NO. _____

In the
Supreme Court of the United States

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND SUE SAVAGLIO-JARVIS, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

ASHTON WHITAKER, BY HIS MOTHER AND NEXT FRIEND MELISSA WHITAKER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are a public school district located in Kenosha, Wisconsin, and its superintendent. The District has a policy which requires both male and female students to use separate bathrooms, locker-rooms, and sleeping accommodations (i.e., hotel rooms) that correspond with their sex—the physical characteristics and biological information that designate one as male or female on their birth certificate. Respondent, a biological female who identifies as male, filed suit against Petitioners challenging the policy under Title IX and the Equal Protection Clause of the United States Constitution.

The court of appeal's decision below only addressed the bathroom issue, but its import necessarily affects other forms of separate but comparable educational programs or activities, such as locker rooms, showers, and overnight accommodations. The court of appeals found that a policy that requires students to use separate bathrooms that correspond with the sex listed on their birth certificate, rather than their gender identity, even though applied equally to boys and girls, is "sex stereotyping" in violation of Title IX. The court's conclusion was premised upon its interpretation of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). This interpretation is directly at odds with the Tenth Circuit's conclusion in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007), that requiring transgender individuals to use the bathroom that corresponds to the sex listed on their birth certificate

is not sex stereotyping under the *Price Waterhouse* analysis.

This issue is not new to this Court. In *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm* this Court granted review to address, in part, the Department of Education's interpretation of Title IX that funding recipients providing sex-separated facilities must generally treat transgender students consistent with their gender identity. When the Department of Education's guidance was later withdrawn, this Court was deprived of an opportunity to address these issues and the case was remanded to the Fourth Circuit. This case provides the Court with a clean vehicle to decide the same underlying important issues without the additional, complicating layers related to addressing administrative review and deference.

In addition to the Title IX issues, the Seventh Circuit also found that the bathroom policy, again applied equally to boys and girls, is "based on sex" and entitled to heightened scrutiny under an Equal Protection analysis. By deeming transgender status as a sex-based classification, the Seventh Circuit has failed to heed this Court's admonishment that lower courts should not create new suspect classifications. Indeed, the Seventh Circuit's decision is contrary to several other Circuits that have held that transgender or transsexual is not a suspect class.

The questions presented are:

1. Whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is sex stereotyping that constitutes discrimination "based on sex" in violation of Title IX.

2. Whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is a sex-based classification triggering heightened scrutiny under an Equal Protection analysis.

PARTIES TO THE PROCEEDING

Petitioners, who were Defendants-Appellants below, are the Kenosha Unified School District No. 1, a public school district in Kenosha, Wisconsin, and its superintendent Sue Savaglio-Jarvis (collectively "Petitioners" or "KUSD").

Respondent, Ashton Whitaker, is a 17-year old student who was born female, but who identifies as male. Respondent's mother, Melissa Whitaker, brought this claim as his next friend.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner the Kenosha Unified School District No. 1 is a public school district in the state of Wisconsin.

Petitioner Sue Savaglio-Jarvis is an individual person.

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INTRODUCTION

This case is about whether providing separate toilet, locker room, shower facilities, and sleeping accommodations for boys and girls in schools is sex-based discrimination in violation of Title IX. While Title IX prohibits discrimination on the basis of sex, regulations promulgated under Title IX also specifically permit public schools to provide separate bathroom, locker room, and shower facilities for boys and girls.

Petitioners have a policy consistent with Title IX that requires boys and girls to use the bathroom that corresponds with the sex listed on their birth certificate. The practical effect of this policy is that students that identify as a gender that is different than their biological sex are not permitted to use the bathroom that corresponds with their gender identity. Those students who identify their gender as something other than the sex listed on their birth certificate can use one of several single-user, gender-neutral bathroom or the bathroom that corresponds to the sex listed on their birth certificate.

Respondent was born female, but identifies as male.[1] Respondent challenged the policy as violating Title IX's prohibition on sex discrimination and the constitutional right to Equal Protection. The Seventh Circuit agreed with Respondent and held

[1] This petition uses "he," "him," and "his" to respect Respondent's desire to be referred to with male pronouns. This does not concede anything on the legal questions presented herein.

that a policy that requires boys and girls to use the bathroom that conforms with the sex listed on their birth certificate is discriminatory because it is based on a failure to conform to stereotypical gender norms. Pet. App. at 28a. The court also held that this type of policy, even though applied equally to boys and girls, is a sex-based classification subject to heightened scrutiny under an Equal Protection analysis. Pet. App. at 32a.

The Seventh Circuit's decision strains the fabric that clothes Title IX. The court of appeals has become the first circuit to mandate that a student must be allowed to use the bathroom that corresponds with his or her identified gender. Additionally, the Seventh Circuit's Equal Protection analysis, holding that heightened scrutiny should be applied to a rule that treats boys and girls equally, goes against the vast majority of decisions addressing the issue and creates a new, *de facto* suspect class of gender identity as opposed to sex.

This is a matter of national importance. The number of students in America's public schools who label themselves as transgender is growing, and advocacy groups are pushing to create rights for these students. School districts, students, and parents across the country need guidance on this issue given the conflicting decisions by various courts, guidance which has been issued and withdrawn by the Department of Education, and the lack of any other definitive answers. Specifically, school districts need definitive guidance on whether they can structure their bathrooms, locker rooms, and shower facilities to require that boys and girls

use separate facilities, as allowed by the Regulations issued under Title IX, but disallowed by the Seventh Circuit. Without such guidance, school districts across the nation could face the loss of federal funding if their policies violate Title IX.

In addition, this Court should grant review because Congress has repeatedly declined to amend the law to address the issue. Also, the Seventh Circuit's decision continues a trend of worrisome judicial activism that began in its recent decision in *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017)[2], and continues in the decision below.

This case is a clean vehicle for the Court to clarify whether requiring boys and girls to use school bathrooms that correspond with their biological sex, rather than their gender identity, is sex-based discrimination under Title IX and whether this classification is entitled to heightened scrutiny in an Equal Protection analysis.

DECISIONS BELOW

The panel opinion of the court of appeals is reported at 858 F.3d 1034 (7th Cir. 2017), and reprinted in Pet. App. at 1a-41a. The district court's opinion is not reported, but is available at No. 16-CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016) and reprinted in Pet. App. at 42a-61a.

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[2] In Hively the Seventh Circuit, en banc, became the first circuit to hold that Title VII protects against discrimination on the basis of one's sexual orientation.

STATEMENT OF JURISDICTION

The court of appeals issued an opinion on May 30, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV.

Title IX states in relevant part: "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(a).

The regulations adopted under Title IX state in relevant part: "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, and "[a] recipient may provide separate housing on the basis of sex." 34 C.F.R. § 106.32.

The above stated Constitutional provisions, statutes, and regulations are reprinted in their entirety in Pet. App. at 172a-182a.

STATEMENT OF THE CASE

I. Factual Background

Respondent is a seventeen-year-old student who attended Tremper High School in the Kenosha Unified School District. Respondent was born as a biological female with a birth certificate that designates his sex as "female." Respondent identifies as being transgender and states that his gender identity is male.

Respondent slowly began transitioning more publicly to identify as male once he entered high school. Respondent began dressing more masculine, requesting to be referred to by male pronouns, and using a masculine name. Respondent has not undergone any sex change surgeries or obtained an amended birth certificate indicating a change in sex.

KUSD requires its students—both boys and girls—to use the bathroom that corresponds with the

sex listed on their birth certificate or to use one of several single-user, gender-neutral bathrooms. KUSD also requires that when its students travel on school-sponsored trips, that students may only share rooms with other students of the same sex as listed on their birth certificate. The same policy applies to locker rooms and shower facilities, although those facilities are not at issue at this juncture of the case.

Respondent admittedly used the men's restroom in contradiction of KUSD's policy. When KUSD learned of this, KUSD reminded Respondent that pursuant to the school policy, all female students were required to either use the women's bathroom or the gender-neutral bathrooms. Despite Respondent's admitted non-compliance with the policy, Respondent was never disciplined.

II. Statutory Background

In 1972, Congress passed Title IX with the specific purpose of curbing discrimination against women in the educational environment:

> The purpose of Title IX, as originally conceived, was 'banning discrimination against women in the field of education.' *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). Summarizing the bill that would become Title IX, Senator Birch Bayh explained: 'Amendment No. 874 is broad, but basically it closes loopholes in existing

> legislation relating to general education programs . . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment.' *Id.* at 524 (emphasis omitted) (quoting 118 Cong. Rec. 5803 (1972)). Responding to a fellow senator's question regarding the scope of the proposed protections, Senator Bayh elaborated: '[W]e are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution.' *N. Haven Bd. of Educ.*, 456 U.S. at 526 (emphasis omitted) (quoting 118 Cong. Rec. 5812); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) (discussing purpose of Title IX); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (same).

Hoffman v. Saginaw Pub. Sch., 2012 WL 2450805, at *5 (E.D. Mich. June 27, 2012).

III. Proceedings Below

Respondent filed suit in the U.S. District Court for the Eastern District of Wisconsin, challenging KUSD's policy as violating Title IX and Equal Protection and seeking declaratory and injunctive relief and monetary damages. Pet. App. at 103a-148a. Respondent moved for a preliminary injunction seeking to enjoin KUSD's policy and permitting Respondent to use the men's bathroom during the pendency of the case.

In response, Petitioners filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court denied the motion to dismiss and then shortly thereafter granted Respondent's motion for temporary injunction. The district court relied in part on the reasoning it employed in denying the motion to dismiss in finding that Respondent had a likelihood of success on the merits. Pet. App. at 50a-51a. The district court held that Respondent demonstrated a likelihood of success on his Title IX and Equal Protection claims. Pet. App. at 49a-51a.

Petitioners timely appealed the granting of the temporary injunction and moved the district court to stay the injunction pending appeal. The district court denied the motion to stay as did the court of appeals.

A panel of the Seventh Circuit affirmed the district court's granting of the preliminary injunction. Pet. App. at 41a. Most salient to this petition, the court of appeals found that Respondent demonstrated a likelihood of success on the merits

on the Title IX and Equal Protection claims, and that as a matter of law, KUSD's policy violated the law. Pet. App. at 21a-38a. Specifically, the court of appeals relied upon the *Price Waterhouse* sex stereotyping theory under Title VII of the Civil Rights Act of 1964 ("Title VII") in holding that: "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." Pet. App. at 28a. Additionally, the panel held that the policy also subjected Respondent, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX." *Id.*

The court of appeals also addressed the Equal Protection issue and found that KUSD's policy is "inherently based upon a sex-classification and heightened review applies." Pet. App. at 33a. Applying intermediate scrutiny for sex-based classifications, the panel held that KUSD did not meet its burden to demonstrate a genuine and exceedingly persuasive justification for the policy. *Id.*

This petition follows.

REASONS FOR GRANTING THE WRIT

Review should be granted because the Seventh Circuit's holding expands the sex stereotyping theory well beyond this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). [3] The Seventh Circuit, as a matter of first impression, held that a policy requiring a student to use the bathroom that corresponds to his or her sex, rather than his or her self-identified gender, is sex stereotyping and amounts to discrimination. This holding creates a *per se* rule that Title IX requires school districts to permit students to use any bathroom that corresponds with their gender identity. This decision vastly expands the scope of *Price Waterhouse*, fails to recognize the difference between Title IX and Title VII, and conflicts with the Tenth Circuit's view of sex stereotyping under *Price Waterhouse*.

The reach of Title IX in the context of transgender students is a question of exceptional national importance. This Court has acknowledged the importance of this question as it previously granted certiorari to address very similar issues in the *G.G.* case. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016). Now that *G.G.* is no longer before this Court, *see Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137

[3] With regard to considerations governing review on certiorari, KUSD is relying on the criteria set forth in U.S. Sup. Ct. R. 10(a), (b), and (c) in support of this petition.

S. Ct. 1239, 197 L. Ed. 2d 460 (2017), this case presents an ideal opportunity for this Court to clarify the scope of Title IX as it applies to transgender students.

Such guidance is especially necessary as school districts must balance their obligations under Title IX with the privacy interests of minor children. School districts across the nation face litigation regardless of the position they take. Schools with more inclusive transgender restroom policies have been sued by students and parents who feel their privacy rights have been violated. *See, e.g.*, *Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016); *Privacy Matters v. United States Dep't of Educ. Doe*, No. 16-CV-3015 (WMW/LIB), 2016 WL 6436658 (D. Minn. Oct. 27, 2016).

Guidance from this Court is also appropriate because Congress has refused to act on the issue of whether Title IX's prohibition against discrimination encompasses transgender status, and it has shown no signs of a willingness to do so. Additionally, the federal agencies that oversee Title IX, the Department of Education and the Department of Justice, have not been able to resolve these issues. They issued a "Dear Colleague" letter purporting to provide guidance, but then rescinded the letter in favor of deferring to "States and local school districts in establishing educational policy." Any such state or local policy, however, could arguably conflict with Federal law, and thus, this approach perpetuates the "head in the sand" approach to the issue.

This case is a clean vehicle for reviewing these issues: the relevant facts are undisputed, and the legal issues were briefed, argued, and squarely ruled on below. Review by this Court is warranted and compelling.

I. The Seventh Circuit's Decision Incorrectly Applies this Court's Decision in *Price Waterhouse* and Conflicts with the Tenth Circuit's Interpretation of *Price Waterhouse's* Sex Stereotyping claim.

A. A policy that applies equally to boys and girls and merely reflects the anatomical differences between them is not sex stereotyping under *Price Waterhouse*.

In holding that a policy that requires students to use the bathroom that corresponds to their biological sex is sex stereotyping, the Seventh Circuit has impermissibly interpreted and expanded this Court's ruling in *Price Waterhouse*. More specifically, the Seventh Circuit has created a *per se* rule that segregating bathrooms based on biological sex is always illegal. The creation of this *per se* rule does not logically flow from the sex stereotyping theory of liability articulated in *Price Waterhouse*.

In *Price Waterhouse*, the plaintiff was a woman who was denied partnership in an accounting firm at least in part because members of the firm expressed that she was "macho," "somewhat masculine," needed to take "a course in charm school," and "overcompensated for being a woman." 490 U.S. at

235. One partner advised her she could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* In concluding the plaintiff had met her burden of establishing that sex played a motivating part in the employment decision, a plurality of this Court explained that "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." *Id.* at 250. This Court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251. This claim has come to be known as a "sex stereotyping" claim.

Petitioners acknowledge that a transgender individual could bring a sex stereotyping claim under Title IX if a policy is based on the belief that a woman is not feminine enough or a man not masculine enough. Nevertheless, a policy that merely reflects the anatomical differences between men and women is not sex stereotyping as defined in *Price Waterhouse.*

This conclusion was explained by the district court in *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015): "to state a cognizable claim for discrimination under a sex stereotyping claim, a plaintiff must allege that he did not conform to his harasser's vision of how a man should look, speak, and act" and that "[s]ex stereotyping claims are based on behaviors,

mannerisms, and appearances." *Id.* at 680. Thus, an allegation that a school refused to permit a transgender student to use the bathroom consistent with his or her gender identity rather than birth sex "is insufficient to state a claim for discrimination under a sex stereotyping theory." *Id.*

The Seventh Circuit's decision ignores this distinction and stretches *Price Waterhouse* beyond reason.

B. The Seventh Circuit's holding that KUSD's policy is sex stereotyping conflicts with the Tenth Circuit's analysis of *Price Waterhouse* and creates a split in the circuits.

Despite the Seventh Circuit's reasoning that *Price Waterhouse* compels the conclusion that requiring a transgender person to use the bathroom consistent with their biological sex is sex stereotyping, the Tenth Circuit has reached the opposite conclusion. In *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007), the Tenth Circuit held that: "However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."

The Seventh Circuit reasoned that the Tenth Circuit's common-sense view in *Etsitty* was "too narrow." Pet. App. at 25a. Instead, the panel relied

upon Title VII decisions from the Eleventh and Sixth Circuits, to hold that: "By definition, a transgender individual does not conform to the sex-based serotypes of the sex that he or she was assigned at birth." *Id.* (citing *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem* 378 F.3d 566 (6th Cir. 2004)). Thus, the Seventh Circuit created a new *per se* rule, that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." Pet. App. at 28a. This rule directly conflicts with the Tenth Circuit's view of sex stereotyping under *Price Waterhouse* and justifies this Court's review of the Seventh Circuit's decision.

When analyzing bathroom segregation, one would be hard pressed to concoct a more pristine example of a practice that is the polar opposite of sex stereotyping. KUSD's policy did not require that Respondent act in a certain way, dress in a certain way, or conform with any other stereotypes associated with one's sex. The policy did not hold Respondent's non-conformance against him. Rather the policy mandated that Respondent use a restroom that corresponds with his birth certificate, regardless of how he presented himself, expressed himself or behaved. The policy ignored every single stereotypical aspect and relied solely and exclusively on biological sex.

The Seventh Circuit's belief that *Price Waterhouse* compels a conclusion that segregating bathrooms is sex stereotyping turns the entire notion

of *Price Waterhouse's* "sex stereotyping" on its head. Bathroom segregation does not reflect the "disparate treatment of men and women" that this Court described as the rationale for including sex stereotyping in the ambit of impermissible conduct:

> 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.

Price Waterhouse, 490 U.S. at 251.

Sex stereotyping requires some sort of disparate treatment. Specifically, evidence of gendered statements or acts that target a plaintiff's non-conformance with traditional conceptions of masculinity or femininity are required to establish a sex stereotyping claim. *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014); *see, e.g.*, *E.E.O.C. v. Boh Bros.*, 731 F.3d 444, 454 (5th Cir. 2013) (finding that evidence that the plaintiff's coworkers taunted him with "sex-based epithets" "directed at [his] masculinity," as well as physical acts of simulated anal sex, simulated male-on-male oral sex, and genital exposure was sufficient to

prevail on a sex stereotyping theory); *Nichols v. Azteca Res. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (finding that evidence that the male plaintiff was "attacked for walking and carrying his tray 'like a woman'—i.e., for having feminine mannerisms," that coworkers called the plaintiff names "cast in female terms," and that coworkers and supervisors referred to him as "she" and "her" was sufficient to prevail on a sex stereotyping theory).

The Seventh Circuit's holding improperly expands the reach of *Price Waterhouse*. The decision effectively creates a *per se* rule that every interaction with a transgender student is motivated by gender and that any decision that has any relation to or impact upon their transgender status are *per se* motivated by sex. This rule would create the absurd result that any rule or policy applied to a transgender student automatically amounts to sex stereotyping regardless of whether there is any evidence that the school acted because of non-conforming behavior. Such a view departs from *Price Waterhouse* where the court relied on actual evidence that established that the employer had relied on sex stereotypes in making an employment decision. In *Price Waterhouse*, it was the employer's affirmative statements that plaintiff did not conform to her gender, and rather acted too manly (referring to her as "macho," "masculine," and advising her to walk, talk, and dress more femininely) that evidenced that its actions were sex-based. Under the Seventh Circuits holding, evidence regarding gender-based behaviors, mannerisms, and

appearances is no longer required to prove that actions were sex-based.

This Court should accept review to resolve this conflict and to hold that a policy that merely reflects the anatomical differences between boys and girls, is not "sex stereotyping." Under such a policy, no one is required to conform their appearance or behavior to a particular sex stereotype. Instead it is applied uniformly to the sexes—male and female alike—and they are both required to use sex-distinct public restrooms. Differential treatment based on sex has long been held to be permissible when the treatment is based on physical differences between males and females. *See United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). That principal remains true here.

C. The Seventh Circuit's reliance on *Price Waterhouse* fails to appreciate the differences between Title VII and Title IX and completely ignores the regulations unique to Title IX.

The regulations implemented under Title IX specifically permit the provision of separate bathrooms, locker rooms, and shower facilities for boys and girls in educational institutions "on the basis of sex." *See* 34 C.F.R. § 106.33. Section 106.33 specifically permits schools to provide separate student bathrooms on the basis of sex, provided the separate accommodations are comparable. *See Texas v. United States*, 201 F. Supp. 3d 810, 817 (N.D. Tex. 2016), *order clarified,* No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016), and *appeal*

dismissed sub nom. State of Texas, et al v. USA, et al. (Oct. 21, 2016). "[T]he Regulation permits discrimination or differentiation on the basis of 'sex' so long as it is in the context of the use of substantially equitable school bathrooms, showers and locker rooms." *Evancho v. Pine-Richland Sch.Dist.*, No. CV 2:16-01537, 2017 WL 770619, at *19 (W.D. Pa. Feb. 27, 2017).

The need for these regulations in the Title IX context makes sense. Providing comparable educational opportunities to both sexes does not mean that schools cannot provide separate facilities for boys and girls to use the bathroom, change clothes, and take showers. Segregation of the sexes in these private areas merely reflects long-standing and well-accepted societal norms upon which many aspects of our society are based.

The existence of the Title IX regulations is a critical distinction between Title IX and Title VII in the context of whether segregating bathrooms by sex is unlawful sex stereotyping. This distinction exists because a "fair reading of the [Title IX] Regulation is that any 'sex' discrimination otherwise made unlawful by Title IX, including as to transgender status or gender identity . . . is nonetheless not unlawful if it is limited to the circumstances specifically considered by the Regulation." *Id.*

In interpreting Title IX, the Seventh Circuit paid no heed to the regulations. The Seventh Circuit relied upon Title VII case law (*Price Waterhouse*), yet it offered no analysis of how the Title IX regulations

affect the segregated bathroom issue. Title VII and Title IX cannot be treated equally on this particular issue because of the existence of 34 C.F.R. § 106.33. Directly utilizing the *Price Waterhouse* sex stereotyping theory, without addressing the import of the regulations, results in a conclusion that school districts violate Title IX by following the express regulations that allow them to segregate their bathrooms.

The Seventh Circuit's decision has effectively nullified the Title IX regulations by labeling KUSD's compliance with them as sex stereotyping. The only way the Seventh Circuit's ruling can be harmonized with the regulation is to completely eliminate the word "sex" from the regulation and replace it with the word "gender identity." Of course, it is not within the Seventh Circuit's purview to redraft the regulations implementing Title IX.

II. The Seventh Circuit Wildly Deviated From This Court's Precedent in Concluding that a Policy that Treats Males and Females the Same is a Sex-Based Classification Entitled to Heightened Scrutiny Under an Equal Protection Analysis.

After improvidently expanding the reach of *Price Waterhouse*, the Seventh Circuit then utilized that same analysis to hold that one must apply heightened scrutiny in analyzing whether KUSD's policy violated Respondent's right to Equal Protection. More specifically, the panel stated that "just as in *Price Waterhouse*, the record for the preliminary injunction shows sex stereotyping" and

that since "the School District's policy cannot be stated without referencing sex . . . [t]his policy is inherently based upon a sex-classification and heightened review applies." Pet. App. at 33a.

The Seventh Circuit's reasoning is flawed, simplistic, and creates another absurd result. The concept that anytime a policy cannot be stated without referencing the word "sex," that it must then be *per se* "sex-based" triggering heightened review, is untenable.

By deeming transgender status as a sex-based classification, the Seventh Circuit has made an end-around this Court's admonishment for lower courts to not create new suspect classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 3255, 87 L. Ed. 2d 313 (1985). This Court has never recognized transgender status as a suspect classification entitled to heightened scrutiny under the Equal Protection clause. *See Johnston*, 97 F. Supp. 3d at 668. Furthermore, other courts of appeals and district courts across the country have considered the Equal Protection allegations of transgender plaintiffs under rational basis review.[4]

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[4] See the following cases all rejecting the notion that transsexual or transgender is a suspect class: *Johnston*, 97 F. Supp. 3d at 668; *Etsitty*, 502 F.3d at 1227-28; *Brown v. Zavaras*, 63 F.3d 967, 970-71 (10th Cir. 1995); *Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981); *Braninburg v. Coalinga State Hosp.*, No. 1:08-CV-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue*, No. CIV S-11-2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012); *Kaeo-Tomaselli v. Butts*, No. CIV. 11-00670 LEK, 2013

This Court's recent decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), also highlights that the Seventh Circuit's conclusion is misguided. This Court has always held that, for Equal Protection purposes, it is the differential treatment of men and women that leads to heightened scrutiny. Governmental laws that differentiate between fathers and mothers, widows and widowers, unwed fathers and unwed mothers, or men and women are the types of laws that demand heightened scrutiny. *Morales-Santana,* 137 S.Ct. at 1688–89 (2017). Requiring transgender students—male and female—to use bathroom facilities that correspond to the sex listed on their birth certificate does not raise the implications of a sex-based distinction simply because the word "sex" is linked to the birth certificate.

The provision of separate bathrooms for men and women has never been found to violate Equal Protection. The Seventh Circuit's misconstruction of transgender status as *per se* sex-based discrimination pursuant to a sex stereotyping theory impermissibly expands the definition of sex for purposes of Equal Protection. Intermediate scrutiny

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WL 399184, at *5 (D. Haw. Jan. 31, 2013); *Lopez v. City of New York*, No. 05 CIV. 10321(NRB), 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009); *Starr v. Bova*, No. 1:15 CV 126, 2015 WL 4138761, at *2 (N.D. Ohio July 8, 2015); *Murillo v. Parkinson*, No. CV 11-10131-JGB VBK, 2015 WL 3791450, at *12 (C.D. Cal. June 17, 2015); *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015); *Stevens v. Williams*, No. 05-CV-1790-ST, 2008 WL 916991, at *13 (D. Or. Mar. 27, 2008); *Rush v. Johnson*, 565 F. Supp. 856, 868 (N.D. Ga. 1983).

should not be applied in this situation because separating boys and girls into different bathrooms is not the kind of governmental regulation that differentiates on the basis of sex. *See id.* Both male and female students are required to use the bathroom that correspond to the sex listed on their birth certificate. "[S]eparating students by sex-based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause." *Johnston*, 97 F. Supp. 3d at 670.

III. School Districts Across the Nation Need This Court's Guidance on these Important Questions of Federal And Constitutional Law

The Seventh Circuit has decided important questions of federal law that have not been settled by this Court and which conflict with the Tenth Circuit's conclusions. The question of whether educational institutions must permit transgender students to use whichever bathroom they choose is an emerging issue that has placed school districts across the country in a difficult predicament.

A. The Seventh Circuit's decision has created an untenable position for schools, requiring them to attempt to juggle the requirements of Title IX and the rights and interests of their other constituents.

With transgender students becoming a more visible and open population, schools must balance the need for inclusivity and fostering a positive education environment for their students with respecting the privacy issues that necessarily accompany bathroom usage. On the one hand, Title IX prevents schools from excluding anyone from participating or enjoying the benefits of any educational program or activity based on sex. *See* 20 U.S.C. § 1681(a); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287, 118 S. Ct. 1989, 1997, 141 L. Ed. 2d 277 (1998) (stating that Title IX focuses on protecting individuals from discriminatory practices carried out by recipients of federal funds). In this regard, schools have a responsibility to ensure that all of its students have equal access to educational opportunities.

Balanced against this equal access requirement is the long-standing recognition of the constitutional rights of privacy and bodily integrity. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 926, 112 S. Ct. 2791, 2846, 120 L. Ed. 2d 674 (1992). These rights include the ability to perform personal bodily functions and to expose oneself in stages of undress outside the presence of members of the opposite sex. "Shielding one's unclothed figure from the view of strangers, particularly strangers of

the opposite sex is impelled by elementary self-respect and personal dignity." *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988). The right to bodily privacy is so important because most people 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." *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (internal citations omitted).

Allowing a transgender student to use the bathroom that does not correspond with the sex on that student's birth certificate threatens the privacy interests of other students. *See Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (stating that allowing a transgender man that identifies as a woman into the women's restroom would threaten the privacy interests of its female employees); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D.W. Va. 1982) (holding that a female would violate a man's legitimate privacy right by entering a men's bathroom while the man was using it).

The need to respect these privacy interests in school aged children is paramount. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734-35 (4th Cir. 2016) (Niemeyer, Circuit Judge, concurring in part and dissenting in part) ("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 exposed to persons of the opposite biological sex" and

"courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind."); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (concluding that a person has a constitutionally protected privacy interest in "his or her partially clothed body" and "particularly while in the presence of members of the opposite sex"); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 751 (E.D. Va. 2015), *rev'd in part, vacated in part,* 822 F.3d 709 (4th Cir. 2016) ("Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public school education is a protective environment. Furthermore, the School Board is tasked with providing safe and appropriate facilities for these students.").

It is unsettling that the Seventh Circuit has trivialized this privacy interest. It is well-accepted that even prisoners have the right to use bathrooms and changing areas without exposure to viewers of the opposite sex. *See Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (finding that a prison violated an inmate's right to privacy by forcing them to use dormitory and bathroom facilities regularly viewable by guards of the opposite sex and stating that "[b]asic human dignity requires some minimal protection of privacy, at least from the opposite sex"); *Miles v. Bell*, 621 F. Supp. 51, 67 (D. Conn. 1985) (recognizing that courts have found a constitutional violation where guards "regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities

or showering") (internal citations omitted). How could the law of the land provide that prisoners have greater privacy interests than school children?

Such delicate issues of privacy should be left to local, elected boards of education. School districts must be cognizant of the rights of their students' parents. Depriving parents of a say over whether their children should be exposed to members of the opposite sex, possibly in a state of partial undress in intimate settings, deprives parents of their right to direct the education and upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (stating that it is the fundamental right of parents to make decisions concerning the care, custody, and control of their children); *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 627, 67 L. Ed. 1042 (1923) (acknowledging the right for parents to control the education of their children).

Finally, this balancing of competing interests is further exacerbated by the constant threat of litigation regardless of the policy adopted by the school. School districts are faced with the proverbial Catch-22 situation. If the school segregates bathrooms based on biological sex, or even offers single-user, gender-neutral bathrooms to transgender students, to respect the privacy interests of students and their parents, then transgender students will bring suit. *See, e.g.*, III.B. *infra*. On the other hand, if the school adopts a policy which permits transgender students to use any bathroom they choose, other students and their

parents will sue seeking to protect their privacy interests. *See, e.g.*, *Students*, 2016 WL 6134121; *Privacy Matters*, 2016 WL 6436658. School districts need to know what their definitive responsibilities are under the law so that they can conform their policies to a settled view of the law.

B. This Court needs to resolve the disparate treatment of this issue by lower courts.

The need for guidance by this Court is highlighted by the disparate guidance from the lower courts on these issues. Since 2015 there has been active litigation over the proper interpretation of Title IX in the context of transgender students using segregated bathroom, locker room, and shower facilities with inconsistent results.

In 2015, the Western District of Pennsylvania held that a public university did not violate Title IX or Equal Protection by prohibiting a transgender male student from using the men's bathroom and locker room. *See Johnston*, 97 F. Supp. 3d at 683.

Later that year, the *G.G.* case began with the district court finding that the school's policy of requiring students to use bathrooms consistent with their corresponding biological sex did not violate Title IX. *G.G*, 132 F. Supp. 3d at 753, *rev'd in part, vacated in part,* 822 F.3d 709 (4th Cir. 2016), *cert. granted in part,* 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), and *vacated and remanded,* 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017). After this Court vacated

the Fourth Circuit's decision reversing the district court, *see Gloucester Cty. Sch. Bd.*, 137 S. Ct. at 1239, this case is now pending in the Fourth Circuit on remand and its uncertain status muddies the waters further for school districts.

In 2016, a federal court in Texas issued a nationwide injunction finding that the Department of Education's interpretation of Title IX that required transgender individuals to be granted access to the bathroom consistent with their gender identity was contrary to Title IX. *Texas*, 201 F. Supp. 3d at 836. The Seventh Circuit's decision creates an incongruence with this nationwide injunction. The Texas court enjoined enforcement of the interpretation of Title IX expressed by Department of Education guidance documents issued by the last administration—that the definition of "sex" as it relates to intimate facilities includes gender identity—by federal agencies. *See id.* at *3.

Days later, a district court in North Carolina, relying on *G.G.*, held that schools must treat students consistent with their gender identity in finding a law that required bathrooms and changing facilities be designated for and only used by persons based on their biological sex violated Title IX. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 637 (M.D.N.C. 2016).

Additionally, a district court in Illinois denied a group of students and parents' motion for preliminary injunction to enjoin a school district

from implementing a policy permitting transgender students to use the bathroom consistent with their gender identity. *Students*, 2016 WL 6134121, at *40. The district court found that the decisions holding "sex" is ambiguous in the context of Title IX and can encompass gender identity were persuasive and supported a finding that the Department of Education did not violate the Administrative Procedures Act. *Id.* at *19.

After this case was initiated in late 2016, more lower courts began weighing in on this issue. An Ohio district court found that prohibiting a transgender female from using the women's bathroom violated Title IX. *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016). The Sixth Circuit affirmed this position in refusing to stay an injunction issued by the district court permitting the transgender student to use the bathroom corresponding with her gender identity. *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016).

In February 2017, a judge in the Western District of Pennsylvania found that a policy requiring students to use bathrooms consistent with their biological sex likely violated Equal Protection, but likely did not violate Title IX in light of the February 22, Dear Colleague letter. *Evancho*, 2017 WL 770619, at *16, *22.

Many of these cases are still pending in their respective courts. The continued validity of the holdings in these cases is questionable in light of this

Court's vacation of the decision in *G.G.*, the rescission of the Dear Colleague letter, and the dismissal of the appeal in *Texas*. Moreover, the Seventh Circuit is the only intermediate appellate court thus far to make a definitive ruling that a policy that requires students to use the bathroom that corresponds with their biological sex violates Title IX. Conflicting interpretations of Title IX cause many problems in the public school setting. This is especially true considering that schools can lose their federal funding if they violate Title IX. Schools must contemplate whether their policies violate Title IX, but there is no definitive ruling from this Court on what Title IX requires for transgender students.

C. Guidance from this Court is necessary as Congress has refused to act and the Departments of Education and Justice have provided little guidance.

The need for this Court to provide guidance to school districts is also evident from the fact that Congress has not taken any steps to clarify the reach of Title IX as applied to transgender students. Congress has not acted to expand the scope of Title IX despite multiple attempts by its members. Members of Congress have proposed the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015), that would prohibit discrimination based on sexual orientation or gender identity under Title IX. Congress, however, has repeatedly refused to enact this proposed legislation, rejecting it in various forms at least four times. This lack of congressional action in the face of public opinion and conflicting court decisions exemplifies the need for this Court to

address the issue. Since Congress has refused to act, it is even more imperative for this Court to hear this issue and rule on whether Title IX and the Constitution requires school districts to permit transgender students to use any bathroom that they choose.

Also contributing to the need for this Court's review is the inconsistent interpretations set forth by the Department of Education and Department of Justice.[5] On May 13, 2016, the Departments of Justice and Education issued a "Dear Colleague" letter advising schools that transgender students are protected under Title IX and must be allowed to use either bathroom. Pet. App. at 154a-171a. On February 22, 2017, the departments issued another Dear Colleague letter expressly withdrawing the statements of policy and guidance reflected in the May 2016 "Dear Colleague" letter. Pet. App. at 151a-153a. The issuance of this new guidance led this Court to withdraw its prior grant of certiorari in *G.G.*, vacate the judgment, and remand the case to

[5] The Department of Justice and the Executive Branch have recently created further uncertainty in the legal landscape. The Department of Justice filed an amicus brief on July 26, 2017 with the full U.S. Court of Appeals for the Second Circuit in *Zarda v. Altitude Express*, arguing that Title VII does not bar employment discrimination based on sexual orientation. This was in direct contradiction to the position adopted by another federal agency—the EEOC. Due to the similarities between Title VII and Title IX in this regard, this filing suggests that the Department of Justice would also adopt the position—in contradiction of the Seventh Circuit—that Title IX does not prohibit sex-separated facilities based on sex.

the Fourth Circuit. *See Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017).

The February 22, 2017 Dear Colleague letter did not issue any new interpretation of Title IX other than that "there must be due regard for the primary role of the States and local school districts in establishing educational policy." Pet. App. at 152a. This statement may conflict with Title IX, and certainly does conflict with the Seventh Circuit's interpretation of Title IX. The executive and legislative branches of government have continued to take a "head in the sand" approach to this issue. In light of their unwillingness, this Court should provide guidance so that school districts can finally take a definitive course of action without the threat of suit and of violating Title IX.

D. The Seventh Circuit's decision has far-reaching consequences and demonstrates its pattern of judicial activism.

Finally, while the Seventh Circuit's decision was limited to bathroom usage, its ruling on Title IX opens the door for transgender students to demand access to showers and locker room facilities of the opposite biological sex. In that scenario, a school must permit biological males to shower with females and biological females to shower with males or be in violation of Title IX. The privacy concerns are even more evident when students will be in complete stages of undress in the presence of members of the opposite sex.

This decision also reflects an ongoing trend of judicial activism within the Seventh Circuit. In rendering its decision, the panel approvingly cited its recent decision in *Hively*, 853 F.3d at 339. Pet. App. at 25a. In that decision, the Seventh Circuit, en banc, became the first circuit in the country to hold that sexual orientation is a protected class under Title VII. *Hively*, 853 F.3d at 350–51. In departing from longstanding precedent that sexual orientation is not covered under Title VII, the Court expressed its view that a statute can be interpreted to give it "a fresh meaning . . . that infuses the statement with vitality and significance today." *Id.* at 352 (Posner, C. J., concurring). The Seventh Circuit's decision here is further evidence that the court is departing from simply interpreting the law, and is instead attempting to rewrite the law to reflect the court's personal and political beliefs about social issues in this Country.

Educational institutions need to know what their responsibilities are under Title IX for the provision of bathrooms to transgender individuals. This is an issue of national importance and school districts, parents, and students alike would greatly benefit from a definitive interpretation from this Court.

III. This Case Is A Clean Vehicle For This Court's Review.

This case presents an ideal vehicle for resolving the questions presented. The relevant facts are not disputed by either side, and no judge below suggested any deficiencies in the record. This case presents a pure question of law applied to

undisputed facts. KUSD does not dispute that it implemented a policy that required students to use the bathroom that corresponded with their biological sex (or to use a separate single-user, gender-neutral bathroom) and that this policy prohibited Respondent from using the men's bathroom.

The issues were also thoroughly briefed and argued below, including whether a policy that segregates bathrooms based on biological sex is sex stereotyping as a matter of law and what level of scrutiny is appropriate for an Equal Protection claim by a transgender individual. Though the Seventh Circuit affirmed the granting of the preliminary injunction, it made a merits-based determination on Respondent's claims that KUSD violated Title IX and Equal Protection (notwithstanding any affirmative defenses to be raised at a later date in the underlying proceedings).

Finally, the parties are ideally suited to bring this case. Respondent is a transgender student and KUSD is a public school district that receives federal funds. These same classes of parties are present in many other pending suits concerning the legality of segregating bathrooms based on biological sex. This case presents an opportunity for this Court to make one ruling that will definitively settle this issue for all similarly situated parties across the country.

CONCLUSION

For the foregoing reasons, KUSD respectfully requests that this Court grant review to provide definitive guidance to all such affected individuals and entities across the country.

Respectfully submitted,

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August 25, 2017

APPENDIX

APPENDIX A

858 F.3d 1034
United States Court of Appeals
Seventh Circuit

Ashton WHITAKER, BY his mother
and next friend Melissa WHITAKER,

Plaintiff-Appellee,

v.

KENOSHA UNIFIED SCHOOL
DISTRICT NO. 1 BOARD OF EDUCATION, et al.,

Defendants-Appellants.

No. 16-3522

Argued March 29, 2017
Decided May 30, 2017

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*1038 Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:16-cv-00943-PP—Pamela Pepper, *Judge*.

Attorneys and Law Firms

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Before Wood, Chief Judge, and Rovner and Williams, Circuit Judges.

Opinion

Williams, Circuit Judge.

Ashton ("Ash") Whitaker is a 17 year-old high school senior who has what would *1039 seem like a simple request: to use the boys' restroom while at school. However, the Defendants, the Kenosha Unified School District and its superintendent, Sue Savaglio, (the "School District") believe that the request is not so simple because Ash[1] is a transgender boy. The School District did not permit Ash to enter the boys' restroom because, it believed, that his mere presence would invade the privacy rights of his male classmates. Ash brought suit, alleging that the School District's unwritten bathroom policy[2] violates Title IX of the Education Amendments Act of 1972 and the Fourteenth Amendment's Equal Protection Clause.

In addition to filing suit, Ash, beginning his senior year, moved for preliminary injunctive relief, seeking an order granting him access to the boys' restrooms. He asserted that the denial of access to the boys' bathroom was causing him harm, as his attempts to avoid using

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[1] We will refer to the Plaintiff-Appellee as "Ash," rather than by his last name, as this is how he refers to himself throughout his brief.

[2] We will refer to the School District's decision to deny Ash access to the boys' restroom as a "policy," although any such "policy" is unwritten and its exact boundaries are unclear.

the bathroom exacerbated his vasovagal syncope, a condition that renders Ash susceptible to fainting and/or seizures if dehydrated. He also contended that the denial caused him educational and emotional harm, including suicidal ideations. The School District vigorously objected and moved to dismiss Ash's claims, arguing that Ash could neither state a claim under Title IX nor the Equal Protection Clause. The district court denied the motion to dismiss and granted Ash's preliminary injunction motion.

On appeal, the School District argues that we should exercise pendent appellate jurisdiction to review the district court's decision to deny the motion to dismiss. However, we decline this invitation, as the two orders were not inextricably intertwined and we can review the grant of the preliminary injunction without reviewing the denial of the motion to dismiss.

The School District also argues that we should reverse the district court's decision to grant the preliminary injunction for two main reasons. First, it argues that the district court erred in finding that Ash had demonstrated a likelihood of success on the merits because transgender status is neither a protected class under Title IX nor is it entitled to heightened scrutiny. And, because the School District's policy has a rational basis, that is, the need to protect other students' privacy, Ash's claims fail as a matter of law. We reject these arguments because Ash has sufficiently demonstrated a likelihood of success on his Title IX claim under a sex-stereotyping theory. Further, because the policy's classification is based upon sex, he has also

demonstrated that heightened scrutiny, and not rational basis, should apply to his Equal Protection Claim. The School District has not provided a genuine and exceedingly persuasive justification for the classification.

Second, the School District argues that the district court erred in finding that the harms to Ash outweighed the harms to the student population and their privacy interests. We disagree. The School District has failed to provide any evidence of how the preliminary injunction will harm it, or any of its students or parents. The harms identified by the School District are all speculative and based upon conjecture, whereas the harms to Ash are well-documented and supported by the record. As a consequence, we affirm the grant of preliminary injunctive relief.

*1040 I. BACKGROUND

Ash Whitaker is a 17 year-old who lives in Kenosha, Wisconsin with his mother, who brought this suit as his "next friend."[3] He is currently a senior at George Nelson Tremper High School, which is in the Kenosha Unified School District. He entered his senior year ranked within the top five percent of his class and is involved in a number of extracurricular activities including the orchestra, theater, tennis, the National Honor Society, and the Astronomical Society. When not

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[3] Because Ash is a minor without a duly appointed representative, pursuant to Rule 17 of the Federal Rules of Civil Procedure, he may assert these claims only through a "next friend" or guardian ad litem.

in school or participating in these activities, Ash works part-time as an accounting assistant in a medical office.

While Ash's birth certificate designates him as "female," he does not identify as one. Rather, in the spring of 2013, when Ash was in eighth grade, he told his parents that he is transgender and a boy. He began to openly identify as a boy during the 2013-2014 school year, when he entered Tremper as a freshman. He cut his hair, began to wear more masculine clothing, and began to use the name Ashton and male pronouns. In the fall of 2014, the beginning of his sophomore year, he told his teachers and his classmates that he is a boy and asked them to refer to him as Ashton or Ash and to use male pronouns.

In addition to publicly transitioning, Ash began to see a therapist, who diagnosed him with Gender Dysphoria, which the American Psychiatric Association defines as "a marked incongruence between one's experienced/expressed gender and assigned gender...."[4] *Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders* 452 (5th ed. 2013). In July 2016, under the supervision of an endocrinologist at Children's Hospital of Wisconsin, Ash began hormone replacement therapy. A month later, he filed a petition to legally change his name to Ashton Whitaker, which was granted in September 2016.

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[4] We take judicial notice of the Diagnostic and Statistical Manual pursuant to Rule 201 of the Federal Rules of Evidence.

For the most part, Ash's transition has been met without hostility and has been accepted by much of the Tremper community. At an orchestra performance in January 2015, for example, he wore a tuxedo like the rest of the boys in the group. His orchestra teacher, classmates, and the audience accepted this without incident. Unfortunately, the School District has not been as accepting of Ash's requests to use the boys' restrooms.

In the spring of his sophomore year, Ash and his mother met with his guidance counselor on several occasions to request that Ash be permitted to use the boys' restrooms while at school and at school-sponsored events. Ash was later notified that the administration had decided that he could only use the girls' restrooms or a gender-neutral restroom that was in the school's main office, which was quite a distance from his classrooms. Because Ash had publicly transitioned, he believed that using the girls' restrooms would undermine his transition. Additionally, since Ash was the only student who was permitted to use the gender-neutral bathroom in the school's office, he feared that using it would draw further attention to his transition and status as a transgender student at Tremper. As a high schooler, Ash also worried that he might be disciplined if he tried to use the boys' restrooms and that such discipline might hurt his chances of getting into college. For these reasons, *1041 Ash restricted his water intake and at-tempted to avoid using any restroom at school for the rest of the school year.

Restricting his water intake was problematic for Ash, who has been diagnosed with vasovagal syncope. This condition renders Ash more susceptible to fainting and/or seizures if dehydrated. To avoid triggering the condition, Ash's physicians have advised him to drink six to seven bottles of water and a bottle of Gatorade daily. Because Ash restricted his water intake to ensure that he did not have to utilize the restroom at school, he suffered from symptoms of his vasovagal syncope, including fainting and dizziness. He also suffered from stress-related migraines, depression, and anxiety because of the policy's impact on his transition and what he perceived to be the impossible choice between living as a boy or using the restroom. He even began to contemplate suicide.

In the fall of 2015, Ash began his junior year at Tremper. For six months, he exclusively used the boys' restrooms at school without incident. But, in February 2016, a teacher saw him washing his hands at a sink in the boys' restroom and reported it to the school's administration. In response, Ash's guidance counselor, Debra Tronvig, again told Ash's mother that he was permitted to only use the girls' restrooms or the gender-neutral bathroom in the school's main office. The next month, Ash and his mother met with Assistant Principal Holly Graf to discuss the school's policy. Like before, Ms. Graf stated that Ash was not permitted to use the boys' restrooms. However, the reason she gave this time was that he was listed as a female in the school's official records and to change those records, the school needed unspecified "legal or medical documentation."

Two letters submitted by Ash's pediatrician, identifying him as a transgender boy and recommending that he be allowed to use male-designated facilities at school were deemed not sufficient to change his designation. Rather, the school maintained that Ash would have to complete a surgical transition ... a procedure that is prohibited for someone under 18 years of age ... to be permitted access to the boys' restroom. Further, not all transgender persons opt to complete a surgical transition, preferring to forgo the significant risks and costs that accompany such procedures. The School District did not give any explanation as to why a surgical transition was necessary. Indeed, the verbal statements made to Ash's mom about the policy have never been reduced to writing. In fact, the School District has *never* provided any written document that details when the policy went into effect, what the policy is, or how one can change his status under the policy.

Fearing that using the one gender-neutral restroom would single him out and subject him to scrutiny from his classmates and knowing that using the girls' restroom would be in contradiction to his transition, Ash continued to use the boys' restroom for the remainder of his junior year.

This decision was not without a cost. Ash experienced feelings of anxiousness and depression. He once more began to contemplate suicide. Nonetheless, the school's security guards were instructed to monitor's Ash's restroom use to ensure that he used the proper facilities. Because Ash continued to use the boys' restroom, he was removed from class on several

occasions to discuss his violation of the school's unwritten policy. His classmates and teachers often asked him about these meetings and why administrators were removing him from class.

In April 2016, the School District provided Ash with the additional option of using *1042 two single-user, gender-neutral restrooms. These locked restrooms were on the opposite side of campus from where his classes were held. The School District provided only one student with the key: Ash. Since the restrooms were not near his classrooms, which caused Ash to miss class time, and because using them further stigmatized him, Ash again avoided using the bathrooms while at school. This only exacerbated his syncope and migraines. In addition, Ash began to fear for his safety as more attention was drawn to his restroom use and transgender status.

Although not part of this appeal, Ash contends that he has also been subjected to other negative actions by the School District, including initially prohibiting him from running for prom king, referring to him with female pronouns, using his birth name, and requiring him to room with female students or alone on school-sponsored trips. Furthermore, Ash learned in May 2016 that school administrators had considered instructing its guidance counselors to distribute bright green wristbands to Ash and other transgender students so that their bathroom usage could be monitored more easily. Throughout this litigation, the School District has denied that it considered implementing the wristband plan.

A. Proceedings Below

In the spring of 2016, Ash engaged counsel who, in April 2016, sent the School District a letter demanding that it permit him to use the boys' restroom while at school and during school-sponsored events. In response, the School District repeated its policy that Ash was required to use either the girls' restroom or the gender-neutral facilities. On May 12, 2016, Ash filed an administrative complaint with the United States Department of Education's Office for Civil Rights, alleging that this policy violated his rights under Title IX. To pursue the instant litigation, Ash chose to withdraw the complaint without prejudice.

On July 16, 2016, Ash commenced this action and on Au-gust 15, he filed an Amended Complaint alleging that the treatment he received at Tremper High School violated Title IX, 20 U.S.C. § 1681, *et seq*., and the Equal Protection Clause of the Fourteenth Amendment. That same day, Ash, in a motion for preliminary injunction, sought to enjoin the enforcement of the School District's policy pending the outcome of the litigation. The next day, the School District filed a motion to dismiss and filed its opposition to the preliminary injunction shortly thereafter.

After a hearing on the motion to dismiss, the district court denied the motion. The next day, it heard oral arguments on Ash's motion for preliminary injunction. A few days later, the district court granted the motion in part and enjoined the School District from: (1) denying Ash access to the boys' restroom; (2) enforcing

any written or unwritten policy against Ash that would prevent him from using the boys' restroom while on school property or attending school-sponsored events; (3) disciplining Ash for using the boys' restroom while on school property or attending school-sponsored events; and (4) monitoring or surveilling Ash's restroom use in any way. This appeal followed.

In a separate appeal, the School District petitioned this court for permission to file an interlocutory appeal of the district court's denial of its motion to dismiss. Although initially the district court certified the order denying the motion to dismiss for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b), it revoked that certification when it concluded that it had erred by including the certification language in its initial order. Therefore, we *1043 denied the School District's petition for interlocutory review of the motion to dismiss for lack of jurisdiction. *See Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker*, 841 F.3d 730, 731–32 (7th Cir. 2016). In the alternative, the School District urged this court to exercise pendent jurisdiction over the order denying the motion to dismiss because the district court had partially granted the preliminary injunction. But since we lacked jurisdiction to consider the petition for interlocutory appeal, we also lacked a proper jurisdictional basis for extending pendent jurisdiction. *Id.* at 732. Therefore, in this appeal, the School District was directed to seek pendent appellate jurisdiction, which it has now done.

II. ANALYSIS

The School District raises two issues on appeal. First, that this court should assert pendent jurisdiction over the district court's decision to deny its motion to dismiss and second, that the district court erred in granting Ash's motion for preliminary injunction. We will address each issue in turn.

A. Pendent Jurisdiction Is Not Appropriate

Ordinarily, an order denying a motion to dismiss is not a final judgment and is not appealable. *See* 28 U.S.C. § 1291 (providing federal appellate courts with jurisdiction over appeals from all final decisions). But, the School District again urges us to assert pendent appellate jurisdiction to consider the denial of the motion to dismiss. We decline the invitation.

Pendent appellate jurisdiction is a discretionary doctrine. *Jones v. InfoCure Corp.*, 310 F.3d 529, 537 (7th Cir. 2002). It is also a narrow one, *Abelesz v. OTP Bank*, 692 F.3d 638, 647 (7th Cir. 2012), which the Supreme Court sharply restricted in *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). After *Swint*, we noted in *United States v. Board of School Commissioners of the City of Indianapolis*, 128 F.3d 507 (7th Cir. 1997), that pendent appellate jurisdiction is a "controversial and embattled doctrine." *Id*. at 510. Nonetheless, the Supreme Court recognized a narrow path for its use in *Clinton v. Jones*, 520 U.S. 681, 707 n.41, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), where it found that a collateral order denying presidential immunity was inextricably

intertwined with an order that stayed discovery and postponed trial, and was therefore, reviewable on appeal.

When applicable, the doctrine allows for review of an "otherwise unappealable interlocutory order if it is inextricably intertwined with an appealable one." *Montano v. City of Chicago*, 375 F.3d 593, 599 (7th Cir. 2004) (quoting *Jones*, 310 F.3d at 536) (internal quotation marks omitted). This requires more than a "close link" between the two orders. *Id*. at 600. Judicial economy is also an insufficient justification for invoking the doctrine and disregarding the final-judgment rule. *McCarter v. Ret. Plan For Dist. Managers of Am. Family Ins. Grp.*, 540 F.3d 649, 653 (7th Cir. 2008). Rather, we must satisfy ourselves that based upon the specific facts of this case, it is "practically indispensable that we address the merits of the unappealable order in order to resolve the properly-taken appeal. *Montano*, 375 F.3d at 600 (quoting *United States ex rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co*., 909 F.2d 259, 262 (7th Cir. 1990)) (internal quotation marks omitted); *see also Abelesz*, 692 F.3d at 647 ("[P]endent appellate jurisdiction should not be stretched to appeal normally unappealable interlocutory orders that happen to be related—even closely related—to the appealable order."). Such a high threshold is required because *1044 a more relaxed approach would allow the doctrine to swallow the final-judgment rule. *Montano*, 375 F.3d at 599 (citing *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988)).

As we discuss below, the district court determined that Ash sufficiently demonstrated a likelihood of success on the merits of his claims and that preliminary injunctive relief was warranted. In doing so, the district court referenced its decision to deny the School District's motion to dismiss. The School District contends that this rendered the two decisions inextricably intertwined. Therefore, it reasons that pendent jurisdiction is appropriate because to engage in a meaningful review of the preliminary injunction order, the court must also review the denial of the motion to dismiss.

Merely referencing the earlier decision to deny the motion to dismiss, however, did not inextricably intertwine the two orders. Certainly the legal issues raised in the motions overlapped, as both motions challenged, in different ways and under different standards, the likely merits of Ash's claim. Invoking pendent jurisdiction simply because of this overlap would essentially convert a motion for preliminary injunctive relief into a motion to dismiss, which would raise the threshold showing a plaintiff must make before receiving injunctive relief. For all practical purposes, this would mean that every time a motion to dismiss is filed simultaneously with a motion for preliminary injunction, this doctrine would apply. This makes no sense and we do not see a compelling reason for invoking the doctrine here.

B. Preliminary Injunctive Relief Was Proper

A preliminary injunction is an extraordinary remedy. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008) (noting that "a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.") (internal quotation marks and citation omitted). It is never awarded as a matter of right. *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016). We review the grant of a preliminary injunction for the abuse of discretion, reviewing legal issues *de novo*, *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir. 2016), while factual findings are reviewed for clear error. *Fed. Trade Comm'n v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016). Substantial deference is given to the district court's "weighing of evidence and balancing of the various equitable factors." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015).

A two-step inquiry applies when determining whether such relief is required. *Id.* at 661. First, the party seeking the preliminary injunction has the burden of making a threshold showing: (1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits. *Id.* at 661–62. If the movant successfully makes this showing, the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently

outweighs the movant's interests. *Jones*, 842 F.3d at 1058.

1. Ash Likely to Suffer Irreparable Harm

The moving party must demonstrate that he will likely suffer irreparable harm absent obtaining preliminary injunctive relief. *See* *1045 *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 787 (7th Cir. 2011). This requires more than a mere possibility of harm. *Id.* at 788. It does not, however, require that the harm actually occur before injunctive relief is warranted. *Id.* Nor does it require that the harm be certain to occur before a court may grant relief on the merits. *Id.* Rather, harm is considered irreparable if it "cannot be prevented or fully rectified by the final judgment after trial." *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1089 (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)) (internal quotation marks omitted). Because a district court's determination regarding irreparable harm is a factual finding, it is reviewed for clear error. *Id.* at 1087.

On appeal, the School District argues that the district court erred in finding that Ash established that he would suffer irreparable harm absent a preliminary injunction. Although Ash proffered reports from two different experts regarding the harm caused to him by the School District's policy, the School District contends that neither expert was able to actually quantify this harm. Further, the School District notes that Ash's failure to take advantage of "readily available alternatives," namely the gender-neutral bathrooms,

undermines his claim of irreparable harm. Lastly, the School District points to Ash's delay in seeking injunctive relief as indicative of the lack of irreparable harm.

The School District's arguments miss the point. The district court was presented with expert opinions that supported Ash's assertion that he would suffer irreparable harm absent preliminary relief. These experts opined that use of the boys' restrooms is integral to Ash's transition and emotional well-being. Dr. Stephanie Budge, a psychologist who specializes in working with adolescents and adults who have Gender Dysphoria, met with Ash and his mother, and in her report noted that the treatment Ash faced at school "significantly and negatively impacted his mental health and overall well-being."

Dr. Budge also noted that Ash reported current thoughts of suicide and that his depression worsened each time he had to meet with school officials regarding his bathroom usage. Ultimately, she opined that the School District's actions, including its bathroom policy, which identified Ash as transgender and therefore, "different," were "directly causing significant psychological distress and place [Ash] at risk for experiencing life-long diminished well-being and life-functioning." The district court did not clearly err in relying upon these findings when it concluded that Ash would suffer irreparable harm absent preliminary injunctive relief.

Further, the School District's argument that Ash's harm was self-inflicted because he chose not to use the gender-neutral restrooms, fails to comprehend the harm that Ash has identified. The School District actually exacerbated the harm, when it dismissed him to a separate bathroom where he was the only student who had access. This action further stigmatized Ash, indicating that he was "different" because he was a transgender boy.

Moreover, the record demonstrates that these bathrooms were not located close to Ash's classrooms. Therefore, he was faced with the unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or avoid use of the bathroom altogether at the expense of his health.

Additionally, Ash alleged that using the single-user restrooms actually invited more scrutiny and attention from his peers, who inquired why he had access to these restrooms and asked intrusive questions about his transition. This further intensified *1046 his depression and anxiety surrounding the School District's policy. Therefore, it cannot be said that the harm was "self-inflicted."

Finally, Ash did not delay in seeking injunctive relief. He had used the boys' bathroom for months without incident, and he filed an administrative complaint with the Department of Education in April 2016, just weeks after the school began to enforce its policy once more. He made the decision to withdraw that complaint over

the summer and commence the instant litigation instead so that he could pursue injunctive relief prior to beginning his senior year. It is important to note that Ash was on summer break and not subject to the School District's bathroom policy at the time he chose to pursue the litigation. Therefore, Ash's decision to seek injunctive relief over the summer rather than initiate an administrative complaint does not undermine his argument that the policy was inflicting, and would continue to inflict, irreparable harm.

2. No Adequate Remedies at Law

The moving party must also demonstrate that he has no adequate remedy at law should the preliminary injunction not issue. *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 813 (7th Cir. 2002). This does not require that he demonstrate that the remedy be wholly ineffectual. *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). Rather, he must demonstrate that any award would be "seriously deficient as compared to the harm suffered." *Id.*

While the School District focuses the majority of its arguments on why Ash's harm is not irreparable, it also argues that any harm he has allegedly suffered can be remedied by monetary damages. We are not convinced. While monetary damages are used to compensate plaintiffs in tort actions, in those situations the damages relate to a past event, where the harm was inflicted on the plaintiff through negligence or something comparable. But this case is not the typical tort action, as Ash has alleged *prospective* harm. He has

asserted that the policy caused him to contemplate suicide, a claim that was credited by the expert report of Dr. Budge. We cannot say that this potential harm—his suicide—can be compensated by monetary damages. Nor is there an adequate remedy for preventable "life-long diminished well-being and life-functioning." Therefore, we reject the School District's analogy to tort damages and find that Ash adequately established that there was no adequate remedy of law available.

3. Likelihood of Success on Merits

A party moving for preliminary injunctive relief need not demonstrate a likelihood of absolute success on the merits. Instead, he must only show that his chances to succeed on his claims are "better than negligible." *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). This is a low threshold. *U.S. Army Corps of Eng'rs*, 667 F.3d at 782. Ash's Amended Complaint contains two claims—one pursuant to Title IX and the other pursuant to the Equal Protection Clause of the Fourteenth Amendment. We will discuss each claim in turn.

i. Title IX Claim

Title IX provides 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 educational program or activity receiving Federal financial assistance...." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31(a). Covered institutions are, *1047 therefore, among other things, prohibited from: (1)

providing different aid, benefits, or services; (2) denying aid, benefits, or services; and (3) subjecting any person to separate or different rules, sanctions, or treatment on the basis of sex. *See* 34 C.F.R. § 106.31(b)(2)–(4). Pursuant to the statute's regulations, an institution may provide separate, but comparable, bathroom, shower, and locker facilities. *Id*. § 106.33. The parties agree that the School District receives federal funds and is a covered institution.

The parties' dispute focuses on the coverage of Title IX and whether under the statute, a transgender student who alleges discrimination on the basis of his or her transgender status can state a claim of sex discrimination. Neither the statute nor the regulations define the term "sex." Also absent from the statute is the term "biological," which the School District maintains is a necessary modifier. Therefore, we turn to the Supreme Court and our case law for guidance.

First, under our own case law, we do not see a barrier to Ash's Title IX claim. Although not as often as some of our sister circuits, this court has looked to Title VII when construing Title IX. *See e.g.*, *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) (noting that "it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX."). The School District contends that we should do so here, and relies on our reasoning in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), to conclude that Ash cannot state a claim under Title IX as a matter

of law. Other courts have agreed with the School District's position. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (relying upon *Ulane* to find that transsexuals are not a protected class under Title VII); *Johnston v. Univ. of Pittsburgh of Commw. Sys. of Higher Educ.*, 97 F.Supp.3d 657, 675–76 (W.D. Pa. 2015) (relying upon *Ulane* to find that a transgender student cannot state a claim under Title IX). We disagree.

In *Ulane*, we noted in dicta that Title VII's prohibition on sex discrimination "implies that it is unlawful to discriminate against women because they are women and against men because they are men." 742 F.2d at 1085. We then looked to the lack of legislative history regarding the meaning of the term "sex" in Title VII and concluded that this prohibition should be "given a narrow, traditional interpretation, which would also exclude transsexuals." *Id.* at 1085–86. This reasoning, however, cannot and does not foreclose Ash and other transgender students from bringing sex-discrimination claims based upon a theory of sex-stereotyping as articulated four years later by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

In *Price Waterhouse*, a plurality of the Supreme Court and two justices concurring in the judgment, found that the plaintiff had adequately alleged that her employer, in violation of Title VII, had discriminated against her for being too masculine. The plurality further emphasized that "we are beyond the day when an employer could evaluate employees by assuming or

insisting that they matched the stereotype associated with their group." *Id.* at 251, 109 S.Ct. 1775. Thus, the Court embraced a broad view of Title VII, as Congress "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.; see also Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) ("In forbidding employers to discriminate against individuals *1048 because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

The Supreme Court further embraced an expansive view of Title VII in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), where Justice Scalia, writing for a unanimous Court, declared that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79, 118 S.Ct. 998.

Following *Price Waterhouse*, this court and others have recognized a cause of action under Title VII when an adverse action is taken because of an employee's failure to conform to sex stereotypes. *See, e.g.*, *Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263-64 (3d Cir. 2001); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d

864, 874–75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999). Our most recent application occurred when, sitting *en banc*, we held that a homosexual plaintiff can state a Title VII claim of sex discrimination based upon a theory of sex-stereotyping. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (holding that a homosexual plaintiff may state a claim for sex-based discrimination under Title VII under either a sex stereotyping theory or under the associational theory).

The School District argues that even under a sex-stereotyping theory, Ash cannot demonstrate a likelihood of success on his Title IX claim because its policy is not based on whether the student behaves, walks, talks, or dresses in a manner that is inconsistent with any preconceived notions of sex stereotypes. Instead, it contends that as a matter of law, requiring a biological female to use the women's bathroom is not sex-stereotyping. However, this view is too narrow.

By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth. We are not alone in this belief. *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, the Eleventh Circuit noted that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Id.* at 1316. The Eleventh Circuit reiterated this conclusion in a *per curiam* unpublished opinion, noting that "sex discrimination includes discrimination against a transgender person for gender

nonconformity." *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed.Appx. 883, 884 (11th Cir. 2016) (unpub.).

The Sixth Circuit has also recognized a transgender plaintiff's ability to bring a sex-stereotyping claim. In *Smith v. City of Salem,* 378 F.3d 566 (6th Cir. 2004), the plaintiff was diagnosed with Gender Identity Disorder, a condition later renamed Gender Dysphoria. Born a male, the plaintiff began to present at work with a more feminine appearance and mannerisms. He[5] alleged in his complaint that as a result, his employer schemed to take action against him and ultimately subjected him to a pretextual suspension in violation of Title VII. While the district court concluded *1049 that because the plaintiff was transsexual he was not entitled to Title VII's protections, the Sixth Circuit disagreed.

Instead, the Sixth Circuit noted that *Price Waterhouse* established that the prohibition on sex discrimination "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*. at 573 (citing *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775). If Title VII prohibits an employer from discriminating against a woman for dressing too masculine, then, the court reasoned, Title VII likewise prohibits an employer from discriminating against a man who dresses in a way that

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[5] We will use the masculine pronoun to refer to the *Smith* plaintiff for the purpose of clarity, as this is how the Sixth Circuit referred to the *Smith* plaintiff throughout its opinion.

it perceives as too feminine. In both examples the discrimination would not occur but for the victim's sex, in violation of Title VII. *Id.* at 574. Therefore, the plaintiff's status as transsexual was not a bar to his claim.

Several district courts have adopted this reasoning, finding that a transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping theory. *See Valentine Ge v. Dun & Bradstreet, Inc*., No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 527 (D. Conn. 2016); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc*., 100 F.Supp.3d 594, 603 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653, 660 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F.Supp.2d 293, 305 (D.D.C. 2008). Further, courts have applied *Price Waterhouse* and found that transgender plaintiffs can state claims based upon a sex-stereotyping theory under the Gender Motivated Violence Act, *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000), and the Equal Credit Opportunity Act, *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000).

Here, however, the School District argues that this reasoning flies in the face of Title IX, as Congress has not explicitly added transgender status as a protected characteristic to either Title VII or Title IX, despite

having opportunities to do so. *See e.g*., Student Non-Discrimination Act of 2015 S. 439 114th Cong. (2015). The Supreme Court has rejected this argument, stating that congressional 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, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962)) (internal quotation marks omitted); *see also Hively*, 853 F.3d at 344 ("[I]t is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them."). Therefore, Congressional inaction is not determinative.

Rather, Ash can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act. Further, based on the record here, these gender-neutral alternatives were not true alternatives because of their distant location to Ash's

classrooms and the increased stigmatization they caused Ash. Rather, the School District only continued to treat Ash differently when it provided him with access to these gender-neutral bathrooms because he was the only student given access.

And, while the School District repeatedly asserts that Ash may not "unilaterally declare" his gender, this argument misrepresents Ash's claims and dismisses his transgender status. This is not a case where a student has merely announced that he is a different gender. Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity. This law suit demonstrates that the decision to do so was not without cost or pain. Therefore, we find that Ash has sufficiently established a probability of success on the merits of his Title IX claim.

ii. Equal Protection Claim

Although we are mindful of our duty to avoid rendering unnecessary constitutional decisions, *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001), *as amended* (July 2, 2001), we will address Ash's Equal Protection claim as the district court determined that Ash also demonstrated an adequate probability of success on the claim to justify the preliminary injunction. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)

(citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). It therefore, protects against intentional and arbitrary discrimination. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). Generally, state action is presumed to be lawful and will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249.

The rational basis test, however, does not apply when a classification is based upon sex. Rather, a sex-based classification is subject to heightened scrutiny, as sex "frequently bears no relation to the ability to perform or contribute to society." *Id.* at 440–41, 105 S.Ct. 3249 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973)) (internal quotation marks omitted); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). When a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *see also Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014). This requires the state to show that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 524, 116 S.Ct. 2264 (internal quotation marks omitted). It is not sufficient to provide a hypothesized or *post hoc* justification created in response to litigation. *Id.* at 533, 116 S.Ct.

2264. Nor may the justification be based upon overbroad generalizations about sex. *Id.* Instead, the justification must be genuine. *Id.*

*1051 If a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain a classification. *See J.E.B.*, 511 U.S. at 138, 114 S.Ct. 1419 (rejecting the state's reliance on sex-based stereotypes as a defense to the discriminatory use of peremptory challenges during jury selection); *see Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.").

As a threshold matter, we must determine what standard of review applies to Ash's claim. The School District urges us to apply the rational basis test, arguing that transgender status is not a suspect class. Applying that test, the School District contends that its policy is presumptively constitutional and that requiring students to use facilities corresponding to their birth sex to protect the privacy of all students is a rational basis for its policy. So, the School District maintains that Ash cannot demonstrate a likelihood of success on his Equal Protection Claim.

Ash disagrees. He argues that transgender status should be entitled to heightened scrutiny in its own right, as transgender people are a minority who have historically been subjected to discrimination based upon the immutable characteristics of their gender identities.

Alternatively, he argues that even if transgender status is not afforded heightened scrutiny in its own right, the School District's bathroom policy creates a sex-based classification such that heightened scrutiny should apply.

There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity. According to a report issued by the National Center for Transgender Equality, 78% of students who identify as transgender or as gender non-conformant, report being harassed while in grades K-12. *See* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, at 33 (2011), *available at* http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. These same individuals in K-12 also reported an alarming rate of assault, with 35% reporting physical assault and 12% reporting sexual assault. *Id.* As a result, 15% of transgender and gender non-conformant students surveyed made the decision to drop out. *Id.* These statistics are alarming. But this case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny. It is enough to stay that, just as in *Price Waterhouse*, the record for the preliminary injunction shows sex stereotyping. We note as well that there is no requirement that every girl, or every boy, be subjected to the same stereotyping. It is enough that Ash has experienced this form of sex discrimination.

Here, the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate. This policy is inherently based upon a sex-classification and heightened review applies. Further, the School District argues that since it treats all boys and girls the same, it does not violate the Equal Protection Clause. This is untrue. Rather, the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School District's bathroom policy if they choose to use a bathroom that conforms to their gender identity. This places the burden *1052 on the School District to demonstrate that its justification for its bathroom policy is not only genuine, but also "exceedingly persuasive." *See Virginia*, 518 U.S. at 533, 116 S.Ct. 2264. This burden has not been met here.

The School District defends its bathroom policy by claiming it needs to protect the privacy rights of all 22,160 students.[6] The mere presence of a transgender student in the bathroom, the School District argues, infringes upon the privacy rights of other students with whom he or she does not share biological anatomy.

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[6] We note that the School District's reliance upon the privacy interests of all of its 22,160 students is odd given that the preliminary injunction order only pertains to Ash, a student at one of its high schools. Many of the School District's students attend schools other than Tremper and are therefore, totally unaffected by the district court's order.

While this court certainly recognizes that the School District has a legitimate interest in ensuring bathroom privacy rights are protected, this interest must be weighed against the facts of the case and not just examined in the abstract, to determine whether this justification is genuine.

What the record demonstrates here is that the School District's privacy argument is based upon sheer conjecture and abstraction. For nearly six months, Ash used the boys' bathroom while at school and school-sponsored events without incident or complaint from another student. In fact, it was only when *a teacher* witnessed Ash washing his hands in the restroom that his bathroom usage once more became an issue in the School District's eyes. And while at oral argument, the School District asserted that it had received just one complaint from a parent, this is insufficient to support its position that its policy is required to protect the privacy rights of each and every student. Counsel for the School District cited to Ash's Amended Complaint for this assertion. The Amended Complaint, however, states that "some parents and other Kenosha residents began to speak out in opposition to Ash's right to use the boys' restrooms." Am. Comp. ¶ 77. It further states that several community members spoke at a School Board meeting and voiced their opposition to a policy that would allow transgender students to use gender-appropriate restrooms. *See id.* ("One parent told the Board that he was opposed to permitting transgender students to use gender-appropriate restrooms...."). Nonetheless, neither party has offered any evidence or even alleged that the School District has received any

complaints *from other students*. This policy does nothing to protect the privacy rights of each individual student vis-à -vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door.

A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall. Nothing in the record suggests that the bathrooms at Tremper High School are particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate *1053 for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line. Therefore, this court agrees with the district court that the School District's privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.

Additionally, at oral argument, counsel for the School District clarified that the only way that Ash would be

permitted to use the boys' restroom would be if he were to present the school with a birth certificate that designated his sex as male. But it is important to keep in mind that the School District has not provided a written copy of the policy. Nor is it clear that one even exists. And, before this litigation, Ash's mother was never told that she needed to produce a birth certificate. Instead, when she asked the School District to permit him to use the boys' restroom, the school's assistant principal told her that Ash could use the boys' restroom only if his sex was changed in the school's official records. To do so, Ash would need to submit unspecified legal or medical "documentation." Despite explaining to the assistant principal that Ash was too young to have sex-reassignment surgery and presenting the School District with two letters from Ash's pediatrician, Ash was still not allowed to use the boys' restroom.

Further, it is unclear that the sex marker on a birth certificate can even be used as a true proxy for an individual's biological sex. The marker does not take into account an individual's chromosomal makeup, which is also a key component of one's biological sex. Therefore, one's birth certificate could reflect a male sex, while the individual's chromosomal makeup reflects another. It is also unclear what would happen if an individual is born with the external genitalia of two sexes, or genitalia that is ambiguous in nature. In those cases, it is clear that the marker on the birth certificate would not adequately account for or reflect one's biological sex, which would have to be determined by considering more than what was listed on the paper.

Moreover, while it is true that in Wisconsin an individual may only change his or her designated sex on a birth certificate after completing a surgical reassignment, *see* Wis. Stat. Ann. § 69.15(4), this is not universally the case. For example, as Ash's counsel pointed out during oral argument, in Minnesota, an individual may amend his or her birth certificate to reflect his or her gender identity without surgical reassignment. *See Requirements for documents submitted to support the amendment of a birth record,* MINNESOTA DEP'T OF HEALTH, *http://www.health.state.mn.us/divs/chs/osr/reqdocs.html#gender* (last visited May 30, 2017). Therefore, a student who is born in Minnesota and begins his transition there, obtaining a modified birth certificate as part of the process, could move to Kenosha and be permitted to use the boys' restroom in one of the School District's schools even though he retains female anatomy.

Additionally, the policy fails to account for the fact that a new student registering with the School District need not even provide a birth certificate. Rather, the School District requires that each new student provide either a birth certificate *or* a passport. *See Registration*, KENOSHA UNIFIED SCH. DIST., *http://www.kusd.edu/registration* (last visited May 30, 2017). Pursuant to the United States Department of State's policies, an individual may apply for and receive a passport that reflects his or her gender identity by presenting a signed medical certification from a physician. *See Gender Designation Change*, U.S. DEP'T OF STATE, https://travel.state.gov/content/

passports/en/passports/information/gender.html#change (last visited May 30, 2017). This process does not *1054 require that an individual have undergone sex-reassignment surgery. Therefore, the School District's reliance upon a birth certificate's sex-marker demonstrates the arbitrary nature of the policy; so, Ash has met the low threshold of demonstrating a probability of success on his Equal Protection Claim.

4. Balance of Harms Favors Ash

Having already determined that the district court did not err in finding that Ash will suffer irreparable harm absent preliminary injunctive relief, we now must look at whether granting preliminary injunctive relief will harm the School District and the public as a whole. Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the harms faced by both parties and the public as a whole. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.,* 549 F.3d 1079, 1100 (7th Cir. 2008); *see also Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). This is done on a "sliding scale" measuring the balance of harms against the moving party's likelihood of success. *Turnell*, 796 F.3d at 662. The more likely he is to succeed on the merits, the less the scale must tip in his favor. *Id.* The converse, however, also is true: the less likely he is to win, the more the balance of harms must weigh in his favor for an injunction to issue. *Id.* Substantial deference is given to the district court's analysis of the balancing of harms. *Id.*

The School District argues that the district court erred in determining that the balance of the harms weighed in favor of granting the injunction because it ignored the fact that the harm extends to 22,160 students in the School District whose privacy rights are at risk by allowing a transgender student to utilize a bathroom that does not correspond with his biological sex. Granting the injunction, the School District continues, also irreparably harmed these students' parents, who are now denied the right to direct the education and upbringing of their children. Additionally, the School District asserts that the injunction harms the public as a whole, since it forces other school districts nationwide to contemplate whether they must change their policies and alter their facilities or risk being found out of compliance with Title IX. Noncompliance places their federal funding at risk. Based upon this record, however, we find the School District's arguments unpersuasive.

The School District has not demonstrated that it will suffer any harm from having to comply with the district court's preliminary injunction order. Nor has it established that the public as a whole will suffer harm. As noted above, before seeking injunctive relief, Ash used the bathroom for nearly six months *without incident*. The School District has not produced any evidence that any students have ever complained about Ash's presence in the boys' restroom. Nor have they demonstrated that Ash's presence has actually caused an invasion of any other student's privacy. And while the School District claims that preliminary injunctive relief infringes upon parents' ability to direct the

education of their children, it offers no evidence that a parent has ever asserted this right. These claims are all speculative.

We are further convinced that the district court did not err in finding that this balance weighed in favor of granting the injunction when considering the statements made by *amici*, who are school administrators from twenty-one states and the District of Columbia. Together, these administrators are responsible for educating approximately 1.4 million students. Each administrator has experience implementing *1055 inclusive bathroom policies in their respective schools, and each has grappled with the same privacy concerns that the School District raises here. These administrators uniformly agree that the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in their combined experience, all students' needs are best served when students are treated equally.

Although the School District argues that implementing an inclusive policy will result in the demise of gender-segregated facilities in schools, the *amici* note that this has not been the case. In fact, these administrators have found that allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls. When considering the experience of this group in light of the record here, which is virtually devoid of any complaints or harm caused to the School

District, its students, or the public as a whole, it is clear that the district court did not err in balancing the harms.

III. CONCLUSION

Appellants' motion to have this court assert pendent appellant jurisdiction over the district court's denial of Appellants' Motion to Dismiss is DENIED. The district court's order granting the Appellee's motion for a preliminary injunction is AFFIRMED.

APPENDIX B

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.

Case No. 16-CV-943-PP

DECISION AND ORDER GRANTING IN PART MOTION FOR PRELIMINARY INJUNCTION (DKT. N0. 10)

I. INTRODUCTION

On July 19, 2016, the plaintiff, Ashton Whitaker, filed this action against the defendants, Kenosha Unified School District and Sue Savaglio-Jarvis, in her official capacity as the Superintendent of the Kenosha Unified School District. Dkt. No. 1. In his complaint (amended on August 15th), the plaintiff alleges that the treatment he received at Tremper High School after he

started his female-to-male transition violated Title IX, 20 U.S.C. §1681, et seq., and the Equal Protection clause of the Fourteenth Amendment. Dkt. Nos. 1, 12. On August 15, 2016, the plaintiff also filed a motion for a preliminary injunction. Dkt. No. 10. The defendants filed a motion to dismiss the next day. Dkt. No. 14. Both motions were fully briefed by August 31, 2016. Dkt. Nos. 11, 15, 17, 19, 21, 22. Following oral arguments on the motions on September 6, 19 and 20, the court issued an oral ruling denying the defendants' motion to dismiss. Dkt. No. 28. See also, Dkt. No. 29 (order denying motion to dismiss). For the reasons stated at the September 20, 2016 hearing, and supplemented here, the court grants in part the plaintiff's motion for preliminary injunction. Dkt. No. 10.

II. BACKGROUND

The plaintiff, Ash Whitaker, is a student at Tremper High School, a public high school in the Kenosha Unified School District (KUSD). Dkt. No. 12 at ¶6. The plaintiff's mother, Melissa Whitaker, brought this action as his next friend. Id. at ¶7. She is also a high school teacher at Tremper. Id.

The plaintiff's birth certificate identifies him as female, and he lived as a female until middle school. Id. at ¶21. Around seventh grade, in late 2013, the plaintiff asked his mother about treatment for transgender individuals. Id. at ¶¶21-23; Dkt. 10-2 at 17. He later was diagnosed by his pediatrician with Gender Dysphoria. Dkt. No. 12 at ¶¶15, 25. "Gender Dysphoria is the medical and psychiatric term for gender incongruence." Dkt. No. 10-2 at 6. Individuals with gender dysphoria

suffer extreme stress when not presenting themselves and living in accordance with their gender identity. Id. Treatment for gender dysphoria consists of transitioning to living and being accepted by others as the sex corresponding to the person's gender identity. Dkt. No. 12 at ¶17. To pursue medical interventions, a person with gender dysphoria must live in accordance with their gender identity for at least one year. Id. at ¶18. If left untreated, gender dysphoria may result in "serious and debilitating" psychological distress including anxiety, depression, and even self-harm or suicidal ideation. Dkt. No. 10-2 at 6-7; Dkt. No. 12 at ¶15. The plaintiff currently is under the care of a clinical psychologist, and began receiving testosterone treatment in July 2016. Id. at ¶25.

During the 2013-2014 school year, the plaintiff began telling close friends that he was a boy, and transitioning more publicly to live in accordance with his male identity. Id. at ¶23. At the beginning of his sophomore year (Fall 2014), the plaintiff told all of his teachers and peers about his transition, and asked that they refer to him using male pronouns and by his male name. Id. at ¶24. In the spring of 2015, the plaintiff asked to be allowed to use the boys' restrooms at school. Id. at ¶27. The school administrators denied the request, stating that the plaintiff was allowed to use only the girls' restroom or the single-user, gender-neutral restroom in the school office. Id. The plaintiff did not want to use the office restroom because it was far from his classes and only used by office staff and visitors. Id. at ¶28. Consequently, the plaintiff avoided drinking liquids, and using the bathroom at school for

fear of being stigmatized as different. Id. at ¶29. During his sophomore year, the plaintiff experienced vasovagal syncope[1], stress-related migraines, depression, anxiety and suicidal thoughts. Id. at ¶31.

Upon learning, over the summer of 2015, that the US Department of Justice had concluded that transgender students have the right to use restrooms in accordance with their gender identity, the plaintiff began using the male-designated bathrooms at school starting his junior year, September 2015. Id. at ¶35. He used the male bathroom without incident until late February 2016. Id. at ¶36-37. Despite the lack of any written policy on the issue, the school informed the plaintiff, in early March, that he could not use the boys' restroom. Id. at 38. Nevertheless, to avoid the psychological distress associated with using the girls' restroom or the single-user restroom in the office, the plaintiff continued to use the boys' restrooms when necessary. Id. at ¶42.

The plaintiff and his mother met with an assistant principal and his guidance counselor on or about March 10, 2016 to discuss the school's decision. Id. at 44. The assistant principal told him that he could use only the restrooms consistent with his gender as listed in the school's official records, and that he could only change

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[1] "Vasovagal syncope . . . occurs when you faint because your body overreacts to certain triggers, such as the sight of blood or extreme emotional distress. It may also be called neurocardiogenic syncope." http://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/home/ovc-20184773 (last visited September 21, 2016).

his gender in the records only if the school received legal or medical documentation confirming his transition to male. Id. Although the plaintiff's mother argued that the plaintiff was too young for transition-related surgery, the assistant principal responded that the school needed medical documentation, but declined to indicate what type of medical documentation would be sufficient. Id. at 45. The plaintiff's pediatrician sent two letters to the school, recommending that the plaintiff be allowed access to the boys' restroom. Id. at 46. Despite lacking a written policy on the issue, id. at ¶60, the school again denied the plaintiff's request, because he had not completed a medical transition, but failing to explain why a medical transition was necessary. Id. at 47.

The plaintiff generally tried to avoid using the restroom at school, but when necessary, he used the boys' restroom. Id. at 48. Consequently, the school directed security guards to notify administrators if they spotted students going into the "wrong" restroom. Id. at ¶56. The school re-purposed two single-user restrooms, which previously had been open to all students, as private bathrooms for the plaintiff. Id. at ¶61. The plaintiff refused to use these bathrooms, because they were far from his classes and because using them would draw questions from other students. Id. Despite several more confrontations with the school administration, id. at ¶¶49, 51, 54, the plaintiff

continued to use the boys' restroom through the last day of the 2015-16 school year. Id. at ¶54.[2]

The plaintiff started his senior year of high school on September 1, 2016. As of the date of oral argument on this motion (September 20, 2016), the school still refused to allow him to use the boys' restroom, and the plaintiff continued to avoid the restrooms generally, using the boys' restroom when needed.

The plaintiff seeks the following relief: an order (1) enjoining the defendants from enforcing any policy that denies the plaintiff's access to the boys' restroom at school and school-sponsored events; (2) enjoining the defendants from taking any formal or informal disciplinary action against the plaintiff for using the boys' restroom; (3) enjoining the defendants from using, causing or permitting school employees to refer to the plaintiff by his female name and female pronouns; (4) enjoining the defendants from taking any other action that would reveal the plaintiff's transgender status to others at school, including the use of any visible

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[2] The plaintiff alleges other instances of discrimination: that the defendants refused to allow him to room with male classmates during two summer orchestra camps, resulting in his having to room alone, id. at ¶¶33-34, 86; that the defendants directed guidance counselors to give transgender students a bright green bracelet to wear (the defendants dispute this, and as of this writing, the school has not implemented such a policy), id. at ¶¶80; and the school initially refusing to allow the plaintiff to run for prom king, id. at ¶¶71-72. For the reasons the court discussed on the record at the September 19, 2016 hearing, th decision decides only the request to enjoin the defendants from prohibiting the plaintiff from using the boys' restrooms.

markers or identifiers (e.g. wristbands, stickers) issued by the district personnel to the plaintiff and other transgender students. Dkt. No. 10 at 2.

As discussed in the oral arguments before the court, this decision only addresses the first two requests; the court denied the orally denied the fourth request without prejudice at the September 19, 2016 hearing, and the court defers ruling on the third request to allow counsel for the defendants to discuss with his client recent developments, such as the plaintiff's legal name change and this court's denial of the defendants' motion to dismiss.

III. DISCUSSION

A. Preliminary Injunction Standard

"A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need." Turnell v. CentiMark Corp., 796 F.3d 656, 661 (7th Cir. 2015) (citing Goodman v. Ill. Dep't of Fin. and Prof'l Regulation, 430 F.3d 432, 437 (7th Cir. 2005)). "[A] district court engages in a two-step analysis to decide whether such relief is warranted." Id. (citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc., 549 F.3d 1079, 1085–86 (7th Cir.2008)). The first phase requires the "party seeking a preliminary injunction [to] make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." Id. at 661-62.

If the movant satisfies the first three criteria, the court then considers "(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the 'public interest')." Id. at 662. When balancing the potential harms, the court uses a 'sliding scale': "the more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." Id.

B. The Plaintiff Has Shown a Likelihood That His Claims Will Succeed on the Merits.

"The most significant difference between the preliminary injunction phase and the merits phase is that a plaintiff in the former position needs only to show 'a likelihood of success on the merits rather than actual success.'" Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 782 (7th Cir. 2011) (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)). In the Seventh Circuit, the court "only needs to determine that the plaintiff has some likelihood of success on the merits." Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 896 (7th Cir. 2001). As the plaintiffs argued, this is a relatively low standard.

The arguments the parties made on September 20, 2016 regarding the motion for preliminary injunction mirror the arguments they made on September 19, 2016 regarding the motion to dismiss. Essentially, the

defendants argue that gender identity is not encompassed by the word "sex" in Title IX, and the plaintiff disagrees. The defendants also argue that under a rational basis standard of review, the plaintiffs cannot sustain an equal protection claim; the plaintiffs respond that they can, and further, that the court should apply a heightened scrutiny standard.

The court denied the motion to dismiss because it found that there were several avenues by which the plaintiff might obtain relief. Dkt. No. 28. The court found that, because no case defines "sex" for the purposes of Title IX, the plaintiff might succeed on his claim that that word includes transgender persons. The court found that, while the defendants raised a number of arguments in support of their claim that the word "sex" does not encompass transgender persons, much of that case law came from cases interpreting Title VII, a different statute with a different legislative history and purpose. The court also found that there was case law supporting the plaintiff's position, as well as the Department of Education's "Dear Colleague" letter, which, the court found, should be accorded Auer deference.

The court also noted that the plaintiff had alleged sufficient facts to support a claim of gender stereotyping, alleging that the defendants had discriminated against him because he did not fit standard stereotypes of girls (the sex the school insists is his).

The court also found that the plaintiff had alleged sufficient facts to support his claims that the defendants

had violated his equal protection rights. While the court did not, at the motion to dismiss stage, and does not now have to decide whether a rational basis or a heightened scrutiny standard of review applies to the plaintiff's equal protection claim, at this point, the defendants have articulated little in the way of a rational basis for the alleged discrimination. The defendants argue that students have a right to privacy; the court is not clear how allowing the plaintiff to use the boys' restroom violates other students' right to privacy. The defendants argue that they have a right to set school policy, as long as it does not violate the law. The court agrees, but notes that the heart of this case is the question of whether the current (unwritten) policy violates the law. The defendants argue that allowing the plaintiff to use the boys' restroom will gut the Department of Education regulation giving schools the discretion to segregate bathrooms by sex. The court noted at both the September 19 and September 20 hearings that it did not agree.

Because of the low threshold showing a plaintiff must make regarding likelihood of success on the merits, see Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir.1999), and because the plaintiff has articulated several bases upon which the court could rule in his favor, the court finds that the defendant has satisfied this element of the preliminary injunction test.

C. The Plaintiff Has Shown that He Has No Adequate Remedy at Law.

The court observed at the September 20 hearing that neither party focused much attention, either in the

moving papers or at oral argument, on the question of whether the plaintiffs had an adequate remedy at law. The plaintiffs argued that plaintiff Ash Whitaker has only one senior year. They argued that even if, at the end of this lawsuit, the plaintiffs were to prevail, no recovery could give back to Ash the loss suffered if he spent his senior year focusing on avoiding using the restroom, rather than on his studies, his extra-curricular activities and his college application process. The defendants made no argument that the plaintiffs have an adequate remedy at law. The court finds, therefore, that the plaintiffs have shown that they have no adequate remedy at law.

D. The Plaintiff Has Shown That He Will Suffer Irreparable Injury If The Court Does Not Enjoin The School's Actions.

The parties focused most of their arguments on the element of irreparable harm. While alleged irreparable harm does not need to occur before a court may grant injunctive relief, there must be more than a mere possibility. United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); Bath Indus., Inc. v. Blot, 427 F.2d 97, 111 (7th Cir. 1970). Put another way, the irreparable harm must be *likely* to occur if no injunction issues. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 21–23 (2008).

During the oral arguments, the plaintiff argued that the defendants' denial of access to the boys' restroom has caused and will continue to cause medical and psychological issues that his present and future health.

In support of this argument, the plaintiff pointed to the declarations from Dr. Stephanie Budge and Dr. R. Nicholas Gorton, M.D., which explain gender dysphoria and discuss, both in terms specific to the plaintiff (Dr. Budge) and terms general to persons suffering from gender dysphoria (Dr. Gorton) the effects on persons with gender dysphoria of not being allowed to live in accordance with their gender identity. See Dkt. Nos. 10-2, 10-3. The defendants responded that the court should grant little weight or credibility to these affidavits, because Dr. Budge barely knew Ash Whitaker, Dr. Gorton did not know him at all, and neither affidavit quantified the harms they described.[3]

Relying primarily on the plaintiff's declaration (which the defendants did not challenge at the hearing), dkt. no. 10-1, the court has no question that the plaintiff's inability to use the boys' restroom has caused him to suffer harm. The plaintiff's declaration establishes that he has suffered emotional distress as a result of not being allowed to use the boys' restrooms. While the school allows him to use the girls' restrooms, his gender identity prevents him from doing so. He has refused to use the single-user bathrooms, due to distance from his classes and, more to the point, the embarrassment and stigma of being singled out and treated differently from all other students. Because the

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[3] While "[a]ffidavits are ordinarily inadmissible at trial . . . they are fully admissible in summary proceedings, including preliminary-injunction proceedings." Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997)(citing Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995).

defendants do not allow him to use the boys' restrooms, he has begun a practice of limiting his fluid intake, in an attempt to avoid having to use the restroom during the school day. Lack of hydration, however, exacerbates his problems with migraines, fainting and dizziness. He describes sleeplessness, fear of being disciplined (and having that impact his school record ahead of his efforts to get into college), and bouts of tearfulness and panic.

The plaintiff also attested to the fact that the emotional impact of his inability to use the restrooms like everyone else, and his being pulled out of class for discipline in connection with his restroom used, impacted on his ability to fully focus on his studies. The Seventh Circuit has recognized that discrimination that impacts one's ability to focus and learn constitutes harm. See e.g., Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 853 (7th Cir. 1999).

To reiterate, the court finds that Ash has suffered harm. The defendants intimated in their arguments, however, that such harm was not irreparable, because the plaintiffs had not provided any evidence that the harm would be long-lasting, or permanent. It was in this context that the defendants challenged the professional declarations the plaintiffs had provided from experts in the field of gender dysphoria and gender transition. As the court stated at the September 20, 2016 hearing, however, the plaintiffs are not required to prove that Ash will be forever irreversibly damaged in order to prove irreparable harm. The Seventh Circuit has noted that irreparable harm is harm that "would [not] be rectifiable following trial." Girl Scouts of

Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc., 549 F.3d 1079, 1088 (7th Cir. 2008). It has held that irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial." Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386 (7th Cir. 1984).

The plaintiff's spending his last school year trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized, being subject to fainting spells or migraines, is not harm that can be rectified by a monetary judgment, or even an award of injunctive relief, after a trial that could take place months or years from now. The court finds that the plaintiffs have satisfied the irreparable harm factor.

E. The Plaintiff's Irreparable Harm Outweighs Any Harm The Defendants Might Experience and the Effects Granting the Injunction Will Have on Nonparties.

The balancing of the harms weighs in the plaintiffs' favor. The court has found that Ash Whitaker has suffered irreparable harm, and will continue to do so if he is not allowed to use the boys' restrooms. The court must balance against that harm the possible harm to the defendants.

In their moving papers, the defendants argued that requiring them to allow Ash to use the boys' restrooms would subject them to financial burdens and facility changes. They did not identify why allowing Ash to use the boys' restrooms would create a financial burden; the

court cannot, on the evidence before it, see what cost would be incurred in allowing Ash to use restrooms that already exist. The defendants provided no evidence regarding any facilities that they would have to build or provide.

The defendants also argued that a requirement that they allow Ash to use the boys' restrooms would violate the privacy rights of other students. They provided no affidavits or other evidence in support of this argument. The evidence before the court indicates that Ash used the boys' restroom for some seven months without incident or notice; the defendants prohibited him from using them only after a teach observed Ash in a boys' restroom, washing his hands. This evidence contradicts the defendants' assertions that allowing Ash to use the boys' restroom would violate other students' privacy rights.

The defendants argued that granting the injunctive relief would deny them the ability to exercise their discretion to segregate bathrooms by sex, as allowed by the regulations promulgated by the Department of Education. This argument is a red herring; the issuance of the injunction will not disturb the school's ability to have boys' restrooms and girls' restrooms. It will require only that Ash, who identifies as a boy, be allowed to use the existing boys' restrooms.

The defendants argued that the injunctive relief would require the defendants, in the first month of the new school year, to scramble to figure out policies and procedures to enable it to comply with the order of relief. This relief, however, does not require the

defendants to create policies, or review policies. It requires only that the defendants allow Ash to use the boys' restrooms, and not to subject him to discipline for doing so.

The court finds that the balance of harms weighs in favor of the plaintiff.

F. Issuance of the Injunction Will Not Negatively Impact the Public Interest.

Finally, the court finds that issuance of the injunction will not harm the public interest. The defendants argue that granting the injunction will force schools all over the state of Wisconsin, and perhaps farther afield, to allow students who self-identify with a gender other than the one reflected anatomically at birth to use whatever restroom they wish. The defendants accord this court's order breadth and power it does not possess. This order mandates only that the defendants allow one student—Ash Whitaker—to use the boys' restrooms for the pendency of this litigation. The Kenosha Unified School District is the only institutional defendant in this case; the court's order binds only that defendant. The defendants have provided no proof of any harm to third parties or to the public should the injunction issue.

G. The Defendants' Request for a Bond

At the conclusion of the September 20, 2016 hearing, the defendants asked that if the court were inclined to grant injunctive relief, it require the plaintiffs to post a bond in the amount of $150,000. The defendants first cited Rule 65, and then cited the

Wisconsin Supreme Court's decision in Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931). The defendants argued that, in the event that events revealed that this court had improvidently granted the injunction, the Muscoda case provided that the court should impose a bond sufficient to reimburse the defendants' costs and attorneys' fees, and counsel estimated that those fees could reach $150,000. The plaintiffs objected to the court requiring a bond, citing the plaintiffs' limited means.

Rule 65(c) states that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The rule leaves to the court's discretion the question of the proper amount of such a bond, and tethers that consideration to the amount of costs and damages sustained by the wrongfully enjoined party.

Counsel for the defendants argued that under Wisconsin law, "costs and damages" includes the legal fees the defendants would incur in, presumably, seeking to overturn the injunction, and argued that those fees could amount to as much as $150,000. In support of this argument, he cited Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931), which held that "[i]t is the established law of this state that damages, sustained by reason of an injunction improvidently issued, properly include attorney fees for services rendered in procuring the dissolution of the injunction, and also for services

upon the reference to ascertain damages." Id. at 651. The problem with this argument is that Seventh Circuit law says otherwise.

> [T]he Seventh Circuit has determined that, for purposes of Fed. R. Civ. P. 65(c), "costs and damages" damages do not include attorneys' fees. Rather, in the absence of a statute authorizing such fees . . . an award of attorneys' fees is only proper where the losing party is guilty of bad faith."

Minnesota Power & Light Co. v. Hockett, 14 Fed. App'x 703, 706 (7th Cir. 2001), quoting Coyne-Delany Co. v. Capital Dev. Bd. Of State of Ill., 717 F.2d 385, 390 (7th Cir. 1983)). See also, Int'l Broth. Of Teamsters Airline Div. v. Frontier Airlines, Inc., No. 10-C-0203, 2010 WL 2679959, at *5 (E.D. Wis. July 1, 2010). When there is a "direct collision" between a federal rule and a state law, the Seventh Circuit has mandated that federal law applies. Id. at 707.

The defendants did not identify any statute authorizing an award of attorneys' fees should they succeed in overturning the injunction. Thus, in order to determine the amount of a security bond under Rule 65(c), the court must consider the costs and damages the defendants are likely to face as a result of being improvidently enjoined, but not the legal costs they might incur in seeking to overturn the injunction. It is unclear what damages or costs the defendants will incur if they are wrongfully enjoined. As discussed above, the defendants have not demonstrated that it will cost them money to allow Ash to use the boys' restrooms. Because

it is within this court's discretion to determine the amount of a security bond, and because the defendants have not demonstrated that they will suffer any financial damage as a result of being required to allow Ash to use the boys' restrooms, the court will not require the plaintiffs to post security.

IV. CONCLUSION

For the reasons explained above, the court **GRANTS IN PART** the plaintiff's motion for a preliminary injunction. Dkt. No. 10. The court **ORDERS** that defendants Kenosha Unified School District and Sue Savaglio-Jarvis (in her capacity as superintendent of that district) are **ENJOINED** from

(1) denying Ash Whitaker access to the boys' restrooms;

(2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;

(3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and

(4) monitoring or surveilling in any way Ash Whitaker's restroom use.

The court **DENIES** the defendants' request that the court require the plaintiffs to post a bond under Rule 65(c).

Dated in Milwaukee, Wisconsin this 22nd day of September, 2016.

BY THE COURT:

/s/ Hon. Pamela Pepper
HON. PAMELA PEPPER
United States District Judge

APPENDIX C

United States Court of Appeals
Seventh Circuit

FINAL JUDGMENT

May 30, 2017

Before: DIANE P. WOOD, Chief Judge
ILANA DIAMOND ROVNER, Circuit Judge
ANN CLAIRE WILLIAMS, Circuit Judge

No. 16-3522

ASHTON WHITAKER, by his mother
and next friend Melissa Whitaker,

Plaintiff-Appellee

v.

KENOSHA UNIFIED SCHOOL
DISTRICT NO. 1 BOARD OF EDUCATION, et al.,

Defendants-Appellants

Originating Case Information:

District Court No.: 2:16-cv-00943-PP
Eastern District of Wisconsin
District Judge Pamela Pepper

The district court's order granting the Appellee's motion for a preliminary injunction is **AFFIRMED**.

The above is in accordance with the decision of this court entered on this date. Costs should be assessed against the Appellants.

APPENDIX D

[1]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

vs.

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.

Case No. CV 16-943
Milwaukee, Wisconsin
September 19, 2016
3:34 p.m.

TRANSCRIPT OF ORAL DECISION ON MOTION TO DISMISS
BEFORE THE HONORABLE
PAMELA PEPPER
UNITED STATES DISTRICT JUDGE

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[2]

[Appearances omitted in printing]

[3]

TRANSCRIPT OF PROCEEDINGS
Transcribed From Audio Recording

* * *

THE COURT: Have a seated everyone, please.

THE CLERK: Court calls a civil case, 2016-CV-943, Ashton Whitaker vs. Kenosha Unified School District No. 1 Board of Education, et al.

Please state your appearances starting with the attorneys for the plaintiffs -- or for the plaintiff.

MR. WARDENSKI: Joseph Wardenski for plaintiff.

MR. ALLEN: This is Michael Allen with Relman Dane Colfax, also for the plaintiff.

THE COURT: Okay, sorry. So we have Mr. Wardenski, we have Mr. Allen and going on Mr. Pledl.

MR. PLEDL: Robert Theine Pledl also for the plaintiffs.

THE COURT: Anybody else for the plaintiffs?

MS. TURNER: This is Ilona Turner with Transgender Law Center for the plaintiff.

THE COURT: Thank you.

MS. PENNINGTON: And Allison Pennington with Transgender Law Center for the plaintiff.

THE COURT: Okay. And for the defendant?

MR. STADLER: Good afternoon, Judge. Attorney Ron Stadler on behalf of the defendants.

[4]

MR. SACKS: Jonathan Sacks on behalf of the defendants.

THE COURT: Good afternoon to everyone.

As I think everyone's aware, we had scheduled today's hearing after you all had presented -- or Mr. Wardenski and Mr. Stadler presented oral argument on the defendant's motion to dismiss. And I asked you all, especially given the lateness of the hour when we finished up those oral arguments, to give me some time to consider them prior to issuing a ruling. And I told you that I was going to issue an oral ruling today because of the fact that there's also a preliminary -- new motion for a preliminary injunction and depending on how the motion to dismiss were to go we'd need to decide whether or not to proceed further on a motion for preliminary injunction. So the purpose of today's hearing is for me to give you a ruling on the motion to dismiss.

As you all are aware, the standard for the motion to dismiss or for a ruling on a 12(b)(6) motion to dismiss is pretty straightforward. A motion to dismiss under 12(b)(6) challenges the sufficiency of the complaint, not the merits in the complaint. So in order to consider a motion to dismiss I have to accept as true all the well-pleaded facts in the complaint and whatever inferences can be drawn those have to be drawn in favor of the plaintiff.

So the complaint has to provide the defendant with **[5]** fair notice of the basis for the claim and also the allegations in it have to be facially plausible. A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct that's alleged.

And I'm quoting there from *Ashcroft vs. Iqbal*, 556 U.S. 662 at 678, 2007.

The standard for dismissal or considering a motion to dismiss, of course, is also stated in *Bell Atlantic Corporation vs. Twombly*, 550 U.S. 544, 555. Sorry, *Iqbal* is 2009. *Twombly* is 2007.

So there is the standard that has to be considered. And at the end of the oral argument a week or so ago, after the parties had gone into extensive discussions I noted that we needed to come back to that standard in evaluating the parties' arguments.

Parties discussed a lot of facts and went into some deep detail on a number of different cases, and I wanted to pull us back to the issue of a motion to dismiss and whether or not we were in a situation where the complaint had enough well-pleaded facts to sustain in reasonable inferences in favor of the plaintiff to sustain notice of the claim and facial plausibility.

In the motion to dismiss I believe the defendants --or I would characterize the defendants' arguments as being that **[6]** in many respects regardless of the factual claims that the plaintiffs alleged that the plaintiffs could not prevail as a matter of law on the two claims raised in the

complaint. And those two claims are: Number one, that the defendants violated Title IX of the Education Amendments of 1972, and; number two, that under 42 U.S.C. 1983, the defendants violated the plaintiff's constitutional rights under the Equal Protection Clause.

So those are the two claims pending in the complaint. And the defendants argued that the plaintiffs could not prevail as a matter of law on either one of those claims, and so most of defendants' arguments were with regard to those legal issues.

The plaintiffs emphasized a number of the factual allegations in the complaint in support of their arguments, but I would think that for the most part the discussions the last time we were together were in relation to the law. So I'm going to start with a discussion of the law that the parties raised and start with Title IX, which is the first cause of action in the complaint.

Title IX, as the parties both agree, indicates that 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 financial assistance.

And the plaintiffs begin by alleging that, in Count 1, **[7]** that the defendants do receive federal funding which is one of the basic starting premises for being covered by Title IX. I don't understand there to be any objection or dispute as to that issue. So the issue is really with regard to whether or not the defendants discriminated against the plaintiff, are treating him differently from other

students -- and I'm now using the language of the complaint -- "based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes."

We spent a great deal of time at the oral arguments when we were last together on the word "sex," S-E-X. Title IX indicates, as I just stated, that it is prohibited for any person to be discriminated against on the basis of sex.

The defendants argued -- first of all, I think they acknowledged that there's no caselaw, there's no court in the Seventh Circuit, lower court or appellate court that has looked at the question of whether that word "sex" covers transgender persons in the Title IX context. So we don't have any guidance in Seventh Circuit caselaw on that issue.

But the defendants argued that it was clear that the word "sex" was the gender that appeared on one's birth certificate. And I think that Mr. Stadler and I discussed that in some detail several times. And I inquired of both parties whether or not either party could cite a case that defined "sex" for the purposes of Title IX, the word "sex" for the purposes of **[8]** Title IX as the gender that appeared on one's birth certificate.

The defendants, Mr. Stadler, indicated that he couldn't point to a case that said as much. Mr. Wardenski indicated that he recalled, but didn't want to be held to it, that *Doe vs. City of Belleville, Illinois*, a Seventh Circuit decision, had indicated that "sex" was not confined -- the definition of "sex" was not confined in

the Title VII context to the gender that appeared on one's birth certificate. He later then submitted a letter indicating that while that decision didn't specifically say that, it did indicate that the term "sex" encompassed more than biology.

So in my mind the starting point for this discussion about whether the complaint states a claim is whether or not there is any set of circumstances or whether or not it is plausible, to use the language of Iqbal and Twombly, for the plaintiffs to argue that there's a question as to whether or not the word "sex" for the purposes of Title IX encompasses the plaintiff.

In considering that question I followed the lead of a case that the parties discussed at some length, which is the *G.G.* case out of the Fourth Circuit. And I understand that that case right now, the Supreme Court has stayed the preliminary injunction order, but that court began by looking at whether or not at the time that the law was passed the dictionary definition of "sex" confined "sex" to if -- to use the **[9]** defendant's words, the gender on one's birth certificate.

If one takes a look right now at dictionary definitions of "sex," one finds some variety. Merriam-Webster Dictionary defines "sex" as, quote, the state of being male or female, unquote. And then it defines the term "male," the word "male," as a man or boy, a male person.

Webster's New World College Dictionary, which if you look at it online is entitled, "Your Dictionary," defines "sex" as "either of the two divisions, male or

female, into which persons, animals, or plants are divided, with reference to their reproductive functions."

And then there's a secondary definition: "the character of being male or female; all the attributes by which males and females are distinguished."

If you look at the term "male" under that dictionary, the Webster's New World College Dictionary, it says "male" as "someone of the sex that produces sperm, or something that relates to this sex," and then the secondary definition seems to be almost identical to the first one except that it adds, "as opposed to a female who produces an egg."

Dictionary.com, online dictionary, is similar to the Webster's New World College Dictionary, it defines "sex" as "either the male or female division of a species, especially as differentiated with reference to the reproductive functions."

It defines "male" as "a person bearing an X and Y **[10]** chromosome pair in the cell nuclei and normally having a penis, scrotum, and testicles, and developing hair on the face at adolescence; a boy or a man."

So those are current dictionary definitions from three different dictionaries. In the *G.G.* case, *G.G. vs. Gloucester County School Board*, 822 F.3d 709, Fourth Circuit, April 19th of 2016, at page 720 I believe it is, that quote started with dictionary definitions from the drafting era of the statute. And they had indicated that if you looked at the American College Dictionary circa 1970, you would find the definition of "sex" as "the character of being either male or female." That's the

same as that Merriam-Webster definition. Or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished."

Then it also looked to Webster's Third New International Dictionary. There are 1800 different kinds of Webster's dictionaries one discovers when one engages in one of these exercises.

Webster's Third New International Dictionary defines "sex" as "the sum of the morphological, physiological and behavorial peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregations and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usually genetically controlled and associated with special sex **[11]** chromosomes, and that is typically manifested as maleness or femaleness."

The conclusion that the *G.G.* court came to when it reviewed those two definitions, the second of which was virtually unpronounceable, is "that a hard-and-fast binary division on the basis of reproductive organs -- although useful in most cases -- was not universally descriptive. The dictionaries, therefore," and by "dictionaries" it means those two to which it referred -- "used qualifiers such as reference to the 'sum of' various factors, or 'typical dichotomous occurrence,' and 'typically manifested as maleness and femaleness.'"

When the *G.G.* court concluded that none of that terminology was particularly helpful in determining

what it means to have the character of being either male or female, if any of those indicators or if -- or if more than one of those indicators points in different directions.

In other words, if -- if a morphological indicator points to "maleness" and a behavorial peculiarity points to "femaleness," the *G.G.* court said that those definitions didn't really help you if you had characteristics that pointed in different directions.

And given the variety of dictionary definitions that I have just recounted between the two that are listed in *G.G.* and the three that I found myself, I agree with that court's **[12]** conclusion. None of these definitions assist in figuring out whether or not the word "sex" -- how to interpret the word "sex" if there's an individual who shows some of the characteristics that we associate with biological sex and some of the characteristics that we associate with other definitions of sex.

The Seventh Circuit has acknowledged in the Title VII context, the employment statute context, in several cases, the difficulties that arise in trying to -- to use that word "sex" -- or in some cases "gender" which we sort of tend to use interchangeably with "sex" -- to categorize individuals under Title VII.

So in *Doe vs. City of Belleville*, 119 F.3d 563, the 997 decision to which the plaintiffs referred, the panel writing, Judges Ripple, Manion and Rovner -- Judge Rovner was the author -- went through an extended discussion and I would say a struggle to consider why it is that if a plaintiff claims to have been harassed by

someone making sexual advances toward that plaintiff that have sexual overtones, the court struggled with why it should matter whether the victim was harassed on the basis of his or her sex.

The court talked about the fact that having someone make sexual advances to you when you don't want them doesn't seem so much related to what your gender is but the fact that you're being put in the position where you're being subjected to sexual advances that you don't want to be subjected to.

[13] In the Seventh Circuit's decision in *Hively*, which we discussed at the last hearing as well, 2016 Westlaw 4039703, the Hively court talked about discrimination based on sexual orientation and stated that it "does not condone," and I quote: "a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry."

Now, that was related to a sexual orientation claim under Title VII. That's at page 14 of that decision, Seventh Circuit, July 28th of 2016.

There are cases out there, not necessarily binding in this court -- not binding on this court, but that discuss how sometimes absurd results can obtain by trying to fit people into biological gender boxes.

For example, *Schroer*, which we talked about at the last hearing, *Schroer vs. Billington*, 577 F Supp.2d 293,

307, that's the D.C. District Court 2008, it discussed this hypothetical:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only toward "converts." That would be a clear case, said the court, of discrimination **[14]** "because of religion."No courts would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute -- and again this is Title VII, not Title IX -- carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

Again, statutory language of Title VII. There are other courts which reach a similar conclusion.

The defendants argued in the motion to dismiss that pursuant to or under the Seventh Circuit's decision in *Ulane vs. Eastern Airlines*, 742 F.2d 1081, which is a Seventh Circuit decision from 1984, that there was

simply no way or there is no way that the plaintiffs could prevail on an argument that the word "sex" in Title IX would apply to the plaintiff. And that **[15]** case does definitively say that under Title VII, Title VII does not provide protection for "transsexual" I think is the word that's used there, or "transsexual persons."

We had some discussion at the previous hearing about the fact that that's a 1984 case. A lot of water has passed under the bridge since that time. But the defendants also argued that it hasn't been overruled by the Seventh Circuit or by the United States Supreme Court and it remains on the books as good law.

So the question is whether or not that decision from the Seventh Circuit in 1984, in the context of Title VII, mandates that the plaintiffs cannot prevail in a Title IX case as presented here today. I don't believe that that is the case sufficient to grant a motion to dismiss, for several reasons.

First, *Ulane* stated at page 1085:

> It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning.

Quoting *Perrin vs. United States*, 444 U.S. 37, 42, 20 1979.

> 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. **[16]** The words of Title VII do not outlaw discrimination against a person who halls a sexual identity disorder, i.e., a person born with a male body who believes himself to be 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 against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

That's a quote from the *Ulane* decision.

Interestingly, though, *Ulane* does not dig into the definition of the word "sex" any more than some of its contemporary decisions do. Instead it says that the "plain meaning" of the word "sex" implies that it's unlawful to discriminate against women because they're women and men because they're men. It doesn't actually state a definition of the word "sex."

Second of all, the court in *Ulane* conceded that -- and again, *Ulane* is a Title VII case -- that there's almost no legislative history regarding the prohibition of sex discrimination in Title VII.

And the court goes into some discussion about how the prohibition in Title VII was originally designed to

prohibit **[17]** discrimination based on race and that at the last minute there were some what I think the *Ulane* court might have characterized as machinations to throw sex in for political reasons, but that there really is no legislative history regarding what the legislator meant by -- the legislature meant by "sex" when it included it in Title VII.

That discussion, of course, is unique to Title VII. This is a Title IX case. So the issue of legislative history or lack thereof relating to Title VII, doesn't really apply in the Title IX context. There may be reasons, there may not be reasons for looking at the word "sex" differently under Title IX and under Title VII. We haven't gotten that far yet because again we're at the motion-to-dismiss stage.

In addition, there were some discussion during oral argument between the parties or disagreement between the parties about whether or not the fact that Congress has not put a further gloss on the definition of the word "sex" in either Title VII or Title IX indicates a legislative intent either to exclude or to include, or something else, transgender persons. And both sides had arguments with regard to what the failure of the statute to change might mean.

In my mind that simply illustrates that there are two different arguments to be made on that topic and we haven't gotten to the point of flushing out those arguments as of yet.

Third, with regard to *Ulane*. As we did discuss at the **[18]** last hearing, *Ulane* predates the Supreme Court's

decision in *Price Waterhouse vs. Hopkins* by five years. The Seventh Circuit has stated in the *Hively* decision that Congress intended, and I quote, "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." And it quotes Price Waterhouse at page 251 in support of that statement.

So *Price Waterhouse* does exist, it does say what it says, and it came along five years after the *Ulane* decision.

And I've already noted, finally, that the *Ulane* decision deals with Title VII and not with Title IX.

Ulane also, I note -- the court in *Ulane* also indicated -- the district court in *Ulane* had made a finding that the plaintiff in that case was female. And the *Ulane* court, toward the end of the decision, indicated that even if the court accepted the district court's finding that the plaintiff is female, the court had not made factual findings relating to whether or not the defendant had actually discriminated against her based on the fact that she was female.

The *Ulane* case, therefore, was in a different procedural posture than this one, because at this point there has not even been a legal determination made, although I think the parties have urged me to do so, as to whether or not the plaintiff is male pursuant to whatever the definition of sex is under Title IX.

So, to sum up, there is no case in the Seventh Circuit **[19]** that defines "sex" under Title IX. No court has specifically addressed whether or not the prohibition of

discrimination on sex that's described in Title IX encompasses transgender students. The caselaw is scattered, I would say.

In the Title VII context, if that is, in fact, the appropriate context to draw from in interpreting Title IX, there is a dispute -- one can assume, although it may not be specifically stated but there were arguments to this effect at the last hearing -- with regard to whether or not the plaintiff is male or female, an issue that would need to be resolved in order to get to the question of discrimination. And as I indicated, I don't believe that *Ulane* prohibits a cause of action at the motion-to-dismiss stage.

I'd also like to briefly address the *G.G.* case. As the defendants pointed out, the Supreme Court took the step to stay the issuance of the preliminary injunction that the Fourth Circuit had approved. And I am not relying on *G.G.* as being binding precedent. It wouldn't be binding precedent on this court even if the Supreme Court had not stayed the issuance of the preliminary injunction, of course, because the Seventh Circuit law binds this court not the Fourth Circuit.

But I note that one of the defendant's arguments was that aside from the Supreme Court's action, perhaps casting doubt on some of the holding in *G.G.*, and there are a number of holdings in *G.G.*, that *Texas vs. United States*, 2016 Westlaw **[20]** 4426495 in the Northern District of Texas, August 21st, 2016, might also cast doubt on *G.G.*

The Texas case was the case in which the State of Texas attempted to push back against a request for national injunctive relief. That case may or may not cast doubt on the reasoning in *G.G.* I think that is an issue that is beyond the scope of the motion to dismiss because, again, *G.G.* is not the binding precedent here.

Even if we reach a stage at some point where I were to conclude or some other judge in this district were to conclude that Title IX does not project -- protect transgender persons --and I note that I haven't reached a decision one way or the other. I think it's premature to reach that decision. But if a court were to reach that decision in this instance, I believe that the plaintiffs have alleged sufficient facts to sustain a gender stereotype claim.

And again, I would refer back to *Price Waterhouse vs. Hopkins*, 490 U.S. 228 at 251, 1989. Price Waterhouse discussed clearly and in detail the legal relevance of sex stereotyping and the fact that sex stereotyping is not allowed, at least again in the Title VII context.

Also, the *Kastl,* K-A-S-T-L*, vs. Maricopa County* case, 325 F.Appx. 492 at 493, Ninth Circuit, a 2009 case, finding that after *Price Waterhouse* and a Ninth Circuit decision, *Schwenk vs. Hartford*, 205 F.3d 1187, at 1201-02, year 2000, Ninth Circuit **[21]** case, "it is unlawful to discriminate against a transgender or any other person because he or she does not behave in accordance with an employer's expectations for men or women."

Again, in Title VII context that's the reference to employers.

And so regardless of what conclusion a court might come to with regard to the word "sex" and whether it covers the plaintiff in the Title IX discrimination context in terms of discrimination, there are facts pleaded in the complaint, and I think they're clear enough to place the defendants on notice that the defendants -- or the plaintiff alleges that the defendants treated him differently because they didn't conform to gender stereotypes associated with being a biological female.

So for those reasons, I believe that there is sufficient -- there are sufficient legal claims alleged here that would be in dispute to survive a motion to dismiss.

As an aside, I also want to indicate -- I had asked the defense some questions -- or the plaintiff, I'm sorry – some questions about denial of educational opportunities. Obviously one of the things that Title IX prohibits, the major thing that Title IX prohibits is that an educational institution deny someone educational opportunities based on one's sex. And I did ask the plaintiffs with regard to the fact that this is an allegation that the plaintiff cannot use bathrooms, the boys' bathroom, whether or not the use of a restroom facility **[22]** constituted an educational opportunity.

There are cases out there which indicate that clearly the ability to be able to conduct one's bodily functions impacts on one's educational opportunities. The plaintiff cited some in the supplemental letter that was filed after the hearing.

So, again, in order to survive a motion to dismiss the question is whether there is any plausible or there are

plausible claims that the plaintiff could make in support of that argument. I believe the caselaw that exists out there shows that at least, yes, there is a plausible argument to be made there.

In addition, there was some argument at the last hearing with regard to whether the Department of Education's "Dear Colleague" letter should be accorded any deference in terms of the Court's consideration of Title IX and whether or not the word "sex" encompasses the plaintiff.

I do agree with the defendants in their first two arguments in that regard and then that that "Dear Colleague" letter does not constitute a statute or a law. And, second of all, that it's not entitled to *Chevron* deference because it isn't a regulation either, it is a letter and the defendants are correct about that.

However, I find that there is reason to consider that the letter ought be granted *Auer* deference. And again, while I'm not relying on *G.G.*, I think that its reasoning in that **[23]** regard is persuasive when it points out that again the relevant regulation promulgated under Title IX allows schools -- and it gives them the discretion actually, the language is "may" – gives educational institutions the discretion to create segregated bathrooms, male/female bathrooms, and it actually uses the same word that the statute uses which is the word "sex." It allows them to create separate bathrooms based on sex.

For the same reasons that I just discussed with regard to the word "sex" in Title IX, I think the use of the word "sex" in the regulation could be considered

ambiguous based on the varying definitions of sex. The regulation, just like Title IX, does not address how that word applies to transgender persons.

And if, in fact, that word is ambiguous because it doesn't address transgender persons and it doesn't define "sex" for the purposes that I iterated above, then I have to grant a deference to the agency's consideration of that language. And at this point I can't conclude -- at this stage in the proceedings, at the motion-to-dismiss stage -- that the agency's interpretation is plainly erroneous or inconsistent with the regulation.

In particular the defendants argued that if -- if "sex" were to cover transgender persons, if a transgender person could use the restroom with which he or she identifies, that this would gut a school's ability to create segregated -- to use **[24]** its discretion under the regulation and to create segregated facilities.

I don't follow the argument that there's nothing there that would prohibit a school from continuing to create segregated facilities, a boys' bathroom and the girls' bathroom or men's bathroom and a women's bathroom. And as I understand the plaintiff's argument at this stage, the plaintiff's argument is that it could continue to allow boys who identify as boys to use the boys' restroom and girls who identify as girls to use a girls' restroom, that the plaintiff's arguing -- the plaintiffs are arguing that the plaintiff should be able to use the boys' restroom because he identifies as a boy and, therefore, boys should use the boys' restroom.

I don't see that argument, whether or not ultimately it prevails, as being an argument that if accepted would gut a school's ability to create segregated restrooms.

The defendants also argue that the only way to keep that letter from being at odds with the regulation is to change the statutory definition of "sex." That we circle back around to my original point, the statute doesn't define "sex." The regulation doesn't define "sex."

The defendants also argue that if sex were to include transgender persons that it would be left up to the schools then to try to assume gender identity based on appearances, social expectations or explicit declarations of identity. The dissent **[25]** in *G.G.* raise that issue as well.

That may or may not be, and that's an issue I guess to be -- a bridge to be crossed for another day. But the question of whether or not that makes the interpretation that the plaintiffs urge inconsistent with the regulation is a separate question. You can still have segregated facilities.

So for all of those reasons with regard to the defendants' argument that there is not a plausible basis for the plaintiffs to succeed at law, I disagree.

That leaves then only the question of whether or not the plaintiffs have alleged sufficient facts to indicate that they could make a plausible claim for discrimination. I think that is -- that question is less in dispute at the motion-to-dismiss stage.

There are a number of allegations that the plaintiffs make in the complaint that Ash is not allowed to use the boys' restroom; that he -- that there are -- have been teachers or other school personnel that have been assigned the task of watching him to make sure that he doesn't use the boys' restroom; that he's been given the key to a single-use restroom which only he is directed to use and only he has the key to use; that he was denied the ability to put his name in or run for prom king initially, although I think that then changed.

There are a number of facts alleged in the complaint that -- that would indicate discrimination if, in fact, there **[26]** were a conclusion that the statute did cover the plaintiff. So I think it's clear that there are sufficient facts alleged in the complaint to support a claim at the motion-to-dismiss stage.

The second allegation in the complaint, the second count, alleges that the defendants violated a 1983 and the Fourteenth Amendment Equal Protection Clause. Under 1983, in order to prove a claim under 1983, the plaintiff has to allege:

Number one, that he was deprived of a right that was secured by the Constitution or laws of the United States;

And, number two, that that deprivation was caused by a person or persons acting under color of state law.

And I am obligated to review that claim pursuant to the Fourteenth Amendment which is the constitutional provision that the plaintiff claims.

In this case the complaint clearly states both the 1983 requirements:

Number one, the plaintiff does claim that he was deprived of equal protection under the Fourteenth Amendment, that is an acknowledged constitutional right, and;

Number two, that the declaration was caused by a person or persons acting under color of state law, in this case the school district -- employees at the school district.

So the 1983 elements are alleged in the complaint. And that takes us to the question of whether or not the elements of an equal protection claim have been alleged in the complaint.

[27] In order to make out an equal protection claim a plaintiff must present evidence that the defendants treated him differently from others who were similarly situated.

He also has to present evidence that the defendants intentionally treated him differently because of his membership in a class to which he belonged.

And I'm citing *Personnel Administrator of Massachusetts vs. Feeney*, 442 U.S. 256 at 279, 1979; also *Nabozny*, N-A-B-O-Z-N-Y, *vs. Podlesny*, P-O-D-L-E-S-N-Y, 92 F.3d 446 at 453, Seventh Circuit 1996.

The complaint alleges that the school treated the plaintiff differently from, and I quote, "other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male

stereotypes." That's from the complaint at Docket No. 1 at pages 32 to 33.

So, if at a later stage in the proceedings the factual conclusion is that the plaintiff is male, it is clear that he has alleged sufficient facts to indicate discrimination relative to other males. Other males are allowed to use the boys' bathroom; other males don't have teachers monitoring them; other males presumably are allowed to run for prom king if they wish to do so or if they're nominated or however that process works, et cetera.

There doesn't seem to be any dispute that the plaintiff is transgender. And if the court were to conclude at **[28]** a later stage in the proceedings that that is a suspect class, then he's also alleged sufficient facts to show discrimination on that basis. Now, at this point, because again we're at the motion-to-dismiss stage, I don't have to make a finding as to whether or not transgender constitutes a suspect class.

And finally, as I indicated earlier, the plaintiff has alleged sufficient facts at the motion-to-dismiss stage to show discrimination based on gender stereotypes.

Now, I noted earlier, I don't have to decide whether transgender is a suspect class at the motion-to-dismiss stage. And for that I refer you to *Durso*, D-U-R-S-O, *vs. Rowe*, R-O-W-E, 579 F.2d 1365 at page 1372. It's a Seventh Circuit decision from 1978. That was a case that involved an incarcerated plaintiff alleging an equal protection claim. But the court stated:

"A state prisoner need not allege the presence of a suspect classification or the infringement of a

fundamental right in order to state a claim under the Equal Protection Clause. The lack of a fundamental constitutional right or the absence of a suspect class merely affects the court's standard of review; it does not destroy the cause of action."

Now, the parties argued in their pleadings on the motion to dismiss rather extensively the question of whether or not in reviewing an equal protection claim the court ought to use the rational basis standard of review or it ought to use a **[29]** strict scrutiny or a heightened scrutiny -- or not strict scrutiny. Neither party ought think his argument with strict scrutiny, but a heightened scrutiny standard of review.

And again, at the motion-to-dismiss stage I don't have to make that determination. What I have to determine at this stage is whether or not the plaintiff has stated a claim, stated sufficient facts in support of a claim that would entitle him to proceed on an equal protection cause of action. And as I've indicated both under the elements of a 1983 claim and under the elements of an equal protection claim, he has asserted those facts taking or construing those facts in the light most favorable to the plaintiff.

So for all of those reasons I am denying the motion to dismiss. And as I had indicated at the last hearing, I wanted to take up the motion to dismiss because if the case were not going to proceed then there wouldn't be any reason for the parties to then continue to discuss the preliminary injunction. The denial of the motion to dismiss obviously means that the case is going to proceed beyond this point and, therefore, it looks like there is a

need then to be able to discuss the issue of the preliminary injunction.

Now, I want to -- I'm going to turn to the parties in just a second to talk about how to proceed with that, but one thing I did want to note is that the motion for the preliminary injunction was filed back about the same time that the motion to **[30]** dismiss was filed, give or take. It was filed before the school year started and there were some questions I think raised by the defendants with regard to whether some of the activities that the plaintiffs had predicted or some of the actions that the plaintiffs had predicted the defendants might engage in would actually be taking place in this school year. By the time we held a hearing I believe that Mr. Whitaker had started school and Mr. Wardenski argued that at least with regard to the use of the restroom issue that that seemed to remain the same as it had last year. But there were no discussions about whether any of the other issues were going on and what was happening.

I bring all that up to indicate that in terms of what actions the plaintiff may be seeking to enjoin, I understand that that may have morphed or developed since the time the original motion for the preliminary injunction was filed so I just wanted to note that.

So, Mr. Wardenski, with regard to the motion for a preliminary injunction, suggestions for moving forward?

MR. WARDENSKI: Yes, Your Honor. Given the hour we could try to present argument briefly today, but we're also happy to come back soon if that would be easier on both sides.

The scope of the relief we're seeking is still the same.

THE COURT: Okay.

MR. WARDENSKI: The restroom policy and practice has **[31]** not changed. We would like to advise the court that Ash, as we had noted in our briefs, had petitioned the Kenosha County Court for a name change and that was granted on Thursday. So he has requested that his student records be updated with regard to his name. It's my understanding that that request has been approved and they're in the process of figuring out what that means in terms of his records.

But I think we would still seek the relief of the staff not referring to him by his birth name or by the female designation, by female pronouns which may still occur regardless of what's on his official records.

As far as I know there's been no further talk of the green wristbands issue, which is fine, but we certainly would like to leave in that piece of the PI motion that would enjoin the districts from identifying in any sort of physical manner or visible manner a transgendered student through something along those lines.

So the primary issue is restrooms, although names and pronouns may still be an issue and otherwise identifying Ash as anything other than Ash or [Indiscernible] while the [Indiscernible] determination proceeds.

THE COURT: Thank you. Mr. Stadler?

MR. STADLER: Thank you, Judge. I would agree that certainly the bathroom policy is still at issue. The

issue of the name I don't believe is going to be at issue at all because **[32]** we have a court order that has changed the name so that is clear.

I do want to be clear, though, that a circuit court's change of name order orders that a birth certificate be amended to reflect a new name, it does not change the gender on the birth certificate. So we will continue to have a birth certificate that lists Ashton Whitaker as female. So if the plaintiff is asking for us to be enjoined from ever referring to Ashton as female, I think that's probably going to be an issue in this matter as well because we're between a rock and a hard place in regard to having a legal document that says the gender of this student is female versus the student's desire to say otherwise. So I think that still is at issue.

The issue in regard to somehow identifying transgender students in any manner is not an issue, it's never happened, it's never been done, it's never been proposed.

THE COURT: Oh, but what do you mean it's never happened? Do you mean the wrist –

MR. STADLER: This wristband thing?

THE COURT: Okay.

MR. STADLER: Never happened. Never been a policy of the district. Has never been the intent of the district to do that.

THE COURT: Okay.

MR. STADLER: I don't believe they can make

any **[33]** allegation that anyone has come forward to Ash or any other transgender student and insisted that they wear a green wristband or identify themselves in any other manner.

THE COURT: Well, it sounds like one way or the other obviously it sounds like the plaintiffs still are requesting that the district not refer to Ash by a female name or a female pronoun regardless of what the birth certificate -- and I understand your point, Mr. Stadler, that the birth certificate is not necessarily going to change gender -- the reference on the birth certificate is not going to necessarily change.

So it does sound like that is being requested and so you're indicating that you're opposing that. So the question is -- and as for the green wristband issue or any other form of identifying the plaintiff as a transgender student, I think this is where we get into a discussion of the evidence that needs to be presented with regard to a preliminary injunction.

So the question is, you know, I realize the defense may want to process a little bit of what the decision is today and perhaps the plaintiffs may also want to take a little bit of time to do that. I realize not a lot but a little bit. So the question and let me just ask you guys practically because you know how we've been working in terms of scheduling here, how much time in terms of minutes/hours -- I'm assuming hours -- do you think you would need to be able to present your evidence in support of the preliminary injunction? And given that it's the **[34]** plaintiff's motion, Mr. Wardenski, I'll ask you first.

MR. WARDENSKI: We think the argument can be brief. You know, frankly I think we presented our evidence in our filings and so if the court, you know, wished to rule on the papers we wouldn't be opposed to that.

But to the extent that a hearing would be helpful I'm prepared to present argument in 10 or 15 minutes. We've already gotten into, you know, some discussion of the merits on the motion-to-dismiss arguments so there's no need to rehash those. So I think it can be a shorter proceeding than the last one was. And it's just a matter of me flying back out here. So -- and I can be -- either tomorrow before I leave or sometime soon with 12 hours' notice.

THE COURT: Let me ask you this. Well, okay, Mr. Stadler. Sorry, I asked Mr. Wardenski a question about time so I'll ask you the same question.

MR. STADLER: I think 10 to 15 minutes is a little light on the time. But I would agree that the issues for an injunction hearing have certainly been narrowed because I think one of the primary issues was reasonable probability of success. I don't see us revisiting that in depth beyond of what we've already argued with regard to the motion to dismiss. So I think we've covered a lot of that ground already.

I think irreparable harm is going to be an issue that gets a lot of attention. I would think we probably need an hour **[35]** to an hour and a half.

THE COURT: Okay. Then let me go back to what I was going to ask Mr. Wardenski. Mr. Wardenski, you

indicated that you felt like you all had pretty much made most of your arguments in your motion-to-dismiss papers and the pleadings on the preliminary injunction. But of the three forms of injunctive relief -- or the three actions you're asking to enjoin, I think the one I'm still a little bit short on information on is the green wristband argument, if that's the form of identification that you all are seeking to have enjoined.

I believe that your papers indicated that there was some talk or some reference to the fact that the school might consider doing that, that your client had heard that. Mr. Stadler has responded that's never been required, it's never been requested, it's not being requested now. So I guess that's the one piece of information.

I understand what you're arguing on the restroom. I understand what you're arguing on the use of his name and pronouns. But the wristband I'm -- I mean is it taking place right now? It doesn't sound like --

MR. WARDENSKI: No -- and I can -- as far as I know. And I can try to, you know, respond to Mr. Stadler's argument. We did present evidence in the form of the testimonial -- the declarations from Ash and his mother Melissa Whitaker as well as **[36]** a photograph of the wristband that was distributed to guidance counselors.

That said, we, you know, are taking the district at its word that that was something that was never -- even if it was proposed it was not implemented and it's not being implemented this school year. So our focus and

certainly the timeliness of our motion for a preliminary injunction is on the restroom access and on the name and pronoun usage.

So, you know, we could always -- if there were, you know, some development later where there was some other signifier separate and apart from the green wristband or if that somehow materialized again we could come back to the court, but I think the relief we're seeking is primarily the first two issues. And there seems to be a little dispute on those as to the facts.

And, you know, and I would just note that the district did not present any affidavits or declarations or any other evidence with its filings, so that's part of the reason why we think that the time needed for that hearing does not need to be extensive.

THE COURT: Okay. I would -- I would -- I think at this point I would deny any request for injunctive relief as it relates to the green wristband issue given the fact that I'm not sure how one can argue irreparable harm if, in fact, it's not being implemented right now. Now, if -- if there is some sort **[37]** of process that's put in place later in the school year, whether it be a green wristband or anything else, then you obviously have the ability to come back and seek injunctive relief. But at this point we don't have it. And so I'm not sure what I would be enjoining other than enjoining something that might or might not happen in the future.

So given that, I think the two issues, as Mr. Stadler said, the [Indiscernible] issues then are the question of the restroom policy and practice and the use of the name.

And if that's the case then I guess the next question -- and, Mr. Stadler, you indicated that you thought 10 or 15 minutes was a little short shrift, are the defendants anticipating presenting any kind of evidence or is this more argument with regard to whether or not the practices alleged would give rise to irreparable harm?

MR. STADLER: I anticipate mostly argument on that issue.

THE COURT: Okay.

MR. STADLER: I want to give some thought to whether we would present evidence on the issue.

THE COURT: Okay.

MR. STADLER: But I also want to be clear on one other thing and that is the name issue. With a court order changing a student's name, the district will be changing Ash Whitaker's name on all of its documentation. It will get changed. So **[38]** there is no issue about name. My hang-up was pronoun. And I say that only because I need to give some thought to that issue as well. Regardless of whether your name has been changed, the gender hasn't been changed and so the district has to give thought as to what it does with a student who has a male-sounding name but a female birth certificate. And I can't speak for the district right now on that issue. It's gonna have to do some thinking itself. That's more the issue. It's not the name issue, it's just the pronoun, and then, you know, are we going to have people thrown in jail because they slip on a pronoun.

THE COURT: I don't think I have the ability to throw anybody in jail in this civil case.

MR. STADLER: That is good.

THE COURT: Unless somebody knows about an indictment that I don't know about.

MR. STADLER: You do have contempt power so --

THE COURT: I try not to use those if I can possibly avoid it.

Then if that's the case, if it's going to mostly be – I mean I want to give everybody the time that they need to consult with clients and do what they need to do. I also, if I don't have to make Mr. Wardenski get on another airplane -- if any of us don't have to get on airplanes I think our lives are highly improved given the state of flight in the United States **[39]** these days. But we could also schedule -- if it's mostly going to be argument and not really presentation of evidence in terms of what's going on here, we could do that by telephone because, you know -- otherwise, I mean, I don't know what time you're leaving in the morning, Mr. Wardenski, but I got a nine o'clock hearing, I got a 10:30, I have a gap between noon and 2:00 and then I got a couple more hearings.

MR. WARDENSKI: Well, I actually -- I have a hearing in Chicago first thing in the morning, but I'm not flying home until later in the day so if there was something in the afternoon that would be possible.

THE COURT: Well, I guess then it depends, Mr. Stadler, on how much time you're going to need to touch base with your client and talk to your client.

MR. STADLER: The problem with my client is there's seven of them.

THE COURT: Yeah, no. It's -- I understand.

MR. STADLER: So I need a little more than 24 hours to be able to round up a school board and to be able to talk to them on those issues.

THE COURT: Okay. So tell me when you think you may be able to do that and perhaps what we can do is take the argument by phone.

MR. STADLER: I'm sorry, I didn't hear the last part.

THE COURT: I ask you to tell me when you think you **[40]** may be able to get with your peeps and then we can do the argument by phone.

MR. STADLER: Again, this is an assumption on my part but I would suspect that I can confer with them sometime this week. So if we were back next week sometime I think that would be sufficient.

THE COURT: Okay. Hold on a second.

(Brief pause.)

MR. WARDENSKI: Your Honor, if I may, if the issue is the pronouns that Mr. Stadler needs to consult with this whole district about, I wonder if there's a way that we could address the restroom arguments first and

then to the extent that there is still a dispute over the name and pronoun use, which may be resolved in the next few days, the name change just happened, you know, two days ago, that we could address that separately.

THE COURT: Do you need, Mr. Stadler, to consult with your clients with regard to the restroom policy?

MR. STADLER: I do not.

THE COURT: Okay.

MR. STADLER: I mean, I have so I do not need further.

THE COURT: Would you all be able to make arguments on the restroom policy now in terms of irreparable harm? Or -- or at some point tomorrow?

MR. WARDENSKI: Either way.

MR. STADLER: I can do tomorrow. I've got -- your **[41]** morning I believe, Judge, was you said fairly packed?

THE COURT: Well, yeah. I mean, I've got a 9:00 a.m. and a 10:30.

MR. WARDENSKI: Yeah, it would probably be afternoon that I could get here.

THE COURT: I could do one o'clock.

MR. WARDENSKI: That would be great.

MR. STADLER: I've got a one o'clock phone conference on a different case, but I will move that to a different time.

THE COURT: Are you sure?

MR. STADLER: Yup.

THE COURT: Okay. Shall we say one o'clock tomorrow?

And the arguments -- just so I'm clear so everybody is on the same page, the arguments tomorrow will be on the restroom use policy. We'll set aside the issue of this district's position on pronouns until Mr. Stadler has had an opportunity to talk with his clients. And maybe we can -- you know, if we need further argument on that we can set up a phone hearing on that.

MR. WARDENSKI: Thank you, Your Honor.

MR. STADLER: Thank you.

THE COURT: Okay.

MR. STADLER: That's fine.

THE COURT: Anything else then that we need to get taken care of this afternoon?

MR. WARDENSKI: No, Your Honor.

[42]

MR. STADLER: No. Thank you.

THE COURT: All right. Thank you all.

THE CLERK: All rise.

(Audio file concluded at 4:38 p.m.)

* * *

[43]

C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified September 27, 2016.

/s/ John T. Schindhelm

John T. Schindhelm

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APPENDIX E

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-use 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 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*

APPENDIX F

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.

Case No. 16-cv-00943-**pp**

AMENDED ORDER DENYING DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS THE AMENDED COMPLAINT (DKT. NO. 14)

On September 6, 2016, the court heard argument on the defendants' Rule 12(b)(6) motion to dismiss the amended complaint (Dkt. No. 14). See Dkt. No. 26 (court minutes from oral argument). On September 19, 2016, after having reviewed the pleadings and attachments and considered the parties' oral arguments, the court delivered its oral ruling, denying

the defendants' motion to dismiss the amended complaint. Dkt. No. 28 (court minutes memorializing oral ruling).

For the reasons stated on the record during that oral ruling, the court

ORDERS that the defendants' Rule 12(b)(6) motion to dismiss the amended complaint is **DENIED**. Dkt. No. 14.

Dated in Milwaukee, Wisconsin this 24th day of September, 2016.

BY THE COURT:

/s/ Hon. Pamela Pepper
HON. PAMELA PEPPER
United States District Judge

APPENDIX G

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

February 22, 2017

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and
- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination "on the basis of sex" in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is

consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term "sex" in the regulations is ambiguous and deferred to what the court characterized as the "novel" interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term "sex" unambiguously refers to biological sex and that, in any event, the guidance was "legislative and substantive" and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT

students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice

APPENDIX H

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] This guidance does not add requirements to applicable law, but provides

information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.
- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.
- *Transgender* describes those individuals whose gender identity is different from the sex they

were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments'

interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, ther e is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a

policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When 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.[13]

- **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[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or

others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**.Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the

sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations**. Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules**. Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records**. FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately

disclosing (or requiring students or their parents to disclose) PII from education records to the school community may violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's

gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

- Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]

- Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary
for Civil Rights
U.S. Department of
Education

/s/
Vanita Gupta
Principal Deputy Assistant
Attorney General for
Civil Rights
U.S. Department of
Justice

[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. §106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25,2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in casesinvolving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 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); *Schroer v. Billington*, 577 F. Supp. 2d 293,

306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access forTransgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] See G.G., 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*,

663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

[9] See, e.g., Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist.*, *CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] See, e.g., OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] See, e.g., Resolution Agreement, *In re Cent. Piedmont Cmty. Coll.*, *NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] See 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] See, e.g., Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "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.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthl

ete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id*. § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.*, Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).

APPENDIX I

U.S.C.A. Const. Amend. XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES;
DUE PROCESS; EQUAL PROTECTION;
APPOINTMENT OF REPRESENTATION;
DISQUALIFICATION OF OFFICERS;
PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall

bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX J

20 U.S.C.A. §1681

§1681. Sex

(a) Prohibition against discrimination; exceptions

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, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution

which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual

because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

APPENDIX K

34 C.F.R. § 106.32

§ 106.32 Housing.

(a) Generally. A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) Housing provided by recipient.

(1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) Other housing.

(1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such

reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

APPENDIX L

34 C.F.R. § 106.33

§ 106.33 Comparable facilities.

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.