as to who you are.

3 Q Have major medical or professional organizations taken a
4 position about transgender people and sex-segregated spaces?

5 A They, in fact, have.

6 Q And what position have they taken?

7 A Well, okay. I will name for some of them. So they
8 represent -- well, let me name them. So the ones offhand that I
9 know are the American Medical Association, the American
10 Psychological Association, and the American Psychiatric
11 Association, the National Association for Social Work, the
12 American Academy of Child and Adolescent Psychiatry, the
13 American -- one of the family therapy associations, the Society
14 for Health and Medicine. I think if you combined these
15 organizations and the others that have taken this position,
16 you're talking about hundreds of thousands of physicians in the
17 United States, and they take the position that individuals with
18 gender dysphoria should not be forced to use a restroom that is
19 not in accordance with their gender identity.

20 Q Has any medical or professional organization taken a
21 different view?

22 A There's a group that I have heard of that has taken a
23 different view.

24 Q When you say "a group," do you mean there is -- there are a
25 group of organizations?

1 A A self-identified -- a self-identified organization, yes.

2 Q There is one organization. Are you referring to the
3 American College of Pediatricians?

4 A I am.

5 Q How would you describe the American College of
6 Pediatricians?

7 A I've read about them a little bit. They are a group of a
8 few hundred clinicians, okay? A few hundred clinicians who have
9 been deemed by major medical organizations, such as the American
10 Psychiatric Association, as anti-LGBT. In reading about them,
11 I've -- online, and, of course, you know, I haven't met any
12 people, so it would be speculation on my part to really say what
13 the basis of their core values are, but in reading about them,
14 they have, perhaps, some faith-based elements to the core of how
15 they approach LGBT identities.

16 Q Have you ever gotten involved in asking schools to allow
17 your patients to use facilities consistent with their gender
18 identity?

19 A I've written letters to schools stating that it is, in my
20 opinion, the emotional best interest of a particular student to
21 use the gender -- the bathroom that is consistent with their
22 gender identity. I have not told the school here's what you
23 need to do with your policy.

24 Q And as a result of your involvement, have any of your
25 patients, in fact, been allowed to use facilities consistent

1 with their gender identity?

2 A Many of them have, yes.

3 Q And have -- have any of the patients not been allowed to
4 use those facilities?

5 A A number. It's not necessarily been out-stated -- it's not
6 been stated, no, that you can't; it's been more of a lack of
7 reaction than, you know, an outright no. It's a lot -- some of
8 that may be what the family's are telling me. You know, and
9 then I will have a conversation with the school and they will
10 navigate some discomfort with that, but there have been kids who
11 have not been provided access to the -- to the bathrooms, the
12 sex-segregated spaces in accordance with their gender identity.

13 Q And in those cases, you know, why do you think their
14 schools have not allowed those transgender students to use
15 facilities that match their gender identity?

16 A I think, largely -- and I sat in the chambers listening to
17 some of the testimony earlier, so I have a characterization of
18 what I think. I think, largely, there's a fear and a lack of
19 education involved. Overall, a lack of education. Similar to
20 the lack of education that takes place in the medical community
21 on how to confidently approach individuals who differ in sexual
22 orientation generate gender expression.

23 So if my own, you know, field of medical education is
24 lagging as of 2011, such that they needed to develop a
25 competency base set, how can we expect that society is caught

1 up? Society has not caught up, and I don't believe that there
2 is a pervasive, prevailing comfort with individuals who differ
3 in terms of their gender identity and their sex anatomy.

4 Q Are there ever cases where there is hostility or antagonism
5 from the school district?

6 A To me, or to the -- to the -- never to me. No one -- no
7 one has been hostile to me.

8 Q The hostility to the notion that transgender students
9 should be allowed to use facilities that match their gender
10 identity?

11 A Hostility is a broad spectrum. I would say, yes, there has
12 been hostility. The simple act of not allowing an individual to
13 use a gender -- a bathroom or a sex-segregated space based on
14 something that a psychiatrist who has gotten to know this
15 patient very well and stating, I predict -- of course, you know,
16 with certain degree, I can't 100 percent predict anything, but
17 if I'm -- my overall of getting to know a family and getting to
18 know a patient, and I'm feeling that after sufficient
19 exploration of these issues that is something that would be in
20 their best emotional -- in their best emotional interest, the
21 act of not recognizing that is -- certainly, one can consider
22 hostile.

23 Q Now, the Plaintiff in this case have asked a lot of
24 questions in discovery about youth who identify as gender fluid.
25 So I would like to ask you a few questions as well.

1 How do you define gender fluid?

2 A Gender fluid, as I pour liquid. Again, gender fluidity is
3 not a clinical term. You ask certain adolescents what it means
4 to them, and I cannot predict how they will answer. From my
5 understanding among LIFe serves that I'm on, among just the
6 various discussions I've been involved in, and this somewhat
7 consumes my life since I work in this field, it describes a
8 temporal relationship.

9 So it describes kind of feeling a certain gender at a
10 certain moment in time, and then switching, and then switching,
11 perhaps, back. So it's a temporal relationship with gender that
12 some adolescents now are experiencing or declaring.

13 Q Out of the hundreds of young people with gender-identity
14 issues that you've treated, how many have declared gender
15 fluidity as their gender identity?

16 A A handful.

17 Q And how do you address the needs of gender fluid people to
18 use sex-segregated spaces like restrooms?

19 A I say it's complicated. You know, I would say that most of
20 the kids who present with this notion of gender fluidity, by
21 definition, if they're not meeting criteria for gender
22 dysphoria, okay, so that deep conviction and sense of self that
23 I'm referring to or being another gender persistently for at
24 least six months and longer, so they're not meeting that, the
25 distress that most of those kids experience is less, because

1 they, in their minds, know that their gender may change at
2 another point in time. So they're usually not coming to me with
3 requests to use another bathroom.

4 Q Another term the Plaintiffs have asked about, in this case,
5 is gender non-binary.

6 A Okay.

7 Q So I would like to ask you: How do you define gender non-
8 binary?

9 A So, again, gender non-binary, you ask an adolescent and you
10 may get a different response. My understanding of gender non-
11 binary is an individual whose gender does not fall into the
12 dichotomous male/female categories.

13 I would like to mention that the DSM-5 criteria that I
14 alluded to earlier, have now moved away from the previous
15 iteration, the gender identity disorder in the DSM-4, which was
16 based on dichotomous iterations, because these group of -- the
17 task force consisting of experts who, in my opinion, are
18 profound experts, they recognize that gender is dimensional in
19 nature.

20 So right now, the DSM-5 would say we're -- because
21 there is a different gender from the gender assigned at birth to
22 meet criteria for gender dysphoria, they're -- one can
23 technically meet -- identify as somewhere in the middle.

24 Q Out of the hundreds of young people with gender-identity
25 issues that you've treated, how many of identified as gender

1 non-binary?

2 A Again, you know, this is new in terms of how people are
3 presenting; so not many, a handful.

4 Q How do you address the needs of gender non-binary people to
5 use sex-segregated spaces like restrooms?

6 A Okay. So, again, from my role as the clinician, it is not
7 up to me to determine what bathroom someone uses. It is not up
8 to me to determine, you know, what -- what gender they are;
9 whether if they call themselves gender non-binary. It's up to
10 me to determine whether they meet criteria for gender dysphoria.
11 There are individuals who are gender non-binary who meet
12 criteria for gender dysphoria.

13 So, for example, if one wants to use a scale of one to
14 ten and someone is a six, so one is female, ten is male, and
15 they were born female and they are a six on the male spectrum,
16 that could be considered gender non-binary -- I'm just giving
17 you an easy way of understanding it -- and for them, being
18 recognized as female or experiencing society as female is
19 disturbing to them. So making decisions with them and sitting
20 down to them, how does using a certain bathroom affect you, and
21 exploring this at length, not making a willy-nilly decision?

22 So, you know, certain kids with gender non -- who
23 identify as gender non-binary, are not gender dysphoric and it
24 just doesn't come up. They don't -- for them, the issue is how
25 to deal with a binary system and dealing with their non-binary

1 identity. In most situations, it just simply doesn't come up.

2 Q Is it ever appropriate for someone who identifies as gender
3 non-binary to use, perhaps, a single-user facility?

4 A Is it ever appropriate? If that's the facility that they
5 feel most comfortable using, that's not going to cause them
6 sufficient emotional distress, then I would say, yes, it would.

7 Q And of the young people with -- that you've treated that
8 identity as gender non-binary, have any of them, in fact, chosen
9 to use single-user facilities?

10 A I think most. If I would -- I have not, you know, written
11 it down, but I would say most of those kids would elect to use a
12 single stall or a single-user restroom or facility.

13 Q Now, the Plaintiffs have submitted a rebuttal report from
14 Dr. Allan Josephson --

15 MS. MAR: And for the benefit of the Court, it's
16 included in your binder as Exhibit I-7.

17 THE WITNESS: Oh, I don't have that.

18 MS. MAR: May I approach the witness?

19 THE COURT: You certainly can.

20 THE WITNESS: Thank you.

21 BY MS. MAR:

22 Q Dr. Leibowitz, have you reviewed Dr. Josephson's report?

23 A I have.

24 Q Now, as an initial matter, is Dr. Josephson someone you are
25 familiar with as a contributor to the field of gender dysphoria

1 in adolescents and children?

2 A No.

3 Q Had you ever heard his name before you reviewed this
4 report?

5 A Yes.

6 Q When did you first hear his name?

7 A I reviewed his report when he was involved in the same
8 gender identity, transgender bathroom case for North Carolina.

9 Q And do you generally know the people who work in this
10 field?

11 A Yes.

12 Q How is that?

13 A I attend conferences that I've been doing, so pretty much
14 since I began doing the work. I am on LIFE serves. I have
15 research collaborators. I am going to conferences both for, you
16 know, the Academy. I run a committee. I have people applying
17 to my committee that I have to read all of their -- their CVs to
18 determine if they -- you know, where -- how much of an expert
19 they are and how much they can contribute. It's safe to say I
20 know, at least within the field of child psychiatry, of which
21 Dr. Allan Josephson is, I know a substantial majority of the
22 individuals doing gender identity work.

23 Q And has Dr. Josephson's name come up in any of those
24 contexts that you mentioned?

25 A Never.

1 Q Do you keep up with research about gender dysphoria in
2 children and adolescents?

3 A Sadly, my phone vibrates quite frequently, and I'm reading
4 pretty much as much as possible, yes.

5 Q Has Dr. Josephson's name come up as a contributor to
6 research in the field of gender dysphoria in children and
7 adolescents?

8 A I have not seen one publication with his name on it.

9 Q What's your reaction to Dr. Josephson's opinions about the
10 treatment for gender dysphoria?

11 A I think that he's clear that he is not a mainstream thinker
12 and doesn't accept the recognized standards of care that I told
13 you hundreds of thousands of physicians in the country recognize
14 as the standards of care.

15 Q All right. I would like to direct your attention to
16 paragraph 26 of Dr. Josephson's report.

17 A Yep.

18 Q Dr. Josephson writes there, quote, "A transgender
19 individual meets the technical, psychiatric criterion and for
20 maintaining a delusion, a false, fixed belief minimally
21 responsive to reason."

22 What's your response to that?

23 A So someone who meet -- who is delusional, okay, would be
24 psychotic. Okay, delusions fall or are subsumed by the
25 psychotic disorder chapter. Why need a chapter entirely unto

1 its own for gender dysphoria when you have an entire chapter for
2 psychotic disorders; schizophrenia, schizoaffective disorder, a
3 delusional disorder?

4 So just beyond that, to say that one's sense of
5 themselves is their gender identity is false or is not accurate,
6 or what he calls "a false, fixed belief minimally responsive to
7 reason," could not be further from the truth, and I would be
8 very hard-pressed to find another child psychiatrist that's
9 Board certified or ascribes to any of the practice parameters
10 put out by the American Academy of Child and Adolescent
11 Psychiatry who would sign with good conscience that they believe
12 that to be true.

13 Q A few paragraphs down, in paragraph 28, Dr. Josephson
14 compares the distress of gender dysphoria to a student's anxiety
15 about an algebra exam.

16 A Yes.

17 Q What's your reaction to that?

18 A Dr. Josephson clearly has no experience working with
19 patients who present with gender-identity concerns. If he is --
20 if he is comparing a discrepancy between one's mind and body to
21 the distress over a grade on algebra, there is no diagnosis in
22 the DSM called "I failed my algebra exam dysphoria." I invite
23 Dr. Josephson to, perhaps, meet more trans youth and work with
24 them and see if his opinion would change on that subject.

25 Q Moving ahead in the report to paragraph 35, Dr. Josephson

1 talks about the need for a thorough exploration and he says,
2 quote, "In the current treatment environment, psychotherapeutic
3 work is often short-circuited, an immediate rush to affirm the
4 gender-identity assumptions of the transgendered patient without
5 due deliberation."

6 How do you respond to that?

7 A I say that's baseless and completely -- that's makes a huge
8 assumption and undermines the very essence of what I do every
9 day.

10 Q Do you agree that there is often an immediate rush to
11 affirm the gender identity without due deliberation?

12 A No psychiatrist in good conscience would accept someone who
13 presents in their office and states this is what I'm feeling in
14 an adolescent immediately without taking the time to explore and
15 understand that person and their family and the context in which
16 they present.

17 Q A few paragraphs above that passage in paragraph 31,
18 Dr. Josephson cites some statistics, and he says, "At the end of
19 adolescents, only a distinct minority persist in desiring to be
20 the opposite gender. In natal males, persistence ranges from 2
21 to 30 percent, and for natal females, persistence ranges from 12
22 to 50 percent, thus efforts to use hormones or surgery to
23 postpone or prevent puberty or to align gender characteristics
24 opposite to genetic sex prior to adulthood poses grave risks."

25 What's your response to that?

1 A As a child and adolescent psychiatrist, we are trained in
2 developmental aspects of approaching children and teenagers.
3 Dr. Josephson's interpretation of the studies demonstrates that
4 he conflates childhood with adolescence. The studies that he's
5 talking about in terms of persistence rates are specific to
6 children into early adolescence, not to the end of adolescence.
7 He ignores the other data that exists that has been put out on
8 persistence rates of an identity for when gender dysphoria
9 emerges or intensifies with pubertal changes.

10 The fact that he would conflate childhood and
11 adolescence as a child and adolescent psychiatrist on gender-
12 identity issues is alarming to me.

13 Q Now, with respect to sex-segregated spaces, Dr. Josephson
14 writes in paragraph 41, "We do not know the effects of requiring
15 transgender individuals to use facilities that match their
16 genetic sex rather than their perceived gender identity."

17 How do you respond to that statement?

18 A It makes me question to how many patients Dr. Josephson has
19 encountered. For him to say that we do not know the effects
20 clearly demonstrates a lack of understanding that we do know the
21 effects. I can tell you story after story after story
22 without -- if I wasn't going to be violating HIPAA, of the
23 patients that I see explaining to me the effects of not using
24 the bathroom that -- or the locker room that they feel is most
25 consistent with who they are.

1 And so, they're holding it in; they are not going to
2 school; they're dropping out of school; they're being
3 homeschooled. There's plenty of effects. One needs to simply
4 see the kids and have the sufficient clinical experience to
5 gather that information.

6 Q And Dr. Josephson has suggested that the specific concerns
7 about not using the bathroom, that you just described, for
8 example, holding it, apply equally to non-transgender kids who
9 are uncomfortable using facilities as transgender children --

10 A Right.

11 Q -- as they do to transgender students who are excluded from
12 facilities.

13 Now, what do you say to that?

14 A Well, you know, of course, like, I can't speculate on how
15 someone who is not transgender would react to what facility they
16 use, or how they're -- who they encounter in the bathroom, but
17 what I would say, is that the non-transgender kids do not walk
18 around every single day wondering how they are perceived, where
19 to go, how to act. They have absolutely no idea what it's like
20 to live and walk in the shoes of a transgender adolescent given
21 society's lack of comfort on this issue. So to equate the
22 distress seems to be a false equivalency.

23 Q Dr. Josephson has also raised concerns about adolescents
24 being exposed to what he describes as different sex nudity.

25 A Okay.

1 Q What is your reaction to that?

2 A Which numbers are you referring to?

3 Q You can see the discussion in paragraphs 42 and 43.

4 A Oh, yes. Okay. Oh, yes. His feelings about being exposed
5 to nudity. Three things come to mind. I think that it's
6 correct to say that anybody can be uncomfortable with nudity.
7 So boys are -- can be uncomfortable with other boy's nudity;
8 girls can be uncomfortable with other girls' nudity, and there
9 is a spectrum within that discomfort that exists that neither he
10 nor I could quantify.

11 Two, I would say that Dr. Josephson, I would imagine,
12 one can -- one -- he would agree, and I would say that if you
13 took a boy who was exposed to a transgender girl -- I'm sorry.
14 If you put breasts, a treated transgender girl into a locker
15 room with other boys, which is what I believe the current policy
16 advocated by the Plaintiffs is trying to do, that would be
17 equally as distressing for those boys.

18 So a girl with breasts who was born a boy being in the
19 boys' locker room, and similarly, if you took a treated
20 transgender boy who has a beard, who has a deep voice, whose
21 body musculature has changed, and you put them into the girls'
22 locker room and expose some nudity to those non-transgender
23 girls, that could be discomfoting to them as well. And so,
24 essentially, this just sort of negates the whole idea that the
25 treatments exist, and discomfort can happen for anybody for

1 anywhere.

2 I think that this is really a matter of -- not about a
3 matter of discomfort with the nudity and more about forcing an
4 individual to be somewhere that -- that they -- that's just
5 incongruent with their deep conviction of who they are, and not
6 about giving people the choice should they feel uncomfortable
7 with nudity in general.

8 Q And at the start of your response, I think you mentioned
9 there were three reactions you had to that passage, and I think
10 we heard from you one and two. Was there -- was there a third
11 reaction?

12 A My third thought would be just more that, you know, it's --
13 we're -- we're neglecting to feel about -- like, when we're
14 thinking about nudity, we're making presumptions about nudity,
15 and there's -- I heard on the testimony today, you know, the
16 testifying today that there was discomfort around tampon use
17 with other girls. So it's very clear that nudity itself could
18 be a spectrum -- nudity can elicit a discomfort, whether it's
19 boy, girl, some combination thereof, and I think those would be
20 my -- my points I would like to make.

21 Q And can nudity elicit some discomfort also among
22 transgender students?

23 A Oh, absolutely. Oh, well, so nudity -- I mean, if we're
24 talking about nudity for transgender students, we're talking
25 about kids who do their very best to conceal their anatomy as

1 much as they possibly can, okay? By definition of gender
2 dysphoria, these are kids that want to be or perceived or
3 identify as the gender that they are. They are binding their
4 chests to flatten it so that nobody knows they have breasts,
5 okay? They are wearing breast paddings to try and simulate
6 having breasts, if they don't have them yet. They're doing
7 everything in their power to be perceived as the gender that
8 they are.

9 So I just think that you have -- when you put these
10 types of kids -- my overarching thought is, when you put these
11 types of kids into sex-segregated spaces, you're -- you're
12 putting -- you're putting these kids at -- that don't want
13 anyone to know who they were and what their history was. So
14 to think that those kids would elicit this massive, traumatic
15 response to others just doesn't appreciate the very essence of
16 who they are.

17 And, again, like I said, this is not a -- this is not
18 chump change. We're talking about a substantial amount of
19 individuals in the United States and the World that are
20 experiencing this.

21 Q Dr. Leibowitz, what's your overall reaction to
22 Dr. Josephson's report?

23 A I find it disturbing. I find it extremely disturbing. I
24 find it -- my heart goes out to any of the kids, I think he said
25 he's been in some capacity involved with 50 or so kids in his

1 lifelong career, 50 over however many thousands of kids he's
2 treated who have gender issues. I hope that they -- that their
3 psychological wellbeing and psychiatric outcomes are optimized
4 as best as possible.

5 That's -- that's my hope, and I hope that he turns to
6 his colleagues in the American Academy of Child and Adolescent
7 Psychiatry, reads the practice parameters that have been
8 published, and I also hope that when he's examining other
9 individuals -- he's a Board -- a Board examiner for other
10 doctors to become Board certified, of which I am. I hope that
11 there's no gender identity patient involved in that process,
12 because it would be awful if a well-meaning, competent, child
13 psychiatrist was not Board certified based on Dr. Josephson's
14 interpretation of a lack of science.

15 Q Thank you, Dr. Leibowitz.

16 A Thank you.

17 MS. MAR: I have nothing further at this time.

18 THE WITNESS: Thank you.

19 THE COURT: Thank you very much, Counsel.

20 Why don't we take a ten-minute recess, and then we'll
21 begin with the cross-examination.

22 MR. LEVIN: Your Honor, as you know, my witness has to
23 be out of here by 4:00. I don't see that happening. Could I
24 suggest that we have a trial deposition at a date and time
25 convenient to all counsel and to the witness? We're already

1 holding the record open for the expert witness of the Plaintiff,
2 and I think that that would allow the Intervenor to be able to
3 present their second witness today and close the record, except
4 for these two witnesses.

5 THE COURT: What is the position of the Plaintiffs?

6 MR. McCALEB: No objection, Your Honor.

7 THE COURT: And the position of the Intervenors?

8 MS. MAR: No objection.

9 THE COURT: Very well. That's what we'll do. And,
10 accordingly, your witness can be excused for the day.

11 MR. LEVIN: Thank you, Your Honor.

12 THE COURT: We'll stand in recess for ten minutes.

13 THE CLERK: All rise.

14 (Break taken from 2:40 p.m. to 2:51 p.m.)

15 THE CLERK: All rise. The United States District
16 Court is again in session. The Honorable Edward G. Smith
17 presiding.

18 THE COURT: You may be seated. Thank you.

19 The Court is called to order. All the parties
20 previously present are, once again, present. The witness is on
21 the witness stand.

22 Counsel, you may cross-examine the witness.

23 MS. MAR: Your Honor, before Mr. McCaleb begins his
24 cross, I just wanted to bring one scheduling matter to the
25 Court's attention.

1 THE COURT: Yes, Counselor.

2 MS. MAR: That is that, Dr. Leibowitz, unfortunately,
3 has to leave today at 3:30 to catch a flight back to Columbus.
4 He's already on the last flight of the day. I understand from
5 opposing counsel that may not be enough time to complete his
6 cross, and so, in conferring over the recess, we thought we
7 could, perhaps, suggest to the Court, either we could begin the
8 cross today and get through what we're able to get through with,
9 you know, the option to pick it up again at, you know, another
10 date that we'll work out amongst ourselves, either here in
11 person or by video.

12 Or if Your Honor prefers, we could, you know, defer
13 the cross entirely to some other date; although, you know,
14 unfortunately, I think that we may have lost Dr. Faidley, so I
15 don't know that we would be able to slide in another witness,
16 although, we do intend to call one more witness on behalf of
17 Intervenor. So those are --

18 THE COURT: I think my preference would be that we get
19 as much of the cross-examination done as possible. If we can't
20 complete it by 3:30, we will let this witness go, and we will
21 schedule another day. I mean, I could do it tomorrow, but I
22 know it's very difficult to get counsel's schedules together.
23 We'll get another date and have the doctor come back and
24 complete his testimony and any redirect there might be, and, of
25 course, Mr. Levin has an opportunity to question him if he so

1 chooses.

2 MS. MAR: Very well. Thank you, Your Honor.

3 THE COURT: Certainly.

4 MR. McCALEB: Thank you, Your Honor.

5 THE COURT: You're welcome, Counselor.

6 CROSS-EXAMINATION

7 BY MR. McCALEB:

8 Q Good afternoon, Dr. Leibowitz. How are you?

9 A Hi, Counsel.

10 Q You're appearing today on behalf of the Pennsylvania Youth
11 Congress; is that correct?

12 A Yes.

13 Q And the Pennsylvania Youth Congress is an organization that
14 expressly purposes to advocate on behalf lesbian, gay, bisexual,
15 transgender, and queer youth; is that correct?

16 A Yes.

17 Q Dr. Leibowitz, in what states are you currently licensed to
18 practice medicine?

19 A Ohio. My Illinois license expires any day.

20 Q Okay. But it's current?

21 A Yes.

22 Q Do you obey the licensing rules and laws of your two
23 licensed states, Illinois and Ohio?

24 A I do.

25 Q When is the last time you reviewed the state licensing

1 rules and code of conduct for your profession?

2 A For my profession?

3 Q Yeah, medical doctor.

4 A Well, I -- a medical doctor, when I signed -- when I signed
5 up for the license a year ago in applying for it for Ohio.

6 Q Are you a member of the American Psychiatric Association?

7 A No. I was.

8 Q How long ago was that?

9 A Several years ago. I let my membership lapse.

10 Q Why did you let your membership lapse?

11 A I didn't want to pay for both the American Academy of Child
12 and Adolescent Psychiatry and the American Psychiatric
13 Association, and child issues are more relevant to my field of
14 practice.

15 Q Thank you. Do you know what forensic testimony means?

16 A I'm not a forensic psychiatrist, so, no.

17 Q Okay. Have you ever reviewed the rules and guidelines for
18 forensic testimony by a psychiatrist?

19 A Nope.

20 Q And you testified earlier, you -- that you had appeared in
21 the North Carolina case as an expert on gender-identity matters?

22 A I did not appear. I submitted a declaration.

23 Q Okay. Thank you. Any other cases you were involved in on
24 gender-identity issues?

25 A Nope.

1 Q Do you testify in front of legislatures on behalf of
2 gender-identity issues?

3 A I testified in front of the Illinois State Senate, as well
4 as the Illinois House of Representatives on a conversion therapy
5 bill that was ultimately signed into law.

6 Q Okay. And your practice is currently 100 percent related
7 to gender-identity issues, correct?

8 A Not 100 percent clinical; 100 percent related to that, yes.

9 Q If I recall your deposition testimony correctly, your
10 clinical practice is a minor part of your current --

11 A 55 percent --

12 Q -- profession?

13 A -- of my time spent is clinical practice since November.

14 Q Okay. Thank you.

15 A I tend to see patients more than I'm obligated to. So I
16 would actually estimate higher in actuality.

17 Q Are you aware of some history in psychiatry of various
18 theories that were advanced and were only found to be basically
19 harmful to patients?

20 A Could you elaborate?

21 Q Well, for example, frontal lobotomies were once an accepted
22 practice for dealing with certain psychiatric conditions. Are
23 you familiar with the history of frontal lobotomies?

24 A I anecdotally recall that being a challenge.

25 Q Do you remember what happened with those?

1 A I don't.

2 Q What about recovery -- excuse me -- recovered memory
3 therapy?

4 A I don't.

5 Q You have no knowledge of that?

6 A No substantial knowledge, no.

7 Q Do you have a rough idea of what the recovered -- recovered
8 memory therapy was?

9 A Nope.

10 Q What about multiple personality therapy?

11 A Multiple personality therapy? I've heard of multiple
12 personality disorder, which is a previous iteration of
13 dissociative identity disorder, but I do not know of multiple
14 personality theory, no.

15 Q Okay. Are you aware of some limitations on clinical
16 judgment of clinicians?

17 A I think every single clinician has limitations.

18 Q Are you aware of researchers who have delved into the
19 limitations on the clinical judgment?

20 A I don't have a familiarity with the -- with the research on
21 clinical judgment.

22 Q I'm sorry; my middle-aged ears. Could you repeat that?

23 A I don't have familiarity with the literature of clinical
24 judgment of providers.

25 Q So are you aware of research on the limitations of

1 physicians, such as yourself, in detecting false statements by
2 patients?

3 A Literature on that? I'm not aware of the literature on
4 that.

5 Q Or research.

6 A No.

7 Q Do you know how accurate are physicians in catching false
8 statements by patients?

9 A I don't know how they -- how one could presumably come up
10 with a number that generalizes to everybody. No, I don't know a
11 number. No.

12 Q Are you familiar with the research of Paul Meehl,
13 M-e-e-h-l?

14 A Nope.

15 Q Are you familiar with the research of Robin Dawes,
16 D-a-w-e-s?

17 A Nope.

18 Q Are you familiar with the research of Howard Garb?

19 A No.

20 Q Or Richard McNally?

21 A Nope.

22 Q Do you believe patients have a right to discuss the risks
23 and benefits of treatment prior to -- prior -- excuse me. Do
24 you believe patients have a right to discuss the risks and
25 benefits of the treatment recommended to them as part of an

1 informed-consent process?

2 A Absolutely, yes.

3 Q What information must the provision -- the physician
4 provide to obtain proper informed consent?

5 A When we're providing informed consent, we need to both
6 explain what it is we know; what the relative risks are for what
7 we know; what the benefits are; what the alternatives treatments
8 might be, and also, when I'm giving informed consent or obtaining
9 informed consent from a family, I'm also discussing what we as a
10 field largely believe we do not know. And, of course, we cannot
11 state what we don't know.

12 Q Do you agree that violations of a patient's informed-
13 consent rights are a form of malpractice?

14 A I mean, that's a very specific question. I believe that
15 all patients need to be -- need to be provided -- all patients
16 need to provide informed consent when they're being recommended
17 an intervention, absolutely, and not -- to not do so, would
18 violate ethical practice. Malpractice, I'm not -- you know,
19 malpractice is not up to me to decide. I'm not a lawyer or an
20 attorney. You know, malpractice is not a physician to decide if
21 I've -- the courts decide malpractice, not -- I don't decide who
22 has engaged in malpractice.

23 Q So did you bring a copy or do you have a copy of the
24 consent form that you use in your practice with you?

25 A No, I did not.

1 Q Do you have a consent form that you use in your practice?

2 A Absolutely.

3 Q Has your informed-consent form been reviewed and approved
4 by a national expert in medical ethics?

5 A It's been reviewed by our Hospital Ethics Board.

6 Q Who is the chairman of that --

7 A I do not know.

8 Q -- Board?

9 A I do not know. Again, these are used in the endocrine
10 department, not in the psychiatry department. So the
11 endocrinologists consent forms are.

12 Q So it's the endocrinologist's consent form, not yours?

13 A It's a multi-disciplinary consent.

14 Q So when that consent form is executed, is your name on the
15 form?

16 A No.

17 Q So it's not your form?

18 A We are a clinic that has multi -- that is multi-
19 disciplinary. So my --

20 Q How do you document that you have met with a patient,
21 walked through the factors that you discussed are required for
22 informed consent, properly obtain that informed consent, how is
23 that documented?

24 A I type it.

25 Q And is that in the patient's record then?

1 A My job, as part of the team, is to accurately diagnose
2 gender dysphoria.

3 MR. McCALEB: That's a non-responsive question. I
4 would ask to be stricken.

5 BY MR. McCALEB:

6 Q So do you have any documentation showing that you walked
7 through those necessary factors of informed consent with a
8 specific patient?

9 A When the clinic -- the documentation goes into a medical
10 record when a patient is recommended and offered a treatment,
11 yes.

12 Q And that documentation lays out the factors that you
13 discussed?

14 A In more detail, but, yes.

15 Q Does the patient sign off on that informed consent
16 statement?

17 A The parent, if the patient is a minor. I believe the
18 patient will also assent as well.

19 Q And that's documented in the records you are keeping?

20 A Yes.

21 Q Are you familiar with what's called the Nuremburg Code?

22 A Oh, I've heard of it. I need to review it when I -- my
23 maintenance of certification comes up. So I could not state to
24 you right now what it -- what it is.

25 Q When was the last time you reviewed the Nuremburg Code?

1 A I never review the code. A psychiatrist typically just
2 would be told what it is, and that is it. But I completely
3 forgot what it is.

4 Q So do you consider it unimportant to your practice to have
5 a familiarity with the Nuremburg Code?

6 A I can't consider something unimportant if I don't remember
7 what it is.

8 Q Are you aware that a declaration of Helsinki from 1964?

9 A No.

10 Q Are you aware of the US Code of Federal Regulations, Title
11 45, Part 46, subpart D, relating to the treatment of children?

12 A No.

13 Q Doctor, have your state licensing boards formally reviewed
14 the propriety of your treatment methods, including your consent
15 procedures?

16 A I don't -- I do not know the answer to that question.

17 Q Do you feel that you were sufficiently trained in medical
18 ethics to be obtaining informed consent?

19 A I'm Board certified in child psychiatry. That's up to the
20 Board to decide whether I'm sufficiently trained or not.

21 Q Doctor, have you published any research on the ethical
22 requirements of informed consent in medicine?

23 A No.

24 Q Can you cite for me any psychological or psychiatric
25 research on the limitations of adolescents to give proper

1 informed consent?

2 A No specific literature, no.

3 Q Doctor, have you informed your patients of the limitations
4 of adolescents to form competent judgments when you're
5 discussing informed consent?

6 A Do I tell the adolescent that they're not competent to make
7 a decision? Is that the question?

8 Q No. Do you discuss the competence of -- excuse me.

9 When you are engaging with an adolescent patient, how
10 do you factor in the limited capacity of an adolescent to make
11 decisions?

12 A I enter it into my formulation as to how -- how advanced I
13 find their thinking to be. I'm considering an adolescent's
14 emotional development and cognitive development in every kid I
15 see.

16 Q Would you agree with a statement the APA made in a court
17 case in 2004 that said Adolescent decision-makers on average are
18 less future oriented and less likely to consider properly the
19 future consequences of their actions?

20 A Yes.

21 Q And in that same court case, do you agree with the APA's
22 conclusion that neuropsychological research demonstrates that
23 the adolescent brain has not reached adult maturity?

24 A Yes.

25 Q Would you further agree with the APA's conclusion that "The

1 unsettled nature of adolescent personality confounds attempts to
2 make sufficiently reliable determinations about the character
3 and future behavior of adolescent defendants"?

4 A I would need more context on that.

5 Q This was in a court case involving a death penalty, and I'm
6 sorry I left off the last two words. Let me re-read that for
7 you.

8 The APA took the position in respect to adolescents in
9 a case involving the death penalty and whether it should apply
10 to them. "The unsettled nature of adolescent personality
11 confounds attempts to make sufficiently reliable determinations
12 about the character and future behavior of adolescent defendants
13 to support execution."

14 A Okay.

15 Q You would agree with that?

16 A It sounds like the APA was talking about adolescents who
17 committed crimes. I would agree, yeah.

18 Q And do you agree with the APA's conclusion that
19 "Individualized capital sentencing cannot correct for the
20 heightened risk of error produced by immature, adolescent'
21 decision-making"?

22 A Can you -- my non-mid-aged brain is having a hard time
23 following that.

24 Q Again, this is a conclusion by the APA in the context of
25 capital sentencing where they said that process could not

1 correct what they described as "the heightened risk of error
2 produced by immature, adolescent decision-making."

3 A If the APA says it, I would largely ascribe to it being a
4 valid statement. Yeah.

5 Q You have agreed with a number of physicians indicating that
6 adolescents have immature decision-making, that they are not
7 fully mature adult brains. Do you disclose these things to
8 parents when you are pursuing informed consent for their
9 adolescent child?

10 A It depends on what we're talking about.

11 Q If you are recommending a course of treatment to alleviate
12 gender dysphoria?

13 A Gender dysphoria is an identity disturbance. This is not
14 about simply going and choosing to, you know, do something like
15 I want to take a trip to Boston to marry my new social media
16 love interest. So, you know, there's a big difference between
17 adolescents making decisions about behavior and comparing that
18 in a false-equivalent way to an identity.

19 Q You work as part of a multi-disciplinary team of
20 professionals in treating gender dysphoria, correct?

21 A Correct.

22 Q Would the endocrinologist's team -- excuse me -- would the
23 endocrinologist on that team proceed with his/her treatment
24 without a psychological affirmation or a recommendation from you
25 that the patient needed that treatment?

1 A No, they wouldn't.

2 Q So the endocrinological treatment is contingent on your
3 psychological -- excuse me, psychiatric input?

4 A In our clinic, yes.

5 Q You mentioned earlier, Doctor, that you could tell story
6 after story of patients involved in gender-dysphoria situations.
7 Have you completed, published any 30-year follow-up studies on
8 patients who have gone through gender-affirmation treatment?

9 A That would have required to me to have been nine when I
10 started that, so, no.

11 Q Well, any ten-year follow-up studies?

12 A Any ten-year follow-up studies? Again, I was Board -- I've
13 completed my training in 2010, so, no.

14 Q So have you --

15 A But I know the folks that have.

16 Q Have you completed any five-year follow-up studies on
17 patients going through gender affirmation using your treatment
18 methods?

19 A I'm not a researcher.

20 Q So you've conducted no formal follow-up studies on your
21 patients for even a five-year period?

22 A It's -- there's no obligation to conduct research on our
23 patients when providing clinical care.

24 Q Have you conducted and published any research that assessed
25 the differences in stress experienced by a patient who goes

1 through your recommended therapy versus other alternative
2 therapies?

3 A These aren't my recommended therapies. These are standards
4 of care recommended therapies.

5 Q And that standard of care rests primarily in the WPATH
6 guidelines?

7 A And the Endocrine Society guidelines, and the American
8 Academy of Child and Adolescent Psychiatry's practice parameter,
9 yes.

10 Q Earlier, you stated that it was unethical to treat a child
11 so as to align the gender identity with their sex.

12 A Uh-huh.

13 Q Meaning, their internal perception would be aligned with
14 their somatic state, and you rested that in, I believe the WPATH
15 guidelines; is that correct?

16 A No. First of all, by "somatic state," what are you
17 referring to?

18 Q The physical gonads.

19 A Their physical anatomy?

20 Q Yes.

21 A Okay. No. I was referring to the American Psychological
22 Association consensus statements on defining conversion therapy
23 and apprising the evidence across development.

24 Q So the WPATH guidelines don't speak to the ethics of that
25 type of therapy; is that your position?

1 A My -- I would have to review the specific section. That's
2 in children, again. You used the word child. So I'm more, you
3 know, prepared in adolescents today, but -- so I would have to
4 go review the subsection in the guidelines on children.

5 Q When I spoke to you about the persistence of gender
6 identity in the deposition, you referred to six or seven
7 studies; approximately, 250 kids total.

8 A Uh-huh.

9 Q And your statement at that time was that you cannot really
10 infer from that limited sample the validity of persistence of
11 gender identity in children; is that correct?

12 A Because you -- you know, the different studies took place
13 over multiple periods of time, so -- and looked at different
14 types of kids; so it would -- making a broad-sweeping conclusion
15 about it would not be accurate, and that is my stance then and
16 my stance today.

17 Q So that's a yes?

18 A Yes.

19 Q What's the probability that your treatments might
20 eventually cause harm to some of your patients?

21 A I cannot answer that question. Does any doctor know the
22 probability that their treatment can cause harm to their
23 patient, like quantify that? Do you know of any other?

24 Q So there is -- when you are recommending a course of
25 treatment that requires a -- that you would recommend -- excuse

1 me. Let me rephrase that question.

2 A Okay.

3 Q When you've recommended a course of treatment for a gender
4 dysphoric student to go through social transition and enter
5 hormone therapy, what probability is there that that recommended
6 treatment might eventually cause harm to your patients?

7 A That's an -- I couldn't give that -- an answer to that.

8 Q So you don't have any --

9 A I do not know.

10 Q -- objective criterion to estimate that by?

11 A Every decision that we make requires a risk and benefit
12 analysis of providing an intervention that has criterias
13 dictated by the standard of care versus the withholding of that
14 intervention, and there's an analysis that takes place in a
15 discussion amongst team members so that no one person has full
16 control of any one child or adolescent's life, and --

17 Q And can you --

18 A -- there --

19 Q Were you finished with your answer?

20 A I don't think anything more I have to say will satisfy your
21 question.

22 Q And referring to the standards of care that you just
23 referenced, what peer-reviewed, published, randomized,
24 controlled studies support those standards of care?

25 A So there's a lot of emphasis on needing to have peer-

1 reviewed, randomized, control studies in order for an
2 intervention to be deemed ethical, at which I think does not
3 apply to multiple areas of mental health.

4 So you can't do a randomized-control trial by --
5 because it's unethical, and IRB would need to approve that
6 control trial, and by putting certain kids into an arm of
7 withholding an intervention and others into an arm of providing
8 the intervention and seeing how they do when there's plenty of
9 data to suggest that not doing a certain intervention will cause
10 harm, no IRB would approve a study that you're suggesting to
11 discredit the science.

12 Q So you have a recommended course of treatment which is
13 immune from any controlled and randomized research to evaluate
14 its validity?

15 A There is plenty of recommended treatments that are not --
16 that don't have backing of randomized-control trials in mental
17 health. We do our best to help our patients.

18 Q Let me ask a series of questions that call for a number as
19 the answer. What's the total dollar amount in research grant
20 funding from the National Institute of Mental Health you have
21 received as a principal investigator?

22 A Zero.

23 Q What's the total dollar amount in research grant funding
24 you've received from the National Institutes of Health as a
25 principal research investigator?

1 A Again, zero.

2 Q What's the total dollar amount in research grant funding
3 you've received from the National Science Foundation as a
4 principal research investigator?

5 A Zero. I haven't received any funding from any institute.
6 So if there's more, the answer will be zero.

7 Q Have you ever served as a principal research investigator?

8 A I'm about to be named as one.

9 Q About to be named.

10 A About to be named.

11 Q What's the total number of years that you have served as a
12 tenured, full professor at any medical school, college, or
13 university?

14 A Zero. And clinicians these days are not typically put on a
15 tenure track, and that's very institution specific.

16 Q What's the number -- how many years, if any, have you
17 served as a tenured associate professor at any medical school,
18 college, or university?

19 A None of the institutions, Harvard Medical School,
20 Northwestern University, the Feinberg School of Medicine, or
21 Ohio State School College of Medicine where I've had faculty
22 appointments provide clinicians who are not researchers a
23 tenured-track option, so zero years.

24 Q Thank you. Have you ever been the subject of a tenure-
25 review process at any medical school, college, or university?

1 A Tenured review?

2 Q Tenure review, yes.

3 A Not ten year, tenure?

4 Q No, not ten year; tenure, t-e-n-u-r-e.

5 A If I'm not on a tenure track, how could I be on a tenure
6 process? No.

7 A You've never been qualified as an expert witness
8 previously?

9 A No.

10 Q So you weren't qualified as an expert in North Carolina
11 then?

12 A So I think legally, I mean, I was solicited, but the case
13 didn't go through. So I never was deposed. I was never --
14 there was never a hearing for it that -- so from a -- my
15 understanding, no judge has granted me the expertness that we're
16 seeking today. Yes. And, quite frankly, I -- you know, what
17 does that even mean, expert witness? I guess that's a legal
18 term, not a medical term, so...

19 Q So you're not familiar with the standards for an expert
20 witness in your profession?

21 A No, I'm not. I'm not.

22 Q You are aware, of course, of the American Medical
23 Association?

24 A I've heard of them. I get a lot of mail requesting dues.

25 Q The AMA, American Medical Association, publishes quite a

1 number of professional journals; that's correct?

2 A Uh-huh. Yes.

3 Q And you've never served on an Editorial Board of the
4 American Medical Association?

5 A I don't believe any of the journals that I've -- no. I can
6 say for sure, no. I've never reviewed a journal for the AMA.

7 Q And you're aware of the American Psychiatric Association?

8 A Yes.

9 Q You're aware it publishes medical journals?

10 A Yes.

11 Q And you've never served on the Editorial Board of the
12 American Psychiatric Association; isn't that correct?

13 A Correct.

14 Q You've heard of the American Psychological Association?

15 A Yes.

16 Q It also publishes a large number of professional journals?

17 A Yes.

18 Q And you've never served on the American Psychological
19 Association Editorial Boards?

20 A Nope.

21 Q So too for the Association for Psychological Science that
22 produces publications and you've never sat on the American --
23 excuse me -- Association for Psychological Science Editorial
24 Board?

25 A Serving on an Editorial Board for a journal is an esteemed

1 privilege that very few people are offered the opportunity to.
2 So, no, I have not. Not for those -- not for those
3 organizations.

4 Q So that's a zero.

5 A Huh-uh. Zero for the organizations you've asked me about.

6 Q Dr. Leibowitz -- Leibowitz, excuse me -- can you cite for
7 me any peer-reviewed, published science journal articles that
8 document a known error rate for your claim that admittance to
9 school privacy facilities, like locker rooms and restrooms of
10 the opposite sex is a necessary component for successful
11 treatment for youths suffering from gender dysphoria?

12 A Nope.

13 Q Can you produce -- excuse me. Can you cite for me any
14 peer-reviewed, published science journal articles that document
15 a known error rate for the claim that your treatment methods do
16 not cause lasting harm to patients, that is, harms that show up
17 later in life?

18 A Please repeat that.

19 Q Can you cite any peer-reviewed, published science journal
20 articles that document an error rate that supports your
21 confidence or claim that your treatment methods do not cause
22 lasting harm to patients; that is, harms that show up later in
23 life in these genders?

24 A Again, these aren't my treatment methods. These are
25 standards of care. So can I cite these studies? My lack of

1 citing a study does not imply they don't exist. That is up to
2 those who review the standards -- the scientific credibility of
3 the standards of care that, let's just say, the majority of the
4 medical associations I've -- all of the medical associations I
5 have listed ascribe to.

6 So I cannot cite specific studies you're asking me to
7 cite. I've never been involved in the development of, you know,
8 what an error rate sort of constitutes for a certain treatment
9 paradigm for a practice guideline. But I trust the
10 organizations that all ascribe to the standards of care and the
11 peer-review process that took place by these organizations.

12 Q Do you have any professional discretion to vary from the
13 standards of care?

14 A So the standards of -- the standards of care themselves say
15 they are flexible. So I'm -- by definition, no, I -- I adhere
16 to the standards of care. There is a flexibility component
17 taking into account individual circumstances of certain clients.

18 Q So isn't it correct then that you adhering to a flexible
19 standard of care without specific knowledge of research
20 demonstrating error rates in a --

21 A That's not true.

22 Q But you did testify the standards of care are flexible,
23 correct?

24 A Correct.

25 Q And you did state that you are not familiar with specific

1 research regarding error rates that would inform you as to the
2 safety long-term of treatments prescribed in accord with these
3 standards of care; isn't that correct?

4 A I'm taking that -- that doesn't mean that the standard of
5 care doesn't -- that those who wrote the standards of care have
6 not taken those specific citations into account.

7 Q So somewhere, someplace, the standards of care have done
8 their due diligence, and your job is just to adhere to the
9 standards of care?

10 A Within -- within reason, of course. Absolutely. Why would
11 I deviate from the standards of care if that's what the medical
12 consensus is, how could I deviate from that?

13 Q And can you cite any peer-reviewed, published scientific
14 journal articles that inform your reason in varying from the
15 standards of care?

16 A Well, I personally don't vary from the standards of care,
17 and I never testified that I did.

18 Q Well, vary within the standards of care? Let me correct
19 the question.

20 A Now I'm confused.

21 Q I'm sorry?

22 A Now I'm confused.

23 Q Okay. When you're operating within the standards of care,
24 you have a certain degree of professional flexibility built into
25 the standards of care; isn't that correct?

1 A Providers are -- have a degree of flexibility.

2 Q And you are a provider?

3 A I am a provider.

4 Q Thank you. And you just testified that the variation that
5 you might apply as a provider was -- would be within the bounds
6 of reason; isn't that correct?

7 A Again, you know, the -- as an absolute statement that is
8 correct. We're -- we're not talking about outlier opinions.
9 We're talking about minor variations. So such as, an example,
10 if there is an age criteria of 16 to start certain hormones, and
11 there is a child that is, you know, maybe going into high school
12 at a younger age and is 15 and a half, for example, and in that
13 child's life -- humans are complex, Counsel.

14 You know, they are very complex. No humans are cookie
15 cutters. So the fact of the matter is, is if a child --
16 starting someone on hormones at age 15 and a half makes better
17 sense than waiting until 16, based on the timing of the effects
18 that that might have, by that, I mean, flexible. Withholding
19 completely a treatment, that is an outlier statement. So I
20 wouldn't say flexible accounts for large variation and deviation
21 from the acceptable standards of care that the majority of
22 medical professional organizations ascribe to.

23 THE COURT: Counsel, it is now 3:30. And I'm
24 wondering if now would be an appropriate time to leave your
25 cross-examination of this witness and recommence it, perhaps, on

1 the same day when the Plaintiff's expert is testifying? Is that
2 possible that we could have everyone back here for both experts
3 at the same time?

4 MS. MAR: Unfortunately, Your Honor, I believe that
5 the witness will be out of the country on that date, but I can
6 promise that opposing counsel and I will put our heads together
7 and we'll find a date or several dates and we'll work with the
8 Court to find one that is that convenient.

9 THE COURT: Fair enough. I mean, I will do whatever I
10 need to do to make sure we have the time to complete this in a
11 timely fashion. So if Counsel can all get together with the
12 witnesses, we'll find a way to make sure we can do it that day.

13 THE WITNESS: I appreciate you being -- like, getting
14 me to my plane, Counsel. I really do.

15 MR. MCCALED: Certainly. I was mindful of the time,
16 also, and was going to raise the 3:30 mark.

17 So thank you, Your Honor.

18 THE COURT: Certainly, sir.

19 THE WITNESS: I appreciate it. I do.

20 MS. MAR: Thank you, Your Honor.

21 THE COURT: Very well. At this point, then, we will
22 allow you to -- we -- is there any business that we need to
23 address with Dr. Leibowitz before he departs?

24 MS. MAR: No.

25 THE COURT: Very well.

1 Sir, you are excused.

2 THE WITNESS: Thank you very much, sir. Thank you.

3 THE COURT: Subject to recall. Thank you.

4 THE WITNESS: Thank you.

5 (Witness excused, subject to recall.)

6 THE COURT: And I believe the next witness is being
7 called by the Intervenor; is that correct?

8 MS. MAR: He is, Your Honor.

9 (Witness summoned)

10 THE COURT: Please stand at the witness stand and
11 raise your right hand to be sworn. No, right up here. Right up
12 here. I'm sorry.

13 THE CLERK: Do you swear or affirm that the testimony
14 you're about to provide, an issue now before this Court, shall
15 be the truth, the whole truth, and nothing but the truth so help
16 you God?

17 MR. DESTEFANO: Yes.

18 THE COURT: Thank you very much. You may be seated.
19 And would you please state your full name, spelling
20 your last name for the record.

21 MR. DESTEFANO: Aidan DeStefano, D-e-S-t-e-f-a-n-o.

22 THE COURT: Thank you very much.

23 Counselor, you may proceed.

24 MS. ROPER: Aidan, would you pull the microphone a
25 little closer to your mouth there so we can hear you. Why don't

1 you say something.

2 MR. DESTEFANO: Hello.

3 MS. ROPER: Say hello to the Judge, please.

4 MR. DESTEFANO: How you doing?

5 THE COURT: Good afternoon.

6 AIDAN DESTEFANO,

7 a witness, having been first duly sworn, was examined and
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MS. ROPER:

11 Q And, Aidan, I'm going to remind you, as I have before, that
12 you need to speak your answers in words rather than saying
13 uh-huh or huh-uh.

14 A Yes.

15 Q Okay. And please try to speak slowly for the sake of the
16 court reporter. All right?

17 A Yes.

18 Q Thank you. Okay. Aidan, did you move to intervene in this
19 case?

20 A I did.

21 Q And at the time that you moved to intervene, were you
22 student in the Boyertown Area School District?

23 A I was.

24 Q And did you go to the Boyertown Area Senior High?

25 A I did.

1 Q And do you call that BASH?

2 A BASH, yeah. Either one, yeah.

3 Q Okay. Are you still a student in the Boyertown Area School
4 District?

5 A I did not. I graduated.

6 Q Okay.

7 THE COURT: You did not graduate?

8 THE WITNESS: No, I did graduate.

9 THE COURT: You did graduate?

10 THE WITNESS: Yeah, yeah, sorry. I was a student,
11 then I did graduate, yes.

12 BY MS. ROPER:

13 Q Okay. And what is -- do you have plans of what you are
14 going to do next?

15 A Yeah. I'm going to be studying at Montgomery Community
16 College and I will be studying human resources.

17 Q Okay. Have you always attended schools in the Boyertown
18 Area School District?

19 A Yes.

20 Q You said you attended the Boyertown Area Senior High, what
21 grades were at that school?

22 A Tenth, eleventh, and twelfth.

23 Q Okay. And what did -- where did you attend before that?

24 A I went to junior high at East. So that's seventh, eighth,
25 and ninth grade.

1 Q Okay. In your petition, you identified yourself as a
2 transgender male. What do you mean by that?

3 A It means that I am male.

4 Q And what does the transgender part of it mean?

5 A I have, you know, female body, but in here it doesn't match
6 in what I have.

7 Q Okay. Do you remember how old you were when you first
8 identified as a male?

9 A I don't. Like, I didn't have age because I always knew.

10 THE COURT: Excuse me, sir?

11 THE WITNESS: I don't have an age cause I always knew.

12 BY MS. ROPER:

13 Q So this is one of those times I'm going to remind you to
14 speak more slowly.

15 A Yeah, sorry.

16 Q Okay. Did you identify as male when you attended Junior
17 High East?

18 A I did, yes.

19 Q Okay. And which restrooms did you use at Junior High East?

20 A So my first day of seventh grade, I thought that I should
21 just try to go into the girls' bathroom just to see what kind of
22 like reaction I would get, just to see. And what I got wasn't
23 good. They said never come back into the bathroom, so on and so
24 forth because they thought that I was a guy.

25 After that, seventh, eighth, and ninth grade, I used

1 the nurse's bathroom because that's where I felt that I would go.

2 Q Okay. When you were at Junior High East, did you have to
3 change for gym class?

4 A I did. And I changed into the nurse's bathroom, because I
5 didn't want to get the same initial reaction I did the first day
6 in seventh grade, same with the locker room, but with more
7 people.

8 Q I'm sorry. Did you say that you tried going into the
9 girls' locker room?

10 A Well, I did, yeah, but it didn't -- I didn't want the same
11 reaction, and I did get it, so --

12 Q Okay.

13 A -- yeah.

14 Q All right. Did you play sports in -- at Junior High East?

15 A Yeah. I was on the girls' basketball team and I was on the
16 girls' track and field.

17 Q Okay. And where would you change for your team practices
18 and games?

19 A Since the school like closes all their facilities, like
20 locks the bathrooms and stuff, the gym was -- like, the locker
21 rooms were only available for me, so like I couldn't change in
22 the nurse's bathroom or any other bathroom that I could find.
23 But the people that I was -- on my team, like for basketball or
24 track and field, they knew what I was going through, so they
25 just said, come into the girls' locker room. But it's -- the

1 space where I changed was different for gym class if I did
2 change into it, so...

3 Does that make any sense?

4 THE COURT: No.

5 THE WITNESS: No? Okay. So -- well, I'm just trying
6 to like describe it. Okay. So for --

7 BY MS. ROPER:

8 Q Let me -- let me try to walk through it here. Let me ask
9 you a very specific question.

10 A Okay.

11 Q Literally, what room did you change in when you were
12 getting ready for team sports?

13 A Okay. So -- can I like describe it to him though so like
14 he understands?

15 Q Sure.

16 A Okay. So you walk into the locker. You know how like
17 locker rooms are like big, like -- like the lockers and stuff?
18 Well, there's another room within that locker room that no one
19 else can go into besides the sports teams and stuff. So I went
20 into there while everyone else changed out in the big locker
21 room, if that makes sense.

22 THE COURT: Okay.

23 BY MS. ROPER:

24 Q Okay. When you -- now, you said you went to the senior
25 high starting tenth grade, right?

1 A Yeah.

2 Q Okay. Did you ever use the girls' bathroom at the senior
3 high?

4 A So just like seventh grade, I went to go on the first day
5 just to see what it was like. The same thing, senior -- at
6 senior high, by tenth grade, and it was beyond what I expected.
7 It was worse. I got yelled at by literally everyone that was in
8 there. I said -- they said, "Just don't come back," where like
9 the same thing that happened the first day in seventh grade.

10 And they told the teachers. I got out of the
11 bathroom, got yelled at by the teachers, because they said,
12 "There's a guy in the bathroom. Why is there a guy in the
13 bathroom," and so on and so forth. So from that day.

14 Q So --

15 A I wasn't going to go in there anyways, but I just wanted to
16 see what it was like.

17 Q Okay. So when you found you were not comfortable in the
18 girls' bathroom, what facilities did you use at the senior high?

19 A So I didn't really know what to do at that time because I
20 did want to go into the guys' bathroom, but for my safety, I
21 didn't want to do that. So I went to the counselor, I said,
22 "What are my options?" They said, "For right now, you can just
23 use the nurse's bathroom," which I was fine, because seventh,
24 eighth, and ninth, still used the nurse's bathroom. Never went
25 to the guys' bathroom. So from then on, I just used the nurse's

1 bathroom.

2 Q Okay. Has your name always been Aidan?

3 A No.

4 Q Okay. What name did you go by in tenth grade when you
5 started at the senior high?

6 A Just "A," the letter "A", because that was my birth name,
7 like started with an A, so I just kept it "A," which is close.

8 Q And what name did you go by in eleventh grade at the senior
9 high?

10 A That's when it was Aidan. So --

11 Q You can explain why.

12 A Between tenth and eleventh grade, I went to court for my
13 name change for the petition. It got denied. So I still kept
14 it Aidan. Like, the school changed it to Aidan. When it got
15 denied, I think I waited six to eight months -- I'm not really
16 sure how long it was -- and then re-petitioned again past --
17 from then on, new birth certificate, new everything. So Aidan.

18 Q Okay. Do you recall what month and year your name was
19 legally changed to Aidan?

20 A Last year in May. So 2016.

21 Q Okay. Besides changing your name, have you taken any other
22 steps to live consistently with your gender identity?

23 A I have. 2015, I started HRT, which is hormone replacement
24 therapy, and that's when I started testosterone.

25 Q Okay. And what effect did having testosterone have on you?

1 A Exactly what you went through as little, puberty again, you
2 know, puberty.

3 Q Okay. Now, in the eleventh grade at the senior high, were
4 you on any sports teams?

5 A You mean tenth grade or eleventh grade?

6 Q Well, let's start with tenth grade, right.

7 A Okay. So the tenth grade, I was on girls' cross-country
8 team, and then I was on track and field for that.

9 And then eleventh grade, I was on -- like, I wasn't on
10 any team, but I was the manager of the cross-country team, so
11 both male and female, but I was practicing with the guys, but I
12 wasn't in any races.

13 And then in twelfth grade, I was on the guys' team. I
14 was running for the guys. And I didn't do any track and field,
15 so I was just doing cross-country.

16 Q Okay. And I know you had to educate me about this. You've
17 mentioned cross-country and track and field. Are those
18 simultaneous? Is one of them --

19 A Cross-country is in the fall, and then track and field's in
20 the spring.

21 Q Thank you. Aidan, when you were a senior at the Boyertown
22 Area Senior High, what bathrooms did you use?

23 A At Boyertown --

24 Q At Boyertown.

25 A -- High School?

1 Q Yes.

2 A So like I said, tenth grade, I used the nurse's bathroom.
3 Eleventh grade, I came up to the counselor again, I said, Hey,
4 what bathroom can I use, like cause I know that -- I think the
5 school board was going to talk about it or within the school
6 they were going to talk about it. And then they said, "For
7 right now, if you still want to use like the nurse's bathroom
8 you can, or if you want to, you can use the guys' bathroom."

9 So I stuck with again the nurse's bathroom cause
10 that's where I was the most comfortable, even though I wanted to
11 so badly to go into the guys' bathroom. But Boyertown kind of
12 has a bad reputation for, you know, some stuff, but I didn't
13 want to get involved with that, so I stayed in the nurse's
14 bathroom for my safety.

15 Q What were you worried might happen to you if you went into
16 the boys' bathroom?

17 A The same thing that happened in the girls' bathroom, but a
18 little fighting, and I wasn't about that, so...

19 Q Okay.

20 A Yeah.

21 Q So you just talked about eleventh grade.

22 A Oh, twelfth grade. So then again, the counselor to me and
23 -- or we just came together again, and they said, You may now
24 use the bathroom that you identify with, which is male. So --
25 or you can use the nurse's bathroom. And then you can also use

1 the locker room. So I used the locker room. Nothing happened
2 to me, like nothing happened. Changed towns.

3 THE COURT: Which locker room?

4 THE WITNESS: Male's bathroom -- locker room, yeah,
5 sorry.

6 But before I went into the guys' locker room, first --
7 well, because you probably -- guys know that there's construction
8 and stuff. And so I waited -- we had to wait like three or four
9 weeks to actually go into the, like, facilities. But within that
10 time, I made sure that my peers were okay with me going into that
11 bathroom. If not, I probably would have just changed in the
12 nurse's bathroom because -- I mean, confrontation's fine, but
13 it's like whatever.

14 So literally everyone was okay with it. The gym
15 teachers were fine, from what I know. So I used the male's
16 facilities, fine, never got questioned at all because this is
17 who I am.

18 BY MS. ROPER:

19 Q Aidan, we just talked about you starting to use the male
20 facilities at the high school when you were a senior. Had you
21 used male facilities in other places before that?

22 A Of course, yeah.

23 Q Since when?

24 A Like before seventh grade. Like, wherever I go, it was the
25 same thing that happened in seventh grade like all eyes, like,

1 oh, why, is there a male in the bathrooms. It was just getting
2 annoying, and I knew that this isn't -- like, I wasn't a girl,
3 so it -- I mean, you probably wouldn't know how it feels, it
4 gets annoying after a time.

5 Q You -- you testified that you were on -- and, you know, I
6 don't want to screw it up -- a cross-country team?

7 A Yeah, cross-country, yeah.

8 Q As a senior?

9 A Uh-huh.

10 Q Which cross-country team?

11 A Boyertown cross-country.

12 Q The boys' or the girls' team?

13 A Boys' team.

14 MS. ROPER: Your Honor, I'm going to refer to one of
15 our exhibits. It's Exhibit 4. I believe you have a book of our
16 exhibits.

17 THE COURT: I do, Counselor.

18 MS. ROPER: Okay. May I approach the witness?

19 THE COURT: Certainly.

20 BY MS. ROPER:

21 Q Aidan, do you recognize this photograph?

22 A Yeah.

23 Q And do you know who took it?

24 A [REDACTED] did.

25 Q Oh, I'm sorry. A student or a relative?

1 A My girlfriend.

2 Q Your -- okay. We're trying to use student names here, so
3 I'm just --

4 A I'm sorry.

5 Q Okay, thank you. And what does this picture show?

6 A This picture shows me in the Boyertown cross-country
7 uniform and proudly showing off that I'm part of the guys' team.
8 And I know that -- I don't know if I'm allowed to say this or
9 not -- but my last race with them was senior night. And so fun
10 fact, when I was on the girls' team, I was top five, so I was
11 running like a 20-minute three miles or whatever like that.
12 With the guys, that's nothing. That's like really slow. So I
13 was like one of the last ones to finish. And they all lined up,
14 cheered for me, and that was amazing, because they acknowledged
15 that, you know, I was on the guys' team.

16 Q It sounds like that was a big deal to you.

17 A (No audible response.)

18 Q You have to answer out loud, I'm sorry.

19 A Yes.

20 Q Okay, thank you. Aidan, in your -- your petition to
21 intervene, you also said something about homecoming court. Were
22 you on the homecoming court?

23 A I was on the homecoming court senior year. I was --

24 Q I'm going to interrupt you to ask you if you want to take a
25 second to --

1 A Yeah, I'm good.

2 Q -- take a sip of water and -- and just take a breath.

3 A So every year, Boyertown has homecoming. You probably know
4 what that is. And through Boyertown, I was like the first
5 transgender to ever like come out and like go through the
6 process and everything. So -- I mean, I don't want to say like
7 I was the one that like had to like experience everything
8 firsthand, but the school just had to like revise some stuff.

9 But there were some talk saying how I wasn't allowed
10 on the court or something like that. I didn't even know if I
11 was on the court. I didn't know I was on the court until I
12 actually got nominated. But I was second round up. I lost by
13 two points, but, whatever. I got -- through -- so for the
14 homecoming court, you had to dress up, obviously. I had my
15 partner next to me for homecoming. And they told us -- the
16 background about us. And this was like in front of the whole
17 school, so like everybody was there. Well, if they were absent,
18 but -- so sophomore, juniors, and seniors there.

19 And I was the first, you know, FTM transgender to
20 nominate or get nominated on the court. And I got the loudest
21 cheers out of the other four nominees, and that was also great,
22 because the teachers were actually applauding too, so --

23 THE COURT: You were nominated as a male member of the
24 court?

25 THE WITNESS: Yes. Yeah, so homecoming king, but I

1 was two points away. But getting acknowledged like that was
2 awesome for -- like from the teachers too because they were
3 cheering for me, so that's good.

4 BV MS. ROPER:

5 Q Aidan, you used a term just a moment ago, you said "FTM."
6 What do you mean?

7 A Female to male transgender, so...

8 THE COURT: I'm sorry, say that again, sir?

9 THE WITNESS: FTM, female to male.

10 BY MS. ROPER:

11 Q Thank you. Once you had permission to use the boys' locker
12 room and the boys' bathroom, did you ever use the nurse's office?
13 Take your time.

14 A To be honest, I still use the nurse's bathroom quite
15 frequently because I was just so used to going in and out of
16 there like when I had to go. Half my classes were near the
17 nurse's bathroom anyways. And if you ever seen the school, the
18 construction, some of my classes were on the third floor and the
19 bathrooms would already be like on the other side of the
20 building or the nurse's like would be on the other side of the
21 building, so I would just use the men's facilities then if I was
22 closest to one of the other, I would just use both of them.

23 Q The fact that you would use the nurse's bathroom when it
24 was convenient, does that mean it didn't matter to you which one
25 that you used?

1 UNIDENTIFIED SPEAKER: Objection.

2 MS. ROPER: I'm sorry, I'll rephrase.

3 THE COURT: I'll overrule the objection, but I think
4 there's an important question, if you don't -- excuse me
5 interruption. You chose to use the nurse's room because you
6 realized that it was making the -- in the female's locker room,
7 it was making everybody uncomfortable, correct?

8 THE WITNESS: Yeah, that was in the seventh grade
9 though.

10 THE COURT: And then when you got older into the later
11 grades, the reason you didn't go in the boys' bathroom, is that
12 because it made you uncomfortable or the individuals in the
13 locker room uncomfortable?

14 THE WITNESS: Yeah, I didn't -- both. Both, yeah.
15 Because I'm not the one for fighting, and Boyertown has a lot of
16 fights, and I didn't want to go into that, so...

17 THE COURT: Okay.

18 And, Counselor, excuse my interruption. You may
19 continue.

20 MS. ROPER: No, no problem.

21 BY MS. ROPER:

22 Q When you say you were concerned about the boys being
23 uncomfortable with you being in there, did you know how they'd
24 be reacting, or was that your --

25 A That was just my gut. Like I -- like, you don't know how a

1 person is. Like, I don't know you, you don't know me. So like
2 -- it's like the same thing, like you don't -- it's like -- I
3 don't know how to explain it. Like you just have to be in the
4 situation, I guess, but, yeah.

5 Q Okay. Aidan, during your senior year at BASH, did you go
6 on a senior trip?

7 A Yep. I went on my senior class trip to Disney.

8 Q To Disney?

9 A Yeah.

10 Q Was that an overnight trip?

11 A It was -- it got delayed, but we were there for like
12 three-ish days.

13 Q And did you room with anybody on that trip?

14 A Yeah, sorry. I went with my cousin, which was my female,
15 but it was just me and her going into -- okay, so --

16 Q If you have more to say about it

17 A Yeah. So one of my teachers, I didn't want to go on the
18 trip because I didn't want to make them have to deal with, oh,
19 this is a transgender, we don't him to go with the guys because
20 of some body parts, whatever, or we don't want him to go into --
21 with the females because that's just not right because he's a
22 guy, so on and so forth.

23 So I was just like, my cousin, [REDACTED], I'll just room
24 with her and they're like fine, because like they're family, so..

25 Q Was there some discussion about you rooming with other

1 girls --

2 A There --

3 Q -- to your knowledge?

4 A Yeah. There was. It was just going to be my friends and
5 -- but their parents were iffy about it, so -- like again, I
6 didn't want to make a big ruckus out of it, so I was just like,
7 it would just be me and my cousin.

8 Q And when you would use the boys' locker room to change for
9 gym or change for sports, would you strip down to the skin?

10 Would you take off your underwear?

11 A I would take everything off besides my boxers.

12 Q Okay. Is there a reason for that?

13 A Because that's how you're supposed to.

14 Q Okay.

15 A You're not supposed to strip down. I mean --

16 Q You don't have to have a different reason.

17 A Yeah.

18 Q I just asked. Aidan, as we mentioned, you sought to
19 intervene when you were still a student at BASH while you were
20 allowed to use the boys' facilities. Can you tell the Judge how
21 it would have felt after you'd been accepted into the boys'
22 facilities to have had to give that up?

23 A Like if I was denied to go into it, or --

24 Q If --

25 A -- like --

1 Q If during your senior year, they had changed and said, no,
2 we're sorry, now you can't do it anymore.

3 THE COURT: And I'm going to interrupt just for a
4 moment just -- not to change your questions, but --

5 MS. ROPER: You go right ahead.

6 THE COURT: -- when you said you were accepted into
7 the boys' locker room, you went into that separate part of the
8 locker room and changed there; is that correct? Did you ever
9 change with the other boys?

10 THE WITNESS: Oh, the locker rooms are different. Not
11 the junior, at the high school, I should have probably said
12 that.

13 THE COURT: Okay.

14 THE WITNESS: But like at the high school, there's
15 like -- there's three stalls because like the construction
16 stuff, there isn't a separate room, but I don't go into it.
17 Like I change like for gym. Changed out with any other guy.
18 Like again, I made sure that they knew. Fine with it. Cross-
19 country, they already knew that I was going through this. They
20 said fine. Well, they didn't say fine; they were just like,
21 okay, like we accept it. Never changed into the stalls because
22 they didn't have an issue with it.

23 THE COURT: Okay. So once you go to your senior year,
24 you just changed with all the other male students?

25 THE WITNESS: Yeah, everyone else, yeah.

1 THE COURT: Okay. I might have stopped your question
2 there, so I guess you should re-ask that question.

3 MS. ROPER: I'd much rather that be clear, Your Honor.

4 BY MS. ROPER:

5 Q So my question was, if when this lawsuit was filed in March,
6 the school had said to you, sorry, no more, you are no longer
7 allowed in the boys' facilities, how would that have felt?

8 A For me, I mean, it would have been disheartening. But I
9 still had my other option of going into the nurse's bathroom. I
10 don't think I've said this yet, but there is a gender fluid
11 bathroom that we have at the school. There's only one. I don't
12 think the bathroom works in there, but like you can still change
13 in there. But like that happened like senior year in the
14 summer, like they changed it in the summer.

15 But you can still use it. But if that wasn't there,
16 per se, like again, like I'd still use the bathroom. But like
17 for the other trans students that are coming up or like are
18 gender fluid or whatever, they can still use that.

19 But like to actually have that right to go into the
20 bathroom that you're supposed to go into, it's -- I don't know
21 how to like -- like put a word to it. But like -- like for me,
22 I guess, like again, I still had that opportunity. Like I'm
23 very open-minded. Like if you say I can't do this, I'll find
24 another way to do it. But for the other students that were
25 coming up that are trans or they turn out to be, knowing that

1 they don't have the right would probably suck for them, because
2 they should be able to use the bathroom that they should be able
3 to use, but...

4 MS. ROPER: Those are the questions I have at the
5 moment, Your Honor.

6 THE COURT: Thank you very much, Counselor.

7 Who from the Plaintiff's team is going to be --

8 MS. GORDON: Yes --

9 THE COURT: Attorney Gordon, you may cross-examine the
10 witness.

11 MS. GORDON: Thank you very much.

12 CROSS-EXAMINATION

13 BY MS. GORDON:

14 Q Nice to meet you.

15 A You too.

16 Q Just -- I have just a few questions. You talked about the
17 senior trip to Disney, and you ended up staying with your
18 cousin, ████████, in the room. But you had been talking with
19 some other friends. Were those female friends or male friends
20 that you were considering rooming with?

21 A Well, since like -- I said like I was the first transgender
22 to actually like go through the process at school. Again, like
23 they didn't really know how to put everything like together.
24 And I told them that like, I'll just room with my cousin. But
25 the other people were female.

1 Q Okay. And then did I understand that the reason it ended
2 up just being you and your cousin was because the parents of the
3 other two girls would not consent to that?

4 A Yeah, correct.

5 Q Okay.

6 A But that was because I didn't know the girls, so -- I mean,
7 I understand that. But, like -- yeah, yeah.

8 Q And it was your preference to stay in room of girls?

9 A I mean, I would have liked to stay -- like I have guy
10 cousins too, but they already had their room, so like that was
11 off. I also had -- can I say gay, I don't know. I don't know
12 what I can say. But like -- sorry, I don't know --

13 Q That's okay.

14 A So I had a few gay friends that like would have loved me to
15 go in there, but again, since I technically have, you know,
16 vagina, that intercourse would happen, I don't know. That's
17 what they would have thought, but that wasn't going to happen.
18 But, I mean, school rules, so I understand.

19 Q So these were --

20 A Like gay friends, yeah, yeah.

21 Q Gay male friends?

22 A Yeah.

23 Q And then I wasn't sure that I heard you correctly, so I
24 will just ask. You talked about a bathroom at the high school
25 that --

1 A Gender fluid bathroom.

2 Q -- was just created this past year?

3 A Uh-huh, I think, or I don't -- like I'm pretty sure it was
4 like going into my senior year. Like it was through the
5 construction, yeah.

6 Q Did you refer to as a gender fluid bathroom?

7 A Yep, so boys and girls can go into it, but there's only one
8 bathroom, like one stall, like one toilet, yeah.

9 Q Why do you call it a gender fluid bathroom?

10 A Because both girls and boys can go into it.

11 Q Do you know students at Boyertown who identify as gender
12 fluid?

13 A To me personally, I don't, but like I know people outside
14 of the school that are. I mean, there's a lot of closeted --
15 like I can tell you right now, I probably know like maybe three
16 or four people that are closeted, but they're so scared to come
17 out because of what they heard, and also like what happened.
18 Not now, but like the lawsuit and stuff, so...

19 Q And are these people that you're thinking about or referring
20 to, are they students at Boyertown?

21 A Two graduated with me, so that leaves one, but there's --
22 since the -- like the freshmen are coming up from the junior
23 highs, there's probably so many more people, so...

24 MS. GORDON: Can we just take a five-minute break,
25 Your Honor?

1 THE COURT: Certainly. We'll stand in recess for five
2 minutes.

3 THE CLERK: All rise.

4 (Break was taken from 4:04 p.m. to 4:11 p.m.)

5 THE CLERK: All rise.

6 The United States District Court is again in session,
7 the Honorable Edward G. Smith presiding.

8 THE COURT: You may be seated, thank you.

9 The court is called to order. All parties previously
10 present are once again present. The witness is on the witness
11 stand.

12 Attorney Gordon, you may continue with your cross-
13 examination.

14 MS. GORDON: I have no further questions.

15 THE COURT: And, Mr. Levin, do you have any questions
16 of the witness?

17 MR. LEVIN: I just have a few.

18 CROSS-EXAMINATION

19 BY MR. LEVIN:

20 Q And we agree, Aidan, that you are dressed today as a man?

21 A Yeah, I always dress like a man.

22 Q That was going to be my next question.

23 A Yeah.

24 Q You always dress --

25 A Yeah.

1 Q -- as a man?

2 A Could I actually say something? Ever since I was little, I
3 was the one who picked out my clothes. My mom has parents, like
4 siblings, family, has never like brought me up, oh, you have to
5 be trans, or you're going to be turn out to be gay cause I know
6 some people think like that. No, I mean, I dress like this
7 because it's just me.

8 Q You have shortest hair like a man, right?

9 A Yeah. Again --

10 Q Deep voice like a man, right?

11 A Again, this is -- you will never find a picture with me
12 with long hair. You will never find a picture of -- okay, you
13 will with a dress because that's what I was forced to for like
14 graduation for like sixth grade or something like that. Other
15 than that, nothing.

16 Q Talking about graduation from high school, at Boyertown,
17 are the boys and the girls dressed in different colors?

18 A They were. I was dressed black, so that's guys.

19 Q You were dressed the same color as the guys, correct?

20 A Correct.

21 Q And I too have old ears, so I'm not sure if I heard you.
22 In public places, do you go to the boys' room or the girl's
23 room, men's room or women's room?

24 A Men's room.

25 Q Cause any problem or ruckus when you go into the men's room?

1 A Never. Ever since -- like if I would go into the female
2 bathroom with my mom, she would get questioned herself. I would
3 get questioned. But if I go with my dad, nothing. Never. To
4 this day, nothing.

5 Q Did you use the men's room here in the courthouse?

6 A I did. Three times.

7 Q Security guards didn't stop you, did they?

8 A Nope.

9 MR. LEVIN: I have nothing further.

10 THE COURT: Thank you, sir.

11 Attorney Roper, do you have any redirect of the
12 witness?

13 MS. ROPER: I don't, Your Honor. That's all.

14 THE COURT: Any other questions from Counsel?

15 I just have a few questions, sir.

16 THE WITNESS: Of course.

17 THE COURT: But I keep you referring to you as sir
18 because you look like a man.

19 THE WITNESS: Exactly.

20 THE COURT: So you -- and there is press in the
21 courtroom, et cetera, so if there's any question I ask that
22 you're uncomfortable with, please let me know that because it
23 may not even -- the answer may not be important.

24

25 ///

EXAMINATION

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BY THE COURT:

Q So from as long as you remember, you've identified as a male?

A Correct.

Q And there was no instance in your life or anything that triggered that; you just always were a male?

A Always.

Q And no one tried to push you in that direction; it was just who you were?

A Yeah. And I've been in therapy, because I did go into therapy, but it wasn't like conversion or anything like that. But I went to therapy not because I was depressed or suicidal or I was questioning myself; I went so I could further my transition and get hormones, because you just can't to a doctor and be like, hey, I want hormones. Like you have to go through -- it's a very long process.

Q Well, did -- when you first identified as a male and you were old enough to articulate it to your parents, what was their reaction?

A My mom -- so my parents were divorced, so my dad didn't really know, but he just thought that -- everyone thought I was just a big butch lesbian, but that didn't turn out to be like that. I mean, I like girls, but that doesn't mean I'm a lesbian --

1 Q Okay.

2 A -- because I'm a guy, so I'm straight.

3 Q Okay. And you said you got therapy?

4 A Uh-huh.

5 Q Were you ever taken a psychiatrist because of the fact that
6 you were identifying as a male, or was it to further along the
7 idea that you identified as a male?

8 A I actually went to an LGBTQ therapist, so it was -- it was
9 like you are accepted they walked in. So she was the one who
10 could get me the hormones. But I had to -- like there were just
11 certain things I had to do to get the hormones.

12 Q Now, you are how old?

13 A Eighteen, almost nineteen.

14 Q All right. So over your 18, almost 19 years, you have had
15 to endure some struggles as a result of this, obviously?

16 A Actually, I -- I mean, some people get brutally like beaten
17 up, bullied. Never once got bullied. I mean, some people
18 wanted to fight me, but I -- like again, I'm not into fighting.
19 Never got questioned. Literally nothing. No one has ever
20 touched me, like, not physical but like, you know.

21 Q And that's -- I'm glad to hear that --

22 A Yeah.

23 Q -- but how about the struggles of what you've testified
24 here today about trying to decide what bathroom to go in --

25 A Yeah.

1 Q -- or what locker room to go into?

2 A At first it was disheartening that I had to go into the
3 girls' bathroom just to see what it was like. And I instantly
4 knew that it wasn't for me, and I knew that it wasn't me.

5 Q And it wasn't for them either?

6 A Yeah -- no, obviously.

7 Q And so then instead of trying to go to the boys' locker
8 room, you chose to use the nurse's room?

9 A Yeah. But I -- like sometimes I'd use the guys', sometimes
10 I would use the nurse's. But if I went into a girls' bathroom
11 right now, wouldn't you all look at me weird? I mean, come on.
12 I mean, like -- and if I went into a guys' bathroom, not knowing
13 that I was trans or what was in my pants, what would you think?
14 That's what I always say to people.

15 I just got -- recently got a new job at a place. They
16 didn't know anything about me. They didn't know I was on
17 certain things, certain daily posts or whatever. They found out
18 that I was trans, did not know. Accepted me right on the spot
19 because they -- they saw me as a guy and they still see me as a
20 guy.

21 Q Now, you understand everyone here is trying to come up with
22 a solution to what is a very difficult issue?

23 A Uh-huh, and I do see that, I do. I see both sides. Like I
24 always see both sides of everything, and I do hear them out,
25 but...

1 Q And you seem to have an incredible insight and an open-
2 mindedness to this whole situation, and yet it's so personal to
3 you.

4 A Yeah.

5 Q You mentioned this gender fluid bathroom. Is that a
6 solution?

7 A It's one bathroom. I don't know. It could be. But they
8 would have to make a big locker room to actually let people
9 change. Like if -- if it was -- I mean, it will take a lot more
10 time to -- cause there's -- there's not one transgender person
11 in the school and there's going to be more coming up, guarantee
12 you.

13 I mean, I don't know. I graduated. Like I don't
14 really have a say into it, but like I can talk for it right now.
15 Something happens -- like if it -- like I don't know what --
16 yeah, I mean, it could be. I don't know. But they would have
17 to make more or a spectrum of it.

18 Q You indicated that you understood why some other students
19 would be uncomfortable, the female students would be
20 uncomfortable if a male who identified as female would be in
21 their locker room, and the male students would be uncomfortable
22 if a male who was anatomically a female was in their locker room.

23 A I have a friend, honestly, I can't name names, but --

24 Q Don't name names.

25 A -- there was a male to female transgender, good friends.

1 She went to the girls' bathroom, didn't really get questioned
2 from my like knowledge, but she had to find like perfect time
3 because she changed into the stall, so -- but they accepted her
4 into the bathroom.

5 Q Okay. And before you were searching for a word, and it had
6 to do with a question if you weren't allowed in the boys' lock
7 room --

8 A Yeah.

9 Q -- even if the boys accepted you. The word I think you
10 were searching for is discrimination. You would feel that you
11 were being discriminated against. Am I wrong? Was that not the
12 word you were searching for?

13 A Like if I wasn't able to go into the guys' bathroom do you
14 mean?

15 Q And then they suddenly said you weren't able to anymore.

16 A Yeah. I mean, again, I would probably find another way or
17 just stick to the nurse's bathroom. I mean, I'm not -- again,
18 not the one to fight over situations, but I'm just talk -- right
19 now, I'm talking for the kids that are coming up. They need to
20 know that they're in a safe school, and that the school
21 recognizes that they're there.

22 Q And you mentioned several other students you know that are
23 transgender --

24 A Yeah.

25 Q -- in just this school district. And we had an expert

1 testify that 0.6 -- I think .6 percent of the population is
2 transgender. And I don't know how accurate that number might
3 ultimately be because it must be a very difficult number to --
4 to ascertain. But if you condensed it down to just the younger
5 population, it would be higher. Why there would be more
6 transgender individuals younger than overall. I'm not quite
7 sure because we didn't get that far in the testimony.

8 But -- so you didn't feel -- you were not the only
9 transgender individual at Boyertown School?

10 A And I will not be the first or the last or -- there's going
11 to be more coming.

12 Q Why do you think this issue hasn't come up before, or has
13 it?

14 A I mean, it probably has, but like back then, like it would
15 have been -- like people shower, so like I can see like why
16 nothing has come out back then. But like now, I mean, like I
17 still don't know. Like I don't know why I didn't get
18 discriminated just because I'm on hormones and I got surgery does
19 not mean that I should be -- like people should accept me more
20 than whoever -- like whoever of the other -- the people saw in
21 the bathroom or the locker room.

22 Q Okay.

23 A Does that make sense?

24 Q More or less.

25 A Okay, sorry.

1 Q More or less. Because you see the dynamic of this entire
2 situation.

3 A Yeah. That's why I -- it's hard to wrap my head around all
4 this because, one, I never got discriminated in the school; two,
5 I never got any looks in the bathroom -- well, besides the
6 female bathroom. They didn't care if I changed in front of
7 them, because I didn't change into stall, like I changed out in
8 the open, so...

9 Q Right. What if you were told that because you were
10 transgender, you couldn't be on the female sports teams if you
11 identified with male? And if you're getting this treatment, it
12 would be unfair --

13 A Yeah. My mom --

14 Q -- to the female athletes?

15 A -- always thought that because like I did swimming,
16 softball, basketball. Literally, everything you could think of,
17 I was the athletic kid. So my mom didn't want me to go on
18 hormones and not be on any sports. I have a gym right near my
19 house. I can do that. Like I find my ways around it.

20 Q What's that like going from a superstar to trailing --

21 A Yeah, exactly.

22 Q -- the pack?

23 A It's the same thing, just a little bit different. If I'm
24 lost in the pack, so be it, I finished the race. I'm happy. I
25 mean --

1 Q Okay. Now, as everyone here is searching for the solution
2 to both accommodate you, but also to accommodate those students
3 that are uncomfortable with somebody who's transgender being in
4 their locker room, do you have the answer?

5 A I don't. I mean, like again, I see both sides. I know
6 some people who even talked to me that they were uncomfortable
7 before. Like they would -- like they've -- they've never seen a
8 transgender like undress in front of them, whether it be non-
9 surgery or hormones or like whatever, like pre-everything. They
10 told me that they would be uncomfortable and I would just be
11 like, maybe change into a stall. I mean, that's what I always
12 tell them. I mean, you just kind of have -- it's 2017. Things
13 like this are going to pop up.

14 Q And how did you feel when the school district implemented
15 its policy with respect to --

16 A Oh, I loved it.

17 Q -- transgenders being able to use the locker rooms that
18 they identify with?

19 A I mean, either way, if it wasn't going to happen, I would
20 use the nurse's bathroom. But not only for me, but the upcoming
21 trans students and the trans students that were already in
22 Boyertown, they came to me and said, Aidan, what's going to
23 happen if it like turns away? I said, I don't know. Like I'm
24 not sure. Like what you asked me, I still don't know what's
25 going to happen. I graduated. I'd like -- of course I would

1 love to come back and use the facilities that I was supposed to
2 be using, or that I should be using, but...

3 Q And do you have any other information you can provide me or
4 anything else you would like to say that could assist me?

5 A What would you like to know? I mean, I don't know how much
6 I can say.

7 Q Have you said it all?

8 A I think I have. The thing that like not worries me, but
9 just like again like I'm just confused about is why someone
10 would discriminate someone pre-T, then why would they not want
11 to discriminate me? Maybe it's because I look more like a guy.
12 Maybe because I don't have breasts. Maybe because -- like I
13 don't know. Like I'm not sure.

14 Q Well, what do you say to the father who has a daughter in
15 the high school that there's now changing supposed right next to
16 her, someone who has -- that has the body of a male, but
17 identifies as a female?

18 A Uh-huh. This is what I can say. The people that are trans
19 and went into the guys' locker room or the girls' locker room, I
20 did warn them. I warned myself before I even came in. I made
21 sure that people accepted me before I went in. So I gave them
22 advice. Maybe they didn't listen to it. I don't know. But, I
23 mean --

24 Q And what was your advice then, go to the nurse's room?

25 A I said, one, if they don't like it, go to the nurse's room;

1 two, change into the stall; or three, wear your gym clothes to
2 school, cause that's I used to do because I didn't want to get
3 involved in anything like that. They came to me because I was
4 the first -- like again, the first trans kid to go through like
5 surgery hormones in high school, so they wanted to come to me
6 for advice, and that's the best I could give them.

7 Q Okay. Anything else?

8 A That's all.

9 THE COURT: Attorney Roper, do you have any questions
10 in light of the Court's questions?

11 MS. ROPER: Yes, Your Honor. There's just a couple
12 things I wanted to clarify in response to the Court's questions.

13 REDIRECT EXAMINATION

14 BY MS. ROPER:

15 Q Aidan, the Judge asked you -- or rather didn't ask you
16 directly, so I'll ask you directly, were you ever told that you
17 could not participate in girls' sports because of your hormone
18 treatment?

19 A I chose not to do it because I didn't want the
20 confrontation. Like, PIAA probably let me anyways.

21 Q You have to say what PIAA is.

22 A That's like where you put your money to actually play the
23 sport, yeah.

24 Q Okay. And I'm going to press you on something. The Judge
25 asked you how you felt when the school told you you could use

1 the male restrooms, and very, very quickly, I thought I heard
2 you say, I loved it, and then you started talking about other
3 people. I think the Judge would like to hear about your
4 feelings and what it meant to you rather than what it meant to
5 other people.

6 A So I think the whole reason why that I loved hearing from
7 the school that I was able to use the men's facilities was
8 because seventh, eighth, ninth, tenth, and eleventh grade, so
9 almost four years I waited to actually hear that I was allowed
10 to use it, not, oh, maybe you can, or so forth. Like I was
11 always so used to going in some nurse's bathroom.

12 The nurses knew me pretty well because I went in like
13 five times a day. But it was awesome. And like, I think I had
14 not just my life together, but I had like, again, surgery. I
15 was on hormones. I felt the best I've felt in a very long time.
16 To actually walk in there the first time, speechless. Like it's
17 a bathroom. I mean, but I was -- to myself, it was speechless
18 because I was able to use the facilities that I was able to use.

19 MS. ROPER: That's all I have.

20 THE COURT: And, Attorney Gordon, do you have any
21 questions in light of the Court's questions?

22 MS. GORDON: No further questions.

23 THE COURT: Mr. Levin?

24 MR. LEVIN: No further questions.

25 THE COURT: Very well.

1 Sir, thank you very much. You may step down.

2 THE WITNESS: Thank you.

3 (Witness excused)

4 THE COURT: And I believe we've gotten so changed
5 around here. We were on the Plaintiff's case. We never did get
6 to the Defendant's case, and we've had the Intervenor's case.
7 Are there any other witnesses that are going to be called today?

8 MS. GORDON: No other witnesses on behalf of
9 Plaintiffs.

10 THE COURT: Okay.

11 MS. GORDON: We do have Dr. Josephson, but not --
12 obviously, at another time --

13 THE COURT: Yes.

14 MS. GORDON: -- so we have one more witness, but not
15 today.

16 THE COURT: So at this point, we've got all --
17 basically all the testimony except the two experts that are
18 remaining, cross-examination and any redirect of the
19 Intervenor's expert --

20 MR. LEVIN: And the superintendent.

21 THE COURT: -- and the superintendent, yes. It would
22 be --

23 MS. ROPER: There is -- there is -- I'm sorry, Your
24 Honor --

25 THE COURT: No, please.

1 MS. ROPER: -- one more. Plaintiffs have identified a
2 trial exhibit that is a declaration from a student. I think
3 that's actually testimony rather than an exhibit. And we -- at
4 the right time, I would like to object to its admission, but I'm
5 mentioning it because you said there's no other testimony, and I
6 think there is.

7 THE COURT: Mr. Levin.

8 MR. LEVIN: We also have the deposition transcripts
9 that have been used in lieu of cross. Want me to identify them
10 and hand them up to the Court now?

11 THE COURT: Certainly, if you're prepared to do that.

12 MR. LEVIN: This book was actually put together by
13 Plaintiffs, but I took out some transcripts that are not to be
14 entered. So what you have here is behind tab 2, Joel Doe.
15 Behind tab 4, Jack Jones. Behind tab 7, Macy Roe. And behind
16 tab 8, Mary Smith. And these are to be entered (indiscernible)
17 extensive cross-examination of those individuals.

18 THE COURT: And there is no objection from the
19 Plaintiffs?

20 MS. GORDON: No objection.

21 THE COURT: And there's no objection from the
22 Intervenor?

23 MS. ROPER: No. In fact, Your Honor, we've handed up
24 a similar book of our deposition designations.

25 THE COURT: Very well. And those I have as my

1 separate procured. And have the Plaintiffs, as well as the
2 Defendants, reviewed this, and is there no objection to the
3 admission of these depositions?

4 MR. LEVIN: I have no objection.

5 THE COURT: I can read the names if it would help.

6 MS. ROPER: Oh, Your Honor, this -- so we had
7 previously exchanged deposition designations. If Plaintiffs
8 have not had an opportunity to review them fully, of course, we
9 don't object to them responding to them.

10 In our -- we have redacted the depositions. We have,
11 of course, had agreement among Counsel with respect to marking
12 things confidential. And we redacted everything that the
13 Plaintiffs designated as confidential.

14 Our view is that some of those designations are
15 unnecessary in terms of preserving confidentiality. But per our
16 agreement, we will raise that objection and, I believe, the
17 Court will have time to rule on it, frankly, before we close the
18 evidence anyway.

19 THE COURT: And whether it's confidential or not, I
20 could still consider it. Or was it of a confidential nature
21 that the Court would not have access to it?

22 MS. ROPER: No, no. I don't think -- I don't want to
23 speak for the Plaintiffs. Just a moment.

24 THE COURT: Do you know what? Maybe we should take a
25 brief recess so Counsel can confer?

1 MS. ROPER: Yes.

2 MS. GORDON: That would be good.

3 THE COURT: Why don't we stand in recess --

4 MS. GORDON: That would make sense.

5 THE COURT: We'll stand in recess for ten minutes.

6 Just let my clerk know when you're ready to proceed.

7 MS. ROPER: Thank you very much.

8 THE CLERK: All rise.

9 (Break taken from 4:32 p.m. to 4:41 p.m.)

10 THE CLERK: All rise. United States District Court is
11 again in session, the Honorable Edward G. Smith presiding.

12 THE COURT: You may be seated. Thank you.

13 The Court is called to order. All parties previously
14 present are once again present.

15 Counsel, who is going to speak for the Plaintiffs?
16 Attorney Gordon.

17 MS. GORDON: Thank you, Your Honor.

18 At this time, we will submit to Your Honor the trial
19 depositions of Macy Roe and Jack Jones. We have those both in
20 redacted form and unredacted form.

21 We also would move in Plaintiff's Exhibits --
22 specifically Plaintiff's Exhibits 1 through 5. 6 has already
23 been moved in. We withdraw 7 and 8. And we would move in
24 Plaintiff's 9 through 64.

25 THE COURT: Attorney Levin, is there any objection to

1 Plaintiff's Exhibit 1 through 5, 6, and 9 through 64?

2 MR. LEVIN: No objection to 1, 2, 3, 4 or 5. 6 is
3 already in.

4 MS. GORDON: And like all the way through 34 are the --

5 MR. LEVIN: Are pictures.

6 MS. GORDON: -- photographs and the video
7 (indiscernible).

8 MR. LEVIN: I have no objection to any of the
9 pictures. That goes through 34. No objections through 43. I
10 have no objections to the rest.

11 THE COURT: Thank you, Counselor.

12 Attorney Roper, does the Intervenor have any objection
13 to Plaintiff's Exhibits 1 through 6 and 9 through 64?

14 MS. ROPER: We have an objection only to number 64.
15 For the rest, no objection.

16 THE COURT: And what is Exhibit 64?

17 MS. GORDON: Your Honor, Exhibit 64 is a declaration
18 of Student G, who is a junior at Boyertown High School.
19 According to the declaration, he was in a bathroom there and
20 experienced a situation or two, girls came into the bathroom.
21 And so the facts are laid out in the declaration. I know that
22 certainly for preliminary injunction proceedings, the Court is
23 more lenient in terms of hearsay -- otherwise hearsay evidence.
24 And we think that it is appropriate to submit this declaration
25 at this time.

1 THE COURT: Is it just to prove that fact, that he was
2 in the bathroom and two females came into the bathroom?

3 MS. GORDON: It is.

4 THE COURT: Is it --

5 MS. GORDON: And his conversation also with Dr. Foley.

6 THE COURT: Now, Attorney Roper, have you had an
7 opportunity, or Attorney Levin, an opportunity to speak to this
8 individual?

9 MR. LEVIN: No.

10 MS. ROPER: No, Your Honor. This is a witness who has
11 never been disclosed, was never discussed as someone whose
12 testimony would be permitted at trial. Although, at a
13 preliminary injunction hearing, the Court has discretion to
14 accept hearsay evidence as appropriate.

15 This would be the only testimonial evidence that has
16 not been subjected to cross-examination in the entire proceeding.
17 I --

18 THE COURT: Well, what I was thinking is, rather than
19 rule on it at this point and relax the Rules of Evidence for the
20 purpose of this declaration, could we hold this 64 off until we
21 get back together, see if you have an opportunity to contact
22 this person? Perhaps could be a stipulation of testimony, maybe
23 even a stipulation of fact, as opposed to an untested
24 declaration where you've not even had the opportunity to consult
25 with the individual? Because I assume it's not a critical

1 addition to an already very well put together case. But
2 certainly, if in fact, this person has evidence to provide and
3 it can be provided in short order as opposed to bringing -- as
4 we've got a lot of deposition testimony -- without even taking
5 the deposition perhaps, just to getting that person on the phone
6 and talking to them, but maybe something that could be
7 stipulated to.

8 MS. ROPER: I think we have plenty of time to try to
9 work it out.

10 THE COURT: Okay. For now, I'll hold off on the
11 admission of 64 to see if we can't get it introduced in a way
12 where Counsel are comfortable that the information is true and
13 accurate.

14 MS. GORDON: Very good, Your Honor. Then we would
15 move into evidence the remaining identified exhibits. And we
16 have binders, but we can also provide these to you
17 electronically on a flash drive, whatever you prefer.

18 THE COURT: Oh. That objection, Plaintiff's Exhibit 1
19 through 6 and 9 through 63 are admitted into evidence.

20 (Plaintiff's Exhibits 1 through 6 and 9 through 63
21 were received in evidence.)

22 THE COURT: The Court defers with respect to Exhibit
23 64 to see if it can be introduced through either a stipulation
24 after Counsel have had an opportunity to question the Declarant.

25 THE CLERK: Paper and (indiscernible).

1 THE COURT: Paper and digital would be outstanding.

2 And when you say digital, do you want it on a flash drive?

3 THE CLERK: Yeah.

4 THE COURT: Electronically.

5 THE CLERK: Prefer to have flash drive.

6 THE COURT: So --

7 MS. GORDON: Both, Your Honor?

8 THE COURT: Yes, if possible.

9 MS. GORDON: Yes, absolutely.

10 THE COURT: Now, from the Defendants, you have some
11 housekeeping as well.

12 MR. LEVIN: Yes, Your Honor. We had an exhibit --
13 well, Exhibit D-8, 9, 10, 11, 12, 13, 14, 15, 32, 33, 34, 35,
14 36, 37, 38, 39, 41, 44, 45, 46, 47, 48, 49, 50, 95, 96 and 97.
15 I understand there are no objections to any of these with two
16 exceptions. Plaintiff objects to a monograph by the National
17 School Board Association and a monograph by the Pennsylvania
18 School Board Association. Dr. Faidley's going to be testifying
19 as to both, so you could make your ruling and then take his --

20 THE COURT: And which --

21 MR. LEVIN: -- trial deposition.

22 THE COURT: -- which two exhibits are those that
23 there's an objection to, Attorney Gordon?

24 MS. GORDON: That would be D-32 and D-35.

25 THE COURT: And with respect to the other named

1 exhibits, there's no objection?

2 MS. GORDON: No objection.

3 THE COURT: And, Attorney Roper, is there any
4 objection from the Intervenor to the other --

5 MS. ROPER: No, Your Honor.

6 THE COURT: -- Defense exhibits?

7 MS. ROPER: No objection.

8 THE COURT: Very well then. Defense Exhibits 8, 9,
9 10, 11, 12, 13 --

10 MS. GORDON: No, I'm sorry.

11 MR. LEVIN: No, I don't think she meant that.

12 MS. GORDON: No, I didn't. I saw the postings on the
13 District website and, I apologize, these two were also posted on
14 the District website, but I identified the incorrect exhibits
15 that we are objecting to as D-37 and D-38.

16 MR. LEVIN: Correct.

17 MS. GORDON: I apologize.

18 THE COURT: So other than D-37 and D-38, all the other
19 exhibits are not objectionable?

20 MS. GORDON: Correct, Your Honor.

21 THE COURT: And from the Intervenor, not objectionable
22 to the Intervenor?

23 MS. ROPER: Correct.

24 THE COURT: Okay. Then Defense Exhibits 8, 9, 10, 11,
25 12, 13, 14, 15, 32, 33, 34, 35 and 36 are admitted into

1 evidence. 37 and 38 we will defer on until the testimony of the
2 superintendent. Exhibits 39, 41, 44, 45, 46, 47, 48, 49, 50,
3 95, 96 and 97 are all admitted into evidence.

4 (Defendant's Exhibits 8 through 15, 23 through 36, 39,
5 41, 44 through 50, 95 through 97 were received in evidence.)

6 MR. LEVIN: Thank you, Your Honor.

7 THE COURT: Anything else from the Defendant?

8 MR. LEVIN: No.

9 THE COURT: We've got the housekeeping so far from the
10 Plaintiff, or is there a little more?

11 MS. GORDON: I do. Now I'm just waiting for --

12 THE COURT: And now we're going to the Intervenor.
13 Attorney Roper.

14 MS. ROPER: Yes, Your Honor. We're going to move into
15 evidence Intervenor Exhibits 1 through 6 and 11 through 18. And
16 I believe there's no objection to those. There's some others in
17 the middle that we need to have brought in through Dr. Faidley,
18 so we're holding off on those.

19 THE COURT: Okay.

20 MS. ROPER: But 1 through 6 and 11 through 18 is what
21 we are moving now.

22 THE COURT: And, Attorney Gordon, is there any
23 objection to Intervenor's Exhibits 1 through 6 and 11 through
24 18?

25 MS. GORDON: No objection, Your Honor.

1 THE COURT: Attorney Levin?

2 MR. LEVIN: No, Your Honor.

3 THE COURT: Very well. Without objection,
4 Intervenor's Exhibits 1 through 6 and 11 through 18 are admitted
5 into evidence.

6 (Intervenor's Exhibits 1 through 6 and 11 through 18
7 were received in evidence.)

8 THE COURT: And any other housekeeping issue for the
9 Intervenor?

10 MS. ROPER: We've already handed hard copies to the
11 Court. May I approach with the flash drive?

12 THE COURT: Certainly. And if you would just hand
13 that to Mr. Holdsbar (phonetic), that would be great.

14 And trying to go slow here to hope that the storm will
15 pass and you won't end up getting soaked as you leave.

16 MS. ROPER: Your Honor?

17 THE COURT: Yes, Counselor.

18 MS. ROPER: I'm sorry, I wanted to make sure I'm not
19 leaving anyone behind here. You have copies of depositions that
20 have various redactions in them. I think we are still working
21 out what extent of redactions we think are appropriate or
22 whether some of these redactions would be subject to an
23 objection to be ruled on by the Court. No one, I think has any
24 problem with you seeing all of that material. But in terms of
25 what of those deposition designations becomes part of the

1 record, I think that is still a work in progress and we would
2 like to get back to you on that.

3 THE COURT: Certainly. Certainly.

4 MS. ROPER: Thank you.

5 THE COURT: And, Counselor, we're to coordinate -- and
6 I do appreciate the incredible work that you've all done already
7 up to this point. But you are going to coordinate so that we
8 can perhaps have those three remaining witnesses all come in on
9 one day, or if necessary on two days because we've got so many
10 individual schedules here that have to be accommodated, but --
11 so I will expect to hear back from -- should I schedule a
12 telephone conference for approximately a week from now?

13 MS. GORDON: I think that would be helpful, yes.

14 THE COURT: Okay. I will schedule a telephone
15 conference. We'll get back on the telephone and see how we're
16 going at figuring out just when we're going to get these
17 individuals in.

18 Mr. Levin's looking to see if he's going to be --

19 MR. LEVIN: I'm looking at my calendar.

20 THE COURT: -- on an island somewhere.

21 MR. LEVIN: I'm leaving for California on the 26th.

22 THE COURT: And when do you get back?

23 MR. LEVIN: The 31st. So if you were planning on
24 having a telephone conference call prior to -- the 25th or prior.

25 THE COURT: Very well. I don't have my schedule in

1 front of me, but if we say the 25th, do you think everyone will
2 be available the 25th?

3 (Pause)

4 THE COURT: Would 10:00 on the 25th of August appear
5 to be okay for everyone?

6 THE CLERK: July.

7 THE COURT: Of July, I'm sorry. 25th of July?

8 MR. LEVIN: Yes, Your Honor.

9 THE COURT: And I'm not suggesting you need to have
10 everything -- all the ducks lined up by that time, but at least
11 we can get an idea of the status and what, if anything, you need
12 from me to assist you.

13 MS. GORDON: The 25th is fine for me, Your Honor.

14 THE COURT: Great.

15 MS. ROPER: 10:00 on the 25th is fine. Thank you.

16 THE COURT: 10:00 a.m. on the 25th.

17 Anything else for this afternoon?

18 Thank you again for all your efforts. We'll stand in
19 recess. Everyone have a great night.

20 THE CLERK: All rise.

21 MR. LEVIN: Thank you.

22 MS. ROPER: Thank you.

23 (Proceedings concluded at 4:54 p.m.)

24 * * * * *

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C E R T I F I C A T I O N

I, Valori Weber, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in
the above-entitled matter, and to the best of our ability.

Valori Weber

Valori Weber, CET-711

Date: July 21, 2017