Case No. 16-3522

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ASHTON WHITAKER,
a minor, by his mother and
next friend,
MELISSA WHITAKER,

Plaintiff-Appellee,

v.

KENOSHA UNIFIED SCHOOL DISTRICT
NO. 1 BOARD OF EDUCATION and
SUE SAVAGLIO-JARVIS,
in her official capacity as
Superintendent of the Kenosha
Unified School District No.1,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 16-CV-943
The Honorable Judge Pamela Pepper

SEPARATE APPENDIX OF KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND SUE SAVAGLIO-JARVIS

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STATEMENT THAT ALL REQUIRED MATERIALS ARE IN APPENDIX PURSUANT TO CIRCUIT RULE 30(d)

The undersigned, counsel of record for the Defendants-Appellants, furnishes the following in compliance with Circuit Rule 30(d).

I hereby certify that the short required appendix bound with the brief includes all materials required by Circuit Rule 30(a) while this separate appendix complies with Circuit Rule 30(b).

Dated this 12th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendant-Appellants hereby certifies that on December 12, 2016, an electronic copy of the foregoing was served on counsel for Plaintiff-Appellee through the ECF system as all parties are registered users.

Dated this 12th day of December, 2016.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER, Plaintiff, v. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the Kenosha Unified School District No. 1, Defendants.	Civ. Action No. 2:16-cv-00943 **AMENDED COMPLAINT**

INTRODUCTION

1. Plaintiff Ashton ("Ash") Whitaker, a 16-year-old boy, is a rising senior at George Nelson Tremper High School ("Tremper") in the Kenosha Unified School District No. 1 ("KUSD") in Kenosha, Wisconsin. Ash is a boy. He is also transgender. Ash was assumed to be a girl when he was born, and was designated "female" on his birth certificate, but has a male gender identity and lives as a boy in all aspects of his life. Ash's family, classmates, medical providers, and others recognize Ash as a boy, respect his male gender identity, and support his right to live and be treated consistent with that gender identity.

2. Defendants Kenosha Unified School District No. 1 Board of Education (the "Board"), Superintendent Sue Savaglio-Jarvis, and their agents, employees, and representatives, have repeatedly refused to recognize or respect Ash's gender identity and have taken a series of discriminatory and highly stigmatizing actions against him based on his sex, gender identity, and transgender status. The actions, as described more fully herein, have included (a) denying him

access to boys' restrooms at school and requiring him to use girls' restrooms or a single-occupancy restroom; (b) directing school staff to monitor his restroom usage and to report to administrators if he was observed using a boys' restroom; (c) intentionally and repeatedly using his birth name and female pronouns, and failing to appropriately inform substitute teachers and other staff members of his preferred name and pronouns, resulting in those staff referring to him by his birth name or with female pronouns in front of other students; (d) instructing guidance counselors to issue bright green wristbands to Ash and any other transgender students at the school, to more easily monitor and enforce these students' restroom usage; (e) requiring him to room with girls on an orchestra trip to Europe and requiring, as a condition of his ability to participate in a recent overnight school-sponsored orchestra camp held on a college campus, that he stay either in a multi-room suite with girls, or alone in a multi-room suite with no other students, while all other boys shared multi-room suites with other boys; and (f) initially denying him the ability to run for junior prom king, despite being nominated for that recognition based on his active involvement in community service, instructing him that he could only run for prom queen, and only relenting and allowing him to run for prom king after a protest by many of those same classmates.

3. Through these actions, Defendants have discriminated against Ash on the basis of sex, including on the basis of his gender identity, transgender status, and nonconformity to sex-based stereotypes, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and on the basis of sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants' actions have denied Ash full and equal access to KUSD's education program and activities on the basis of his sex.

4. Plaintiff, through his mother and next friend, Melissa Whitaker, brings this action against Defendants based on these unlawful and discriminatory actions.

5. Plaintiff seeks a declaratory judgment, preliminary and permanent injunctive relief, and damages resulting from Defendants' discriminatory actions.

PARTIES

6. Plaintiff Ash Whitaker is a 16-year-old boy. He was born in 1999. He resides in Kenosha, Wisconsin and is a student at Tremper High School, a public high school in the Kenosha Unified School District No. 1. He will begin his senior year at Tremper on September 1, 2016.

7. Melissa Whitaker is Ash's mother and brings this action as his next friend. Ms. Whitaker resides in Kenosha, Wisconsin and is employed by the Kenosha Unified School District No. 1 as a high school teacher at Tremper.

8. Defendant Kenosha Unified School District No. 1 Board of Education is a seven-member elected body responsible for governing the Kenosha Unified School District No. 1, a public school district serving over 22,000 students in kindergarten through 12th grade who reside in the City of Kenosha, Village of Pleasant Prairie, and Town and Village of Somers. The Board derives its authority to govern KUSD directly from the Wisconsin Constitution and state statutes. The school district is a recipient of federal funds from the U.S. Department of Education, the U.S. Department of Agriculture, and the U.S. Department of Health and Human Services, and, as such, is subject to Title IX of the Education Amendments of 1972, which prohibits sex discrimination against any person in any education program or activity receiving Federal financial assistance. The Board designates responsibility for the administration of KUSD to its Superintendent of Schools, currently Dr. Sue Savaglio-Jarvis, who oversees a number of district-

level administrators. KUSD operates 42 schools, including six high schools. One of the high schools is Tremper, a 1,695-student public high school located in Kenosha, serving students in grades 9 through 12. Tremper's administration includes a principal and three assistant principals. The Board is vicariously liable for the acts or omissions of its employees, agents, and representatives, including those of the other Defendant Savaglio-Jarvis and other Tremper administrators, staff, and volunteers.

9. Defendant Sue Savaglio-Jarvis is the Superintendent of the Kenosha Unified School District and is sued in her official capacity. At all times relevant to the events described herein, Savaglio-Jarvis acted within the scope of her employment as an employee, agent, and representative of the Board. In such capacity, she carried out the discriminatory practices described herein (a) at the direction of, and with the consent, encouragement, knowledge, and ratification of the Board; (b) under the Board's authority, control, and supervision; and (c) with the actual or apparent authority of the Board.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343(a)(3), and is authorized to order declaratory relief under 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper in the Eastern District of Wisconsin under 28 U.S.C. § 1391(b) because the claims arose in the District, the parties reside in the District, and all of the events giving rise to this action occurred in the District.

FACTS

Gender Identity and Gender Dysphoria

12. Sex is a characteristic that is made up of multiple factors, including hormones, external physical features, internal reproductive organs, chromosomes, and gender identity.

13. Gender identity—a person's deeply felt understanding of their own gender—is the determining factor of a person's sex. Gender identity is often established as early as two or three years of age, though a person's recognition of their gender identity can emerge at any time. There is a medical consensus that efforts to change a person's gender identity are ineffective, unethical, and harmful. A person's gender identity may be different from or the same as the person's sex assigned at birth.

14. The phrase "sex assigned at birth" refers to the sex designation recorded on an infant's birth certificate. For most people, gender identity aligns with the person's sex assigned at birth, a determination generally based solely on the appearance of a baby's external genitalia at birth. For transgender people, however, the gender they were assumed to be at birth does not align with their gender identity. For example, a transgender boy is a person who was assumed to be female at birth but is in fact a boy. A transgender girl is a person who was assumed to be a boy at birth but is in fact a girl.

15. Gender Dysphoria is a condition recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th edition ("DSM-5"). It refers to clinically significant distress that can result when a person's gender identity differs from the person's assumed gender at birth. If left untreated, Gender Dysphoria may result in profound psychological distress, anxiety, depression, and even self-harm or suicidal ideation.

16. Treatment for Gender Dysphoria is usually pursuant to the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("Standards of Care"), published by the World Professional Association for Transgender Health ("WPATH") since 1980. WPATH is an international, multidisciplinary, professional association of medical providers, mental health providers, researchers, and others, with a mission of promoting

evidence-based care and research for transgender health, including the treatment of Gender Dysphoria. WPATH published the seventh and most recent edition of the Standards of Care in 2011.

17. Consistent with the WPATH Standards of Care, treatment for Gender Dysphoria consists of the person "transitioning" to living and being accepted by others as the sex corresponding to the person's gender identity. A key stage in that process is a "social transition," in which the individual lives in accordance with his gender identity in all aspects of life. A social transition, though specific to each person, typically includes adopting a new first name, using and asking others to use pronouns reflecting the individual's true gender, wearing clothing typically associated with that gender, and using sex-specific facilities corresponding to that gender. Failing to recognize or respect a transgender person's gender is contrary to established medical protocols and can exacerbate an individual's symptoms of Gender Dysphoria.

18. Medical treatments, such as hormone therapy or surgical procedures, may also be undertaken to facilitate transition and alleviate dysphoria, typically after an individual's social transition. Under the WPATH Standards of Care, living full-time in accordance with one's gender identity in all aspects of life for at least one year is a prerequisite for any medical interventions. Medical treatments are not necessary or appropriate in all cases.

19. A social transition requires that a transgender boy be recognized as a boy and treated the same as all other boys by parents, teachers, classmates, and others in the community. This includes being referred to exclusively with the student's new name and male pronouns, being permitted to use boys' restrooms and overnight accommodations on the same footing as other male students, and having the right to keep information about the student's transgender status private. Singling out a transgender student and treating him differently than other boys

communicates the stigmatizing message to that student and the entire school community that he should not be recognized or treated as a boy, simply because he is transgender. This undermines the social transition and exposes the student to the risk of renewed and heightened symptoms of Gender Dysphoria such as anxiety and depression. It also frequently leads transgender students to avoid using school restrooms altogether, often resulting in adverse physical health consequences such as urinary tract infections, kidney infections, and dehydration, and other consequences such as stress and difficulty focusing on classwork.

Plaintiff's Background

20. Ash has been a student in KUSD's schools since kindergarten. On September 1, 2016, he will begin his senior year at Tremper High. Ash is an excellent student: he has a high grade point average and is currently ranked in the top five percent of his class of over 400 students. All of his academic classes in his junior year were either Advanced Placement or Honors level classes. He is also very involved in many school activities, including the school's Golden Strings orchestra, theater, tennis team, National Honor Society, and Astronomical Society. After graduation, he hopes to attend the University of Wisconsin-Madison and study biomedical engineering. Ash also works part-time as an accounting assistant in a medical office.

21. Ash is a boy. He is also transgender. He was designated "female" on his birth certificate and lived as a girl until middle school, when he recognized that he is, in fact, a boy, and he began to experience profound discomfort with being assumed to be a girl by others.

22. At the end of eighth grade, in the spring of 2013, Ash told his parents that he is transgender and a boy. Shortly thereafter, he told his older brothers.

23. During the 2013-2014 school year, Ash's freshman year of high school at Tremper, Ash began confiding to a few close friends that he is a boy. He slowly began

transitioning more publicly to live in accordance with his male identity: he cut his hair short, began wearing more traditionally masculine clothing, and began to go by a typically masculine name and masculine pronouns.

24. At the beginning of his sophomore year, in the fall of 2014, Ash told all of his teachers and peers that he is a boy, requesting that he be referred to using male pronouns and his new name. On Christmas, 2014, Ash told his extended family, including grandparents, aunts, uncles, and cousins, that he is a boy.

25. Ash has undertaken his gender transition under the guidance and care of therapists and medical doctors. He was diagnosed with Gender Dysphoria by his pediatrician. Around the time of his public transition, Ash began seeing a gender specialist therapist to support him in his transition. He is currently under the care of clinical psychologist, who is also a gender specialist. In April 2016, he began consulting with an endocrinologist at Children's Hospital of Wisconsin to discuss hormonal therapy. Ash began receiving testosterone treatment under the care of an endocrinologist in July 2016.

26. Since Ash's transition at school, he has been widely known and accepted as a boy by the school community. At a Golden Strings orchestra performance at a hotel on January 17, 2015, Ash wore a tuxedo, just like all the other boys, with the support of his orchestra teacher, Helen Breitenbach-Cooper. Students and teachers who did not know Ash prior to his transition did not and would not have recognized him as different from any other boy until the discriminatory events described in this complaint took place.

KUSD's Refusal to Permit Plaintiff Access to Restrooms Consistent with His Gender Identity

27. In the spring of 2015, during Ash's sophomore year, Ash and his mother had several meetings with Ash's guidance counselor, Debra Tronvig, during which they requested

that Ash be permitted to use the boys' restrooms at school. The counselor spoke to the school's principal, Richard Aiello, and one of its assistant principals, Brian Geiger, and she advocated that Ash be permitted to use the boys' restrooms. However, at a meeting in March 2015, she reported back to Ash and his mother that the school administrators had decided that Ash would only be permitted to use the girls' restrooms or the single-user, gender-neutral restroom in the school office. Tronvig and the school administrators did not suggest or indicate any circumstance under which Ash might be permitted to use the boys' restrooms in the future.

28. After that meeting, Ash felt overwhelmed, helpless, hopeless, and alone. Both of the restroom options offered by Defendants were discriminatory, burdensome, or unworkable. Ash was deeply distressed by the prospect of using the girls' restrooms, as it would hinder and be at odds with his public social transition at school, undermine his male identity, and convey to others that he should be viewed and treated as a girl. He was also deeply distressed by the prospect of using the office restroom, which is located in the rear of the office, behind the office secretaries' work stations—far out of the way from most of his classes—and is only used by office staff and visitors. It is Ash's understanding that no other students are allowed to use the office restroom. Ash feared the questions he would face from students and staff about why he was using that particular restroom; the inconvenience of traveling long distances from (and missing time in) his classes to use that restroom; and the fact that he would be segregated from his classmates and further stigmatized for being "different."

29. At the same time, Ash was fearful of the potential disciplinary consequences if he failed to comply with the administrators' directives not to use the boys' restroom. He worried that such a disciplinary record could potentially interfere with his ability to get into college, as he had no prior record of discipline. As a result of that fear and anxiety, seeing no plausible

options, Ash largely avoided using any restrooms at school for the rest of that school year, and, when absolutely necessary, he only used a single-user girls' restroom near his theater classroom.

30. In order to avoid using restrooms at school, Ash severely restricted his liquid intake. This was particularly dangerous because Ash suffers from vasovagal syncope, a medical condition that results in fainting upon certain physical or emotional triggers. The triggers cause a person's heart rate and blood pressure to drop suddenly, reducing blood flow to the brain and resulting in a loss of consciousness. Because dehydration and stress trigger his fainting episodes, Ash's primary care doctor requires him to drink 6-7 bottles of water and a bottle of Gatorade daily.

31. In addition to vasovagal syncope, Ash also suffers from migraines triggered by stress. During his sophomore year, while avoiding using restrooms, Ash experienced greatly heightened symptoms of both vasovagal syncope and stress-related migraines. He also experienced increased symptoms associated with Gender Dysphoria, including depression, anxiety, and suicidal thoughts.

32. Ash also worried that the emotional and physical toll caused by the school's treatment of him would lead to medical or psychological harm that would delay or make it unsafe for him to begin hormone treatment as part of his transition. This anxiety further increased his symptoms of Gender Dysphoria.

33. In July 2015, Ash took a trip to Europe with his school orchestra group, Golden Strings. In response to Ash's request to room with other boys, his orchestra teacher, Breitenbach-Cooper, checked with school administrators and then informed him that he would not be permitted to do so. Ash felt hurt and embarrassed when he learned of the school's decision. Once again, he understood the school's decision to be based on a perception that he is

not really a boy, and he felt degraded and humiliated by the administrators' continued failure to recognize and respect his gender identity.

34. As a result of the school's decision, Ash was forced to share a room with a girl. During the trip, the students were frequently grouped by gender while traveling between destinations, and Ash was consistently grouped with girls.

35. In July 2015, while on the trip to Europe, feeling less scrutinized, Ash began to use male-designated bathrooms. During that trip, Ash saw a news story about a lawsuit against the Gloucester County School District in Virginia by another transgender student who was denied access to boys' restrooms at his high school. That story reported that the U.S. Department of Justice had concluded that transgender students have the right to use restrooms in accordance with their gender identity under Title IX and had filed a brief in the Virginia case, *G.G. v. Gloucester County School Board*, asserting that the school district's policy violated transgender students' rights under Title IX. Ash was elated to learn that he did, in fact, have the legally protected right to use the restroom consistent with his gender. For the rest of the trip, Ash exclusively used male-designated bathrooms, and he continued to do so upon returning to the United States.

36. When he returned to school for his junior year, in September 2015, Ash continued exclusively using boys' restrooms, including at Tremper. He did so for the first seven months of the school year without any incident. No other students ever made an issue of Ash using the boys' bathroom. Ash did not discuss this decision with administrators or teachers, because he understood it to be his legal right.

37. In late February 2016, after observing Ash using a boys' bathroom, a Tremper teacher advised two assistant principals, Geiger and Wendy LaLonde, of that fact. Geiger then

informed the other administrators of Ash's restroom use and asked them what the school's policy was.

38. Aiello, LaLonde, Geiger, and the third assistant principal, Holly Graf, agreed that, although neither KUSD nor Tremper had any existing written policy on students' restroom usage, the school's policy should be that transgender students, including Ash, would not be permitted to use school restrooms corresponding to their gender identity. Consistent with the school's previous decision in spring 2015, they decided that Ash would not be permitted to use the boys' restroom and, instead, would only be permitted to use the girls' restrooms or the single-user restroom in the school office.

39. Following that decision, Graf emailed Ash's guidance counselor, Tronvig, and requested that Tronvig relay the school's restroom policy to Ash and his mother. Tronvig responded by email that she did not know what that policy was. Graf and Tronvig then met in person and Graf explained to Tronvig that Ash would not be permitted to use the boys' restrooms.

40. In late February 2016, Tronvig called Ms. Whitaker to inform her of the administration's decision that Ash would only be permitted to use the girls' restrooms or the single-user restroom in the school's main office.

41. When Ash learned about the school's decision, in early March 2016, he was distressed. He felt humiliated and deeply uncomfortable by the idea of using a girls' restroom, even more so than the previous year—because he is not a girl, he had not used female-designated restrooms at school or elsewhere for a long time, and because using the girls' restrooms as a boy risked subjecting him to ridicule, scrutiny, stigma, and harassment by other students and school staff. For the reasons alleged above, he also felt deeply uncomfortable with using the single-user

main office restroom. He believed that either alternative would imply his status as a transgender boy required him to be segregated from other students, despite the fact that he had used the boys' restrooms regularly and otherwise been treated as a boy by nearly everyone in the school community for many months.

42. Ash was also afraid of what disciplinary consequences he might face if he failed to comply with the school's policy. Faced with two unacceptable options proposed by the school administrators, Ash continued to use the boys' restrooms, as he had been doing already. That approach was the only way Ash felt he could mitigate the physical harm that he would suffer if he refrained from all restroom use during the school day and during his after-school extracurricular activities. Because of his active involvement in after-school activities, a typical school day for Ash lasts from 7 a.m. to 4 or 5 p.m., *i.e.*, 9 or 10 hours. Some activities require him to be on Tremper's campus until as late as 10 p.m., a 15-hour day. These long days at school make avoiding restrooms altogether impossible.

43. Ash's decision to use the boys' restroom consistent with his legal right, though in defiance of school policy, nevertheless exacted an emotional toll. Ash became more depressed and anxious, grew distracted from his school work, and began to have trouble sleeping.

44. On or about March 10, 2016, Ash and his mother met with Graf and Tronvig. During that meeting, Graf referred to Ash exclusively by his birth name. In that meeting, Graf told Ms. Whitaker that the reason Ash could not use the boys' restrooms was because he could only use restrooms consistent with his gender as listed in the school's official records. Graf said that the only way the school could change Ash's gender in its records would be if the school received legal or medical documentation confirming his transition to male.

45. Ms. Whitaker explained that, to her knowledge, Ash was too young for transition-related surgery. Graf repeated that the school would need some kind of medical documentation, but declined to indicate what type of medical "documentation" would be sufficient to demonstrate that Ash's gender marker should be changed on his school records and that he could use boys' restrooms.

46. In response, Ms. Whitaker contacted Ash's pediatrician. The pediatrician faxed a letter to the school on or about March 11, 2016, confirming that Ash is a transgender boy and recommending that Ash be allowed to use male-designated facilities at school. At Ms. Whitaker's request, the pediatrician subsequently sent the school a second letter, reiterating her recommendation about Ash's restroom usage.

47. Despite the letters from Ash's doctor, Aiello emailed Ms. Whitaker that the school would continue to deny boys' restroom access to Ash because he had not completed a medical transition.

48. Ash continued to use the boys' restrooms when needed, but he mainly attempted to avoid using restrooms altogether by not drinking or eating while at school, in order to avoid the scrutiny, fear, and humiliation he faced when he had to use a restroom at school. His anxiety and depression increased further. He also experienced increased physical symptoms relating to his vasovagal syncope, including dizziness, nearly fainting, and migraines. Ash returned to see his pediatrician in late March 2016 to have his symptoms evaluated. The pediatrician again instructed him to eat and drink regularly to avoid those symptoms. Nonetheless, Ash was unable to comply with those instructions, out of fear of using the restrooms at school. Concerned about his physical health, his mother would regularly hand him a bottle of water and tell him to drink it

to avoid dehydration, and he would refuse, saying that he did not want to have to use the restroom.

49. On or about March 17, 2016, Geiger observed Ash as he entered a boys' restroom, and reported that fact to Graf. Minutes later, Graf insisted that Ash leave his acting class and come to her office, and met with him alone for half an hour, lecturing him about his use of the boys' restrooms.

50. During that same meeting, Graf asked Ash why he was not using the girls' restroom or single-user restroom as directed. He informed her that the school's policy violated his rights as a transgender student under Title IX. When Ash made clear he could not use girls' restrooms because he is not a girl, she again asked him to compromise and use the single-user restroom in the main office. He again refused because of the humiliation, stigma, and lost class time that he would face using that bathroom. Graf then reiterated her instruction that Ash cease his use of boys' restrooms.

51. During that March 17 meeting—as well as at virtually all other times—Graf consistently referred to Ash using his traditionally female birth name and female pronouns, despite Ash's request that she use his new name and male pronouns. In that meeting, when Ash became upset by Graf's restroom directive and refusal to respect his male gender, Graf said, "S-----, calm down," using his birth name. Ash, angry and embarrassed, said, "No, I'm leaving," and left the office.

52. During that meeting, Graf directly threatened that Ash would be subject to disciplinary action if he continued to use the boys' restrooms. Specifically, she indicated Ash would have to "go down to 109 or 203"—referring to Room 109, the in-school suspension room, and Room 203, the school's disciplinary office.

53. Following the meeting with Graf, Ash began to cry in the hallway. He had difficulty concentrating in his classes for the remainder of the day, holding back tears. He skipped work that afternoon and did not do any homework. Instead, he just went home after school and lay in bed feeling terrible.

54. When he absolutely needed to use the restroom, Ash continued to use the boys' restrooms exclusively through June 9, 2016, the final day of the school year. As a result, Graf continued to call Ash, his mother, or both into her office for periodic meetings. At those meetings, Graf would inquire about Ash's restroom use, and, when told he was still using the boys' restrooms, would repeat the school's policy that he must use the girls' restroom or a single-user restroom. During these meetings, Graf continued to refer to Ash by his birth name and female pronouns.

55. Ash grew increasingly embarrassed by Graf's repeated inquiries about his restroom use, which he felt to be an invasion of his privacy. Since each meeting with administrators occurred during class time, Ash was also concerned about the effect of these repeated meetings on his academic performance and feared that he would face scrutiny from other students and teachers about why he was being removed from class so frequently. Ash, who continued to have no disciplinary record at the school, also became more worried about the increasingly real prospect of disciplinary consequences that might affect his ability to participate in extracurricular activities and negatively impact his college application process in the upcoming school year.

56. In April 2016, Ms. Whitaker learned that school administrators had sent an email to all of the school's security guards, instructing them to notify administrators if they spotted any

students who appear to be going into the "wrong" restroom. Individual security guards later told Ms. Whitaker that they understood the directive to be targeted at Ash.

57. Ash felt very uncomfortable and distressed knowing that security guards and administrators were actively monitoring his restroom use.

58. On April 5, 2016, Ms. Whitaker was pulled out of her Tremper classroom and summoned to a meeting with two KUSD district-level administrators: Dr. Bethany Ormseth, KUSD's Chief of School Leadership, and Susan Valeri, KUSD's Chief of Special Education and Student Support.

59. In that meeting, Ms. Whitaker asked Ormseth and Valeri whether KUSD had adopted any policy concerning transgender students and restroom use. They provided no answer to Ms. Whitaker's question, other than to say that a policy was in the process of being created by a committee of the school board. Ms. Whitaker responded, "You don't need a policy—it's a federal law." Later in the school year, Ms. Whitaker learned that Rebecca Stevens, a KUSD school board member, had contradicted Ormseth and Valeri's account, stating to another board member that no committee had yet been formed and no policy was being written.

60. In fact, despite repeated requests by Ms. Whitaker to see the written policy about transgender students' restroom use during the course of the 2015-2016 school year, no Tremper or KUSD official has ever provided such a policy. Ms. Whitaker reasonably believes no such policy exists. Rather, the Tremper administration developed and enforced a school "policy" in direct and specific response to those administrators' discomfort with the restroom usage of one student: Ash.

61. The next day, on April 6, 2016, Ash and Ms. Whitaker attended a meeting with Aiello, Graf, and Valeri. At that meeting, the administrators offered Ash a further

"accommodation" regarding his restroom use: they informed him that he would also be allowed to use two single-user restrooms located on the far opposite sides of campus. Those restrooms had previously been available for any student's use, but new locks had been installed and Ash alone was given the key to open them. The stigma of being assigned personal, segregated restrooms—to which he alone of all the 1,695 students in the building had a key—caused Ash additional significant emotional distress. In addition, neither of these single-occupancy restrooms was convenient to Ash's classes and would have required him to miss more class time than his peers if he used those restrooms during class.

62. At the April 6 meeting, Ash asked Valeri for KUSD's rationale for prohibiting his use of the boys' restrooms. Valeri replied with a statement to the effect of, "Well, we've never had a student who identifies as male but was born female."

63. Ash replied by asserting that Title IX prohibits discrimination based on sex, which protects transgender students and requires schools to permit them to use restrooms consistent with the student's gender identity.

64. Valeri denied that Title IX protects transgender students' access to bathrooms consistent with their gender identity.

65. When Ash asked Valeri to explain her understanding of Title IX, she refused to do so, stating words to the effect of, "I don't think I'm going to give you any reasons."

66. In order to avoid disciplinary sanctions from Tremper administrators for using boys' restrooms on the one hand, and the scrutiny and embarrassment that would result from using individually assigned restroom facilities on the other, Ash continued to avoid using school restrooms as much as possible. He has never used the designated locked single-user restrooms, as doing so would call unwanted attention to himself by using a key to enter a restroom to which

no other student has access, and because of his desire not to spend unnecessary time out of class traveling to those inconveniently located restrooms.

67. As a result of the stress caused by the school's discriminatory actions, and his attempts to avoid using any restrooms at school, Ash's migraines and episodes of fainting and dizziness continued to worsen. His depression, anxiety, and dysphoria also deepened. He became severely depressed and lethargic, and no longer wanted to get out of bed in the morning.

68. Due to the serious consequences the school's actions were having on Ash's physical and psychological well-being, he considered withdrawing from Tremper and transferring to an online school to finish high school. He ultimately decided not to withdraw at that time, due to his involvement in activities like the school orchestra that would not be available if he were enrolled in an online school, and because changing schools would put him further behind in his classwork.

School's Refusal to Permit Ash to Be Considered for Junior Prom King

69. Tremper High's junior prom was scheduled for May 7, 2016. In late March, the faculty advisor for the junior prom, Lorena Danielson, submitted the names of candidates for the prom court to Aiello. Candidates for prom king and queen are required to earn volunteer hours in order to participate and whoever earns the most hours is selected for prom court. Based on his community service hours, the junior prom advisor designated Ash as a candidate for prom king and then met with Aiello to confirm the list.

70. After meeting with the junior prom advisor, Aiello called Ms. Whitaker in for a meeting with him and Graf on or about March 22, 2016, during which he told her that Ash could be on the prom court, but could only be a candidate for prom queen, not prom king. When Ash learned about this, he was devastated. He was humiliated at the prospect of running for prom

queen, when all his classmates knew him to be a boy. He felt deeply disrespected and angry that the administrators failed to recognize how hurtful and unfair this additional form of discrimination was.

71. On April 4, 2016, Ash and his friends presented a MoveOn.org petition to Tremper administrators demanding that Ash be allowed to run for prom king and to use the boys' restrooms at school, which was signed by many members of the Tremper community and thousands of others around the country. When administrators failed to respond, on April 5, 2016, 70 students participated in a sit-in at Tremper's main office to show their support for Ash. The students held signs expressing the view that transgender students should be treated equally, and supporting Ash's right to be allowed to run for prom king and to use the boys' restrooms at school.

72. Following the sit-in and media attention about KUSD's treatment of Ash, in the April 6, 2016 meeting referenced above, Aiello, Graf, and Valeri informed Ash and Ms. Whitaker that Ash would be permitted to run for prom king.

73. Although Ash was pleased to have the opportunity to run for prom king and heartened by the outpouring of support from his classmates, he continued to feel deeply distressed as a result of the school administrators' initial decision that he could only run for prom queen and their continued pattern of refusing to recognize or respect his male gender identity.

Name and Gender in School Records

74. KUSD has not changed Ash's name on his official records and other documents, including classroom attendance rosters used by his teachers. Although most of Ash's teachers refer to him by his male name, substitute teachers have frequently referred to him by his birth name in front of his classmates because that is the name that appears on the attendance rosters.

In response, and in order to avoid embarrassment or discomfort from his classmates, Ash has been compelled to approach all of his teachers at the beginning of each term to advise them of his preferred name and pronouns and request that they do not refer to him by his birth name. He similarly must approach substitute teachers before class every time a teacher is absent. Although some teachers note his correct name on the class roster, others have not documented that name on the roster, and occasionally substitute teachers still refer to him by his birth name in class. Being called a traditionally female name in front of all his classmates reveals that he is transgender to all of his peers and makes Ash feel embarrassed and distressed. The practice has resulted in Ash experiencing increased symptoms of Gender Dysphoria, including anxiety and depression.

75. In the meetings with administrators on March 6 and March 22, Ms. Whitaker requested that the school change Ash's name and gender in its official records to avoid those problems. In both meetings, Graf told Ms. Whitaker that in order to change Ash's name or gender in the school's official records, the school would need to see legal or medical documentation. The medical documentation Ash's pediatrician sent was deemed insufficient, although Graf and Aiello refused to specify what the contents of acceptable documentation would be, despite repeated requests for clarification. They also failed to specify what type of "legal documentation" would be necessary to update the school records.

76. In August 2016, Ash filed a petition in Kenosha county court seeking a court-ordered name change, which is pending as of the date of this Amended Complaint. Even if KUSD is unable to change Ash's name or gender in its official school records because Ash has not yet obtained a legal name change, KUSD can and should take steps to avoid intentional or inadvertent disclosure of Ash's birth name or sex assigned at birth to KUSD employees or

students, including by modifying informal or public-facing documents, such as attendance rosters, to reflect Ash's male name and male gender.

Other Harassing and Stigmatizing Treatment Faced by Ash at School

77. After news broke about the petition for Ash to run for prom king and use boys' restrooms at school, some parents and other Kenosha residents began to speak out in opposition to Ash's right to use boys' restrooms. On May 10, 2016, shortly after the junior prom, at a meeting of the Board, several community members spoke in opposition to allowing transgender students to use restrooms in accordance with their gender identity. One parent told the Board that he was opposed to permitting transgender students to use gender-appropriate restrooms because such a policy would permit sexual predators to enter women's restrooms and put his daughters at risk.

78. That person's wife, who volunteers as a pianist with the school orchestra, has created and maintains a public Facebook group called "KUSD Parents for Privacy," which contains numerous posts critical of transgender students' rights. Several posts on that page have mentioned Ash and his mother by name, accompanied by their photographs. One post, on May 14, 2016, linked to an article about Ash, contains a photograph of him and his mother, and describes him as a "pawn."

79. At an orchestra rehearsal at the school on May 11, 2016, the day following the Board meeting at which her husband spoke, this woman approached Ash, put her hands on his shoulders, and said words to the effect of, "A----, honey, this isn't about you, this is bigger than you. I'm praying for you." Ash was extremely uncomfortable and embarrassed, and did not respond. Ms. Whitaker and Ash later brought this incident to Aiello's attention. Aiello requested that Breitenbach-Cooper, the orchestra teacher, call the volunteer to advise her not to

talk to students like that, but took no further action. Nothing changed as a result. She is still a regular volunteer with the school orchestra and has continued to attend every rehearsal. Her constant presence substantially diminishes Ash's enjoyment of an extracurricular activity that has formed an important part of his educational experience at Tremper.

Green Wristbands to Mark Transgender Students

80. In May 2016, Ash's guidance counselor, Tronvig, showed Ms. Whitaker what appeared to be a bright green wristband (comprised of green adhesive stickers). Tronvig told Ms. Whitaker that a school administrator had given her these wristbands with the instruction that they were to be given to any student who identified himself or herself as transgender. Ms. Whitaker understood this to mean that the school intended to use the wristbands to mark students who are transgender and monitor their restroom usage. Upon information and belief, other guidance counselors were also provided these wristbands and instructed them to give them to transgender students.

81. Branding transgender students in this way would single them out for additional scrutiny, stigma, and potentially harassment or violence, and violate their privacy by revealing their transgender status to others.

82. Upon learning about the school's proposed green wristband practice, Ash felt sickened and afraid. He was aware of the prevalence of violent attacks against transgender people nationwide, and grew very afraid that the school would attempt to force him to wear the wristband on penalty of discipline. If he did wear the wristband, he knew that other students would likely ask him repeatedly why he was wearing it, and he would have to explain over and over that he is transgender. He expected that some students would stare, and others would outright ridicule him. He felt like his safety would be even more threatened if he had to wear this visible badge of his transgender status.

83. To Plaintiff's knowledge, the green wristband practice proposed at the end of the school year may be implemented in the new school year, such that guidance counselors will be expected to provide these wristbands to transgender students in the upcoming school year.

Overnight Accommodations at Summer Orchestra Camp

84. Ash participated in a five-day, school-sponsored summer orchestra camp from June 12-16, 2016. The camp was held on the campus of the University of Wisconsin-Oshkosh, and students stayed in dormitories on campus. The dorms used for the camp were suites with two to four bedrooms and a common living room, kitchenette, and two single-occupancy restrooms. Each suite had either four separate, single-occupancy bedrooms, or two double-occupancy rooms. During the evenings, school chaperones placed tape across each of the bedroom doorways to prevent students from leaving the bedrooms at night. The suites were designated either male or female.

85. In advance of the camp, the school allowed students to sign up for dorm rooms with their friends. Ash had signed up to stay in a boys' suite with one of his best friends, a male student.

86. Breitenbach-Cooper, the orchestra teacher, told Aiello about Ash's request to stay in the same suite as his friend and other male students. Aiello replied that Ash could not do so because, under Tremper's policy, he could not stay with other boys. Aiello told Breitenbach-Cooper that Ash would have to stay in a suite with girls or alone in a suite, segregated from all of his peers.

87. In order to participate in the orchestra camp, Ash reluctantly agreed to stay in double-bedroom suite all alone, with no other students sharing the suite. He rejected the "option" to stay in a suite with girls because he is a boy and he felt uncomfortable staying with girls.

88. This arrangement excluded Ash from socializing with other students during the entire five-day camp. Students were prohibited from entering other suites, and could only socialize within their own suite or in common areas of the building. Since almost all the other students remained in their suites to socialize in the evenings, Ash stayed in his room alone each evening while the other students enjoyed time to socialize with their friends. He felt lonely and depressed, and disappointed that he was not able to have the same good memories of his final year at camp as all the other students.

89. The school's decision to segregate Ash from the other boys also left him feeling hurt and embarrassed. He understood the school's decision to be based on a perception that he might engage in sexual activity with another boy, and he felt degraded and humiliated by the idea that administrators were thinking about him in those terms.

District's Failure to Change its Discriminatory Policies after Notice of Legal Obligations

90. Ash and Ms. Whitaker have repeatedly advised KUSD officials that their actions violate Ash's right to attend school free from sex discrimination, as required by Title IX and the Equal Protection Clause. Despite being put on notice of the violations of Ash's statutory and constitutional rights, KUSD has refused to change its policies to date.

91. On April 19, 2016, through his attorneys, Ash sent a letter to Superintendent Savaglio-Jarvis demanding that KUSD permit him to use boys' restrooms at school.

92. By letter of April 26, 2016, KUSD's attorneys responded, acknowledging their awareness of U.S. Department of Education guidance documents interpreting Title IX to protect students from discrimination based on their gender identity—as well as the Fourth Circuit's April 19, 2016 opinion in *G.G. v. Gloucester County School Board*, a Title IX case brought by a transgender high school student who was denied access to boys' restrooms at school, in which

that appeals court deferred to the Department of Education's interpretation of Title IX and held that the plaintiff student was entitled to restroom access consistent with his gender identity. The letter nevertheless maintained that KUSD is not bound by these authorities and would not change its position on Ash's restroom use.

93. On May 12, 2016, Ash filed an administrative complaint with the U.S. Department of Education Office for Civil Rights ("OCR"), alleging that KUSD's actions violated Ash's rights under Title IX. Shortly before filing this lawsuit, Plaintiff's attorneys contacted OCR and requested to withdraw that complaint, without prejudice.

94. On May 13, 2016, the U.S. Department of Education and U.S. Department of Justice issued a joint guidance letter to all public schools, colleges, and universities in the country receiving Federal financial assistance, reiterating the federal government's previously stated position that, pursuant to Title IX, all public schools are obligated to treat transgender students consistent with their gender identities in all respects, including regarding name and pronoun usage, restroom access, and overnight accommodations.

95. Following the issuance of the federal guidance on May 13, 2016, KUSD officials publicly acknowledged the guidance but stated that they did not believe they were required to comply with it. KUSD issued a statement declaring, "[t]he Department of Education's . . . letter is not law; it is the Department's interpretation of the law," suggesting that it would not change its policy absent a court order.

96. To date, the Board has not articulated or adopted any formal policy regarding transgender students in KUSD's schools.

97. Based on the statements and actions of KUSD officials, Ash feels deep anxiety and dread about experiencing continued discrimination during his senior year and the effect that it will have on him during the college application process.

INJURY TO PLAINTIFF

98. Through their actions described above, Defendants have injured and are continuing to injure Plaintiff.

99. Defendants have denied Ash full and equal access to KUSD's education programs and activities by denying him the full and equal access to student restrooms and overnight accommodations during school-sponsored trips offered to other male students.

100. Ash has experienced and continues to experience the harmful effects of being segregated from, and treated differently than, his male classmates at school and during school-sponsored events, including lowered self-esteem, embarrassment, social isolation, and stigma, as well as heightened symptoms of Gender Dysphoria, including depression and anxiety.

101. When school administrators and staff intentionally used his birth name or female pronouns (or allowed others to do so), instructed him not to use the boys' restrooms, instructed security personnel to surveil his movements, and otherwise undermined his male identity and singled him out as different from all other boys, he has felt deeply hurt, disrespected, and humiliated.

102. Defendants' discriminatory actions, and the efforts Ash has made to comply with the directive not to use the boys' restroom—limiting food and drink while at school—have led to a host of physical symptoms, including dehydration, dizziness, fainting, and migraines. All of those symptoms virtually disappeared once Ash returned home from the orchestra camp and

summer break began, and Ash was no longer facing daily scrutiny and anxiety and could eat and drink at a healthy level.

103. As a direct and continuing result of Defendants' discriminatory actions, Ash has suffered increased and continuing emotional distress over the last six months. He has experienced escalating symptoms of depression and anxiety, and his self-esteem has suffered, as a result of the discrimination he has experienced at school. Although he cried very little in the past, he frequently cries and fights back tears.

104. As a result of the depression and anxiety Defendants' actions caused, Ash has also had difficulty eating and sleeping properly, and difficulty concentrating in classes and on his homework.

105. As a result of Defendants' actions, and the feelings of fear and scrutiny he has grown used to, Ash now feels unsafe being outside of the house, afraid that he will be targeted for an assault by someone who knows he is transgender. He will typically only go out in groups of friends, and tries to avoid ever going out with only one other friend or alone.

106. Ash has also missed significant class time due to being compelled by KUSD officials to participate in repeated, lengthy meetings during class time to discuss his use of restrooms, his name and gender in school records, and the school's determination that he would be prohibited from running for prom king.

107. All of the above discriminatory treatment has undermined the efficacy of the social transition component of his gender transition and heightened his symptoms of Gender Dysphoria.

108. If Defendants refuse to grant Ash access to boys' restrooms by the time his senior year begins on September 1, 2016, he will likely experience the same social stigma, emotional

distress, academic harm, and detrimental impediments to his gender transition resulting from Defendants' conduct that he experienced during his junior year.

CAUSES OF ACTION

First Cause of Action
Violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*.

109. Plaintiff realleges and incorporates the facts and allegations contained in paragraphs 1 through 108 as fully set forth herein.

110. Under Title IX and its implementing regulations, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31 (Department of Education Title IX regulations); 7 C.F.R. § 15a.31 (Department of Agriculture Title IX regulations); 45 C.F.R. § 86.31 (Department of Health and Human Services Title IX regulations). Title IX's prohibitions on sex discrimination extend to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient" of federal funding. 34 C.F.R. § 106.31; 7 C.F.R. § 15a.31; 45 C.F.R. § 86.31.

111. Title IX's prohibition on discrimination "on the basis of sex" encompasses discrimination based on an individual's gender identity, transgender status, and gender expression, including nonconformity to sex- or gender-based stereotypes.

112. Conduct specifically prohibited under Title IX includes, *inter alia*, treating one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; providing different aid, benefits, or services in a different manner; denying any person any such aid, benefit, or service; or otherwise

subjecting any person to separate or different rules of behavior, sanctions, or other treatment. 34 C.F.R. § 106.31; 7 C.F.R. § 15a.31; 45 C.F.R. § 86.31.

113. As a Federal funding recipient, Defendant Kenosha Unified School District No. 1 Board of Education, including the academic, extracurricular, and other educational opportunities provided by the Kenosha Unified School District and Tremper High School, is subject to Title IX's prohibitions on sex- and gender-based discrimination against any student.

114. As set forth in paragraphs 28 to 98 above, Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from accessing male-designated restrooms at school, and requiring that he use female-designated restrooms or single-occupancy restrooms, have discriminated and continue to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, and thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex, in violation of Title IX.

115. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from staying in male-designated overnight accommodations on school-sponsored trips, and requiring him to stay in female-designated overnight accommodations or segregated accommodations on those trips, has discriminated and continues to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, and thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational

opportunities offered by KUSD and Tremper High School, on the basis of sex, in violation of Title IX.

116. Defendants have further violated Title IX by failing to recognize fully and respect Plaintiff, a transgender boy, as a male student, including through administrators' repeated and intentional use of Plaintiff's traditionally female birth name and female pronouns to address him and refer to him to others; the failure to take necessary and appropriate action to update or modify Ash's official and/or informal student records, including classroom attendance rosters, to prevent teachers, substitute teachers, and other school staff from referring to him by his female birth name and female pronouns in the presence of other students; Tremper administrators' initial refusal to permit Ash to run for junior prom king and directive that he run for prom queen instead, withdrawn only after a student protest and media attention; and Tremper administrators' instruction to school guidance counselors to provide green wristbands to transgender students. Through these actions, individually and collectively, Defendants have and continue to exclude Plaintiff from participation in, deny him the benefits of, and subject him to discrimination in KUSD's education programs and activities, on the basis of sex, in violation of Title IX.

117. Defendants, through instructing Tremper staff to report the restroom use of any student who "appears" to be using the "wrong" restroom, operates an unlawful policy or practice of profiling Plaintiff and other students who are transgender and/or do not conform to sex- or gender-based stereotypes, and thereby deprive Plaintiff and similarly situated students of their rights under Title IX to be free from discrimination on the basis of sex, including on the basis of gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, in further violation of Title IX.

118. Plaintiff has been, and continues to be, injured by Defendants' discriminatory conduct and has suffered damages as a result.

Second Cause of Action
Violation of 42 U.S.C. § 1983 Based on
Deprivation of Plaintiff's Rights under the
Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

119. Plaintiff realleges and incorporate the facts and allegations contained in paragraphs 1 through 108 as fully set forth herein.

120. Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, discrimination based on sex, including gender, gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, as well as discrimination based on transgender status alone, is presumptively unconstitutional and is therefore subject to heightened scrutiny.

121. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from accessing male-designated restrooms at school, and requiring that he use female-designated restrooms or single-occupancy restrooms, have discriminated and continue to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

122. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from staying in male-designated overnight accommodations on school-sponsored trips, and requiring him to stay in female-designated overnight

accommodations or segregated accommodations on those trips, has discriminated and continues to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

123. Defendants have further violated Plaintiff's rights under the Equal Protection Clause by failing to recognize fully and respect Plaintiff, a transgender boy, as a male student, including through administrators' repeated and intentional use of Plaintiff's traditionally female birth name and female pronouns to address him and refer to him to others; the failure to take necessary and appropriate action to update or modify Ash's official and/or informal student records, including classroom attendance rosters, to prevent teachers, substitute teachers, and other school staff from referring to him by his female birth name and female pronouns in the presence of other students; Tremper administrators' initial refusal to permit Ash to run for junior prom king and directive that he run for prom queen instead, withdrawn only after a student protest and media attention; and Tremper administrators' instruction to school guidance counselors to provide green wristbands to any student who identified himself or herself as transgender. Through these actions, individually and collectively, Defendants have and continue to exclude Plaintiff from participation in, deny him the benefits of, and subject him to discrimination in KUSD's education programs and activities, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

124. Defendants, through instructing Tremper staff to report the restroom use of any student who "appears" to be using the "wrong" restroom, operates an unlawful policy or practice of profiling Plaintiff and other students who are transgender and/or do not conform to sex- or gender-based stereotypes, and thereby deprive Plaintiff and similarly situated students of their rights to be free from discrimination on the basis of sex, including on the basis of gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, in further violation of the Equal Protection Clause.

125. Defendants' discrimination against Ash is not substantially related to any important governmental interest, nor is it rationally related to any legitimate governmental interest.

126. Defendants are liable for their violation of Ash's Fourteenth Amendment rights under 42 U.S.C. § 1983.

127. Plaintiff has been, and continues to be, injured by Defendants' conduct and has suffered damages as a result.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Ash Whitaker, by and through his mother and next friend, Melissa Whitaker, requests that this Court:

(a) enter a declaratory judgment that the actions of Defendants complained of herein are in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(b) issue preliminary and permanent injunctions (i) directing Defendants to provide Plaintiff access to male-designated restrooms at school, and otherwise to treat him as a boy in all respects for the remainder of his time as a student in Defendants' schools or until resolution of

this lawsuit, whichever is later; (ii) restraining Defendants, their agents, employees, representatives, and successors, and any other person acting directly or indirectly with them, from adopting, implementing, or enforcing any policy or practice at the school or District level that treats transgender students differently from their similarly situated peers (*i.e.*, treating transgender boys differently from other boys and transgender girls differently from other girls); (iii) directing Defendants to clarify that KUSD and Tremper's existing policies prohibiting discrimination on the basis of sex apply to discrimination based on gender identity, transgender status, and nonconformity to sex- and gender-based stereotypes; (iv) ordering Defendants to provide training to all district-level and school-based administrators in the Kenosha Unified School District on their obligations under Title IX and the Equal Protection Clause regarding the nondiscriminatory treatment of transgender and gender nonconforming students; and (v) ensuring that all district-level and school-based administrators responsible for enforcing Title IX, including Defendants' designated Title IX coordinator(s), are aware of the correct and proper application of Title IX to transgender and gender nonconforming students;

(c) order all compensatory relief necessary to cure the adverse educational effects of Defendants' discriminatory actions on Plaintiff's education;

(d) award compensatory damages in an amount that would fully compensate Plaintiff for the emotional distress and other damages that have been caused by Defendants' conduct alleged herein;

(e) award Plaintiff his reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

(f) order such other relief as this Court deems just and equitable.

Dated: August 15, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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** Application for admission to this Court to follow*
*** Application for admission to this Court pending*

Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients

American Psychological Association

The "Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients" provide psychologists with (a) a frame of reference for the treatment of lesbian, gay, and bisexual clients[1] and (b) basic information and further references in the areas of assessment, intervention, identity, relationships, diversity, education, training, and research. These practice guidelines are built upon the "Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients" (Division 44/Committee on Lesbian, Gay, and Bisexual Concerns Joint Task Force on Guidelines for Psychotherapy with Lesbian, Gay, and Bisexual Clients, 2000) and are consistent with the American Psychological Association (APA) "Criteria for Practice Guideline Development and Evaluation" (APA, 2002a). They assist psychologists in the conduct of lesbian, gay, and bisexual affirmative practice, education, and research.

The term *guidelines* refers to pronouncements, statements, or declarations that suggest or recommend specific professional behavior, endeavors, or conduct for psychologists. Guidelines differ from standards in that standards are mandatory and may be accompanied by an enforcement mechanism. Thus, these guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and to help ensure a high level of professional practice by psychologists. These guidelines are not intended to be mandatory or exhaustive and may not be applicable to every clinical situation. They should not be construed as definitive and are not intended to take precedence over the judgment of psychologists. *Practice guidelines* essentially involve recommendations to professionals regarding their conduct and the issues to be considered in particular areas of psychological practice. Practice guidelines are consistent with current APA policy. It is also important to note that practice guidelines are superseded by federal and state law and must be consistent with the current APA "Ethical Principles of Psychologists and Code of Conduct" (APA, 2002b).[2]

Background

In 1975, the APA adopted a resolution stating that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities" and urging "all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations" (Conger, 1975, p. 633). In the years following the adoption of this important policy, the APA indeed has taken the lead in promoting the mental health and well-being of lesbian, gay, and bisexual people and in providing psychologists with affirmative tools for practice, education, and research with these populations. In 2009, the association affirmed that "same-sex sexual and romantic attractions, feelings, and behaviors are normal and positive variations of human sexuality regardless of sexual orientation identity" (APA, 2009a, p. 121).

This article was published Online First August 29, 2011.

These guidelines were adopted by the APA Council of Representatives, February 18–20, 2011, and replace the original "Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients," which were adopted February 26, 2000, and expired at the end of 2010. These revised and updated guidelines were developed by the Division 44/Committee on Lesbian, Gay, Bisexual, and Transgender Concerns Guidelines Revision Task Force. The task force included Kristin Hancock (chair) and members Laura Alie, Armand Cerbone, Sari Dworkin, Terry Gock, Douglas Haldeman, Susan Kashubeck-West, and Glenda Russell. The task force thanks Glenn Ally, Laura Brown, Linda Campbell, Jean Carter, James Croteau, Steven David, Randall Ehbar, Ruth Fassinger, Beth Firestein, Ronald Fox, John Gonsiorek, Beverly Greene, Lisa Grossman, Christine Hall, Tania Israel, Corey Johnson, Jennifer Kelly, Christopher Martell, Jonathan Mohr, David Pantalone, Mark Pope, and Melba Vasquez for their thoughtful contributions. The task force also acknowledges the long-standing support of Clinton Anderson, director of APA's Lesbian, Gay, Bisexual, and Transgender Concerns Office, and APA staff liaisons Sue Houston (Board for the Advancement of Psychology in the Public Interest) and Mary Hardiman (Board of Professional Affairs) for their assistance.

Each of the 21 new guidelines provides an update of the psychological literature supporting it, includes sections on rationale and application, and expands upon the original guidelines to provide assistance to psychologists in areas such as religion and spirituality, the differentiation of gender identity and sexual orientation, socioeconomic and workplace issues, and the use and dissemination of research on lesbian, gay, and bisexual issues. The guidelines are intended to inform the practice of psychologists and to provide information for the education and training of psychologists regarding lesbian, gay, and bisexual issues. The revision was funded by Division 44 (Society for the Psychological Study of Lesbian, Gay, and Bisexual Issues) of the American Psychological Association (APA) and the APA Board of Directors.

This document is scheduled to expire as APA policy in 10 years (2020). After this date, users are encouraged to contact the APA Public Interest Directorate to confirm that this document remains in effect or is under revision.

Correspondence concerning this article should be addressed to the Public Interest Directorate, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242.

[1] Throughout this document, the term *clients* refers to individuals across the life span, including youth, adult, and older adult lesbian, gay, and bisexual clients. There may be issues that are specific to a given age range, and, when appropriate, the document identifies these groups.

[2] Hereinafter, this document is referred to as the APA Ethics Code.

 0003-066X/11/$12.00
Vol. 67, No. 1, 10–42 DOI: 10.1037/a0024659

Sixteen years following APA's 1975 resolution, a gap in APA policy and the practice of psychologists was identified in a study by Garnets, Hancock, Cochran, Goodchilds, and Peplau (1991) that documented a wide variation in the quality of psychotherapeutic care to lesbian and gay clients. These authors and others (e.g., Fox, 1996; Greene, 1994b; Nystrom, 1997; Pilkington & Cantor, 1996) suggested that there was a need for better education and training in working with lesbian, gay, and bisexual clients. For this reason, the "Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients" (Division 44/Committee on Lesbian, Gay, and Bisexual Concerns Joint Task Force on Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients, 2000) were developed.

Need

A revision of the guidelines is warranted at this point in time because there have been many changes in the field of lesbian, gay, and bisexual psychology. Existing topics have evolved, and the literature also has expanded into new areas of interest for those working with lesbian, gay, and bisexual clients. In addition, the quality of the data sets of studies has improved significantly with the advent of population-based research.

Furthermore, the past decade has seen a revival of interest and activities on the part of political advocacy groups in attempting to repathologize homosexuality (Haldeman, 2002, 2004). Guidelines grounded in methodologically sound research, the APA Ethics Code, and existing APA policy are vital to informing professional practice with lesbian, gay, and bisexual clients. These guidelines have been used nationally and internationally in practice and training and in informing public policy. They will expire or be revised in 10 years from the date they are adopted by APA.

Compatibility

These guidelines build upon APA's Ethics Code (APA, 2002b) and are consistent with preexisting APA policy pertaining to lesbian, gay, and bisexual issues. These policies include but are not limited to the resolution titled "Discrimination Against Homosexuals" (Conger, 1975); the "Resolution on Sexual Orientation, Parents, and Children" (Paige, 2005); the "Resolution on Sexual Orientation and Marriage" (Paige, 2005); the "Resolution on Hate Crimes" (Paige, 2005); the "Resolution Opposing Discriminatory Legislation and Initiatives Aimed at Lesbian, Gay, and Bisexual Persons" (Paige, 2007); and the "Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts" (APA, 2009b). The guidelines are also compatible with policies of other major mental health organizations (cf. American Association for Marriage and Family Therapy, 1991; American Counseling Association, 1996; American Psychiatric Association, 1974; Canadian Psychological Association, 1995; National Association of Social Workers, 1996) which state that homosexuality and bisexuality are not mental illnesses.

Development Process

These guidelines were developed collaboratively by Division 44/Committee on Lesbian, Gay, Bisexual, and Transgender Concerns. The guidelines revision process was funded by Division 44 and by the APA Board of Directors. Supporting literature for these guidelines is consistent with the APA Ethics Code (APA, 2002b) and other APA policy. In addition, the *Application* sections of the text were enhanced to provide psychologists with more information and assistance.

Definition of Terms

Sex refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.

Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender normative; behaviors that are viewed as incompatible with these expectations constitute gender nonconformity.

Gender identity refers to "one's sense of oneself as male, female, or transgender" (APA, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000).

Gender expression refers to the "way in which a person acts to communicate gender within a given culture; for example, in terms of clothing, communication patterns, and interests. A person's gender expression may or may not be consistent with socially prescribed gender roles, and may or may not reflect his or her gender identity" (APA, 2008, p. 28).

Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). Although these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum (e.g., Kinsey, Pomeroy, Martin, & Gebhard, 1953; Klein, 1993; Klein, Sepekoff, & Wolff, 1985; Shively & De Cecco, 1977). In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women (e.g., Diamond, 2007; Golden, 1987; Peplau & Garnets, 2000).

Coming out refers to the process in which one acknowledges and accepts one's own sexual orientation. It also encompasses the process in which one discloses one's sexual orientation to others. The term *closeted* refers to a state of secrecy or cautious privacy regarding one's sexual orientation.

Attitudes Toward Homosexuality and Bisexuality

Guideline 1. Psychologists strive to understand the effects of stigma (i.e., prejudice, discrimination, and violence) and its various contextual manifestations in the lives of lesbian, gay, and bisexual people.

Rationale. Living in a heterosexist society inevitably poses challenges to people with nonheterosexual orientations. Many lesbian, gay, and bisexual people face social stigma, heterosexism, violence, and discrimination (Herek, 1991b, 2009; Mays & Cochran, 2001; I. H. Meyer, 2003). Stigma is defined as a negative social attitude or social disapproval directed toward a characteristic of a person that can lead to prejudice and discrimination against the individual (VandenBos, 2007). Herek (1995) defined heterosexism as "the ideological system that denies, denigrates, and stigmatizes any nonheterosexual form of behavior, identity, relationship, or community" (p. 321). These challenges may precipitate a significant degree of minority stress for lesbian, gay, and bisexual people, many of whom may be tolerated only when they are "closeted" (DiPlacido, 1998). Minority stress can be experienced in the form of ongoing daily hassles (e.g., hearing antigay jokes) and more serious negative events (e.g., loss of employment, housing, custody of children, physical and sexual assault; DiPlacido, 1998). According to a probability sample study by Herek (2009), antigay victimization has been experienced by approximately 1 in 8 lesbian and bisexual individuals and by about 4 in 10 gay men in the United States. Enacted stigma, violence, and discrimination can lead to "felt stigma," an ongoing subjective sense of personal threat to one's safety and well-being (Herek, 2009).

Antigay victimization and discrimination have been associated with mental health problems and psychological distress (Cochran, Sullivan, & Mays, 2003; Gilman et al., 2001; Herek, Gillis, & Cogan, 1999; Mays & Cochran, 2001; I. H. Meyer, 1995; Ross, 1990; Rostosky, Riggle, Horne, & Miller, 2009). Equally important, as individuals form lesbian, gay, and bisexual identities in the context of extreme stigma, most lesbian, gay, and bisexual people have some level of internalized negative attitudes toward nonheterosexuality (Szymanski, Kashubeck-West, & Meyer, 2008a). Szymanski, Kashubeck-West, and Meyer (2008b) reviewed the empirical literature on internalized heterosexism in lesbian, gay, and bisexual individuals and found that greater internalized heterosexism was related to difficulties with self-esteem, depression, psychosocial and psychological distress, physical health, intimacy, social support, relationship quality, and career development.

There are significant differences in the nature of the stigma faced by lesbians, gay men, and bisexual individuals. Lesbians and bisexual women, in addition to facing sexual prejudice, must contend with the prejudice and discrimination posed by living in a world where sexism continues to exert pervasive influences (APA, 2007). Similarly, gay and bisexual men are confronted not only with sexual prejudice but also with the pressures associated with expectations for conformity to norms of masculinity in the broader society as well as in particular subcultures they may inhabit (Herek, 1986; Stein, 1996). Bisexual women and men can experience negativity and stigmatization from lesbian and gay individuals as well as from heterosexual individuals (Herek, 1999, 2002; Mohr & Rochlen, 1999). Greene (1994b) noted that the cumulative effects of heterosexism, sexism, and racism may put lesbian, gay, and bisexual racial/ethnic minorities at special risk for stress. Social stressors affecting lesbian, gay, and bisexual youths, such as verbal and physical abuse, have been associated with academic problems, running away, prostitution, substance abuse, and suicide (D'Augelli, Pilkington, & Hershberger, 2002; Espelage, Aragon, Birkett, & Koenig, 2008; Savin-Williams, 1994, 1998). Less visibility and fewer lesbian, gay, and bisexual support organizations may intensify feelings of social isolation for lesbian, gay, and bisexual people who live in rural communities (D'Augelli & Garnets, 1995).

Research has identified a number of contextual factors that influence the lives of lesbian, gay, and bisexual clients and, therefore, their experience of stigma (Bieschke, Perez, & DeBord, 2007). Among these factors are race and ethnicity (e.g., L. B. Brown, 1997; Chan, 1997; Espin, 1993; Fygetakis, 1997; Greene, 2007; Szymanski & Gupta, 2009; Walters, 1997); immigrant status (e.g., Espin, 1999); religion (e.g., Davidson, 2000; Dworkin, 1997; Fischer & DeBord, 2007; Ritter & Terndrup, 2002); geographical location–regional dimensions, such as rural versus urban or country of origin (e.g., Browning, 1996; D'Augelli, Collins, & Hart, 1987; Kimmel, 2003; Oswald & Culton, 2003; Walters, 1997); socioeconomic status, both historical and current (Albelda, Badgett, Schneebaum, & Gates, 2009; Badgett, 2003; Díaz, Bein, & Ayala, 2006; Martell, 2007; G. M. Russell, 1996); age and historical cohort (G. M. Russell & Bohan, 2005); disability (Abbott & Burns, 2007; Shuttleworth, 2007; Swartz, 1995; Thompson, 1994); HIV status (O'Connor, 1997; Paul, Hays, & Coates, 1995); and gender identity and presentation (APA, 2008; Lev, 2007).

Application. Psychologists are urged to understand that societal stigmatization, prejudice, and discrimination can be sources of stress and create concerns about personal security for lesbian, gay, and bisexual clients (Mays & Cochran, 2001; Rothblum & Bond, 1996). Therefore, creating a sense of safety in the therapeutic environment is of primary importance (see Guideline 4). Central to this is the psychologist's understanding of the impact of stigma and his or her ability to demonstrate that understanding to the client through awareness and validation. Psychologists working with lesbian, gay, and bisexual people are encouraged to assess the client's history of victimization as a result of harassment, discrimination, and violence. In addition, overt and covert manifestations of internalized heterosexism should be assessed (Sánchez, Westefeld, Liu, & Vilain, 2010; Szymanski & Carr, 2008). Different combinations of contextual factors related to gender, race, ethnicity, cultural background, social class, religious background, disability, geographic region, and other

2016 WL 4426495
Only the Westlaw citation is currently available.
United States District Court,
N.D. Texas, Wichita Falls Division.

State of Texas et al., Plaintiffs,
v.
United States of America et al., Defendants.

Civil Action No. 7:16-cv-00054-O
|
Signed August 21, 2016

Synopsis
Background: Various states, state agencies, and school districts brought action against Department of Education, Department of Labor, and Department of Justice, among others, challenging defendants' assertion that Title VII and Title IX require that all persons must be afforded opportunity to have access to restrooms, locker rooms, and showers that match their gender identity rather than their biological sex. Plaintiffs moved for a preliminary injunction.

Holdings: The District Court, Reed O'Connor, J., held that:

[1] plaintiffs had standing to bring suit;

[2] plaintiffs' challenge was ripe for review;

[3] federal guidelines were final agency action subject to judicial review;

[4] guidelines were subject to notice and comment; and

[5] deference was not owed to Department's interpretation of a Title IX implementing regulation.

Motion granted.

Attorneys and Law Firms

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PRELIMINARY INJUNCTION ORDER

Reed O'Connor, UNITED STATES DISTRICT JUDGE

*1 Before the Court are Plaintiffs' Application for Preliminary Injunction (ECF No. 11), filed July 6, 2016; Defendants' Opposition to Plaintiffs Application for Preliminary Injunction (ECF No. 40), filed July 27, 2016; and Plaintiffs' Reply (ECF No. 52), filed August 3, 2016. The Court held a preliminary injunction hearing on August 12, 2016, and counsel for the parties presented their arguments. *See* ECF No. 56. [1]

This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school. The sensitivity to this matter is heightened because Defendants' actions apply to the youngest child attending school and continues for every year throughout each child's educational career. The resolution of this difficult policy issue is not, however, the subject of this Order. Instead, the Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

That being the case, the issues Plaintiffs present require this Court to first decide whether there is authority to hear this matter. If so, then the Court must determine whether Defendants failed to follow the proper legal procedures before issuing the Guidelines in dispute and, if they failed to do so, whether the Guidelines must be suspended until Congress acts or Defendants follow the proper legal procedure. For the following reasons, the Court concludes that jurisdiction is proper here and that Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing the Administrative Procedures Act's notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts. Accordingly, Plaintiffs' Motion should be and is hereby **GRANTED.**

I. BACKGROUND

The following factual recitation is taken from Plaintiffs' Application for Preliminary Injunction (ECF No. 11) unless stated otherwise. Plaintiffs are composed of 13 states and agencies represented by various state leaders, as well as Harrold Independent School District of Texas and Heber-Overgaard Unified School District of Arizona.[2] They have sued the U.S. Departments of Education ("DOE"), Justice ("DOJ"), Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials (collectively "Defendants"), challenging Defendants' assertions that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex.[3] Plaintiffs claim that on May 13, 2016, Defendants wrote to schools across the country in a Dear Colleague Letter on Transgender Students (the "DOJ/DOE Letter") and told them that they must "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk losing Title IX-linked funding." Mot. Injunction 1, ECF No. 11. Plaintiffs also allege Defendants have asserted that employers who "refuse to permit employees to utilize the intimate areas of their choice face legal liability under Title VII." *Id.* Plaintiffs complain that Defendants' interpretation of the definition of "sex" in the various written directives (collectively "the Guidelines")[4] as applied to Title IX of the Education Amendments of 1972 ("Title IX") and Title VII of the Civil Rights Act of 1964 ("Title VII") is unlawful and has placed them in legal jeopardy.

***2** Plaintiffs contend that when Title IX was signed into law, neither Congress nor agency regulators and third parties "believed that the law opened all bathrooms and other intimate facilities to members of both sexes." Mot. Injunction. 1, ECF No. 11. Instead, they argue one of Title IX's initial implementing regulations, 34 C.F.R. § 106.33 ("§ 106.33" or "Section 106.33"), expressly authorized separate restrooms on the basis of sex. Section 106.33 provides: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Plaintiffs assert the term sex in the pertinent statutes and regulations means the biological differences between a male and female. Mot. Injunction 2, ECF No. 11. Plaintiffs state that Defendants' swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines, coupled with Defendants' actions to enforce these new agency policies through investigations and compliance reviews, causes Plaintiffs to suffer irreparable harm for which a preliminary injunction is needed. *Id.* at 3–8; Pls.' Reply 3–7, ECF No. 54.

Defendants contend that the Guidelines and recent enforcement actions are designed to prohibit sex discrimination on the basis of gender identity and are "[c]onsistent with the nondiscrimination mandate of [Title IX]," and that "these guidance documents ... are merely expressions of the agencies' views as to what the law requires." Defs.' Resp. 2–4, ECF No. 40. Defendants also contend that the Guidelines "are not legally binding, and they expose [P]laintiffs to no new liability or legal requirements" because DOE "has issued documents of this nature for decades, across multiple administrations, in order to notify schools and other recipients of federal funds about how the agency interprets the law and how it views new and emerging issues." *Id.* at 4–5.[5] Defendants also state that the "[g]uidance documents issued by [DOE] 'do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations' " and these documents expressly state that they do not carry the force of law. *Id.* at 5 (citing Holder Memo 2, ECF No. 6-10, to clarify that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status," but the memo "is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case").

A. TITLE IX

Title IX, enacted in 1972, is the landmark legislation which prohibits discrimination among federal fund recipients by providing that no person "shall, on the basis of sex, ... be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. The legislative history shows Congress hailed Title IX as an indelible step forward for women's rights. Mot. Injunction at 2–4. After its passage, the DOE and its predecessor implemented a number of regulations which sought to enforce Title IX, chief among them, and at issue here, § 106.33. *See G.G.*

ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir.2016) (stating that the Department of Health, Education, and Welfare ("HEW") adopted its Title IX regulations in 1975 pursuant to 40 Fed. Reg. 24,128 (June 4, 1975), and DOE implemented its regulations in 1980 pursuant to 45 Fed. Reg. 30802, 30955 (May 9, 1980)). Section 106.33, as well as several other related regulations, permit educational institutions to separate students on the basis of sex, provided the separate accommodations are comparable.

II. LEGAL STANDARDS

A. The Administrative Procedure Act (the "APA")

*3 [1] "The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' " *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (quoting 5 U.S.C. § 702). "Where no other statute provides a private right of action, the 'agency action' complained of must be *final* agency action.' " *Id.* at 61–62, 124 S.Ct. 2373 (quoting 5 U.S.C. § 704). [6] In the Fifth Circuit, "final agency action" is a jurisdictional threshold, not a merits inquiry. *Texas v. Equal Employment Opportunity Comm'n*, —— F.3d ——, ——, No. 14–10949, 2016 WL 3524242 at *5 (5th Cir. June 27, 2016) ("*EEOC* "); *see also Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir.2004) ("If there is no 'final agency action,' a federal court lacks subject matter jurisdiction." (citing *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir.1999))).

[2] [3] [4] An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948); and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970)). "In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.' " *EEOC*, —— F.3d at ——, 2016 WL 3524242, at *5; *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir.2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). When final agency actions are presented for judicial review, the APA provides that reviewing courts should hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150–151, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991).

B. Preliminary Injunction

[5] The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974). To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.*; *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir.2008).

*4 [6] [7] To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir.2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n. 15 (5th Cir.2001). A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

[8] [9] [10] [11] The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985) (citing *Canal*, 489 F.2d at 572). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir.1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir.1985)). Even when a movant satisfies each of the

four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light Co.*, 760 F.2d at 621. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.*

III. ANALYSIS

Plaintiffs argue that: (1) Defendants skirted the notice and comment process—a necessity for legislative rules; (2) the new mandates are incompatible with Title VII and Title IX and the agencies are not entitled to deference; (3) the mandates violate the clear notice and anti-coercion requirements which the federal government may attach to spending programs; and (4) nationwide relief is necessary to prevent the irreparable harm Defendants will cause Plaintiffs. Mot. Injunction 2–3, ECF No. 11.

Defendants assert that Plaintiffs are not entitled to a preliminary injunction because: (1) Plaintiffs do not have standing to bring their claims; (2) this matter is not ripe for review; (3) Defendants' Guidelines do not violate the APA; (4) Plaintiffs cannot demonstrate irreparable harm and they have an alternative remedy; (5) Defendants did not violate the Spending Clause; (6) and an injunction would harm Defendants and third parties. Defs.' Resp. 1–3, ECF No. 40. Defendants allege that should an injunction be granted, it should be implemented only to Plaintiffs in the Fifth Circuit. *Id.* The Court addresses these issues, beginning with Defendants' jurisdictional arguments. [7]

A. Jurisdiction

1. Standing

***5 [12]** Defendants allege that "[P]laintiffs' suit fails the jurisdictional requirements of standing and ripeness ... because they have not alleged a cognizable concrete or imminent injury." Defs.' Resp. 12, ECF No. 40 (citing *Lopez v. City of Hous.*, 617 F.3d 336, 342 (5th Cir.2010)). Defendants allege "a plaintiff must demonstrate that it has 'suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' " *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendants contend that "[t]he agencies have merely set forth their views as to what the law requires" regarding whether gender identity is included in the definition of sex, and "[a]t this stage, [P]laintiffs have alleged no more than an abstract disagreement with the agencies' interpretation of the law," since "[n]o concrete situation has emerged that would permit the Court to evaluate [P]laintiffs' claims in terms of specific facts rather than abstract principles." *Id.* at 13–14.

Defendants also allege that Plaintiffs "have [not] identified any enforcement action to which they are or are about to be subject in which a defendant agency is seeking to enforce its view of the law. As such, any injury alleged by plaintiffs is entirely speculative, as it depended on the initiation of some kind of enforcement action ... which may never occur." Defs.' Resp. 14, ECF No. 40.

Plaintiffs state that Defendants are affirmatively using the Guidelines to force compliance as evidenced by various resolution agreements reached in enforcement cases across the country and from the litigation against the state of North Carolina, all of which is designed to force Plaintiffs to amend their policies to comply or place their federal funding in jeopardy. Hr'g Tr. at 78. Plaintiffs argue they are clearly the object of the Defendants' Guidelines, and those directives run afoul of various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities. [8] Hr'g Tr. at 77. Plaintiffs contend all of this confers standing according to the Fifth Circuit's opinion in *Texas v. Equal Employment Opportunity Commission*, —— F.3d ——, No. 14–10940, 2016 WL 3524242 (5th Cir. June 27, 2016). Hr'g Tr. 78.

***6** Defendants counter that *EEOC* was wrongly decided and, regardless, the facts here are distinguishable from that case. [9] *Id.* Defendants primarily distinguish *EEOC* from this case based on the *EEOC* majority's view that the "guidance [at issue] contained a 'safe harbor' [provision]" and "the [guidance at issue had] the immediate effect of altering the rights and obligations of the 'regulated community' ... by offering them [ ] detailed and conclusive means to avoid an adverse EEOC finding." Defs.' Resp. 15, ECF No. 40. Defendants claim that the same kind of facts are not present here. Defendants contend further that "the [transgender] guidance documents do not provide 'an exhaustive procedural framework,' [or] ... a safe harbor, but merely express[ ] the agencies' opinion about the proper interpretation of Title VII and Title IX." *Id.* Thus,

they argue, the Court lacks jurisdiction and should decline to enter a preliminary injunction. *Id.* [10]

[13] **[14]** **[15]** The Court finds that Plaintiffs have standing. "The doctrine of standing asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.' " *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir.2013) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130. The injury in fact must be "concrete and particularized" and "actual or imminent," as opposed to "conjectural" or "hypothetical." *Id.* at 560, 112 S.Ct. 2130. When "a plaintiff can establish that it is an 'object' of the agency regulation at issue, 'there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.' " *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *2; *Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130. The Fifth Circuit provided, "[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *Id.* at ——, 2016 WL 3524242 at *6 (quoting *Contender Farms LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir.2015)).

In *EEOC*, Texas sued the EEOC over employment guidance the EEOC issued to employers concerning their Title VII obligations. In response, the EEOC argued Texas lacked standing because the guidance was advisory only and imposed no affirmative obligation. The Fifth Circuit held that Texas had standing to seek relief because it was an object of the EEOC's guidance as the guidance applied to Texas as an employer. *Id.* at ——, 2016 WL 3524242 at *4.

This case is analogous. Defendants' Guidelines are clearly designed to target Plaintiffs' conduct. At the hearing, Defendants conceded that using the definition in the Guidelines means Plaintiffs are not in compliance with their Title VII and Title IX obligations. Hr'g Tr. 74. Defendants argue that that this does not confer standing because the Guidelines are advisory only. Defs.' Resp. 14, ECF No. 40. But this conflates standing with final agency action and the Fifth Circuit instructed district courts to address the two concepts separately. *See EEOC*, —— F.3d at ——, 2016 WL 3524242 at *3. Defendants' Guidelines direct Plaintiffs to alter their policies concerning students' access to single sex toilet, locker room, and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations. [11] Plaintiffs' counsel argued the Guidelines will force Plaintiffs to consider ways to build or reconstruct restrooms, and how to accommodate students who may seek to use private single person facilities, as other school districts and employers who have been subjected to Defendants' enforcement actions have had to do. Hr'g Tr. 80–81. That the Guidelines spur this added regulatory compliance analysis satisfies the injury in fact requirement. *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *4 ("[T]he guidance does, at the very least, force Texas to undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations ... overrides the State's interest .... [T]hese injuries are sufficient to confer constitutional standing, especially when considering Texas's unique position as a sovereign state ...."). That Plaintiffs have standing is strengthened by the fact that Texas and other Plaintiffs have a "stake in protecting [their] quasi-sovereign interests ... [as] special solicitude[s]." *Mass. v. E.P.A.*, 549 U.S. 497, 520, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ("Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.").

*7 Accordingly, Plaintiffs have standing to pursue this lawsuit.

2. Ripeness

[16] Defendants also argue that this case is not ripe for review. According to Defendants, this Court should avoid premature adjudication to avoid entangling itself in abstract disagreements over administrative policies. Defs.' Resp. 13, ECF No. 40 (citing *Nat'l Park Hosp. Ass'n v. Dep.'t Interior*, 538 U.S. 803, 807, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003)). Defendants argue that more time should be given to allow the administrative process to run its course and develop more facts before the Court can address this case. *Id.* at 13 (citing *Abbott Labs.*, 387 U.S. 136, 149, 87 S.Ct. 1507 (1967)); Hr'g Tr. 62. Plaintiffs

counter that, taking into account recent events where Defendants have investigated other entities that do not comply with the Guidelines, this case is ripe. Pls.' Reply 4–7, ECF No. 52; Hr'g Tr. 79.

[17] "A challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.' " *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir.2007) (citing *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812, 123 S.Ct. 2026).

The Court finds that Plaintiffs' case is ripe for review. Here, the parties agree that the questions at issue are purely legal. Hr'g Tr. 61. Defendants asserted at the hearing that Plaintiffs are not in compliance with their obligations under Title IX given their refusal to change their policies. Hr'g Tr. 74. Furthermore, for the reasons set out below, the Court finds that Defendants' actions amount to final agency action under the APA.[12] *EEOC*, — F.3d at —— n. 9, 2016 WL 3524242 at *11 n. 9 ("Having determined that the Guidance is 'final agency action' under the APA, it follows naturally that Texas's APA claim is ripe for review. Texas's challenge to the EEOC Guidance is a purely legal one, and as such it is unnecessary to wait for further factual development before rendering a decision.") (Internal citations omitted).

Finally, the facts of this case have sufficiently developed to address the legal impact Defendants' Guidelines have on Plaintiffs' legal questions in this case. *Texas*, 497 F.3d at 498–99. The only other factual development that may occur, given Defendants' conclusion Plaintiffs are not in legal compliance, is whether Defendants actually seek to take action against Plaintiffs. But it is not clear how waiting for Defendants to actually take action would "significantly advance [the court's] ability to deal with the legal issues presented." *Texas*, 497 F.3d at 498–99. As previously stated, Defendants' Guidelines clash with Plaintiffs' state laws and policies in relation to public school facilities and Plaintiffs have called into question the legality of those Guidelines. Mot. Injunction 9–12, ECF No. 11. Therefore, "further factual development would not 'significantly advance the courts ability to deal with the legal issues presented.' " *Texas*, 497 F.3d at 498–99. Accordingly, the Court finds that this case is ripe for review.

3. Final Agency Action under the APA

***8 [18]** The Court now evaluates whether the Guidelines are final agency action meeting the jurisdictional threshold under the APA. *EEOC*, — F.3d at ——, 2016 WL 3524242 at *5. Defendants argue that there has been no final agency action as the documents in question are merely "paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." Defs.' Resp. 18, ECF No. 40. Defendants also allege that the Guidelines are "[v]alid interpretations of the statutory and regulatory authorities on which they are premised" because although Title IX and § 106.33 provide that federal recipients may provide for separate, comparable facilities, the regulation and statute "do not address how they apply when a transgender student seeks to use those facilities ...." *Id.* at 20–21.

Plaintiffs allege that the agencies' Guidelines are binding nationwide and the Defendants' enforcement patterns in various states clearly demonstrate that legal actions against those that do not comply will follow. Mot. Injunction 9–12, ECF No. 11; Reply 2–8, ECF No. 52. Plaintiffs identify a number of similar cases where Defendants have investigated schools that refused to comply with the new Guidelines and where they sued North Carolina over its state law which, in part, made it legal to require a person to use the public restroom according to their biological sex. Reply 6, ECF No. 52.

An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett*, 520 U.S. at 177–78, 117 S.Ct. 1154. "In evaluating whether a challenged agency action meets these two conditions, the court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.' " *EEOC*, — F.3d at ——, 2016 WL 3524242 at *5 (quoting *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir.2011)).

The Court finds that the Guidelines are final agency action under the APA. Defendants do not dispute that the Guidelines are a "consummation" of the agencies' decision-making process. Hr'g Tr. 61; *Nat'l*

Pork Producers Council v. E.P.A., 635 F.3d 738, 755–56 (5th Cir.2011) (citing *Her Majesty the Queen in Right of Ontario v. Envtl. Prot. Agency*, 912 F.2d 1525, 1532 (D.C.Cir.1990) (deciding that EPA guidance letters constitute final agency actions as they "serve[d] to confirm a definitive position that has a direct and immediate impact on the parties ....")).

The second consideration is also satisfied in this case because legal consequences flow from the Defendants' actions. Defendants argue no legal consequences flow to Plaintiffs because there has been no enforcement action, or threat of enforcement action. Hr'g Tr. 71. The Fifth Circuit held in *EEOC* however that "an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties." —— F.3d at ——, 2016 WL 3524242 at *8. According to the Fifth Circuit, " 'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability." *Id.* (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, —— U.S. ——, 136 S.Ct. 1807, 1814–15, 195 L.Ed.2d 77 (2016) (holding that using the pragmatic approach, an agency action asserting that plaintiff's land was subject to the Clean Water Act's permitting process was a final agency action which carried legal consequences). The Fifth Circuit concluded that "[i]t is also sufficient that the Enforcement Guidance [at issue in *EEOC*] has the immediate effect of altering the rights and obligations of the 'regulated community' (i.e. virtually all state and private employers) by offering them a detailed and conclusive means to avoid an adverse EEOC finding ...." —— F.3d at ——, 2016 WL 3524242 at *6.

***9** In this case, although the Guidelines provide no safe harbor provision, the DOJ/DOE Letter provides not only must Plaintiffs permit individuals to use the restrooms, locker rooms, showers, and housing consistent with their gender identity, but that they find *no* safe harbor in providing transgender students individual-user facilities as an alternative accommodation. Indeed, the Guidelines provide that schools may, consistent with Title IX, make individual-user facilitates available for *other* students who "voluntarily seek additional privacy." *See* DOJ/DOE Letter 3, ECF No. 6-10. Using a pragmatic and common sense approach, Defendants' Guidelines and actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants' Guidelines. *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *8 ("Instead, 'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability."); *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1056–57 (5th Cir.1993) (stating that "[w]ere HUD to formally define the phrase [at issue] ... [the plaintiffs] would undoubtedly have the right to review HUD's final agency action under § 702 [of the APA]"); *Frozen Foods Express v. United States*, 351 U.S. 40, 44–45, 76 S.Ct. 569, 100 L.Ed. 910 (1956) (holding an order specifying which commodities the Interstate Commerce Commission believed were exempt was final agency action, even though the order simply gave notice of how it would interpret the statute and would apply only when an action was brought): *compare with AT & T Co. v. E.E.O.C.*, 270 F.3d 973, 975–76 (D.C.Cir.2001) (holding that the EEOC's compliance manual was not a final agency action because the policy guidance did not intend to bind EEOC staff in their official conduct, the manual simply expressed the agency's view with respect to employers' actions and compliance with Title VII).

Accordingly, the Court finds that Defendants' Guidelines are final agency action such that the jurisdictional threshold is met. *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *5.

4. Alternative Legal Remedy

[19] Defendants also contend that district court review is precluded and Plaintiffs should not be allowed to avoid the administrative process by utilizing the APA at this time. Defs.' Resp. 16, ECF No. 40. Defendants allege that "review by a court of appeals is an 'adequate remedy' within the meaning of the APA," and "[s]ection 704 of the APA thus prevents plaintiffs from circumventing the administrative and judicial process Congress provided them." *Id.* Defendants argue "Congress has precluded district court jurisdiction over pre-enforcement actions like this." *Id.* at 17. Defendants cite several cases, including the Supreme Court's opinions in *Thunder Basin v. Reich*, 510 U.S. 200, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) and

Elgin v. Department of Treasury, — U.S. —, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012), in support of this argument. [14]

Defendants' assertion that there is no jurisdiction to review Plaintiffs' APA claims fails and their reliance on *Thunder Basin*, *Elgin*, and the other cited cases is misplaced. In *Thunder Basin*, the Supreme Court held that the Mine Act's statutory review scheme precluded the district court from exercising subject-matter jurisdiction over a pre-enforcement challenge. To determine whether pre-enforcement challenges are prohibited courts look to whether this "intent is 'fairly discernible in the statutory scheme.' " *Thunder Basin*, 510 U.S. at 207, 114 S.Ct. 771 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)). The Supreme Court held that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history ... and whether the claims can be afforded meaningful review." *Id.* (internal citation omitted).

***10** Although the Mine Act was silent about pre-enforcement claims, the Supreme Court held that "its comprehensive enforcement structure demonstrate[d] that Congress intended to preclude challenges," and the Mine Act "expressly authorize[d] district court jurisdiction in only two provisions ... [which allowed] the Secretary [of Labor] to enjoin [ ] violations of health and safety standards and to coerce payment of civil penalties." *Id.* at 209, 114 S.Ct. 771. Thus, plaintiffs had to "complain to the Commission and then to the court of appeals." *Id.* (italics omitted).

Elgin reached a similar conclusion, holding that the Civil Service Reform Act ("CSRA") was the exclusive avenue to judicial review for petitioners' claims against the Treasury Department. 132 S.Ct. 2126, 2128 ("Just as the CSRA's 'elaborate' framework [citation omitted] demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review.").

No similar elaborate statutory framework exists covering Plaintiffs' claims. Neither Title VII nor Title IX presents statutory schemes that would preclude Plaintiffs from bringing these claims in federal district court. Indeed, the Supreme Court has held that Title IX's enforcement provisions, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory remedy for violations. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (holding that Title IX did not preclude a private right of action for damages). Given Defendants lack of authority to the contrary, the presumption of reviewability for all agency actions applies. *EEOC*, — F.3d at —, 2016 WL 3524242 at *11 (citing *Abbott Labs.*, 387 U.S. at 140, 87 S.Ct. 1507) ("To wholly deny judicial review, however, would be to ignore the presumption of reviewability, and to disregard the Supreme Court's instruction that courts should adopt a pragmatic approach for the purposes of determining reviewability under the APA.").

Having concluded that Plaintiffs claims are properly subject to judicial review, the Court next evaluates whether a preliminary injunction is appropriate.

B. Preliminary Injunction

1. Likelihood of Success on the Merits

The first consideration is whether Plaintiffs have shown a likelihood of success on the merits for their claims. Plaintiffs aver that they have shown a substantial likelihood that they will prevail on the merits because Defendants have violated the APA by (1) circumventing the notice and comment process and (2) by issuing final agency action that is contrary to law. Mot. Injunction 12–16, ECF No. 11. Furthermore, Plaintiffs contend that Defendants' new policies are not valid agency interpretations that should be granted deference because "[a]gencies do not receive deference where a new interpretation conflicts with a prior interpretation." Pls.' Reply 11, ECF No. 52 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)).

Defendants contend that their actions do not violate the APA because the Guidelines are interpretive rules and are therefore exempt from the notice and comment requirements. Defs.' Resp. 12–18, ECF No. 40. Defendants argue the Guidelines are exempt because they do not carry the force of law, even though "the agencies' interpretations of the law are entitled to some deference." Further, they argue because their interpretation is reasonable, this interpretation is entitled to deference. [15]

Defendants also assert they did not act contrary to law because the Guidelines are valid interpretations of Title IX as the statute and regulations "do not address how [the laws] apply when a transgender student seeks to use those facilities" or "how a school should determine a transgender student's sex when providing access to sex-segregated facilities." *Id.* at 20–21. Thus, according to Defendants, this situation presents an ambiguity in the regulatory scheme and Defendants are allowed to provide guidelines to federal fund recipients on this matter. *Id.* at 21.[16]

***11** In their Reply, Plaintiffs counter that DOE's implementing regulation, § 106.33, is not "ambiguous[,] [a]s a physiologically-grounded regulation, it covers every human being and therefor all those within the reach of Title IX." Reply 8, ECF No. 52. They contend further, "[t]o create legal room to undo what Congress (and preceding regulators) had done, Defendants manufacture an ambiguity, claiming that 'these regulations do not address how they apply when a transgender student seeks to use those facilities ....' " *Id.* (citing Defs.' Response 20–21, ECF No. 40). Plaintiffs continue, "[i]n enacting Title IX, Congress was concerned that women receive the same opportunities as men, [t]hus, Congress utilized 'sex' in an exclusively biological context[,] [and] "[t]he two sexes are not fungible." *Id.* at 8–9 (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 91 L.Ed. 181 (1946). It is the biological differences between men and women, Plaintiffs allege, that led Congress in 1972 to "permit differential treatment by sex only[,]" provide a basis for DOE "to approve 'separate toilet, locker rooms, and shower facilities on the basis of sex" in § 106.33, and led the Supreme Court "to conclude that educational institutions must 'afford members of each sex privacy from the other sex.' " *Id.* at 9 (quoting 118 Cong. Rec. 5807 (1972)); *United States v. Virginia*, 518 U.S. 515, 550 n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)).

The Court finds that Plaintiffs have shown a likelihood of success on the merits because: (1) Defendants bypassed the notice and comment process required by the APA; (2) Title IX and § 106.33's text is not ambiguous; and (3) Defendants are not entitled to agency deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).[17]

i. Notice and Comment under the APA

Defendants state that "[t]he APA does not require agencies to follow notice and comment procedures in all situations [, and the APA] specifically excludes interpretive rules and statements of agency policy from these procedures." Defs.' Resp. 17–18, ECF No. 40. Defendants allege "[t]he guidance documents are ... paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." *Id.* at 18. According to Defendants, "the interpretations themselves do not carry the force of law ...." *Id.* at 19. Defendants rely on *G.G.*, 822 F.3d 709, 720 (4th Cir.2016) to support their claim that DOE's "interpretation of the single-sex facility regulation implementing Title IX is reasonable, and does not conflict with those regulations in any way." *Id.*

Plaintiffs contend that Defendants' rules are legislative because: "(1) they grant rights while also imposing significant obligations; (2) they amend prior legislative rules or longstanding agency practice; and (3) bind the agencies and regulated entities," requiring them to go through the notice and comment process. Mot. Injunction 12, ECF No. 11.

[20] **[21]** The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them. 5 U.S.C. §§ 553(b)–(c). This is referred to as the notice and comment requirement. The purpose is to permit the agency to understand and perhaps adjust its rules based on the comments of affected individuals. *Prof'ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir.1995). However, not every action an agency takes is required to go through the notice and comment process. "The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C.Cir.2014). "Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not." *Id.* (citing 5 U.S.C. § 553). "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

[22] **[23]** The APA does not define a legislative or "substantive" rule, but in *Morton v. Ruiz*, 415 U.S. 199, 234, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), the Supreme Court held that a substantive rule or "a legislative-type rule," is one that "affect[s] individual rights and obligations." *Id.* at 232, 94 S.Ct. 1055. The Supreme Court also held, "the promulgation of these regulations must conform with any procedural requirements imposed by Congress." *Chrysler Corp.*, 441 U.S. at 303, 99 S.Ct. 1705. Thus, agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *Id.* (quoting *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969)). If a rule is substantive, notice and comment requirements must be adhered to scrupulously. *Prof'ls and Patients for Customized Care*, 56 F.3d at 595.

***12** "[L]egislative rules (and sometimes interpretive rules) may be subject to pre-enforcement review" because they subject a party to a binding obligation which can be the subject of an enforcement action. *McCarthy*, 758 F.3d at 251. ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties —and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule ...."). The APA treats interpretive rules and general statements of policy differently. *Id.* ("As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule."). [18]

[24] **[25]** **[26]** Courts have focused on several factors to evaluate whether rules are interpretative or legislative. Courts analyze the agency's characterization of the guidance and post-guidance events to determine whether the agency has applied the guidance as if it were binding on regulated parties. *McCarthy*, 758 F.3d at 252–53. However, "the most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *McCarthy*, 758 F.3d at 252 (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34; *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C.Cir.2002)). "A touchstone of a substantive rule is that it establishes a binding norm." *Prof'ls and Patients for Customized Care*, 56 F.3d at 596; *see also Texas v. United States*, 809 F.3d 134, 202 (5th Cir.2015) (King, J., dissenting) (declaring that an agency action establishing binding norms which permit no discretion is a substantive rule requiring notice and comment). If agency action "draws a 'line in the sand' that, once crossed, removes all discretion from the agency" the rule is substantive. *Id.* at 601.

[27] Here, the Court finds that Defendants rules are legislative and substantive. Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are "compulsory in nature." *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C.Cir.2000); [19] *see also Prof'ls and Patients for Customized Care*, 56 F.3d at 596 (the label an agency places on its exercise of administrative power is not conclusive, rather it is what the agency does with that policy that determines the type of action). Defendants confirmed at the hearing that schools not acting in conformity with Defendants' Guidelines are not in compliance with Title IX. Hr'g Tr. 71. Further, post-Guidelines events, where Defendants have moved to enforce the Guidelines as binding, buttress this conclusion. *Id.* at 7; Mot. Injunction 15–16, ECF No. 11; Reply 4–8, ECF No. 52. The information before the Court demonstrates Defendants have "drawn a line in the sand" in that they have concluded Plaintiffs must abide by the Guidelines, without exception, or they are in breach of their Title IX obligations. Thus, it would follow that the "actual legal effect" of the Guidelines is to force Plaintiffs to risk the consequences of noncompliance. *McCarthy*, 758 F.3d at 252; *Catawba Cty.*, 571 F.3d at 33–34; *Gen. Elec. Co.*, 290 F.3d at 382; *see also Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C.Cir.2005). Plaintiffs, therefore, are legally affected in a way they were not before Defendants issued the Guidelines. The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. *Panhandle Producers and Royalty Owners Ass'n v. Econ. Regulatory Admin*, 847 F.2d 1168, 1174 (5th Cir.1988) (stating that a substantive rule is one that establishes standards of conduct that carry the force of law). As such, Defendants should have complied with the APA's notice and comment requirement. 5 U.S.C. § 553; *Nat'l Min. Ass'n*, 758 F.3d at 251; *Chrysler Corp.*, 441 U.S. at 301–03, 99 S.Ct. 1705. Permitting the definition of sex to be defined in this way would allow Defendants to "create de facto new regulation" by agency action without complying with the proper procedures. *Christensen v. Harris Cty.*, 529 U.S. 576, 586–86, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). This is not permitted.

***13** Accordingly the Court finds that Plaintiffs would likely succeed on the merits that Defendants violated the notice and comment requirements of the APA.

ii. Agency Action Contrary to Contrary to Law (5 U.S.C. § 553)

Plaintiffs contend that Defendants' Guidelines are contrary to the statutory and regulatory text, Congressional intent, and the plain meaning of the term. Mot. Injunction 14, ECF No. 11. When an agency acts contrary to law, its action must be set aside. 5 U.S.C. § 706(2)(A). Plaintiffs argue that Defendants' interpretation of the meaning of the term "sex" as set out in the Guidelines contradicts its meaning in Title VII, Title IX, and § 106.33. They assert "the meaning of the terms 'sex,' on the one hand, and 'gender identity,' on the other, both now and at the time Titles VII and IX were enacted, forecloses alternate constructions." Mot. Injunction 16, ECF No. 11 (citing *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S.Ct. 2381. They also allege that the ordinary meaning of the term controls. *Id.* at 17 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995)).

Defendants contend that Plaintiffs' arguments for legislative history and intent at the time of passage are irrelevant. Hr'g Tr. 33 ("But it may very well be that Congress did not intend the law to protect transgender individuals. [But,] ... as the Supreme Court has made it absolutely clear in *Oncale*, the fact that Congress may have understood the term sex to mean anatomical sex at birth is largely irrelevant.") Defendants also allege that "Title IX and Title VII should be construed broadly" to protect any person, including transgendered persons, from discrimination. Hr'g Tr. 33–34.

The starting point to analyze this dispute begins with the actual text of the statute or regulation, where the words should be given their ordinary meaning. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). When the words are unambiguous, the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)). The pertinent statutory text at issue in this case provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681. Title IX expressly permits educational institutions to maintain separate living facilities for the different sexes. *Id.* at § 1686. The other language at issue comes from one of the DOE regulations promulgated to implement Title IX, which states: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

Defendants assert the Guidelines simply provide clarity to an ambiguity in this regulation, and that ambiguity is how to define the term sex when dealing with transgendered students. Defs.' Resp. 20, ECF No. 40. Because they contend the regulation is ambiguous, Defendants argue "[f]oundational principles of administrative law instruct [the Court] to give controlling weight to [their] interpretations of their own ambiguous regulations unless [they are] plainly erroneous." *Id.*

***14** Plaintiffs contend the text of both Title VII and Title IX is not ambiguous. Mot. Injunction 16–19, ECF No. 11. They argue when Congress passed both statutes it clearly intended sex to be defined based on the biological and anatomical differences between males and females. *See id.* at 17–18 (citing legislative history and common understanding of its meaning at the time of passage). Plaintiffs likewise assert § 106.33 is unambiguous, for the same reason, as it was designed to separate students based on their biological differences because they have a privacy right to avoid exhibiting their "nude or partially nude body, genitalia, and other private parts" before members of the opposite sex. Pls.' Reply 8–9, ECF No. 52. Based on this, they argue Defendants have manufactured an ambiguity so they can then unilaterally change the law to suit their policy preferences. *Id.* at 8.

iii. Auer Deference

[28] Because Defendants assert their regulation is ambiguous, the Court must determine whether their interpretation is entitled to deference. Defendants contend an agency may interpret its own regulation by issuing an

opinion letter or other guidance which should be given controlling weight if: (1) the regulation is ambiguous; and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. Defs.' Resp. 21, ECF No. 40; *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) ("[An agency's] interpretation of [its regulation] is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' ") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

[29] **[30]** **[31]** This deference is only warranted however when the language of the regulation is ambiguous. *Moore v. Hannon Food Services, Inc.*, 317 F.3d 489, 495 (5th Cir.2003). Legislation is ambiguous if it is susceptible to more than one accepted meaning. *Calix v. Lynch*, 784 F.3d 1000, 1005 (5th Cir.2015). "Multiple accepted meanings do not exist merely because a statute's 'authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.' " *Id.* (citing *Moore*, 317 F.3d at 497 *and* applying this rule of construction to regulations).

[32] **[33]** **[34]** If a regulation is not ambiguous, the agency's interpretation may be considered but only according to its persuasive power. *Moore*, 317 F.3d at 495. "Thus, a court must determine whether 'all but one of the meanings is ordinarily eliminated by context.' " *Calix*, 784 F.3d at 1005 (quoting *Deal v. United States*, 508 U.S. 129, 132–33, 113 S.Ct. 1993, 124 L.Ed.2d 44 1993 (1993)). When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent. *D.C. Bd. of Elections & Ethics v. D.C.*, 866 A.2d 788, 798 n. 18 (D.C.2005) ("In finding the ordinary meaning, 'the use of dictionary definitions is appropriate in interpreting undefined statutory terms.' "); *1618 Twenty–First St. Tenants Ass'n, Inc. v. Phillips Collection*, 829 A.2d 201, 203 (D.C.2003) (same). Furthermore, "an agency is not entitled to deference when it offers up an interpretation of [a regulation] that [courts] have already said to be unambiguously foreclosed by the regulatory text." *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 399 (5th Cir.2014) (citing *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655).

Based on the foregoing authority, the Court concludes § 106.33 is not ambiguous. It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth. *See* 34 C.F.R. § 106.33; 45 Fed. Reg. 30955 (May 9, 1980); *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S.Ct. 2381 (holding that intent determined at the time the regulations are promulgated). It appears Defendants at least tacitly agree this distinction was the intent of the drafter. *See* Holder Memo 1, ECF No. 6-3 ("The federal government's approach to this issue has also evolved over time."); *see also* Hr'g Tr. 33 ("[I]t may very well be that Congress did not intend the law to protect transgender individuals.").

***15** Additionally, it cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students. Pls.' Mot. Injunction 17–18, ECF No. 11 (citing legislative history and common understanding of its meaning at the time of passage). As the support identified by Plaintiffs shows, this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33. *See* Pls.' Am. Compl. ¶¶ 8–13, ECF No. 6; *see also G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (providing comprehensive list of various definitions from the 1970s which demonstrated "during that time period, virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions."). This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their "nude or partially nude body, genitalia, and other private parts," and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy. *See G.G.*, 822 F.3d at 723.

This conclusion is also supported by the text and structure of the regulations. Section 106.33 specifically permits educational institutions to provide separate toilets, locker rooms, and showers based on sex, *provided* that the separate facilities are comparable. The sections immediately preceding and following § 106.33 likewise permit educational institutions to separate students on the

basis of sex. For instance, § 106.32 permits educational institutions to provide separate housing for students on the basis of sex, again so long as the separate housing is comparable, and § 106.33 permits separate educational sessions for boys and girls when dealing with instruction concerning human sexuality. 34 C.F.R. §§ 106.32, 106.34. Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality, was to protect students' personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex. *G.G.*, 822 F.3d at 723. Accordingly, this interpretation of § 106.33 is consistent with the structure and purpose of the regulations.

Based on the foregoing, the Court concludes § 106.33 is not ambiguous. Given this regulation is not ambiguous, Defendants' definition is not entitled to *Auer* deference, meaning it does not receive controlling weight. *Auer*, 519 U.S. at 461, 117 S.Ct. 905. Instead, Defendants' interpretation is entitled to respect, but only to the extent it has the power to persuade. *Christensen*, 529 U.S. at 587, 120 S.Ct. 1655. In his dissent in *G.G.*, Judge Niemeyer characterized Defendants' definition as "illogical and unworkable." *G.G.*, 822 F.3d at 737. He outlined a number of scenarios, which need not be repeated here, where the Defendants' interpretation only causes more confusion for educational institutions. *Id.* A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased. *See Morton*, 415 U.S. at 237, 94 S.Ct. 1055; *see also Christopher v. SmithKline Beecham Corp.*, —— U.S. ——, 132 S.Ct. 2156, 2168, 183 L.Ed.2d 153 (2012) (holding that an agency announcement of an interpretation preceded by a very lengthy period with no interpretation indicates agency considered prior practice lawful). Accordingly, the Court concludes Defendants' interpretation is insufficient to overcome the regulation's plain language and for the reasons stated above is contrary to law.

2. Threat of Irreparable Harm

[35] The Court next addresses irreparable harm. Defendants allege that Plaintiffs have not identified any pending or imminent enforcement action, and the Guidelines "expose [P]laintiffs to no new liability or legal requirements." Defs.' Resp. 7, ECF No. 40 (citing *Google v. Hood*, 822 F.3d 212, 227 (5th Cir.2016). Defendants argue that, "[a]lthough [P]laintiffs *do* identify a small number of specific 'policies and practices' that they claim are in conflict with [D]efendants' interpretation of Title IX, they have identified no enforcement action being taken against them—now or in the future—as a result of these polices." Defs.' Resp. 8–9, ECF No. 40. They assert that even if DOE were "to decide to bring an administrative enforcement action against plaintiffs for noncompliance ... at some point in the future, [P]laintiffs *still* would be unable to make a showing of irreparable harm because they would have an opportunity to challenge the interpretation in an administrative process prior to any loss of federal funds." *Id.* at 9 (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir.1975)).

***16** Plaintiffs counter that "Defendants' actions cause irreparable harm by forcing policy changes, imposing drastic financial consequences, and usurping [Plaintiffs'] legitimate authority." Mot. Injunction 21, ECF No. 11. According to Plaintiffs, Defendants' actions present "a Hobson's choice between violating federal rules (labeled as regulations, guidance, and interpretations) on the one hand, and transgressing longstanding policies and practices, on the other." *Id.* Thus, Plaintiffs characterize Defendants' administrative letters and notices as "mandates" which effectively carry the force of law. *Id.* Plaintiffs also allege that Defendants' rules are "irreconcilable with countless polices regarding restrooms, showers, and intimate facilities," while threatening to override the practices of "countless schools," which had previously been allowed to differentiate intimate facilities on the basis of biological sex consistent with Title IX, federal regulations, and laws protecting privacy and dignity. *Id.* (citing Mot. Injunction, Ex. P. (Thweatt Dec.) 5–7, ECF No. 11-2).

Defendants' appear to concede the Guidelines conflict with Plaintiffs' policies and practices, *see* Defs.' Resp. 8–9; ECF No. 40 ("[P]laintiffs do identify a small number of specific 'policies and practices' ...."); however, they argue that additional threats of enforcement are required before irreparable harm exists. Case law does not support this contention. Instead the authorities hold, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir.1997) (stating,

whenever an enactment of a state's people is enjoined, the state suffers irreparable injury); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir.2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Maryland v. King*, —— U.S. ——, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., *in chambers*) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

As Defendants have conceded the conflict between the Guidelines and Plaintiffs' policies, and Plaintiffs have identified a number of statutes that conflict, the Court concludes Plaintiffs have sufficiently demonstrated a threat of irreparable harm.[20]

3. Balance of Hardships and Public Interest[21]

[36] The Court next considers whether the threatened injury to the Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants and its impact on the public interest. *Nichols*, 532 F.3d at 372. Plaintiffs risk either running afoul of Defendants' Guidelines or complying and violating various state statutes and, in some cases, their state constitutions. Mot. Injunction 21, ECF No. 11. Plaintiffs also state that they likely risk legal action from parents, students, and other members of their respective communities should they actually comply with Defendants' Guidelines. Defendants argue these harms do not outweigh the damage that granting the injunction will cause because it will impede their ability to eliminate discrimination in the workplace and educational settings, prevent them from definitively explaining to the public the rights and obligations under these statutes, and it would have a deleterious effect on the transgendered.

***17** The Court concludes Plaintiffs have established that the failure to grant an injunction will place them in the position of either maintaining their current policies in the face of the federal government's view that they are violating the law, or changing them to comply with the Guidelines and cede their authority over this issue. *See* DOJ/DOE Letter, ECF No. 6-10 ("This letter summarizes a school's Title IX obligations regarding transgender students and explains how [DOE and DOJ] evaluate a school's compliance with these obligations."). Plaintiffs' harms in this regard outweigh those identified by Defendants, particularly since the Supreme Court stayed the Fourth Circuit's decision supporting Defendants' position, and a decision from the Supreme Court in the near future may obviate the issues in this lawsuit. As a result, Plaintiffs interests outweigh those identified by Defendants. Further, Defendants have not offered evidence that Plaintiffs are not accommodating students who request an alternative arrangement. Indeed, the school district at issue in *G.G.* provided its student an accommodation.

Accordingly, the Court finds that Plaintiffs have met their burden and these factors weigh in favor of granting the preliminary injunction.

C. Scope of the Injunction

Finally, the Court must determine the scope of the injunction. Plaintiffs seek to apply the injunction nationwide. Mot. Injunction 3, ECF No. 11; Pls.' Reply 13, ECF No. 52. Defendants counter that the injunction should be narrowly tailored to Plaintiffs in the Fifth Circuit. Defs.' Resp. 28, ECF No. 40.

[37] **[38]** "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.* at 702, 99 S.Ct. 2545 (permitting a nationwide injunction because the class action was proper and finding that a nationwide injunction was not more burdensome than necessary to redress plaintiffs' complaints).

The Court concludes this injunction should apply nationwide. As the separate facilities provision in § 106.33 is permissive, states that authorize schools to define sex to include gender identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by it. Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation. However, an injunction should not unnecessarily interfere with litigation currently pending

before other federal courts on this subject regardless of the state law. As such, the parties should file a pleading describing those cases so the Court can appropriately narrow the scope if appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' application for a preliminary injunction (ECF No. 11) should be and is hereby **GRANTED**. *See* Fed. R. Civ. P. 65. It is **FURTHER ORDERED** that bond is set in the amount of one hundred dollars.[22] *See* Fed. R. Civ. P. 65(c). Defendants are enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals. This preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).

***18 SO ORDERED** on this **21st day** of **August, 2016.**

All Citations

--- F.Supp.3d ----, 2016 WL 4426495

Footnotes

1 The Court also considers various amicus briefs filed by interested parties. *See* ECF Nos. 16, 28, 34, 36-1, 38-1.

2 Plaintiffs include: (1) the State of Texas; (2) Harrold Independent School District (TX); (3) the State of Alabama; (4) the State of Wisconsin; (5) the State of West Virginia; (6) the State of Tennessee; (7) Arizona Department of Education; (8) Heber-Overgaard Unified School District (Arizona); (9) Paul LePage, Governor of the State of Maine; (10) the State of Oklahoma; (11) the State of Louisiana; (12) the State of Utah; (13) the state of Georgia; (14) the State of Mississippi, by and through Governor Phil Bryant; (15) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.

3 Plaintiffs refer to a person's "biological sex" when discussing the differences between males and females, while Defendants refer to a person's sex based on the sex assigned to them at birth and reflected on their birth certificate *or* based on "gender identity" which is "an individual's internal sense of gender." *See* Am. Compl. 12, ECF No. 6; Mot. Injunction 1, ECF No. 11; Am. Compl. Ex. C (Holder Transgender Title VII Memo) ("Holder Memo 2014") App. 1 n.1, ECF No. 6-3 (" '[G]ender identity' [is defined] as an individual's internal senses of being male or female."); *Id.* at Ex. J. (DOJ/DOE Letter) 2, ECF No. 6-10. When referring to a transgendered person, Defendants' Guidelines state "transgender individuals are people with a gender identity that is different from the sex assigned to them at birth ...." Am. Compl., Ex. C (Holder Memo 2014), App. 1 n.1, ECF No. 6-3. "For example, a transgender man may have been assigned female at birth and raised as a girl, but identify as a man." *Id.* at Ex. D (OSHA Best Practices Guide to Restroom Access for Transgender Employees) ("OSHA Best Practice Guide"), App. 1, ECF No. 6-4. The Court attempts to use the parties' descriptions throughout this Order for the sake of clarity.

4 The Guidelines refer to the documents attached to Plaintiffs' Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) ("DOE Q&A Memo), ECF No. 6-2; (3) Ex. C ("Holder Memo 2014"), ECF No. 6-3, (4) Ex. D (OSHA Best Practice Guide), ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet), ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.

5 Defendants cited to U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance, http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html (last visited August 5, 2016) (discussing the purpose of guidance documents and providing links to guidance documents).

6 Agency action is defined in 5 U.S.C. § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (quoting 5 U.S.C. § 551(13)). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: 'an agency statement of ... future effect designed to implement, interpret,

or prescribe law or policy' (rule); 'a final disposition ... in a matter other than rule making' (order); a 'permit ... or other form of permission' (license); a 'prohibition ... or ... taking [of] other compulsory or restrictive action' (sanction); or a 'grant of money, assistance, license, authority,' etc., or 'recognition of a claim, right, immunity,' etc., or 'taking of other action on the application or petition of, and beneficial to, a person' (relief)." *Id.* (quoting § 551(4), (6), (8), (10), (11)).

7 The parties have requested that the Court provide expedited consideration of the preliminary injunction. The briefing on this request was completed on August 3, 2016, and the matter was not ripe until after the hearing was completed on August 12, 2016. Because further legal issues concerning the basis for Plaintiffs' Spending Clause claim were raised at the hearing and require further briefing, the Court will not await that briefing at this time. *See* Hr'g Tr. 35, 44, 52–53 (discussing new program requirements and whether a new program is the same as annual grants). Therefore, the Spending Clause issue is not addressed in this Order. *See* ECF Nos. 11–12. Finally, where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX because the two statutes are commonly linked. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 546, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982).

8 Plaintiffs' motion provides the following citations to their state laws which give them legal control over the management of the safety and security policies of educational buildings in their states and which the Guidelines will compel them to disregard. Texas cites to Tex. Const. art. 7 § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); Tex. Educ. Code §§ 4.001(b) (stating the objectives of public education, including Objective 8: "School campuses will maintain a safe and disciplined environment conducive to student learning."); 11.051 ("An independent school district is governed by a board of trustees who, as a corporate body, shall: (1) oversee the management of the district; and (2) ensure the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations."); 11.201 (listing the duties of the superintendent including "assuming administrative responsibility and leadership for planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district ...."); and 46.008 ("The commissioner shall establish standards for adequacy of school facilities. The standards must include requirements related to space, educational adequacy, and construction quality."); Pls.' Reply Ex. (Belew Decl.) 4, ECF No. 52-1 (stating the Texas Education Agency ("TEA") is responsible for "[t]he regulation and administration of physical buildings and facilities within Texas public schools" among other duties). Plaintiffs also provided an exhaustive list of similar state constitution citations, statutes, codes, and regulations that grant each Plaintiff the power to control the regulations that govern the administration of public education and public education facilities. *See* Mot. Injunction 9–11 n. 9-22, ECF No. 11 (quoting Ala. Code §§ 16–3–11, 16–3–12, 16–8–8–16–8–12 ("Alabama law authorizes state, county, and city boards of education to control school buildings and property."); Wis. stat. chs. 115, 118 ("In Wisconsin, local school boards and officials govern public school operations and facilities ... with the Legislature providing additional supervisory powers to a Department of Public Instruction."); Wis. Stat. § 120.12(1) ("School boards and local officials are vested with the 'possession, care, control and management of the property and affairs of the school district, and must regulate the use of school property and facilities."); Wis. Stat. § 120.13(17) ("Wisconsin law also requires school boards to '[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes.' "); W. Va. Const. art. XII, § 2; W. Va. code § 18–5–1, 18–5–9(4) ("West Virginia law establishes state and local boards of education ... and charges the latter to ensure the good order of the school grounds, buildings, and equipment."); Tenn. Code Ann. §§ 49–12, 1–302, 49–1–201 ("In Tennessee, the state board of education sets statewide academic policies, ... and the department of education is responsible for implementing those polices[, while] [e]ach local board of education has the duty to "[m]anage and control all public schools established or that may be established under its jurisdiction."); Tenn. Code Ann. §§ 49–1–201(a)–(c)(5), 49–2–203(a)(2) ("The State Board is also responsible for "implementation of law" established by the General Assembly, ... and ensuring that the 'regulations of the state board of education are faithfully executed.' "); Ariz. Rev. Stat. §§ 15–203(A)(1), 15–341(A)(1), 15–341(A)(3) ("Arizona law establishes state and local boards of education, ... and empowers local school districts to '[m]anage and control the school property within its district.' "); Me. Rev. Stat. tit. 20–A, §§ 201–406, 1001(2), 6501 ("Maine provides for state and local control over public education. While state education authorities supervise the public education system, control over management of all school property, including care of school buildings[,] ... [a]nd Maine law provides requirements related to school restrooms."); Okla. Const. art. XIII, §§ 5, 5–117 ("Oklahoma law establishes a state board of education to supervise public schools. Local school boards are authorized by the board to operate and maintain school facilities and buildings."); La. Const. art. VIII, § 3, LSA–R. Stat. § 17:100.6 ("In Louisiana, a state board of education oversees public schools, ...while local school boards are charged with the management, administration, and control of buildings and facilities within their jurisdiction."); Utah Code §§ 53A–1–101, 53A–3–402(3) ("Utah law provides for state and local board of educations, ... and authorizes the local boards to exercise control over school buildings and

facilities."); Ga. Code § 20–2–59, 520 ("Georgia places public schools under the control of a board of education, ... and delegates control over local schools, including the management of school property, to county school boards govern local schools."); Miss. Code Ann. § 37–7–301 ("In Mississippi, the state board of education oversees local school boards, which exercise control over local school property."); Ky. Rev. Stat. §§ 156.070, 160.290 ("In Kentucky, the state board of education governs the state's public school system, ... while local boards of education control "*all* public school property" within their jurisdictions,.. and can make and adopt rules applicable to such property.").

9 *Id.* at 14 ("[T]he government respectfully disagrees with that decision for many of the reasons stated in Judge Higginbotham's dissenting opinion, and ... EEOC is distinguishable from this case in important respects."); Hr'g Tr. 53 ("Let me say at the outset ... the Government disagrees with that decision.").

10 The Court addresses Defendants' claim that Plaintiffs have an adequate alternate remedy in Section III.A.4.

11 For example, Plaintiffs list Wisconsin's state statutes regarding this matter, which state that school boards are required to "[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes." Mot. Injunction 10 n.9, ECF No. 11 (citing Wis. Stat. s. 120.12(12)). Plaintiffs interpret this to mean that Wisconsin has the authority to maintain separate intimate facilities that correspond to a person's biological sex. *Id.*

12 The Court further addresses this issue in section III.A.3.

13 The Holder Memorandum concludes, "For these reasons, the [DOJ] will no longer assert that Title VII's prohibition of discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination)." Holder Memo 2, ECF No. 6-3. Other guidance from Defendants take similar actions. *See also* DOJ/DOE Letter 4–5, ECF No. 6-10.

14 Defendants also assert *NAACP v. Meese* supports this argument but the Court disagrees. In that case, the plaintiffs sought to enjoin the Attorney General from reopening or agreeing to reopen any consent decree in any civil rights action pending in any other court. The district court denied this request, holding such actions would violate principles of separation of powers and comity. 615 F.Supp. 200, 201–02 (D.D.C.1985) ("Plaintiffs' action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States."). The *Meese* court also concluded there was no final agency action to enjoin and, by definition, there would be an alternative legal remedy related to those cases where a consent decree existed because those decrees were already subject to a presiding judge. *Id.* at 203 n. 9. Additionally, Defendants reliance on *Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953 (5th Cir.1991) does not apply because there was no final agency action in that case.

15 Defendants argue the Court should be guided in this decision by the Fourth Circuit's decision in *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.2016) ("*G.G.*"). Defendants contend the Fourth Circuit's majority opinion in *G.G.* should be followed as it provides the proper analysis. The Supreme Court recalled the Fourth Circuit's mandate and stayed the preliminary injunction entered by the district court in that case. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, —— U.S. ——, 136 S.Ct. 2442, 2442, —— L.Ed.2d —— (2016) (Breyer, J. concurring) ("In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy."). The Supreme Court takes such actions only on the rarest of occasions. *Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) ("On such an application, since the Court of Appeals refused the stay '* * * this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari."); *Russo v. Byrne*, 409 U.S. 1219, 1221, 93 S.Ct. 21, 34 L.Ed.2d 30 (1972) ("If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted."). Because it is impossible to know the precise issue (s) that prompted the Supreme Court to grant the stay, it is difficult to conclude that *G.G.* would control the outcome here. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers) (declaring it is very difficult to predict anticipated Supreme Court decision). Nevertheless, the Court has reviewed the opinion and considers the well-expressed views of each member of the panel in reaching the decision in this case.

16 Defendants characterize their Guidelines as, "supply[ing] 'crisper and more detailed lines' than the statutes and regulations that they interpret," without "alter[ing] the legal obligations of regulated entities." *Id.* at 20 (citing *Am. Mining Cong. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C.Cir.1993)).

17 Defendants' counsel stated at the hearing that Defendants would not be entitled to *Chevron* deference for the Guidelines. *See* Hr'g Tr. 72. Thus, the Court addresses only Defendants' claim that they are entitled to *Auer* deference when interpreting § 106.33.

18 *Catawba Cty.* provides: "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.")

19 In *Appalachian Power*, the D.C. Circuit held that an EPA guidance was a legislative rule despite the guidance document's statement that it was advisory. The Court analyzed the document as a whole and found that "the entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates." 208 F.3d at 1022–23. Similarly, the DOJ/DOE Letter uses the words "must," and various forms of the word "require" numerous times throughout the document. Am. Compl. Ex. J (DOJ/DOE Letter), ECF No. 6-10.

20 Defendants also contend the injunction should be denied because Plaintiffs delayed in seeking this relief. The DOJ/DOE Letter is dated May 13, 2016. This case was filed very soon after on May 25, 2016, and the parties reached an agreement on a briefing schedule to consider this request. The Court concludes Plaintiffs did not fail to act timely.

21 The Parties address the third and fourth Canal factors together, therefore they are treated together in this Order as well.

22 Neither party addressed the appropriate bond amount should an injunction be entered.

End of Document

2016 WL 4508192
Only the Westlaw citation is currently available.
United States District Court,
M.D. North Carolina.

Joaquín Carcaño, et al., Plaintiffs,
v.
Patrick McCrory, in his official capacity as Governor of North Carolina, et al., Defendants,
and
Phil Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Tim Moore, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants.

1:16cv236
|
August 26, 2016

Synopsis

Background: Civil liberties organization, transgender students and employee of state university brought action against North Carolina governor, university, and university officials alleging that North Carolina law requiring that multiple occupancy bathrooms and changing facilities must be designated for and only used by persons based on their biological sex, and setting statewide nondiscrimination standards, discriminated against transgender, gay, lesbian, and bisexual individuals on basis of sex, sexual orientation, and transgender status in violation of Title IX, equal protection, and due process. After two North Carolina legislators were allowed to intervene as defendants, 315 F.R.D. 176, organization and university students and employee moved for preliminary injunction enjoining enforcement of so-called "bathroom bill" portion of the law, requiring public agencies to ensure that multiple occupancy bathrooms, showers, and other similar facilities were designated for and only used by persons based on their biological sex, defined as the sex listed on their birth certificate.

Holdings: The District Court, Thomas D. Schroeder, J., held that:

[1] individual plaintiffs' Title IX claims presented a justiciable case or controversy;

[2] Title IX claims were prudentially ripe;

[3] individual plaintiffs were likely to succeed on merits of their claim that the law violated Title IX by discriminating against them on basis of sex;

[4] plaintiffs were not likely to succeed on merits of their claim that the law violated Equal Protection Clause by discriminating on basis of sex;

[5] individual plaintiffs would likely to suffer irreparable harm in the absence of preliminary injunction;

[6] balance of equities favored granting preliminary injunction; and

[7] it was in the public interest to grant preliminary injunction.

Motion granted in part and denied in part.

Attorneys and Law Firms

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MEMORANDUM OPINION, ORDER AND PRELIMINARY INJUNCTION

THOMAS D. SCHROEDER, District Judge

***1** This case is one of three related actions in this court concerning North Carolina's Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known as House Bill 2 ("HB2"). Although Plaintiffs challenge multiple portions of HB2, they presently seek preliminary relief only as to Part I, the so-called "bathroom bill" portion of the law, which requires public agencies to ensure that multiple occupancy bathrooms, showers, and other similar facilities are "designated for and only used by" persons based on their "biological sex," defined as the sex listed on their birth certificate. 2016 N.C. Sess. Laws 3 §§ 1.2–1.3. Plaintiffs include two transgender [1] students and one employee (collectively, the "individual transgender Plaintiffs") of the University of North Carolina ("UNC"), as well as the American Civil Liberties Union of North Carolina ("ACLU-NC"), which sues on behalf of its transgender members. (Doc. 9 ¶¶ 5–7, 10.) The individual transgender Plaintiffs (in their individual capacities) claim that Part I violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. ("Title IX"). (Doc. 9 ¶¶ 235–43.) In addition, the individual transgender Plaintiffs and ACLU-NC claim that Part I violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. [2] (Id. ¶¶ 186–200, 220–34.)

It is important to note what is (and is not) in dispute. All parties agree that sex-segregated bathrooms, showers, and changing facilities promote important State privacy interests, and neither Plaintiffs nor the United States contests the convention. Further, no party has indicated that the pre-HB2 legal regime posed a significant privacy or safety threat to anyone in North Carolina, transgender or otherwise. The parties do have different conceptions, of how North Carolina law generally operated before March 2016, however, and whether "sex" includes gender identity.

***2** Plaintiffs contend that time is of the essence, as HB2's impact will be most felt as educational institutions across the State begin a new academic year. As a result, the court has endeavored to resolve Plaintiffs' motion for preliminary relief as quickly as possible.

Ultimately, the record reflects what counsel for Governor McCrory candidly speculates was the status quo ante in North Carolina in recent years: some transgender individuals have been quietly using bathrooms and other facilities that match their gender identity, without public awareness or incident. (See Doc. 103 at 70 (speculating that, even if Part I remains in force, "some transgender individuals will continue to use the bathroom that they always used and nobody will know.").) This appears to have occurred in part because of two factors. First, the record suggests that, for obvious reasons, transgender individuals generally seek to avoid having their nude or partially nude bodies exposed in bathrooms, showers, and other similar facilities. (See Doc. 103 at 140.) Second, North Carolina's decades-old laws against indecent exposure, peeping, and trespass protected the legitimate and significant State interests of privacy and safety.

After careful consideration of the limited record presented thus far, [3] the court concludes that the individual transgender Plaintiffs have made a clear showing that (1) they are likely to succeed on their claim that Part I violates Title IX, as interpreted by the United States Department of Education ("DOE") under the standard articulated by the Fourth Circuit; (2) they will suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in favor of an injunction; and (4) an injunction is in the public interest. Accordingly, the court will enjoin UNC from enforcing Part I against the individual transgender Plaintiffs until the court reaches a final decision on the merits in this case. Plaintiffs have not made a clear showing they are likely to succeed on their Equal Protection claim, and the court will reserve ruling on their Due Process claims pending additional briefing from the parties.

It is important to emphasize that this injunction returns the parties to the status quo ante as it existed in Title IX facilities prior to Part I's passage in March 2016. On the current record, there is no reason to believe that a return

to the status quo ante pending a trial on the merits will compromise the important State interests asserted.

I. BACKGROUND

*3 Based on the record thus far, the court makes the following findings for the limited purpose of evaluating Plaintiffs' motion for preliminary injunction.

A. North Carolina Law Before 2016

Like most States, North Carolina has long enforced a variety of public decency laws designed to protect citizens from exposing their nude or partially nude bodies in the presence of members of the opposite sex, as well as from being exposed to the nude or partially nude bodies of members of the opposite sex. With regard to the former, North Carolina's peeping statute, enacted in 1957, makes it unlawful for any person to "peep secretly into any room occupied by another person," N.C. Gen. Stat. § 14–202(a), including a bathroom or shower, and penalties are enhanced if the offender does so for the purpose of sexual gratification, id. § 14–202(d). With regard to the latter, North Carolina's indecent exposure statute, enacted in 1971, makes it unlawful for any person to "willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons." Id. § 14-190.9(a). Traditionally, the indecent exposure statute applied only to individuals who exposed themselves to members of the opposite sex. See State v. Fusco, 136 N.C.App. 268, 270, 523 S.E.2d 741, 742 (1999) (interpreting an earlier version of § 14-190.9(a)). In 2005, North Carolina removed the language that had previously limited the statute's application to situations in which individuals exposed themselves in the presence of members of the opposite sex. 2005 N.C. Sess. Laws 226 § 1 (modifying N.C. Gen. Stat. § 14–190.9). That same amendment, however, created an exception for situations in which "same sex exposure" occurs in a "place[ ] designated for a public purpose" and is "incidental to a permitted activity." Id.

In addition to these statutes, public agencies in North Carolina have also traditionally protected privacy through the use of sex-segregated bathrooms, locker rooms, showers, and similar facilities. Although this form of sex discrimination has a long history in the State and elsewhere, the parties offer differing ideas of the justification for the practice. Plaintiffs acknowledge, as Defendants contend, that such segregation promotes privacy and serves important government interests, particularly with regard to minors. (See, e.g., Doc. 103 at 15–21.) Arguably, segregating such facilities on the basis of sex fills gaps not addressed by the peeping and indecent exposure statutes—for example, a situation in which a man might inadvertently expose himself to another while using a facility that is not partitioned. It is also possible that sex-segregated facilities protect against embarrassment from engaging in intimate bodily functions in the immediate vicinity of the opposite sex, regardless of whether one's body is subject to view.

Whatever the justification, the segregation of these facilities has traditionally been enforced through voluntary compliance, social mores, and, when necessary, criminal trespassing law. See In re S.M.S., 196 N.C.App. 170, 675 S.E.2d 44 (2009). For example, in S.M.S., a fifteen year old boy was adjudicated delinquent of second degree trespass after he was caught in the girls' locker room at his high school. Id. at 170–71, 675 S.E.2d at 44–45. Pursuant to N.C. Gen. Stat. § 14–159.13, it is a second degree trespass to enter the premises of another when reasonably conspicuous signs are posted to give the intruder "notice not to enter the premises." In upholding the boy's conviction, the North Carolina Court of Appeals concluded, "The sign marked 'Girl's Locker Room' was reasonably likely to give respondent notice that he was not authorized to go into the girls' locker room." S.M.S., 196 N.C.App. at 173, 675 S.E.2d at 46.

*4 For most, the application of the peeping, indecent exposure, and trespass laws to sex-segregated bathrooms and showers is straightforward and uncontroversial. For transgender users, however, it is not clearly so. While there are no reported cases involving transgender users, at the preliminary injunction hearing Governor McCrory, Senator Berger, and Representative Moore indicated their assumption that this was so because transgender users have traditionally been excluded (or excluded themselves) from facilities that correspond with their gender identity. The evidence in the current record, however, suggests the opposite. At least in more recent years, transgender individuals who dress and otherwise present themselves in accordance with their gender identity have generally been accommodated on a case-by-case basis, with educational institutions generally permitting them to use bathrooms and other facilities that correspond with their gender identity unless particular circumstances weigh in favor of some other form of accommodation.

For example, Plaintiffs submitted an affidavit from Monica Walker, the Diversity Officer for public schools in Guilford County, North Carolina, the State's third largest school district, with over 72,000 students in 127 school campuses. (Doc. 22-19 ¶¶ 2–3.) Over the last five years, Ms. Walker has developed a protocol for accommodating transgender students as they undergo the social transition from male to female, or vice versa. (Id. ¶¶ 8–11.) This protocol emphasizes the importance of developing a "tailored" plan that addresses the unique needs and circumstances of each case. (See id. ¶ 11.) Based on her experience with four transgender students, Ms. Walker indicates that these students typically use bathrooms that correspond with their gender identity. (Id.) Ms. Walker has not received any complaints about this arrangement from students or parents, and although every school in Guilford County has single occupancy bathrooms available for any student with privacy concerns, no student has ever requested such an accommodation. (Id. ¶¶ 13–16.) This may be because all multiple occupancy bathrooms in Guilford County schools have separate stalls or privacy partitions, such that students are not exposed to nudity in bathrooms. (See id.) Although Ms. Walker has yet to deal with questions concerning access to locker rooms, she is confident that the privacy interests of transgender and non-transgender students alike could be accommodated through the same means used to accommodate any student with body image or shyness issues. (See id.) In sum, Ms. Walker reports that the practice of tailoring specific accommodations for transgender students on a case-by-case basis in Guilford County has been "seamless." (Id. ¶ 12.) And according to an amicus brief filed by school administrators from nineteen States plus the District of Columbia—including Durham County Schools in North Carolina, another large school district—Guilford County's experience is typical of many school districts from across the country. (See Doc. 71.)

This conclusion is also consistent with the experiences of the individual transgender Plaintiffs in this action. All three submitted declarations stating that they used bathrooms, locker rooms, and even dormitory facilities corresponding with their gender identity beginning as early as 2014. (Doc. 22-4 ¶ 15; Doc. 22-8 ¶ 19; Doc. 22-9 ¶¶ 15, 19–20.) No one has reported any incident or complaint from their classmates or the general public. (See Doc. 22-4 ¶ 30; Doc. 22-8 ¶ 25; Doc. 22-9 ¶ 20.)

This evidence is admittedly anecdotal. It is possible that before Part I, some transgender individuals in North Carolina were denied accommodations and completely excluded from facilities that correspond with their gender identity due to privacy or safety concerns. Also, minors may have received different types of accommodations than adults, and practical considerations may have led to different arrangements for bathrooms as opposed to showers and other facilities. And, it may be that the practice of case-by-case accommodation is a more recent phenomenon, such that other norms prevailed for most of North Carolina's history until the last few years. But Defendants have not offered any evidence whatsoever on these points, despite having four months between the filing of this lawsuit and the hearing on this motion to do so. Indeed, the court does not even have a legislative record supporting the law to consider.[4]

*5 As a result, the court cannot say that the practices described by Ms. Walker, the school administrators, and the individual transgender Plaintiffs represent an aberration rather than the prevailing norm in North Carolina, at least for the five or more year period leading up to 2016. Rather, on the current record, it appears that some transgender individuals have been quietly using facilities corresponding with their gender identity and that, in recent years, State educational institutions have been accommodating such students where possible.

B. The Charlotte Ordinance and the State's Response

In November 2014, the Charlotte City Council began considering a proposal to modify that city's non-discrimination ordinances to prohibit discrimination on the basis of marital status, familial status, sexual orientation, gender identity, and gender expression.[5] (Doc. 23-3 at 2.)[6] On March 2, 2015, the proposed ordinance was amended to include the following language: "Notwithstanding the forgoing [sic], this section shall not, with regard to sex, sexual orientation, gender identity, and gender expression, apply to rest rooms, locker rooms, showers, and changing facilities." (Id.) Shortly thereafter, the proposed ordinance failed by a vote of six to five. (Id.)

On February 22, 2016, the Charlotte City Council considered a new proposal to revise its non-discrimination ordinances. (Doc. 23-5 at 2–3.) Like the prior proposal, the new proposal added "marital status, familial

status, sexual orientation, gender identity, [and] gender expression" to the list of protected characteristics. (Doc. 23-2 at 1.) Unlike the prior proposal, however, the new proposal did not contain any exceptions for bathrooms, showers, or other similar facilities. (See id. at 1–6.) In addition, the new proposal repealed prior rules that exempted "[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private" from Charlotte's prohibitions against sex discrimination. (Id. at 5.) The new proposal, which regulated places of public accommodation and businesses seeking to contract with Charlotte (id. at 2–6), passed by a vote of seven to four (Doc. 23-5 at 3)[7] and set an effective date of April 1, 2016 (Doc. 23-2 at 6).

The Charlotte ordinance provoked a swift response from the State. Governor McCrory and several members of the General Assembly strongly condemned the ordinance, which they generally characterized as an affront to both privacy and public safety, and they indicated their desire to see a legislative response to Charlotte's actions. (See, e.g., Doc. 23-7 at 2; Doc. 23-8 at 2.) The General Assembly was not scheduled to reconvene until April 25, 2016, however, and despite his opposition to the Charlotte ordinance, Governor McCrory declined to exercise his authority to call a special legislative session. (See Doc. 23-16 at 2–3; Doc. 23-18 at 4.) As a result, the General Assembly only reconvened after three-fifths of the members of the House of Representatives requested a special session. (Docs. 23-17 at 2.)[8]

*6 On March 23, 2016, the General Assembly convened for the special session and moved quickly. (See Doc. 23-19 at 2.) The parties have offered little information on the legislative process, but it appears that members of the House Judiciary Committee were given only a few minutes to read HB2 before voting on whether to send the bill back to the House for a full debate. (See id.) That afternoon, the House passed HB2 by a vote of eighty-four to twenty-five after three hours of debate. (Doc. 23-21 at 3.) All Republicans and eleven of the thirty-six Democrats present voted for the bill, while twenty-five Democrats voted against it. (Id.) HB2 then passed with unanimous support in the Senate after Democrats walked out in protest. (Id.) Governor McCrory signed the bill into law later that day. (Id.) The law became effective immediately. HB2 § 5.

C. HB2's Effect on North Carolina Law

Despite sweeping rhetoric from both supporters and opponents, a few basic contours of HB2 are apparent.

1. Nondiscrimination Standards Under State Law

First, HB2 modified the State's nondiscrimination laws. Previously, the State had prohibited discrimination on the basis of race, religion, color, national origin, age, sex, and handicap. See id. §§ 3.1. Part III of HB2 modified this language to prohibit discrimination on the basis of "biological sex," rather than simply "sex." Id. (modifying N.C. Gen. Stat. § 143–422.2). It also extended these nondiscrimination protections, which had previously applied only to the State, to cover private employers and places of public accommodation. See id. §§ 3.1-3.3.

Part III also eliminated State common-law causes of action for violations of non-discrimination laws. See id. § 3.2 (modifying N.C. Gen. Stat. 143–422.3). This appeared to eliminate the State cause of action for wrongful termination in violation of public policy, although it did not prevent North Carolinians from filing actions under federal non-discrimination laws, whether in State or federal court. This provision has since been repealed. 2016 N.C. Sess. Laws 99 § 1(a).

2. Preemption of Local Ordinances

Parts II and III of HB2 preempt all local ordinances that conflict with the new Statewide nondiscrimination standards, including the Charlotte ordinance that prompted HB2's passage.[9] Specifically, Part II preempts local non-discrimination requirements for public contractors to the extent that such requirements conflict with State law. HB2 §§ 2.1–2.3. Similarly, Part III preempts local nondiscrimination ordinances for places of public accommodation to the extent that such ordinances conflict with State law. Id. §§ 3.3. Collectively, Parts II and III effectively nullified the prohibitions in Charlotte's ordinance against discrimination on the basis of marital status, familial status, sexual orientation, gender identity, and gender expression.[10]

3. Public Bathrooms and Changing Facilities

As discussed above, Parts II and III effectively nullified the controversial portions of the Charlotte ordinance, including its regulation of bathrooms, showers, and other similar facilities among contractors and in places of public accommodation. Part I goes a step further, however, explicitly setting rules for the use of similar facilities operated by State agencies.

Part I provides that all public agencies, including local boards of public education, shall "require" that every "multiple occupancy bathroom or changing facility"[11] be "designated for and only used by persons based on their biological sex."[12] Id. §§ 1.2–1.3. Part I defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate."[13] Id. Although Part I allows public agencies to provide separate, single occupancy facilities as an accommodation for individuals who are uncomfortable with their assigned facility, the law does not require the option. See id. (stating that public agencies may provide "accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances" (emphasis added)). In addition, Part I prohibits agencies from accommodating individuals by permitting them to access multiple occupancy facilities that do not match the sex listed on their birth certificates. Id. ("[I]n no event shall [any] accommodation result in the public agency allowing a person to use a multiple occupancy bathroom or changing facility designated ... for a sex other than the person's biological sex."). Because the law is limited to State agencies, there is no dispute that private businesses, places of public accommodation, and other persons throughout the State remain free to define "sex" and regulate bathroom and other facility usage as they please, subject to other applicable law.

*7 At the hearing for this motion, the parties offered differing interpretations of how Part I affects North Carolina law. As discussed below, UNC argues that, at least on its campuses, Part I means only that public authorities must maintain signs on their multiple occupancy bathrooms designated "men" or "women." Senator Berger and Representative Moore suggested that Part I functions as "a directive" to public agencies that they must "implement policies" on bathroom use. (Doc. 103 at 112.) Ultimately, the United States, Senator Berger, and Representative Moore all agree that, at a minimum, Part I dictates how the trespassing statute applies to transgender individuals' use of bathrooms.

Before Part I became law, North Carolina had no prohibition against public agencies determining on a case-by-case basis how best to accommodate transgender individuals who wished to use particular bathrooms, showers, or other similar facilities. In addition, transgender individuals who used facilities that did not match the sex listed on their birth certificate could presumably argue that they believed they had permission to enter facilities that matched their gender identity; indeed, as discussed above, a number of transgender students had actual permission from the agencies with authority over the facilities in question.

Part I forecloses these possibilities. Now, public agencies may not provide any accommodation to transgender individuals other than the provision of a separate, single-user facility—though they are not required to do so. Thus, unless the agency that controls the facility in question openly defies the law, any person who uses a covered facility that does not align with his or her birth certificate commits a misdemeanor trespass. Similarly, unless school administrators like Ms. Walker wish to openly defy the law, they cannot give students permission to enter facilities that do not correspond with the sex on their birth certificates and presumably must discipline or punish students who disobey this directive.

D. Procedural History

Almost immediately, HB2 sparked multiple overlapping federal lawsuits. On March 28, 2016, ACLU-NC, Equality North Carolina, and the individual transgender Plaintiffs filed this action against Governor McCrory (in his official capacity), UNC,[14] and Attorney General Roy Cooper, alleging that various parts of HB2 discriminate against transgender, gay, lesbian, and bisexual individuals on the basis of sex, sexual orientation, and transgender status in violation of Title IX and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. (Doc. 1.)[15]

On May 9, 2016, the United States filed a separate action against the State, Governor McCrory (in his official capacity), the North Carolina Department of Public

Safety ("NCDPS"), and UNC, seeking a declaration that compliance with Part I constitutes sex discrimination in violation of Title IX, the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13) ("VAWA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). (Doc. 1 in case no. 1:16cv425 (the "425 case").)

That same day, State officials filed two separate declaratory judgment actions in the United States District Court for the Eastern District of North Carolina. Governor McCrory and Frank Perry, Secretary of NCDPS, filed an action in their official capacities against the United States and the United States Department of Justice ("DOJ"), seeking a declaration that HB2 does not violate Title VII or VAWA (case no. 5:16cv238 (the "238 case")). Meanwhile, Senator Berger and Representative Moore filed a separate lawsuit against DOJ on behalf of the General Assembly, seeking a declaration that HB2 does not violate Title VII, Title IX, or VAWA, as well as declarations that DOJ had violated both the Administrative Procedure Act and various constitutional provisions (case no. 5:16cv240 (the "240 case")). Finally, on May 10, 2016, an organization called North Carolinians for Privacy filed its own action in support of HB2 in the Eastern District, seeking declaratory and injunctive relief against DOJ and DOE related to Title IX, VAWA, the Administrative Procedure Act, and the Religious Freedom Restoration Act (case no. 5:16cv245 (the "245 case")).

***8** The 240 and 245 cases were subsequently transferred to this court and renumbered 1:16cv844 and 1:16cv845, respectively. This court also granted Senator Berger and Representative Moore's motion to intervene permissively in both this action (Doc. 44) and the 425 case (Doc. 64 in the 425 case). As a result, Senator Berger and Representative Moore dismissed their separate declaratory action as duplicative of the claims and defenses presented in the 236 and 425 cases, (Doc. 33 in case no. 1:16cv844), leaving three HB2 cases pending before this court. The 238 case remains pending in the Eastern District.

In the midst of all of this procedural fencing, Plaintiffs filed the instant motion for preliminary injunction on May 16, 2016. (Doc. 21.) The motion was fully briefed as of June 27, 2016 (see Doc. 73), and the court began discussions with the parties regarding an appropriate schedule for a hearing on and consideration of this motion. However, on July 5, 2016—two months after filing its complaint and over three months after the passage of HB2[16]—the United States filed its own motion for preliminary injunction in the 425 case. (Doc. 73 in the 425 case.) The United States' motion would not be fully briefed until mid-August 2016, and in light of the Defendants' request for preliminary discovery, consolidation of United States' motion with Plaintiffs' motion would likely delay a hearing on the present motion until at least September 2016.

As a result, despite the court's strong preference to avoid piecemeal litigation of the HB2 cases, the court held a hearing on Plaintiffs' motion on August 1, 2016, and the court permitted the United States to participate in light of the fact that the 425 case also contains a Title IX claim.[17] The motion is now ready for determination.

II. ANALYSIS

Plaintiffs ask this court to enjoin Defendants from enforcing Part I until the court issues a final ruling on the merits. (Doc. 22 at 44–45.) Before reaching the merits of Plaintiffs' motion, however, the court must first address threshold defenses raised by UNC.[18]

A. Justiciability and Ripeness

[1] As UNC Board of Governors Chairman Louis Bissette has noted, "[UNC] is in a difficult position," in this case, "caught in the middle between state and federal law." (Doc. 23-28 at 2.) Neither embracing nor repudiating Part I, UNC argues that while it intends to comply with the law, it does not intend to enforce the law because Part I contains no mechanism to do so. UNC argues that Part I therefore has essentially no effect on its campuses and that this court should not consider the individual transgender Plaintiffs' Title IX claim for jurisdictional and prudential reasons.[19] For the reasons that follow, the court disagrees.

***9 [2] [3] [4]** "Federal courts are principally deciders of disputes, not oracular authorities. We address particular cases or controversies and may not arbitrate abstract differences of opinion." Doe v. Duling, 782 F.2d 1202, 1205 (4th Cir.1986) (citations and internal quotation marks omitted). This requirement stems from Article III, Section 2 of the United States Constitution and presents

both jurisdictional and prudential limits on the exercise of federal judicial power. Warth v. Seldin, 422 U.S. 490, 498–99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). As a jurisdictional matter, a plaintiff complaining about State conduct must show "some threatened or actual injury resulting from the putatively illegal action." Id. at 499, 95 S.Ct. 2197 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). For example, where the dispute concerns the validity of a criminal statute, the challenger must show a credible threat of prosecution in order to establish a live case or controversy. Duling, 782 F.2d at 1205–06.

[5] **[6]** Similarly, the prudential ripeness requirement is designed to prevent courts from "entangling themselves in abstract disagreements over administrative policies" until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732–33, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). A case is ripe and fit for judicial decision when the "rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." Franks v. Ross, 313 F.3d 184, 195 (4th Cir.2002). In determining whether a case is ripe, the court must consider both "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." Ohio Forestry Ass'n, 523 U.S. at 733, 118 S.Ct. 1665 (quoting Abbott Labs., 387 U.S. at 149, 87 S.Ct. 1507).

Here, UNC points to numerous statements from UNC President Margaret Spellings, including a guidance memorandum sent to the chancellors of all UNC constituent institutions, that Part I "does not contain provisions concerning enforcement" and that the university's non-discrimination policies, which generally prohibit discrimination on the basis of gender identity, "remain in effect." (See, e.g., Doc. 38-5 at 1–2.) The guidance memorandum also notes, however, that UNC must "fulfill its obligations under the law unless or until the court directs otherwise." (Id. at 2.) UNC therefore acknowledges that "University institutions must require every multiple occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex." (Id. at 1 (emphasis added).) President Spellings directed constituent institutions to take three specific actions under the law: (1) maintain existing single-sex signage on multiple occupancy bathrooms and other similar facilities, (2) provide notice of HB2 to campus constituencies as appropriate, and (3) share information about the locations of single occupancy bathrooms on campus. (See id. at 1–2.)

Despite the assertion that UNC does not intend to "enforce" Part I, UNC's pronouncements are sufficient to establish a justiciable case or controversy. The university has repeatedly indicated that it will—indeed, it must—comply with State law. (Id. at 1–2.) Although UNC has not changed the words and symbols on its sex-segregated facilities, the meaning of those words and symbols has changed as a result of Part I, and UNC has no legal authority to tell its students or employees otherwise. In light of Part I, the sex-segregated signs deny permission to those whose birth certificates fail to identify them as a match. UNC can avoid this result only by either (1) openly defying the law, which it has no legal authority to do, or (2) ordering that all bathrooms, showers, and other similar facilities on its campuses be designated as single occupancy, gender-neutral facilities. Understandably, UNC has chosen to do neither.

***10** As a result, although President Spellings promises to "investigate" instances in which individuals are excluded from bathrooms "to determine whether there has been a violation of the University nondiscrimination policy and applicable law" (Doc. 38-1 ¶ 15), this does not help UNC because it has not expressly given any student or employee permission to the use bathrooms, showers, and other facilities consistent with his or her gender identity. To the contrary, UNC has explicitly acknowledged that Part I "remains the law of the State" and that neither UNC nor its non-discrimination policies has "independent power to change that legal reality." (Doc. 23-27 at 2–3.) Unless and until UNC openly defies the law, the signs that UNC posts on its bathrooms, showers, and other similar facilities render transgender individuals who use facilities that match their gender identities trespassers, thus exposing them to potential punishment (certainly by other authorities, if not by UNC). In addition, if the trespasser is a student, he or she is subject to discipline under one of UNC's student codes of conduct, which generally prohibit students from violating federal, State, or local laws. (See, e.g., Doc. 67-8 at 3.)

Thus, contrary to UNC's characterizations, this is not a case in which an arcane criminal law lingers on the books for decades with no threat of enforcement. See, e.g., Duling, 782 F.2d at 1206 (finding no justiciable case or controversy surrounding a fornication and cohabitation statute when there had been no arrests or prosecutions pursuant to the law for several decades). Nor is this a case in which public agencies do nothing more than "stand ready to perform their general duty to enforce laws." See id. Instead, UNC currently instructs the individual transgender plaintiffs that Part I is in effect on UNC's campuses. (See, e.g., Doc. 67-5 at 3 (memorandum from UNC Chancellor Carol Folt stating, "The memo from UNC General Administration also confirms that the law relating to public restrooms and changing facilities does apply to the University.").) That UNC has not articulated plans for administering a specific punishment for transgender individuals who violate its policy does not undermine the existence of a justiciable case or controversy. See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716–17 (4th Cir.2016) (evaluating the merits of a Title IX claim involving transgender bathroom use without discussing whether the school board had threatened the student with any specific punishment for disobeying the policy), stay and recall of mandate granted, —— U.S. ——, 136 S.Ct. 2442, —— L.Ed.2d ——.

[7] These considerations also dictate the ripeness analysis. President Spellings has indicated that she does not intend to take any further action, including promulgating any further guidelines or regulations with regard to Part I, until after this lawsuit concludes. (Doc. 38-1 at ¶ 16.) As a result, a delay will not render this case more fit for judicial review. See Ohio Forestry Ass'n, 523 U.S. at 733, 118 S.Ct. 1665. In addition, for reasons discussed below, UNC's exclusion of the individual transgender Plaintiffs from sex-segregated facilities that match their gender identity causes them substantial hardship each day the policy is in effect. See infra Section II.B.2. As a result, this case is prudentially ripe.

B. Preliminary Relief

[8] [9] [10] In order to obtain a preliminary injunction, a party must make a "clear showing" that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 21, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). All four requirements must be satisfied in order for relief to be granted. Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir.2009), vacated on other grounds, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010). A preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir.1991) (citations and internal quotation marks omitted). Plaintiffs must show more than a grave or serious question for litigation; they must "clearly" demonstrate that they are "likely" to succeed on the merits. Real Truth About Obama, 575 F.3d at 346–47.

1. Likelihood of Success on the Merits

a. Title IX

*11 [11] [12] To establish a claim under Title IX, the individual transgender Plaintiffs must show that (1) they were excluded from participation in an education program because of their sex; (2) the educational institution was receiving federal financial assistance at the time of their exclusion; and (3) the improper discrimination caused them harm. G.G., 822 F.3d at 718. UNC and its constituent institutions receive federal financial assistance under Title IX. (See Doc. 23-27 at 2.) In addition, for the reasons explained below, UNC's enforcement of Part I has caused medical and other harms to the individual transgender Plaintiffs. See infra Section II.B.2. Thus, the primary question for the court is whether the individual transgender Plaintiffs are likely to show that Part I unlawfully excludes them from certain bathrooms, showers, and other facilities on the basis of sex.

[13] Title IX provides: "No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This prohibition against sex discrimination protects employees as well as students. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). As a result, covered institutions may not "limit any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31(b)(7); see also id. §

106.31(b)(2) (prohibiting discrimination in the provision of "aid, benefits, or services"). Access to bathrooms, showers, and other similar facilities qualifies as a "right, privilege, advantage, or opportunity" for the purposes of Title IX. G.G., 822 F.3d at 718 n. 4.

[14] "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). Thus, "[n]ot all distinctions on the basis of sex are impermissible under Title IX." G.G., 822 F.3d at 718. For example, the statute itself contains an exception that permits covered institutions to "maintain [] separate living facilities for the different sexes." 20 U.S.C. § 1686. In addition, a DOE regulation states that covered institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

Until very recently, little to no explicit authority existed regarding the application of Title IX and its related regulations to transgender students and employees. Around 2013, however, DOE began taking the position that covered institutions must treat transgender individuals consistent with their gender identity. (See Doc. 23-29 at 3 (citing Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, and Arthur Zeidman, Director, U.S. Dep't of Educ. Office of Civil Rights, to Dr. Joel Shawn, Superintendent, Arcadia Unified Sch. Dist. (July 24, 2013), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf).)

On April 19, 2016, the Fourth Circuit concluded that courts must defer to DOE's relatively recent position in the context of sex-segregated bathrooms. G.G., 822 F.3d at 723. In G.G., a high school sophomore in eastern Virginia transitioned from female to male, living as a boy in all aspects of life. Id. at 715. School officials initially supported G.G.'s transition and took steps to ensure that teachers and staff treated the student as a boy. Id. School officials also gave G.G. permission to use the boys' bathrooms, although they made no decision with regard to locker rooms or showers because G.G. did not participate in physical education. Id. & n. 2. G.G. used the boys' bathrooms without incident for several weeks. Id. at 715–16. At some point, however, parents and community members began contacting the local school board to complain about G.G.'s use of the boys' bathrooms. Id. at 716. In response, the school board implemented a policy limiting access to sex-segregated bathrooms and locker rooms based on "biological gender" and requiring its schools to provide "an alternative appropriate private facility" to accommodate students with "gender identity issues." Id. The school board also mandated a series of steps designed to improve privacy for all students, including adding partitions and privacy strips in bathrooms and constructing additional single occupancy bathrooms. Id.

***12** Shortly after the school board adopted its new policy, G.G. requested an opinion letter from DOE regarding the application of Title IX to transgender students. See id. at 732 (Niemeyer, J., dissenting in part). On January 7, 2015, DOE responded with an opinion letter that states,

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.

(Doc. 23-29 (the "DOE opinion letter").) On June 11, 2015, G.G. sued the school board, claiming that the policy of excluding students from bathrooms on the basis of "biological gender" violated Title IX. G.G., 822 F.3d at 717.

[15] The district court dismissed G.G.'s Title IX claim, concluding that the DOE opinion letter is not entitled to deference under the doctrine announced in Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). See G.G., 822 F.3d at 717.[20] The district court concluded that 34 C.F.R. § 106.33, which permits schools to "provide separate toilet, locker room, and shower facilities on the basis of sex," unambiguously refers to a student's "birth or biological sex." 822 F.3d at 719. The district court also reasoned that, even if the meaning of the phrase "on the basis of sex" were ambiguous in this

regulation, then DOE's interpretation would be clearly erroneous and inconsistent with the regulation because " 'on the basis of sex' means, at most, on the basis of sex and gender together, [so] it cannot mean on the basis of gender alone." Id.

The Fourth Circuit reversed. Id. at 727. The court first concluded that the phrase "on the basis of sex" in § 106.33 is ambiguous because the regulation "is silent as to how a school should determine whether a transgender individual is a male or female." Id. at 720. The court then determined that DOE's interpretation, while "novel" and "perhaps not the intuitive one," is not clearly erroneous because a dictionary from 1971 defined the word "sex" as encompassing "morphological, physiological, and behavioral" characteristics. Id. at 721–22.[21] Finally, the court concluded that the DOE opinion letter reflects the agency's fair and considered judgment on policy formulation, rather than a convenient litigating position. Id. at 722–23. As a result, the court remanded with instructions for the district court to give the DOE opinion letter "controlling weight" with regard to the meaning of § 106.33. Id. at 723, 727.

[16] On remand, the district court entered a preliminary injunction requiring the school board to allow G.G. to use the boys' bathrooms. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 4:15cv54, 2016 WL 3581852, at *1 (E.D.Va. June 23, 2016). The Fourth Circuit denied the school board's request to stay that injunction pending appeal. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No 16–1733, — Fed.Appx. ——, ——, 2016 WL 3743189, at *2 (4th Cir. July 12, 2016). However, on August 3, 2016—two days after the hearing on Plaintiffs' motion in the present case—the Supreme Court stayed the Fourth Circuit's mandate and the district court's preliminary injunction until it could rule on the school board's forthcoming petition for a writ of certiorari. Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, —— U.S. ——, 136 S.Ct. 2442, — L.Ed.2d —— (2016). Such intervention is granted where a lower court "tenders a ruling out of harmony with [the Supreme Court's] prior decisions, or [raises] questions of transcending public importance, or [presents] issues which would likely induce [the] Court to grant certiorari." See Russo v. Byrne, 409 U.S. 1219, 1221, 93 S.Ct. 21, 34 L.Ed.2d 30 (1972) (Douglas, J.).

***13** In light of the foregoing, the fate of G.G. is uncertain. But, despite the stay and recall of the mandate, the Supreme Court did not vacate or reverse the Fourth Circuit's decision. See G.G., 136 S.Ct. at 2442. Thus, while other courts may reach contrary decisions, see Texas v. United States, No. 7:16cv54, — F.Supp.3d ——, —— – ——, 2016 WL 4426495, at *14–15, (N.D.Tex. Aug. 21, 2016) (adopting the view advanced in Judge Niemeyer's dissenting opinion from G.G.),[22] at present G.G. remains the law in this circuit. See United States v. Collins, 415 F.3d 304, 311 (4th Cir.2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court."); Friel Prosthetics, Inc. v. Bank of America, No. CIV.A.DKC 2004–3481, 2005 WL 348263, at *1 & n. 4 (D.Md. Feb. 9, 2005) (noting that a stay of a Fourth Circuit mandate in a separate case would not "prevent the Fourth Circuit decision from having precedential value and binding authority" in the present case); see also Abukar v. Ashcroft, No. 01–242, 2004 WL 741759, at *2–3 (D.Minn. Mar. 17, 2004) (assuming that an Eighth Circuit opinion in a separate case retained its precedential value despite the Eighth Circuit's subsequent decision to recall and stay its own mandate in light of impending Supreme Court review).

Consequently, to evaluate the individual transgender Plaintiffs' Title IX claim, the court must undertake a two-part analysis. First, the court must determine whether Part I violates Title IX's general prohibition against sex discrimination. See 20 U.S.C. § 1681(a). Second, if Part I violates Title IX's general prohibition against sex discrimination, the court must then determine whether an exception to that general prohibition applies. See Jackson, 544 U.S. at 175, 125 S.Ct. 1497 ("Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition."). The only potentially applicable exception cited by the parties comes from a DOE regulation that allows schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. However, in light of G.G., this court must give controlling weight to the DOE opinion letter, which states that schools "generally must treat transgender students consistent with their gender identity" (Doc. 23-29 at 3), when considering the scope of this exception during the second stage of the analysis.

Under this framework, the Title IX analysis in this case is relatively straightforward. Part I requires schools to segregate multiple occupancy bathrooms, showers, and other similar facilities on the basis of sex. HB2 § 1.2–1.3. Because the provision of sex-segregated facilities necessarily requires schools to treat individuals differently depending on their sex, Part I falls within Title IX's general prohibition against sex discrimination. The only potentially applicable exception comes from § 106.33, which permits sex-segregated bathrooms and other facilities. But G.G. and the DOE opinion letter teach that, for the purposes of this regulation, a school generally must treat students consistent with their gender identity. (See 822 F.3d at 723; Doc. 23-29 at 3.) Part I, by contrast, requires schools to treat students consistent with their birth certificates, regardless of gender identity. HB2 §§ 1.2–1.3. Thus, although Part I is consistent with the DOE opinion letter when applied to most students, it is inconsistent with the DOE opinion letter as applied to the individual transgender Plaintiffs, whose birth certificates do not align with their gender identity. As a result, Part I does not qualify for the regulatory exception—as interpreted by DOE—and therefore appears to violate Title IX when applied to the individual transgender Plaintiffs.

***14** Defendants raise a number of objections to the application of G.G. in this case, but none is sufficient at this time.

Defendants first argue that the Fourth Circuit's holding in G.G. is limited to bathrooms and does not extend to showers or other similar facilities. True, G.G. concluded that "the [DOE's] interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to Auer deference and is to be accorded controlling weight." 822 F.3d at 723. Further, the court noted that because G.G. did not seek access to other facilities, "[o]nly restroom use is at issue in this case." Id. at 715 n. 2. And as to the objections raised, the court commented, "We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent." Id. at 723 n. 10. Consequently, the district court only ordered the school board to allow G.G. to use boys' bathrooms. G.G., 2016 WL 3581852, at *1.

But the indispensable foundation of G.G.'s holding is that DOE's interpretation of "sex" in § 106.33, as outlined in the DOE opinion letter, is entitled to controlling weight. 822 F.3d at 723. As the dissent in G.G. aptly noted, "acceptance of [G.G's] argument would necessarily change the definition of 'sex' for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on 'sex,' a term that must be construed uniformly throughout Title IX and its implementing regulations." Id. at 734 (Niemeyer, J., dissenting in part). In fact, the majority also agreed with this point. Id. at 723 ("In many respects, we are in agreement with the dissent. We agree that 'sex' should be construed uniformly throughout Title IX and its implementing regulations."). Moreover, the passage of the DOE opinion letter—which G.G. requires be accorded controlling weight—explicitly includes "locker rooms" and "shower facilities" among the "situations" in which students must be treated consistent with their gender identity. (Doc. 23-29 at 3.)[23]

To be sure, the G.G. court did note that the bathrooms at the Virginia school were separately partitioned. 822 F.3d at 716. But it is difficult to find any articulation of how that fact was important to the court's reasoning. Although showers and changing rooms clearly present obvious practical concerns that differ from bathrooms, both the logic and holding of G.G. make no distinction between facilities. The court made this point clear by noting that in applying its analytical framework it would not weigh "privacy interests or safety concerns—fundamentally questions of policy" which it said was "a task committed to the agency, not the courts." Id. at 723–24.[24]

***15** **[17]** While district courts are often said to be the "front line experimenters in the laboratories of difficult legal questions," Hively v. Ivy Tech Comm. Coll., South Bend, — F.3d ——, ——, 2016 WL 4039703, at *4 (7th Cir.2016), they are bound to follow circuit precedent. To accept Defendants' argument—which is more an attack on G.G.'s reasoning than a legal distinction—would violate that obligation. Therefore, at this early stage on a motion for preliminary relief pending trial, it is enough to say that G.G. requires Title IX institutions in this circuit to generally treat transgender students consistent with their gender identity, including in showers and changing rooms. (Doc. 23-29 at 3.) Defendants do not deny that Part I bars Title IX institutions from attempting to accommodate such students in any fashion, except in the limited form of a separate facility that is optional

in the State's discretion. See HB2 §§ 1.2–1.3. Thus, G.G. indicates that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim.

Even Plaintiffs accept that the State's interests are legitimate and seem to acknowledge that there may be practical limits to the application of DOE's guidance, especially where minors are involved. (See Doc. 103 at 15–21.)[25] At the hearing, counsel for the amici school administrators represented that public school showers and changing rooms—facilities in which students are likely to be partially or fully nude—today often contain partitions, dividers, and other mechanisms to protect privacy similar to bathrooms. (See Doc. 103 at 137–38.) This suggests that, as in G.G., other forms of accommodation might be available to protect privacy and safety concerns. See G.G., 822 F.3d at 723 (agreeing that " 'an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts' are not involuntarily exposed" and concluding that "[i]t is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach" to grant DOE's interpretation of its regulations controlling weight).[26] Ultimately, the question of determining the full scope of transgender users' rights to these more intimate facilities under DOE's interpretation—as to which the State has significant legitimate interests—is not before the court. For now, it suffices to say that Part I's blanket ban that forecloses any form of accommodation for transgender students other than separate facilities likely violates Title IX under G.G.

Defendants also note that the school board policy in G.G. did not include any criteria for determining the "biological gender" of particular students. See 822 F.3d at 721–22. By contrast, Part I includes a simple, objective criterion —the sex listed on the individual's birth certificate—for determining an individual's "biological sex." HB2 §§ 1.2–1.3. Defendants are correct on this point. But the holding of G.G. did not turn on any supposed ambiguity in the school board's policy. Instead, G.G. rested on the Fourth Circuit's determination that the DOE opinion letter is entitled to controlling weight under Auer. 822 F.3d at 723. The DOE opinion letter does not even remotely suggest that schools may treat students inconsistent with their gender identity so long as the school has clear criteria for determining an individual's "biological sex."

Defendants next argue that G.G. did not involve any constitutional challenges to DOE regulations or the DOE opinion letter. True, the Fourth Circuit noted the absence of such challenges in G.G., see id. at 723–24, whereas Defendants did raise such issues in their answer and counterclaims (see Doc. 54 ¶¶ 120–25). But Defendants have not raised any constitutional defenses in their responses to the individual transgender Plaintiffs' motion for preliminary injunction, and Plaintiffs therefore have not yet responded to these issues.[27] The court cannot ignore G.G. and simply assume that Defendants will prevail on constitutional defenses that they may or may not develop at some point in the future. See Native Ecosystems Council & All. for the Wild Rockies v. U.S. Forest Serv., No. 4:11–cv–212, 2011 WL 4015662, at *10 n. 10 (D.Idaho Sept. 9, 2011) (declining to consider claims not raised in a party's brief for the purposes of a preliminary injunction but preserving those claims for the remainder of the case); see also Carter v. Lee, 283 F.3d 240, 252 n. 11 (4th Cir.2002) (contentions not raised in a party's opening brief are generally considered to be waived). Of course, Defendants may ultimately develop successful constitutional defenses at a later stage of the proceedings.

***16** Finally, Defendants argue that this case differs from G.G. because that case involved no major complaints or safety concerns from students. Defendants are correct, though community members certainly raised these kinds of objections. See G.G., 822 F.3d at 715–16. But on this record, Defendants have not offered sufficient evidence to distinguish Plaintiffs' factual circumstances, or those pertaining to anyone else in North Carolina for that matter, from those in G.G.[28] To the contrary, the current record indicates that the individual transgender Plaintiffs used bathrooms and locker rooms corresponding with their gender identity without complaint for far longer than G.G. used the boys' bathrooms at his school. (Compare Doc. 22-4 ¶¶ 15, 30 (approximately five months), and Doc. 22-8 ¶¶ 19, 25 (approximately eighteen months), and Doc. 22-9 ¶¶ 15, 19–20 (same), with G.G., 822 F.3d at 715–16 (seven weeks). Moreover, as noted above and like the situation in G.G., bathroom, shower, and other facilities are often separately partitioned to preserve privacy and safety concerns. (See Doc. 103 at 138; Doc. 22-19 ¶ 14.) Finally, the Fourth Circuit's analysis in G.G. did not rest on the specific circumstances of that case or the wisdom of DOE's position, but rather on the deference owed to the DOE opinion letter. Id. at 723–24 ("[T]he weighing

of privacy interests or safety concerns — fundamentally questions of policy—is a task committed to the agency, not the courts. ... To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our Auer analysis complete, we leave policy formulation to the political branches.").

* * *

G.G. compels the conclusion that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim. Part I's wholesale ban on access to facilities is inconsistent with DOE's guidance on Title IX compliance under G.G. and precludes educational institutions from attempting to accommodate particular transgender individuals who wish such accommodation in bathrooms and other facilities. [29]

b. Constitutional Claims

In addition to their Title IX claim, Plaintiffs also seek access to sex-segregated facilities at public rest stops and other entities not covered by Title IX. As a result, despite granting relief under Title IX, the court must also consider Plaintiffs' constitutional claims. The constitutional claims in this case raise novel and difficult questions in a context underdeveloped in the law. As a practical matter, therefore, Plaintiffs' task of presenting the kind of "clear showing" necessary to justify preliminary relief, Winter, 555 U.S. at 22, 129 S.Ct. 365, is even more difficult in this case. Thus, this court is more cautious to act where the application of existing principles of law to new areas is uncertain and novel, particularly in the context of a preliminary injunction. See Capital Associated Indus. v. Cooper, 129 F.Supp.3d 281, 288–89 (M.D.N.C.2015) ("Where, as in this case, 'substantial issues of constitutional dimensions' are before the court, those issues 'should be fully developed at trial in order to [e]nsure a proper and just resolution.' " (quoting Wetzel v. Edwards, 635 F.2d 283, 291 (4th Cir.1980))); see also Gantt v. Clemson Agr. Coll. of S.C., 208 F.Supp. 416, 418 (W.D.S.C.1962) ("On an application for preliminary injunction, the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.").

i. Equal Protection

*17 **[18]** **[19]** **[20]** The Fourteenth Amendment provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. However, this broad principle "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). As a result, the Supreme Court has "attempted to reconcile the principle with the reality" by prescribing different levels of scrutiny depending on whether a law "targets a suspect class." Id. Laws that do not target a suspect class are subject to rational basis review, and courts should "uphold the legislative classification so long as it bears a rational relation to some legitimate end." Id. By contrast, laws that target a suspect class, such as race, are subject to strict scrutiny. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

[21] **[22]** **[23]** **[24]** It is well settled that classifications based on sex are subject to intermediate scrutiny. See United States v. Virginia, 518 U.S. 515, 532–33, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Under intermediate scrutiny, the State must demonstrate that the challenged law serves " 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " Id. at 533, 116 S.Ct. 2264 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)). Unlike strict scrutiny, the government is not required to show that the law is the "least intrusive means of achieving the relevant government objective." United States v. Staten, 666 F.3d 154, 159 (4th Cir.2011) (citations and internal quotation marks omitted). "In other words, the fit needs to be reasonable; a perfect fit is not required." Id. at 162. Nevertheless, "[t]he burden of justification is demanding and it rests entirely on the State." Virginia, 518 U.S. at 533, 116 S.Ct. 2264. In addition, the justification must be "genuine, not hypothesized or invented post hoc in response to litigation." Id. Finally, the justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Id.

[25] Here, Part I classifies citizens on the basis of "biological sex" and requires that each sex use separate multiple occupancy bathrooms, showers, and other similar facilities. HB2 §§ 1.2–1.3. Because Part I facially classifies and discriminates among citizens on the basis of sex, intermediate scrutiny applies.[30] See Virginia, 518 U.S. at 532–33, 116 S.Ct. 2264.

[26] There is no question that the protection of bodily privacy is an important government interest and that the State may promote this interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions. See, e.g., Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir.1993) ("The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different."); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir.1989) ("Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating."); see also Doe v. Luzerne Cty., 660 F.3d 169, 176–77 (3d Cir.2011) (observing that several circuits have recognized "a constitutionally protected privacy interest in [one's] partially clothed body"); Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir.1992) (stating that "[t]he right to bodily privacy is fundamental" and noting that "common sense" and "decency" protect a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); York v. Story, 324 F.2d 450, 455 (9th Cir.1963) ("The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."). This interest is particularly strong with regard to minors. See, e.g., Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir.2005) ("Students of course have a significant privacy interest in their unclothed bodies."); Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir.1980) (stating that it "does not take a constitutional scholar" to conclude that a strip search invades a student's privacy rights). At the hearing on this motion, Plaintiffs acknowledged that the practice of segregating bathrooms and other similar facilities on the basis of sex promotes this government interest. (See Doc. 103 at 15–19.)

***18** All parties agree that bodily privacy qualifies as an important State interest and that sex-segregated facilities are substantially related to that interest.[31] But the relevant authorities do not define "sex" or explicitly explain which differences between men and women give rise to the State's interest in separating the sexes for privacy purposes; generally, these cases simply observe that individuals of one sex have a privacy interest in being separated from "the other sex." See, e.g., Lee, 641 F.2d at 1119. Not surprisingly, then, the parties disagree about which definition of "sex" promotes the State's interest in bodily privacy. Defendants contend that bodily privacy interests arise from physiological differences between men and women, and that sex should therefore be defined in terms of physiology for the purposes of bathrooms, showers, and other similar facilities. Plaintiffs, by contrast, implicitly contend that bodily privacy interests arise from differences in gender identity, and that sex should therefore be defined in terms of gender identity for the purposes of these facilities.

To support their position, Plaintiffs submitted expert declarations stating that, from a "medical perspective," gender identity is the only "appropriate" characteristic for distinguishing between males and females. (See, e.g., Doc. 22-1 ¶ 23.) Defendants have indicated their strong disagreement with this position, though they have not yet offered any evidence on this point in this case.[32] But regardless of the characteristics that distinguish men and women for "medical" purposes, Supreme Court and Fourth Circuit precedent supports Defendants' position that physiological characteristics distinguish men and women for the purposes of bodily privacy.

Although the Supreme Court has never had an occasion to explicitly explain which differences between men and women justify the decision to provide sex-segregated facilities, the Court has generally assumed that the sexes are primarily defined by their differing physiologies. In Virginia, for example, the Court rejected the notion that women were not suited for education at the Virginia Military Institute ("VMI"). See 518 U.S. at 540–46, 116 S.Ct. 2264; see also id. at 533, 116 S.Ct. 2264 (stating that laws "must not rely on overbroad generalizations about the different talent, capacities, or preferences of males and females."). Even while rejecting stereotypical assumptions about supposed "inherent differences" between men and women, the Court acknowledged, "Physical differences between men and women ... are enduring," adding that the

"two sexes are not fungible." Id. The Court then linked these physiological differences to privacy considerations, adding, "Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." Id. at 550 n. 19, 116 S.Ct. 2264.

Virginia is not the only Equal Protection case to distinguish between the sexes on the basis of physiology. In Tuan Anh Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001), the Court upheld an Immigration and Naturalization Service ("INS") policy that imposed "a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother." Id. 59–60, 121 S.Ct. 2053. The Court held that the government's "use of gender specific terms" is constitutionally permissible when the relevant law "takes into account a biological difference" between men and women. Id. at 64, 121 S.Ct. 2053. The Court rejected the argument that the INS policy reflected stereotypes about the roles and capacities of mothers and fathers, stating that "the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis." Id. at 68, 121 S.Ct. 2053. Instead, the Court found, "There is nothing irrational or improper in the recognition that at the moment of birth ... the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype." Id. Finally, the Court concluded:

> *19 To fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73, 121 S.Ct. 2053.

The Court's decisions in Virginia (1996) and Nguyen (2001) are not merely relics of an earlier, less enlightened time when courts did not have the benefit of modern medical science. Rather, as recently as January 2016, the Fourth Circuit cited Virginia approvingly while concluding that physiological differences justified treating men and women differently in some contexts. See Bauer v. Lynch, 812 F.3d 340, 350 (4th Cir.2016). In Bauer, a male applicant "flunked out of the FBI Academy after falling a single push-up short of the thirty required of male Trainees." Id. at 342. The applicant sued, noting that his performance would have qualified him under the different physical fitness standards applied to female applicants. Id. The Fourth Circuit found that different standards for men and women arose from the FBI's efforts to "normalize testing standards between men and women in order to account for their innate physiological differences," such that an approximately equal number of men and women would pass the tests. Id. at 343. In light of this, the Fourth Circuit concluded that the FBI's policy was permissible because "equally fit men and women demonstrate their fitness differently." Id. at 351. In concluding that the FBI could distinguish between men and women on the basis of physiology, the court explained:

> Men and women simply are not physiologically the same for the purposes of physical fitness programs. ... The Court recognized [in Virginia] that, although Virginia's use of 'generalizations about women' could not be used to exclude them from VMI, some differences between the sexes were real, not perceived, and therefore could require accommodations.

Id. at 350.[33]

In light of the foregoing, it appears that the privacy interests that justify the State's provision of sex-segregated bathrooms, showers, and other similar facilities arise from physiological differences between men and women, rather

than differences in gender identity. See Virginia, 518 U.S. at 533, 116 S.Ct. 2264; Nguyen, 533 U.S. at 73, 121 S.Ct. 2053; Bauer, 812 F.3d at 350. The Fourth Circuit has implicitly stated as much, albeit in dicta, noting:

> When ... a gender classification is justified by acknowledged differences [between men and women], identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender.
>
> The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each that is different. Therefore, any analysis of the nature of a specific facility provided in response to a justified purpose, must take into account the nature of the difference on which the separation is based ....

***20** Faulkner, 10 F.3d at 232. In fact, even Plaintiffs' counsel acknowledged the State's interest in, for example, ensuring that "12-year-old girls who are not familiar with male anatomy" are not exposed to male genitalia by "somebody older who's showing that to them, a mature adult." (Doc. 103 at 24–25.) As a result, it appears that the constitutionality of Part I depends on whether the law's use of birth certificates as a proxy for sex is substantially related to the State's privacy interest in separating individuals with different physiologies.

There is little doubt that Part I is substantially related to the State's interest in segregating bathrooms, showers, and other similar facilities on the basis of physiology. By Plaintiffs' own allegations, "The gender marker on a birth certificate is designated at the time of birth generally based upon the appearance of external genitalia." (Doc. 9 ¶ 26; see also Doc. 22-1 ¶ 14.) Plaintiffs contend that birth certificates are an "inaccurate proxy for an individual's anatomy" because some transgender individuals have birth certificates that do not reflect their external physiology, either because (1) they were born in a State that permits them to change the sex on their birth certificates without undergoing sex reassignment surgery, or (2) they were born in a State that does not permit them to change the sex on their birth certificates, regardless of whether they undergo sex reassignment surgery. (Doc. 22 at 32-33.) But even if the court assumes (contrary to the evidence in the record) that no transgender person possesses a birth certificate that accurately reflects his or her external physiology, Part I would still be substantially related to the State's interest because, by Plaintiffs' own estimate, only 0.3% of the national population is transgender. (Doc. 23-37 at 2.) For the remaining 99.7% of the population, there is no evidence that the sex listed on an individual's birth certificate reflects anything other than that person's external genitalia. Without reducing the "reasonable fit" requirement to a numerical comparison, it seems unlikely that a law that classifies individuals with 99.7% accuracy is insufficient to survive intermediate scrutiny. See Staten, 666 F.3d at 162 ("In other words, the fit needs to be reasonable; a perfect fit is not required.").

Finally, the privacy interests discussed above do not appear to represent a post hoc rationalization for Part I. See Virginia, 518 U.S. at 533, 116 S.Ct. 2264 (requiring that a justification be "genuine, not hypothesized or invented post hoc in response to litigation"). Plaintiffs contend that Part I "effectively seeks to define transgender individuals out of existence and shut them out from public life."[34] (Doc. 22 at 35.) As a preliminary matter, it is hard to infer legislative intent based on the current record which, as noted above, contains little information about the legislative process leading to HB2's passage. The preliminary record does contain a few examples of objectionable statements by some legislators in media outlets, though these statements generally express hostility toward "the liberal agenda" and the "homosexual community" rather than transgender individuals. (See, e.g., Doc. 23-7 at 2; Doc. 23-15 at 2.) But the record also contains many statements, some by these same legislators and others by legislative leaders and Governor McCrory, reflecting an apparently genuine concern for the privacy and safety of North Carolina's citizens. (See, e.g., Doc. 23–7 at 2 (stating that the Charlotte ordinance "has created a major public safety issue"); Doc. 23-15 at 2 ("The Charlotte ordinance just violates, to me, all basic human principles of privacy and it just has so many unintended consequences."); Doc. 23–16 at 2 ("While special sessions are costly, we cannot put a price tag on the safety of women and children."); id. at 3 ("We need to respect the privacy of women and children and men in a very private place, and that's our restrooms and locker rooms.").) In light of the many contemporaneous statements by State leaders regarding privacy and the substantial relationship between Part I and the State's privacy interests, Plaintiffs have not clearly shown that privacy was an afterthought or a pretext invented after the fact solely for litigation

purposes. Nor does the court infer improper motive simply from the fact that Part I negatively impacts some transgender individuals.[35] See Romer, 517 U.S. at 631, 116 S.Ct. 1620 ("[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

*21 In sum, Supreme Court and Fourth Circuit precedent support the conclusion that physiological differences between men and women give rise to the privacy interests that justify segregating bathrooms, showers, and other similar facilities on the basis of sex. In addition, Plaintiffs admit that the vast majority of birth certificates accurately reflect an individual's external genitalia. Although the correlation between genitalia and the sex listed on a person's birth certificate is not perfect in every case, there is certainly a reasonable fit between these characteristics, which is what the law requires. See Staten, 666 F.3d at 162 ("In other words, the fit needs to be reasonable; a perfect fit is not required."). At this preliminary stage, and in light of existing case law, Plaintiffs have not made a clear showing that they are likely to succeed on their Equal Protection claim.

For the reasons explained above, the court concludes that Part I is substantially related to an important government interest. Because Part I passes intermediate scrutiny, the law necessarily clears the lower hurdle of rational basis review. See Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 907 (9th Cir.2007); Contest Promotions, LLC v. City and Cty. of San Francisco, 100 F.Supp.3d 835, 849 (N.D.Cal.2015). As a result, in order to warrant preliminary relief, Plaintiffs must make a clear showing that Part I burdens a fundamental right and therefore triggers strict scrutiny.

Plaintiffs argue that Part I burdens two separate fundamental rights. First, they argue that Part I burdens a fundamental right to informational privacy by forcing transgender individuals to use bathrooms in which they will appear out of place, thereby disclosing their transgender status to third parties. Second, they argue that Part I violates a right to refuse unwanted medical treatment because many States, including North Carolina, require transgender individuals to undergo sex reassignment surgery before changing the sex on their birth certificates. Each argument will be addressed in turn.

ii. Due Process

[27] [28] The Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has long held that, in addition to requiring the government to follow fair procedures when taking certain actions, the Due Process Clause also "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). As a result, a law that burdens a fundamental right is subject to strict scrutiny and cannot be upheld unless the State demonstrates that it is narrowly tailored to serve a compelling interest. See Carey v. Population Servs. Int'l, 431 U.S. 678, 686, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir.1990). By contrast a law that does not burden a fundamental right is subject only to rational basis review, and a court must uphold such a law "so long as it bears a rational relation to some legitimate end." Romer, 517 U.S. at 631, 116 S.Ct. 1620.

(a) Informational Privacy

[29] [30] The constitutional right to privacy protects, among other things, an individual's "interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). "The right to privacy, however, is not absolute." Walls, 895 F.2d at 192. Instead, the constitutional right to privacy is only implicated when State action compels disclosure of information of a "fundamental" nature. Id. "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." Id. The Fourth Circuit has held that, as a "first step" in determining whether a particular category of information is entitled to constitutional protection, courts should examine whether the information "is within an individual's reasonable expectations of confidentiality." Id.

*22 Plaintiffs contend that a person's transgender status constitutes sensitive medical information and that this type of information is subject to constitutional protection. They cite various cases in which courts held that information qualifies for constitutional protection when

it is of a sexual, personal, or humiliating nature, or when the release of the information could subject the person to a risk of bodily harm. See Powell v. Schriver, 175 F.3d 107, 111 (2d Cir.1999) ("[T]he right to confidentiality includes the right to protection regarding information about the state of one's health.") (quoting Doe v. City of New York, 15 F.3d 264, 267 (2d Cir.1994)); Love v. Johnson, 146 F.Supp.3d 848, 853 (E.D.Mich.2015). These courts concluded that an individual's transgender status qualifies for constitutional protection because such information is of a private, sexual nature and disclosure of this information could subject a transgender person to ridicule, harassment, or even bodily harm. See Powell, 175 F.3d at 111 ("Like HIV status ... transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others."); Love, 146 F.Supp.3d at 856; see also K.L. v. Alaska, Dep't of Admin., Div. of Motor Vehicles, No. 3AN–11–05341, 2012 WL 2685183, at *6 (Alaska Super.Ct. Mar. 12, 2012) (concluding that an individual's transgender status qualifies for privacy protection under Alaska law). In Love, for example, the court considered a Michigan law that prevented individuals from changing the sex on their driver's license.[36] 146 F.Supp.3d at 856–57. The court concluded that this policy burdened Due Process privacy interests because it forced transgender individuals to tacitly reveal their transgender status whenever they displayed their driver's licenses to others. Id.; see also K.L., 2012 WL 2685183 at *4–7 (same).

None of these cases applied Fourth Circuit law, however, and the Fourth Circuit's decision in Walls casts doubt on the validity of these cases in this circuit. In Walls, a public employee was fired after refusing to complete a background check that included questions about her prior marriages, divorces, debts, criminal history, and sexual relationships with same-sex partners. 895 F.2d at 190. The employee brought an action under 42 U.S.C. § 1983 against her employer, claiming that the questionnaire violated her right to privacy. Walls, 895 F.2d at 189–92. The Fourth Circuit explained that the "right to privacy protects only information with respect to which the individual has a reasonable expectation of privacy." Id. at 193. The court therefore concluded that the right to privacy did not protect the information sought in the agency's questionnaire, including questions about prior marriages, divorces, and children, "to the extent that this information is freely available in public records." Id.

[31] Walls suggests that Part I does not burden a fundamental privacy interest, at least under current Fourth Circuit law. Plaintiffs argue that Part I discloses an individual's transgender status to third parties by revealing the sex on their birth certificates through their choice of bathroom; when a stereotypically-feminine appearing individual uses a men's bathroom, Plaintiffs argue, third parties will know that the individual has a male birth certificate and infer that the person is transgender. (See Doc. 9 at ¶¶ 223–24.) But pursuant to Walls, individuals have no constitutionally-protected privacy interest in information that is freely available in public records. 895 F.2d at 193. And although the parties have not addressed this issue, the sex listed on an individual's birth certificate appears to be freely available in public records, at least if the individual was born in North Carolina. See N.C. Gen. Stat. § 130A–93(b) (providing that all birth data collected by the State qualifies as public records except for the names, addresses, and social security numbers of children and parents); see also id. § 132-1(b) (providing that all public records "are the property of the people" and requiring that the public be given access to such information "free or at minimal cost unless otherwise specifically provided by law").

***23** As a result, regardless of whether the court finds the reasoning in Love and K.L. persuasive, the sex listed on a person's birth certificate does not appear to qualify for constitutional protection under Walls. Plaintiffs cite general statements about privacy from Walls, but they overlook the obvious question of why the rule the court actually applied in that case should not govern this case as well. (See Doc. 22 at 36–38; Doc. 73 at 36–37.) It is possible that, with further development, Plaintiffs may be able to sufficiently distinguish Walls and demonstrate that the rule from that case should not apply outside of the employment context. For example, the policies at issue in Love and K.L. arguably have more in common with Part I than Walls, which dealt with an employment background check—a situation in which a third party can reasonably be expected to know the individual's name, address, and other identifying information that would make a public records search more practicable. Walls, 895 F.2d at 193–95.

On the other hand, there are also significant distinctions between this case and the cases cited by Plaintiffs. Unlike Part I, most of Plaintiffs' cases involved State actors

who intentionally revealed or threatened to reveal private information. See, e.g., Powell, 175 F.3d at 109–11 (prison guard openly discussed an inmate's transgender status in the presence of other inmates); Sterling v. Borough of Minersville, 232 F.3d 190, 192, 196 (3d Cir.2000) (police officer threatened to tell an arrestee's family that the arrestee was gay). Even Love and K.L., Plaintiffs' most factually-analogous cases, challenged policies governing the modification of State documents rather than the circumstances in which a State may rely on those documents. Love 146 F.Supp.3d at 856; K.L., 2012 WL 2685183 at *4–8. Love held that Michigan must allow transgender individuals to change the sex on their driver's license so that they would not have to reveal their transgender status during traffic stops; plaintiffs did not argue, and the court did not hold, that the State should be enjoined from asking drivers for identification during traffic stops. See 146 F.Supp.3d at 856; see also K.L., 2012 WL 2685183 at *4–8 (same).

Unlike the plaintiffs in Love and K.L., Plaintiffs challenge North Carolina's ability to use birth certificates as an identifying document in the context of bathrooms, showers, and other facilities, rather than its rules for altering the information contained in the birth certificate itself. This highlights a potential conceptual difficulty with Plaintiffs' Due Process theories. Even under Part I, an individual's choice of bathroom does not directly or necessarily disclose whether that person is transgender; it merely discloses the sex listed on the person's birth certificate. Part I does not disclose medical information about any persons whose gender identity aligns with their birth certificate, either because they are not transgender or because they have successfully changed their birth certificate to match their gender identity (with or without sex reassignment surgery). Nor does Part I disclose medical information about transgender individuals whose name, appearance, or other characteristics do not readily identify their gender identity. Part I could only disclose an individual's transgender status inasmuch as third parties are able to infer as much in light of the person's birth certificate and appearance. Thus, it is not readily apparent to what extent any Due Process concerns are attributable to Part I as opposed to the laws that govern the modification of birth certificates.

In light of the foregoing, Plaintiffs have not clearly shown that they are likely to succeed on the merits of their informational privacy claim. See Winter, 555 U.S. at 20–22, 129 S.Ct. 365 (stating that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" (emphasis added)). The law in this area is substantially underdeveloped, however, and the parties devoted relatively little attention to this claim both in their briefs and at the hearing on this matter. Although Plaintiffs have not demonstrated that they are entitled to preliminary relief on this claim, their arguments and authorities raise substantial questions that merit additional consideration. As a result, the court will reserve ruling on Plaintiffs' informational privacy claim at this time so that the parties may submit additional briefing according to the schedule outlined in Section III below.

(b) Unwanted Medical Treatment

***24** Plaintiffs also contend that Part I violates transgender individuals' constitutional right to refuse unwanted medical treatment because North Carolina and many other States require sex reassignment surgery before the sex on a person's birth certificate may be changed. (Doc. 9 ¶¶ 228–34; Doc. 22 at 39.)

The parties' arguments on this issue are even less developed than those pertaining to informational privacy, with just three paragraphs devoted to the issue in the parties' principal briefs combined. (See Doc. 22 at 38–39; Doc. 55 at 18.) Plaintiffs rely almost exclusively on United States v. Charters, 829 F.2d 479 (4th Cir.1987). In Charters, the Fourth Circuit held that a mentally ill prisoner had a Due Process interest in refusing the State's efforts to medicate him with antipsychotic drugs against his will. Id. at 490–500. In reaching this decision, the court applied principles derived from the "rights to freedom from physical invasion and freedom of thought as well as the right to privacy protected by the Constitution and the common law." Id. at 490. From these principles, the court observed, "The right to refuse medical treatment has been specifically recognized as a subject of constitutional protection." Id. at 491.

[32] Governments assuredly must meet heightened scrutiny before forcibly medicating prisoners, or any citizens for that matter, against their will. But Plaintiffs have not shown how this holding applies to Part I, which does not address medical treatment at all. True, Part I may require some transgender individuals (who

otherwise do not benefit from the court's injunction as to Title IX facilities) to undergo potentially unwanted medical treatment if they wish to access public bathrooms, showers, and other similar facilities that align with their gender identity. But they are free to use facilities that align with their biological sex, and they may have access to single-user facilities. As much as one sympathizes with the plight of these transgender individuals, this degree of "compulsion" is far removed from the situation in Charters, where a captive prisoner was strapped down and forced to submit to medication against his will. See Charters, 829 F.2d at 482–84. If the Due Process Clause were implicated any time an individual must undergo medical treatment in order to access a desired benefit or service, it would cast serious doubts on a wide variety of laws. See, e.g., N.C. Gen. Stat. § 130A–155 (requiring schools and child care facilities to ensure that children have received appropriate vaccines before accepting them as students); 19A N.C. Admin. Code § 3B.0201(a)(3) (requiring some individuals to wear corrective lenses in order to obtain a driver's license). [37]

At a minimum, further development of Plaintiffs' argument is necessary before the court can determine whether Charters prevents the State from enforcing Part I. As with Plaintiffs' informational privacy claim, the court will reserve ruling to give the parties an opportunity to submit additional briefing on this claim in accordance with the schedule outlined in Section III below.

2. Irreparable Harm

*25 **[33]** A party seeking a preliminary injunction must also show that it is likely to suffer irreparable harm in the absence of preliminary relief. Winter, 555 U.S. at 20, 129 S.Ct. 365. Irreparable injury must be both imminent and likely; speculation about potential future injuries is insufficient. See id. at 22, 129 S.Ct. 365.

[34] On the current record, the individual transgender Plaintiffs have clearly shown that they will suffer irreparable harm in the absence of preliminary relief. All three transgender Plaintiffs submitted declarations stating that single occupancy bathrooms and other similar facilities are generally unavailable at UNC and other public agencies. (See Doc. 22-4 ¶¶ 18–20; Doc. 22-8 ¶ 27; Doc. 22-9 ¶¶ 24–25.) In fact, two of the individual transgender Plaintiffs indicate that they are not aware of any single occupancy facilities in the buildings in which their classes are held. (Doc. 22-8 ¶ 27; Doc. 22-9 ¶¶ 24–25.) Part I therefore interferes with these individuals' ability to participate in their work and educational activities. (See Doc. 22-4 ¶ 21; Doc. 22-8 ¶ 27; Doc. 22-9 ¶ 24.) As a result, some of these Plaintiffs limit their fluid intake and resist the urge to use a bathroom whenever possible. (Doc. 22-4 ¶ 21; Doc. 22-8 ¶ 32.) Such behavior can lead to serious medical consequences, such as urinary tract infections, constipation, and kidney disease. (Doc. 22-16 at 3–4.) This concern is not merely speculative; there is evidence that one of the individual transgender Plaintiffs has already begun to suffer medical consequences from behavioral changes prompted by Part I. (Doc. 73-1 at 1–2.)

In their response to Plaintiffs' motion, Defendants suggest that the individual transgender Plaintiffs' claims of irreparable harm are speculative and exaggerated, but Defendants have not presented any evidence to contradict Plaintiffs' evidence. (See Doc. 61 at 22–26.) Therefore, on this record, the court has no basis for doubting Plaintiffs' assertions that they cannot use multiple occupancy facilities that match their birth certificates for fear of harassment and violence, that single occupancy facilities are not reasonably available to them, and that they are at a serious risk of suffering negative health consequences as a result.

[35] Defendants also argue that Plaintiffs delayed in filing their motion for preliminary injunction seven weeks after the passage of HB2. (Doc. 61 at 23.) In some circumstances, a delay in requesting preliminary relief can be relevant to the irreparable harm inquiry. See, e.g., Static Control Components, Inc. v. Future Graphics, LLC, No. 1:06cv730, 2007 WL 1447695, *2–3, 2007 U.S. Dist. LEXIS 36474, at *7–9 (M.D.N.C. May 11, 2007) (finding that an employer's eight-week delay in seeking to prevent a former employee from working for a competitor weighed against a finding of irreparable harm); Fairbanks Capital Corp. v. Kenney, 303 F.Supp.2d 583, 590–91 (D.Md.2003) (finding an eleven-month delay in bringing a trademark infringement suit to be reasonable under the circumstances). Here, however, HB2 was passed on an expedited schedule, and Plaintiffs doubtlessly needed some time to compile the more than sixty documents they submitted to support their motion, including exhibits, declarations from fact witnesses, and the opinions of expert witnesses. In addition, the legal landscape regarding HB2's enforcement

remained in flux immediately after the laws' passage. (See, e.g., Doc. 23-24; Doc. 23-28.) Under these circumstances, Plaintiffs' minimal delay in seeking preliminary relief does not undermine their claims regarding irreparable harm.

***26** Finally, the court notes that similar facts were deemed sufficient to support a finding of irreparable harm in G.G. See G.G., 2016 WL 3581852 at *1; G.G., 822 F.3d at 727–29 (Davis, J., concurring). The court therefore concludes that the individual transgender Plaintiffs have made a clear showing that they are likely to suffer irreparable harm in the absence of preliminary relief.

3. Balance of Equities and the Public Interest

In addition to likelihood of success on the merits and irreparable harm, those seeking preliminary relief must also demonstrate that the balance of equities tips in their favor and that an injunction is in the public interest. Winter, 555 U.S. at 20, 129 S.Ct. 365. On the current record, both favor entry of an injunction.

[36] The balance of equities favors the entry of an injunction. One noteworthy feature of this case is that all parties claim that they want to preserve North Carolina law as it existed before the law was enacted; they simply disagree about the contours of that pre-HB2 legal regime. (See Doc. 103 at 6, 15–21, 65–71, 74–90, 96–102; Doc. 9 ¶¶ 166–68.) For the reasons discussed above, the court concludes that Part I does not accurately restore the status quo ante in North Carolina, at least as it existed in the years immediately preceding 2016. While Part I reiterates the male/female distinction for the vast majority of persons, it imposes a new restriction that effectively prohibits State agencies from providing flexible, case-by-case accommodations regarding the use of bathrooms, showers, and other similar facilities for transgender individuals where feasible.[38] See HB 2 §§ 1.2–1.3. Because Defendants do not claim to have had any problems with the pre-2016 regime (Doc. 103 at 65–71, 74–90, 96–102), the entry of an injunction should not work any hardship on them. By contrast, the failure to enjoin Part I would cause substantial hardship to the individual transgender Plaintiffs, disrupting their lives.

[37] For similar reasons, the court concludes that an injunction is in the public interest. Of course, every individual has "a legitimate and important interest in [ensuring] that his or her nude or partially nude body, genitalia, and other private parts are not involuntarily exposed." G.G., 822 F.3d at 723 (citations and internal quotation marks omitted). The dispute in this case centers on facilities of the most intimate nature, and the State clearly has an important interest in protecting the privacy rights of all citizens in such facilities. See, e.g., Virginia, 518 U.S. at 550 n. 19, 116 S.Ct. 2264 (stating that separate facilities in coeducational institutions are "necessary to afford members of each sex privacy from the other sex"); Faulkner, 10 F.3d at 232 (noting "society's undisputed approval of separate public restrooms for men and women based on privacy concerns"). The privacy and safety concerns raised by Defendants are significant, and this is particularly so as they pertain to the protection of minors. See, e.g., Beard, 402 F.3d at 604 ("Students of course have a significant privacy interest in their unclothed bodies."). At the hearing on the present motion, Plaintiffs acknowledged that the State has a legitimate interest in protecting the privacy of its citizens, particularly minors and students, and that sex-segregated bathrooms, showers, and other similar facilities serve this interest. (See Doc. 103 at 15–19.)

***27** But transgender individuals are not exempted from such privacy and safety rights. The current record indicates that many public agencies have become increasingly open to accommodating the interests of transgender individuals as society has evolved over time. (See, e.g., Doc. 22-19 ¶¶ 8–9.) This practice of case-by-case accommodation, while developing, appears to have gained acceptance in many places across North Carolina over the last few years. (See, e.g., Doc. 22-4 ¶ 15; Doc. 22-8 ¶ 19; Doc. 22-9 ¶¶ 15, 19–20.) And the preliminary record contains uncontested evidence that these practices allowed the individual transgender Plaintiffs to use bathrooms and other facilities consistent with their gender identity for an extended period of time without causing any known infringement on the privacy rights of others. (See Doc. 22-4 ¶ 30; Doc. 22-8 ¶ 25; Doc. 22-9 ¶ 20.)

In fact, rather than protect privacy, it appears at least equally likely that denying an injunction will create privacy problems, as it would require the individual transgender Plaintiffs, who outwardly appear as the sex with which they identify, to enter facilities designated for the opposite sex (e.g., requiring stereotypically-masculine appearing transgender individuals to use women's bathrooms), thus prompting unnecessary alarm

and suspicion. (See, e.g., Doc. 22-9 ¶ 28 (describing one student's experiences being "screamed at, shoved, slapped, and told to get out" when using bathrooms that did not match the student's gender identity.) As counsel for Governor McCrory candidly acknowledged, even if Part I remains in effect, "some transgender individuals will continue to use the bathroom that they always used and nobody will know." (Doc. 103 at 70.)

Finally, the argument for safety and privacy concerns proffered by the State as to transgender users are somewhat undermined here by the structure of Part I itself. Unlike the policy in G.G., which contained no exceptions, Part I permits some transgender individuals to use bathrooms, showers, and other facilities that do not correspond with their external genitalia. This is so because some States do not permit transgender individuals to change their birth certificates even after having sex reassignment surgery, see, e.g., Tenn. Code Ann. § 68–3–203(d), while others allow modification of birth certificates without such surgery, see, e.g., Md. Code, Health–Gen § 4–211. In this regard, Part I's emphasis on birth certificates elevates form over substance to some degree as to some transgender users.

As for safety, Defendants argue that separating facility users by biological sex serves prophylactically to avoid the opportunity for sexual predators to prey on persons in vulnerable places. However, the individual transgender Plaintiffs have used facilities corresponding with their gender identity for over a year without posing a safety threat to anyone. (See Doc. 22-4 ¶¶ 15, 30; Doc. 22-8 ¶¶ 19, 25; Doc. 22-9 ¶¶ 15, 19–20.) Moreover, on the current record, there is no evidence that transgender individuals overall are any more likely to engage in predatory behaviors than other segments of the population. In light of this, there is little reason to believe that allowing the individual transgender Plaintiffs to use partitioned, multiple occupancy bathrooms corresponding with their gender identities, as well as UNC to seek to accommodate use of similar showers and changing facilities, will pose any threat to public safety, which will continue to be protected by the sustained validity of peeping, indecent exposure, and trespass laws. And although Defendants argue that a preliminary injunction will thwart enforcement of such safety laws by allowing non-transgender predators to exploit the opportunity to cross-dress and prey on others (Doc. 55 at 4–5), the unrefuted evidence in the current record suggests that jurisdictions that have adopted accommodating bathroom access policies have not observed subsequent increases in crime, (see Doc. 22-10 at 6–10; Doc. 22-13).

***28** **[38]** Finally, the court acknowledges that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers). In this case, however, this concern lessened by the continued validity of Parts II and III of HB2, which serve the State's ostensible goal of preempting the Charlotte ordinance and maintaining the law as it existed before March 2016. The State acknowledges that it had no problems with that pre-2016 legal regime. (Doc. 103 at 65–71, 74–90, 96–102.)

In sum, the court has no reason to believe that an injunction returning to the state of affairs as it existed before March 2016 would pose a privacy or safety risk for North Carolinians, transgender or otherwise. It is in the public interest to enforce federal anti-discrimination laws in a fashion that also maintains long-standing State laws designed to protect privacy and safety. On this record, allowing UNC to permit the transgender Plaintiffs to use multiple occupancy, partitioned restrooms corresponding to their gender identity, and to seek flexible accommodation for changing rooms and other facilities, therefore serves the public interest.

III. CONCLUSION

Plaintiffs' motion seeks to preliminarily enjoin Defendants "from enforcing Part I of House Bill 2." (Doc. 21 at 3; see also Doc. 22 at 44–45.) As a result, the issue currently before the court is whether Title IX or the Constitution prohibits Defendants from enforcing HB2's exclusion of transgender individuals from multiple-occupancy bathrooms, showers, and other similar facilities under all circumstances based solely on the designation of "male" or "female" on their birth certificate.

For the reasons stated, applicable Fourth Circuit law requires that DOE's guidance defining "sex" to mean gender identity be accorded controlling weight when interpreting DOE's Title IX regulations. Because Part I of HB2 prevents transgender individuals from using multiple-occupancy bathrooms and similar facilities based solely on the gender listed on their birth certificate,

it necessarily violates DOE's guidance and cannot be enforced. As for Plaintiffs' constitutional claims, Plaintiffs have not made a clear showing they are likely to succeed on their Equal Protection claim, and the court reserves ruling on the Due Process claims pending further briefing from the parties.

The Title IX claim currently before the court is brought by the individual transgender Plaintiffs on their own behalf; the current complaint asserts no claim for class relief or any Title IX claim by ACLU-NC on behalf of its members. (Doc. 9 ¶¶ 235–243.)[39] Consequently, the relief granted now is as to the individual transgender Plaintiffs.

The individual transgender Plaintiffs have not sought an order guaranteeing them access to any specific facility. The court's order will return the parties to the status quo ante existing immediately before the passage of Part I of HB2, wherein public agencies accommodated the individual transgender Plaintiffs on a case-by-case basis, rather than applying a blanket rule to all people in all facilities under all circumstances. Plaintiffs have no complaint with UNC's pre-HB2 policy; Defendants, in turn, do not contend that it caused any significant privacy or safety concerns. Such an order is also consistent with the DOE opinion letter, which states that schools "generally" must treat students consistent with their gender identity. (Doc. 23-29 at 3.) As a result, the court does not decide how Defendants should apply DOE's guidance in all situations and circumstances. Suffice it to say that for the time being, UNC is not constrained from accommodating the individual transgender Plaintiffs through appropriate means that accord with DOE guidance and recognize the unique circumstances of each case, just as it apparently did for several years prior to HB2. In doing so, UNC should be mindful of North Carolina's trespass, peeping, and indecent exposure laws, which protect the privacy and safety of all citizens, regardless of gender identity. In short, UNC may not apply HB2's one-size-fits-all approach to what must be a case-by-case inquiry.[40]

***29** IT IS THEREFORE ORDERED that Plaintiffs' motion for preliminary injunction (Doc. 21) is GRANTED IN PART and DENIED IN PART, as follows:

(1) The individual transgender Plaintiffs' motion for preliminary injunction on their Title IX claim is GRANTED. The University of North Carolina, its officers, agents, servants, employees, and attorneys, and all other persons acting in concert or participation with them are hereby ENJOINED from enforcing Part I of HB2 against the individual transgender Plaintiffs until further order of the court.

(2) Plaintiffs' motion for preliminary injunction on their Equal Protection claim is DENIED without prejudice to a final determination on the merits.

(3) The court reserves ruling on Plaintiffs' motion for preliminary injunction on their Due Process claims. If Plaintiffs wish to submit additional briefing on these claims, they must do so no later than September 9, 2016. Any response briefs must be filed no later than September 23, 2016, and any reply briefs must be filed no later than October 7, 2016. Although the parties may address any matter relevant to the Due Process claims in their briefs, the court is particularly interested in the following questions: (1) whether the sex on an individual's birth certificate is freely available in public records in North Carolina and other States and, if so, whether individuals have a Due Process privacy interest in such information; and (2) the degree to which a law in general, and Part I in particular, must burden a fundamental right in order to warrant strict scrutiny. Plaintiffs' initial brief and any response briefs may not exceed twenty pages per side, and Plaintiffs' reply may not exceed ten pages. If the parties desire additional oral argument regarding Plaintiffs' Due Process claims, any hearing will be combined with the consolidated preliminary injunction hearing and trial on the merits in the 425 case.

All Citations

--- F.Supp.3d ----, 2016 WL 4508192

Footnotes

1 Transgender individuals are persons who do not identify with their birth sex, which is typically determined on the basis of external genitalia. (Doc. 22-1 ¶¶ 12, 14; see also Doc. 9 ¶ 26.) According to the latest edition of the American Psychiatric

Association's Diagnostic and Statistical Manual of Mental Disorders, some transgender individuals suffer from a condition called gender dysphoria, which occurs when the "marked incongruence between one's experienced/expressed gender and assigned gender" is associated with "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (Doc. 22-5 ¶¶ 12–13.) In other words, gender dysphoria occurs when transgender individuals experience emotional, psychological, or social distress because "their deeply felt, core identification and self-image as a particular gender does not align" with their birth sex. (See Doc. 22-1 ¶ 19.) For purposes of the present motion, the court accepts Plaintiffs' unrebutted evidence that some transgender individuals form their gender identity misalignment at a young age and exhibit distinct "brain structure, connectivity, and function" that does not match their birth sex. (Id. ¶¶ 18, 22.)

2 After the preliminary injunction hearing, ACLU-NC moved to file a second amended complaint to allege a Title IX representational claim. (Doc. 116.) Briefing on that motion is incomplete, so the court only considers Title IX relief for the individual transgender Plaintiffs at this time.

3 In response to Plaintiffs' motion for preliminary injunction, Governor McCrory, Senator Burger, and Representative Moore requested a several-month delay. (Doc. 53 at 9–11; Doc. 61 at 27–29.) These Defendants claimed the need for extensive factual discovery to adequately address the issues presented in Plaintiffs' motion. (Id.) They collectively submitted only six exhibits, however, each of which consists of a short news article or editorial. (See Docs. 55-1 through 55-6.) Moreover, during a scheduling conference held on July 1, 2016, they indicated that they did not intend to offer additional exhibits or live testimony and that any preliminary injunction hearing could be limited to oral argument. As a result, nearly the entire factual record in this case is derived from materials submitted by Plaintiffs.

4 Defendants have since filed transcripts of the legislative record in a separate case. (Docs. 149-5 through 149-8 in case no. 1:16cv425.)

5 Charlotte's existing non-discrimination ordinances prohibited discrimination on the basis of race, gender, religion, national origin, ethnicity, age, disability, and sex. (See Doc. 23-2 at 1, 6.)

6 Not all of the exhibits in the record contain internal page numbers, and many include cover pages that were not part of the original documents. For clarity, all record citations in this opinion refer to the pagination in the CM/ECF version of the document.

7 All seven votes in favor of the ordinance were cast by Democrats, while two Democrats and two Republicans voted against the ordinance. (See Doc. 23-5 at 4–8.)

8 The Governor may call special sessions of the General Assembly in response to unexpected or emergency situations. (See Doc. 23-18 at 4.)

9 Part II also preempted local minimum wage standards. HB2 §§ 2.1–2.3. This portion of HB2 has not been challenged in these cases.

10 These are apart from the law's effect, if any, on the Charlotte ordinance's protections against discrimination on the basis of "gender," "ethnicity," and "handicap."

11 The statute defines a "multiple occupancy bathroom or changing facility" as a "facility designed or designated to be used by more than one person at a time where [persons] may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a [restroom], locker room, changing room, or shower room." Id. §§ 1.2-1.3.

12 This rule is subject to various exceptions that are not pertinent here. For example, Part I does not apply when individuals enter bathrooms for custodial or maintenance purposes, or to assist other individuals in using the facility. See id. §§ 1.2–1.3.

13 Notwithstanding the reference to "the physical condition of being male or female," all parties agree that the law defines "biological sex" as the sex listed on the individuals' current birth certificate. (See Doc. 22 at 6 (Plaintiffs, stating that Part I restricts access to facilities "based on the gender marker on one's birth certificate"); Doc. 50 at 15 (UNC, stating that Part I requires individuals to use bathrooms corresponding with their "biological sex, as listed on their birth certificates"); Doc. 55 at 1 (Governor McCrory, stating that Part I "notes that ['biological sex'] is 'stated on a person's birth certificate' "); Doc. 61 at 6 (Senator Berger and Representative Moore: "HB2 determines biological sex based on the person's current birth certificate.").) Notably, the law's reliance on birth certificates necessarily contemplates that transgender individuals may use facilities consistent with their gender identity—notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery—as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States.

14 Plaintiffs named UNC, the UNC Board of Governors, and W. Louis Bissette, Jr., in his official capacity as Chairman of the UNC Board of Governors, as Defendants. For convenience and clarity, the court refers to these and other related entities collectively as "UNC," except where otherwise indicated.

15 Plaintiffs dropped Equality North Carolina and Attorney General Cooper in their first amended complaint on April 21, 2016. (Doc. 9.)

16 The United States also announced that it would not cut off Title IX funding during the pendency of its lawsuit and asked this court for relief from a provision in VAWA that requires it to suspend funding forty-five days after filing suit. (See Doc. 53 in the 425 case.)

17 Defendants sought leave to conduct up to six months of discovery before responding to the United States' motion for preliminary injunction. (See Docs. 53, 61.) In response to these and other concerns, the court exercised its authority under Federal Rule of Civil Procedure 65(a)(2) to advance the trial in the United States' action and consolidate it with the hearing on the United States' motion for preliminary injunction, which is scheduled to begin November 14, 2016. (Doc. 104.)

18 UNC has also filed a motion to dismiss the claims against it. (Doc. 89.) The motion to dismiss raises similar issues, as well as additional issues not addressed in the briefing on the present motion. (See Doc. 90.) The court will issue a separate ruling on the motion to dismiss at a later date.

19 UNC also argues that it is immune from the individual transgender Plaintiff's constitutional claims and that Chairman Bissette is not a proper party under Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Because Plaintiffs have since moved to amend their complaint to drop Chairman Bissette and substitute UNC President Margaret Spellings as a Defendant (see Doc. 116-1 ¶¶ 11–12), and because the court will not grant relief on their constitutional claims at this time, see infra Section II.B.1.b, the court does not reach these issues.

20 Under Auer, an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461, 117 S.Ct. 905 (citations and internal quotation marks omitted).

21 The court noted that another dictionary defined "sex" as "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished." Id. at 721. Neither of the dictionaries cited by the majority included gender identity as a component of "sex." See id. at 721–22.

22 The court also concluded that DOE's guidance violated the Administrative Procedure Act, and the court preliminarily enjoined DOJ from using or asserting DOE's position on gender identity in any litigation initiated after the entry of its order. Id. at ——— – ———, ———, 2016 WL 4426495 at *11–*14, 17. Because Texas is a district court opinion from outside the Fourth Circuit, however, and because the court's order was issued after the initiation of this case, this court remains bound by G.G. and the Texas order has no direct effect on this litigation.

23 Indeed, DOE has continued to issue expanded guidance well after the filing of this lawsuit and the 425 case against the State. DOE's newest guidance explicitly mandates transgender access to all facilities that are consistent with their gender identity. (E.g., Doc. 23-30 at 4 ("Restrooms and Locker Rooms. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.").) This guidance does not include the qualifier "generally," which was included in the DOE opinion letter. (Id.) Plaintiffs contend that this document, which was not available at the time of G.G., is also entitled to Auer deference. (See Doc. 22 at 14.) The Texas court, which was not bound by G.G., concluded that this guidance is not entitled to Auer deference. 2016 WL 4426495, at *15.

24 Nor does it appear that the court or DOE considered the potentially significant costs associated with retrofitting some facilities to ensure privacy.

25 DOJ, however, argues that DOE's guidance makes no such allowance and that G.G.'s holding requires controlling weight across all facilities. (Doc. 103 at 54-57.)

26 For example, Part I excludes some transgender users from showers and changing rooms that match their gender identity even if such facilities are fully partitioned or otherwise unoccupied.

27 In fact, although Senator Berger and Representative Moore's brief incorporates some portions of their answer by reference, it does not incorporate the constitutional claims or defenses to the Title IX claim. (See Doc. 61 at 13 (referencing defenses to Plaintiffs' Equal Protection and Due Process claims).) At the hearing on Plaintiffs' motion, the legislators first raised the argument that enforcing DOE's interpretation of "sex" would constitute a Spending Clause violation under Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15–16, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). (Doc. 103 at 81-85.) As Defendants have yet to develop this defense, it does not rise to the level of undermining the individual transgender Plaintiffs' showing of a likelihood of success on the merits.

28 Defendants did present two news articles describing men in Seattle and Virginia who entered women's bathrooms or showers. (Docs. 55-1, 55-52.) Neither man claimed to be transgender; one was apparently protesting a local ordinance,

while the other was arrested for peeping. (See id.) North Carolina's peeping and indecent exposure statutes continue to protect the privacy of citizens regardless of Part I, and there is no indication that a sexual predator could successfully claim transgender status as a defense against prosecution under these statutes.

29 Plaintiffs argue in supplemental briefing that "broad relief" equivalent to a facial ban of HB2 is necessary to ensure protection of the individual transgender Plaintiffs' rights. (Doc. at 13.) But there is no class-wide claim presently pending, and ACLU-NC did not allege a Title IX claim. In light of UNC's insistence that it will not take any further action in response to Part I, broader relief is not necessary to ensure that the individual transgender Plaintiffs receive effective preliminary relief. Cf. Nat'l Org. for Reform of Marijuana Laws (NORML) v. Mullen, 608 F.Supp. 945, 964 (N.D.Cal.1985) (ordering broad relief on individual claims where the individual plaintiffs were at "significant risk for repeated rights violations" because government actors could not effectively "distinguish the parties from the nonparties").

30 The parties have devoted substantial time and energy to arguments regarding (1) whether transgender individuals qualify as a suspect class for Equal Protection purposes, and (2) whether Plaintiffs have established a sex stereotyping claim under the line of cases beginning with Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (construing Title VII). As Plaintiffs acknowledge, however, success on either of these theories in the context of their Equal Protection claim would result in the court applying the same intermediate level of scrutiny applied to laws that facially classify citizens on the basis of sex. (Doc. 103 at 35–36.) Thus, the court declines to consider these issues at this stage because Part I facially classifies individuals on the basis of sex.

31 Despite this concession, many of Plaintiffs' arguments in this case would, if accepted and taken to their logical conclusion, suggest that the time-honored practice of sex-segregated bathrooms and showers is unconstitutional. At the hearing on this motion, counsel speculated that sex-segregated bathrooms are justified, if at all, (1) by virtue of the long history of providing such facilities, (2) to express society's belief that "the two sexes, the two genders ... should be separated except in marriage," and (3) because no one has bothered to challenge the practice of providing sex-segregated facilities which, while separate, tend to be roughly equal in quality. (See id. at 16–21.)

32 As with legislative history, however, Defendants recently offered medical evidence in the 425 case. (See Docs. 149-9 through 149-12 in the 425 case.)

33 Bauer involved Title VII rather than the Equal Protection Clause. Id. Nevertheless, the Fourth Circuit stated that the same principles "inform [its] analysis" of both types of claims. Id.

34 It should go without saying that Part I, which regulates access to public bathrooms, showers, and other similar facilities, neither defines transgender individuals "out of existence" nor prevents them from participating in public life.

35 Of course, not all transgender individuals are negatively impacted by Part I because some may be able to change the sex on their birth certificates, with or without sex reassignment surgery, and others may choose to use bathrooms or other facilities that accord with their biological sex, whether or not they suffer dysphoria as a result.

36 Notably, the policy in Love only applied to individuals who sought to change the sex on an existing driver's license; Michigan apparently did not require individuals to present a birth certificate to support their claimed sex when initially obtaining a license. Id. at 851–52 & n. 2.

37 Here, too, as with the informational privacy claim, Plaintiffs' real problem appears to be various States' inflexible rules for changing one's sex on a birth certificate, in so far as Part I permits transgender users who did not have any surgery to use facilities matching their gender identity as long as their birth certificate has been changed—an issue the parties have not adequately addressed.

38 For this reason, the preliminary injunction in this case is a prohibitory injunction and is not subject to the heightened standard that applies to mandatory injunctions. See Pashby v. Delia, 709 F.3d 307, 319 (4th Cir.2013) ("Prohibitory preliminary injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.").

39 Although Plaintiffs moved to amend their complaint after the hearing on the present motion (Doc. 116), the motion to amend has not been resolved.

40 To the extent the individual transgender Plaintiffs assert an unqualified right to use all multiple occupancy bathrooms, showers, and changing rooms under all circumstances (see Doc. 9 at 56), that issue is not currently before the court. Whether it will be at a later stage in this case, or as part of the United States' motion for preliminary injunction in the 425 case, remains for later determination.

End of Document

2009 WL 35237
United States District Court,
N.D. Indiana,
South Bend Division.

Amber CREED a/k/a Christopher Creed, Plaintiff
v.
FAMILY EXPRESS CORPORATION, Defendant.

No. 3:06–CV–465RM.
|
Jan. 5, 2009.

Attorneys and Law Firms

Dale M. Schowengerdt, Kevin Theriot, Alliance Defense Fund, Leawood, KS, for Defendant.

OPINION and ORDER

ROBERT L. MILLER, JR., Chief Judge.

***1** This cause is before the court on the motion of Family Express Corporation for summary judgment on Amber Creed's claims against it. Ms. Creed claims that while she was employed by Family Express, she was discriminated against based on her sex when Family Express terminated her for failing to conform with male stereotypes in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq* and Indiana Code § 22–9–1–3. For the reasons that follow, the court grants Family Express's summary judgment motion.

FACTUAL BACKGROUND

The following facts are taken from the summary judgment record and are viewed in the light most favorable to Ms. Creed, the nonmoving party. Ms. Creed suffers from gender identity disorder, a condition in which one exhibits a strong and persistent cross-gender identification (either the desire to be or insistence that one is of the other sex) and a persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision* (DSM–IV–TR) 576 (4th ed.2000). At birth, Ms. Creed's sex was classified as male. Over time though, she determined that her gender designation didn't correspond with her gender identity, which is female.

Before being hired by Family Express, Ms. Creed started her gender transition. In researching gender identity disorder, Ms. Creed learned that the standards of care for the treatment of the disorder include a therapeutic protocol called the real-life experience, which involves living full time as a member of the sex with which the person identifies. *See* Creed Dec. ¶ 13. After real-life experience in the desired role, the next phases of treatment include hormones of the desired gender and, finally, surgery to change the genitalia and other characteristics. *Id.* On April 26, 2005, Ms. Creed sought counseling relating to her gender transition and was diagnosed with gender identity disorder. Ms. Creed continued counseling for three sessions or so but stopped going because she couldn't afford the cost.

Employment History

Ms. Creed began working as a sales associate at Family Express Store # 51 in LaPorte, Indiana on February 14, 2005. When she applied for the position, Ms. Creed had a masculine demeanor and appearance and presented herself as Christopher Creed. Over the course of her employment, Ms. Creed continued to come to terms with her gender identity and gradually changed her appearance to look more feminine. Ms. Creed began wearing clear nail polish, trimming her eyebrows, and sometimes wore black mascara. In the fall of 2005, Ms. Creed started growing her hair out and began wearing it in a more feminine style. During this time, Ms. Creed also increasingly used the name "Amber." At all times during her employment, Ms. Creed wore Family Express's required unisex uniform consisting of a polo shirt and slacks.

***2** Ms. Creed says her store manager, Dan Arthur, knew she identified as a female, and he spoke with her on several occasions about her gender transition. Ms. Creed says Mr. Arthur was supportive and urged her to continue her employment as a female. Co-workers Janice Dankert and Justin Mosely also knew Ms. Creed identified as a female, and they discussed her gender transition on several occasions.

Ms. Creed says that she met or exceeded Family Express's legitimate performance expectations and received positive

feedback about her job performance throughout her employment. Ninety days after being hired, Ms. Creed received a raise and a rating of "very good" on her first professional development review. On her next review, Ms. Creed received another raise and a rating of "effective." Ms. Creed also received several positive customer comment cards and earned the "Greeter of the Month" award three times.

Family Express's Grooming Policy.

Family Express agrees that Ms. Creed performed her duties in a satisfactory manner, but maintains that she didn't fulfill the conditions of her employment adequately because she refused to follow the company's sex-specific dress code and grooming policy. Family Express requires all of its employees to "maintain a conservative, socially acceptable general appearance, conceal all tattoos, take out all body piercing[s], and wear uniforms neatly, with shirts tucked in and belts worn." The policy's sex-specific portion requires males to maintain neat and conservative hair that is kept above the collar and prohibits earrings or any other jewelry that accompanies body piercing. Females also must maintain neat and conservative hair, which needn't be above the collar, and may wear makeup and jewelry so long as it is conservative and business-like. The Human Resources Department oversees all final decisions about whether an employee's appearance conforms with the policy.

Family Express places great importance on its dress code and grooming policy, claiming that it is vital to the company's competitive advantage in the market. To impress this point upon employees, the Director of Operations explains during the two-day orientation for new sales associates that the policy is a non-negotiable part of employment. Family Express claims that the policy is strictly enforced and evenly applied, with no exceptions allowed, and it submits documentary evidence of employee discipline to support this argument.

On December 2, 2005, Ms. Creed received a copy of the Family Express employee handbook, which sets forth the conduct policy for retail employees. The conduct policy provides that all employees must wear an approved uniform with name tag, and the employee's general appearance must be clean, neat, and socially acceptable. The handbook references Family Express's dress code and grooming policy, which is kept in the operations manual maintained by the company. According to Ms. Creed, sales associates do not receive a copy of the operations manual or the dress code and grooming policy.

Customer Complaints About Ms. Creed's Appearance

*3 Ms. Creed never received any complaints from customers about her feminine appearance. Indeed, many customers were extremely supportive of her gender transition and pleased with her performance, even going so far as to fill out positive comment cards and tell her that they only felt comfortable while she was working. Ms. Creed also maintains that Mr. Arthur never told her to change her appearance or that she was in violation of the dress code and grooming policy. Likewise, Mr. Arthur never expressed any concern that Ms. Creed would be terminated because of her appearance.

Family Express, on the other hand, asserts that Mr. Arthur received more than fifty complaints about Ms. Creed's appearance, and so contacted Director of Human Resources Cynthia Carlson to tell her that Ms. Creed wasn't in compliance with the dress code and grooming policy. Mr. Arthur testified that he believed Ms. Creed was a good employee, but her failure to conform to the policy was affecting her ability to do her job and was alienating customers.

Director of Operations Mike Berrier testified that Family Express received a customer complaint about Ms. Creed's appearance on December 13, 2005. Mr. Berrier said the customer told him that she thought Ms. Creed was a wonderful employee, but that she felt uncomfortable with Ms. Creed's wearing makeup, nail polish, and a more feminine hairstyle. Mr. Berrier claimed that he received another complaint through the company website on either December 12 or 13, which stated that a store employee was dressing in a way that was a "male person, but female in appearance." Mr. Berrier also received an email from Ms. Carlson about her phone call from Mr. Arthur about Ms. Creed. Mr. Berrier noted that store employees never complained to him about Ms. Creed's appearance.

Ms. Creed's Termination

LeAnn McKinney, a district store manager, came to Store # 51 on or around December 13. Ms. McKinney observed Ms. Creed's feminine appearance and told her that her hairstyle looked good. Shortly thereafter, Mr. Arthur told Ms. Creed that she had been called into a meeting with Mr. Berrier. On December 14, Ms. Creed met with Mr. Berrier and Ms. Carlson. Mr. Berrier and Ms. Carlson told her that they had received a complaint about her feminine appearance and that she could no longer present herself in a feminine manner at work. Ms. Creed told them that she was transgender and going through the process of gender transition. In response, Ms. Carlson asked her whether "it would kill her" to appear masculine for eight hours a day and asked her why she applied for a job if she knew she was undergoing gender transition. At that point, Mr. Berrier and Ms. Carlson told her that if she didn't report to work "as a male" she would be terminated and that she had twenty-four hours to decide if she would present herself in a more masculine manner. When Ms. Creed told them she couldn't do so, they terminated her employment.

Ms. Creed contends that, during the meeting, neither Mr. Berrier nor Ms. Carlson told her that she was required to conform to the dress code and grooming policy. She alleges that the only statement made in reference to the policy was when Ms. Carlson said that she noticed Ms. Creed's hair was slightly below her collar. In response to this comment, Ms. Creed asked if it would be appropriate for Family Express to apply the female appearance standard to her and inquired about a possible relocation. Ms. Creed claims that Ms. Berrier and Mr. Carlson declined her requests.

***4** As Family Express sees it, Mr. Berrier and Ms. Carlson explained to Ms. Creed that she would have to cut her hair and not wear nail polish and makeup or resign from her position as a sales associate. Mr. Berrier testified that neither he nor Ms. Carlson told Ms. Creed that she couldn't present herself in a feminine manner at work and denied hearing Ms. Carlson ask Ms. Creed whether it would kill her to appear as a man at work. Mr. Berrier alleges that Ms. Creed said that she wouldn't be able to conform with the dress code and grooming policy but didn't explain why; at which point, Family Express considered Ms. Creed's actions a "voluntary termination."

At his deposition, Mr. Berrier testified about the kind of characteristics he considered to be more female, including hairstyle, body, physique, and voice. Mr. Berrier commented that he doesn't consider wearing makeup or painting fingernails to be masculine characteristics. Mr. Berrier also stated that Ms. Creed looked more female to him than usual at the termination meeting because of her makeup, hairstyle, and nail polish.

Following her termination, Ms. Creed posted the following blog entry, explaining that she had been fired earlier that day:

> "[t]hey told it was because I wasn't conforming to the dress-code policy of the company (which clearly is designed to separate gender associations and to maintain that the employees are 'socially acceptable by the majority of society' or in other words, politically correct.) ... I was given a choice: Either conform to the policy, which would mean that I would have to cut my hair and stop wearing makup [sic] (specifically stated in the meeting several times) and conform my gender to my birth sex ... or be terminated."

Procedural History

On March 10, 2006, Ms. Creed filed a charge of discrimination with the EEOC, complaining that she was treated in a discriminatory manner because of her sex. The EEOC issued a dismissal and notice of rights to Ms. Creed, and she filed her complaint seeking reinstatement to her former position or front pay in lieu of reinstatement, lost wages and employment-related benefits, compensatory damages, punitive damages, attorneys fees, costs, and pre-judgment interest on all sums recoverable.

Family Express moved to dismiss Ms. Creed's complaint for failure to state a claim upon which relief can be granted. The court granted the motion in part and dismissed Counts II and IV, in which Ms. Creed claimed that she was discriminated against on the basis of her transgender status, holding that discrimination against transsexuals because they are transsexuals isn't discrimination "because of sex" as prohibited by Title VII. The court denied the motion as to Counts I and III, in which Ms. Creed contends that she was discriminated against because Family Express perceived her "to be a man who did not conform with gender stereotypes associated with men in our society, or because it perceived Plaintiff to be a woman who did not conform with gender stereotypes associated with women in our society." Family

Express moved for summary judgment on the remaining counts, arguing that it didn't discriminate against Ms. Creed based on her sex but terminated her because she refused to comply with its sex-specific dress code and grooming policy.

DISCUSSION

***5** Summary judgment is appropriate when "the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). In deciding whether a genuine issue of material fact exists, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine issue of material fact exists when a rational trier of fact could not find for the nonmoving party even when the record as a whole is viewed in the light most favorable to the nonmoving party. *O'Neal v. City of Chicago*, 392 F.3d 909, 910–911 (7th Cir.2004). A nonmoving party cannot rest on mere allegations or denials to overcome a motion for summary judgment; "instead, the nonmovant must present definite, competent evidence in rebuttal." *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 924 (7th Cir.2004). Specifically, the nonmoving party must point to enough evidence to show the existence of each element of its case on which it will bear the burden at trial. *Celotex v. Catrett*, 477 U.S. 317, 322–323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Lawrence v. Kenosha Cty.*, 391 F.3d 837, 842 (7th Cir.2004).

Ms. Creed alleges that Family Express discriminated against her based on her sex by terminating her for failure to comply with male stereotypes in violation of Title VII as well as the Indiana Civil Rights Act. As noted in the order on Family Express's motion to dismiss, because Indiana's definition of discrimination is similar to 42 U.S.C.A. § 2000e–2(a), Indiana courts construe this provision consistent with Title VII. *Indiana Civil Rights Com'n v. Marion Cty. Sheriff's Dept.*, 644 N.E.2d 913, 915 (Ind.Ct.App.1994). Accordingly, the court applies the standard applicable in Title VII actions to Ms. Creed's claims under Indiana Code § 22–9–1–3.

Title VII prohibits an employer from harassing an employee "because of the employee's sex." *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir.2000) (*citing Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)); 42 U.S.C. § 2000e–2(a)(1). Title VII doesn't allow an employer to treat employees adversely because their appearance or conduct doesn't conform to stereotypical gender roles. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (holding that the plaintiff's employer discriminated against her by acting on the basis of a belief that she wasn't conforming to the stereotypes associated with her gender); *Doe by Doe v. City of Belleville, Ill. .*, 119 F.3d 563, 581 (7th Cir.1997) ("[A] man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex.' "), *vacated and remanded on other grounds, City of Belleville v. Doe*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

***6** Although discrimination because one's behavior doesn't conform to stereotypical ideas of one's gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not. *See Spearman v. Ford Motor Co.*, 231 F.3d at 1085; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir.1984). To sustain a claim based on sex stereotyping, then, a plaintiff must show that the employer actually relied on his or her gender in making an adverse employment decision. *See Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1064 (7th Cir.2003) (recognizing sex stereotyping claim under Title VII but holding that evidence didn't support the claim); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir.2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender nonconformity.").

Family Express's Dress Code and Grooming Policy

Family Express maintains that it didn't discriminate against Ms. Creed based on her gender because it relied on a uniformly applied, sex-specific dress code

and grooming policy. In support, Family Express cites a line of cases finding that gender-specific dress and grooming codes don't violate Title VII so long as the codes don't disparately impact one sex or impose an unequal burden. *See e.g., Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir.2004); *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir.1998); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2nd Cir.1996).

In *Austin v. Wal–Mart Stores, Inc.*, this court denied the plaintiff's sex discrimination claim, holding that Wal–Mart's policy requiring male employees to have short hair didn't violate Title VII. 20 F.Supp.2d 1254, 1256–1257 (N.D.Ind.1998); *see also Carroll v. Talman Fed. Sav. and Loan Ass'n of Chicago*, 604 F.2d 1028, 1031 (7th Cir.1979) (holding that dress code policy which required women to wear uniforms but only required men to require customary business attire discriminated against women in violation of Title VII). Similarly, in *Jespersen v. Harrah's Operating Company, Inc.*, the Ninth Circuit ruled that Harrah's Casino's grooming standards requiring women to wear makeup and styled hair and men to dress conservatively wasn't discriminatory because the policy didn't impose an unequal burden on either sex. 392 F.3d at 1078.

Family Express analogizes to *Jespersen*, claiming that its policy also applies to all employees, requires a unisex uniform, and doesn't single out males or females. Moreover, Family Express argues that its policy is justified in commonly accepted social norms and is reasonably related to its business needs. Like the policy in *Jespersen*, the dress code and grooming policy in this case doesn't take male or female mannerisms into account or appear to have a disparate impact on either sex. Likewise, the policy only applies to physical appearance and doesn't require an employee to behave in a certain manner. Accordingly, Family Express's requirement that male and female employees adhere to grooming standards matching their gender doesn't discriminate on the basis of sex. *Cf. Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 n. 7 (9th Cir.2001) (explaining that reasonable regulations that require male and female employees to conform to different dress and grooming standards do not necessarily constitute actionable discrimination under Title VII).

*7 Regardless of whether Family Express's policy is valid under Title VII, however, Ms. Creed may succeed on her sex stereotyping claim if she can present sufficient evidence from which a rational jury could infer intentional discrimination. *Rogers v. City of Chicago*, 320 F.3d at 753; *see also Doe by Doe v. City of Belleville, Ill.*, 119 F.3d at 594 ("The fact that one motive was permissible does not exonerate the employer from liability under Title VII; the employee can still prevail so long as she shows that her sex played a motivating role in the employer's decision."). Family Express can't shield such discrimination behind a valid dress code and grooming policy. *See e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224–1227 (10th Cir.2007) (finding that employer's requirement that employees use restrooms matching their biological sex didn't discriminate on the basis of sex but that plaintiff may demonstrate employer's alleged concern regarding restroom usage was pretext for discrimination based on the plaintiff's failure to conform to gender stereotypes). Even if the policy itself is non-discriminatory, Ms. Creed may prove that Family Express discriminated against her if she can show that her gender, not grooming policy violations, actually motivated her termination. *See e.g., Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir.1997) (an employee can prevail under Title VII so long as an illicit criterion played a motivating role in her discharge, even if another, legitimate criterion also played a role).

Ms. Creed's Proof of Sex Stereotyping

Ms. Creed doesn't challenge Family Express's right to maintain a fair and reasonable appearance code, but rather, she claims that Family Express terminated her because she failed to conform to stereotypes about how a man should appear. Ms. Creed may establish her sex stereotyping claim under Title VII by either the "indirect method" or the "direct method" of proof. *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860 (7th Cir.2007); *see also Kampmier v. Emeritus Corp.*, 472 F.3d 930, 939 (7th Cir.2007).

Indirect Method of Proof

Under the indirect method, Ms. Creed may establish a prima facie case of discrimination by demonstrating that: (1) she belongs to a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment

action; and (4) Family Express treated similarly situated female employees more favorably. *See Spearman v. Ford Motor Co.*, 231 F.3d at 1087 (*citing Greenslade v. Chicago Sun–Times, Inc.*, 112 F.3d 853, 863 (7th Cir.1997)). Upon such a showing, the burden shifts to Family Express to articulate a legitimate nondiscriminatory reason for terminating Ms. Creed. *Hossack v. Floor Covering Assocs.*, 492 F.3d at 860. If Family Express meets that burden, Ms. Creed bears the ultimate burden to show that Family Express's proffered reason is a pretext for sex discrimination. *Id* (*citing Barricks v. Eli Lilly and Co.*, 481 F.3d 556, 559 (7th Cir.2007)).

***8** Although the court has referred to Ms. Creed as female in this opinion in deference to her self-identification, she must be considered male for the purposes of Title VII. *See Spearman v. Ford Motor Co.*, 231 F.3d at 1084 ("Congress intended the term 'sex' to mean 'biological male or biological female.' ") (citation omitted). The parties don't dispute that Ms. Creed is a member of a protected class based on her gender or that her termination was an adverse employment action. Similarly, both sides agree that Ms. Creed performed her job satisfactorily, apart from her violation of the dress code and grooming policy. Ms. Creed hasn't produced evidence of a similarly situated female in violation of the dress code and grooming policy whose treatment could be compared to hers. Accordingly, Ms. Creed must rely on the direct method of proof. *See Hossack v. Floor Covering Assocs.*, 492 F.3d at 860.

Direct Method of Proof

To establish a prima facie case of sex stereotyping under the direct method, Ms. Creed must present evidence, either direct or circumstantial, that she wouldn't have been terminated but for her failure to conform to male stereotypes. *See Steinhauer v. DeGolier*, 359 F.3d 481, 485 (7th Cir.2004). Direct evidence essentially requires an admission by the decisionmaker that the adverse employment action was "based on the prohibited animus." *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994); *see also Rudin v. Lincoln Land Comm. College*, 420 F.3d 712, 720 (7th Cir.2005); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 576 (7th Cir.2001) (noting that admissions of discriminatory intent are rarely encountered).

In addition to direct evidence, Ms. Creed may also proceed under the direct method by presenting a "convincing mosaic" of circumstantial evidence that points to a discriminatory reason for her termination. *Ptasznik v. St. Joseph's Hosp.*, 464 F.3d 691, 695 (7th Cir.2006); *see also Adams v. Wal–Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir.2003). Unlike direct evidence, circumstantial evidence "need not directly demonstrate discriminatory intent, but rather it 'allows a jury to infer intentional discrimination by the decisionmaker' from suspicious words or actions.' " *Hossack v. Floor Covering Assocs.*, 492 F.3d at 860 (*citing Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir.2003)). There are three types of circumstantial evidence of particular relevance when establishing an inference of intentional discrimination: (1) dubious coincidences such as suspicious timing, ambiguous statements, and comments or behavior directed at employees in the protected group; (2) evidence that the employer systematically treated similarly situated employees outside the protected group better; and (3) evidence that the plaintiff was qualified for the job and the employer's reason for treating her differently was a mere pretext for discrimination. *See Hassan v. Foley & Lardner LLP*, 2008 WL 5205818 at *8 (7th Cir. Dec.15, 2008) (citing *Troupe v. May Dep't Stores Co.*, 20 F.3d at 736).

***9** Ms. Creed offers a variety of facts that purportedly create an inference of discrimination. She relies heavily on the comments made by Mr. Berrier and Ms. Carlson during the termination meeting. Ms. Creed alleges that after she informed Mr. Berrier and Ms. Carlson that she was going through a gender transition, Ms. Carlson asked her whether "it would kill [her] to appear masculine for eight hours a day" and why she applied for the job if she knew she would be undergoing a gender transition. Ms. Creed says she was told that she had to report to work "as a male." Ms. Creed also points to Mr. Berrier's deposition testimony in which he admitted that he thought Ms. Creed didn't look like the same person because of her feminine appearance, and he didn't consider wearing makeup or having long hair to be masculine characteristics.

These statements, Ms. Creed argues, reveal that Family Express terminated her because her mannerisms didn't conform with its expectations of how a man should look. Family Express claims Mr. Berrier and Ms. Carlson simply were articulating the fact that Ms. Creed was in violation of its dress code and grooming policy.[1]

Construing the parties' contradictory statements in Ms. Creed's favor, this evidence alone can't establish that Family Express wouldn't have terminated Ms. Creed but for her gender. While Ms. Carlson's comments, in particular, were insensitive of Ms. Creed being in the process of coming to terms with her gender identity, these comments in and of themselves don't establish that Family Express fired Ms. Creed because she wasn't "male" enough.

The statements simply do not allow a trier of fact to decide that Family Express acted on the basis of a prohibited purpose—Ms. Creed's failure to embody sexual stereotypes—as opposed to a legitimate non-discriminatory purpose—breach of the grooming policy—or even for what is, under today's law, a legitimate discriminatory purpose—because Ms. Creed was transgender. Remarks with such ambiguity do not amount to proof under the direct method sufficient to create a genuine issue of material fact. See, e.g., *Petts v. Rockledge Furniture,* 534 F.3d 715, 720–722 (7th Cir.2008) (reference to plaintiff as "mother of the store" not proof of gender bias); *Tubergen v. St. Vincent Hosp. and Health Care Ctr. ., Inc.,* 517 F.3d 470, 475 (7th Cir.2008) ("old guard" not necessarily reference to chronological age).

Ms. Creed also relies on the timing of her termination as evidence of discriminatory animus, pointing out that she was fired shortly after her co-workers and store manager began to notice changes in her appearance. Family Express claims it received numerous complaints about her appearance, but Ms. Creed wasn't notified of these complaints, or that she was in violation of the company's policy, until the day of her termination. Mr. Berrier and Ms. Carlson fired Ms. Creed on the spot after she informed them that she couldn't conform her appearance to the male standard. Mere temporal proximity alone, however, is insufficient to establish a genuine issue of material fact. *See Tubergen v. St. Vincent Hosp. & Heath Care Ctr., Inc.,* 517 F.3d 470, 473–474 (7th Cir.2008); *see also Wyninger v. New Venture Gear, Inc.,* 361 F.3d 965, 981 (7th Cir.2004). As a result, Ms. Creed must rely on evidence in addition to the timing of her termination in order to proceed under the direct method of proof.

***10** To meet this burden, Ms. Creed alleges that Family Express's explanation for her termination was merely a pretext for discrimination. First, she claims that Family Express gave shifting reasons for her termination. According to Ms. Creed, Family Express initially told her that it called the termination meeting because it received customer complaints about her appearance. In support, Family Express submitted affidavits from Ms. Creed's co-workers claiming that her appearance was affecting her performance. Despite these representations, Family Express ultimately told Ms. Creed that she was being fired for violating the dress code and grooming policy. Ms. Creed disputes the inference that her performance was unsatisfactory, noting that she received positive reviews and the greeter of the month on numerous occasions. Family Express agrees that it didn't fire Ms. Creed based on her performance: the complaints merely alerted Family Express to Ms. Creed's violation of its policy, which is strictly enforced regardless of whether the company receives complaints about an employee.

Second, Ms. Creed argues that a negative inference should be drawn from Family Express's inability to produce copies of the alleged customer complaints during discovery. Family Express couldn't produce copies of the complaint Ms. Carlson received via the internet because the claims website had been deleted, and Mr. Berrier couldn't locate the notes which documented the customer complaint received via telephone. There is no evidence of bad faith destruction of documents, and the complaints themselves weren't relevant to Family Express's decision to enforce its dress code and grooming policy.

To prove pretext, Ms. Creed must establish that Family Express gave a dishonest explanation for its actions. *See Grube v. Lau Indust., Inc.,* 257 F.3d 723, 730 (7th Cir.2001) (pretext "means something worse than a business error; pretext means deceit used to cover one's tracks."); *Kulumani v. Blue Cross Blue Shield Ass'n,* 224 F.3d 681, 684 (7th Cir.2000). If Family Express acted in good faith, the court can't second-guess its actions regardless of whether those actions constitute a prudent business decision. *Leonberger v. Martin Marietta Materials, Inc.,* 231 F.3d 396, 399 (7th Cir.2000); *see also Green v. Nat'l Steel Corp.,* 197 F.3d 894, 899 (7th Cir.1999).

Ms. Creed hasn't shown that Family Express's decision to terminate her was a lie or had no basis in fact. *See Mills v. Health Care Serv. Corp.,* 171 F.3d 450, 458 (7th Cir.1999). Family Express presented evidence that it applies its dress code and grooming policy uniformly to all employees; in fact, Family Express terminated several other employees

for policy violations. Ms. Creed might argue that real-life experience as a member of the female gender is an inherent part of her non-conforming gender behavior, such that Family Express's dress code and grooming policy discriminates on the basis of her transgender status, but rightly or wrongly, Title VII's prohibition on sex discrimination doesn't extend so far. *See Etsitty v. Utah Transit Auth.*, 502 F.3d at 1224. As already explained, Ms. Creed's Title VII claim must rest entirely on the theory of protection as a man who fails to conform to sex stereotypes. While the court may disagree with Family Express that a male-to-female transsexual's intent to present herself according to her gender identity should be considered a violation of its dress code and grooming policy, that is not the issue the law places before the court. The summary judgment record contains too little evidence to permit an inference that Family Express didn't actually terminate Ms. Creed for this legally permissible reason. The totality of Ms. Creed's evidence creates no genuine issue of material fact that Family Express terminated her based on her gender.

***11** Ms. Creed hasn't presented sufficient evidence of discriminatory motivation which would allow a jury to reasonably infer that Family Express terminated her for failing to meet its masculine stereotypes. Ms. Creed hasn't carried her burden on her sex discrimination claim, and Family Express is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, the court GRANTS the defendant's motion for summary judgment [Doc. No. 34]. The clerk shall enter judgment accordingly.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 35237, 105 Fair Empl.Prac.Cas. (BNA) 329, 91 Empl. Prac. Dec. P 43,422

Footnotes

1 Family Express rebuts Ms. Creed's claim that Mr. Berrier and Ms. Carlson never explicitly told her that she in violation of the dress code by evidence of her blog post from the day she was terminated. In that post, Ms. Creed stated that she lost her job, and "[t]hey told me it was because I wasn't conforming to the dress-code policy of the company ...." Ms. Creed further acknowledged that she was given a choice to either conform to the policy or be terminated.

2003 WL 21525058
Only the Westlaw citation is currently available.
United States District Court,
S.D. Indiana,
Indianapolis Division.

John A. SWEET, Plaintiff,
v.
MULBERRY LUTHERAN HOME, Defendant.

No. IP02–0320–C–H/K.
|
June 17, 2003.

Attorneys and Law Firms

John A. Sweet, West Lafayette, IN, for Plaintiff.

Gregory W. Moore, Hall, Render, Killian, Heath & Lyman, Indianapolis, IN, for Defendant.

ENTRY ON MOTION FOR SUMMARY JUDGMENT

DAVID F. HAMILTON, District Judge.

***1** Plaintiff John Sweet was fired from his job as a licensed practical nurse for defendant Mulberry Lutheran Home. Sweet contends that Mulberry violated Title VII of the Civil Rights Act of 1964 in two ways: (1) by firing him because he intended to change his sex from male to female, and (2) by filing a complaint with state nursing authorities to retaliate against him for complaining to the EEOC about his firing. Mulberry has moved for summary judgment, which the court grants. First, controlling precedent of the Seventh Circuit holds that Title VII does not prohibit discrimination on the basis of a person's intention to change sex. Second, the undisputed evidence shows that Mulberry fired him because its believed he had abused patients, not because of his intentions regarding his sex or his complaints. Third, the undisputed evidence shows that the person who filed the complaint against Sweet did not know of his EEOC charge and therefore could not have been motivated by a desire to retaliate against him for that conduct. The court also dismisses Sweet's state law claims without prejudice because all federal claims are being dismissed before trial.

Summary judgment is warranted only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). To defeat a properly supported motion for summary judgment, the party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.,* 477 U.S. at 324, quoting Fed.R.Civ.P. 56(e). The court considers the record evidence in the light reasonably most favorable to the non-moving party, in this case plaintiff Sweet.

I. *Undisputed Facts*

Mulberry is a long-term health care facility located in Mulberry, Indiana. At the times relevant to Sweet's claims, Annette Galvin was employed as Director of Nursing. As part of her duties, Galvin supervised Sweet, who was employed as a licensed practical nurse at Mulberry.

In September 2001, Galvin became aware of three incidents that formed the basis of the decision to terminate Sweet's employment. All three incidents occurred during Sweet's shifts on September 11 and 12, 2001. Sweet worked his regularly scheduled second shift on September 11, 2001. At Galvin's request, Sweet agreed to stay on for the night shift as a supervisor to fill in for an unexpected absence. In the first incident, a Mulberry resident was left outside until approximately 2:45 a.m. on the morning of September 12, 2001. In the second incident, Sweet violated Mulberry policy by failing to assess a resident who had fallen from bed. In the third incident, Sweet refused to change a resident's portable oxygen tank. These incidents each reflected substandard practice and poor judgment. Mulberry has always contended that these incidents were the reason it fired Sweet.

***2** After Sweet was fired, Galvin prepared and filed a complaint against Sweet with the Indiana Health Professions Bureau. Galvin took this step because of her obligation as a Registered Nurse to report instances of potential patient abuse and neglect based on the three incidents described in the preceding paragraph. At the time Galvin filed that complaint with the state agency, Galvin was unaware that Sweet had filed a Charge of Discrimination with the Equal Employment Opportunity Commission.

Sweet filed two complaints with the EEOC. The first complaint was filed on October 12, 2001 alleging that his firing amounted to discrimination on the basis of sex because Mulberry learned of his planned sex change. The second complaint was filed on November 13, 2001, alleging that Mulberry had retaliated against Sweet for filing the first EEOC complaint by filing Galvin's complaint with the state nursing agency.

II. *Title VII Claim Based on Intent to Change Sex*

Title VII makes it an unlawful employment practice to discriminate against an individual on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e–2(a). As Sweet testified in his deposition, his claim of discrimination is that he was terminated because of his intent to change his sex. The Seventh Circuit has rejected similar claims, and its decisions require summary judgment in favor of Mulberry on this claim.

In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.984), a male airline pilot was fired when, following sex reassignment surgery, she attempted to return to work as a woman. The district court had found in favor of the plaintiff, but the Seventh Circuit reversed. The Seventh Circuit considered whether the word "sex" in Title VII meant not only biological sex, *i.e.*, male or female, but also "sexual preference" and "sexual identity." The Seventh Circuit concluded that sex meant "biological sex." The *Ulane* court stated:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e–2(a)(1) strongly reinforces the view that the section means nothing more than the plain language implies.

742 F.2d at 1085. Under *Ulane,* therefore, discrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not sexual orientation or sexual identity, including an intention to change sex.

***3** In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), the Supreme Court held that discrimination on the basis of sex or gender stereotyping was discrimination because of "sex" within the meaning of Title VII. It could be argued, therefore, that the narrow approach of *Ulane*—that "sex" as used in Title VII meant biological sex and nothing more —is no longer viable. But this is not the case:

> Long after *Price Waterhouse* was decided, courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person's "sex."

Oiler v. Winn–Dixie Louisiana, Inc., 2002 WL 31098541, *5 n. 59 (E.D.La. Sept. 16, 2002) (collecting cases). In *Oiler,* for example, the plaintiff was terminated because he was a man with a sexual or gender identity disorder who publicly disguised himself as a woman, and was held outside a protected class under Title VII.

One of the decisions cited in *Oiler* was *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir.2000), which was also decided after *Price Waterhouse.* In *Spearman,* the Seventh Circuit affirmed summary judgment for an employer where a male homosexual employee alleged he had been sexually harassed by other male workers who taunted his feminine behavior. The Seventh Circuit adhered to the reasoning of *Ulane:*

> Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation. [citing *Ulane*]. Therefore, harassment based solely upon a person's sexual preference

> or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.

231 F.3d at 1084. *Spearman* thus shows the continuing vitality of the rule in *Ulane* in the Seventh Circuit, and though *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes, that was not the nature of Sweet's claim in this case. [1]

Accordingly, Sweet's intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex.

Mulberry would still be entitled to summary judgment on this claim even if Sweet's theory were legally actionable. Sweet could prove his discrimination claim under Title VII either by presenting direct evidence of prohibited discrimination or by relying on the indirect, "burden-shifting" method of proof outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993).

Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon presumption or inference. *Plair v. E.J. Brach & Sons, Inc.,* 105 F.3d 343, 347 (7th Cir.1997). The direct evidence must show that the defendant said or did something indicating discriminatory animus with regard to the specific employment decision in question. *Id.* Sweet has not offered direct evidence of discrimination based on his intent to change his sex.

***4** Under the indirect method of proof in *McDonnell Douglas,* the Supreme Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory treatment cases." *St. Mary's Honor Ctr.,* 509 U.S. at 506. The test consists of three steps. First, the plaintiff must come forward with evidence of a *prima facie* case of discrimination, meaning facts which, if not otherwise explained, would support an inference of discrimination. Second, the defendant may respond by stating a legitimate, non-discriminatory reason for the adverse employment action. Finally, if a legitimate, non-discriminatory reason is offered, the plaintiff must come forward with evidence that would allow a reasonable trier of fact to find that the stated reason is not the true one, but only a pretext for discrimination. See *McDonnell Douglas,* 411 U.S. at 802–04; *DeLoach v. Infinity Broadcasting,* 164 F.3d 398, 401 (7th Cir.1999).

To establish a *prima facie* case of sex discrimination under *McDonnell Douglas,* Sweet must come forward with evidence that: (1) he was a member of a protected group, (2) he was doing the job well enough to meet his employer's legitimate expectations, (3) despite his adequate job performance, he was subjected to an adverse employment action, and (4) he was treated less favorably than similarly situated employees who were not planning to change their gender. See *Markel v. Bd. of Regents of Univ. of Wisconsin System,* 276 F.3d 906, 911 (7th Cir.2002); *Bragg v. Navistar Intern. Transp. Corp.,* 164 F.3d 373, 376 (7th Cir.1998).

Even if the court assumes that Sweet was a member of a protected group and has otherwise met the elements of a *prima facie* case, Mulberry has offered a legitimate, non-discriminatory reason for firing him: abuse of patients. Sweet has no evidence that this reason was pretext for discrimination. This mode of analysis is occasionally undertaken because the issue of satisfactory job performance, which lies at the heart of many employment cases, must be analyzed in detail at both stages of the *McDonnell Douglas* test and "it is therefore simpler to run through that analysis only once." *Simmons v. Chicago Bd. of Education,* 289 F.3d 488, 492 (7th Cir.2002), citing *Gordon v. United Airlines, Inc.,* 246 F.3d 878, 886 (7th Cir.2001).

To avoid summary judgment on the issue of pretext, Sweet must come forward with evidence that would allow a reasonable trier of fact to find that Mulberry's proffered reason for firing him was a lie. *Jordan v. Summers,* 205 F.3d 337, 343 (7th Cir.2000); *Rand v. CF Industries, Inc.,* 42 F.3d 1139, 1145 (7th Cir.1994). Evidence that an employer made an erroneous decision or used poor business judgment is not sufficient to establish pretext; the issue is the honesty of the employer's stated reason. See *Richter v. Hook SupeRx, Inc.,* 142 F.3d 1024, 1031–32 (7th Cir.1998).

Mulberry contends that it terminated Sweet's employment because of the three instances of abusive and inadequate care described above. Such actions are obviously a

legitimate and non-discriminatory reason for firing a licensed practical nurse. Sweet disagrees with Mulberry's view of the facts, but he has not presented actual evidence disputing those incidents. Sweet's response to Mulberry's argument on this point suffers from two deficiencies. First, his response is not presented in the form of evidence, even though Sweet was notified of that requirement of Rule 56(e) of the Federal Rules of Civil Procedure and even though the court gave him an extra opportunity to meet that requirement. See *Gilty v. Village of Oak Park,* 919 F.2d 1247, 1255 n. 13 (7th Cir.1990) (explaining that statements that are "neither notarized nor made under penalty of perjury [do] not comply with Rule 56(e) ... As such, we can simply ignore them."); *Martz v. Union Labor Life Ins. Co.,* 757 F.2d 135, 138 (7th Cir.1985) ("When a party seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence."). Second, the content of his response (even if it had been presented as evidence) is nothing more than Sweet's own assessment of his job performance. Such assessments are not sufficient to establish a genuine issue of fact as to the *honesty* of Mulberry's stated reason for firing him. *Fortier v. Ameritech Mobile Communications, Inc.,* 161 F.3d 1106, 1114 (7th Cir.1998) ("even if [a plaintiff's] personal appraisal contains true statements about his accomplishments, [an employer is] entitled to determine that the deficiencies in his performance outweighed such accomplishments").

***5** In sum, therefore, Sweet's claim of discrimination is not cognizable here. Even if it were, he has not shown direct evidence of discrimination or that Mulberry's stated reason for firing him was only a pretext for discrimination.

III. *Claim of Retaliation*

In addition to prohibiting certain forms of discrimination in the workplace, Title VII provides that an employer may not take an adverse employment action or discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a). Sweet alleges that Mulberry engaged in unlawful retaliation when, after he filed his EEOC charge of discriminatory firing, Mulberry reported the incidents of patient abuse to the state licensing agency.

Mulberry argues first that it is entitled to summary judgment because Sweet did not oppose conduct prohibited by Title VII. Mulberry relies on *Hamner v. St. Vincent Hospital and Health Care Center,* 224 F.3d 701, 706–07 (7th Cir.2000), which held that a homosexual employee's complaints to management about harassment by male co-workers did not cover any practice prohibited by Title VII, so that his complaints had not "opposed any practice made an unlawful employment practice by this subchapter." His complaints therefore could not support a retaliation claim, the Seventh Circuit concluded, and affirmed summary judgment for the employer.

By its plain terms, however, the retaliation provision of Title VII also outlaws retaliation against a person for simply filing a charge of discrimination with the EEOC. *Hamner* did not involve an EEOC charge. Sweet's action of filing an EEOC charge about what he honestly believed was unlawful discrimination falls squarely within the terms of 42 U.S.C. § 2000e–3(a). See *Clark County School Dist. v. Breeden,* 532 U.S. 268, 271 (2001) (distinguishing between two prongs of retaliation statute, and rejecting claim based on filing of EEOC charge on grounds of causation, not because charge was actually unreasonable); see also *Fine v. Ryan Int'l Airlines,* 305 F.3d 746, 752 (7th Cir.2002) (employee need not prevail on underlying claim to prove retaliation; all that is required is reasonable, good faith belief that practice violated Title VII).

Nevertheless, Mulberry is entitled to summary judgment on the retaliation claim because a reasonable trier of fact could not find that Galvin filed the complaint in retaliation for Sweet's filing of his EEOC charge. Sweet has produced no direct evidence that Galvin filed the licensing complaint for retaliatory reasons. Sweet also has not produced circumstantial evidence that would support an inference of retaliatory intent. Sweet has not provided any evidence that he, and not any similarly-situated employee who did not file an EEOC complaint, was subjected to adverse action. What's more, Mulberry has shown without contradiction from Sweet that Galvin had a legitimate reason for filing the licensing complaint, and that Galvin was not even aware of the first EEOC filing when she presented the licensing complaint. If Galvin did not know about the EEOC charge, then it could not have motivated her decision. *Alexander v. Wisconsin Dept. of Health and Family Services,* 263 F.3d 673, 86 (7th Cir.2001) (plaintiff's inability to provide evidence that any of the actors involved in his suspension had

any knowledge of his complaint before his suspension, prevents an inference of pretext to be drawn from the timing of his suspension and eventual termination); see generally *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640, 644 (7th Cir.2002) (explaining standard for summary judgment as applied to retaliation claims). Accordingly, Mulberry's motion for summary judgment must be granted as to Sweet's claim of retaliation.

IV. *Pendent State Law Claims*

***6** Sweet's complaint includes claims under Indiana state law for defamation and wrongful termination. This court has jurisdiction over such claims by virtue of 28 U.S.C. § 1367(a), which provides that, in any action in which the district courts "have original jurisdiction," they may exercise supplemental jurisdiction over state law claims related to the federal claim. Pursuant to 28 U.S.C. § 1367(a), "judicial power to hear both state and federal claims exists where the federal claim has sufficient substance to confer subject matter jurisdiction on the court, and the state and federal claims derive from a common nucleus of operative facts." *Ammerman v. Sween,* 54 F.3d 423, 424 (7th Cir.1995), citing *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966). When a district court dismisses the claims over which it had original jurisdiction, it has discretion either to retain jurisdiction over the supplemental claims or to dismiss them. *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 717 (7th Cir.1998).

Discretion notwithstanding, its "well established that if federal claims are dismissed before trial, the federal district courts should generally dismiss the state law claims as well." *Vukadinovich v. Board of Sch. Trustees of the Michigan City Area Schs.*, 978 F.2d 403, 415 (7th Cir.1992). There is no reason in this action why the general rule should not be followed. The court will relinquish jurisdiction over the supplemental claims under Indiana law pursuant to § 1367(c).

V. *Request to Amend Complaint to Add Claims*

Sweet stated in his response to Mulberry's motion for summary judgment that, if Mulberry persists in its motion for summary judgment, he would like to amend his complaint by adding a claim for wrongful endangerment, presumably asserted under Indiana state law.

This sort of conditional request to amend pleadings only in the event of an adverse ruling on a motion is not appropriate. It disrupts the orderly development of the action and is untimely in any event. See *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir.1995). Apart from the question of timing, the content of the proposed additional claim shows it to be based on asserted violations of Indiana state law. As with the state law claims already pled, the court has no reason to exercise jurisdiction over the proposed new claim. Leave to amend the complaint is therefore denied.

VI. *Conclusion*

The undisputed evidence in this case shows that Sweet's behavior did not place him within the protection of Title VII, that Mulberry terminated Sweet's employment for a legitimate, non-discriminatory reason (poor quality of nursing care and/or supervision), and that there was no retaliation against Sweet through the subsequent filing of a licensing complaint with State authorities. Because the burden at this point rests with Sweet to "inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered," *Liberles v. County of Cook,* 709 F.3d 1122, 1126 (7th Cir.1983), and because Sweet has not met his burden in these circumstances, Mulberry's motion for summary judgment must be granted. The dismissal of the federal claims shall be with prejudice, while the dismissal of the pendent state law claims shall be without prejudice, and Sweet's contingent request to amend his complaint by adding certain claims under state law is denied.

***7** Final judgment shall be entered accordingly.

So ordered.

JUDGMENT

The court, having this day granted defendant's motion for summary judgment, it is hereby ORDERED, ADJUDGED, AND DECREED plaintiff John A. Sweet's claims under federal law against defendant Mulberry Lutheran Home are DISMISSED WITH PREJUDICE, and plaintiff John A. Sweet's claims arising under state law against defendant Mulberry Lutheran Home are DISMISSED WITHOUT PREJUDICE as the

court relinquishes jurisdiction. The costs of this action are assessed against the plaintiff.

All Citations

Not Reported in F.Supp.2d, 2003 WL 21525058

Footnotes

1 For purposes of its motion for summary judgment, Mulberry does not concede that Sweet's cross-dressing or intended sex change played any part in its decision to fire him. Sweet argues otherwise but has offered no evidence to support his claim.

End of Document

2002 WL 31098541
United States District Court, E.D. Louisiana.

Peter OILER
v.
WINN–DIXIE LOUISIANA, INC.

No. Civ.A. 00–3114.
|
Sept. 16, 2002.

ORDER AND REASONS

AFRICK, J.

***1** Plaintiff, Peter Oiler ("Oiler"), filed this employment discrimination action to recover damages from his former employer, Winn–Dixie Louisiana, Inc. ("Winn–Dixie"), pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), and the Louisiana antidiscrimination statute, La. R.S. 23:332(A)(1) (West 2002).[1] Plaintiff has filed a motion for summary judgment with respect to liability issues.[2] Defendant has filed a cross motion for summary judgment.[3] Both motions are opposed and both parties have filed reply memoranda.[4]

At issue is whether discharging an employee because he is transgendered and a crossdresser is discrimination on the basis of "sex" in violation of Title VII. For the following reasons, the motion of defendant for summary judgment is GRANTED and the motion of plaintiff for summary judgment is DENIED.

Facts

In 1979, plaintiff, Peter Oiler, was hired by defendant, Winn–Dixie, as a loader.[5] In 1981, he was promoted to yard truck driver and he later became a road truck driver.[6] As a road truck driver, plaintiff delivered groceries from Winn–Dixie's grocery warehouse in Harahan, Louisiana, to grocery stores in southern and central Louisiana and Mississippi.[7]

Plaintiff is a heterosexual man who has been married since 1977.[8] The plaintiff is transgendered.[9] He is not a transsexual and he does not intend to become a woman.[10] Plaintiff has been diagnosed as having transvestic fetishism with gender dysphoria[11] and a gender identity disorder.[12] He is a male crossdresser.[13] The term crossdresser is used interchangeably with transvestite.[14]

When he is not at work, plaintiff appears in public approximately one to three times per month[15] wearing female clothing and accessories.[16] In order to resemble a woman, plaintiff wears wigs and makeup, including concealer, eye shadow, foundation, and lipstick.[17] Plaintiff also wears skirts, women's blouses, women's flat shoes, and nail polish.[18] He shaves his face, arms, hands, and legs.[19] He wears women's underwear and bras and he uses silicone prostheses to enlarge his breasts.[20] When he is crossdressed as a woman, he adopts a female persona and he uses the name "Donna".[21]

Prior to 1996, plaintiff only crossdressed at home. After 1996, assuming the identity of "Donna", plaintiff crossdressed as a woman in public.[22] While crossdressed, he attended support group meetings, dined at a variety of restaurants in Kenner and Metairie, visited night clubs, went to shopping malls, and occasionally attended church services.[23] He was often accompanied by his wife and other friends, some of whom were also crossdressed.[24]

On October 29, 1999, plaintiff told Gregg Miles, a Winn–Dixie supervisor, that he was transgendered.[25] He explained that he was not a transsexual and that he did not intend to become a woman.[26] However, he told Miles that for a number of years he had been appearing in public at restaurants and clubs while crossdressed.[27] He told Miles that while he was crossdressed, he assumed the female role of "Donna".[28] He asked whether he would be terminated if Michael Istre, the president of Winn Dixie Louisiana, Inc., ever saw plaintiff crossdressed as a woman.[29]

***2** On the same day, Miles had a private meeting with Istre.[30] Miles told Istre that plaintiff was transgendered.

Miles explained that for several years the plaintiff had been appearing in public crossdressed as a woman.[31] Istre contacted Winn–Dixie's counsel for legal advice.[32]

Istre and Miles made the decision to terminate the plaintiff's employment with Winn–Dixie.[33] On November 1, 1999, Istre and Miles asked Oiler to resign.[34] Several times after he was initially asked to resign, plaintiff met with Winn–Dixie managers who gave him a deadline by which he would have to resign.[35] The deadline was extended a number of times.[36] On January 5, 2000, when plaintiff did not resign voluntarily, Winn–Dixie discharged him .[37] The reason plaintiff was terminated was because he publicly adopted a female persona and publicly crossdressed as a woman. Specifically, Istre and Miles, acting for Winn–Dixie, terminated Oiler because of his lifestyle, i.e., plaintiff publicly crossdressed for several years by going to restaurants and clubs where he presented himself as "Donna", a woman.[38] Istre and Miles believed that if plaintiff were recognized by Winn–Dixie customers as a crossdresser, the customers, particularly those in Jefferson Parish where plaintiff worked, would disapprove of the plaintiff's lifestyle.[39] Istre and Miles thought that if Winn–Dixie's customers learned of plaintiff's lifestyle, i.e., that he regularly crossdressed and impersonated a woman in public, they would shop elsewhere and Winn–Dixie would lose business.[40] Plaintiff did not crossdress at work and he was not terminated because he violated any Winn–Dixie on-duty dress code.[41] He was never told by any Winn–Dixie manager that he was being terminated for appearing or acting effeminate at work, i.e., for having effeminate mannerisms or a high voice.[42] Nor did any Winn–Dixie manager ever tell plaintiff that he did not fit a male stereotype or assign him work that stereotypically would be performed by a female.[43]

Plaintiff received a "Dismissal and Notice of Rights" issued by the United States Equal Employment Opportunity Commission.[44] Plaintiff subsequently filed this lawsuit.[45]

Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).[46] "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). To defeat a properly supported motion for summary judgment, the party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." ' *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2552, *quoting* F.R.Civ.P. 56(e); *Auguster v. Vermilion Parish School Board*, 249 F.3d 400, 402 (5th Cir.2001).

Issues Presented

***3** Plaintiff alleges two grounds in support of his motion for summary judgment. First, plaintiff argues that Title VII prohibits employment discrimination on the basis of sexual stereotyping and that defendant's termination of him for his off-duty acts of crossdressing and impersonating a woman is a form of forbidden sexual stereotyping.[47] Second, plaintiff contends that he is a victim of disparate treatment in violation of Title VII. He alleges that he was terminated because he crossdressed while off-duty, although other similarly situated female employees were not discharged.[48]

Defendant denies that plaintiff was fired for failing to conform to a male stereotype. It asserts that plaintiff's activities as a male who publicly pretended to be a female do not fall within Title VII's protection. As to plaintiff's

disparate treatment claim, defendant contends that the there is no evidence in the record that any female employee of Winn–Dixie ever crossdressed and impersonated a male. [49]

Title VII

Title VII, 42 U.S.C. § 2000e–2(a) provides in part that "[i]t shall be an unlawful employment practice for an employer (1) to ... discharge any individual ... because of such individual's ... sex." [50] The threshold determination with respect to plaintiff's first claim is whether a transgendered individual who is discharged because he publicly crossdresses and impersonates a person of the opposite sex has an actionable claim under Title VII.

In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.1984), *cert. denied*, 471 U.S. 1017, 105 S.Ct. 2023, 85 L.Ed.2d 304 (1985), a male airline pilot was fired when, following sex reassignment surgery, she attempted to return to work as a woman. The court considered whether the word "sex" in Title VII meant not only biological sex, i.e., male or female, but also "sexual preference" and "sexual identity." The Seventh Circuit concluded, based upon the plain meaning of the word "sex" and the legislative history of Title VII, that sex meant "biological sex". The court recognized that it is a "maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning." 742 F.2d at 1085. The *Ulane* court stated that:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e–2(a)(1) strongly reinforces the view that the section means nothing more than the plain language implies.

**4 *Id.*

Following *Ulane*, several courts have held that persons with gender identity disorders, including those discharged because they were transsexuals, did not have claims cognizable under Title VII. [51] Like the *Ulane* court, these courts have held that discrimination on the basis of *sex* means discrimination on the basis of the plaintiff's biological sex.

In 1964, when Title VII was adopted, there was no debate on the meaning of the phrase "sex". [52] In the social climate of the early sixties, sexual identity and sexual orientation related issues remained shrouded in secrecy and individuals having such issues generally remained closeted. Thirty-eight years later, however, sexual identity and sexual orientation issues are no longer buried and they are discussed in the mainstream. Many individuals having such issues have opened wide the closet doors.

Despite the fact that the number of persons publicly acknowledging sexual orientation or gender or sexual identity issues has increased exponentially since the passage of Title VII, the meaning of the word "sex" in Title VII has never been clarified legislatively. From 1981 through 2001, thirty-one proposed bills have been introduced in the United States Senate and the House of Representatives which have attempted to amend Title VII and prohibit employment discrimination on the basis of affectional or sexual orientation. None have passed. [53]

In contrast to the numerous failed attempts by Congress to include affectional or sexual orientation within Title VII's ambit, neither plaintiff nor defendant can point to any attempts by Congress to amend Title VII in order to clarify that discrimination on the basis of gender or sexual identity disorders is prohibited. [54] Neither party has identified any specific legislative history evidencing Congressional intent to ban discrimination based upon sexual or gender identity disorders.

Plaintiff argues that his termination by Winn–Dixie was not due to his crossdressing as a result of his gender identity disorder, but because he did not conform to a gender stereotype. In support of his argument, plaintiff relies on the United States Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse,* the United States Supreme Court held that discrimination on the basis of sex or gender stereotyping was discrimination because of "sex" within the meaning of Title VII. In that case, the partnership candidacy of the plaintiff, a senior manager who was the only woman of eighty-eight candidates considered for partnership, was placed on hold for a year .[55] The Supreme Court noted that the evidence suggested that "[t]here were clear signs ... that some of the partners reacted negatively to Hopkins' personality *because she was a woman."*[56] *(italics added).* Partners at the firm criticized her because she was "macho", "overcompensated for being a woman", and suggested that she needed "a course at charm school".[57] The most damning evidence of sex discrimination was the advice Ms. Hopkins was given to improve her partnership chances. She was told she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[58]

***5** The Supreme Court found that the plaintiff was discriminated against because of her gender, i.e., because she was a woman, in violation of Title VII. The Court explained:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender....
>
> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[in] forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." ' *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir.1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

490 U.S. at 250–251; 109 S.Ct. at 1790–1791.

In analyzing plaintiff's Title VII claim post *Price Waterhouse,* the Court notes that courts have long held that discrimination on the basis of sexual orientation is not actionable under Title VII. In *Simonton v. Runyon,* 232 F.3d 33 (2nd Cir.2000), the court found that, "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation." 232 F.3d at 36. While the *Simonton* court did not decide whether the plaintiff was being discriminated against because of a sexual stereotype in violation of *Price Waterhouse,* it did observe:

> The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes.

Id. at 38.[59]

After much thought and consideration of the undisputed facts of this case, the Court finds that this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits

normally valued in a female employee, but disparaged in a male employee.[60] Rather, the plaintiff disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity. The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named "Donna."

***6** Plaintiff's actions are not akin to the behavior of plaintiff in *Price Waterhouse*. The plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona.[61]

This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. After a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with *Ulane* and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase "sex" has not been interpreted to include sexual identity or gender identity disorders.

In holding that defendant's actions are not proscribed by Title VII, the Court recognizes that many would disagree with the defendant's decision and its rationale. The plaintiff was a long-standing employee of the defendant. He never crossdressed at work and his crossdressing was not criminal or a threat to public safety.

Defendant's rationale for plaintiff's discharge may strike many as morally wrong. However, the function of this Court is not to raise the social conscience of defendant's upper level management, but to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress and it cannot, therefore, afford the luxury of making a moral judgment. As the *Ulane* court observed:

> Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court.... If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

742 F.2d at 1086.

By virtue of the many courts which have struggled for two decades with the issue of whether Title VII, in prohibiting discrimination on the basis of "sex", also proscribes discrimination on the basis of sexual identity disorders, sexual preference, orientation, or status, Congress has had an open invitation to clarify its intentions. The repeated failure of Congress to amend Title VII supports the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder. In reaching this decision, this Court defers to Congress who, as the author of Title VII, has defined the scope of its protection. Neither Title VII nor the United States Supreme Court's decision in *Price Waterhouse* affords plaintiff the protection that he seeks.

Disparate Treatment

***7** Plaintiff's second claim is that he, as a male crossdresser, was treated differently than three women employees whom he observed wearing male clothing and who were not fired for being crossdressers .[62] As explained in *Portis v. First National Bank of New Albany, MS*, 34 F.3d 325 (5th Cir.1994):

> A Title VII plaintiff carries 'the initial burden of offering evidence adequate to create an inference that

an employment decision was based on a discriminatory criterion illegal under the Act.' *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977)....

> A plaintiff may use either direct or circumstantial evidence to prove a case of intentional discrimination. [*United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714, n. 3, 103 S.Ct. 1478, 1481, n. 3, 75 L.Ed.2d 403 (1983)]. Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in *McDonnell Douglas.*[63] This test establishes a prima facie case by inference, but it is not the exclusive method for proving intentional discrimination. "[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 621–22, 83 L.Ed.2d 523 (1984).

'Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption.' *Brown v. East Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir.1993). In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face. [citations omitted].

34 F.3d at 328–329.

With respect to the proof necessary to establish a disparate treatment claim pursuant to Title VII, the Fifth Circuit has stated:

> We have held that in order for a plaintiff to show disparate treatment, she must demonstrate "that the misconduct for which she was discharged was nearly identical to that engaged in by a[n] employee [not within her protected class] whom [the company] retained." *Smith v. Wal–Mart Stores (No. 471),* 891 F.2d 1177, 1180 (5th Cir.1990) (per curiam) (first and second alterations ours, third alteration in original) (quoting *Davin v. Delta Air Lines, Inc.,* 678 F.2d 567, 570 (5th Cir. Unit B 1982)) [other citations omitted]. Or put another way, the conduct at issue is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer. *See Wyvill v. United Cos. Life Ins. Co.,* 212 F.3d 296, 304–05 (5th Cir.2000) (requiring the plaintiff to show that the company treated others differently in "nearly identical circumstances" and finding that "the striking differences between the two men's situations more than account for the different treatment they received.") (other citations omitted).

***8** *Wallace,* 271 F.3d at 221.

There is no evidence in the record establishing that any woman who worked for the defendant was a crossdresser, i.e., a woman who adorned herself as a man in order to impersonate a man and who used a man's name.[64] While there were women working for the defendant who wore jeans, plaid shirts, and work shoes while working in the warehouse or in refrigerated compartments, there is no evidence that they were transgendered or that they were crossdressers, i.e., that they impersonated men and adopted masculine personas or that they had gender identity disorders.[65] Plaintiff's claim for disparate treatment fails because he has not demonstrated a genuine issue of material fact with respect to this claim and the defendant is entitled to judgment as a matter of law.[66]

Conclusion

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of defendant, Winn–Dixie, Louisiana, Inc., for summary judgment is GRANTED.

IT IS FURTHER ORDERED that the motion of plaintiff, Peter Oiler, for summary judgment is DENIED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31098541, 89 Fair Empl.Prac.Cas. (BNA) 1832, 83 Empl. Prac. Dec. P 41,258

Footnotes

1 In footnote one of plaintiff's memorandum in support of his motion for summary judgment, plaintiff states: "For the sake of convenience, because the Louisiana state law counterpart to Title VII is 'similar in scope' to Title VII, Mr. Oiler discussed only Title VII in this memorandum. *See Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1274 (5th Cir.1989) (quotation omitted). That said, because Title VII does not necessarily limit the scope of Louisiana state law, Louisiana state law may afford greater protection than Title VII."

In an April 15, 2002, status conference, held after the cross motions for summary judgment were filed, plaintiff's counsel agreed that the remedy afforded by the Louisiana employment discrimination statute is coextensive with the remedy provided by Title VII, the federal employment discrimination statute. Rec. Doc. No. 55. Plaintiff's counsel also agreed that plaintiff would waive any argument that state law provided broader protection or greater remedies than Title VII. Rec. Doc. No. 55.

2 Rec. Doc. No. 37.

3 Rec. Doc. No. 42.

4 Rec. Doc. No. 40 (Defendant's memorandum in opposition to plaintiff's motion for summary judgment), Rec. Doc. No. 51 (Plaintiff's consolidated memorandum in opposition to defendant's motion for summary judgment and in reply to defendant's opposition to plaintiff's motion for summary judgment), and Rec. Doc. No. 54 (Defendant's reply memorandum to plaintiff's opposition).

5 Rec. Doc. No. 37, Declaration of Peter Oiler ("Oiler Dec."), para. 5.

6 Rec. Doc. No. 37, Oiler Dec., para. 5.

7 Rec. Doc. No. 37, Oiler Dec., para. 5.

8 Rec. Doc. No. 37, Oiler Dec., paras. 2 and 4.

9 Rec. Doc. No. 37, Oiler Dec., para. 3. Plaintiff defines transgendered as meaning that his gender identity, i.e., his sense of whether he is a male or female, is not consistently male. *Id.*

Walter Bockting, Ph.D., a psychologist who describes himself as an expert on transgender issues, defines the term "transgendered" as:

> [A]n umbrella term used to refer to a diverse group of individuals who cross or transcend culturally-defined categories of gender. They include crossdressers or transvestites (who desire to wear clothing associated with another sex), male-to-female and female-to-male transsexuals (who pursue or have undergone hormone therapy or sex reassignment surgery), transgenderists (who live in the gender role associated with another sex without desiring sex reassignment surgery), bigender persons (who identify as both man and woman), drag queens and kings (usually gay men and lesbian women who do 'drag' and dress up in, respectively, women's and men's clothes), and female and male impersonators (males who impersonate women and females who impersonate men, usually for entertainment).

Rec. Doc. No. 37, Bockting Dec., attached report, p. 7.

10 Rec. Doc. No. 37, Oiler Dec., para. 3.

11 Dr. Bockting reports that:

> Mr. Oiler's transgender identity can best be described as a male heterosexual crossdresser. While Mr. Oiler does report a history of some gender dysphoria (discomfort with the male sex assigned at birth), he is not transsexual; he does not want to take feminizing hormones or undergo sex reassignment surgery.... His motivation to crossdress appears two-fold: (1) to express a feminine side and (2) to relieve stress. In addition, he sometimes experiences sexual excitement in response to crossdressing. Associated distress includes emotional turmoil, agitation, and marital conflict. Therefore, a DSM–IV diagnosis of Transvestic Fetishism with gender dysphoria is warranted.

Rec. Doc. No. 37, Bockting Dec., attached report, p. 6.

12 Dennis P. Sugrue, Ph.D., is also a psychologist who describes himself as an expert on transgendered issues. Dr. Sugrue does not agree with Dr. Bockting's diagnosis of transvestic fetishism, but he instead opines that plaintiff is transgendered with a gender identity disorder. He states in his report:

> Mr. Oiler's cross-dressing behavior suggests that he is *transgendered*, a non-clinical term frequently used in recent years for individuals whose behavior falls outside commonly accepted norms for the person's biological gender. In clinical terms, *Gender Identity Disorder NOS (Not Otherwise Specified)* is the most appropriate diagnosis.
>
> The (DSM–IV) provides three diagnostic options for individuals with gender disturbances: *Transvestic Fetishism, Gender Identity Disorder,* and *Gender Identity Disorder NOS.* Although cross-dressing can at times have an erotic quality for Mr. Oiler, his behavior does not meet the DSM–IV transvestic fetishism criteria....
>
> Mr. Oiler displays evidence suggestive of a *gender identity disorder* as defined by DSM–IV. For example, he frequently wishes to pass as the other sex, desires to be treated as the other sex, and is convinced that he has the

typical feelings and reactions of the other sex. He does not, however, display a preoccupation with ridding himself of primary and secondary sex characteristics or the conviction that he was born the wrong sex—features necessary for the diagnosis of a *Gender Identity Disorder* (often referred to as *transsexualism*). Hence the diagnosis of *Gender Identity Disorder NOS.*

Rec. Doc. No. 37, Segrue Dec., attached report, p. 6.

13 Rec. Doc. No. 37, Oiler Dec., para. 3.

14 Rec. Doc. No. 37, Bockting Dec., attached report, pp. 7 and 9.

15 Rec. Doc. No. 37, Bockting Dec., attached report, p. 3.

16 Rec. Doc. No. 37, Oiler Dec., para. 3.

17 Rec. Doc. No. 40, Exh. A, Deposition of Peter Oiler ("Oiler Dep."), p. 94.

18 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 94–95.

19 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 94–95.

20 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 95.

21 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 96.

22 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 92.

23 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 92–93, 115.

24 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 93–94.

25 Rec. Doc. No. 37, Oiler Dec., para. 9.

26 Rec. Doc. No. 37, Oiler Dec., para. 9.

27 Rec. Doc. No. 40, Exh. C, Deposition I of Greg Miles ("Miles Dep. I"), pp. 110–111, 237.

28 Rec. Doc. No. 40, Exh. C, Miles Dep. I, pp. 237–238.

29 Rec. Doc. No. 40, Exh. C, Miles Dep. I, p. 111.

30 Rec. Doc. No. 42, Exh. A, Deposition of Michael Istre ("Istre Dep."), p. 67; Exh. I, Declaration of Michael Istre ("Istre Dec."), para. 2.

31 Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 69–70.

32 Rec. Doc. No. 42, Exh. A, Istre Dep., p. 71; Exh. B, Miles Dep ., p. 112.

33 Rec. Doc. No. 42, Exh. I, Istre Dec., para. 3.

34 Rec. Doc. No. 37, Oiler Dec., para. 10; Rec. Doc. No. 43, Exh. C, Miles Dep., pp. 236–238; Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91–100.

35 Rec. Doc. No. 37, Oiler Dec., para. 11.

36 Rec. Doc. No. 37, Oiler Dec., para. 11.

37 Rec. Doc. No. 37, Oiler Dec., para. 13.

38 Rec. Doc. No. 42, Exh. B, Miles Dep. I, pp. 236–238. Miles explained that by "lifestyle" he meant that the plaintiff "told me that he had been doing this for several years. He knew he was different from childhood. He ... described what he did away from work. It wasn't that he did it at home. He went out into the public. He went out into the night life. He went out to dinner in a female persona and that was something he chose to do." Miles Dep. I, p. 237. In his deposition, Miles testified:

Q: And so it was his off-the-job behavior over this period of time that you've referenced, is that what caused you to terminate him?

A: You say behavior; I say life-style.

Q: What do you mean by "life-style"?

A: Mr. Oiler told me that he had been doing this for several years.... It wasn't that he did it at home. He went out into the public. He went out into the night life. He went to dinner in a female persona and that was something he chose to do.

* * * *

Q: So, what made it problematic for you such that you terminated him was the fact that he was taking this life-style out of his home into the public; is that correct?

A: Yes, sir.

Q: And, specifically, he was dressing in a certain way in full view of the public, going out to restaurants and clubs and things like that. Is that what made this something that you wanted to terminate him for?

A: There's more to it than just that statement.

Q: So what more? Just clarify for me.

A: He had adopted a female persona. He called himself Donna when he went out. It wasn't just one or two things. It was the entire picture that he told."

Miles Dep. I, p. 236–238.

39 Istre was concerned that plaintiff was "going out in public impersonating a woman, wearing the wig and the makeup and the jewelry and the dress and the shoes and the underwear and calling himself by name repeatedly." According to Istre, that "could have some effect on my business." Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91–92.

Istre explained that, "I think with him doing all of these things, and when he is at work driving one of my trucks with a 45 or 50 foot trailer, whatever he is driving with Winn–Dixie, and walking through my stores and people recognizing him coming up to the front of the store or driving up in the front of our stores, with the truck parked in the front of the parking lot or in the front of the building, walking in, going to the office and going through the back of the store, I think if my customers recognized him ... I'd lose business." Istre Dep., pp. 95–96.

Istre also considered the fact that plaintiff regularly worked in Jefferson Parish, stating that, "Well, Peter said ... [cross-dressing] was unacceptable in Jefferson Parish, and when I looked at Jefferson Parish and the amount of stores that I have in Jefferson Parish, which is approximately 18 or so stores and I've got a large customer base there that have various beliefs, be it religion or a morality or family values or people that just don't want to associate with that type of behavior, those are the things that I took into consideration." Istre Dep., p. 99.

40 Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91–100; Rec. Doc. No. 42, Exh. B, Miles Dep., pp. 125–127.

41 Rec. Doc. No. 37, Exh. A, Istre Dep., p. 118.

42 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214. Prior to October 29, 1999, plaintiff had complained to Miles that there were rumors in his workplace that he was gay and he asked Miles to discourage the rumors. Rec. Doc. No. 37, Oiler Dec., para. 8. On October 29, 1999, Miles asked Oiler if the rumors had stopped and Oiler stated that they had. Rec. Doc. No. 37, Oiler Dec., para. 9.

Plaintiff is not making a Title VII claim for sexual harassment based upon rumors in his workplace that he was gay or that co-employees referred to him using demeaning terms, such as "sissy", or any other inappropriate term used by some to refer to a male who does not fit a masculine sexual stereotype. There is no evidence in the summary judgment record that any such name-calling occurred or that the plaintiff was harassed because of his gender identity disorder. Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214. Until plaintiff voluntarily told his supervisor at Winn–Dixie that he was transgendered, there is no indication in the record that any person employed at Winn–Dixie knew that plaintiff was transgendered.

43 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214.

44 Rec. Doc. No. 42, Exh. C, Oiler Dep., Dep. Exh. 11. The EEOC Notice of Suit Rights states that, "[t]he EEOC is closing its file on this charge for the following reason: The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC."

45 Rec. Doc. No. 1.

46 Whether a fact is material depends upon the substantive law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510, *citing generally* 10A C. Wright, A. Miller, and M. Kane, *Federal Practice & Procedure* § 2725, pp. 93–95 (1983). A dispute about a material fact is genuine if, construing the evidence in the light most favorable to the nonmoving party, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

47 Plaintiff does not claim that because of his gender identity disorder, he has a disability under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq,* or that his discharge is a violation of ADA. Congress specifically excluded gender identity disorders from coverage under the ADA. *See,* 42 U.S.C. § 12211(b), which states in relevant part: "Under this chapter, the term "disability" shall not include—(1) transvestism, transsexualism, ... gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."

48 Plaintiff alleges that the defendant "does not fire female employees who regularly wear masculine clothing and accessories in public off the job." Rec. Doc. No. 37, p. 15.

49 Rec. Doc. No. 42, p. 15.

50 La. R.S. 23:332, the Louisiana counterpart to Title VII, provides in pertinent part that "A. It shall be unlawful discrimination in employment for an employer to engage in any of the following practices: (1) Intentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's ... sex."

51 *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir.1977) (Transsexual's Title VII claim rejected on the basis that Congressional intent was that the word "sex" in the statute was to be given its plain meaning as indicated by the failure of several bills to amend Title VII to prohibit discrimination on the basis of "sexual preference"); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (The court held that the discharge of plaintiff, who "misrepresented himself 'herself' as an anatomical female when she applied for the job", was not actionable under Title VII. Plaintiff alleged that he was a "female with the anatomical body of a male." The court stated that, "we are in agreement with the district court that for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII."); *Dobre v. National R.R. Passenger Corp.*, 850 F.Supp. 284, 286–287 (E.D.Pa.1993) ("[A]n employer may not discriminate against a female because she is *female*. [citations omitted]. However, neither the plaintiff's memorandum of law nor the Court's independent research has disclosed any case broadening Title VII so as to prohibit an employer from discriminating against a male because he wants to become a female. Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism."); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 370 (E.D.Md.1977) (Court dismissed Title VII claim of a transsexual, holding that to construe Title VII "to cover plaintiff's grievance would be impermissibly contrived and inconsistent with the plain meaning of the words.... The gravamen of the Complaint is discrimination against a transsexual and that is precisely what is not reached by Title VII."); *Voyles v. Ralph K. Davies Medical Center*, 402 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd*, 570 F.2d 354 (9th Cir.1978) (Table, No. 75–3808) ("It is this Court's opinion, however, that employment discrimination based on one's transsexualism is not, nor was intended by Congress to be, proscribed by Title VII of the Civil Rights Act of 1964, of which 42 U.S.C. § 2000e–2(a)(1) is part. Section 2000e–2(a)(1) speaks of discrimination on the basis of one's 'sex.' No mention is made of change of sex or of sexual preference. The legislative history of as well as the case law interpreting Title VII nowhere indicate that 'sex' discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof."); *Doe v. United States Postal Service*, 1985 WL 9446 at *2 (D.D.C.1985) (Court held that plaintiff, a male transsexual whose offer of employment was rescinded after employer learned that he was planning to undergo sex reassignment surgery and wanted to begin work as a woman, failed to state a claim under Title VII. The court agreed with *Ulane*, noting that a "prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they are born", *quoting Ulane*, 742 F.2d at 1085); *Emanuelle v. United States Tobacco Co., Inc.*, 1987 WL 19165 at *1 (D.Ill.1987), *aff'd*, 886 F.2d 332 (7th Cir.1989) (Table, No. 87–2785) (Court held that the Title VII claims of plaintiff, a transsexual, must be dismissed as not within the jurisdiction of Title VII); *James v. Ranch Mart Hardware, Inc.*, 1994 WL 731517 at *1 (D.Kan.1994) ("Plaintiff cannot state a claim for discrimination based upon transsexualism because employment discrimination based upon transsexualism is not prohibited by Title VII", *citing Voyles*, 403 F.Supp. at 457. "Even if plaintiff is psychologically female, Congress did not intend 'to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual." *Id .* at *1, *quoting Sommers*, 667 F.2d at 748); *Rentos v. Oce–Office Systems*, 1996 WL 737215 at *6 (S.D.N.Y.1996) ("Every federal court that has considered the question has rejected the application of the Civil Rights Act of 1964, 42 U.S.C.2000e–2 (1982) ["Title VII"] to a transsexual claiming employment discrimination [citations omitted].... Plaintiff's counsel recognizes the uniformity of the federal courts' position in his Affidavit in Opposition, in which he states that he is 'aware that Federal Law, under Title VII, precludes protection of transsexuals with respect to discrimination in the workplace.' [Affidavit in Opposition, para. 4]. Plaintiff's Amended Complaint therefore cannot hope to, and does not purport to, state a claim under Title VII.").

52 *Ulane*, 742 F.2d at 1085. As observed in *Ulane*, "When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. 'Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.' [citations omitted]. This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. [citation omitted]." *Id.*

> "The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation." *Id.*

53 H.R. 1454 Civil Rights Amendments Act of 1981 (Jan. 28, 1981—1st Session), rejected; H.R. 3371, Civil Rights Act of 1981 (May 1, 1981—1st Session), rejected; S. 1708, Civil Rights Amendments Act of 1981 (Sept. 9, 1981—1st Session), rejected; S. 430, Civil Rights Amendments Act of 1983 (Jan. 24, 1983—1st Session), rejected; H.R. 427, Civil Rights Amendments Act of 1983 (Jan. 3, 1983—1st Session), rejected; H.R. 2624, Civil Rights Amendments Act of 1983 (April 19, 1983—1st Session), rejected; S. 1432, Civil Rights Amendments Act of 1985 (July 15, 1985—1st Session), rejected; H.R. 230, Civil Rights Amendments Act of 1985 (Jan. 3, 1985—1st Session), rejected; S. 464, Civil Rights Amendments Act of 1987 (Feb. 4, 1987—1st Session), rejected; H.R. 709, Civil Rights Amendments Act of 1987 (Jan. 21, 1987—1st Session), rejected; S. 47, Civil Rights Amendments Act of 1989 (Jan. 3, 1989—1st Session), rejected; H.R. 655, Civil Rights Amendments Act of 1989 (Jan. 24, 1989—1st Session), rejected; S. 574, Civil Rights Amendments Act of 1991 (Feb. 6, 1991—1st Session), rejected; H.R. 1430, Civil Rights Amendments Act of 1991 (Mar. 13, 1991—1st Session), rejected; H.R. 423, Civil Rights Amendments Act of 1993 (Jan. 5, 1993—1st Session), rejected; S. 2238, Employment Non–Discrimination Act of 1994 (June 7, 1994—2nd Session), rejected; H.R. 431, Civil Rights Act of 1993 (Jan. 5, 1993—1st Session), rejected; H.R. 4636 Employment Non–Discrimination Act of 1994 (June 23, 1994—2nd Session), rejected; H.R. 382, Civil Rights Amendments Act of 1995 (Jan. 4, 1995—1st Session), rejected; S. 932, Employment Non–Discrimination Act of 1995 (June 5, 1995—1st Session), rejected; H.R. 1863, Employment Non–Discrimination Act of 1995 (June 15, 1995—1st Session), rejected; H.R. 365, Civil Rights Amendments Act of 1998 (Jan. 7, 1997—1st Session), rejected; S. 869, Employment Non–Discrimination Act of 1997 (June 10, 1997—1st Session), rejected; H.R. 1858, Employment Non–Discrimination Act of 1997 (June 10, 1997—1st Session), rejected; H.R. 311, Civil Rights Amendments Act of 1999 (Jan. 9, 1999—1st Session), rejected; S. 1276, Employment Non–Discrimination Act of 1999 (June 24, 1999—1st Session), rejected; H.R. 2355, Employment Non–Discrimination Act of 1999 (June 24, 1999—1st Session), rejected; H.R. 217, Civil Rights Amendments Act of 2001 (Jan. 3, 2001—1st Session), pending; S. 1284, Employment Non–Discrimination Act of 2001 (July 31, 2001—1st Session), pending; H.R. 2692, Employment Non–Discrimination Act of 2001 (July 31, 2001—1st Session), pending; Protecting Civil Rights for All Americans Act (Jan. 22, 2001—1st Session), pending.

54 The Court directed the parties to file supplemental briefs addressing whether, from 1982 to the present, Congress had made any attempts to amend Title VII to expressly include affectional or sexual orientation, preference or identity within the meaning of discrimination on the basis of "sex". Rec. Doc. No. 59. While the defendant identified numerous attempts to amend Title VII to specifically prohibit employment discrimination on the basis of "affectional or sexual orientation", neither party identified any proposed bill by either the House or the Senate to amend Title VII to specifically prohibit discrimination on the basis of gender or sexual identity.

55 490 U.S. at 231–232; 109 S.Ct. at 1780–1781.

56 490 U.S. at 235; 109 S.Ct. at 1782.

57 *Id.*

58 490 U.S. at 235; 109 S.Ct. at 1782.

59 Long after *Price Waterhouse* was decided, courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person's "sex." *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir.1999) ("We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084–1085 (7th Cir.2000), *cert. denied*, 532 U.S. 995, 121 S.Ct. 1656, 149 L.Ed.2d 638 (2001) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation. [citation omitted]. Therefore, harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); *Mimms v. Carrier Corp.*, 88 F.Supp.2d 706, 713–714 (E.D.Tex.2000) (Citing *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir.1978), the court agreed with the defendant that discrimination on the basis of sexual orientation is not actionable under Title VII, stating

that "[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act. Therefore, lacking membership in a protected class, the plaintiff's claim must fail as a matter of law."); *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257, at *4, n. 2 (W.D.Mo.2000) (In a Title VII suit brought by a transsexual, the court rejected plaintiff's suggestion that harassment because of homophobia was protected by Title VII, stating that "Title VII's protections do not extend to discrimination on the basis of sexual orientation or sexual preference."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir.2001), *cert. denied*, 122 S.Ct. 1126, 151 L.Ed.2d 1018 (2002) ("Harassment on the basis of sexual orientation has no place in our society [citations omitted]. Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by Bibby—and, indeed, his very claim —indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.").

60 There is no evidence that plaintiff was discriminated against because he was perceived as being insufficiently masculine, i.e., that he suffered adverse employment actions because he appeared to be effeminate or had mannerisms which were stereotypically feminine. This is distinguishable from *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir.2001). In *Nichols*, the male plaintiff sued under Title VII alleging that he was verbally harassed "because he was effeminate and did not meet [his co-employees'] views of a male stereotype." *Id.* at 869. The *Nichols* court recognized that this was a *Price Waterhouse* claim alleging discrimination on the basis of sexual stereotypes, stating that "[a]t its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray 'like a woman'—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.' And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender. *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here." *Id.* at 874–875.

61 *See also, Bellaver v. Quanex Corp.*, 200 F.3d 485, 495 (7th Cir.2000). In a Title VII case filed by a woman claiming that she was discriminated against on the basis of sexual stereotypes, the court found that the evidence presented a genuine issue whether male employees were treated better than she was. *Id.* at 495. The court observed:

> As in *Price Waterhouse*, the evidence suggests that the employer here may have relied on impermissible stereotypes of how women should behave. Bellaver's evaluations are marred only by the repeated references to her interpersonal skills, but these same types of deficiencies seemed to be tolerated in male employees. Penny knew of the sexist double-standard, knew that men resented working with Bellaver because she was a woman and knew that the company had a reputation as a 'good ol' boy' network. Penny sought Bellaver's firing in late 1996 or early 1997 because of her social skills, or lack thereof. The human resources manager ... reviewed Bellaver's file and told Penny that he did not have cause to fire her based on her interpersonal skills.... Penny and Gulliford decided to fire Bellaver and have Penny, Hucker and others absorb her duties. A jury reasonably could find that this decision was motivated at least in part by the double-standard applied to men and women because only Bellaver [a woman employee] and not Breen, Arbizzani or Gulliford [all male employees], was criticized for being hard to get along with.

Id. at 492–493.

62 Rec. Doc. No. 37, p. 15

63 "To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. [Citation omitted]. Once the employer articulates a legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions 'simply drops out of the picture,' and the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' because of [her sex]'." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)." *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir.1998), *cert. denied* 525 U.S. 1000, 119 S.Ct. 509, 142 L.Ed.2d 422 (1998), *reh'g denied*, 525 U.S. 1117, 119 S.Ct. 894, 142 L.Ed.2d 792 (1999). "The plaintiff bears the ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against her because of her protected status." *Wallace v. Methodist Hospital System*, 271 F.3d 212, 220–221 (5th Cir.2001), *reh'g denied*, ___ F.3d ___, 2001 WL 1748326 (5th Cir.2001) (Table, No. 00–20255), *cert. denied*, 122 S.Ct. 1961, 152 L.Ed.2d 1022 (2002), *citing Tex.*

Dept. of Cmty. Affairs v. Burdine, 450 U .S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) and *St. Mary's,* 509 U.S. at 511–12, 113 S.Ct. at 2749–50.

64 Rec. Doc. No. 42, Exh. A, Istre Dep., p. 131, and Exh. I, Istre Dec., para. 4 and 6; Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 235–236, 238, 243–244, and 247.

65 Plaintiff acknowledged in his deposition that he did not know if the three female employees whom he alleged were similarly situated were crossdressers or transgendered. Nor did he know whether Winn–Dixie management perceived these female employees to be crossdressers or transgendered. Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 248–253.

66 F.R.Civ.P. 56(c).

End of Document

EEOC DOC 0120133080 (E.E.O.C.), 2015 WL 4397641

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

Office of Federal Operations

DAVID BALDWIN

v.

ANTHONY FOXX, SECRETARY, DEPARTMENT OF TRANSPORTATION
(FEDERAL AVIATION ADMINISTRATION), AGENCY.

Appeal No. 0120133080
Agency No. 2012-24738-FAA-03
July 15, 2015

DECISION

***1** Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e-2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency's final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant's initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission's jurisdiction. [1]

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency's Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida.

On August 28, 2012, Complainant contacted an EEO Counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

The Agency accepted the complaint for investigation. When the investigation was completed, Complainant was given his notice of right to request a hearing before an EEOC Administrative Judge or an immediate final decision by the Agency based on the investigative report. On May 21, 2013, Complainant requested an immediate final decision from the Agency. The Agency issued its Final Agency Decision (FAD) on July 12, 2013.

The evidence developed during the investigation shows that in October 2010, Complainant was selected for and accepted a temporary FLM position at the Miami facility. The record further reflects that the Agency issued a vacancy announcement for a permanent FLM position in June 2012.

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as well as his familiarity with the Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

***2** The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor, who was involved in the selection process for the permanent position, made several negative comments about Complainant's sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner had attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on a number of occasions that he was "a distraction in the radar room" when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant's claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO Counselor, as required by EEOC regulations. The Agency reasoned that the 45-day limitation period in which Complainant should have contacted an EEO Counselor started to run in October 2010, the date on which the Complainant was aware that his temporary FLM position would expire after two years and he would be returned to his previous position. Therefore, the Agency found, Complainant's EEO Counselor contact in August 2012 was made well beyond the 45-day limitation period.

The FAD also notified Complainant that, pursuant to the "Secretary's Policy on Sexual Orientation" and the "Departmental Office of Civil Rights' March 7, 1998 Procedures for Complaints of Discrimination based on Sexual Orientation," the "sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)]."

Complainant appealed the Agency's decision to the Commission.

ANALYSIS AND FINDINGS

Timeliness of EEO Counselor Contact

EEOC's regulations require that complaints of discrimination be brought to the attention of an Equal Employment Opportunity Counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). The Commission has long applied a "reasonable suspicion" standard, viewed from the perspective of the complainant, to determine when the 45-day limitation period is triggered. See, e.g., Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120093169, 2014 WL 2999934 (EEOC June 27, 2014) (citing Howard v. Dep't of the Navy, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999), citing Ball v. U.S. Postal Serv., EEOC Appeal No. 01871261, 1988 WL 921053 (EEOC July 6, 1988), req. for recon. den., EEOC Request No. 05980247 (July 15, 1988)). Thus, the time limitation is not triggered until a complainant should reasonably suspect discrimination, even if all the facts that might support the charge of discrimination have not yet become apparent.

***3** Further, it is well-settled that when, as here, there is an issue of timeliness, "fa]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Williams v. Dep't of Def., EEOC Request No. 05920506, 1992 WL 1374923, *3 (EEOC Aug. 25, 1992). We conclude the Agency has not met this burden and erred in dismissing the complaint for untimely EEO counseling.

In its FAD, the Agency stated that it considered the date of the alleged adverse action to be October 2010, when Complainant assumed his temporary FLM position and, according to the Agency, knew that he would be returned to his former position at the expiration of the appointment. However, the Agency acknowledged in its FAD that "the date of the incident for the instant complaint is in dispute." It is clear that a permanent FLM vacancy was posted in June 2012 and a selection was made in July 2012, although the selectee later declined the position and the certificate of eligibles expired without any further selection being made. The Agency argued that Complainant did not apply for the position, [2] but Complainant claims that he did not formally apply because of his understanding that all temporary FLMs were automatically considered for vacant, permanent FLM positions. Further, Complainant stated that his desire for promotion was well known in the Miami facility.

According to the affidavits of Complainant's first-level supervisor (S1) and second-level supervisor (S2), individuals, including Complainant, competed for the temporary FLM appointments. In February 2012, an announcement was made that a temporary FLM (Employee 1) had been converted to permanent status. Employee 1 did not compete for the permanent position. Subsequently, a second temporary FLM (Employee 2) was converted to permanent status without competing for the position. [3] Neither S1 nor S2 explained the process by which temporary FLMs were converted to permanent status, although S2 stated that it was a matter of managerial discretion.

It is not reasonable for the Agency to argue that Complainant knew or should have known that he was being discriminated against with regard to conversion to a permanent position at the time he was appointed to a temporary FLM position. Complainant had no reason to know or to suspect at the time of his temporary appointment that he subsequently would not be selected for a permanent FLM position, let alone for discriminatory reasons. As the elevation of the two temporary FLMs demonstrates, conversion to a permanent FLM position was a realistic possibility for Complainant if a vacancy arose during his tenure. The Agency's position might have merit if Complainant's claim were that, when he was given a temporary appointment, other individuals outside of his protected group were given permanent appointments. But that is not the claim at bar. Rather, the claim is whether Complainant was treated disparately when he was not converted to permanent status nearly two years after his appointment.

***4** The standard we apply to determine timeliness is when Complainant *reasonably* should have first suspected discrimination. Here, we find that Complainant could only reasonably have suspected that discrimination occurred after he learned he was not selected for conversion to the permanent FLM position on July 26, 2012, near the end of his two-year temporary assignment. See Howard, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999). Complainant's contact with an EEO Counselor on August 28, 2012, therefore, fell within the 45-day limitation period and was timely. Accordingly, we remand the complaint for further processing by the Agency consistent with the ruling below.

EEOC Jurisdiction over Complainant's Sex Discrimination Claim

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(l) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").

Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions. See Price Waterhouse v. Hopkins, 490 U.S. 228, 239,

241-42 (1989); Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (quoting Price Waterhouse, 490 U.S. at 239).[4] This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.[5]

***5** In the case before us, we conclude that Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf ("*Sexual orientation* refers to the *sex* of those to whom one is sexually and romantically attracted" (second emphasis added). It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

***6** The court in Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he "experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." Id. at *2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. See also Heller v. Columbia Edgewater Country

Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller's manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.") (internal citations omitted). [6]

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as an interracial marriage or friendship. See, e.g., Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009) ("This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race."); Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008) ("We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race."). [7] This is because an employment action based on an employee's relationship with a person of another race necessarily involves considerations of the employee's race, and thus constitutes discrimination because of the employee's race.

*7 This analysis is not limited to the context of race discrimination. Title VII "on its face treats each of the enumerated categories" -- race, color, religion, sex, and national origin --"exactly the same." Price Waterhouse, 490 U.S. at 243 n.9 ("[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin."); see also Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir. 1982) ("[T]he standard for proving sex discrimination and race discrimination is the same."); Horace v. City of Pontiac, 624 F.2d 765, 768 (6th Cir. 1980) ("Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination.").

Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, "by definition," discrimination because of the employee or applicant's sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race [in violation of Title VII]."); Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) ("Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.").

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if

such individuals demonstrate that they were treated adversely because they were viewed--based on their appearance, mannerisms, or conduct--as insufficiently ""masculine" or "feminine."[8] But as the Commission[9] and a number of federal courts[10] have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

***8** Sexual orientation discrimination and harassment "[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms." Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The Centola court continued:

> In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real" men should date women, and not other men.

Id.

Those deeper assumptions and stereotypes about "real" men and "real" women were similarly noted by the court in Terveer v. Library of Congress in rejecting the government's motion to dismiss:

> Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Here, Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor's] supervision or at the LOC," and that "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male." As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

Terveer v. Billington. 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (citations omitted) (first quoting Pl.'s Am. Compl.; then quoting Fed. R. Civ. P. 8(a)).

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above.[11] Indeed, many courts have gone to great lengths to distinguish adverse employment actions based on "sex" from adverse employment actions based on "sexual orientation." The stated justification for such intricate parsing of language has been the bare conclusion that "Title VII does not prohibit . . . discrimination because of sexual orientation." Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the "borders [between the two classes] are . . . imprecise." Id. (alteration in original).[12]

***9** Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) ("Congress had only the traditional notions of 'sex' in mind" when it passed Title VII and those "traditional notions" did not include sexual orientation or sexual preference.) abrogated by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001).[13]

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in Oncale v. Sundowner Offshore Services, Inc., "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.[14] Nothing in the text of Title VII "suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone." Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.").[15] But the Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of "people in interracial relationships." See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998), reinstated in relevant part, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of "masculine women." See Price Waterhouse, 490 U.S. at 239-40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of "non-believers." See, e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word "mothers" in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

***10** Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant's allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.[16] Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process.

We recognize that many agencies also have separate complaint processes in place for claims of sexual orientation discrimination. Agencies may maintain, and employees may still utilize, these procedures if they wish. But the 1614 process is the most appropriate method for resolving these claims. Agencies should make applicants and employees

aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.

CONCLUSION

Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII. Furthermore, we conclude that Complaint's initial EEO Counselor contact was timely. We remand the Complainant's claim of discrimination to the Agency for further processing for a determination on the merits.

ORDER The Agency is ORDERED to continue processing the remanded claims. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall reissue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within thirty (30) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision on the merits of his discrimination claims **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

***11** Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington,

DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

***12** Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you instead wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

Footnotes

1 This decision addresses only the timeliness and jurisdiction questions raised on appeal. We take no position on the merits of Complainant's claim of discrimination. That is for the Agency to determine upon remand.

2 Complainant did not submit an application for the vacant permanent FLM position. Whether, under the facts of this case, Complainant was or was not required to submit an application in order to be considered for the vacant permanent position goes to the merits of his complaint. At this stage of the proceedings, the inquiry is limited to whether Complainant has met the procedural requisites to maintain his EEO complaint. See, e.g., Complainant v. U.S. Equal Employment Opp. Commn., EEOC Appeal No. 0120120403, 2013 WL 6145999 (EEOC Nov. 13, 2013) (citing Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642, 1991 WL 1189594 (EEOC Aug. 15, 1991). We find that he has done so.

3 While Employee 2 was converted to permanent status to resolve an EEO complaint he had filed, there is no indication that the reason for his conversion to permanent status was common knowledge. S1 averred that Employee 2 would have qualified for conversion to permanent status in any event.

4 As used in Title VII, the term "sex" "encompasses both sex - that is, the biological differences between men and women - and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping - failing to act and appear according to expectations defined by gender." As such, the terms "gender" and ""sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.") (plurality opinion). We do the same in this decision.

5 As we observed in Macy, 2012 WL 1435995 at *6:

"Title VII . . . identif[ies] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.'" [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.

6 Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See Videckis v. Pepperdine Univ., ___ F. Supp. 3d ___, No. 15-298, 2015 WL 1735191 (CD. Cal., 2015) ("[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); Lawson v. Kelly, ___ F. Supp. 3d ___, No. 14-522, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification," and it violates the Equal Protection Clause); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), aff'd sub nom., Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

7 See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . ."); Hancock v. Dep't of Transp., EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), req. for recon. den., EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) ("[A]n individual may be entitled to protection by virtue of association with a member of a protected class . . . ."); Robertson v. U.S. Postal Serv., EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n. 1 (association discrimination may be established where evidence permits the inference that an agency's act or omission would not have occurred if the complainant and associate were of the same race).

8 See Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) ("It follows [from Price Waterhouse] that employers who discriminate against men because they . . . act femininely[ ] are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); EEOC v. Boh Brothers, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) ("[A] jury could view Wolfe's behavior as an attempt to denigrate Woods because -- at least in Wolfe's view -- Woods fell outside of Wolfe's manly-man stereotype" and that would constitute sex discrimination in violation of Title VII).

9 See Veretto v. United States Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); Baker v. Social Security Administration, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC January 11, 2013) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-conforming behavior); Dupras v. Dep't of Commerce, EEOC Request No. 0520110648, 2013 WL 1182329

(EEOC March 15, 2013) (complainant's allegation that she was subjected to stereotyping on the basis of sex because of her sexual orientation is sufficient to state a claim of sex discrimination under Title VII); Culp v. Dep't of Homeland Security, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC May 7, 2013) (complainant's allegation of sexual orientation discrimination states a claim of sex discrimination because it was an allegation that her supervisor was motivated by stereotypes that women should only have relationships with men); Brooker v. U.S. Postal Service, EEOC Request No. 0520110680, 2013 WL 4041270 (EEOC May 20, 2013), (complainant's allegation that coworkers were spreading allegations about his sexual orientation was properly framed as a claim of sex discrimination); Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0120110576, 2014 WL 4407457 (EEOC August 19, 2014) (reaffirming the analysis in the cases cited above).

10 See Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Heller, 195 F. Supp. 2d at 1224 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); Koren v. Ohio Bell, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) ("And here, Koren chose to take his spouse's surname--a "traditionally" feminine practice--and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name."); Terveer v. Billington, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he "alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, and that his orientation as homosexual had removed him from Mech's preconceived definition of male.") (internal citations and quotes omitted); Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. 2014) (denying an employer's motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); Deneffe v. SkyWest, Inc., 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying employer's motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male "braggadocio" about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights) Cf. Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014), *petition for cert. filed*, (U.S. Dec. 31, 2014) (No. 14-765) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory."; Id. at 495 (Berzon, J. concurring) ("[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.").

11 A review of cases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. For example, in a brief to the Seventh Circuit Court of Appeals requesting rehearing based on various broad declaratory statements that Title VII does not cover sexual orientation, the EEOC pointed out that only one previous Seventh Circuit case had analyzed the question of coverage of sexual orientation discrimination under Title VII and that case, decided in 1984, had not been reviewed in light of subsequent decisions such as Price Waterhouse. Instead, a string of Seventh Circuit panel decisions had simply reiterated the holding in the first case without any further discussion. Br. EEOC Supp. Reh'g 8-9, Muhammad v. Caterpillar Inc., ECF No. 49, No. 12-1723 (7th Cir. Oct. 7, 2014). The Seventh Circuit denied the request for rehearing but reissued its decision without the statements that sexual orientation discrimination is not covered under Title VII. See Muhammad v. Caterpillar, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, .Oct. 16, 2014).

12 We do not view the borders between sex discrimination and sexual orientation as "imprecise." As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

13 Indeed, the Equal Employment Opportunity Commission's own understanding of Title VII's application to sexual orientation discrimination has developed over time. Compare Johnson v. U.S. Postal Serv., EEOC Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991) (holding that Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and Morrison v. Dep't of the Navy, EEOC Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994) (affirming that Title VII's discrimination prohibition does not include sexual preference or orientation as a basis), with Morris v. U.S. Postal Serv., EEOC Appeal No. 01974524, 2000 WL 226001, at *1-2 (EEOC Feb. 9, 2000) (distinguishing Johnson and Morrison and holding that complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex). Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections extended to LGBT employees and explained that federal decisions have been inconsistent in this area. See Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H.

Comm. on Educ. & Labor, 111th Cong. (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission).

14 Title VII prohibits discrimination on the basis of "sex" without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, "[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress's province." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ___ (2015), 135 S.Ct. 2028, 2033, 2015 WL 2464053, *4 (2015).

15 See also Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing Bibby and Simonton (see infra) with approval); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) ("Title VII has not been amended to prohibit discrimination based on sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent.").

16 There may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.

EEOC DOC 0120133080 (E.E.O.C.), 2015 WL 4397641

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2011 WL 221823
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois,
Eastern Division.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, General Committee of Adjustment, Central Region, Plaintiff,
v.
UNION PACIFIC RAILROAD COMPANY, Defendant.

No. 10 C 8296.
|
Jan. 24, 2011.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

JAMES B. ZAGEL, District Judge.

I. INTRODUCTION

*1 This dispute surrounds changes made to the vacation planning methods implemented by Union Pacific Railroad Company ("UP" or "Carrier"). The Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "Union") opposes the changes and asks that I issue a preliminary injunction requiring UP to return all vacation planning to the status quo as it existed in 2010 until the dispute is resolved though arbitration. In the alternative, BLET asks that I order the parties to arbitrate the issues on an expedited 60–day basis and require UP to make the engineers whole if its unilateral forcing of vacations is not approved in the arbitration. For the following reasons, BLET's motion for a preliminary injunction is denied.

II. STATEMENT OF RELEVANT FACTS

UP requires that all engineers be "full time" employees "marked up" and available for work on a seven-day, 24–hour basis. When called, engineers must present themselves at the terminal within one and a half and two hours. Because of the engineers' unpredictable schedules, planned vacation time is very important to the engineers and their families.

The parties have a National Agreement which addresses vacation and scheduling. Pursuant to the National Agreement, "due regard" shall be given to the preference of employees in the seniority order in the class of service in which engaged. The representatives of the carriers and the employers further agree to cooperate in arranging vacation periods.

In 1990, an award by Arbitrator La Rocco stated that "the Carrier should oblige the employee in fixing vacation dates in accordance with his desires or preferences, unless by doing so would result in a serious impairment in the efficiency of operations which could not be avoided by the employment of relief workers at that particular time or by the making of some other reasonable adjustment ." A second award by La Rocco in 1993 provided that UP could not require vacations to be "flat lined" or spread out evenly or inflexibly over a 52 week period, without regard to service needs and engineers' preferences. The 1993 award also states that if a Carrier wishes to place an inflexible or absolute cap on the number of engineers who can take vacation during any single week, the Carrier must justify the cap by needs of service.

Traditionally, the process of setting vacations proceeded as follows. First, engineers submit their preferred vacation dates to their BLET Local Chairman. The Local Chairman then reviewed all requests, accounted for seniority, and then passed to the Carrier the BLET vacation requests. Following the submission, negotiations might take place as to the maximum numbers of engineers who are allowed to take vacations at one time, though usually an agreement was reached that was acceptable to both the BLET and the Carrier.

In 2009, BLET opposed UP's 2010 vacation scheduling efforts. In particular, the Kansas City and St. Louis vacation groups were unable to reach an agreement with UP until February, 2010. At the heart of these disagreements were cut backs in the number of engineers

who were allowed to take vacation on any particular week. In some areas, the Carrier cut back the number of vacation slots available per week from fifteen to seven or eight. The Carrier also required a minimum number of engineers to be off every week of the year. BLET argued that these changes resulted in an impermissible denial of their preferences. They further contended that the Carriers had not shown that its service needs require such vacation scheduling. Pursuant to the Agreement, a Carrier is entitled to unilaterally rearrange vacations when required by the service needs of the company.

***2** The prolonged talks in 2009 and early 2010 led to vacations being scheduled on a compressed 46–week year. To ensure that the 2011 schedule was prepared by the start of the year, work began on the 2011 vacation schedule in August 2010. Patrick Kenny, UP's Director of Crew Utilization, presented a proposed 2011 vacation schedule on November 9, 2010 which was rejected. Again, the rejection focused on a cut back in available vacation slots, and perceived "flat lining." Between November 16, 2010 and December 4, 2010 over 200 letters were sent to each Local Chairman regarding the 2011 vacation schedule. The correspondence informed the union representatives that the deadline to input their members' vacations was December 15, 2010. According to UP, "it became evident, based on BLET–GCA's failure to return calls or otherwise respond," that there would not be cooperation. An extension for inputting vacation was granted until December 21.

On December 16, 2010, UP sent a broadcast to all employees inviting them to enter their own vacation bids prior to December 21, 2010. This was a departure from previous protocol whereby engineers' vacation bids went through the Local Chairmen. On December 20, 2010 95% of employee's vacations had been scheduled. The remaining 5% were almost exclusively in the Kansas City or St. Louis service units. These units demanded up to 15 vacation slots per week with no minimums. On December 22, 2010, the Kansas City and St. Louis vacation groupings had still not been scheduled. UP extended the deadline for scheduling to December 27, 2010. Schedules were still not completed, and finally, on December 29, 2010, UP scheduled the vacations for Kansas City and St. Louis based on the offer made on December 22, 2010.

III. DISCUSSION

The parties argue this motion assuming that the dispute at hand is 'minor' in nature. Minor disputes are those "involving the interpretation of application of existing labor agreements." *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 256, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Major disputes relate to the formation of collective bargaining agreements or efforts to secure them. *Id.* at 253. Though BLET argues that this Court has jurisdiction to enter an injunction in minor disputes, it does not concede that this cannot be considered a major dispute.[1] For purposes of this motion, I consider this a minor dispute.

UP opposes the injunction on two grounds. First, UP disputes that this Court has jurisdiction to issue an injunction, contending that this matter must go directly to arbitration. Next, UP argues that even if this Court does have jurisdiction to issue an injunction, the injunction should be denied on the merits.

Before I begin my analysis, I note that each party has a valid reason for standing their ground and applying their given leverage. From UP's perspective, unilaterally implementing vacation changes applies pressure on the Union to simply accept its modifications. Disputing any change is a costly process involving extensive negotiations and even arbitration. Furthermore, the Union runs the risk of losing at arbitration. From the Union's perspective, by not accepting the new policy, the Union can successfully delay a resolution of the process. This in turn causes the Carrier uncertainty and disrupts some of its ability to manage its employees. Though taking such positions has led to a stand off, a resolution will ultimately be reached through arbitration.

***3** At the hearing held on January 21, 2011, I heard testimony from representatives of each side, as well as extensive legal and factual argument. I have considered both the written briefs and oral argument in reaching my decision. However, BLET's testimony and argument regarding incorrect grouping for purposes of seniority plays no part in my decision. The processes that underlie employee grouping are separate and distinct from those at issue here. It is not uncommon for erroneous grouping to occur. Here, though an improper grouping in one or two cases may have damaged a vacation schedule, it was the grouping, and not the policy at issue in this dispute, that was the cause. Additionally, though UP puts forth an argument of unclean hands, given the timing of the Carrier's implementation of the 2010 schedule in late

December 2010, I am unwilling to tax the union alone for causing a delay.

A. This Court Does Have Jurisdiction To Issue A Preliminary Injunction.

In the case of minor disputes, a federal court has only limited power to order an injunction to maintain the status quo. *National Ry. Labor Conference v. International Ass'n of Machinists and Aerospace Workers,* 830 F.2d 741, 749 (7th Cir.1987). As a general rule, a railroad may "continue to apply its interpretation of the agreement during the pendency of a minor dispute." *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.,* 788 F.2d 794, 799 (1st Cir.1986), cert. denied, —— U.S. ——, 107 S.Ct. 111, 93 L.Ed.2d 59 (1986). Because the dispute itself lies within the exclusive jurisdiction of the railway adjustment board, the federal courts may issue an injunction against strikes arising out of minor disputes in order to effect the purpose of the Railway Labor Act to provide for compulsory arbitration in such disputes. *Brotherhood of Railroad Trainmen v. Chicago River & Indian Railway Co.,* 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *see also Brotherhood of Locomotive Engineers v. Missouri–Kansas–Texas Railway Co.,* 363 U.S. 528, 531, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960) ("M–K–T").

The status quo requirement is important because it discourages strikes while disputes are being resolved. *Shore Line R. Co. v. Transportation Union,* 396 U.S. 142, 150, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969). BLET seeks a preliminary injunction under Section 6 of the Railway Labor Act which provides that "rates of pay, rules, or working conditions shall not be altered" during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board. 45 U.S.C. § 156. Under this section, a court may order an injunction when there is a major dispute, and a carrier attempts to, ignores or repudiates or changes the terms of an existing collective bargaining agreement. *Consolidated Rail Corp. v. Railway Labor Executives Ass'n,* 491 U.S. 299, 303, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989).

Though BLET cites *Brotherhood of Locomotive Engineers v. Missouri–Kansas–Texas Railroad* ("M–K–T), 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960), for the proposition that this Court has jurisdiction to enjoin UP from altering the status quo to preserve the interest in arbitration—even in the case of a minor dispute—they overstate the application of that case. *Brotherhood of Locomotive Engineers* states that an injunction of minor disputes is proper to prevent strikes. It does not discuss injunctions outside the context of a strike. Another case relied upon by BLET is *International Brotherhood of Teamsters Airline Division v. Frontier Airlines, Inc.,* —— F.3d ——, 2010 WL 5060260 (7th Cir.2010). There, the Seventh Circuit stated that "preliminary injunctions may be issued in minor disputes despite the exclusive jurisdiction of disputes of the NLRB or its counterpart in the airline industry." The cases cited by the Seventh Circuit in support of that statement, are *M–K–T,* and *National Railway Labor Conference v. International Ass'n of Machinists & Aerospace Workers,* 830 F.2d 741, 749–50 (7th Cir.1987). In both of these cases, the Courts' discussions surrounding the issuance of an injunction in minor disputes revolved around preventing strikes or other self help.

***4** The Seventh Circuit however, has also held that a district court may issue an injunction to prevent irreparable harm. *Bhd. of Railway Engineers v. Atchison,* 847 F.2d 403, 405 n. 1 (7th Cir.1988). Specifically, the Seventh Circuit notes that "a court may enjoin employer actions that engender only minor disputes if the delay in obtaining an NRAB decision will result in irreparable harm to employees." BLET asserts irreparable harm, contending that a "long-delayed decision" would impose hardship and irreparable injury that arbitration cannot remedy. Given the precedent set by the Supreme Court and the Seventh Circuit, I find that I do have the authority to issue an injunction.

B. BLET's Request For A Preliminary Injunction Is Denied.

A plaintiff is entitled to a preliminary injunction only when it meets three requirements: (1) showing a likelihood of success on the merits; (2) an inadequate remedy at law; and (3) irreparable harm. *Ty, Inc. v. Jones Group, Inc.,* 237 F.3d 891, 895 (7th Cir.2001). In addition to these three requirements, the court must also balance the harm the moving party would endure without the injunction, with the harm the non-movant would suffer if the injunction is granted. *Id.* Finally, the court must consider "the wild card that is the public interest." *Lawson Products, Inc. v. Avnet, Inc.,* 782 F.2d 1429, 1433 (7th Cir.1986).

1. Likelihood of success on the merits

UP argues that BLET has no chance of success on the merits. To meet this requirement, the Seventh Circuit requires only a "better than negligible chance of success." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.,* 549 F.3d 1079, 1096 (7th Cir.2008) (internal citation omitted). This is a very low threshold. Furthermore, when determining whether to grant injunctive relief against an employer when arbitration is pending, the Seventh Circuit has recognized that determinations on the merits "would intrude significantly on the arbitrator's function." *Local Lodge No. 1266, Int'l Ass'n of Machinists and Aerospace Workers, AFL–CIO v. Panoramic Corp.,* 668 F.2d 276, 284 (7th Cir.1981). Accordingly, a plaintiff need only establish that he advocates a sound position. *Id.* Though UP engages in a lengthy explanation of how its new policy complies with the La Rocco Awards, I find that BLET has met its burden.

2. Adequate remedy at law

To satisfy this requirement, BLET must show that absent court intervention, any remedy would be "seriously deficient as compared to the harm suffered." *Foodcomm Intern. v. Barry,* 328 F.3d 300, 304 (7th Cir.2003). UP argues that BLET has an obvious remedy at law: arbitration through the RLA. BLET disagrees. Practically speaking, BLET contends that the arbitration process, even assuming a victory, will not be able to compensate engineers who are forced to take vacation, or who are denied their vacation preferences.

I am unpersuaded by BLET's arguments. The Union's harm is almost certainly capable of monetary compensation; disappointment is not irreparable in the classic sense of the word, and emotional suffering is commonly compensated by cash. UP has agreed to an expedited arbitration of this dispute, and the arbitrator is capable of offering full relief. Whatever harm that would be done to individuals by an arbitration that consumes more than sixty days can be adequately compensated by cash, days off, or similar pecuniary remedies. Accordingly, I find that BLET has an adequate remedy available at law.

3. Irreparable Harm

***5** The Seventh Circuit has recognized, in the context of a suit over Family and Medical Leave Act rights, that "working conditions pose problems for the workers. For instance, some workers are "on call", meaning they have no regularly set days off and may be called to duty at any time consistent with federal laws." *Brotherhood of Maint. of Way Employees, et al., v. CSX Transp., et al.,* 478 F.3d 814, 819 (7th Cir.2007). Likewise, the Court recognized that "workers cherish their vacations" and noted that "vacation agreements are the subject of apparently hard bargaining. Their right to time one's vacation and, to perhaps a slightly lesser degree, personal leave days, is a hard-won right of railroad workers." *Id.* Accordingly, BLET argues that depriving workers of their vacation preferences would inflict irreparable injury on many engineers. "There is no way to give a person back time spent with a toddler as they begin to walk or talk, with family members enjoying time together, and countless other events which engineers plan for their vacations."

UP states that BLET cannot show irreparable harm because "at worst, a UP employee may be instructed to take a paid vacation when the needs of service allow for it, rather than on the week of the employee's preference." This, argues UP, does not amount to irreparable harm. I agree. As noted above, any harm done to individual union members can be compensated through cash awards or additional days off. Though there will be the inevitable disappointment of an unplanned forced vacation, or cancelled plans, this is not irreparable in the classic sense of the word; emotional suffering is commonly compensated by monetary awards. I further note that even by the actual terms of the Agreement, harm is not irreparable. The Carrier has always retained the power to rearrange vacations at any time if the service needs of the railroad so dictate.

Finally, BLET argues that the Carrier is rewarding those engineers who have acquiesced to the Carrier's invitation to deal directly as to vacation slots. "The message is all too clear: If you acquiesce to the Carrier's requests to change working conditions and attempt to ice out the Union from its statutory and contractual role, you will be rewarded; if instead you insist on the Carrier respecting agreements and practices and through your lot with the Union, you will be punished." As discussed below, any loss in stature or authority that the Union faces in the absence of an injunction is not irreparable.

4. Balance of Harms and Public Interest

The balance of harms in this case results in a tie. There are two aspects to the harm UP will suffer. The first is monetary cost. UP states that cost of retraining engineers,

and recalling and retraining furloughed employees is great; in 2010, UP incurred retraining costs for the Kansas City Service Unit in excess of 1.8 million dollars, and for the St. Louis Service Unit in excess of 1.5 million dollars. Though these costs are substantial, they are typical. Each year requires a certain amount of retraining to accommodate vacation schedules, and UP does not contend that 2010 was unique. It is the 'cost of doing business.' A second harm to UP, if an injunction is issued, is seen in its inability to manage personnel effectively. Though disruptive, the situation will be temporary as the arbitrator's award will confirm the proper procedures to be followed and vacation scheduling will resume a normal pattern. This is the same injury that the Union faces in the absence of an injunction. Without a return to the status quo, the Union leadership faces damage to its stature and authority. If the Union goes on to win at arbitration, its strong stance will be vindicated and its stature will be restored. Conversely, if it loses, it will be placed in a position where it can assure its members that it 'fought to the death' for its members.

***6** Similarly, when the public interest is considered, the result is a tie.

V. CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction is denied. Pursuant to this order there will be no further broadcasts from UP to its employees encouraging direct scheduling. I further deny Plaintiff's request to order the arbitrator to make BLET's employees whole in the event they are successful at arbitration. The arbitrator is entitled to award an entire remedy. As he has not declined to issue such relief, it is not ripe for me to rule on this issue.

All Citations

Not Reported in F.Supp.2d, 2011 WL 221823, 160 Lab.Cas. P 10,339

Footnotes

1 In a supplemental filing, BLET argues that the dispute at hand can be considered a major dispute because it constitutes a unilateral imposition of work rule changes which are to be sought through collective bargaining. The parties' briefs assume that this is a minor dispute, and the parties did not argue orally over this issue at the preliminary injunction hearing.

2016 WL 6134121
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Students and Parents for Privacy, a voluntary unincorporated association; C.A., a minor, by and through her parent and guardian, N.A.; A.M., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A.T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W., Plaintiffs,
v.
United States Department of Education; John B. King, Jr., in his official capacity as United States Secretary of Education; United States Department of Justice; Loretta E. Lynch, in her official capacity as United States Attorney General; and School Directors of Township High School District 211, County of Cook and State of Illinois, Defendants,
and
Students A, B, and C, by and through their parents and guardians, Parents A, B, and C; and the Illinois Safe Schools Alliance, Intervenor-Defendants.

No. 16-cv-4945
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Signed 10/18/2016

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

Jeffrey T. Gilbert, United States Magistrate Judge

I. EXECUTIVE SUMMARY

***1** Plaintiffs Students and Parents for Privacy, an unincorporated association, and five current or prospective high school students who live in suburban Cook County, Illinois, by and through their parents and legal guardians, (collectively, "Plaintiffs") have filed a Motion for Preliminary Injunction that, if granted, would require Defendant School Directors of Township High School District 211 ("District 211" or "the District") to segregate restrooms and locker rooms on the basis of students' biological sex (which Plaintiffs consider to be sex assigned at birth). Plaintiffs also seek to enjoin a rule, adopted by Defendant United States Department of Education ("DOE") and enforced in conjunction with Defendant United States Department of Justice ("DOJ") (together with the Secretary of Education and the Attorney General, collectively "the Federal Defendants"), that requires all schools in the United States to allow students to use restrooms and locker rooms consistent with their gender identity. Last, Plaintiffs seek to enjoin the District's policy, implemented in August 2013, allowing transgender students to use restrooms consistent with their gender identity, and an agreement DOE entered into with District 211 in December 2015 in which the District agreed to allow Student A, a transgender girl, to use the girls' locker rooms at William Fremd High School ("Fremd High School"), a public high school in Palatine, Illinois.

District Judge Jorge Alonso referred Plaintiffs' Motion for Preliminary Injunction to this Magistrate Judge for a Report and Recommendation as to whether it should be granted or denied. A preliminary injunction is an extraordinary remedy. Granting a preliminary injunction

in this case would change the status quo before a full determination on the merits of the claims and defenses raised in the lawsuit. Preliminary injunctive relief is granted only when the moving parties—here, Plaintiffs—make a clear showing that they have a likelihood of success on the merits of their claims, they likely will suffer irreparable harm if an injunction is not issued pending a final determination of the matters at issue, and they lack an adequate remedy at law. If the moving parties make these three threshold showings, then they still must show, on balance, that they will suffer more harm if an injunction is not issued than the non-moving parties will suffer if it is issued, and that the public interest would be served by the issuance of an injunction.

The Court finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that DOE violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, by promulgating a rule that interprets Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, to require that schools permit transgender students to use restrooms and locker rooms consistent with their gender identity, and by entering into an agreement informed by that rule with District 211 under which the District is required to allow Student A to use the girls' locker rooms at Fremd High School. The law in the Seventh Circuit concerning the meaning of the term "sex" as used in Title IX may be in flux. Just last week, the Seventh Circuit vacated a decision by a panel of that court that adhered to a longstanding interpretation of the word "sex" in the almost identically worded Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, as very narrow, traditional and biological. Plaintiffs relied heavily on the now vacated panel decision. The full court of appeals agreed to rehear that case next month. Recent rulings by courts around the country including a district court in the Seventh Circuit evince a trend toward a more expansive understanding of sex in Title IX as inclusive of gender identity. Therefore, the Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that DOE's interpretation of Title IX is not in accordance with law or entitled to deference.

***2** The Court also finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that District 211 or the Federal Defendants are violating their right to privacy under the United States Constitution or that District 211 is violating Title IX because transgender students are permitted to use restrooms consistent with their gender identity and Student A is allowed to use the girls' locker rooms at Fremd High School. High school students do not have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs. In addition, sharing a restroom or locker room with a transgender student does not create a severe, pervasive, or objectively offensive hostile environment under Title IX given the privacy protections District 211 has put in place in those facilities and the alternative facilities available to students who do not want to share a restroom or locker room with a transgender student. Further, the facilities District 211 provides for its male and female students are comparable as is required by Title IX.

In addition, even if Plaintiffs were able to show they have a likelihood of success on the merits of their claims, they still would not be entitled to the injunctive relief they seek. Plaintiffs have not shown they are likely to suffer irreparable harm if the District's or the Federal Defendants' actions are not enjoined. Plaintiffs also have not shown they lack an adequate remedy at law against either District 211 or the Federal Defendants if they ultimately succeed on their claims. Therefore, Plaintiffs have not made the three required threshold showings at this early stage of the case that the law requires to change the status quo before a final decision on the parties' claims and defenses.

For all of these reasons, there is no legal reason why District 211 cannot continue to permit all students to use restrooms and Student A to use locker rooms consistent with their gender identity while this case proceeds. As discussed more fully below, District 211 balanced the interests of all its students when it decided to permit transgender students to use restrooms consistent with their gender identity and to allow Student A to use the girls' locker rooms at her high school. Although the District decided to allow Student A to use the girls' locker rooms under threat of an enforcement action by DOE, it nevertheless agreed to resolve that action rather than litigate the issue, and it defends its decision to do so in this case. District 211 now offers all students reasonable accommodations to ensure their privacy is protected in restrooms and locker rooms. In addition, the District has made clear that any cisgender high school student who

does not want to use a restroom or a locker room with a transgender student is not required to do so.

Accordingly, this Court respectfully recommends to Judge Alonso that Plaintiffs' Motion for Preliminary Injunction be denied.

II. BACKGROUND

A. Events That Preceded This Lawsuit

In August 2013, District 211 began allowing transgender students to use restrooms consistent with their gender identity ("the Restroom Policy"). Verified Complaint for Injunctive and Declaratory Relief ("Complaint"), [ECF No. 1, at ¶¶ 214-217]. [1] But it did not allow transgender students to use locker rooms consistent with their gender identity. In December 2013, Student A, a transgender girl now in her senior year at Fremd High School, filed a complaint with DOE's Office of Civil Rights ("OCR"), alleging that District 211 was violating Title IX by denying her access to the girls' locker rooms. *Id.* at ¶¶ 71-75, 80. [2]

***3** Title IX prohibits recipients of "Federal financial assistance" from discriminating on the basis of sex in education programs and activities. 20 U.S.C. § 1681(a). DOE and DOJ share responsibility for enforcing Title IX. *See id.* at § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this grant of authority, OCR investigates complaints, conducts compliance reviews, promulgates regulations, and issues guidance. DOE's regulations implementing Title IX provide, in relevant part, that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any ... education program or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a). The regulations permit recipients to provide sex-segregated "toilet, locker room, and shower facilities," so long as "facilities provided for students of one sex [are] comparable to such facilities for students of the other sex." *Id.* at § 106.33. As a recipient of "Federal financial assistance" from DOE, District 211 is subject to Title IX. *See* 20 U.S.C. § 1681(a).

In a series of guidance documents issued in 2014 and 2015 (collectively, "Guidance Documents" or "Guidance"), DOE explained how schools that receive "Federal financial assistance" should comply with Title IX and its implementing regulations with respect to transgender students. In April 2014, in response to requests for clarification from various funding recipients, DOE, through OCR, issued guidance stating that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity." Questions and Answers on Title IX and Sexual Violence ("Q&A on Sexual Violence"), [ECF No. 21-9, at 5]. In December 2014, DOE also said that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities ("Q&A on Single-Sex Classes and Extracurricular Activities"), [ECF No. 21-8, at 25]. In April 2015, DOE reiterated this interpretation, stating that recipients must "help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes." Title IX Resource Guide, [ECF No. 21-7, at 21-22]. [3]

The Guidance Documents were issued after Student A filed her complaint with OCR concerning locker room access but during the time that OCR was reviewing that complaint. After investigating Student A's complaint, OCR notified District 211 by a letter dated November 2, 2015—the "Letter of Findings" for short—that excluding Student A from the girls' locker rooms violated Title IX's implementing regulations. Letter of Findings, [ECF No. 21-10, at 13]. The Letter of Findings further explained that if OCR and District 211 were not able to negotiate an agreement to bring the District into compliance with its obligations, OCR would issue a Letter of Impending Enforcement Action. *Id.*

On December 2, 2015, OCR and District 211 entered into an Agreement to Resolve, which will be referred to as the "Locker Room Agreement." Locker Room Agreement, [ECF No. 21-3]. The Locker Room Agreement provides, among other things:

> ***4** Based on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room facilities designated for female students at school and to take steps to protect the

> privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker rooms to accommodate Student A and any students who wish to be assured of privacy while changing.

Id. at 2. The Locker Room Agreement further provides:

> If any student requests additional privacy in the use of sex-specific facilities designed for female students beyond the private changing stations described [above], the District will provide that student with access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.

Id.

B. Plaintiffs' Complaint In This Case

On May 4, 2016, a little more than five months after the Locker Room Agreement was signed, Plaintiffs filed this lawsuit against the Federal Defendants and District 211, challenging the Restroom Policy, the Locker Room Agreement, and the Guidance Documents. Complaint, [ECF No. 1].[4] In Count I of their Complaint, Plaintiffs allege that DOE violated the APA by entering into the Locker Room Agreement with District 211 and by promulgating a rule, embodied in the Guidance Documents, requiring schools to treat students consistent with their gender identity. In Counts II and IV respectively, Plaintiffs allege that the Federal Defendants and District 211 are violating Plaintiffs' constitutional right to privacy, and that the District is violating their rights under Title IX, by allowing transgender students to use restrooms consistent with their gender identity and by allowing Student A, who Plaintiffs consider to be a biological male, to use the girls' locker rooms.

In addition, Plaintiffs assert claims for violations of their parental right to direct the education and upbringing of their children (Count III); the Illinois and Federal Religious Freedom Restoration Acts (Counts V and VI); and the Free Exercise Clause of the First Amendment (Count VII). Counts I and VI are against the Federal Defendants only; Counts IV and V are against District 211 only. The remaining counts are against all Defendants.

***5** Plaintiffs are an unincorporated association and five individually named minor plaintiffs (four females and one male), identified only by their initials. Plaintiffs use the term "Girl Plaintiffs" to refer to "all girl students who attend Fremd, or will attend Fremd in fall 2016, and are part of the Students and Parents for Privacy [including the four female minor named plaintiffs]." *Id.* at ¶ 36. They use the term "Student Plaintiffs" to refer to "all students who are part of Students and Parents for Privacy [including the five individual minor named plaintiffs]." *Id.*[5] The only individual minor plaintiff who is male is identified as B.W. in paragraph 35 of the Complaint. Plaintiffs allege B.W. is subject to the Restroom Policy but he is not referenced anywhere else in the Complaint. Student Plaintiffs allege they are affected by the Restroom Policy, but only Girl Plaintiffs allege they are affected by the Locker Room Agreement. The only transgender student who is alleged to have used a restroom or locker room at Fremd High School is Student A.

Plaintiffs allege, among other things, the Restroom Policy and the Locker Room Agreement cause Girl Plaintiffs to experience "embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity" because they use, and anticipate having to use, restrooms and locker rooms with Student A, who they label as a "biological male." *Id.* at ¶¶ 7, 11; *see also id.* at ¶ 226 (adding the word "intimidation" to the list of emotions Girl Plaintiffs allege they are experiencing). Plaintiffs allege Girl Plaintiffs are afraid, worried, and embarrassed about the possibility of seeing or being seen by Student A when either Girl Plaintiffs or Student A are in a state of undress. *Id.* at ¶¶ 8, 9, 114, 126, 127, 186, 187. Plaintiffs assert Girl Plaintiffs' distress is "ever-present" and "constant." *Id.* at ¶¶ 114, 115, 125, 237. Plaintiffs also say Girl Plaintiffs are fearful of having to attend to personal needs in restrooms and locker rooms when Student A is present. *Id.* at ¶¶ 8, 10. All Student Plaintiffs allege they "experience embarrassment, humiliation, anxiety, intimidation, fear, apprehension,

stress, degradation, and loss of dignity" because of the Restroom Policy. *Id.* at ¶ 226.

Plaintiffs generally allege the Restroom Policy and the Locker Room Agreement have a negative effect on Girl Plaintiffs' access to educational opportunities, benefits, programs, and activities at their schools. *Id.* at ¶¶ 12-13. Plaintiffs allege some Girl Plaintiffs risk tardiness by running to the opposite end of the school, during short passing periods, to find a restroom or locker room that Student A is not likely to be using, and change clothes as quickly as possible while experiencing stress and anxiety and avoiding eye contact and conversation. *Id.* at ¶ 12.

Plaintiffs allege the privacy protections District 211 provides in restrooms and locker rooms do not do enough to ameliorate Student Plaintiffs' concerns about sharing those facilities with a transgender student assigned a different sex than theirs at birth, or the risk that they may see or be seen by a transgender student when either is in an unclothed or partially clothed state. Plaintiffs allege there are "large gaps" above and below the doors on the stalls in both the boys' and girls' restrooms, *id.* ¶ 158, and "gaps along the sides of the door[ ] that another student could see through even inadvertently," *id.* at ¶ 228. Plaintiffs allege this "mean[s] that the Student Plaintiffs, both boys and girls, must risk exposing themselves to the opposite sex every time they use the restroom." *Id.* at ¶ 229. Plaintiffs allege the privacy stalls provided in the physical education locker room for changing clothes or showering are not adequate to address Girl Plaintiffs' fundamental concern with using the same facility as Student A. *Id.* at ¶¶ 259-260. Plaintiffs also allege Girl Plaintiffs are ridiculed and harassed by their classmates when they use the privacy stalls. *Id.* at ¶¶ 140-146. Plaintiffs allege there are no private stalls in the girls' swim locker room and the girls' gymnastics locker room for changing clothes or showering. *Id.* at ¶¶ 161, 172-174, 196-197. Plaintiffs allege the completely separate, private facilities District 211 provides for students who do not want to use the common facilities "are inadequate and inferior" to the common facilities and "unworkable in terms of the practical locker room needs of Girl Plaintiffs." *Id.* at ¶ 245; *see also id.* at ¶¶ 242-244.

C. Plaintiffs' Motion For Preliminary Injunction

*6 On May 23, 2016, Plaintiffs moved for a preliminary injunction on Counts I, II, and IV of their Complaint. Plaintiffs' Motion for Preliminary Injunction ("Plaintiffs' Motion"), [ECF No. 21]. As noted above, Count I is a claim against the Federal Defendants for violating the APA. Count II is a claim against both the Federal Defendants and District 211 for violating Plaintiffs' constitutional right to privacy. Count IV is a claim against District 211 for violating Title IX. Judge Alonso referred Plaintiffs' Motion for Preliminary Injunction to this Magistrate Judge for a Report and Recommendation. [ECF Nos. 24, 26].

In their Complaint, Plaintiffs ask the Court to "set aside" or enjoin DOE's "new rule that redefines 'sex' in Title IX" and to enjoin the Federal Defendants from taking "any action" based on this interpretation of Title IX and its implementing regulations as requiring schools to treat a student's gender identity as the student's sex. Complaint, [ECF No. 1, Prayer for Relief, at ¶¶ B and C]. During oral argument on their Motion for Preliminary Injunction, however, Plaintiffs' counsel clarified that Plaintiffs are asking the Court only to enter a preliminary injunction restraining the Federal Defendants from "further application of the rule to force District 211 to comply with it in the operation of its facilities." Oral Argument Transcript, [ECF No. 127, at 155]; *see also id.* at 155-58. In other words, Plaintiffs are not now asking the Court broadly to "set aside" a rule or prevent the Federal Defendants from taking "any action" based on DOE's interpretation of Title IX other than with respect to District 211. *Id.* Plaintiffs will seek broader relief if they prevail on the merits of their claims at the conclusion of this case. *Id.* Plaintiffs further seek to enjoin District 211 from enforcing the Restroom Policy and complying with the Locker Room Agreement. Complaint, [ECF No. 1, Prayer for Relief, at ¶ A]. [6]

D. District 211's Request For Early Discovery And The June 9, 2016 Hearing

Shortly after Plaintiffs moved for a preliminary injunction, District 211 requested leave to conduct discovery before responding to Plaintiffs' Motion. Plaintiffs opposed the District's request for early discovery. They wanted a relatively quick (as the litigation timeline goes) decision on their request for injunctive relief and to avoid getting bogged down in fact-intensive, drawn-out discovery that potentially could delay a decision on their Motion. On June 3, 2016, at the Court's direction, District 211 served the interrogatories it wanted Plaintiffs to answer and a short memorandum explaining

why the District felt the discovery was necessary for a ruling on Plaintiffs' Motion. [ECF No. 44]. Five days later, on June 8, 2016, Plaintiffs filed a Motion for Protective Order opposing the requested discovery. [ECF No. 48].

*7 On June 9, 2016, the Court held a hearing and granted Plaintiffs' Motion for Protective Order. The Court found that responses to the interrogatories District 211 sought to serve were not necessary at this preliminary stage for the Court to make its recommendation on Plaintiffs' Motion. [ECF No. 52]. The Court's ruling was based on Plaintiffs' representation that the thrust of their case in support of their Motion rests on facial challenges to the Restroom Policy and the Locker Room Agreement which, as Plaintiffs allege, is the result of DOE's interpretation of Title IX in the Guidance Documents. In Plaintiffs' words:

> Plaintiffs' preliminary injunction motion places before this Court two questions of law related to the activities of the District. First, does letting a biological male use the girls' locker rooms and restrooms, and so subjecting the Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate the Girl Plaintiffs' constitutional right to privacy? Second, does letting a biological male use these private female facilities create a hostile environment for the Girl Plaintiffs, in violation of Title IX, and does offering the Girl Plaintiffs incomparable facilities as compared to boy students violate Title IX?

Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Protective Order ("Plaintiffs' Protective Order Brief"), [ECF No. 50, at 3].

At the June 9 hearing, Plaintiffs' counsel elaborated on what Plaintiffs were and were not arguing in support of their Motion for Preliminary Injunction:

> What you need to know, Your Honor, is that the policy exists, nobody disputes that, that the policy allows a biological [male] student into a locker room and restroom, and that, of course, results in interactions in the locker room on a daily basis between girls and boys.... Inserting the biological male into those facilities is sufficient to show the violation.

Transcript of June 9, 2016 Hearing ("June 9 Hearing Transcript") [ECF No. 128, at 18].

District 211's proposed interrogatories (and depositions of certain Plaintiffs and others that might have followed) were focused on discovering the "who, what, where, when, etc."—in other words, the facts—underlying Plaintiffs' anonymous, general, and relatively conclusory allegations in their Complaint. *See* District 211's Proposed Interrogatories, [ECF No. 44-1]. Plaintiffs argued none of that discovery was necessary at this stage because they are not relying on the specifics of any interactions in either restrooms or locker rooms between any Plaintiff and Student A or anyone else in support of their Motion for Preliminary Injunction. According to Plaintiffs' counsel, "who saw who in the state of undress or naked ... is not relevant ... at the preliminary injunction stage. We don't need to prove that. We didn't allege that in the complaint, nor do we rely on it at the preliminary injunction stage." June 9 Hearing Transcript, [ECF No. 128, at 18]. Rather, Plaintiffs argued the simple fact that Student A, in Plaintiffs' words a biological boy, is or can be present in the girls' restrooms and locker rooms is what entitles them to the relief they seek:

> The District's policies allow Student A access to the girls' private facilities.... Student A has used the girls' facilities while some Girl Plaintiffs were present. Girl Plaintiffs know that any time they use the restroom or locker room, Student A has the right to be present with them. They also know that, even if he is not present, he could walk in at any time. As a result, Girl Plaintiffs are suffering stress, anxiety, embarrassment, and intimidation.

*8 Plaintiffs' Protective Order Brief, [ECF No. 50, at 3]. [7]

The Court agreed Plaintiffs are entitled to frame the issues as they want in support of their Motion for Preliminary Injunction. The Court also recognized that, if it allowed District 211 to proceed with the discovery it wanted to take, that materially could delay a decision on Plaintiffs' Motion. In addition, District 211's counsel agreed that if Plaintiffs were resting their case in favor of a preliminary injunction on "the risk of exposure ... in front of a biological male whose gender identity is female ... [a] fact that I don't think anybody disputes[,] ... as opposed to looking at what plaintiffs allege has actually happened in locker rooms and restrooms," then the District's proposed discovery could be deferred. June 9 Hearing Transcript, [ECF No. 128, at 15].

On May 25, 2016, Students A, B, and C, by and through their parents and legal guardians, and the Illinois Safe Schools Alliance (collectively, "Intervenor-Defendants") filed a Motion to Intervene in this case. [ECF No. 30]. As discussed above, Student A is the subject of the Locker Room Agreement entered into by DOE and District 211. Locker Room Agreement, [ECF No. 21-3]. Student C is a transgender boy who recently entered his freshman year at a high school in District 211 and wants to use the boys' restrooms and locker rooms at his school. Declaration of Parent C ("Parent C's Declaration"), [ECF No. 32-3, at ¶¶ 2, 10]. Student B is a transgender boy who soon will attend a high school in District 211 and wants to use the boys' restrooms and locker rooms at his high school. Declaration of Parent B ("Parent B's Declaration"), [ECF No. 32-2, at ¶¶ 2, 19]. The Illinois Safe Schools Alliance is an organization that supports lesbian, gay, bisexual, and transgender students in Illinois through advocacy and training, including in District 211. Declaration of Owen Daniel-McCarter, [ECF No. 32-4, at ¶¶ 2-15]. On June 15, 2016, Judge Alonso granted Intervenor-Defendants' Motion to Intervene. [ECF No. 56]. Intervenor-Defendants oppose Plaintiffs' Motion for Preliminary Injunction.

Plaintiffs' Motion for Preliminary Injunction is fully briefed, and this Court held oral argument on August 15, 2016. The record before the Court on Plaintiffs' Motion consists of Plaintiffs' Complaint and the attached exhibits, the parties' respective briefs filed in support of and in opposition to Plaintiffs' Motion, the various declarations and other materials submitted with those briefs, and counsels' oral arguments during the hearing on Plaintiffs' Motion. For all of the reasons set forth below, the Court respectfully recommends that Judge Alonso deny Plaintiffs' Motion for Preliminary Injunction.

III. LEGAL STANDARD

***9** A preliminary injunction " 'is an extraordinary and drastic remedy.' " *Goodman v. Ill. Dep't of Fin.*, 430 F.3d 432, 437 (7th Cir. 2005) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). In the Seventh Circuit, the court analyzes a request for such relief in two distinct phases: a threshold phase and a balancing phase. *Girl Scouts of Manitou Council Inc. v. Girl Scouts of USA, Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008). During both phases, movants—here, Plaintiffs—bear the burden of proving " *'by a clear showing'* " that a preliminary injunction should be granted. *Goodman*, 430 F.3d at 437 (quoting *Mazurek*, 520 U.S. at 972) (emphasis in the original).

During the first phase, Plaintiffs must make three threshold showings. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661-62 (7th Cir. 2015). Plaintiffs must show they have a likelihood of success on the merits. *Id.* at 662. They must show, "absent preliminary injunctive relief, [they] will suffer irreparable harm in the interim prior to a final resolution." *Id.* And Plaintiffs must show there is no adequate remedy at law. *Id.* If Plaintiffs fail to make any of these showings, the court must deny injunctive relief. *Girl Scouts*, 549 F.3d at 1086.

If Plaintiffs carry their burden in the threshold phase, the court then proceeds to the balancing phase. During this stage of the analysis, the court first "weighs the irreparable harm that the moving part[ies] would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving part[ies] would suffer if the court were to grant the requested relief." *Id.* Then the court considers how granting or denying the injunction would affect the interests of non-parties—commonly called the "public interest." *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). During the balancing phase, the court "weighs the balance of potential harms on a 'sliding scale' against the movant[s'] likelihood of success." *Turnell*, 796 F.3d at 662.

IV. ANALYSIS

A. Likelihood Of Success On The Merits

To satisfy the first threshold requirement for a preliminary injunction, Plaintiffs must show they have a likelihood of success on the merits. *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). "This 'likelihood' standard requires more than a 'mere possibility of relief' and more than a 'better than negligible' showing." *Truth Foundation Ministries, NFP v. Village of Romeoville*, ___ F. Supp. 3d ____, 2016 WL 757982, at *8 (N.D. Ill. Feb. 26, 2016).

1. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their APA Claim Against The Federal Defendants

a. The Locker Room Agreement And The Federal Defendants' Interpretation Of The Word "Sex" In Title IX Are Subject To Judicial Review

The APA vests "the courts with the power to 'interpret ... statutory provisions' and overturn agency action inconsistent with those interpretations." *Gutierrez-Brizuela v. Lynch*, ___ F.3d ____, 2016 WL 4436309, at *7 (10th Cir. Aug. 23, 2016) (Gorsuch, J., concurring) (quoting 5 U.S.C. § 706). But the APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see also Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016). Therefore, "[w]hether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006).

***10** The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Only two of these types of actions—sanction and rule—are relevant to this case. A sanction is, in pertinent part, "the whole or a part of an agency ... prohibition, requirement, limitation, or other condition affecting the freedom of a person." *Id.* at § 551(10). And a "rule" is, again in pertinent part, "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* at § 551(4).

This case involves a sanction and a rule. Plaintiffs argue and the Federal Defendants agree the Locker Room Agreement is a sanction because it imposes "concrete consequences" on District 211. *See* Oral Argument Transcript, [ECF No. 127, at 48, 141, 143, 151]. The rule is the Federal Defendants' "interpretation of Title IX," stated in the Guidance, "as requiring schools to treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." Federal Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Federal Defendants' Response Brief"), [ECF No. 80, at 1]. The Federal Defendants agree with Plaintiffs that this "interpretation," which the Court will refer to as "the Rule," is a rule. *See id.* at 15 ("Here, the Guidance has all the indicia of an interpretive rule.").

Generally, an agency action is final when the action marks the consummation of the agency's decision-making process, and has legal consequences or, phrased another way, directly affects a party. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 800, 806 (D.C. Cir. 2006); *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003). Under this standard, an agency's behavior may indicate that an action is final even when the agency has not observed " 'the conventional procedural accoutrements of finality.' " *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001)). In the end, the finality requirement must be interpreted pragmatically. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016).

The Federal Defendants do "not contest[ ]" that the Locker Room Agreement constitutes final agency action. Oral Argument Transcript, [ECF No. 127, at 48, 139]; *see also id.* at 141, 143. The Locker Room Agreement marked the conclusion of DOE's administrative action against District 211, and DOE did not contemplate any further proceedings. The Locker Room Agreement imposes on District 211 concrete obligations that, according to the Federal Defendants, are legally enforceable. *See id.* at 48, 141, 143, 151. At least some of these legal obligations exceed what Title IX and its implementing regulations would require the District to do if the Locker Room Agreement did not exist. The Court thus is satisfied that the Locker Room Agreement constitutes final agency action because it represents the culmination of

DOE's decision-making process and has concrete legal consequences that bind District 211 and impact Plaintiffs.

The Federal Defendants argue the Rule is not final agency action and, thus, not subject to judicial review. They do not dispute that the Rule is the culmination of DOE's decision-making process with respect to the issue of whether "sex" as used in Title IX includes gender identity. Instead, they assert in a footnote that the Rule "is not final agency action ... because it does not determine rights or obligations and no 'legal consequences' flow from it." Federal Defendants' Response Brief, [ECF No. 80, at 16 n.9]. The Federal Defendants do not say why the Rule does not determine rights or obligations and has no legal consequences. Instead, the footnote references the corresponding text in the body of the brief, which explains why, in the Federal Defendants' view, the Rule is interpretive, not legislative. In essence, then, the Federal Defendants seem to be arguing the Rule is not a final agency action because it is an interpretive rule.

***11** This argument is contrary to clear precedent holding that interpretive rules and guidance documents may be subject to judicial review. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014); *Oregon v. Ashcroft*, 368 F.3d 1118, 1147 (9th Cir. 2004), *aff'd sub nom.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006). " 'An agency may not avoid judicial review merely by choosing the form of' " a guidance document " 'to express its definitive position on a general question of statutory interpretation.' " *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986)). "Once [an] agency publicly articulates an unequivocal position ... and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy*, 801 F.2d at 436; *see also Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (" '[A]n interpretative rule is subject to review when it is relied upon or applied to support an agency action in a particular case.' ") (quoting Edwards, Elliott, & Levy, *Federal Standards of Review* 161 (2d ed. 2013)).[8]

For all practical purposes, the Rule gives schools across the country "marching orders" as to what DOE expects them to do. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). It does not describe what DOE thinks Title IX might mean or propose how schools possibly could interpret Title IX. The Guidance Documents state definitively that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity," Q&A on Sexual Violence, [ECF No. 21-9, at 5], and tell schools what they "must" do to comply with Title IX, *see, e.g.*, Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 25]; Title IX Resource Guide, [ECF No. 21-7, at 21-22]. DOE has not expressed any uncertainty about the binding nature of its interpretation. To the contrary, even since the filing of this lawsuit, DOE has continued to maintain and advance its interpretation as binding on schools in the United States. On May 23, 2016, for example, DOE issued a Dear Colleague Letter saying that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Dear Colleague Letter, [ECF No. 21-6, at 3]. There is no indication in the record that, within DOE, agency officials consider the Rule to be a suggestion or an interim position. Rather, it guides DOE's review of complaints and pursuit of enforcement actions.

In this particular case, the Rule "informed" DOE's "review" of Student A's complaint against District 211. Federal Defendants' Response Brief, [ECF No. 80, at 1-2]. After its review, DOE sent a Letter of Findings to District 211, saying the agency found the District to be in violation of Title IX, and that, if DOE and the District did not agree to resolve the matter, the agency would issue a Letter of Impending Enforcement Action within 30 days, initiating a process that ultimately could result in District 211 losing its federal funding. Letter of Findings, [ECF No. 21-10, at 13]. District 211 and DOE then entered into the Locker Room Agreement, a resolution that the Federal Defendants concede was "informed" by the Rule. Federal Defendants' Response Brief, [ECF No. 80, at 1-2]. The Federal Defendants concede the Locker Room Agreement has a direct and consequential effect on District 211 and, thus, in turn on Plaintiffs. *See* Oral Argument Transcript, [ECF No. 127, at 48, 141, 143, 151].

***12** DOE says it issued the Rule in response to questions it was receiving from schools around the country confronted with how they should address transgender students' use of facilities denominated as single-sex. *See* Federal Defendants' Response Brief, [ECF No. 80, at 16];

Q&A on Sexual Violence, [ECF No. 21-9, at ii]; Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 1]. As a practical matter, the Rule represents and has been treated by DOE as its definitive statement that "sex" as used in Title IX and its implementing regulations includes gender identity. This has led some schools, such as District 211, to acquiesce to DOE's view. For all of these reasons, the Rule constitutes final agency action. *See Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1006-07 (D.C. Cir. 2014); *CSI*, 637 F.3d at 411-14; *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d, 215 F.3d 45, 47-50 (D.C. Cir. 2000); *Appalachian Power*, 208 F.3d at 1020-23; *Philip Morris USA Inc. v. United States Food & Drug Admin.*, ___ F. Supp. 3d ____, 2016 WL 4378970, at *10-12 (D.D.C. Aug. 16, 2016); *Pharm. Research & Manufacturers of Am. v. United States Dep't of Health & Human Servs.*, 138 F. Supp. 3d 31, 39-47 (D.D.C. 2015). [9]

Moreover, even if the Rule were not a final agency action, it still would be reviewable in this case because it would be at least a preliminary or intermediate agency action that led to the Locker Room Agreement, which is a final agency action. The APA provides that a court may review preliminary and intermediate agency actions "on the review of the final agency action." 5 U.S.C. § 704. That means when a court is reviewing a final agency action, such as the Locker Room Agreement, it also can review any preliminary or intermediate agency actions that led to the final agency action. *See Benzman v. Whitman*, 523 F.3d 119, 132 (2d Cir. 2008); *Oliver v. U.S. Dep't of the Army*, 2015 WL 4561157, at *3 (D.N.J. July 28, 2015); *Souza v. California Dep't of Transp.*, 2014 WL 793644, at *4 (N.D. Cal. Feb. 26, 2014); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 801 F. Supp. 2d 383, 404 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012); *cf. Com. of Mass. v. U.S. Nuclear Regulatory Comm'n*, 924 F.2d 311, 322 (D.C. Cir. 1991) ("Section 704 authorizes us to review only those preliminary, intermediate, or procedural rulings that relate to the final agency action presently before the court.").

For all of these reasons, the Rule is subject to judicial review in this case.

b. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their Argument That "Sex" As Used In Title IX Unambiguously Excludes Gender Identity

Plaintiffs argue DOE violated the APA by promulgating the Rule and entering into the Locker Room Agreement which, according to Plaintiffs, conflict with the unambiguous meaning of the term "sex" in Title IX. Plaintiffs contend the statute and its implementing regulations unambiguously mean that one's "sex" is determined by his or her "chromosomes, anatomy, gametes, and reproductive system." Plaintiffs' Reply Memorandum in Support of Their Preliminary Injunction Motion ("Plaintiffs' Reply Brief"), [ECF No. 94, at 1]. Sex does not and cannot, Plaintiffs assert, include gender identity. Plaintiffs look to Seventh Circuit decisions interpreting Congress's intent when it used the word "sex" in the almost identically worded Title VII to support their position under Title IX.

***13** The Federal Defendants argue the word "sex" as used in Title IX is ambiguous as to whether one's sex is determined " 'with reference exclusively to genitalia' " or " 'with reference to gender identity.' " Federal Defendants' Response Brief, [ECF No. 80, at 19] (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016)). They claim that, because of this ambiguity, courts should defer to DOE's interpretation of the term "sex" under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Chevron U.S.A. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Intervenor-Defendants go a step further and argue that whenever there is not complete alignment among a student's sex-related characteristics, the unambiguous meaning of the term "sex" in Title IX requires that schools determine a student's sex based upon his or her gender identity because gender identity in those circumstances is the only way to determine sex. Intervenor-Defendants' Brief in Response to Plaintiffs' Motion for Preliminary Injunction ("Intervenor-Defendants' Response Brief"), [ECF No. 79, at 2-7].

The Seventh Circuit first addressed, to the extent relevant here, the meaning of "sex" as used in Title VII in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). In that case, which involved a transsexual plaintiff alleging employment discrimination under Title VII, the court of appeals held Congress intended the term "sex" in Title VII to have a "narrow, traditional interpretation." *Id.* at 1086. *Ulane* was decided in 1984, more than 32 years ago, and a number of courts around the country since

then have declined to follow its reasoning in light of more recent developments in the law including, among others, the Supreme Court's recognition in 1989 that discrimination claims based upon gender stereotypes and gender non-conformity are cognizable under Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Roberts v. Clark Cty. Sch. Dist.*, 2016 WL 5843046, at *6 (D. Nev. Oct. 4, 2016). [10]

On July 28, 2016, in *Hively v. Ivy Tech Community College, South Bend*, a panel of the Seventh Circuit had an opportunity to overrule *Ulane* but declined to do so. 830 F.3d 698 (7th Cir. 2016). Instead, it concluded *Ulane*'s holding that Congress intended a very narrow and traditional interpretation of the term "sex" in Title VII "so far, appears to be correct." *Id.* at 702. On October 11, 2016, however, the full Seventh Circuit vacated the panel's decision in *Hively* and granted a rehearing en banc in that case, with oral argument scheduled for November 30, 2016. Order Granting Rehearing En Banc and Vacating the Panel Opinion, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, Dkt. No. 60 (7th Cir. Oct. 11, 2016); Notice of En Banc Oral Argument, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, Dkt. No. 61 (7th Cir. Oct. 11, 2016).

As a result of these recent developments, it appears the law in the Seventh Circuit concerning the interpretation of the term "sex" in Title VII, as relevant to the almost identically worded Title IX, may be in flux. When the Seventh Circuit rules after its en banc review of *Hively*, whether with one voice or otherwise, it very well could shed important new light on the question of whether the term "sex" as used in Title VII, and by implication in Title IX, encompasses gender identity.

***14** To understand the parties' respective arguments as to the meaning of the term "sex" under Title VII and Title IX and the current state of the law in that respect in this Circuit and around the country, it is important to understand the Seventh Circuit's decisions in *Ulane* and its progeny through and including the recent panel decision, now vacated, in *Hively*.

i. *Ulane v. Eastern Airlines, Inc.* and its progeny

The plaintiff in *Ulane*, Karen Frances Ulane, was an Army veteran who earned the Air Medal with eight clusters for her service in Vietnam. *Ulane*, 742 F.2d at 1082. When Ulane returned home, Eastern Airlines, Inc. hired her as a pilot, and she eventually reached the position of First Officer. *Id.* When it discovered that Ulane was transsexual, though, Eastern fired her. *Id.* at 1082-83. Ulane then filed suit, alleging that Eastern discriminated against her because of her sex in violation of Title VII. *Id.* at 1082. The district court, after a bench trial, found that "sex" "comprehend[s] 'sexual identity' " because " 'sex is not a cut-and-dried matter of chromosomes,' but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual." *Id.* at 1084 (quoting *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 823-24 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984)). The district court ruled in Ulane's favor, holding Title VII prohibits discrimination on the basis of transsexualism. *Id.* The court also ruled Eastern had discriminated against Ulane as a female. *Id.* at 1087.

The Seventh Circuit disagreed with the district court's analysis and held Title VII does not prohibit discrimination on the basis of transsexualism. *Id.* at 1084. In doing so, the court of appeals attempted to discern Congress's intent when it enacted Title VII, and the court identified three adjectives that describe Congress's thinking about the plain meaning of "sex." *See id.* at 1085, 1086 (discussing the "plain" and "common" meaning of Title VII). The first adjective is "traditional." *Id.* at 1085 (recognizing "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex"); *id.* at 1085-86 (saying Congress's failure to amend Title VII "strongly indicates ... sex should be given a ... traditional interpretation"); *id.* at 1086 (determining only Congress can decide whether "sex" should encompasses "the untraditional"); *id.* (declining "to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation"). The second is "narrow." *Id.* at 1085-86 (concluding Congress's failure to amend Title VII "strongly indicates ... sex should be given a narrow ... interpretation"); *id.* at 1086 (explaining "Congress had a narrow view of sex in mind when it passed

the Civil Rights Act"). And the third is "biological." *Id.* at 1087 (agreeing "with the Eighth and Ninth Circuits that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress"). [11]

***15** Based on its understanding of congressional intent, the Seventh Circuit in *Ulane* overruled the district court's conclusion that "sex" "comprehend [s] 'sexual identity.' " *Id.* at 1084. The court of appeals said that "even though some may define 'sex' in such a way as to mean an individual's 'sexual identity,' our responsibility is to ... determine what Congress intended when it decided to outlaw discrimination based on sex." *Id.* In this context, the Seventh Circuit held discrimination because of "sex" does not encompass discrimination based on "a sexual identity disorder or discontent with the sex into which [one was] born." *Id.* at 1085. [12]

Between 1984 and 2015, the Seventh Circuit referenced *Ulane*'s holding that the word "sex" in Title VII is to be interpreted in a narrow, traditional, and biological sense in three opinions. In *Doe by Doe v. City of Belleville, Illinois*, a 1997 decision, the court of appeals said "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination." 119 F.3d 563, 572 (7th Cir. 1997), *judgment vacated sub nom. City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998), and *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). [13] Then, in a pair of opinions —*Hamner* and *Spearman*—released just two months apart in 2000, the Seventh Circuit, again relying on *Ulane*, reaffirmed that "Congress intended the term 'sex' to mean 'biological male or biological female.' " *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084-85 (7th Cir. 2000) (quoting *Ulane*, 742 F.2d at 1087); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (quoting *Ulane*, 742 F.2d at 1087). Between 2001 and 2015, though, *Ulane* almost entirely faded from Seventh Circuit opinions. [14]

ii. *Hively* and the Seventh Circuit's decision to vacate the panel's ruling and rehear that case en banc

As noted above, on July 28, 2016, *Ulane* re-emerged in the Seventh Circuit. In *Hively*, a panel of the court of appeals said *Ulane* remained good law. The plaintiff-appellant in that case, Kimberly Hively, was a former teacher who alleged Ivy Tech Community College denied her full-time employment and promotions on the basis of her sexual orientation. *Hively*, 830 F.3d at 699. On appeal, Hively argued, among other things, that *Ulane* and *Hamner* were wrong and should be reversed. Appellant's Brief at 4-17, *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016) (No. 15-1720), Dkt. No. 10. The panel in *Hively* rejected this argument. Instead, the panel said the "understanding in *Ulane* that Congress intended a very narrow reading of the term 'sex' when it passed Title VII of the Civil Rights Act, so far, appears to be correct." *Hively*, 830 F.3d at 702.

***16** Plaintiffs, the Federal Defendants, and Intervenor-Defendants (District 211 did not brief the APA issue) submitted supplemental briefs after the panel's decision in *Hively*. Plaintiffs argued *Ulane* and *Hively* were case dispositive in their favor: "[u]nder the law of *Hively* and *Ulane*, Plaintiffs should prevail on the merits of their APA claim, as well as their Title IX and privacy claims, and so Plaintiffs' Motion for Preliminary Injunction should be granted." Plaintiffs' Supplemental Brief Addressing *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016) ("Plaintiffs' Supplemental Brief"), [ECF No. 118, at 1]. The Federal Defendants and Intervenor-Defendants argued, on the other hand, that *Hively* should be limited to its facts, and only to Title VII and sexual orientation claims. *See generally* Federal Defendants' Supplemental Brief, [ECF No. 116]; Federal Defendants' Responsive Supplemental Brief, [ECF No. 121]; Intervenor-Defendants' Opening Brief on *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. 2016) ("Intervenor-Defendants' *Hively* Brief"), [ECF No. 117]; Intervenor-Defendants' Response Brief on *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. 2016) ("Intervenor-Defendants' Responsive Supplemental Brief"), [ECF No. 120].

The Federal Defendants also argued *Ulane* and *Hively*, both of which interpreted Title VII, are not relevant to, much less controlling of any resolution of the question presented in this case under Title IX. Title VII and Title IX are different statutes enacted at different times to address different discriminatory conduct. And while the court of appeals in *Ulane* found that Congress included the term "sex" in Title VII at the last minute as the resfult of an effort intended to kill the bill, *Ulane*, 742

F.2d at 1085, the entire purpose behind Title IX was to address discrimination on the basis of sex broadly in educational institutions, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Still, courts routinely rely on Title VII jurisprudence to determine the meaning of similar provisions in Title IX. *Carmichael v. Galbraith*, 574 Fed.Appx. 286, 293 (5th Cir. 2014); *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 695 (4th Cir. 2007); *Doe v. Claiborne Cty., Tenn. By & Through Claiborne Cty. Bd. of Educ.*, 103 F.3d 495, 514 (6th Cir. 1996). Moreover, in this case, all parties rely on Title VII cases in support of their respective legal positions, and they effectively equate the meaning of "sex" in Title VII and Title IX. *See, e.g.*, Plaintiffs' Supplemental Brief, [ECF No. 118, at 3]; Federal Defendants' Responsive Supplemental Brief, [ECF No. 121, at 2]; Intervenor-Defendants' *Hively* Brief, [ECF No. 117, at 9]; Intervenor-Defendants' Responsive Supplemental Brief, [ECF No. 120, at 7].

Therefore, had the Seventh Circuit not vacated *Hively*, the panel's decision certainly would have been relevant to this Court's analysis of the issues raised by Plaintiffs under Title IX. When the Seventh Circuit vacated the panel's decision, however, it called into serious question whether the narrow, traditional, and biological interpretation of the term "sex" announced in *Ulane* remains good law in this Circuit with respect to Title VII and Title IX. Moreover, although the panel in *Hively* relied on *Ulane*'s reading of congressional intent underlying Title VII, courts throughout the country for years have questioned and discounted the continued vitality of *Ulane*, particularly since the Supreme Court's decision in *Price Waterhouse*. *See Smith*, 378 F.3d at 573 ("[T]he approach in ... *Ulane* ... has been eviscerated by *Price Waterhouse*."). As the Sixth Circuit noted in *Smith*, "the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Id.*

In addition, two of the three judges on the *Hively* panel said the distinction between discrimination claims based on gender stereotypes or gender non-conformity, which are cognizable under Title VII but only if a person does not conform to the stereotypes associated with his or her gender assigned at birth, and sexual orientation claims, which are not cognizable under Title VII, "seems illogical," and "[p]erhaps the writing is on the wall" that this legal paradox should be corrected. *Hively*, 730 F.3d at 718. [15] In this Circuit, the distinction between these two kinds of claims flows in no small part from the narrow, traditional, and biological interpretation of the term "sex" announced in *Ulane*. The same two judges on the *Hively* panel also recognized that "precedent can be overturned when principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine ... or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 718 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 33, 854-55 (1992)). [16]

***17** In language that seems to invite the kind of re-examination that will now take place in the form of an en banc rehearing, two of the three judges on the *Hively* panel also said:

> [W]e can see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms. We allow two women or two men to marry, but allow employers to terminate them for doing so. Perchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our precedent.

Id. [17]

In this Court's view, the Seventh Circuit's en banc review of *Hively* also may delve into the underlying basis for the *Hively* decision, which is whether *Ulane* correctly divined that Congress intended a very narrow, traditional, and biological interpretation of the term "sex" in Title VII. *See Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (per curiam) (explaining that the Seventh Circuit usually only hears cases en banc to address an intra-circuit split, not involved here, or a question of exceptional importance). Whether or not the court of appeals does so, however, its en banc decision could have an important impact on Plaintiffs' argument about the meaning of the term "sex" in Title VII and, by implication, in Title IX. In this respect,

that decision could affect materially Plaintiffs' likelihood of success on the merits of their APA claim as this case proceeds.

In light of this uncertainty in the Seventh Circuit, it is useful to look to decisions by other courts concerning the issues raised in this case. To date, only one court of appeals has addressed whether "sex" in Title IX can or must include gender identity. In a case known as *G.G.*, a district court in Virginia found one of Title IX's implementing regulations allowed a local school board " 'to limit bathroom access 'on the basis of sex,' including birth or biological sex.' " *G.G.*, 822 F.3d at 719 (quoting *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 745-46 (E.D. Va. Sept. 17, 2015)). The Fourth Circuit disagreed. *See id.* at 727. In its decision reversing the district court, the court of appeals explained that "sex" is ambiguous as it "is susceptible to more than one plausible reading because it permits ... determining maleness or femaleness with reference exclusively to genitalia ... [and] determining maleness or femaleness with reference to gender identity." *Id.* at 720. The court of appeals concluded DOE's interpretation of the term "sex" at issue in that case, which is the same interpretation challenged in this case, is not plainly erroneous or inconsistent with Title IX because various dictionaries from the time when the statute was enacted and its implementing regulations were promulgated "suggest that a hard-and-fast binary division on the basis of reproductive organs---although useful in most cases—was not universally descriptive." *Id.* at 721. The Fourth Circuit therefore found DOE's interpretation of "sex" as used in Title IX must be given deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *G.G.*, 822 F.3d at 723; *see also Carcano v. McCrory Berger*, ___ F. Supp. 3d ____, 2016 WL 4508192, at *13-17 (M.D.N.C. Aug. 26, 2016) (recognizing *G.G.* cannot be limited to its facts and deferring to DOE's interpretation of "sex"). [18]

***18** In *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, a district court in the Seventh Circuit reached the same conclusion under Title IX notwithstanding *Ulane* or *Hively*. Court Minutes from the Oral Argument Hearing on 9/6/2016 ("*Whitaker* Court Minutes"), *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 16-cv-00943-PP, Dkt. No. 26 (Sept. 6, 2016). The court recognized none of the relevant dictionary definitions "are helpful" in determining one's sex "when ... genes, or chromosomes, or character, or attributes ... point toward male identity, and others toward female." *Id.* at 3. Then it identified some of the problems with a narrow definition of "sex." *Id.* at 3-4. Finally, the court found *Ulane* did not control the issue because it was a Title VII case decided before *Price Waterhouse*. *Id.* at 4-5. For these reasons, the court held the term "sex" as used in Title IX is ambiguous and it deferred to DOE's interpretation under *Auer*. *Id.* at 6-7.

A district court in Ohio also recently decided "sex" as used in Title IX is ambiguous and, therefore, DOE's interpretation should be given deference under *Auer*. *Highland*, 2016 WL 5372349, at *15. The court recognized dictionaries at the time Title IX was enacted "defined 'sex' in a myriad of ways." *Id.* at *11. Relying in part on *G.G.*, the court concluded that "neither Title IX nor the implementing regulations define the term 'sex' or mandate how to determine who is male and who is female when a school provides sex-segregated facilities." *Id.* The court also acknowledged Title IX allows transgender people to bring claims when they are discriminated against because of their gender non-conformity. *Id.* at *12-13. The court concluded Title IX is ambiguous and then found DOE's interpretation is not plainly erroneous or inconsistent with Title IX. *Id.* at *13-14. Based on these determinations, the court gave *Auer* deference to DOE's rule. *Id.* at *14.

These decisions holding "sex" is ambiguous in the context of Title IX and, therefore, that it can encompass gender identity are well-reasoned and persuasive. [19] They provide another basis for questioning whether *Ulane*, a Title VII case, has continued validity and should be applied in the context of Title IX. While the Seventh Circuit's decision to vacate the panel's decision in *Hively* and to rehear that case en banc technically leaves *Ulane* in place as the law in this Circuit, it does so only barely, in this Court's view, particularly with respect to the interpretation of Title IX. Unconstrained by *Hively*'s recent affirmation of *Ulane*, and with the continued vitality of the narrow, traditional, and biological view of the term "sex" articulated in *Ulane* subject to question, this Court believes the better reasoned recent decisions hold that the term "sex" in Title IX can be interpreted to encompass gender identity as DOE has interpreted it.

Under the APA, a court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA also says a court must "hold unlawful and set aside" agency action

that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* at § 706(2)(C). Plaintiffs argue that the Rule and the Locker Room Agreement violate the APA because they are based on an interpretation of Title IX that is "not accordance with" Congress's intent regarding the unambiguous meaning of "sex" and because they likely are "in excess of" DOE's jurisdiction and authority because DOE is not empowered to interpret Title IX contrary to congressional intent.

***19** The foundation for each of Plaintiffs' arguments, in the Seventh Circuit, is *Ulane* and *Hively*. Plaintiffs' rely heavily on these two cases for the premise that Congress intended a very narrow and traditional interpretation of the term "sex" in Title VII and, by implication, in Title IX. Given the discussion above, the Court cannot say that Plaintiffs have a likelihood of success on the merits of these arguments. It is far from clear that the narrow interpretation of the term "sex" articulated 32 years ago in *Ulane* will continue to inform the Seventh Circuit's jurisprudence generally after its en banc review of *Hively* or, in particular, with respect to whether that term as used in Title IX includes gender identity.

Accordingly, against this legal backdrop and at this early stage of this case, the Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that the Federal Defendants violated the APA by promulgating the Rule or entering into the Locker Room Agreement based on an interpretation of Title IX that includes gender identity within the term "sex."

c. Plaintiffs Have Not Shown A Likelihood Of Success On The Merits Of Their Other APA Claims

Plaintiffs argue the Rule is legislative in nature and, thus, DOE was required to observe the notice-and-comment process. Plaintiffs' Opening Brief, [ECF No. 23, at 11-12]; Plaintiffs' Reply Brief, [ECF No. 94, at 4-9]. This argument relies in large part on Plaintiffs' contention that "sex" in Title IX means biological sex. Because they have not shown this premise is sound, that flaw significantly undermines the assertion that the Rule is legislative.

Plaintiffs also contend the Rule is legislative because it "contradicts four decades of unbroken authority." Plaintiffs' Opening Brief, [ECF No. 23, at 11]. A rule is not legislative, though, simply because it reflects a new position of the agency. *Twp., Marion Cty., Ind. v. Davila*, 969 F.2d 485, 492 (7th Cir. 1992). Rather, "the APA 'permit[s] agencies to promulgate freely [interpretive] rules—whether or not they are consistent with earlier interpretations' of the agency's regulations." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 719 (D.C. Cir. 2015) (quoting *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015)); *see also Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 681 (6th Cir. 2005).

Plaintiffs also argue the Rule must be legislative because it impacts legal rights and obligations. An interpretive rule, though, may have a substantial impact on the rights of individuals because " '[t]he impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals.' " *Davila*, 969 F.2d at 493 (quoting *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983)). If a rule "cannot be independently legally enforced [because] there must be some external legal basis supporting its implementation," than it is interpretive. *Iowa League of Cities v. EPA*, 711 F.3d 844, 874 (8th Cir. 2013). The "critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' " *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

It is undisputed that DOE issued the Guidance that contains the Rule in response to questions from school administrators, teachers, and parents. *See* Federal Defendants' Response Brief, [ECF No. 80, at 16]; Q&A on Sexual Violence, [ECF No. 21-9, at ii]; Q&A on Single-Sex Classes and Extracurricular Activities, [ECF No. 21-8, at 1]. The Guidance details what DOE thinks Title IX means. It does not provide an independent basis for an enforcement action. Instead, any action would have to be grounded in Title IX itself. Moreover, the specific facts of this case demonstrate DOE does not treat the Guidance as giving rise to the legal obligation to treat transgender students consistent with their gender identity. DOE began its review of Student A's complaint before any of the challenged Guidance Documents were issued. And its Letter of Findings does not reference or cite the Guidance. Therefore, the record shows the Guidance was issued in response to questions received by DOE to inform

schools and the public in general as to what schools must do to comply with DOE's understanding of Title IX.

***20** For these reasons, the Rule is interpretive and need not have been promulgated through the notice-and-comment process. [20]

In addition, Plaintiffs contend the Rule conflicts with Title IX and Plaintiffs' constitutional right to privacy. Plaintiffs' Opening Brief, [ECF No. 23, at 10]. As discussed in the subsequent sections of this Report and Recommendation, the Court finds Plaintiffs do not have a likelihood of success on either of these claims. This, in turn, undermines that aspect of Plaintiffs' APA claim. [21]

Plaintiffs assert the Rule violates the Spending Clause of the Constitution because it permits the Federal Defendants to pull federal funds for discrimination based on a student's gender identity. Plaintiffs' Opening Brief, [ECF No. 23, at 10-11]; Plaintiffs' Reply Brief, [ECF No. 94, at 17-18]. Plaintiffs do not dispute that Congress has provided adequate notice that federal funds may be withheld from a school that discriminates in violation of Title IX. Instead, Plaintiffs argue Title IX only prohibits discrimination based on biological sex and, therefore, that Title IX does not provide notice that funding may be withheld for discrimination based on gender identity. As with many of Plaintiffs arguments, this one rests on the meaning of "sex" in Title IX. And, as the Court already has explained, Plaintiffs have not carried their burden, at this stage, to establish clearly they have a probability of success on the merits of that claim.

Title IX does not explicitly state that a school may lose its federal funding if it does not take adequate steps to stop discrimination against transgender students. But a spending condition is not unconstitutional simply because its application may be unclear in certain contexts. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 665-66 (1985). Moreover, Congress need not "specifically" identify and prescribe "each condition in the legislation." *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 921 (7th Cir. 2012). Simply put, "it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

***21** Finally, Plaintiffs argue DOE acted arbitrarily and capriciously by promulgating the Rule because the agency did not provide a rational explanation for its action. Plaintiffs' Opening Brief, [ECF No. 23, at 9-10]; Plaintiffs' Reply Brief, [ECF No. 94, at 16-17]. In the Guidance and the Letter of Findings, however, DOE extensively cited the provisions of Title IX, its regulations, and relevant court decisions. In the Letter of Findings, DOE also acknowledged the privacy concerns of the various parties; described in detail the layout of the various restrooms and locker rooms, with a particular emphasis on the resulting privacy risks; and laid out the alternative privacy options. Letter of Findings, [ECF No. 21-10, at 3-13]. In the "Conclusion" section of the Letter of Findings, DOE dedicated a lengthy paragraph solely to explaining how a privacy curtain, coupled with Student A's stated intention to use the curtain, could adequately protect all "potential or actual student privacy interests." *Id.* at 13. Plaintiffs have not done enough to overcome the "highly deferential" standard of review for arbitrary and capricious claims, under which agency actions are presumed valid. *See Am. Trucking Associations, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 245 (D.C. Cir. 2013); *see also Judulang v. Holder*, 132 S. Ct. 476, 483 (2011) (noting that a court must not " 'substitute its judgment for that of the agency' ") (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

For all of these reasons, Plaintiffs do not have a likelihood of success on the merits of their claim that the Rule and the Locker Room Agreement violate the APA.

2. Plaintiffs Have Not Shown They Have A Likelihood Of Success On The Merits Of Their Constitutional Claim Against Either The Federal Defendants Or District 211

Plaintiffs allege a violation of their right to substantive due process. There is a "basic framework" for evaluating substantive due process claims. *Christensen v. Cty. of Boone, Ill.*, 483 F.3d 454, 461 (7th Cir. 2007). The analysis begins with "a 'careful description' of the [right] said to have been violated." *Id.* at 462 (quoting *Doe v. City of Lafayette*, 377 F.3d 757, 768 (7th Cir. 2004)); *see also Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 763 (N.D. Ill. 2015). Then the inquiry turns to whether that right is "fundamental." *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763. If it is, the question becomes whether there is a "direct" and "substantial" interference with a fundamental right. *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763. Even if there is such an interference, the challenged action still must "shock[ ]

the conscience" for there to be a constitutional violation. *Christensen*, 483 F.3d at 462; *Second Amendment Arms*, 135 F. Supp. 3d at 763.

a. There Is No General Constitutional Right To Privacy

Plaintiffs assert a claim against the Federal Defendants and District 211 for violating their "fundamental right to privacy." Complaint, [ECF No. 1, at p.53].[22] In *Griswold v. Connecticut*, the Supreme Court acknowledged for the first time that the "penumbras" of the "specific guarantees in the Bill of Rights" protect certain privacy interests. 381 U.S. 479, 484 (1965). But the Supreme Court never has recognized "a generalized right" to privacy in the substantive due process context. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178 (3d Cir. 2005); *see also Katz v. United States*, 389 U.S. 347, 350 (1967) (explaining that the Fourth Amendment also does not encompass a "general constitutional 'right to privacy' "). Instead, it has extended substantive due process protection to privacy interests only in limited circumstances. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing that " 'individual decisions ... concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment' ") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986)); *Whalen v. Roe*, 429 U.S. 558, 578 (1977) (holding that a New York law, which established a database of names and addresses of persons who received prescriptions for certain drugs sold on the black market, did not pose an unconstitutional invasion of privacy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that the right to privacy "found[ ] in the Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision" to terminate a pregnancy); *Griswold*, 381 U.S. at 485-86 (holding that the Fourteenth Amendment confers a right to privacy in one's marital relations and use of contraceptives).

***22** The Supreme Court "always [has] been reluctant to expand the concept of substantive due process because guide posts for responsible decision making in this area are scarce and open-ended." *Glucksberg*, 521 U.S. at 720. "The doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Accordingly, the "Supreme Court of the United States has made clear, and [the Seventh Circuit] similarly cautioned, that the scope of substantive due process is very limited." *Belcher v. Norton*, 497 F.3d 742, 753 (7th Cir. 2007).

b. Plaintiffs Too Broadly Define The Right At Issue In This Case

The first step in the substantive due process analysis is to define carefully the right (or rights) at issue in this case. As the Seventh Circuit has observed, the definition of a substantive due process right is "constrained by the factual record before [the court], which sets the boundaries of the liberty interests *truly* at issue in the case." *Lafayette*, 377 F.3d at 769 (emphasis in original); *see also Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1240 (11th Cir. 2004). The definition must be "specific and concrete," avoiding "sweeping abstractions and generalities." *Lafayette*, 377 F.3d at 769. Crafting a narrow, focused definition ensures that courts "do not stray into broader 'constitutional vistas than are called for by the facts of the case at hand.' " *Doe v. Moore*, 410 F.3d 1337, 1344 (11th Cir. 2005) (quoting *Williams*, 378 F.3d at 1240). This in turn "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Glucksberg*, 521 U.S. at 722.

An example is helpful. In *Washington v. Glucksberg*, the plaintiff asserted as a fundamental right the "liberty to choose how to die," "a right to control of one's final days," and "the liberty to shape death." *Id.* The court of appeals framed the right at issue as "a liberty interest in determining the time and manner of one's death" and "a right to die." *Id.* The Supreme Court, however, rejected all of these formulations as not specific enough. Instead, the Supreme Court asked whether there was a "right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723; *see also Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008) (expressing doubt that the definition of a right "to engage in a private act of consensual sex" is narrow enough).

Plaintiffs assert generally that the Restroom Policy and the Locker Room Agreement violate their constitutional "right to privacy."[23] They identify two broad privacy interests they contend are protected by substantive due process. The first is the "right to privacy in one's fully or partially unclothed body." Complaint, [ECF No. 1, at ¶

362]; *see also id.* at ¶ 393. The second is "the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex." *Id.* at ¶ 363; *see also id.* at ¶ 393. Plaintiffs' framing of these rights is not tied to the facts of the case and, therefore, is inconsistent with the Seventh Circuit's admonition to avoid "sweeping abstractions and generalities" in the context of substantive due process analysis. *Lafayette*, 377 F.3d at 769.

***23** For this reason, the Federal Defendants argue Plaintiffs' articulation of the fundamental rights at issue in this case "grossly overstates the interest that they actually seek to vindicate, which is an alleged right to change [clothes] in a locker room from which transgender students are excluded." Federal Defendants' Response Brief, [ECF No. 80, at 3]. When opposing District 211's request for discovery, Plaintiffs also framed their constitutional argument more narrowly than they do in their Motion for Preliminary Injunction. In their brief in support of their Motion for Protective Order, Plaintiffs identified the issue to be decided as: "does letting a biological male use the girls' locker room and restrooms, and so subjecting Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate Girl Plaintiffs' constitutional right to privacy?" Plaintiffs' Protective Order Brief, [ECF No. 50, at 3]. This is a better attempt at framing the issue, and it encompasses Plaintiffs' main claim in this case which revolves around Student A's access to restrooms and locker rooms also used by Girl Plaintiffs, but it does not account for Plaintiffs' claim that allowing transgender students to use restrooms consistent with their gender identity violates the privacy rights of both male and female Student Plaintiffs.

Essentially, in the Court's view, Plaintiffs' constitutional claim posits this question: do high school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs? The Court will analyze Plaintiffs' constitutional claims in this context. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1087 (9th Cir. 2015) (refining the definition of the right at issue to account for the fact that the challenged conduct applied "only to persons in specific circumstances," not "generally to the population as a whole").

c. High School Students Do Not Have A Constitutional Right Not To Share Restrooms Or Locker Rooms With Transgender Students Whose Sex Assigned At Birth Is Different Than Theirs

Initially, it is important to note that, for purposes of the constitutional analysis, the Court is not bound by the narrow, traditional, and biological understanding of "sex" that the Seventh Circuit held in *Ulane* that Congress codified in Title VII. Congress's intent in enacting that statute is irrelevant to the analysis of Plaintiffs' asserted constitutional right to privacy. Further, in the Court's view, sex assigned at birth is not the only data point relevant to the question of whether the Constitution precludes a school from choosing to allow transgender students to use restrooms or locker rooms consistent with their gender identity. Rather, as the Federal Defendants and Intervenor-Defendants point out, a transgender person's gender identity is an important factor to be considered in determining whether his or her needs, as well as those of cisgender people, can be accommodated in the course of allocating or regulating the use of restrooms and locker rooms. So, to frame the constitutional question in the sense of sex assigned at birth while ignoring gender identity frames it too narrowly for the constitutional analysis.

In addition, it also is important to note Plaintiffs are not required—"compelled" in their words, Plaintiffs' Opening Brief, [ECF No. 23, at 15]—by any state actor to use restrooms or locker rooms with Student A or any other transgender student. The District's Restroom Policy allows transgender students to use restrooms consistent with their gender identity. No cisgender student is compelled to use a restroom with a transgender student if he or she does not want to do so. In addition, District 211 does not require any cisgender girl student to use a locker room with Student A if she does not want to do so. As discussed more fully below, District 211 has made clear that any cisgender high school student who does not want to use a restroom or a locker room with a transgender student is not required to do so.

If the privacy stalls and protections the District provides in restrooms and locker rooms are not sufficient for the comfort of any student, whether cisgender, transgender, or otherwise, he or she can use an alternative facility that satisfies his or her privacy needs. *See* Declaration of Mark Kovack ("Kovack's Declaration"), [ECF No. 78-1, at ¶¶ 15-17] (explaining available privacy alternatives include separate, single-use facilities). In addition, District 211 notified all parents that "[s]tudents who seek additional

levels of privacy [other than the stalls provided in the communal locker rooms] may request the use of an alternate changing area by contacting their school counselor." *Id.* at ¶ 15(b). The absence of any compulsion distinguishes this case from others Plaintiffs cite which, as discussed below, involve involuntary invasions of someone's privacy.

***24** Generally speaking, the penumbral rights of privacy the Supreme Court has recognized in other contexts protect certain aspects of a person's private space and decision-making from governmental intrusion. Even in the context of the right to privacy in one's own body, the cases deal with compelled intrusion into or with respect to a person's intimate space or exposed body. No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.

Again, courts are very careful in extending constitutional protection in the area of personal privacy. "Although the Supreme Court has recognized fundamental rights in regard to some special ... privacy interests, it has not created a broad category where any alleged infringement on privacy ... will be subject to substantive due process protection." *Moore*, 410 F.3d at 1343-44. In other words, "privacy" is not a magic term that automatically triggers constitutional protection. Instead, the same rules that govern every other substantive due process analysis apply in the privacy context. *See Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 591 (6th Cir. 2008). That means an asserted privacy right is not fundamental unless it is " 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.' " *Khan v. Bland*, 630 F.3d 519, 535 (7th Cir. 2010) (quoting *Glucksberg*, 521 U.S. at 720-21). The list of rights that rise to this level is "a short one." *Sung Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012). This list " 'for the most part' " has been limited to " 'matters relating to marriage, family, procreation, and the right to bodily integrity.' " *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 615 (7th Cir. 2014) (quoting *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion)); *see also Kraushaar v. Flanigan*, 45 F.3d 1040, 1047 (7th Cir. 1995).

In assessing the nature and scope of Plaintiffs' constitutional rights, and whether those rights have been infringed, the Court also must consider the need to preserve the discretion of schools to craft individualized approaches to difficult issues that are appropriate for their respective communities. Schools "have the difficult task of teaching 'the shared values of a civilized social order.' " *Doninger v. Niehoff*, 527 F.3d 41, 54 (2d Cir. 2008) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 683 (1986)). Our public education system "has evolved" to rely "necessarily upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *see also Jeffrey v. Bd. of Trustees of Bells ISD*, 261 F. Supp. 2d 719, 728 (E.D. Tex. 2003), *aff'd*, 96 Fed.Appx. 248 (5th Cir. 2004) ("Local school boards have broad discretion in the management of school affairs."). The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Even when confronting segregation, perhaps the most intractable problem ever to afflict our public schools, the Supreme Court emphasized that schools "have the primary responsibility for elucidating, assessing, and solving" problems that arise during desegregation. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299 (1955); *see also Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2214 (2016) ("Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."). Therefore, our Nation's deeply rooted history and tradition of protecting school administrators' discretion require that this Court not "unduly constrain[ ] [schools] from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him [or her] for later professional training, and in helping him [or her] to adjust normally to his [or her] environment." *Bannon v. Sch. Dist. of Palm Beach Cty.*, 387 F.3d 1208, 1220 (11th Cir. 2004) (Black, J., specially concurring) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 287 (1988)).

***25** It also is important to remember that constitutional privacy rights, whether rooted in the Fourth Amendment or the Fourteenth Amendment, "are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). "[I]t is well established that public school students enjoy a reduced expectation of privacy in comparison to the public at large." *Dominic J. v. Wyoming Valley W. High Sch.*, 362 F. Supp. 2d 560, 570 (M.D. Pa. 2005). Of particular relevance to this case, public school locker rooms in this country traditionally have been and remain "not notable for the privacy they afford." *Vernonia, 515 U.S.* at 657.

Contemporary notions of liberty and justice are inconsistent with the existence of the right to privacy asserted by Plaintiffs and properly framed by this Court. A transgender boy or girl, man or woman, does not live his or her life in conformance with his or her sex assigned at birth. The record in this case provides ample evidence of this point. Intervenor-Defendants Students A, B, and C live, for all intents and purposes, consistent with their gender identity. Student A "live[s] her life full-time as a girl." Declaration of Parent A ("Parent A's Declaration"), [ECF No. 32-1, at ¶ 5]. She dresses in girls' clothes. *Id.* She maintains "a traditionally female hair style ... and overall appearance." Kovack's Declaration, [ECF No. 78-1, at ¶ 7]. She plays on girls' athletic teams. Parent A's Declaration, [ECF No. 32-1, at ¶ 7]. Her legal name is female, and she uses female pronouns to refer to herself. *Id.* at ¶ 5. Her passport lists her gender as female. *Id.* Likewise, Student B "live[s] his life full-time as a boy." Parent B's Declaration, [ECF No. 32-2, at ¶ 5]. He dresses in boys' clothing and cuts his hair short. *Id.* His legal name is a "traditionally male name," and he uses male pronouns to refer to himself. *Id.* Student C also lives "life as a boy." Parent C's Declaration, [ECF No. 32-3, at ¶ 5]. He uses male restrooms in public. *Id.* at ¶ 10. His legal name is a "traditionally male name," and he uses male pronouns to refer to himself. *Id.* at ¶ 5. His state identification card lists his gender as male, and his Social Security records do the same. *Id.*

Further, people who interact with Students A, B, and C largely treat them consistent with their gender identity. In fact, many people who interact with Students A, B, and C on a daily basis may have no idea, and may not care, what sex they were assigned at birth. Even before OCR got involved, District 211 "honored Student A's request to be treated as female" in every respect other than locker room access. Letter of Findings, [ECF No. 21-10, at 2]. The District allowed her to use the girls' restrooms. Kovack's Declaration, [ECF No. 78-1, at ¶ 9]. All of Student B's friends and most of his family use male pronouns to refer to him. Parent B's Declaration, [ECF No. 32-2, at ¶ 5]. The teachers, administrators, and staff at Student B's school "have made an effort to treat" him "consistent with his gender identity." *Id.* at ¶ 8. The school employees and Student B's friends support his use of the boys' restrooms. *Id.* at ¶ 13. Similarly, the administrators, teachers, and staff at Student C's school "treat him as they would treat any other boy at the school." Parent C's Declaration, [ECF No. 32-3, at ¶ 6]. That includes using his legal, male name and male pronouns to refer to him. *Id.* Other students at Student C's school also "are supportive of" Student C. *Id.* at ¶ 7.

***26** In addition, the military, which historically has served a vital role as a melting pot in our society, allows transgender personnel to serve openly and fully integrated in all military services. Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. Times, July 1, 2016, at A3, *available at* http://www.nytimes.com/2016/07/01/us/transgender-military.html; *see also* Rand Corporation, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* 44 (2016), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf (citing as precedent the successful integration of transgender service members in the armed forces of Australia, Canada, Israel, and the United Kingdom); Palm Center, *Report of the Planning Commission on Transgender Military Service* (2014), *available at* http://www.palmcenter.org/wpcontent/uploads/2014/08/Report-of-Planning-Commission-on-Transgender-Military-Service_0-2.pdf (finding publically-available data indicates that allowing transgender service members to serve openly does not have a significant effect on unit cohesion, operational effectiveness, or readiness). The National Collegiate Athletic Association includes transgender student-athletes in collegiate sports consistent with their gender identity. Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), *available at* https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.