EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY SMITH, *et al*.,

Plaintiffs,

v.

BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND, *et al*.,

Defendants.

Civil Action No. 1:17-cv-02302-ELH

INTERVENORS-DEFENDANTS' MOTION TO DISMISS

Applicants Intervenors-Defendants move to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and failure to state a claim upon which relief can be granted pursuant to Fed R. Civ. P. 12(b)(6). The reasoning for this Motion is set forth in the accompanying Memorandum.

Date: November 1, 2017

Respectfully submitted,

/s/ Kristy Anderson

Kristy Anderson (Bar No. 29787)
MARYLAND STATE EDUCATION ASSOCIATION
140 Main Street
Annapolis, MD 21401
443.433.3665 (T)
410.263.5730 (F)
kanderson@mseanea.org

Alice O'Brien*
Eric A. Harrington*
Amanda L. Shapiro*
NATIONAL EDUCATION ASSOCIATION
1201 16th Street, N.W.
Washington, D.C. 20036
202.822.7018 (T)
202.822.7033 (F)
aobrien@nea.org
eharrington@nea.org
ashapiro@nea.org

Counsel for Applicants Intervenors-Defendants

** applications for Pro Hac Vice admission pending*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY SMITH, *et al*., Plaintiffs, v. BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND, *et al*., Defendants.	Civil Action No. 1:17-cv-02302-ELH

MEMORANDUM OF LAW IN SUPPORT OF INTERVENORS-DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

INTRODUCTION

Education professionals and experts agree that policies that allow transgender and gender nonconforming students to live as themselves at school are good for these students and for the overall school climate. These experts and professionals also recognize that discriminating against transgender and gender nonconforming students by denying their very existence is deeply harmful to them, denies them equal educational opportunities, and erodes the school climate for all students.

The Frederick County Board of Education ("School Board") recognizes all this, and has adopted policies that protect the rights of transgender students to an equal education ("Policies"), while at the same, protecting the important privacy interests of all students. Plaintiffs object to the Policies on ideological grounds and seek to commandeer this Court's equitable powers to compel the School Board and its staff to carry out Plaintiffs' preferred vision for our schools, a

vision of antediluvian school gender policing that is not only pedagogically unsound, but also constitutionally infirm.

The Plaintiffs' Complaint should be dismissed on multiple, separate and independent, grounds, some of them are already before this Court on the other Defendants' motions to dismiss. FCTA specifically urges this Court to dismiss the Complaint for two reasons. First, Plaintiffs lack standing to assert their claims because they have neither been injured by the policies nor would striking down the policies redress any injury they have alleged. Second, the Complaint should be dismissed because Plaintiffs seek only relief that itself would be unconstitutional. Plaintiffs ask this Court to order the School Board to deny transgender students access to bathrooms and school programs consistent with their gender identity and to order school staff to disclose to parents all matters relating to a student's sexuality or gender identity. Both of these broad orders would result in constitutional violations of students' rights. Indeed, as we show below, the School Board's policies are not just constitutionally permissible; many of them are constitutionally required. As such, an order declaring them illegal or enjoining them too would violate the Constitution.

FACTUAL BACKGROUND

The Frederick County School Board has adopted a series of Policies designed to protect its transgender and gender nonconforming students and promote the safety and privacy of all its students. The Policies:

- protect the privacy of all students by providing that transgender students control information about their gender identity and by guaranteeing every student, regardless of gender identity, the right to use a private bathroom or locker room facilities or be provided other privacy protections, such as privacy curtains, if they request them;

- provides that "[a]ll students must have access to facilities, including rest rooms, locker rooms, or changing facilities, that correspond to their gender identity";
- ensures that students will be called by preferred names and pronouns, directs all staff to call students by preferred names and pronouns, and establishes that "[a]ll staff who work with students will have access to a current and complete list of preferred names and pronouns";
- ensures that students are allowed to participate in educational programs, including athletics, overnight field trips, dances, graduation, and the like, in a manner consistent with their gender identity;
- provides much needed training and professional development for staff; and
- prohibits bullying and harassment on the basis of "gender expression," sex, sexual orientation, and gender identity.

See ECF No. 15-3, at 3–5 (Defs.' Mot. to Dismiss, Ex. 1, at 2–4); ECF No. 15-5 (Defs.' Mot. to Dismiss, Ex. 3).

Two pseudonymous Plaintiffs, Mary Smith and Jane Doe, brought suit and request that this Court strike down Policies 437 and 443 and order essentially anti-Policies 437 and 443. Specifically, Plaintiffs request an order:

- declaring Policies 437 and 443 unconstitutional and illegal under several theories and enjoining them in their entirety;
- requiring school staff and administration to inform parents of "all matters" involving their students' "sexuality or gender or related information or behavior";

- requiring staff to only allow students to use bathrooms and lockers rooms that align with students' birth-assigned sex regardless of the student's gender identity or expression; and
- requiring the School Board to refuse to allow girls to participate in male-designated athletic programs, and vice versa.

Pls.' Compl. ¶ I (Petition for Relief).

ARGUMENT

I. This Court should dismiss the Complaint under Civil Rule 12(b)(1) because the Plaintiffs lack standing.

"The party attempting to invoke federal jurisdiction bears the burden of establishing standing," and Plaintiffs' Complaint fails to do so. *See Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). Plaintiffs do not establish that they have suffered "an actual or threatened injury that is not conjectural or hypothetical." *Id*. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). They must then establish that the injury is "fairly traceable to the challenged conduct," and a "favorable decision" from this Court would be "likely to redress the injury." *Id*.

Plaintiffs do not specify in their Complaint which asserted injuries establish standing, but a few potential injuries can be gleaned from the Complaint. First, Plaintiffs allege that even before the Policies were adopted, the student Plaintiff was videotaped in various stages of undressing by other girls in a bath facility at school and the video was posted on the internet, Pls.' Compl. ¶ 45, and because of the video incident she suffers anxiety based on the requirement

that she participate in physical education and change into appropriate clothes to participate, *id*. ¶¶ 47–48; is "concerned" that a "male who identifies as female will enter her bath facility," *id*. ¶ 49; and that she has suffered harassment for refusing to use pronouns consistent with a student's gender identity, *id*. ¶ 51.

No doubt, being videoed on a cellphone camera in various stages of undress that is then posted on the internet is a concrete and particularized injury. But that injury is not at all traceable to the challenged Policies—it occurred prior to the adoption of the Policies—and would not be redressed by striking them down. None of the relief Plaintiffs seek would prevent that injury or remedy it after the fact. Indeed, such conduct violates school policy before and after passage of the challenged Policies.

If anything, striking down the Policies would make injuries like Plaintiffs' worse: the Policies add privacy protections that allow any student who wants to use a private facility to change or use the bathroom with a right to do so and specifically prohibit the conduct that Plaintiffs allege occurred. And Policy 437 prohibits "bullying, harassment, or intimidation . . . *by the use of electronic technology* at a public school" that "creates a hostile educational environment . . . ." Pls.' Compl. Ex. C, at 2 (emphasis added). Regulation No. 400-48 further clarifies that "showing pornographic images to others" is harassment proscribed by Policy 437. *Id*. Ex. C, at 21.

Plaintiff's general concern about being in the bathroom with a transgender student is not concrete or particularized. The Virginia Supreme Court recently addressed a Complaint where a student challenging his school's trans-inclusive policy alleged that he "fears that the policy might involve the use of his bathroom or locker room by a transgender student." *Lafferty v. Sch. Bd. of Fairfax Cty*., 798 S.E.2d 164, 168 (Va. 2017). That court concluded that such "fears" are "purely

speculative," and thus do not assert the type of present injury to establish standing. *Id*. The same conclusion follows here. The student Plaintiff asserts only that she is "concerned" that she may, at some point, use a bathroom with a transgender student, and that is not enough.

The Virginia Supreme Court also addressed an allegation that the plaintiff had standing to challenge a policy requiring use of preferred names and gender pronouns because he was "'distressed' about how his words might be misinterpreted and thinks cautiously about his speech." *Id*. Again, the plaintiff "d[id] not allege any present facts that would place him in violation of the policy, rendering any injury purely speculative." *Id*. None of these alleged injuries established standing because "general distress over a general policy does not alone allege injury sufficient for standing, even in a declaratory judgment action." *Id*. And the same is true here.

To be sure, Plaintiffs here allege that they have been "harass[ed] and coerce[d]" by school officials who "threaten[ed] retaliation, expulsion and permanent negative academic records for failure to use the pronouns." Pls.' Compl. ¶ 51. To support this allegation, Plaintiffs reference an attached email. *See id*. ¶ 51 (citing Pls.' Compl. Ex. D). But the attached exhibit supporting this allegation, in fact, contradicts the allegation. *See id*. Ex. D. The exhibit is an email from Liz Barrett, the Vice President of the School Board, that says, "students aren't subject to discipline when they make [pronoun] mistakes," but if a student misgenders with "malice (like the intent to bully or harass), staff will handle through conversations and feedback," and discipline would occur only if the bullying "continued." *Id*. Exhibits attached to the complaint are considered part of the complaint, and allegations that contradict those exhibits cannot be accepted as true for purposes of deciding a motion to dismiss. *See, e.g*., *Veney v*. *Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) ("[The Court need not] accept as true allegations that contradict

matters properly subject to judicial notice or by exhibit."). As such, Plaintiffs' harassment allegation cannot establish standing.

In sum, Plaintiffs' claims should be dismissed because they have failed to meet the requirements for standing.

II. This Court should dismiss the Complaint because Plaintiffs only seek relief that would itself violate the Constitution.

A. Complaints that seek only unconstitutional relief must be dismissed.

It is axiomatic that courts cannot grant unconstitutional relief, and when plaintiffs seek only unconstitutional relief, their complaint should be dismissed. Some courts characterize this reality as grounded in Article III's limitation on judicial authority. "[A]rticle III inhibits a federal court from entertaining any complaint that . . . seeks relief that cannot be granted, or which, if granted, may seriously infringe the constitutional rights of others." *Wymbs v. Republican State Exec. Comm. of Florida*, 719 F.2d 1072, 1081 (11th Cir. 1983). Others characterize this limitation as grounded in the Equal Protection Clause's mandate that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws," which applies with equal force to courts as well. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 14–15 (1948) (citing *Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883) and noting that the Fourteenth Amendment's Equal Protection Clause makes void "state action of every kind" including, "judicial . . . proceedings"). But under either rationale, the result is clear: when a plaintiff seeks only unconstitutional relief, the complaint should be dismissed without consideration of the merits of the plaintiff's claims.

For example, this Court in *Starr v. Parks*, granted a Rule 12(b)(6) motion to dismiss a complaint brought by parents of white students who claimed that they had a constitutional right to re-segregate the schools. 345 F. Supp. 795, 802 (D. Md. 1972). Reasoning that the plaintiffs'

sought relief would undermine the recent desegregation of Baltimore schools, this Court dismissed the complaint for failure to state a claim for which relief can be granted because the Court "refuse[d] to be a party to the plaintiffs' attempt to trench upon the Constitutional rights of others, as decreed by the Court since *Brown v. Board of Education*, in order to remedy an imagined deprivation by the defendants of the plaintiffs' Constitutional rights." *Id*. Simply put, "the Court cannot constitutionally grant the relief sought by the plaintiffs." *Id*.; *see also Kidwell v. Transp. Comm'ns Int'l Union*, 946 F.2d 283, 299, 302 (4th Cir. 1991) (affirming summary judgment on plaintiffs' First Amendment claim against a labor union in part because the plaintiff's requested relief would itself violate the union's First Amendment associational rights).

B. Plaintiffs seek court orders that unconstitutionally discriminate on the basis of gender and transgender.

The Fourteenth Amendment's Equal Protection Clause applies to local boards of education and school districts. *See, e.g*., *Fitzgerald v. Barnstable Sch. Comm*., 555 U.S. 246, 258 (2009); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Plaintiffs' requested relief—compelling school officials to deny bathroom access to transgender and gender nonconforming students consistent with their gender identity and prohibiting students to participate in athletic programs consistent with their birth-assigned gender—would constitute gender- and transgender-based discrimination in violation of the Equal Protection Clause.

First, each form of relief would constitute sex discrimination because it "cannot be stated without referencing sex." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1051 (7th Cir. 2017). Plaintiffs want this Court to order the school to allow certain students to use only certain bathrooms based on the Plaintiffs' proposed sex

classifications and to order the school to allow certain students to access certain athletic programs, again based upon Plaintiffs' proposed sex classifications.

Second, to the extent these requests could be characterized as transgender discrimination, that too would constitute gender discrimination under the Equal Protection Clause. Nearly all recent decisions addressing whether transgender discrimination is sex discrimination hold that discrimination against transgender individuals is sex discrimination under the Equal Protection Clause (or Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972).[1] *Whitaker*, 858 F.3d at 1049–50; *see also Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that "discrimination against a transgender individual because of her gender nonconformity is sex discrimination"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that transgender plaintiff's claim of discrimination on the basis of sex stereotyping "easily constitute[s] a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution"); *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000) (holding that violence against a transgender person is violence "on the basis of gender, [because it is] due, at least in part, to an animus based on the victim's gender"); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 869 (S.D. Ohio 2016) ("Title IX discrimination on the basis of a transgender person's gender non-conformity constitutes discrimination 'because of sex.'"); *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("[D]iscrimination on the basis of transgender identity is . . . discrimination

[1] Some of these cases arise under Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, but, as a general matter, "the disparate treatment standard of Title VII applies as well to [sex discrimination] claims arising under the equal protection clause and Title IX." *See, e.g.*, *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988).

'because of sex'"); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (concluding that transgender discrimination is sex discrimination under several theories).

The *Glenn* court put it well:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. [T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination. . . . [I]nstances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute [sex] discrimination.

663 F.3d at 1316–17.

As it specifically pertains to bathroom access, the *Whitaker* court made clear 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 [is a form of prohibited sex discrimination]." *Whitaker*, 858 F.3d at 1049.

Third, courts now recognize, in increasing numbers, that transgender discrimination is also subject to heightened scrutiny under a quasi-suspect class analysis because, as a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination. *See, e.g.*, *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 872–84 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015); *Doe 1 v. Trump*, No. CV 17-1597, 2017 WL 4873042, at *28 (D.D.C. Oct. 30, 2017).

In any event, state action that discriminates on the basis of gender or against a quasi-suspect class—and, as noted, a court order is such state action—is allowed under the Equal Protection Clause only when the justification for the discrimination is "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The disparate treatment must "serve[]

important governmental objectives and that the discriminatory means employed [must be] substantially related to the achievement of those objectives." *Id*. at 524 (quoting *Mississippi Univ*. *for Women v*. *Hogan*, 458 U.S. 718, 724 (1982) (internal quotations omitted)). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id*. The justification cannot itself be grounded in gender stereotypes or "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id*. Finally, it is well established that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *United States v*. *Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *U*.*S*. *Dep't of Agric*. *v*. *Moreno*, 413 U.S. 528, 534-35 (1973)).

Therefore, Plaintiffs' request to compel school officials to deny bathroom access to transgender and gender nonconforming students consistent with their gender identity and prohibit students from participating in athletic programs consistent with their gender identity cannot pass the required intermediate scrutiny and therefore may not be granted by this Court.

1. *Requiring students to use sex-segregated facilities inconsistent with their gender identity would violate transgender students' rights under the Equal Protection Clause*.

In *Whitaker v*. *Kenosha Unified School District*, the Seventh Circuit specifically addressed whether a school district's refusal to allow a transgender boy to use the boys' bathroom could satisfy intermediate scrutiny, and the Court concluded that it could not. 858 F.3d 1034, 1051–54 (7th Cir. 2017). At least two other federal district courts have reached the same conclusion. *See Evancho*, 237 F. Supp. 3d at 288–91; *Highland Sch*. *Dist*., 208 F. Supp. 3d at 874–77.

These courts considered the same justifications that the Plaintiffs offer here for the trans-exclusive bathroom policy. They assert that transgender students' mere presence in a bathroom would (1) violate the privacy rights of classmates, Pls.' Compl. ¶¶ 36, 52, 63, *Whitaker*, 858 F.3d at 1039; *Evancho*, 237 F. Supp. 3d at 289–90, *Highland*, 208 F. Supp. 3d at 874–76; and (2) create "safety and lewdness concerns," *Highland*, 208 F. Supp. 3d at 876–77; *see also* Pls.' Compl. ¶¶ 35, 36, 52.

None of the courts presented with these justifications found them "exceedingly persuasive." The *Whitaker* court recognized that schools have an important interest in protecting the privacy of its students, but denying access to transgender students does nothing to advance that interest; the court considered the contrary view "sheer conjecture and abstraction":

> 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.

Whitaker, 858 F.3d at 1052.

The *Evancho* court noted that even after it had allowed an extensive factual record to be built, those challenging trans-inclusive bathroom policies could not find one instance where "use of the restrooms consistent with their gender identities actually le[d] to the invasion of concrete privacy interests." 237 F. Supp. 3d at 281. The *Highland* court likewise concluded, that even after being given the opportunity to develop a factual record, those challenging trans-inclusive school bathroom policies "cannot show that allowing a transgender girl to use the girls' restroom would compromise anyone's privacy interests." *Highland Local Sch. Dist.*, 208 F. Supp. 3d at 875; *see also Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418 at *67 (E.D. Pa. Aug. 25, 2017) (rejecting cisgender students' assertion of a right not to use bathroom

facilities with transgender students because "there are numerous privacy protections for students at the school that significantly reduce or eliminate any potential issues").

As for the Plaintiffs' asserted safety concerns, the *Highland* court noted that there were "*no* incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose [that] have *ever* occurred." *Highland Local Sch. Dist.*, 208 F. Supp. 3d at 876. "[I]f anything . . . protection of the transgender students themselves is usually [administrators'] most pressing concern, because those students [are] already accustomed to being stigmatized and in some cases harassed." *Id*.

The *Evancho* court addressed safety concerns this way:

> [Denying bathroom access to transgender students] would not appear to have been necessary in order to fill some gap in the District's code of student conduct or the positive law of Pennsylvania in order to proscribe unlawful malicious "peeping Tom" activity by anyone pretending to be transgender. There is no evidence of such a gap. The existing disciplinary rules of the District and the laws of Pennsylvania would address such matters. And . . . there is no record evidence of an actual or threatened outbreak of other students falsely or deceptively declaring themselves to be "transgender" for the purpose of engaging in untoward and maliciously improper activities in the High School restrooms.

Evancho, 237 F. Supp. 3d at 291.

The *Highland* and *Evancho* courts even examined whether denying transgender students bathroom access consistent with their gender identity could satisfy rational basis review, and both concluded that it could not. *See Highland Local Sch. Dist.*, 208 F. Supp. 3d at 877 ("As already stated, Highland most certainly has a legitimate interest in the privacy and safety of its students. But Highland cannot show that its restroom policy is rationally related to those interests."); *see also Evancho*, 237 F. Supp. 3d at 286 n.31 ("[T]he Supreme Court cautioned that laws that classify people, irrespective of the personal motives of their drafters, raise the 'inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'") (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

As these decisions make clear, Plaintiffs cannot establish that privacy or safety concerns would justify a complete ban on allowing transgender or gender nonconforming students from accessing bathrooms and lockers rooms consistent with their gender identity. As such, the sought order is unconstitutional and cannot be granted by this Court.

2. Plaintiffs' proposed gender policing of all school athletics is also unconstitutional.

Plaintiffs seek to enjoin the School Board "from permitting males to participate in sport, athletic programs, and sports funding and scholarships with females, and females from participation in sports, athletic programs, and sports funding and scholarships with males." Pls.' Compl. ¶ I.

Federal courts have long recognized that denying girls access to boys' athletic programs on a per se basis violates the Equal Protection Clause. *See, e.g.*, *Fortin v. Darlington Little League*, 514 F.2d 344, 350–51 (1st Cir. 1975) (holding that a Little League, a state actor, could not categorically exclude girls); *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 397 (M.D. Pa. 2014) (granting preliminary injunction to parents of female students who were barred from junior high and high school wrestling teams); *Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, 816 F. Supp. 2d 869, 930, 938–39 (E.D. Cal. 2011) ("'[D]enial of an opportunity in a specific sport, even when overall opportunities are equal, can be a violation of the equal protection clause.'" (quoting *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1130–31 (9th Cir. 1982)); *Israel by Israel v. W. Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 485–88 (W. Va. 1989) (striking down rule prohibiting female student from trying out for boys' baseball team where school also had a girls' softball team); *Lantz by Lantz v. Ambach*, 620 F. Supp. 663, 665–66 (S.D.N.Y. 1985) (holding high school regulation prohibiting girl from trying

out for boys' football team violated equal protection); *Force by Force v. Pierce City R–VI Sch. Dist.*, 570 F. Supp. 1020, 1024–25 (W.D. Mo. 1983) (equal protection violated by prohibiting eighth-grade girl from competing for place on school's football team); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 166 (D. Colo. 1977) (striking down rule that prohibited all girls from playing interscholastic soccer because of physical safety concerns for girls noting that "the range of differences among individuals in both sexes is greater than the average differences between the sexes"); *Clinton v. Nagy*, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (holding that the Equal Protection Clause required a municipal football league to let a qualified girl play); *cf. Mercer v. Duke Univ.*, 190 F.3d 643, 648 (4th Cir. 1999) (holding that, under Title IX, a male football team could not exclude a female student who had already tried out for the team purely on the basis of her gender).

Force by Force v. Pierce City R-VI School District is illustrative. In that case, a federal district court held that a junior high school's prohibition on female participation on the football team violated the Equal Protection Clause, reasoning that the classification could not be justified solely on the notion that a typical 13-year-old female has a higher potential for injury than a 13-year-old male. 570 F. Supp. at 1022–32. Gender-based discrimination, after all, cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" to justify the discrimination. *Virginia*, 518 U.S. at 533. It turns out that "some 13 year old females could safely play eighth grade football in mixed sex competition, and some 13 year old males could not." 570 F. Supp. at 1029. Yet the school allowed all boys and precluded all girls, and this wholesale exclusion was unconstitutional. *Id.*

For the precise same reasons, it follows that Plaintiffs' proposed order prohibiting any and all cross-gender participation—as Plaintiffs define it—in athletics is unconstitutional and therefore such a blanket order from this Court would itself be unconstitutional.

C. Requiring educators to communicate "all matters" relating to students' sexuality or gender to parents, without exception, would violate students' constitutional rights.

Plaintiffs seek an order requiring Defendants to "communicate with parents as to all matters they become aware of relating, regarding or involving their child's sexuality or gender or related information or behavior in school." Pls.' Compl. ¶ I. This too would be unconstitutional because it would not be constitutional in all its applications.

1. Requiring school staff to communicate all matters of sexuality and gender with parents would violate students' constitutional right to privacy.

"Every circuit except for the D.C. Circuit has now recognized a constitutional right to informational privacy, but the scope of protection varies." Emily Gold Waldman, *Show and Tell?: Students' Personal Lives, Schools, and Parents*, 47 Conn. L. Rev. 699, 707 (2015) (collecting cases). What is clear from all the Circuits is that requiring educators to disclose *all matters* relating to a student's sexuality or gender, regardless of the circumstance, would violate students' constitutional rights to privacy.

The sought relief would require that school officials disclose to parents "all matters" related to a student's "sexuality or gender," meaning that school staff would have to report "all matters" about a student's sexual orientation, gender identity, sexual activity, pregnancy status, and more. Federal courts have recognized that these precise disclosures violate students' constitutional rights to privacy. For example, a federal district court in California has held that a student had a reasonable expectation of privacy about her sexual orientation, and that even

though she was out at school, she had a protected interest in not being outed to her parents by school officials. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1192–95 (C.D. Cal. 2007); *see also Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000) (holding an officer threatening to disclose the sexual orientation of an arrestee to his family member violated the constitutional right to privacy). The Second Circuit has likewise held that transgender individuals have a compelling interest in protecting the privacy of their transitioning. *See Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("[Transgender individuals] understandably might desire to conduct their affairs as if such a transition was never necessary."). And the Third Circuit has held that a high school swim coach violated a student's constitutional privacy rights when he disclosed the results of her pregnancy test. *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000).

To be sure, these courts applied different standards and considered the facts of the particular cases to determine whether a constitutional right to privacy was violated. But when schools (and other governmental actors) release private information about sexual activity, pregnancy, gender identity, or sexual orientation, without any specific justification for the disclosure, the constitutional right to privacy is violated. "If the information is protected by a person's right to privacy, then the defendant has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest." *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990).

The order Plaintiffs seek would require school staff to report "all matters" regarding "gender and sexuality," regardless of the particular circumstances, and thus, would violate some students' constitutional right to privacy.

2. *Requiring school staff to communicate all matters of sexuality and gender with parents would violate students' Due Process rights*.

The Fourth Circuit recognizes "a Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity." *Doe v. Rosa*, 795 F.3d 429, 436–37 (4th Cir. 2015). Although this right does not "guarantee [that governmental actors provide] certain minimal levels of safety and security," it does make it unconstitutional under the Due Process Clause for state actors to "create[] or increase[] the risk of private danger . . . through affirmative acts." *Id*. at 437, 439 (internal citations and quotation marks omitted). Under the Due Process Clause, individuals are not entitled to "protection from lions at large," but "state actors may not disclaim liability when they themselves throw others to the lions." *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995).

If educators were under a court order to inform parents about "all matters" relating to a student's "sexuality or gender," they would be compelled to throw their students to the lions under certain circumstances. If a student comes out to an educator as gay or transgender, but implores the teacher not to out him to his parents because he fears domestic violence or being expelled from his home, Plaintiffs' sought order would compel the educator to tell the parents about the student coming out anyway. If a student tells an educator that her father is sexually assaulting her, the educator, under Plaintiffs' order, would have to tell the father about the student's allegation. If a student implored school administrators to not subject her to an out-of-school suspension because her parent would sexually assault her during her suspension, school officials would have to tell the parent of the sexual assault allegation. But these circumstances constitute the very types of affirmative acts that increase the risk of private danger that the state-created danger doctrine prohibits. *See, e.g.*, *Wilson v. Columbus Bd. of Educ.*, 589 F. Supp. 2d 952 (S.D. Ohio 2008) (holding that assistant principal created state danger when she suspended a

female student even though the student had "strongly suggested some type of sexual abuse in the home" and her stepfather subsequently raped her repeatedly during the suspension).

D. The challenged Policies cannot be enjoined or declared illegal because they are constitutionally required.

Finally, Plaintiffs' request for a declaratory judgment against the policies would also be unconstitutional because the challenged policies themselves are not just constitutionally permitted; many of them are, in fact, constitutionally required:

- Schools must allow transgender and gender nonconforming students access to bathroom facilities consistent with their gender identity. *See, e.g.*, *Whitaker*, 858 F.3d at 1053–54.
- Schools cannot refuse to use preferred names and gender pronouns. *See, e.g.*, *Highland Local Sch. Dist.*, 208 F. Supp. 3d at 879.
- Schools must prevent and remedy harassment on the basis of gender stereotypes, including harassment based on gender nonconformity or transgender status. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257–58 (2009) (holding that school-based gender harassment that is the result of custom, policy, or practice is actionable under the Equal Protection Clause).
- And schools must allow students to access school programs such as athletics, dances, and the like in a manner consistent with the students' gender identity and cannot rely on generalized stereotypes about the genders to deny access. *See, e.g.*, *Force by Force*, 570 F. Supp. at 1024–25.

CONCLUSION

The Frederick County School Board has done right by its students and staff. Yet Plaintiffs seek to enlist this Court in an unconstitutional effort to undo their work. The Plaintiffs are not injured by the challenges Policies and seek only unconstitutional relief. The Complaint should be dismissed with prejudice.

Date: November 1, 2017

Respectfully submitted,

/s/ Kristy Anderson
Kristy Anderson (Bar No. 29787)
MARYLAND STATE EDUCATION ASSOCIATION
140 Main Street
Annapolis, MD 21401
443.433.3665 (T)
410.263.5730 (F)
kanderson@mseanea.org

Alice O'Brien*
Eric A. Harrington*
Amanda L. Shapiro*
NATIONAL EDUCATION ASSOCIATION
1201 16th Street, N.W.
Washington, D.C. 20036
202.822.7018 (T)
202.822.7033 (F)
aobrien@nea.org
eharrington@nea.org
ashapiro@nea.org

Counsel for Applicants Intervenors-Defendants

** applications for Pro Hac Vice admission pending*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY SMITH, *et al*.,

Plaintiffs,

v.

BOARD OF EDUCATION OF FREDERICK COUNTY, MARYLAND, *et al*.,

Defendants.

Civil Action No. 1:17-cv-02302-ELH

ORDER

This matter is before the Court on the Intervenors-Defendants' Motion to Dismiss for lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. Upon consideration of the Motion to Dismiss and the entire record herein,

IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED, and the Complaint is DISMISSED with prejudice.

SO ORDERED this _____ day of _____, 2017.

Ellen L. Hollander
United States District Judge