

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	. August 11, 2017
Capacity as Superintendent of	.
The Boyertown Area School	. 2:03 p.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 INJUNCTION 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: Thank you. You may be seated. And good
5 afternoon.

6 IN UNISON: Good afternoon, Your Honor.

7 THE COURT: The Court is called to order in the matter
8 of Doe vs. the Boyertown Area School District, et al. This is
9 civil action number 17-1249.

10 Present in the courtroom are a number of attorneys. I
11 don't know if you'd all like to state your appearances for the
12 record.

13 MS. HOLCOMB: Christiana Holcomb for the Plaintiff.

14 MR. McCALEB: Gary McCaleb for the Plaintiff.

15 MS. GORDON: Cathy Gordon for Plaintiffs.

16 MR. SAMEK: Jeremy Samek for the Plaintiffs.

17 MR. LEVIN: Michael Levin for the Defendants, Your
18 Honor.

19 MS. ROPER: Mary Catherine Roper for the Intervenor.

20 MS. COOPER: Leslie Cooper for the Intervenor.

21 MS. MAR: Ria Mar for the Intervenor. Good afternoon,
22 Your Honor.

23 THE COURT: Thank you very much. Good afternoon.

24 And as a housekeeping item, with respect to the record

1 still being open and what additional evidence the parties wish
2 to introduce, what is the status of that?

3 MS. GORDON: Your Honor, we have -- I guess as an
4 administrative matter, we have transcripts, as well as exhibits
5 that need to be provided to you. So we will be presenting at
6 this time both redacted and unredacted transcripts of the
7 depositions of all witnesses in the case. It was agreed by all
8 counsel that they could be entered into evidence in total, so
9 designations, counter-designations have been set aside. They
10 have been properly redacted and the redactions have been
11 coordinated among counsel and agreed upon. We have Rule 5.2
12 references that are to be filed under seal. And, of course, the
13 unredacted transcripts to be filed under seal as well, Your
14 Honor.

15 THE COURT: Fantastic.

16 MS. GORDON: If I may approach and I can provide those
17 to you?

18 THE COURT: Certainly.

19 MS. GORDON: These are being provided, Your Honor,
20 both a hard copy and electronic form as requested.

21 THE COURT: Very well.

22 (Pause while documents distributed.)

23 MS. GORDON: Your Honor, we also address the matter of
24 confidential matter contained in the hearing transcripts.

25 You'll recall that Your Honor conducted hearings on both July 17

1 and July 31. There was confidential information that, as a part
2 of the record in the January 17th -- I'm sorry, July 17th
3 transcript, and we have redacted that, again, by agreement of
4 counsel. We have a Rule 5.2 redaction list for that as well.

5 And the July 31, 2017 transcript did not contact any
6 confidential information, therefore, it is just being provided
7 to you as the original. Again, these are provided both in paper
8 form and electronic. If I may approach?

9 THE COURT: Very well. Certainly.

10 (Pause while documents distributed.)

11 MS. GORDON: More trees being killed, Your Honor.

12 And then with respect to Plaintiff's exhibits, again,
13 there were a few exhibits that required the redaction of some
14 confidential information, and you'll be receiving in both
15 electronic form and in paper form the redacted and unredacted
16 versions, as well as Rule 5.2 lists with the exception of two of
17 our exhibits where there were simply pseudonyms that were used
18 in place of the individuals' real names per agreement of the
19 parties. So I will present those to you as well. The --

20 UNIDENTIFIED SPEAKER: (Indiscernible).

21 MS. GORDON: So this is just our copy.

22 So they have been already provided in another binder
23 that has been presented to --

24 THE COURT: So no more binders?

25 MS. GORDON: No more binders. At least not from

1 Plaintiffs, Your Honor.

2 There was one other exhibit, Exhibit 64, which was a
3 declaration of Student G. You'll recall that there was raised a
4 hearsay objection to that declaration by Intervenor. At the
5 request of this Court, the counsel were able to get together and
6 reach a stipulation of facts. You had suggested at the last
7 hearing that we present that today, and I would like to do so.
8 If Your Honor would like that presented just in written form, if
9 you want it read into the record, I'm not sure how you'd like to
10 receive it.

11 THE COURT: For me, it's fine to be in written form if
12 that's fine with Counsel. And that is solely with respect to
13 declaration of Student G.

14 MS. GORDON: Correct. And with that, that is the
15 evidence of Plaintiff.

16 THE COURT: So that closes the case with respect to
17 the Plaintiff. Does that also close the case? I think the
18 School District still had some additional evidence that you
19 wished to introduce for the record?

20 MR. LEVIN: No, we're fine.

21 THE COURT: And does it also close the case with
22 respect to the Intervenor?

23 MS. ROPER: Yes, Your Honor.

24 THE COURT: So the record is now closed.

25 MS. ROPER: Yes.

1 THE COURT: And parties are prepared to argue?

2 MS. GORDON: Your Honor, if I may raise one additional
3 issue --

4 THE COURT: Certainly, Counsel.

5 MS. GORDON: -- and this is a consequence of a filing
6 that was made yesterday evening by Defendants. Attached to
7 their findings of fact and conclusions of law, was about a
8 320-page exhibit, they are represented to be copies of
9 Pennsylvania school policies that touch upon transgender issues
10 or protections for transgender students. We have an objection
11 to that exhibit, Your Honor. Those are not authenticated
12 documents. In fact, we were not aware of them, and they have
13 not been a part of this case. Certainly, no witness has
14 testified to their authenticity.

15 Defendants are asking, Your Honor, to take judicial
16 notice. And in doing so, they cite to a Pennsylvania Procedural
17 Statute and a DNC second case. Their reliance on Pennsylvania
18 Procedural Law is misplaced, Your Honor. This is a matter of
19 the Federal Rules of Evidence which govern and control. And we
20 believe that because they have not been authenticated, that they
21 are therefore inadmissible, and we would object to their
22 admission.

23 THE COURT: Mr. Levin.

24 MR. LEVIN: Your Honor, we believe that the Court
25 could take judicial notice of policies adopted by other school

1 districts around the state. It's easy to authenticate them by
2 simply going to the websites of those various school districts
3 and going to the links for their policies in saying them.
4 They're really no different than state or federal statutes.
5 Policies by school districts are adopted at public meetings.

6 THE COURT: Let's assume that every school district in
7 the state of Pennsylvania had the same policy, and that policy
8 mirrored what Boyertown did. What would be the relevance of
9 that to the Court?

10 MR. LEVIN: Well, I think it goes to the issue of
11 weighing of the harm and the public policy that you're going to
12 have to do in determining whether to issue a preliminary
13 injunction. School districts that have adopted policies that
14 prohibit discrimination against transgender students and/or to
15 allow transgender students to use the facilities which
16 correspond to their gender identity, your decision's going to
17 affect all of that. So it's for that limited purpose.

18 THE COURT: Very well.

19 Does the Intervenor wish to be heard?

20 MS. ROPER: Not on the evidentiary question, Your
21 Honor. I think it's clear that these kinds of policies are in
22 place in various school districts.

23 THE COURT: And, Mr. Levin, did you attach them and
24 then did you also reference them in your findings of fact
25 conclusions of law?

1 MR. LEVIN: Right, they are. There's, I think, one,
2 maybe two, proposed conclusions of law findings of fact that
3 specifically reference them.

4 THE COURT: Very well.

5 And, Attorney Gordon, did you wish to be heard any
6 further?

7 MS. GORDON: Well, Your Honor, I would just represent
8 that based on our very quick review of those policies, that
9 there were only seven that actually addressed the use of
10 facilities, bathrooms and locker rooms, by transgender
11 individuals.

12 And I would simply request that if Your Honor is
13 inclined to actually permit these to be admitted into evidence,
14 that we be given an opportunity to brief the issue before that
15 ruling is made.

16 THE COURT: Well, my concern in the first instance is
17 the extent to which those other policies would impact on the two
18 reasons that you've given. The one is the irreparable harm, I
19 believe. And the irreparable harm here really should probably
20 be determined based on the circumstances at Boyertown and the
21 circumstances of these individuals and the evidence that's been
22 presented in this case. And I don't know that looking to what
23 other schools have done with different facilities and with
24 trying to identify who can use those facilities, I don't know
25 that really helps me with respect to the irreparable.

1 Now, with respect to public policy, that's a little
2 bit of a different story because obviously, when trying to
3 determine public policy, it may be, in fact, appropriate for the
4 Court to look beyond this case and to look at what other school
5 districts have done, especially if there's some explanation for
6 why they've done what they've done.

7 I think at this point what I need to do is take a look
8 at what was submitted last night and determine whether it is
9 appropriate to consider it and whether it would be relevant, and
10 if so, then I certainly would allow the Plaintiffs and the
11 Intervenors, if they wished, an opportunity to brief the issue
12 of the extent to which they should be considered what relevance,
13 if any, they should have to the Court at whether there's any
14 prejudice to any party considering them through judicial notice,
15 which obviously, I'm always very reluctant to take judicial
16 notice of anything unless it's a clearly a law or something that
17 clearly is appropriately judicial notice is taken of.

18 So I will let you know once I've had an opportunity to
19 review that submission.

20 Any other housekeeping items?

21 MS. GORDON: Nothing else, Your Honor, from the
22 Plaintiffs.

23 THE COURT: And who is going to argue on behalf of the
24 Plaintiffs?

25 MR. SAMEK: Me, Your Honor.

1 THE COURT: Very well. Mr. Samek, you may proceed,
2 sir.

3 MR. SAMEK: Your Honor, good afternoon, and may it
4 please the Court.

5 The importance of privacy has long been considered
6 central to our western notions of freedom. One court in 2011
7 explained that a measure of personal isolation and personal
8 control over the conditions of privacy as abandonment is the
9 very essence of personal freedom and dignity.

10 We've long recognized the right to use restrooms and
11 locker rooms without members of the opposite sex present,
12 precisely because this is an area where we enter to undress and
13 to perform very personal, private functions.

14 The separate spaces for men and women are justified
15 based on our biological differences that express themselves and
16 our anatomical differences.

17 The 9th Circuit held in York v. Story that the desire
18 to shield one's unclothed figure from the views of strangers,
19 and particularly strangers of the opposite sex, is impelled by
20 elementary self-respect and personal dignity.

21 The 3rd Circuit has recognized the constitutionally
22 protected privacy interest in his or her partially clothed body
23 in the Luzerne County case. The Canedy court in the 7th Circuit
24 held that the right to privacy is firmly ensconced among the
25 individual liberties that are protected by our Constitution.

1 In 1975, when writing a commentary for the *Washington*
2 *Post* regarding the proposed Equal Rights Amendment, Ruth Bader
3 Ginsberg, now a Justice, stated with regard to the contention
4 that restrooms would be open to both men and women that,
5 "Separate places to disrobe, sleep, perform personal bodily
6 functions are permitted, and in some situations, required by
7 regard for individual privacy. Individual privacy, a right of
8 Constitutional dimension, is appropriately harmonized with the
9 equality principle."

10 The Supreme Court in a decision requiring the Virginia
11 Military Institute to admit women expressly stated that the
12 school must protect the right to bodily privacy of each student
13 when they stated that their decision, "undoubtedly required
14 alterations necessary to afford members of each sex privacy from
15 the other sex."

16 This is such a deeply experienced expectation that we
17 even recognize the right to privacy for those who are
18 incarcerated and those dealing with searches. How much more in a
19 situation like this when our children are involved entrusted into
20 the care of our schools.

21 In 2015, the Western District of Pennsylvania found in
22 favor of a university who continued to protect the privacy of
23 all students in privacy facilities by maintaining them based on
24 sex. In the words of Judge Ken Gibson, while the question of
25 whether students may use opposite sex facilities is new, the

1 applicable legal principles are well settled. In fact, the
2 universality of this expectation is also reflected in
3 Pennsylvania law that require separate privacy facilities for
4 men and women in all kinds of settings, including in our schools
5 for the benefit of our children.

6 In fact, in Boyertown, prior to the 2016 school year,
7 the District separated locker rooms and restrooms on the basis
8 of biological sex. Dr. Foley, one of the principals at the
9 school, as well as Dr. Cooper, the high school principal, both
10 agreed that the reason for the prior policy was to protect the
11 bodily privacy of students from members of the opposite sex.
12 But all that changed in the beginning of the year 2016-17 when
13 they opened private facilities to students of the opposite sex
14 to accommodate those students' desire to live consistent with
15 their beliefs about gender.

16 In so doing, they've redefined sex. They're asking
17 the Court to allow them to redefine it to no longer mean
18 biological sex, but instead to mean gender identify, which their
19 expert testified was the subjective deep conviction sense of
20 self as a particular gender, male or female, or something else
21 altogether.

22 They did this without telling the parents or the other
23 students that the opposite sex was going to be permitted into
24 the locker rooms and bathrooms. As a direct result, violations
25 of students' privacy rights in bathrooms and locker rooms

1 occurred, and they will continue to occur unless an injunction
2 is granted.

3 Joel Doe was standing in his underwear and found
4 himself in the presence of a girl who was wearing nothing above
5 her waist than a bra, and she identifies as male.

6 Jack Jones found himself in a similar situation,
7 exposed to a girl while in his underwear.

8 Mary Smith walked into a girls' bathroom, only to find
9 a boy, and the embarrassment and stress she experienced as a
10 result caused her to "hurriedly exit the locker room," in the
11 words of a district employee who viewed the video for exiting
12 shortly after she entered that bathroom.

13 The Plaintiffs have had their privacy violated, and
14 continued violations are certain to occur. The school is
15 violating the Unconstitutional Conditions Doctrine by
16 conditioning of multi-user private facilities on giving up their
17 fundamental right to privacy for members of the opposite sex.

18 These students and others have experienced
19 embarrassment and humiliation. Joel stopped using the boys'
20 locker room. They all limit their bathroom use because of the
21 anxiety and stress that a member of the opposite sex would come
22 in at any time.

23 Mary Smith has decided not to return to Boyertown next
24 year if the school's practice continues.

25 Your Honor, in the Defendant's opening and the

1 Intervenor's opening, the Defendant said that this is not about
2 privacy. The Intervenor stated that this is about exclusion.
3 But I want to point something out that's very important. We
4 need to all take a step back from that type of language and
5 realize what's being requested here.

6 Both sides agree that there should be separate
7 restrooms. Both sides agree that there should be standards by
8 which somebody uses one restroom or the other. Both sides are
9 excluding people, Your Honor. The question is, are we going to
10 do it based on the rationale that has always been the gold
11 standard upon which we can ever separate the sexes, which is
12 based on the biological distinctions between them, or are we
13 going to do it on an illegitimate category, a new category based
14 on the subjective internal beliefs of each individual.

15 Your Honor, when talking about when it's ever a time
16 to separate groups of human beings, specifically on the basis of
17 sex, courts have always held that you cannot do so based on
18 gender stereotypes and things of that nature.

19 But, Your Honor, what the school district is doing is
20 precisely that. They're elevating somebody's internal sense of
21 how they are identifying their gender based on what stereotypes
22 they most closely associate with themselves, the societal
23 constructs in permitting students to make choices about which
24 restrooms they use based on how much they believe and that they
25 identify with those gender stereotypes. And, Your Honor, that's

1 an illegitimate basis to separate students.

2 So this isn't about whether one side is excluding or
3 the other side's excluding; both sides are saying that there
4 should be two separate restrooms.

5 The question is on what basis we ought to be able to
6 do it. Pennsylvania has had a statute in place for a long, long
7 time. I believe 1949 is when the most recent iteration of that
8 specific section was written. That specifically requires that
9 separate privacy facilities be constructed on the basis of sex
10 and their use be regulated on the basis of sex.

11 Your Honor, sex is a binary classification. There's
12 two sexes: male and female. The Intervenor's expert testified
13 to as much. Gender identity is not a binary classification.
14 Gender identity exists in the identification as male, the
15 identification as female, the identification as gender fluid, as
16 gender non-conforming, as gender binary, as gender queer, as
17 none of the above.

18 Your Honor, we have two separate bathrooms and two
19 separate locker rooms. They don't have them based on our deep
20 internal feelings about anything.

21 Of course, we all want to show respect for all
22 students. And I believe that in this case we've seen evidence
23 that that is exactly what's happened. People should be able to
24 in the United States of America to live according to their
25 conscious wherever possible. They should be able to live

1 according to the dictates of their conscience. They should be
2 able to live based on the gender stereotypes that they identify
3 most with. And they shouldn't be discriminated against because
4 of how they identify themselves or what pronoun they want to use.

5 However, when we're talking about locker rooms and
6 bathrooms, the term gender identity in sex when you're talking
7 about Title VII and whether you can be fired at your accounting
8 firm is quite different than the context of locker rooms and
9 bathrooms, and let me tell you why.

10 There's a big debate in our country about whether
11 Title IX, what that means. Does sex mean gender identity? Is
12 it ambiguous or not? I think our briefing is very clear that
13 sex when they're talking about it is in the binary sense and
14 they're not talking about it the sense that can be as expansive
15 as the multiple members of gender identities that exist, Your
16 Honor.

17 But when somebody is fired because of their gender
18 identity, that doesn't -- there's no one-for-one exchange on your
19 right not to be fired on the basis of sex. Those two things can
20 exist together at the same time. They're not mutually exclusive.

21 But, Your Honor, in the bathroom and locker room
22 context, those two terms are mutually exclusive. If you
23 regulate bathroom use on the basis of sex, then you can -- if
24 you identify with the opposite sex, you still use it based on
25 your sex.

1 The Intervenor put a witness up who testified that his
2 body is female and talked in very clear detail about the fact
3 that there's a female body. That's the purpose. That's the
4 reason why the bathrooms are separated.

5 But if we separate bathrooms based on gender identity,
6 we're no longer doing it based on sex. Those two cannot
7 co-exist equally. When we change the definition of that term,
8 it's a mutually exclusive term and other people's rights become
9 violated.

10 Now, Your Honor, one of the things that I think comes
11 up often, and we've even seen these in some of the more recent
12 decisions that have been made, is the right to -- does the right
13 to privacy exist only when somebody's going to do something that
14 would be otherwise illegal for somebody of the same sex to do?
15 And the answer is no.

16 Your Honor, there is a number of cases where the
17 courts have held that it is proper to hire only a male who's
18 going to be working in the bathrooms and locker rooms in order
19 to clean them during the day when there's other males using them
20 and vice versa for females. It's not because -- and in a school
21 district, I think we see this -- we expect male janitors to go
22 into those locker rooms if they're during the day when the kids
23 are using it and to not go into the female locker rooms if
24 they're a male janitor. Why? It's not because we think that
25 all male janitors are going to do something potentially illegal

1 or do something potentially wrong. That would be wrong for
2 somebody of the same sex to do. The reason is because the girls
3 who are using the facility, their right to privacy would be
4 violated.

5 The girls' right to privacy does not spring to
6 existence or cease existing based on the state of mind of the
7 male janitor or whether based on the good intent or the good
8 purpose that they have for being there. They could be there
9 just to do their job. But, Your Honor, the girls' right to
10 privacy doesn't change based on the state of mind of the other
11 individual. The girls' right to privacy is theirs and theirs
12 alone.

13 We don't have separate restrooms on the basis of who
14 we're attracted to. Those are subjective internal feelings. We
15 don't have separate bathrooms on the basis of race. Those have
16 nothing to do with how we use the bathroom. And besides, race
17 exists in numbers well beyond the number two. Sex only exists
18 in the number two.

19 We don't them based on what we wear. Your Honor, I
20 would submit to you that it would be a violation of
21 PricewaterhouseCoopers to have such a rule that regulated
22 bathroom use on the basis of what clothes you wear. It would
23 also violate it on the basis of what your grooming habits are,
24 whether you adopt gender stereotypes about the opposite sex.
25 Separating bathrooms on any of those other basis would violate

1 the Constitution and would violate PricewaterhouseCoopers as
2 well.

3 The other side will get up here and argue that there's
4 no -- this injunction shouldn't be granted because they're going
5 to provide single-user restrooms or a team locker room for
6 students who don't want to change around members of the opposite
7 sex.

8 Your Honor, that's insufficient. The students, first
9 of all, in the team locker room-type situation, the evidence
10 from the principals were that students who identify with the
11 opposite sex would also be able to use those same team locker
12 rooms if they felt uncomfortable using the normal locker rooms.
13 So the team locker rooms solve nothing because students who
14 identify with the opposite sex would still be able to use those.

15 An example from this case is Joel Doe, if he decided
16 to use a team locker room, if Student A decided to also use the
17 team locker room, they wouldn't stop Student A from doing so if
18 Student A felt more comfortable in the team locker room.

19 But put that aside for one moment. Let's address the
20 individual single-user bathrooms.

21 Because there's a state law requiring separate
22 bathrooms, there is a benefit that is provided to students to be
23 able to use these multi-user facilities and the school is
24 conditioning the use of those benefits on giving up their
25 Constitutional right to bodily privacy when they use those

1 facilities.

2 Let me give you a couple cases with this
3 unconstitutional conditions and how this really works.

4 An unconstitutional condition doesn't have to be a
5 situation where you have an absolute statutory right like we have
6 here. There's an Eastern District case dealing with the Boy
7 Scouts where the City of Philadelphia was providing them rent for
8 a dollar a year, or something even less perhaps. The City of
9 Philadelphia decided to rescind that good rent agreement because
10 they disagreed with their exercise of their constitutional
11 freedoms -- the Boy Scouts exercise of constitutional rights.
12 The court held that you can't condition, even a gratuitous
13 benefit on somebody giving up constitutional rights.

14 We've seen that in situations even in a prisoner
15 context where the court held that a prisoner doesn't have a right
16 to stay in one prison or not be transferred to another prison.
17 But where a prison transfers that person in condition them being
18 able to stay where they are on giving up constitutional rights,
19 that that violates the unconstitutional conditions doctrine.

20 So even gratuitous benefits, Your Honor, can't be
21 withheld conditioned on giving up constitutional rights. But
22 that's what's happening here when the school says, you know, we
23 have these multi-user bathrooms and locker rooms available, and
24 that's clearly a benefit of education, and I don't think that
25 there's any disagreement with that, but to use that, you have to

1 give up your right to bodily privacy from members of the
2 opposite sex. That's not something that can happen.

3 The University of Pittsburgh, Judge Kim Gibson, was
4 very clear that the body of case law that exists is expansive
5 that demonstrate that there's a right to bodily privacy.

6 And, in fact, Your Honor, a Pennsylvania case stated
7 that the highest right to privacy, because there's numerous
8 rights to privacy, but the highest right to privacy in the
9 Constitution is our right to privacy against being viewed or
10 viewing members of the opposite sex in these spaces.

11 Prisoners who have almost zero rights have a right to
12 privacy that's weighed against discrimination law when it comes
13 to hiring female prison guards in the male prison or vice versa.
14 Courts have held that we can tell female prison guards that
15 they're not going to be in certain areas, that they're not going
16 to be able to perform certain functions, that they're not going
17 to be able to perform certain searches unless it's an emergency
18 situation, to protect the rights of privacy of prisoners from
19 members of the opposite sex. Certainly, Your Honor, the right
20 to privacy of our students needs to be protected.

21 The question will come up about weighing the different
22 interests of the students involved here. Clearly, there's
23 students who want to be able to continue to use the multi-user
24 restrooms based on their sex and have their privacy protected
25 from members of the opposite sex.

1 Your Honor, the evidence in this case has been very
2 clear that this is not about excluding transgender people from
3 locker rooms. All of the Plaintiffs in this case have testified
4 that they are fine with having people who identify as transgender
5 in their locker room as long as they're the same sex as them.

6 The testimony from the principal has been that there
7 has never been a student who complained because there is a
8 student who is the same sex as them, but who identified
9 differently.

10 The school has even gone so far even in this past year
11 to permit a transgender student to room with a member of the
12 same sex on a school trip.

13 The right to privacy, the rights that are in conflict
14 here, the rights that the Intervenors and the Defendants are
15 going to ask you to weigh are different. The rights that the
16 Plaintiffs are requesting are based on statutory law, they're
17 based on constitutional law, and they're based on a fundamental
18 right of privacy to be able to use these facilities without
19 members of the opposite sex present.

20 The competing claimed interest is the right to be able
21 to use a restroom that makes someone feel more comfortable or
22 more accepted in their prerogative to live according to the
23 gender identity that they mostly adhere to.

24 But, Your Honor, that is not a constitutional right,
25 that's not a statutory right. And that right violates others.

1 And how do we do this in our case law in other places when we
2 have a conflict like this? We provide reasonable accommodations
3 for people. If you have discomfort using restrooms with people
4 of the same sex, we would provide a reasonable accommodation.
5 The same way in employment law, we would provide -- if you have
6 two employees who want off on Saturday because of their religious
7 belief and 98 employees don't, it would be unreasonable not to
8 provide those two employees the day off.

9 But if their situation was reversed and 98 of your 100
10 employees wanted the day off, we would call that -- it's an
11 undue burden on the employer. And, Your Honor, that undue
12 burden is just a financial burden.

13 Here what's happened is the school has provided lots
14 of reasonable accommodations to students who seek to live
15 according to the dictates of their conscience and identify with
16 the gender identity and the gender stereotypes that they mostly
17 -- that they desire to adhere to. They've let them wear the
18 color that they want at graduation. They've let them use the
19 pronoun that they want. They've called them the names that they
20 asked to be called. They've let them run on the track team of
21 the opposite sex. They permit you to be eligible to be on the
22 prom king or queen regardless of your sex.

23 And, Your Honor, in all of those instances, the right
24 to privacy isn't compromised. Nobody else's rights are being
25 taken away. But to accommodate in the bathroom context takes

1 away other people's rights. That's where our right to live
2 according to the dictates of our conscience hits a block. We
3 can't permit people to violate other people's rights providing
4 reasonable accommodations and that's what's happening here.

5 We're asking you to issue an injunction in this case
6 because constitutional rights, there's a public benefit to
7 providing injunctions when constitutional rights are at issue.
8 Courts have held that the right to privacy cannot be remedied by
9 just monetary value. Anytime there's a right to privacy at
10 issue, it is proper to issue an injunction, like in this case.

11 Your Honor, if you have any other questions, I'd be
12 glad to --

13 THE COURT: I do. What's the role of the legislature
14 in this? We're asking the Court now to basically expand the
15 right to privacy, if we're going to do it in a constitutionally
16 context, dramatically. Or, we're asking the Court to take
17 Title IX, which we all know was never intended to go as far as
18 it already has gone, and now we're going to take it one step
19 further, and it begs the question with respect to Title IX, as
20 well as Title VII, if it's to be redrafted, is it the role of
21 the courts to redraft it, or is it the role of the legislature
22 to redraft it?

23 MR. SAMEK: Right. Well, I would say that it's the
24 role of the legislature to redraft it. But if I could just take
25 one step back and talk about kind of how it's been changed up

1 and to this point.

2 There's a lot of courts who looked at this and said,
3 look, gender identity isn't it in the terms. Clearly, there's
4 many instances where they're talking about the other sex or one
5 sex or the other. They're clearly talking about binary sex.

6 So some courts have said, you know, we're not going to
7 reinterpret into the statute for that reasons. Others have then
8 gone one step further and said the same thing, but there is a
9 right not to be discriminated based on the stereotypes that we
10 adopt. So while we're not going to say you can't be fired
11 because of your gender identity, we will say we're not going to
12 permit people to fire you just because you adopt the gender
13 stereotype of the opposite sex.

14 So it's a little bit of a legislative versus judicial
15 philosophy on how far you can push the Oncolly (phonetic) court
16 decision essentially, which is sometimes there's things that a
17 statute or people drafting a statute didn't foresee, but there's
18 a harm that we still want to prevent, such as male-on-male
19 sexual harassment. It may not have been the reason why Title
20 VII was enacted. People are mostly probably thinking of males
21 harassing females, but it's still a reason that you would want
22 to -- an evil that Title VII can remedy.

23 But the problem again, as I've alluded to earlier, is
24 if a court does decide to read gender identity into a statute
25 and protect that as well, those two don't conflict. They're not

1 mutually exclusive because when you say that you're going to
2 protect somebody from being fired based on gender identity, you
3 don't all of a sudden become able to be fired based on your sex.

4 But in the bathroom and locker room context, once you
5 say that sex means gender identity, it no longer means
6 biological sex as we've seen in this case where members of the
7 opposite sex can now come into the restrooms and locker rooms.

8 So it's absolutely something that under Title IX, I
9 think even in the regulation itself, I think it's 166.33 or
10 whereabouts, it says specifically that you can have restrooms,
11 locker rooms, and changing facilities on the basis of the sex.
12 And that's really been a point of contention where we say, well,
13 you know, having some court said that Title VII can be read to
14 mean gender identity, well, yes, in the employment context where
15 those things are not mutually exclusive.

16 But I'd like to point out one other thing, Your Honor.
17 For the courts who have determined -- and there's been -- in the
18 past one and a half years, there's been some courts who have
19 pushed like the Pine-Richland case or the Kenosha case where
20 they've looked at this issue and said, well, maybe this is
21 something that is ambiguous, so we're going to let the
22 Government make the determination.

23 When you interpret a statute, I think a rule of
24 judicial interpretation is the Constitutional Savings Doctrine,
25 that you attempt to interpret a statute in a way that would be

1 constitutional.

2 And if you read Title IX, the purpose of Title IX was
3 to prevent invidious discrimination between the sexes. And they
4 wanted to ensure, as we even saw when Justice Ginsberg was
5 writing about the Equal Rights Amendment, they wanted to ensure
6 because one of the arguments that the other side brought out was,
7 well, if you make it completely equal, don't we lose our right to
8 privacy in bathrooms and locker rooms? And the answer is always,
9 well, no. And Justice Ginsberg did that when she wrote in 1975.
10 And the regulations show that they did that here.

11 Now, the word "may" exists. But in the context of a
12 very strictly constructed statute attempting to get rid of all
13 discrimination between the sexes, that makes sense that they
14 would say, hey, you can still keep separate bathrooms because of
15 privacy.

16 If you were to read it as being permissive, essentially
17 what you've done is you've created a situation where Title IX is
18 unconstitutional. You're permitting people to trade situations
19 where they can open up facilities and require them in a school
20 context to condition -- you're giving up your right to
21 fundamental -- your fundamental right to privacy based on being
22 able to use a benefit that the school provides.

23 THE COURT: Isn't that partly resolvable if the
24 legislature would define gender, define what sex is? Because
25 there's another thing in this case that I don't think really

1 came out in a big way, the one thing is the School District has
2 to approve you -- before you if you're a biological male from
3 using the female locker room, vice versa. And it's always kind
4 of been suggested that it's almost an all or nothing, that you
5 know who is a biological male, you know who is a biological
6 female, and you know who is transgender.

7 But when I heard the expert testify, he indicated you
8 can be transgender and not even be diagnosed with gender
9 dysphoria. The pictures that were introduced into evidence, and
10 of course, the witness, who was a fantastic witness, there was
11 no question there. They -- if you looked at them, you said,
12 that is a male who should be in a male bathroom if you didn't
13 know that he had female parts, there would be no question about
14 it, and vice versa with the females.

15 But the issue that I don't think really came out is
16 what about on that sliding scale where someone looks exactly
17 like a male, but they identify as a female, does it make a
18 difference -- does appearance matter with respect to, first of
19 all, whether it's severe and persuasive and offensive, does
20 appearance matter? And is this about appearance? Is this about
21 redefining gender or redefining one's sex? And how does the
22 School District make the determination of when someone is past
23 that threshold that they should be given permission to use the
24 bathroom of the sex they identify with?

25 MR. SAMEK: Well, I think that it is not about

1 appearance at all. And I believe that the other side would
2 agree to that and actually --

3 THE COURT: Not to interrupt you, but obviously your
4 definition's easier. I mean, it's the objective. The objective
5 is always easier: male, female, what are your body parts and
6 that's who you are.

7 The subjective, which relies on the individual saying
8 who they believe they are or whether they believe they're a male
9 or female, that's much more difficult because it's not
10 objective. It's subjective. But there are often objective
11 characteristics that go along with that subjective identify, as
12 we saw in this courtroom. And I apologize for the interruption,
13 but...

14 MR. SAMEK: Your Honor, I think you're absolutely
15 right. The way that the School District did this the previous
16 year and on back was very, very clear, it was just based on your
17 biological sex.

18 And there isn't even any confusion in the School
19 District context because when somebody identifies as transgender,
20 it's very -- well, you're transgender, that means you identify as
21 something other than your sex. Sometimes it's kind of a wink-
22 wink-nod-nod, oh, Your Honor, don't you think that we're going to
23 have to check people's pants to figure out what they are? Well,
24 no, absolutely not. They can go back to doing it the same exact
25 way they've always done it. You have a policy or practice that

1 says male, female locker rooms. It's based on binary sex. The
2 say way they did two years ago, three years ago, four years ago.
3 If it is determined that somebody is abusing that system or it
4 comes out that somebody is of the opposite sex, then they can
5 reasonably accommodate that person.

6 But our right to privacy doesn't change based on what
7 somebody's wearing. Our right to privacy doesn't change based
8 on the grooming habits that somebody has. If they did, that
9 would be a violation of Pricewaterhouse. That would be a
10 violation of gender -- of discrimination laws based on gender
11 stereotypes because those external things aren't relevant to the
12 bathroom that we use.

13 And our society I think is having a little bit of --
14 we're looking at this and there will be times where somebody may
15 go into a restroom and their eyebrows are going to raise and
16 they're not going to be sure if somebody's in the right place or
17 not. That will happen.

18 But, Your Honor, that will happen no matter who
19 succeeds on this injunction hearing in the School District.
20 Student A and Student B, not as convincing when it comes to the
21 external appearance, which by the testimony is pretty evident,
22 but the two choices are, we can have people who are the same sex
23 as us in the restroom and locker rooms, or we could have people
24 of the opposite sex in restrooms and locker rooms. The school
25 testified that they don't have a practice of making a

1 distinction based on what the person wears.

2 And it's interesting, Your Honor, that even the
3 Plaintiff's expert testified that he doesn't tell people which
4 bathroom or locker room that they should use, and that there's
5 people who identify as transgender who decide not to use
6 restrooms with the opposite sex. There's a whole host of a
7 reasons and a whole host of sliding scales with what makes
8 people feel more comfortable.

9 But, Your Honor, our right to privacy doesn't change
10 based on what somebody's wearing. It doesn't change based on
11 what somebody's thinking.

12 And in addition to my analogy with our janitors, Your
13 Honor, if we have a father who has a couple daughters and some
14 of them have a disability. I have a daughter with a disability
15 myself. When she reached a certain age, I may want to go and
16 help her with some things that she needs help with. And I would
17 submit to you that I'm a decent man and have good intentions,
18 and those intentions would be to help my daughter. But I
19 shouldn't do that because my presence violates their right to
20 privacy, regardless of my good intent or my good reason for
21 being there. And that's one of the things that I think some of
22 the other courts have started to look at this and got wrong.

23 One other thing, Your Honor -- and then if you have
24 any other questions, I'd be glad to answer them -- is the other
25 courts, the Pine-Richland courts, for instance, who have looked

1 at this, have looked at this and said, you know, I haven't seen
2 any privacy violations. I haven't seen anybody who's done
3 anything wrong. And there's no evidence that there's ever been
4 any sort of privacy violations or anybody's ever changed clothes
5 in the common areas of a bathroom or locker room. I think the
6 evidence in this case is very clear that those kind of things
7 have happened.

8 The other cases like Kenosha and Pine-Richland that
9 have come to contrary conclusions have said, well, any privacy
10 violations are really speculative. We don't have any evidence
11 like this before us right now. That's not the case here.

12 And another difference is that we have evidence of
13 what actually goes on in the common areas of those locker rooms
14 and those common areas of the bathrooms. People use those to
15 change clothes. People enter into states of undress in those
16 places. The right to privacy starts when we enter those doors.

17 If stalls were enough to protect our privacy, there
18 would be no reason to segregate males and females from those
19 common areas either. There would be absolutely no constitutional
20 justification to have -- to prevent anybody from going into the
21 common areas if those were enough.

22 The reason it's not enough is in the pudding -- the
23 proof is in the pudding. That's why we have those separate
24 spaces and we don't permit people from the opposite sex to
25 frequent those areas. Obviously, in this case, with males,

1 there's another -- with urinals, there's much, much more
2 exposure. And I think that's something you can take judicial
3 notice of, but it's also something that's just obvious from the
4 evidence submitted here that there's a very open -- open and the
5 chances that privacy violations are going to continue is very
6 clear.

7 THE COURT: Now, what about irreparable harm? Now,
8 recognizing that a violation of your constitutional rights in
9 and of itself may be irreparable harm, but putting that aside,
10 we have a situation where your clients are suggesting that they
11 do not want to change in a locker room with transgender
12 students. There are private facilities available to them. One
13 of the arguments was they wouldn't be able to go to the
14 bathroom, but there are private facilities available to them
15 that they can avail themselves of until this case is resolved.
16 Where is the irreparable harm here?

17 MR. SAMEK: So if you're taking the constitutional
18 considerations completely off the table, where is --

19 THE COURT: So I don't want you to argue something
20 that's obvious.

21 MR. SAMEK: Sure. Well, the students in this case
22 have testified that their -- they've had to modify -- extremely
23 modify the way that they can actually even use the bathrooms.
24 First of all, there's only, I think four that exist. And the
25 amount of students who would be required to use those would be

1 very, very high.

2 The other part is, Your Honor, this is something that
3 exists in every school, in every school building for every day
4 for every student. Every student isn't aware that this lawsuit
5 is going on. Every parent is not aware that this lawsuit is
6 coming on. New students coming into the school district aren't
7 necessarily aware of what's going on here.

8 Some people who are aware aren't even aware that
9 there's a different between gender identity and sex, which is
10 something that for a long time most people have viewed as being
11 synonymous.

12 There's a lot of confusion. When the school year
13 starts, there are going to be people who go into the restroom or
14 locker rooms who don't want to use it with people of the
15 opposite sex who are going to have their privacy violated as
16 well.

17 Mary Smith is not going to come back to the school if
18 the injunction is not entered because of the affect that this
19 has had on her. There are other students that were her friends
20 that she testified are reducing their use and the ability to use
21 those spaces as well.

22 But, Your Honor, in the Title IX context, this is
23 another thing that hasn't been brought up in some of these other
24 cases, like the Title IX sexual harassment aspect.

25 Court cases are very clear -- and I'll give you the

1 name -- the Norwood case out of the 7th Circuit said it would be
2 an extreme violation of privacy to permit males or females into
3 the restrooms of the opposite sex merely to clean them.

4 In the Lewis case in the 2nd Circuit, they said that
5 they affirmed a jury verdict that found that it is sexual
6 harassment for a company to not only -- it wasn't even a policy
7 that they permitted it, but they just didn't do anything about
8 cleaners coming into the restroom of the opposite sex to clean,
9 which is a step back from what we have here where that's the
10 actual purpose and intent of the practice that the School
11 District instituted. They found that that was sexual
12 harassment.

13 So we don't permit -- in sexual harassment law, we
14 don't permit the harassing entity to tell the victim, you need
15 to remove yourself from the harassment situation, and that's the
16 solution. We don't do that. There's a Western District case
17 just in 2008 where the school district, essentially the kid went
18 on home bound instruction. The court found that that wasn't a
19 solution to sexual harassment.

20 There was another school district who said we're going
21 to just move the victim to another class to resolve the problem.
22 That in and of itself was sexual harassment.

23 And what the School District is doing here is saying,
24 yeah, you might have a problem, you might feel harassed being
25 asked to change around people of the opposite sex, being asked

1 to tolerate it and make it as natural as possible, but you can
2 just use a single-user facility. That's sexual harassment. We
3 can't condition the use of those restrooms based on either
4 tolerating the sexual harassment or else going someplace else.

5 THE COURT: Now, the Supreme Court in a completely
6 different context, one said that student athletes -- and this
7 was in the context of student athletes -- enjoy a reduced
8 expectation of privacy. School sports are not for the bashful.
9 Public school locker rooms are not notable for the privacy they
10 afford.

11 MR. SAMEK: Absolutely.

12 THE COURT: Now, there are many people in school
13 bathrooms who I'm sure are not happy changing next to people of
14 the same sex. If you take a different continuum, changing next
15 to homosexuals because they're different from them, and their
16 views of sex are different. Then it takes up this next level of
17 transgender. And then I would suggest the next level of
18 opposite sex. Any one of these, whether it's the same sex,
19 whether it's homosexual, whether it's a transgender, whether
20 it's -- they're on a different continuum, but they can be
21 uncomfortable, bashful, not want to change under those
22 circumstances.

23 And the school is providing -- it appears to me, the
24 school is providing an alternative to any student under any of
25 those circumstances.

1 Your main argument is the history of this country,
2 without question, has been separate bathrooms, male/female, that
3 the Crimes Code comes into play, the School Code comes into
4 play, Title IX comes into play, Title VII comes into play,
5 separate bathrooms are permitted. You can't have separate
6 bathroom based on race, but you can have separate bathrooms
7 based on sex, and there's a reason for that. And it's not
8 discrimination; it's a recognition of the difference between
9 male and female and what basically you've been arguing.

10 However, the fundamental point that comes in here is,
11 is somebody who's transgender a male simply because they were
12 born a male, or are they a female because they identify as a
13 female? And your argument is, there's no question about that.

14 MR. SEMAK: Yeah, Your Honor. There is no question
15 about that. And I think the Defendant -- the Intervenor's
16 expert made that very clear. There's a difference between sex
17 and gender identity. Sex exists in the binary. There's two
18 sexes. Gender identity exists on a continuum and a spectrum and
19 there's many, many different gender identities outside of just
20 the two.

21 And, Your Honor, if you go back to the idea that the
22 Supreme Court -- or the cases where the Supreme Court said
23 there's a reduced expectation in locker rooms and bathrooms,
24 that's absolutely correct. And that's exactly the reason why we
25 have separate bathrooms because there is a reduced expectation

1 of privacy in those places because those are the exactly the
2 areas where we go to perform functions that we're not going to
3 do out in the open with other people present.

4 And that's why it's so important when we look at those
5 cases, we see that they're so careful to make sure that the
6 sexes have the space that they need to be able to perform those
7 activities, even to the point of permitting that in the cases of
8 prisoners. It's something that is that important to us that
9 even in safety type context where there's a search where people
10 weigh that right to privacy against the right or the need to
11 search somebody.

12 Another example and when you're doing analysis tests
13 and the Supreme Court has looked at this a few times, and this
14 in our briefing as well, but they've always been very, very
15 clear to make certain to point out that the person conducting
16 the test, whenever it is proper, is a person of the same sex as
17 the person who's being tested. That's how important it is.

18 And like you said, Your Honor, when you take these
19 other categories, these other classifications that people may
20 feel uncomfortable about, those are the type of classifications
21 that were not permitted to discriminate and to exclude people on
22 the basis of, whether -- whoever you're attracted to. A
23 subjective internal attraction to somebody is not the reason we
24 have separate restrooms. And I would argue, Your Honor, that to
25 separate restrooms based on attraction would actually be

1 illegal. I think the ACLU would join me in that.

2 Your Honor, I believe that to separate on the basis of
3 race is illegal for the very same reason because it has nothing
4 to do with why we have separate bathrooms in the first place
5 existing in the binary.

6 And that same reason is true with how we subjectively
7 and deeply identify with gender stereotypes about one sex or the
8 other or none. These are deeply, subjective, internal beliefs.
9 And people -- the school has done a good job in accommodating
10 these children in areas where the privacy rights of others
11 aren't compromised. But we should never allow somebody's rights
12 to live according to the dictates of their conscience violate
13 others' constitutional rights. That's not how we solve problems
14 in our society. We can do that by reasonably accommodating
15 people.

16 This isn't about hate. It's not about exclusion for
17 the sake -- because of anybody's gender identity. People are
18 being treated in the way that the policy was, the status quo
19 policy before they changed it. They are being treated equally
20 on the basis of their sex. They are being told it doesn't
21 matter what you dress like. It doesn't matter what you wear.
22 It doesn't matter what you believe. It doesn't matter religious
23 beliefs or what you believe about gender identity. We use the
24 restroom based on our sex. That's treating people equally.

25 And in the Pricewaterhouse case, if you did a

1 hypothetical with the facts there, and that was the case where
2 there was a woman who had a lot of the stereotypical attributes
3 of males and was being treated differently because of it and the
4 Court held that that was discrimination.

5 If the workplace had told her, you know, you look too
6 much like a male or you talk too much a male, we're not going to
7 let you use the female restroom anymore because you scare the
8 males. Your Honor, that would be discrimination. We don't have
9 them for those reasons; we just have it based on our sex.

10 THE COURT: Very well. Thank you very much, sir.

11 MR. SAMEK: And I don't know if I have to reserve any
12 time for rebuttal.

13 THE COURT: You don't have to reserve it because
14 you'll be given it.

15 MR. SAMEK: Okay. Thank you, sir.

16 THE COURT: Mr. Levin.

17 MR. LEVIN: Good afternoon, Your Honor.

18 THE COURT: Good afternoon, sir.

19 MR. LEVIN: May it please the Court. I'm Mike Levin
20 and I represent the Defendants, the School District;
21 Dr. Faidley, who I hope will soon be released from this case
22 since he's no longer employed by the School District;
23 Dr. Cooper; and Dr. Foley. And I would like to point that
24 Dr. Cooper is sitting next to me at counsel table today.

25 The Plaintiffs are asking for an order in this case

1 that would prevent transgender students from using the bathrooms
2 and locker rooms that correspond to their gender identity. We
3 submit that the Plaintiffs have no right to such relief; that
4 they certainly cannot meet the heavy burden of establishing a
5 right to such relief; and they are requesting the Court to issue
6 an order that likely violates the legal and constitutional
7 rights of the transgender students attending the Boyertown Area
8 School District.

9 Let's look at what happens when people try to impose a
10 rule like the one that the Plaintiffs want this Court to impose
11 in this case.

12 On March 23, 2016, North Carolina's legislature passed
13 a sweeping law that reversed a Charlotte ordinance that had
14 extended some rights to people who were transgender and forced
15 transgender people to use bathrooms that corresponded to the
16 gender on their birth certificates.

17 The reaction was swift and widespread. The National
18 Basketball Association announced that it would move its all-star
19 game out of the state. There were cancellations of conventions
20 in the state by organizations and cancellations of shows by
21 performers protesting the law.

22 PayPal announced that it was reversing its decision to
23 move into the state.

24 The NCAA and the Atlantic Coast Conference removed
25 events from North Carolina.

1 The ACLU, Equality North Carolina, and other groups
2 sued within days of the Bathroom Bill becoming law.

3 The U.S. Department of Justice followed on May 9 after
4 first warning the state that the law jeopardized billions of
5 federal dollars the state receives each year in money for
6 schools, colleges and other issues.

7 On August 26, 2016, U.S. District Judge Thomas
8 Schroeder banned the University of North Carolina from enforcing
9 the Bathroom Bill against the transgender plaintiffs in that
10 lawsuit pending final trial.

11 Governor McCrory dug in and he lost his reelection
12 bid. Many believe that it was because of his support of the
13 Bathroom Bill.

14 On March 30, 2017, a bill to eliminate House Bill 2's
15 bathroom regulations was enacted and signed into law. In other
16 words, the General Assembly corrected the error it first made.

17 Another example. A case cited by Plaintiff's counsel
18 today, Johnston v. University of Pittsburgh. Judge Gibson, who
19 I am proud to say I went to law school with and I served on law
20 review, he was number one in the class. I was not. He was
21 editor in chief of law review. I was not. He, therefore, made
22 few mistakes in law school. I venture to guess he made a
23 mistake in the Johnston case.

24 He ruled that the rights of transgender students were
25 not violated when the University prohibited the Plaintiff from

1 using the bathrooms and locker rooms consistent with his gender
2 identity. Judge Gibson said, and I quote, "This case presents
3 one central question, whether university receiving federal funds
4 engages in unlawful discrimination in violation of the United
5 States Constitution and federal and state statutes when it
6 prohibits a transgender male student from using sex segregated
7 restrooms and locker rooms designed for men on a university
8 campus."

9 The simple answer is no. Consequently, Judge Gibson
10 granted the motion to dismiss in that case, and it was appealed.
11 But what was the final result of the case? The case was settled
12 with the university allowing transgender students to use
13 bathrooms and locker rooms consistent with their gender
14 identity. Like North Carolina, the University of Pittsburgh
15 recognized the right thing to do.

16 Like North Carolina and the University of Pittsburgh,
17 initially the Pine-Richland School District adopted a rule that
18 prohibited transgender students from using the bathrooms and
19 locker rooms that corresponded to their gender identity. A
20 majority of the school board adopted a resolution that said in
21 part, and I quote, "All students will have the choice of using
22 either the facilities that correspond to their biological sex or
23 unisex facilities."

24 Suit was filed in response and on February 27, 2017,
25 Judge Hornak granted a preliminary injunction in favor of the

1 transgender plaintiff.

2 The court restrained and enjoined the school district
3 from enforcing the resolution or any policy practice or custom
4 of the school district that denies plaintiffs the right and
5 access to use district's restroom consistent with the
6 plaintiffs' gender identities, and from taking any formal and
7 informal disciplinary action against the plaintiffs because they
8 use restrooms consistent with their gender identities.

9 That case has now been settled in favor of allowing
10 the students to use the restrooms and locker rooms consistent
11 with their gender identity and with payments of \$20,000 to each
12 of the plaintiffs and \$75,000 in attorney's fees.

13 Let me ask, why did North Carolina get the
14 overwhelming national criticism in response to the Bathroom Bill
15 causing it to partially repeal the act? Why did the University
16 of Pittsburgh settle the case and recognize the rights of
17 transgender students after winning at the motion to dismiss
18 stage? Why did the school board in Pine-Richland agree to
19 settle that case to pay a sizeable amount in attorney's fees and
20 to the plaintiffs?

21 I submit to you that the reason for all of those
22 things is the growing recognition that such is the right thing
23 for the law to do and that the law, in fact as it currently
24 exists, comes to that conclusion.

25 Among the materials that we provided with our proposed

1 findings or the many formal of policies adopted across the
2 Commonwealth of Pennsylvania expressly prohibiting discrimination,
3 and I agree that only about a half dozen or so expressly talk
4 about bathrooms, but the rest talk about prohibiting
5 discrimination against transgender students.

6 Many of the school districts have already written
7 policies that are consistent with what the Boyertown Area School
8 District practice is.

9 The Plaintiffs argue that this case is about invasion
10 of privacy and sexual harassment, and the Court heard the start
11 of the argument by Plaintiff's counsel that this is a case of
12 privacy. And they cited in the materials in their brief that
13 they filed back in May, as well as the proposed findings of law,
14 they cited many, many cases standing for the proposition that
15 there is a general privacy right in certain areas, and they gave
16 many different examples.

17 However, in each of those cases where it was held the
18 privacy rights were violated, it was a situation where there was
19 a mandatory or forced violation of privacy, such as in the
20 student case of a strip search, a forced search.

21 Here, because of the alternatives made by the
22 Boyertown Area School District, there is no invasion of privacy.
23 Any students who feel uncomfortable, regardless of transgender
24 or any other reason from changing where transgender students
25 would be changing or using the bathrooms, have other facilities.

1 Those other facilities are open to the Plaintiffs in this case.

2 And once the situation was brought to the School
3 District's attention, the School District responded quickly to
4 advise the Plaintiff, Joel Doe, that he had alternatives. He
5 chose not to use them.

6 And the Plaintiffs, interestingly, failed to cite any
7 authority for their proposition that granting alternative
8 bathroom facilities to people who feel uncomfortable is a
9 violation of any statute or is a violation of any constitutional
10 law. There is no case that gives a statutory or constitutional
11 right to change in a gym locker room when there is an alternative
12 locker room available to you that will provide you with all of
13 the privacy you deserve.

14 There is no case law or constitutional right that says
15 your rights -- your constitutional or statutory rights are
16 violated because you may feel uncomfortable going into a multi-
17 user bathroom where you have a private bathroom, single-user
18 bathroom. And there was no citation by the Plaintiffs for
19 either of those. Consequently, because of the alternatives,
20 there is nothing that needs protection by this Court.

21 The flip side of the coin is that there is a growing
22 number of cases that told that the rights of transgender
23 students are violated when prohibited from using bathrooms and
24 locker rooms consistent with the gender identity.

25 As the Court is well aware, the Plaintiffs have the

1 burden of showing that they're likely to prevail in this case,
2 yet, they failed to cite some important areas of the law. And
3 unless I missed it when reading their brief and their proposed
4 findings and proposed conclusions of law, they did not address
5 what affect, if any, the Equal Protection Clause of the 14th
6 Amendment has. The Plaintiffs did not address what the
7 Americans With Disabilities Act effect on this case is or what
8 Section 504 may mean.

9 The Equal Protection Clause, as the Court is well
10 aware, was the legal basis for Judge Hornak granting a
11 preliminary injunction in favor of transgender students in
12 Evancho vs. Pine-Richland. In granting the preliminary
13 injunction in Evancho, Judge Hornak found no justification for
14 the resolution of the school district requiring transgender
15 students to use bathrooms and locker rooms consistent with their
16 gender identity.

17 Judge Hornak also found that the privacy concerns were
18 satisfied by the layouts of the bathrooms in that district. The
19 bathrooms and the fact that there are alternative locker rooms
20 are at least equal, if not better, than what was in the Pine-
21 Richland School District.

22 The -- I mentioned the fact that the Plaintiffs failed
23 to address Section 504 or the Americans With Disabilities Act
24 that prohibits discrimination on the basis of disability and
25 also requires accommodations to be given to people with

1 disabilities. Although, the Americans With Disability Act
2 expressly states that gender identity disorder is carved out of
3 a disability, the statute does not tell us what that really
4 means. And we have at least one court in the Eastern District,
5 Blatt vs. Cambella, 2017 Westlaw 217 8123, where Judge Leeson
6 denied a motion to dismiss under Title VII and the ADA by a
7 transgender employee after concluding that gender dysphoria is a
8 disability under the ADA.

9 Congress did not exempt out gender dysphoria.
10 Congress did not exempt out depression. Congress did not exempt
11 out anxiety. So I suppose it is possible what the expert
12 testified that you could have a person who has gender identity
13 disorder or who is transgender who may not have these medical
14 conditions, who may not have a diagnosis of depression, who may
15 not need an accommodation in order to advance their welfare.
16 But there are certainly transgender people who have all of those
17 medical conditions and may well need accommodations.

18 We are all learning in this area. This is a
19 relatively new area of the law of the school district. This
20 school district, unlike others which have adopted policies, this
21 school district has not yet adopted a policy, but the testimony
22 has been consistent that it is taking one step at a time. It's
23 making individual judgments based upon the information coming
24 from the guidance counselors who were dealing with the students,
25 et cetera.

1 I suggest to you that at an absolute minimum under
2 Section 504 of the Rehabilitation Act and the Americans With
3 Disabilities Act, that those transgender students who have
4 disabilities would have a right to an accommodation.

5 And under chapter 15 of the State Board Regulations,
6 that's 22 PA Code, chapter 15 -- which I know more than a little
7 bit about since I and Janet Stontlet (phonetic) from the
8 Education Law Center actually wrote those, and the State Board
9 of Education adopted them as a settlement of a case that the Law
10 Center had against the Commonwealth of Pennsylvania --
11 Boyertown, without knowing it, was actually engaged in the
12 process of chapter 15 requires, and that is that there be an
13 evaluation by the school district whether accommodations are
14 necessary for a student, and that the student be given those
15 accommodations that are necessary. They didn't write it out in
16 what's called a service plan, which is what chapter 15 requires,
17 but they did it as a matter of fact in this case.

18 Again, unless I missed it when I read their briefs in
19 their proposed findings, Plaintiff's counsel did not discuss the
20 Americans With Disabilities Act or Section 504.

21 Judge Leeson said in the Blatt case, quote, "In view
22 of these considerations, it is fairly possible to interpret the
23 term gender identity disorder narrowly to refer simply to the
24 condition of identifying with a different gender, not to exclude
25 from ADA coverage disabling conditions that persons who identify

1 with a different gender may have, such as blast (phonetic)
2 gender dysphoria, which substantially limits major life
3 activities of interacting with others, reproducing, and social
4 and occupational functioning."

5 Because this interpretation allows the court to avoid
6 the constitutional questions raised in this case, it is the
7 Court's duty to adopt it. Accordingly, blast condition is not
8 excluded by Section 12.211 of the ADA and Cambella's (phonetic)
9 motion to dismiss blast ADA claims on this basis are denied.

10 You heard undisputed evidence in this case from
11 Dr. Leibowitz that gender dysphoria and the place it has in the
12 discussion of transgender issues. Not only are the Plaintiffs
13 asking this Court to issue an order that will affect students
14 who are not parties to this case, but they're asking for an
15 order without providing evidence of the harm and damage that may
16 be done to those students.

17 Another law that the Plaintiffs give short triff
18 (phonetic) to is actually Title IX and its protections for the
19 transgender students.

20 In Evancho, Judge Hornak conducted an extensive
21 analysis of Title IX and the cases dealing with things like
22 transgender issues or sexual stereotypes. After noting how the
23 sex discrimination prescriptions under Title VII and Title IX
24 are essentially the same, Judge Hornak said, "Numerous courts
25 have held that Title VII's prohibition of discrimination on the

1 basis of sex includes discrimination on the basis of, among
2 other things, transgender status, gender non-conformity, sex
3 stereotyping, and sexual orientation."

4 Judge Hornak then listed most of those cases. And the
5 Court said after listing those cases, "The Court concludes that
6 the Plaintiffs have demonstrated a reasonable likelihood of
7 showing that Title IX's prohibition of sex discrimination
8 includes discrimination as to transgender individuals based on
9 their transgender status and gender identity."

10 However, the Court stated that such a conclusion did
11 not end and the inquiry when it came to bathrooms and locker
12 rooms. With respect to bathrooms and locker rooms, the Court
13 considered the regulations under Title IX, 34 CFR 106.33 says,
14 "A recipient may" -- emphasis the word may -- "provide separate
15 toilet, locker room and shower facilities on the basis of sex,
16 but such facilities provided for students of one sex shall be
17 comparable to such facilities provided for students of the other
18 sex."

19 It is interesting that the regulators did not use the
20 word must. They gave discretion to the recipients of federal
21 financial assistance. And Section 504, of course, applies both
22 in the employer context, as well as the educator context. They
23 gave discretion as to whether such separate facilities will be
24 provided and where they will be provided. Judge Hornak
25 interpreted that as being a carve-out from what otherwise would

1 be discrimination.

2 The Court concluded that because of the regulatory
3 carve-out, the School District's policy likely did not violate
4 Title IX. In that case, the policy was to exclude transgender
5 students from bathrooms and locker rooms.

6 But then after that decision was issued, the 7th
7 Circuit in Whitaker vs. Kenosha, they upheld a preliminary
8 injunction on the basis in favor of transgender students on the
9 basis of a violation of Title IX.

10 But with that background, that brings us to what does
11 Title IX say in this case with respect to the protections of
12 transgender students?

13 In this case, the School District did not exercise its
14 discretionary power it had under the regulation. In this case,
15 the practice of the School District, beginning last year, was to
16 allow transgender students to use the bathroom and locker rooms
17 consistent with their gender identity. There is nothing in
18 Title IX mandating a contrary result. If Title IX required
19 separate facilities, the regulation would have used the word
20 "must" rather than the word "may."

21 Where a recipient of federal financial assistance
22 elects to treat transgender students the way that Boyertown has
23 elected to treat transgender students, it is submitted that the
24 School District is acting in accordance with Title IX.

25 To repeat the conclusion of Judge Hornak, "The Court

1 concludes that the Plaintiffs have demonstrated a reasonable
2 likelihood of showing that Title IX's prohibition of sex
3 discrimination includes discrimination as to transgender
4 individuals based on their transgender status and gender
5 identity."

6 I would like to close, before I answer any questions
7 by the Court, by quoting a powerful statement by Senior Circuit
8 Judge Davis from the 4th Circuit in his concurring opinion in
9 one of the several decisions issued in GG vs. Gloucester County
10 School Board, 853 Fd. 3d 729, last year.

11 "GG's" -- and GG is a transgender individual -- "GG's
12 plight has shown us the inequities that arise when the Government
13 organizes society by outdated constructs like biological sex and
14 gender. Fortunately, the law eventually catches up to the lived
15 facts of people."

16 I have nothing further. If the Court has any
17 questions for me.

18 THE COURT: Yes, sir. The process of Boyertown, if
19 someone wishes to use a locker room based on their gender
20 identity as opposed to their sex, they must be approved by the
21 school; is that correct?

22 MR. LEVIN: Correct.

23 THE COURT: And what is the process for them getting
24 approved and what are the considerations, the factors that are
25 taken into consideration approving them?

1 MR. LEVIN: There was very little evidence in this
2 case about that. Dr. Cooper, if I recall my reading of his
3 transcript -- Your Honor might remember that I was not here
4 through that testimony -- was that the guidance counselors are
5 involved in the process and make a recommendation to Dr. Cooper,
6 and Dr. Cooper then meets with Central Administration.

7 If us lawyers were a lot smarter and perhaps involved
8 in the process earlier, maybe we would have papered it a little
9 bit differently to give more information. But in some respects,
10 the students have privacy concerns with what they tell their
11 guidance counselors. The guidance counselors have to keep
12 matters that they discuss with the students confidential.
13 There's a state statute that requires confidentiality. So on
14 this record, there is no evidence of all of the factors taken
15 into account.

16 However, there's also no evidence, and I would submit
17 to Your Honor that it's Plaintiff's burden of proving to the
18 contrary, these are transgender students. There's no evidence
19 that they're not. You met one of them. And I think it is clear
20 from Aidan's presence in this courtroom that students aren't
21 labeled transgender or given the right to use the bathrooms
22 consistent with the gender identity lightly. And Aidan
23 testified that he used the men's room here in this federal
24 courthouse. Under the Plaintiff's theory, that was a violation
25 of somebody's constitutional right to privacy when he used those

1 bathrooms.

2 I disagree. I think when we know as much as we know
3 today, which is not as much -- which is a lot more than we knew
4 five years ago and ten years ago about the plight of these
5 people. When I went to school, there were no students that I
6 could recall that had peanut allergies and school districts did
7 not have to deal with peanut allergies. Now we have separate
8 tables for students with peanut allergies and we prohibit
9 students from bringing peanuts into classrooms in order to
10 provide those kinds of accommodations. In many respects, the
11 accommodations required for transgender people are equally well
12 deserved.

13 THE COURT: You did a great synopsis of the evolving
14 law and the -- how this issue has taken a priority, I might say,
15 in our society right now. You mentioned multiple instances that
16 were legislative, others that were judicial.

17 First of all, do you believe there is a right to
18 privacy under the Constitution as it applies to locker rooms?

19 MR. LEVIN: Yes.

20 THE COURT: And second of all, you mentioned multiple
21 statutes, obviously all written by legislatures, and yet you
22 discussed how they were changed by courts, or interpreted by
23 courts to create things that the legislature could have put into
24 them. Do you have a position on what the role of the
25 legislature is on this evolving issue and what is the role of

1 the courts?

2 MR. LEVIN: Well, to the extent that there is a
3 constitutional right that the transgender students have under
4 the Equal Protection Act, obviously, any statute could not be
5 written in a way which would violate that.

6 With respect to the Court's interpretations of what
7 different statutes mean and what sex means, for example, and how
8 courts are to interpret it and whether it's to be simple
9 biological sex or something else, it probably would behoove the
10 General Assembly to start thinking in terms of real-life issues
11 that we now have to talk about.

12 But this case, and in fact, the order that the
13 Plaintiffs propose to Your Honor present some very interesting
14 questions which are related to your question about what role
15 does the General Assembly have versus what role do the courts
16 have, et cetera.

17 The Plaintiffs want sex determined by quote "biological
18 sex," end of quote. There's no statutory definition about what
19 that means. And from reading and watching shows like *20/20* on
20 occasion that have stories about this, some people are born where
21 the biological sex of that individual is not as clear-cut as it
22 is most of the time. So what is biological sex?

23 And when the Plaintiffs in their proposed order want
24 it to be determined based on biological sex, what if there's
25 surgery that changes the physical structures in the person? Is

1 that new biological sex?

2 And I started to do it at lunch -- I couldn't find it
3 -- but the Plaintiffs themselves, the four individual Plaintiffs
4 themselves weren't entirely clear on what they would want the
5 school district to do. I believe I'm accurate in saying that at
6 least one or more of the Plaintiffs, even if a student had a sex
7 change operation, they would not want that student in the
8 bathroom if they were born the other sex. And I believe there
9 was at least one, maybe more of the Plaintiffs, testified
10 contrary that if they did have the surgery.

11 Some of the laws and some of the concepts are based
12 upon the sex assigned at birth. And a shorthand equation of that
13 is what's on the birth certificate. Well, Pennsylvania now will
14 allow a change in the birth certificate, the gender without any
15 sex change operation. So under the Plaintiff's proposed rule, a
16 student could have a birth certificate that says he's a male, and
17 yet the Plaintiffs say he has to go to the girls' room.

18 So it's a lot more complicated than simply saying
19 we're in a society where sex is binary and that's the end of the
20 story. We're in a society that's much more complex where the
21 rights of disabled, where the rights of minorities, where the
22 rights of transgender all must be protected.

23 And we're in a School District that allows -- the
24 School District is acting 100 percent consistently with the
25 decision in Pine-Richland. Every single student can go to the

1 bathroom consistent with their gender identity. And those who
2 have concerns about privacy have more than ample opportunity to
3 have their privacy protected.

4 Thank you.

5 THE COURT: Thank you very much, sir.

6 And, Attorney Roper, would you like a 10-minute recess
7 before we begin?

8 MS. ROPER: I would be very grateful for that, Your
9 Honor.

10 THE COURT: Very well. We'll stand in recess for 10
11 minutes.

12 THE CLERK: All rise.

13 (Recess taken from 3:30 p.m. to 3:43 p.m.)

14 THE CLERK: All rise. Court is again in session.

15 THE COURT: You may be seated, thank you.

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

18 Attorney Roper, you may argue.

19 MS. ROPER: Thank you, Your Honor. Good afternoon.

20 I'm going to try not to duplicate our filing since
21 it's quite apparent the Court has read everything that was
22 submitted.

23 But I do want to begin, particularly given all the
24 case law cited by Plaintiffs, with one very important
25 observation. There is only one decision in the federal courts

1 that addresses a similar request to that made by the Plaintiffs.
2 And that was in a case that the Plaintiffs have not discussed,
3 but that we briefed. That is, Students and Parents for Privacy
4 vs. United States Department of Education from the Northern
5 District of Illinois. A report and recommendation from a United
6 States Magistrate Judge who was dealing with an almost identical
7 request for a preliminary injunction to exclude transgender
8 students from bathrooms and locker rooms in a school where they
9 were allowed to use those facilities in congruence with their
10 gender identity.

11 That decision, Your Honor, essentially addresses
12 almost all the arguments made by Plaintiffs. There were some
13 different claims there because the United States Department of
14 Education was also a defendant that are not relevant here.
15 Otherwise, the Court walks through the same questions about
16 constitutional privacy, distinguishes the same cases that are
17 cited by the Plaintiffs here. It is the only case that is on
18 all fours.

19 And it goes the other way, finding not only that there
20 is no right to privacy that encompasses the right to exclude
21 others from single-sex facilities, no right -- no sexual
22 harassment under Title IX under these circumstances, but also
23 finds that there is no irreparable harm threatened to non-
24 transgender students who are afforded the opportunity to use
25 private facilities; in other words, they're not forced to undress

1 in front of anyone, transgender or otherwise, that they're not
2 comfortable undressing in front of.

3 THE COURT: Now, do you of any personal knowledge as
4 to why the district court has not adopted that report and
5 recommendation?

6 MS. ROPER: Yes, Your Honor. That report
7 recommendation was issued before the election. After the
8 election, the case -- or, I'm sorry -- after it was issued, the
9 case was stayed to wait for the Supreme Court to rule in GG vs.
10 County of Gloucester.

11 Of course, the Supreme Court instead remanded GG and
12 County of Gloucester, and then the guidance that was the basis
13 of the claim against the United States Department of Education
14 was withdrawn. The case is now on a very different footing. It
15 is still in the midst of briefing and so on, and there has been
16 no further decision made.

17 But a lot has happened since that report and
18 recommendation. Nothing that undermines the findings, however,
19 with respect to a constitutional right to privacy with respect
20 to Title IX, with respect to the issue of irreparable harm.
21 Nothing has changed that would undermine those findings by the
22 court.

23 And, of course, Plaintiffs gave passing reference to
24 cases in which courts have held in sort of the inverse
25 procedural posture, that transgender students are entitled to

1 preliminary injunctive relief in order to be able to use the
2 bathrooms that match their gender identity.

3 There have been a number of such decisions. At the
4 closest, both geographically and temporally, Your Honor, is the
5 recent decision in Evancho vs. Pine-Richland School District.

6 Contrary to what Plaintiffs say, that decision did not
7 turn on a finding that there had been no encounters between
8 transgender students and non-transgender students in restrooms.
9 Instead, that case turned on a finding that the transgender
10 students had a right to use the facilities that match their
11 gender identity and included an analysis of, of course since it
12 was a preliminary injunction, the relative hardships and found
13 again, as Mr. Levin has mentioned, that the alternate facilities
14 in that case ensured that no one was required to take off their
15 clothes or do anything else in any space where they were
16 uncomfortable with the other people in the space.

17 Those are our -- frankly, our closest authorities, our
18 closest precedents.

19 The other cases that Plaintiffs cite -- and I'm
20 actually going to stop talking about law for a minute to talk
21 about the record -- but before I do that, I just want to say,
22 the other cases that Plaintiffs cite are largely in opposite and
23 often do not hold the things that Plaintiffs are citing them
24 for. But I'll get back to that.

25 I would like to talk about the record before I go back

1 to talking about the likelihood of success, because as Your
2 Honor has already noted, the record is key, particularly in any
3 proceeding seeking a preliminary injunction, but also because
4 the 3rd Circuit has instructed us that privacy claims are to be
5 evaluated with exacting attention to the details and
6 circumstances before the Court. They are not fungible. We need
7 to look at the circumstances here.

8 So what we have learned, Your Honor, through our many
9 hours -- and we appreciated Your Honor's patience with our
10 scheduling issues in terms of presenting the evidence here -- we
11 have learned that there are several transgender students at
12 BASH, the Boyertown Area Senior High. I've adopted the kids'
13 name for the high school, it was just easier. And that there
14 have been openly transgender students at BASH since Aidan
15 DeStefano first approached the administration when he started
16 there in 2014.

17 We have also learned through the testimony of
18 Dr. Leibowitz, that a transgender person is someone who's innate
19 identity concerning their gender, their gender identity, is
20 different from the sex they were assigned at birth based on
21 their genitalia.

22 I want to say something here. Plaintiffs suggested
23 that gender identity is based on the individual's preferred
24 gender stereotypes. As if Mr. DeStefano when he was younger
25 said, I prefer short hair, therefore, I think I'm a boy. That --

1 there's no testimony, and indeed, frankly insulting, to the whole
2 understanding of what a transgender person is. As Dr. Leibowitz
3 testified, as Mr. DeStefano testified, each person has an innate
4 sense of self. You do and I do. Ours may well match the sex we
5 were assigned at birth. But for transgender people, it doesn't.
6 And Mr. DeStefano wants to have short hair and dress in a
7 stereotypical male fashion because he's male, not the other way
8 around.

9 We also learned from Dr. Leibowitz that transgender
10 teens in particular are at risk of experiencing gender
11 dysphoria. Gender dysphoria is a mental health diagnosis
12 identified in the DSM-5. And it does not refer to the status of
13 being transgender, but instead, refers to clinically significant
14 stress, anxiety, and depression that many transgender people
15 feel because what they know about themselves on the inside does
16 not match how they are perceived and how they are treated by
17 others in our society.

18 We have also learned that teens with gender dysphoria
19 who do not receive treatment for the condition are at far higher
20 risk of depression, anxiety, other negative mental health
21 outcomes, up to and including, suicidal ideation much more than
22 their peers.

23 Fortunately, we also learned from Dr. Leibowitz that
24 gender dysphoria can be treated. And the dangers of the adverse
25 mental health conditions greatly lessened. The only treatment

1 for gender dysphoria that is accepted by a consensus of the
2 medical and psychological community is to help the adolescent
3 reduce the stress of that disconnect between how he views
4 himself inside and how others view him. And that treatment
5 protocol, which is laid out in the WPATH Standards of Care which
6 were discussed at length and submitted to Your Honor, has been
7 endorsed by the American Psychiatric Association, the American
8 Psychological Association, the American Academy of Pediatrics,
9 the American Academy of Child and Adolescent Psychiatry, the
10 Endocrine Society, and the American Medical Association.

11 Just another digression here, Your Honor, with respect
12 to Plaintiffs' argument. They referred to -- I want to get the
13 words right -- an illegitimate new category of identifying people
14 when they talk about gender identity. There's nothing
15 illegitimate about recognition of gender identity and of gender
16 dysphoria, the result when a person cannot live in conformity
17 with her or her gender identity. That concept of gender
18 identity, the need to treat people in conformity with their
19 gender identity is accepted science in the medical and
20 psychiatric community. Those are the accepted standards of care.

21 Plaintiffs may believe that those standards of care
22 are not sufficiently supported by double-blind studies which,
23 frankly, just don't happen in the mental health world, as
24 Dr. Leibowitz explained, but those are the standards of care.
25 It is a stick in the eye I think to the entire consensus of the

1 medical and psychiatric community to suggest that it is an
2 entirely illegitimate construct.

3 THE COURT: Although, I interpreted that more to
4 suggest that legally, transgender is not yet been adopted as a
5 protected class. And I say that in a very broad sense. If that
6 what was being suggested, that this is not a protected class as
7 intended under, for instance, Title VII or Title IX, to be
8 transgender, how would you respond to that?

9 MS. ROPER: It certainly is, I think, accepted that
10 discrimination against an individual because he or she is
11 transgender is a violation of our anti-discrimination laws
12 because it is treating someone based on your perception about
13 their sex and how they should behave and how they should express
14 their gender that is not based on any kind of necessity.

15 And here, Your Honor, I'm out of my depth. I can't
16 sort of quote chapter and verse from these Title VII cases, but
17 that's a determination. And I'm not saying that every court has
18 found that. But a great many courts have, and particularly, in
19 this context.

20 THE COURT: I mean, that's what we're arguing in one
21 respect is, what does it mean to say you can't discriminate on
22 the basis of sex? What does those words mean and who properly
23 defines them? Does the Court define through its interpretative
24 responsibility? Does the legislature define it by virtue by
25 adjusting the legislation, modifying it to make it clear and to

1 properly reflect what are protected classes in this country?

2 MS. ROPER: Although, literally, Your Honor, in this
3 case, you are not being asked to determine the legal rights of
4 transgender students.

5 THE COURT: I know, it's the exact opposite.

6 MS. ROPER: You're being asked to determine the legal
7 rights of the non-transgender students --

8 THE COURT: Yes.

9 MS. ROPER: -- which I would suggest have far less
10 support in the case law, but -- I keep promising to get to that,
11 and I really do -- I don't -- I'm not at all discouraging the
12 interruptions. I just want to get --

13 THE COURT: Well, I know you were well prepared, so I
14 like to let you go.

15 MS. ROPER: Thank you, Your Honor. I do want to
16 finish talking about the record for a moment.

17 As we heard from Dr. Leibowitz, an important
18 treatment, probably the primary treatment for teens with gender
19 dysphoria, is to help them with social transition. That is
20 enabling them to live their lives, enabling a transgender boy
21 like Aidan was, now he's a transgender man -- I know he's
22 listening -- to live as the person he knows himself to be,
23 helping him to figure out how to restructure his life, beginning
24 at home and then moving into the other spaces where he lives,
25 beginning with things like what am I called? What name do I

1 use? What pronouns do I ask people to use? How am I going to
2 dress? How am I going to present myself? What is the self I
3 want to present and how do I want to express that? That is all
4 part of a social transition, helping someone to find what the
5 expression of their gender is.

6 Now, that is not -- and, Your Honor, suggesting that
7 it is pushing a transgender boy, say to wear a particular thing,
8 to wear his hair a particular way, as Dr. Leibowitz, I think,
9 made very, very clear, it is a process of helping the teen find
10 out how he wants to express his self-identity.

11 And at some point, certainly for Aidan, it was very
12 early on. That teen probably is going to feel very uncomfortable
13 in facilities that correspond to his sex assigned at birth and
14 contradict his gender identity. And so part of the social
15 transition then is dealing with that question.

16 And, you know, Your Honor, we heard from Dr. Leibowitz,
17 I said, he will want or a transgender teen will want. But what
18 we heard from Dr. Leibowitz is that this is not simply a matter
19 of preference. All of us, wherever we go in our day-to-day
20 lives, we use the restroom. And every time I walk up to a
21 restroom, I am confronted with needing to identify myself as male
22 or female. It's not a big deal to me. It's not a big deal to
23 most of us. But to someone who is already dealing with the
24 feeling that the world does not respect who I am, to have to walk
25 through a door that says I'm the other, is very, very distressing

1 and very upsetting.

2 And so many transgender teens will, first of all, avoid
3 facilities, restrooms, locker rooms and so on, that would require
4 them to essentially affirm the sex assigned at birth, which they
5 do not identify with.

6 And secondly, they will want to use the facilities that
7 they do belong in, those facilities that correspond with their
8 gender identity. A boy wants to go into the boys' room, a girl
9 wants to go in the girls' room, in part because that is then
10 choosing the correct label we each must choose many, many times a
11 day. And that repetition, the restrooms, while it sounds to some
12 to be trivial, it is the most ubiquitous challenge to a
13 transgender boy or girl's sense of self, is they have to walk up
14 to that door every single time and say, which one am I going to
15 claim.

16 And that is why it is so essential, so fundamental to
17 many transgender teens, not all. Every transgender person goes
18 through his or her own process of transition, his or her own
19 process of deciding how they want to express themselves. But for
20 many of them, Dr. Leibowitz testified, this is incredibly
21 important. This is central to their sense of identity and their
22 ability to live in conformity with that sense of identity.

23 It is so central, he said, that when his patients get
24 to for the first time go to school where they're compelled to go
25 and walk through the door of the restroom or the locker room that

1 matches their gender identity, they -- what did he say, it lifts
2 away a cloud. It lifts a weight of burden off of them that they
3 have otherwise felt every day, probably multiple times a day,
4 because, you know, many of us have to relieve ourselves many
5 times a day.

6 So this is -- it is fundamental. It is about being
7 accepted for who they are, believed about who they are. And that
8 is incredibly important to transgender teens, probably to all
9 transgender people.

10 You heard Aidan testify. You heard him pretty much
11 lose the ability to speak when he talked about how important it
12 was to him to be accepted on the boys' cross country team. How
13 important it was to him to be almost elected prom king. What was
14 it four votes, separating him between prom king and next in the
15 court. That acceptance from his peers was overwhelming important
16 to him, literally overwhelming to him.

17 And he expressed much the same thing, although, he
18 found difficulty with the words, but this is what he said about
19 being able to use the boys' bathroom and locker rooms, even
20 though he had for used an alternative space, the nurse's
21 bathroom. He said, it was awesome. And like I think I had not
22 just my life together, but I had like again surgery. I was on
23 hormones. I felt the best I've felt in a long time to actually
24 walk in there the first time, speechless. Like, it's a bathroom.
25 I mean, but I was to myself, I was speechless, because I was able

1 to use the facilities that I was able to use.

2 He's a young man struggling to express something that
3 is difficult to express, Your Honor, but I think the depth of
4 importance was quite apparent from that testimony.

5 So here's another thing that we've learned through this
6 process. No student at BASH has to use a restroom or change in a
7 room where they feel uncomfortable. Every student can find
8 alternate facilities. Just in terms of single-user bathrooms
9 that are for -- there are four throughout the high school that
10 are always accessible to students, four more that are accessible
11 for students who actually have things going on in the places
12 where they are. We're talking about the guidance office, the
13 principal's office, et cetera.

14 The school has talked about making other spaces
15 available so the students can have privacy, whether it's the
16 little teen auntie room lockers, or the whole separate team
17 locker facility. There are lots of options. And the school is
18 -- has -- school officials testified over and over again that
19 they're going to work make every student comfortable. Make sure
20 no student has to change.

21 And every student is going to have a different level of
22 comfort with different things, right. Mary Smith was perfectly
23 willing to take off her bra and underwear in front of other girls
24 when she was changing, but she didn't want to be around anybody,
25 including other girls when she had her period. Then she would

1 change in a shower stall or to use the bathroom, she would use
2 the nurse's office.

3 Macy Roe never, she testified, took off her underwear
4 or her bra when she was changing around other girls. She didn't
5 have a problem using the bathroom when she was -- when she had
6 her period.

7 Jack Jones testified that he always tried to change in
8 the most secluded corner of the locker room, including long
9 before this school year, because he just isn't comfortable taking
10 his clothes off in front of other people.

11 Every person has a personal sense of modesty. It is
12 different from person to person. It is different in different
13 circumstances. And what the school is doing is allowing every
14 student essentially to protect that personal sense of modesty.

15 Each of the Plaintiffs testified that they were
16 embarrassed and uncomfortable at the idea of using a restroom or
17 a locker room if there might be a transgender student in the same
18 facility, but -- and I don't mean to question their sincerity, I
19 don't at all, but Mary Smith, for example, would not -- did not
20 routinely use a stall or go behind a curtain to change when she
21 learned that there were transgender girls in the school using the
22 girls' facility. She did routinely do that when she was
23 concerned about people knowing she had her period.

24 So again, in terms of the degree of their
25 embarrassment, no one questions the sincerity of their objection

1 to this practice, the sincerity of their discomfort with the
2 concept of transgender students being in the same room as them,
3 but none of them testified to anything like a clinical level of
4 distress. And that's going to be important, of course, when we
5 are talking about the balancing of hardships.

6 In addition, every single one of the Plaintiffs
7 acknowledged that using a single-user facility would protect
8 their privacy. They testified they don't want to do that.
9 Actually, some of them have been doing that during the past
10 school year. And indeed, as we heard, Mary Smith would do it on
11 occasion independent of this whole controversy, even before that.
12 But they didn't want to because they believed they have a right
13 not to.

14 But not a single Plaintiff and not a single parent
15 identified any disadvantage, any loss, any problem with using the
16 alternate facilities. And that's going to be very important, not
17 only for the question of irreparable harm, but also when we talk
18 about unconstitutional conditions. The idea of giving up a
19 benefit when they actually haven't alleged any disadvantage to
20 the alternative arrangement, it just doesn't fly.

21 On the other hand, of course, as Dr. Leibowitz
22 explained, there are potentially severe harms to transgender
23 students who are excluded from facilities that match their gender
24 identity. They are at risk for significant mental health
25 consequences, such as increased anxiety and depression, and even

1 an increased risk of suicide.

2 His testified about his own patients and said,
3 essentially, the ones who are particularly distressed, they leave
4 school. Whether they leave school in the middle of the day to go
5 try to find a bathroom that they can use without someone
6 challenging them, or whether they just dropped out of school
7 entirely, drop out, they're home schooled, whatever, to avoid
8 again that stress of again and again and again during the school
9 day having to confront a situation where they are barred from the
10 restroom that matches who they are.

11 On this record, Plaintiffs cannot satisfy their burden.
12 Because I've been talking about the evidence, I just want to talk
13 about irreparable harm and the balancing of the hardships and
14 then really want to take a break and invite the Court's
15 questions, because you've been listening very respectfully, but I
16 am quite certain you have questions having spent now several days
17 in front of you.

18 So first of all, Plaintiffs cannot establish the kind
19 of irreparable harm that justifies an injunction pending the
20 adjudication of their claims. The cases they cite talk about a
21 presumption of irreparable harm in very different kinds of
22 circumstances: First Amendment cases, in cases involving
23 abortion rights, which is, as the 3rd Circuit has explained to us
24 an entirely different kind of privacy right, we don't have a
25 single case that suggests that they have an automatic -- or, I'm

1 sorry -- a presumption of irreparable harm in this kind of case.

2 Furthermore, as I mentioned, while certainly there may
3 be some degree of emotional distress that could arise to
4 irreparable harm, even though emotional distress is something
5 normally compensated by damages, Plaintiffs have not testified to
6 that level of distress. They put up with the situation, making
7 the best of it for some eight months in the school. None of them
8 has sought any counseling or other aid as a result of their
9 distress over this. And indeed, Jack Jones testified that the
10 thing that embarrassed him most is that he's one of the few
11 students objecting to the practice.

12 Most importantly, of course, the students all -- the
13 Plaintiffs all hold in their hand the powers to avoid any
14 embarrassment by using the alternative facilities. Especially
15 when we are talking about a request to change the existing
16 situation, one that benefits transgender students during the
17 pendency of litigation before things are fully decided, before
18 there's a full record, although we've certainly done our best to
19 present a lot to the Court. When you're talking about a
20 preliminary injunction halting the School District's existing
21 practice during the pendency of this litigation, it takes more
22 than that the Plaintiffs are uncomfortable, especially when they
23 have an alternative that completely protects their right to
24 bodily privacy.

25 And frankly, there is no authority that supports the

1 granting of a preliminary injunction in this case, the only case
2 on all fours denied, or at least the magistrate judge recommended
3 denial of the preliminary injunction in that case.

4 So I just -- now, I would like to talk about
5 unconstitutional conditions, because that is Plaintiffs' answer
6 to the lack of harm. They say they're harmed. It's actually a
7 violation of their rights to ask them to use alternate facilities
8 if they don't like the conditions in the multi-user facilities
9 because it's requiring them to give up a right that they have.

10 We didn't brief the unconstitutional conditions
11 doctrine because Plaintiffs hadn't cited any authority in support
12 of it, and we may indeed need to submit some things supplemental
13 to the Court. But let me start by addressing what they have in
14 their most recent submission, the conclusions of law proposed
15 last night.

16 They cite two cases about unconstitutional conditions.
17 The first one, Regan vs. Taxation With Representation, actually
18 holds the opposite of what they contend. It holds that the
19 general rule is that the Government can condition a benefit on
20 the surrender of certain rights. And that was a challenge by a
21 501(c)(3) group that said we shouldn't have to give up our right
22 to lobby if we are -- in order to enjoy the deduction of
23 donations to us that comes with the 510(c)(3) status under the
24 tax law.

25 And the court said, no. In fact, in general, the

1 Government can condition the benefits (indiscernible) that it
2 distributes.

3 The other case that they cite is about conditions on
4 land development permits, and there's a whole different line of
5 case law that addresses that, really separate from sort of the
6 fundamental rights component of the Unconstitutional Conditions
7 Doctrine. That case also acknowledges that the Government can,
8 in fact, impose conditions on the issuance of permits in this
9 case, but put some constitutional limits on how far those
10 conditions can go.

11 In fact, the cases that discuss the Unconstitutional
12 Conditions Doctrine, the default is that the Government can
13 impose conditions on the use of benefits that it provides. There
14 are exceptions. It cannot impose a condition aimed at the
15 suppression of what it considers dangerous views. It cannot
16 impose a condition that prevents the independent exercise of a
17 right.

18 So, for instance, those are the cases that talk about
19 the Government saying, if we give you this money, you can't --
20 and this comes from League of Women Voters, it had to with
21 programming on publicly-supported broadcast stations -- and the
22 court said again, the condition -- that condition, in fact,
23 failed constitutional review, because not only did the Congress
24 try to say you can't use our Government money for this, but they
25 also said, you can't even do it with any of your other money,

1 right. And that's the situation where you get into an
2 unconstitutional conditions issue when the Government is actually
3 preventing you from doing something, not with the benefit it
4 provides. It can condition the use of its benefit, but
5 independently of that benefit.

6 And obviously, this is a very, very different kind of
7 case. But if you want to draw the analogy, Plaintiffs here are
8 not being asked to give up their right to privacy. They are not
9 being forced to take off their underwear in front of anyone.

10 They have the opportunity to use -- Mary Smith has the
11 opportunity to use the girls' bathroom, she has the opportunity
12 to use any of the other facilities, some of which she's already
13 used in the past, none of which provide her any disadvantage.

14 So first of all, in terms of an unconstitutional
15 condition, it's not clear that they are giving up anything
16 because they haven't even alleged, there's not a shred of
17 testimony that there's some problem with them using alternate
18 facilities; that there's any disadvantage, any harm, inhibits
19 their educational opportunities in any way.

20 But secondly, the fact that there is a way for them to
21 exercise whatever privacy rights they have, independent of the
22 bathroom labeled girls or the bathroom labeled boys, means that
23 there is no violation of the Unconstitutional Conditions
24 Doctrines here.

25 This is important, of course, because it is their only

1 response to the Court's questions about irreparable harm. It is
2 their only response to the availability of the alternative
3 facilities that they -- that somehow requires them to give up a
4 right. It does not. That is not what the Unconstitutional
5 Conditions Doctrine holds.

6 So, Your Honor, I want to wrap this up as much as I
7 can. You've already heard me talk about the balance of
8 hardships. On the one hand, we have the clearly genuine
9 discomfort of the Plaintiffs, but not a discomfort so severe that
10 it requires treatment, that it requires them to avoid school
11 activities.

12 On the other hand, we have the potential of extreme
13 harm to transgender students at BASH. The way Dr. Leibowitz put
14 it, he said it puts their lives on delay. It is an incredible --
15 it keeps them from participating fully in the school. Many of
16 them leave school. It endangers their mental health in many,
17 many different ways. And I think that that testimony, first of
18 all, was quite coach, and second of all, is completely
19 unchallenged.

20 Plaintiffs argue that the standards of care are not
21 supported by, and the treatments that Dr. Leibowitz and his
22 colleagues use, which are set forth in the Standards of Care, are
23 not sufficiently supported by science. They are the standard of
24 science in this area at this point because that is how science is
25 developed in the mental health arena is through the consensus of

1 experts.

2 And in terms of the balance of hardships, of course,
3 Plaintiffs have options. The transgender students really don't.
4 Aidan DeStefano could not, either in terms of his own personal
5 comfort, or in terms of the comfort of other students, use the
6 girls' room at Boyertown. And that was true from even before he
7 attended the high school.

8 He instead, students like him, would be forced to go to
9 alternative facilities, would be forced to give up the
10 opportunity to live in congruity with their internal sense of
11 self, their gender identity. And I'm not going to reiterate what
12 kind of harms that can produce.

13 Finally, Your Honor, something that I'm embarrassed to
14 say we forgot to include in our proposed findings of fact and
15 conclusions of law, which was a reference to the deference due
16 school officials, who I think very clearly from the evidence
17 presented here, are simply trying to do their best to be
18 protective and supportive of their students. There's no ill will
19 here at all.

20 And as further evidence of that -- not evidence, this
21 is not evidence, but essentially argument on that point, we had
22 intended to and will submit an amicus brief that was submitted in
23 the 4th Circuit in the GG vs. Gloucester County School Board case
24 submitted by school administrators from more than ten states
25 talking about their experience with policies that allow

1 transgender boys to use boys' rooms, transgender girls to use
2 girls' rooms, and the lack of disruption and lack of difficulty
3 that that has presented.

4 Your Honor, at this point, I would go on to talk about
5 sort of technical legal arguments in terms of the likelihood of
6 success, but that is really changing the subject, and so I wanted
7 to ask if you had questions you wanted to bring out at this
8 point.

9 THE COURT: No. You've talked a lot about the
10 constitutional issues, as well as the standards for preliminary
11 injunction. What about the idea of Title IX, and if you look at
12 its precise language, no person in the United States shall on the
13 basis of sex be excluded from participation and be denied the
14 benefits of, or be subjected to discrimination under any
15 education program or activity receiving, et cetera, et cetera,
16 et cetera? The argument here from the Plaintiffs is that this is
17 a hostile school environment --

18 MS. ROPER: Yes.

19 THE COURT: -- essentially, which has been recognized
20 as falling within that language and of its hostile environment of
21 harassment essentially to be within that kind of subset that's
22 been interpreted until Title IX has to be sexual harassment that
23 is so severe, pervasive, and objectively offensive that so
24 undermines and detracts from the victim's educational experience
25 that he is effectively denied equal access to an institution's

1 resources and opportunities.

2 Well, interestingly, my question for you is because I
3 don't have to ask you whether you believe the situation for the
4 Plaintiffs is so severe, perverse, and objectively offensive,
5 et cetera, but I also assume on the reverse, you would argue
6 that, in fact, Title IX in that very language, protects the
7 transgender student from discrimination on the basis of sex on
8 the argument that transgender going through the math is
9 discrimination on the base of sex. Is that correct?

10 MS. ROPER: Absolutely. And a number of courts have
11 held that and probably articulated it better than I am going to
12 be able to in-depth.

13 THE COURT: And do you want to address at all the
14 hostile environment harassment argument?

15 MS. ROPER: Certainly, Your Honor.

16 So first of all, one requirement under Title IX is that
17 the Plaintiff be targeted because of his or her sex. These
18 Plaintiffs are not being targeted. They are not being treated
19 differently than anyone else, same sex or different sex.
20 Plaintiffs are offered exactly the same opportunities as all the
21 other students, Mary Smith the same as Joel Doe, et cetera, at
22 the high school.

23 But more importantly, when we ask whether this is an
24 environment that is severe, pervasive and objectively offensive,
25 the cases that are cited by Plaintiffs all involve misbehavior.

1 They involve, whether it's inappropriate touching, inappropriate
2 comments, et cetera and so forth.

3 The evidence in this case is that Mary Smith saw a
4 transgender girl washing her hands in the bathroom. And Joel Doe
5 and Jack Jones saw a transgender boy changing his clothes in the
6 locker room. This is not misbehavior; this is the use of
7 facilities in the way that they are intended. There is nothing
8 severe, harassing, et cetera, about this.

9 And to say that is not to say -- so in other words, the
10 conduct is not severe. The conduct is not outrageous. The
11 Plaintiffs' perception and the Plaintiffs' sense of discomfort
12 may indeed be severe, although I've already sort of talked about
13 what their level of discomfort is, that's not the test. The
14 question is whether the conduct directed at them is outrageous.
15 There's no conduct directed at them at all. Certainly, not on
16 the basis of the sex. And the conduct that is occurring is the
17 appropriate use of facilities by transgender students.

18 THE COURT: Thank you very much.

19 MS. ROPER: All right.

20 Your Honor, you've properly characterized the
21 Plaintiffs' arguments for a constitutional claim as new legal
22 ground. Indeed. What they seek is not only a new constitutional
23 right, a new articulation of a very different constitutional
24 right, it's one unlike any other. It is not a right to be free
25 from an intrusion; it is the right to exclude others. And that

1 is unique and I think without precedent -- and here I use the
2 term both colloquially and legally -- in our system.

3 The -- at its most fundamental, they misconstrue the
4 right to bodily privacy. The first thing that the Plaintiffs
5 argued is the 3rd Circuit has recognized a right to privacy with
6 respect to your partially-clothed body, and they quote Doe vs.
7 Luzerne County.

8 It's really important to look at Doe vs. Luzerne County
9 because it holds the opposite, Your Honor. In that case, the
10 Plaintiff Doe was either fully or partially unclothed, depending
11 on whether you count the piece of paper wrapped around her at the
12 time that her male colleagues pushed open the door so that they
13 could look at her and record her being examined after -- as part
14 of a decontamination procedure.

15 The court did not find that that invasion of her
16 privacy was so severe as to state a constitutional right.
17 Instead, the court remanded the case for additional findings as
18 to whether her male colleagues saw the most intimate parts of her
19 body. Could they see, despite the paper, depending on how she
20 was turned, her breasts, her buttocks, et cetera, that was an
21 open question.

22 So, in fact, the court's holding was quite -- was the
23 opposite of what Plaintiffs contend. The court did not find a
24 constitutional violation on those facts, even those facts were
25 certainly an incredibly offensive and outrageous situation in

1 terms of her male colleagues barging in on her while she was in
2 the midst of a required decontamination proceeding that required
3 her to be nude. Not -- she had no choice in the matter. She
4 didn't have -- she tried to go into a private facility and they
5 barged into that facility. An entirely different situation.
6 And, of course, not the holding the Plaintiffs would say it was.

7 Instead, the 3rd Circuit has said, we're not going to
8 outline exactly which areas of skin are covered by the
9 constitution and which aren't. We aren't going to draw those
10 bright line rules. We can't determine on this record whether
11 there was a violation because we don't have enough detail about
12 what was exposed.

13 So that's a really important foundation here. We're in
14 the 3rd Circuit. What is the right to bodily privacy? It's
15 certainly -- well, we aren't even sure that it's the right not to
16 have your co-workers barge into a room where you are mostly or
17 entirely unclothed. We know that it requires some pretty
18 outrageous conduct. All the cases that Plaintiffs cite turn on
19 outrageous conduct, except for the cases that in fact hold
20 something entirely different.

21 So for instance, the cases that say an employer may,
22 not that an employer's required, may make the sex of the
23 applicant a condition when hiring for, say, cleaning in single-
24 sex facilities.

25 There is in fact no authority that establishes a

1 constitutional right to not be in a facility that is being used
2 by a transgender person.

3 Your Honor, there is not a legally defined expectation
4 of privacy that there will not be a transgender person in your
5 bathroom or in your locker room, nor could there be. Transgender
6 people exist. They use multi-user facilities in all the places
7 that the rest of us use multi-user facilities.

8 While it is certainly the Plaintiffs' preference that
9 they not be in a facility with a transgender person, that is not
10 law, and there is no authority that they can cite that says that.

11 Moving on, of course, you can't have -- and I'm not
12 going to comment on whether their right to privacy has been
13 violated in the past by what happened in the past when they
14 didn't know the situation. This is a preliminary injunction
15 proceeding. We're talking about the circumstances going forward
16 when they all know what the situation is in school. They all
17 know what their alternatives are. They all know that they can,
18 in fact, completely protect themselves.

19 The right to bodily privacy, as articulated by the 3rd
20 Circuit, wherever -- whichever parts of the skin does or doesn't
21 attend to is a right to not unwillingly expose your body to other
22 people. It is not -- that's a right that isn't about whether
23 you're standing in the locker room or standing someplace else;
24 it's about exposure.

25 These Plaintiffs will not in the future have never been

1 forced to expose themselves to anyone and never will be forced to
2 expose themselves to anyone. That is the fundamental difference,
3 both in terms of what scope -- where the privacy sort of begins
4 or ends, where that line is, but also these Plaintiffs are not
5 compelled in the way that was the fact in cases that they cite.

6 Now, they contend that the Evancho vs. Pine-Richland
7 School District case turned on the idea that there had been no
8 violations. I think I already mentioned -- I apologize, Your
9 Honor, now I remember, I have said that's not the case.
10 Transgender students have been using the facilities at Pine-
11 Richland and then were banned from them. And it was under those
12 circumstances that the Court found the transgender students had a
13 right to a preliminary injunction to restore them to those
14 facilities.

15 Your Honor, I think this is a tough social issue and
16 one as to which people have genuinely and deeply different and
17 sometimes incompatible views, but it is not a tough legal case.
18 It is not a tough preliminary injunction case. With all due
19 respect to the Plaintiffs and their distress that I do not
20 question, the law is not on their side and the record is not on
21 their side. And we urge that the Court would deny the motion for
22 a preliminary injunction.

23 THE COURT: Thank you very much, Counselor.

24 Mr. Samek, I know you've been chomping at the bit to be
25 able to respond to your two adversaries here.

1 MR. SAMEK: I'll try to be brief.

2 THE COURT: Now, what did you think of Attorney Roper's
3 last statement that this is a very tough social issue, but it's
4 not a tough legal issue and it's not a tough issue with respect
5 to whether the standards for a preliminary injunction have been
6 met?

7 MR. SAMEK: I agree with that statement, but I disagree
8 as to the conclusion, Your Honor. I think that the legal issue
9 is very clear, just like the judge in the Western District
10 stated.

11 In fact, let me quote what he said in regard to the ADA
12 argument that deconstructing sex-segregated bathrooms is a policy
13 matter better suited for congressional consideration and
14 deliberation. And I believe that to be the issue, Your Honor.

15 There's a state law here that requires schools to have
16 separate facilities on the base of sex and regulate usage based
17 on that.

18 One of the -- the 3rd Circuit case, the Luzerne County
19 case, that was a case where the initial -- the lower court didn't
20 do much of the work to determine what actually happened, so they
21 did send it back down.

22 But one of the things that the 3rd Circuit said in
23 considering whether there's a constitutional right and
24 expectation of privacy and so on and so forth is, is there an
25 expressed statutory mandate involved? Here, there absolutely is

1 in Pennsylvania state law. And, in fact, we have cites that show
2 just how thorough the legislature has done in ensuring that --
3 across Pennsylvania that bathrooms and locker rooms are protected
4 on the basis of sex.

5 The distinctions that they're making are largely based
6 on an idea that -- if they're making the arguments to support
7 that we should not have separate restrooms at all, a lot of the
8 arguments might gain some traction if there are no basis to have
9 separate restrooms.

10 Most of the arguments that the Intervenor and the
11 Defendants made are directed towards, hey, this isn't that big of
12 a deal because there's stalls and you go into the locker room and
13 there's been no bad conduct. But again, Your Honor, I remind you
14 that the standards of privacy aren't based on whether somebody
15 does something that would be otherwise illegal or improper for
16 somebody of the same sex to do. Otherwise, we wouldn't have
17 separate restrooms. We would all use the same one and expect
18 everybody to abide by that same code of conduct.

19 But there is an expectation of privacy that's so deep
20 and so fundamental that it's throughout our case law that we have
21 an expectation of bodily privacy from members of the opposite
22 sex. And despite the facts of the Luzerne County case where
23 there was some question where the Court said, I don't even really
24 know what they've seen or what they haven't seen, so you kind of
25 need to make that determination. The Court also said that the

1 constitutional right, that there is a constitutional right, and
2 it involves the partially clothed body as well.

3 There's a case in California where a girl was showering
4 in the locker room and she was -- the Granau case -- she was
5 viewed by a member of the opposite sex. She was wearing her
6 swimsuit, so the other said, you know, Your Honor, she just got
7 out of the swimming pool where everybody could see her and she
8 could have been showering on the shower like at the beach wearing
9 the same exact swimsuit. But the Court said, you know what, when
10 you go into that area, you have an expectation of privacy from
11 the other sex. And that's violated. It doesn't matter the fact
12 that she was wearing the same thing that she was wearing when she
13 was out in the swimming pool. There's that expectation of
14 privacy that we have. And we also have it in federal law with
15 Title IX, Your Honor.

16 None of the Intervenors or the Defendants addressed the
17 argument that regardless of the fact that Title VII -- and
18 there's been some debate between courts and legislatures of the
19 proper rule as to whether they can add gender identity -- but
20 none of them address the argument that when you swap those terms
21 or you add the gender identity term into sex as to the privacy
22 context, that those terms become mutually exclusive. You can
23 protect people based on sex from being fired. You can protect
24 them based on gender identity are being fired simultaneously. To
25 grant one doesn't exclude the other. But here, to say that our

1 privacy rights are based on gender identity, removes our privacy
2 rights based on sex.

3 The GG case that went up through the District Court and
4 the District Court found in favor of the school who were
5 protecting privacy on the basis of sex, it went up to the 4th
6 Circuit and on a two to one decision essentially said that you
7 need to start letting students of the opposite sex who identify
8 differently use those restrooms.

9 That went up to the Supreme Court. And the Supreme
10 Court stayed the 4th Circuit decision and the effect of that was
11 to do exactly what we're asking you to do here. It's to revert
12 back to protecting the binary system of restrooms based on
13 biological sex. And that is still in place in that case, Your
14 Honor. We're not asking you to do anything different than is
15 already place in that GG case right now based on the Supreme
16 Court's ruling that had the same exact effect as what we're
17 asking you to do here.

18 With regard to the Kenosha and the GG and the Pine-
19 Richland case, the Defendants I believe brought up the fact, or
20 they brought up the -- they made a statement that it included
21 bathrooms and locker rooms. Your Honor, that's not true. In
22 that case, Pine-Richland had only opened up their bathrooms and
23 not their locker rooms to members of the opposite sex. The judge
24 specifically pointed it out in a footnote and said that this is
25 excluding the locker rooms. And then when referring to the

1 bathrooms, he said there's no evidence before me that anybody's
2 privacy every could or would be violated in the common areas.

3 That's not the case here, Your Honor. We understand
4 that in this school district, people do change and they do use
5 the common areas, and there's other evidence that people have
6 looked in through the cracks to see if somebody's using it.
7 Obviously, you have urinal situation which presents a whole
8 different set of issues for the male students.

9 But those cases didn't involve any plaintiffs who had a
10 privacy claim -- who had a breach of privacy claim. Absolutely,
11 there's something -- there's interest here that needs to be
12 protected.

13 Ms. Roper made the statement that the expert said that
14 some students at times may feel like they don't want to go back
15 to school if they're not permitted to use the restroom of the
16 opposite sex of which they identify.

17 Your Honor, the only evidence in this case for any
18 student is Mary Smith who has testified that she is not coming
19 back to school because of the stress and anxiety that she has
20 felt based on this new policy that was put in place and the
21 practice that doesn't protect her rights.

22 There's a statutory and there's a constitutional right
23 to privacy based on our sex. The standards by which the expert
24 said that when he's -- when he is counseling individuals, he
25 doesn't tell them what restroom that they should or shouldn't

1 use. His goal is to find out whether they have gender dysphoria
2 or not. He testified that there's some students that don't want
3 to use the restroom of the opposite sex.

4 He testified that the transitioning, the gender
5 transitioning process and standards are evolving, but they're
6 based on a weak set of science -- agree that it was based on a
7 weak set of science, and that the show of transition signs is not
8 settled.

9 We have a body of case law that is so strong that it's
10 assumed to be a bona fide occupational qualification at times to
11 even unspoken, to subsume discrimination law, that the right to
12 privacy is the gold star when it comes to when you can separate
13 men and women, versus an interest that's based on weak science
14 evolving standards and questions that nobody is really 100
15 percent sure about.

16 And, Your Honor, as far as comparing the relative
17 harms, other than Mary Smith not coming back to school, Ms. Roper
18 stated that the only issue that we brought up is that our
19 constitutional rights were being violated, and that's absolutely
20 not true. Your Honor, there's evidence throughout of the anxiety
21 and the stress and the embarrassment and humiliation that were
22 suffered by these students. She left out the fact that the male
23 students were in their underwear whenever they were confronted
24 for the first time with somebody of the opposite sex in their
25 locker room.

1 The other -- one of the other points that I really
2 think should be pointed out, nobody, nobody wants somebody to
3 commit suicide for any reason. And whenever that issue comes up,
4 the evidence in this case, the expert talked about that and said
5 that part of that -- and I think Ms. Roper sort of eluded to this
6 as well -- is because when they're looking at the signs on the
7 door, they're saying, well, it's reminding them -- it's reminding
8 them that their sex is incongruent with their gender identity.

9 But, Your Honor, that's not the purpose for why we have
10 restrooms and locker rooms. Part of that is because we have a
11 flawed perception of what these facilities are for. They're not
12 for affirming our beliefs about stereotypes and about the gender
13 rules that we wish to live our lives or that we feel a deep
14 desire to live our lives. I'm not saying that this is a choice
15 that somebody just woke up one day and chose to do.

16 But regardless, even the expert testified that the
17 indications of when somebody is either transgender or gender
18 dysphoria are which societal constructs about gender they adopt.
19 But those are not the reason for the bathrooms and the locker
20 rooms.

21 And I'll point out one other thing. In addition to the
22 bathroom being a place where you're reminded that your sex is
23 different than your gender identity, the word transgender, when
24 anybody uses that to describe themselves, or when they say that
25 I'm part of the LGBT community because of the "T," and they

1 identify themselves with that "T," that's also a reminder.

2 That's a reminder that I'm transgender, and transgender means
3 somebody who is identifying with a gender that's not their sex.

4 Those reminders can't be avoided, and we can't violate
5 other people's privacy rights -- we can't violate other people's
6 rights in order to avoid all reminders that a person's gender and
7 sex are incongruent.

8 Your Honor, Ms. Roper stated that the balance of
9 hardships, she characterized them as Aidan having no place to go
10 and that the Plaintiffs do have a place to go. But, Your Honor,
11 that couldn't be further from the truth.

12 Here, any student, based on their sex, can use the
13 restroom based on their sex. And it doesn't matter how they
14 identify themselves or any other characterization or
15 classification, they have a right to use the restroom based on
16 their sex. And the students -- the evidence in this case is that
17 the students have accepted people that identify differently, but
18 are the same sex as them into their locker room. Even the
19 Plaintiffs here are fine, don't believe their privacy is violated
20 by somebody of the same sex as them using the locker room with
21 them.

22 The School District, all of them have testified that
23 they didn't have any complaints from any students of a student of
24 the same sex using the locker rooms or bathrooms with them. But
25 the same can't be said for students using restrooms of the

1 opposite sex.

2 Students who identify differently do have a place to go
3 and their privacy is protected from those of the opposite, even
4 if they're not worried about that. But the Plaintiffs in this
5 case and other students, they have no multi-user bathrooms or
6 locker rooms that they can go to. There's none available. They
7 can't go to the girls' room if they're a male, and they can't go
8 to the male room because there's people of both sexes that are
9 permitted to be there.

10 And, Your Honor, the one last thing I could say is
11 about the Unconstitutional Condition Doctrine. Ms. Roper was --
12 and whenever I first discussed it, I was talking about how even
13 if a benefit is a gratuitous, that the Government can take away
14 that gratuitous benefit for any reason, but they can't take away
15 -- they can't take it away by conditioning it on unconstitutional
16 -- with an unconstitutional condition, which involves removing
17 somebody's constitutional rights.

18 And that's what's happening here. The only difference
19 here is that our case is even stronger because it's not just a
20 benefit that the Government can give and take away; this is a
21 statutory right that the State requires school districts to do.
22 And it's also -- in Title IX, it's a requirement to avoid
23 harassing people based on their sex.

24 Your Honor, even in cases where we've seen -- well, I'm
25 going to -- if you have any other questions, I want to be

1 cognizant of the time.

2 THE COURT: Not at all, sir.

3 MR. SAMEK: Okay, thank you.

4 THE COURT: Thank you very much.

5 MR. SAMEK: Appreciate it.

6 THE COURT: Mr. Levin, would you like to be heard
7 further?

8 MR. LEVIN: I would, Your Honor. I'll try to be brief.
9 Counsel said that state law requires separate
10 bathrooms. Actually, the law requires separate water closets.
11 It shows you how recent and up to date the school code is.

12 But although we acknowledge that there are numerous
13 laws and regulations in Pennsylvania requiring the construction
14 and presence of separate bathrooms, there's absolutely no law
15 that tells anybody how they're to be used and what restrictions
16 on their use there can be.

17 And I would suggest to you that any General Assembly
18 that required construction of water closets was not thinking in
19 any way, shape, or form about transgender folks.

20 Second point that Counsel made was that in GG vs.
21 (indiscernible) in the Supreme Court, stayed the preliminary
22 injunction was essentially granting the kind of relief that the
23 Plaintiffs are asking for here, and I could not disagree more.

24 In that case, the only thing we know for sure is that
25 they were staying the issuance of a preliminary injunction. We

1 have no clue as to why they were staying it and what they saw
2 wrong with the issuance of the preliminary injunction. We have
3 no indication from the Supreme Court or the 4th Circuit that
4 their stay was because they agree with anything that the
5 Plaintiffs are articulating in this case.

6 In fact, when the United States Supreme Court agreed to
7 hear Alacotter (phonetic) in that case, they limited it to two
8 questions, only one of which may have some tangential
9 relationship to this case.

10 The first question was if the hour deference doctrine
11 was retained, should an unpublished agency letter be afforded
12 deference. That was the first question the Supreme Court called
13 to attention.

14 And the second question was, regardless of deference,
15 was the interpretation of Title XI correct? That's tangentially
16 related to one of the issues here. But it did not deal with any
17 of the other issues. It did not signal in any way, shape, or
18 form that the Supreme Court was in agreement with this concept
19 that students have the right to use multi-user locker rooms and
20 the availability of other locker rooms or other bathrooms is not
21 a sufficient offense to a privacy claim or to a sexual
22 discrimination claim.

23 And then the last thing is that Mary Smith is choosing
24 not to come back to school if an injunction is not granted. That
25 does not establish irreparable damage. That's her personal

1 choice. If the Court concludes that the alternative privacy
2 facilities being made available by the School District are proper
3 and sufficient, and she chooses not to avail herself of that,
4 that's her voluntary choice and cannot be conceived to be
5 irreparable damage or harm.

6 Thank you.

7 THE COURT: Thank you very much, Counselor.

8 And, Attorney Roper, anything further?

9 MS. ROPER: Very briefly, Your Honor. Thank you.

10 THE COURT: Certainly.

11 MS. ROPER: Four things, some of them very brief.

12 With respect to whether students essentially being
13 forced out of school. What Dr. Leibowitz was talking about was
14 students leaving school entirely, not choosing a different
15 school, but missing out on all opportunities for education in the
16 congregate environment because they can't find a place.

17 He did talk about students who would change school
18 districts in order to find a place where they could use -- where
19 a transgender boy would change school districts to find a place
20 where he could use the boys' room, et cetera.

21 When -- with respect to Dr. Leibowitz and the state of
22 science underscoring the understanding of gender dysphoria and
23 the standards of care, he never said the science was weak, nor as
24 Plaintiffs state in their proposed findings of fact, did he say
25 the science was limited. He said that there aren't the kinds of

1 studies Plaintiffs were asking about because those kinds of
2 students generally aren't done in the mental health field and
3 that the field of treating gender dysphoria is too new to have
4 things like 30-year follow-up studies. He never characterized
5 this as a weak area of science. And I think as a matter of law,
6 when you have a consensus of the scientific community, that's the
7 established science and not subject to question under Daubert or
8 otherwise.

9 Plaintiffs keep talking about being forced to undress
10 in front of the opposite sex. It would be a violation of their
11 right to privacy if they were forced to undress in front of
12 anyone. The right of bodily integrity is the right to keep
13 certain things private.

14 And though it was a 4th Amendment claim and not a
15 privacy claim in the Redding case, the case -- and I'm just
16 forgetting the rest of the name at the moment -- the Safford
17 School District -- or Redding vs. Safford School District --
18 Safford vs. Redding School District, I'm sorry -- the plaintiff
19 in that case was forced to essentially turn out her underwear in
20 front of female school officials because they were looking for
21 some supposedly contraband Ibuprofen. It wasn't about being in
22 front of a male principal; it was about exposing one's body.
23 That is what the right to bodily integrity is about.

24 And finally, Plaintiffs talk about essentially their
25 point is anatomy is destiny. Right. Whatever you're born with,

1 that's how we characterize you in this society and that is
2 fundamental to our understanding of society. At least that's
3 what the attorneys argue.

4 But the Plaintiffs have specifically disclaimed any
5 reliance on a person's present anatomy. They believe, and their
6 testimony's very clear in their depositions, that whatever a
7 person is designated at birth, that is the sex that they are,
8 regardless of how their anatomy might change. And they said they
9 would have no problem if, say, a transgender boy had had surgery
10 and now had a penis. And they have no problem with him being in
11 the girls' room.

12 So I think that that's not credible. Your Honor, that
13 is not a circumstance that would protect the interests of all
14 students in the school. And the school has made, I think, a very
15 carefully considered judgment about what protects the interests
16 of all students in the school.

17 This is not about anatomy and it's not about what
18 anatomy they may or may not see. Dr. Leibowitz testified to the
19 fact that transgender students are keen on hiding their anatomy.
20 A transgender boy does not want to display any part of himself
21 that is incongruent with his gender identity. This is not about
22 what anatomy they're going to encounter in the locker rooms.

23 This is about Plaintiff's conviction that the sex
24 assigned at birth is something that a person cannot escape. And
25 that is simply inconsistent with the science. It is what people

1 expect from someone based on the genitalia that they're born
2 with, their sex assigned at birth. That is not the law. You
3 don't get to decide who gets what privileges and what access
4 based on your assumptions about how they should behave.

5 And indeed, Your Honor, there is no -- even Plaintiffs
6 have admitted, they won't know what the sex assigned at birth
7 was, what the biological sex was of any individual as they walk
8 in the room. The Court noted the pictures that are part of the
9 record. And indeed, one does not need to be transgender to be --
10 to cause people to raise eyebrows. There are girls who look very
11 boyish. There are boys who look very girlish. And don't
12 identify, right, a girl who identifies as a girl, but has very
13 boyish features. I mean, that is -- we can't say that to the
14 extent Plaintiffs are saying your anatomy -- or at least your
15 anatomy at birth is what determines the rest of your life.
16 That's just not how things work in our society.

17 And I think that -- and that is, by the way, Your
18 Honor, you asked some questions about how the School District
19 should determine who is ready to go into a restroom that matches
20 their gender identity. This is where, you know, a slope that the
21 District can't step on, right. They can't decide who's feminine
22 enough, who's male enough. Instead, they have chosen the path of
23 respecting the students and presumably, they're treating
24 professional's views of what that student is ready for. And, you
25 know, these are all students they know, they have dealt with,

1 they have seen go through the name changes, the pronoun changes,
2 et cetera, and so forth. This isn't a surprise to anyone.

3 So I'm sorry, I think I've now completed my four
4 points, but I wanted to make sure that we weren't talking about
5 what anatomy is visible in a locker room. That's not the issue.
6 It's not the issue Plaintiffs have testified about, and that is
7 not, I think, what the law is based on.

8 Thank you.

9 THE COURT: Very well, Counselor. Thank you.

10 Anything further from anyone?

11 MR. SAMEK: Could I have just one minute?

12 THE COURT: Oh, certainly.

13 (Pause)

14 MR. SAMEK: Your Honor, we have nothing further.

15 THE COURT: Very well.

16 MR. LEVIN: Nothing further, Your Honor.

17 THE COURT: Thank you, sir.

18 And I assume you are all done?

19 MS. ROPER: Yes.

20 THE COURT: And I do very much appreciate everything
21 that you've submitted and the argument here today. It was
22 outstanding.

23 On the issue of the school policies that were attached
24 to the School District's findings of fact and conclusions of law,
25 Attorney Gordon, you had suggested -- I believe that you wanted

1 an opportunity to brief, I believe, as to why judicial notice
2 cannot be taken of those under the Rules of Evidence.

3 MS. GORDON: And as to admissibility of those
4 documents.

5 THE COURT: Okay. And, Mr. Levin, you do want those to
6 be considered part of the record?

7 MR. LEVIN: Yes.

8 THE COURT: All right. Then I'm going to certainly
9 give you an opportunity. I've, of course, not made a decision
10 one way or the other; I haven't looked at them yet. But I'll
11 certainly give you an opportunity to submit anything you'd like
12 to submit in opposition of that.

13 And, Mr. Levin, if you'd like to submit in support of
14 it.

15 How long would you need to submit that?

16 MR. GORDON: Three business days. By Wednesday?

17 THE COURT: Very well. I'll give you each of you three
18 business days, if you wish to. You're not required to. But if
19 you do, I will certainly consider that before making any
20 determination as to whether those policies would be part of the
21 record in this case.

22 Any other housekeeping issues we need to take care of?

23 (No response.)

24 THE COURT: Very well. Then I want to thank all of you
25 very much. Have a great weekend. We'll wait for those briefs

1 and we'll get our decision out. Thank you.

2 MR. LEVIN: Thank you, Your Honor.

3 THE CLERK: All rise.

4 (Proceedings concluded at 5:02 p.m.)

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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 my ability.

Valori Weber

Valori Weber, CET-711

Date: September 28, 2017