UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor, by and through his Guardians JOHN DOE and JANE DOE, et al., Plaintiffs, v. BOYERTOWN AREA SCHOOL DISTRICT, et al., Defendants, and PENNSYLVANIA YOUTH CONGRESS FOUNDATION, Intervenor-Defendant.	Civil Action No. 17-1249-EGS

INTERVENOR-DEFENDANT PENNSYLVANIA YOUTH CONGRESS FOUNDATION'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs are four students and recent graduates of Boyertown Area Senior High School (the "High School") who object to transgender students using school restrooms and locker rooms that correspond to their gender identity. They claim that this violates their constitutional and statutory rights to privacy and Title IX, and they ask this Court to issue a preliminary injunction ordering the Boyertown Area School District (the "District") to exclude transgender students from facilities that correspond with their gender identity, regardless of any student's circumstances. Plaintiffs' motion should be denied.

Plaintiffs cannot demonstrate a likelihood of success on the merits. Their claim that the

District is violating their right to privacy in common restrooms and locker rooms is a non-starter given that Plaintiffs are not even required to use those facilities. Private restroom and changing facilities are available to anyone who seeks greater privacy than that afforded by the communal boys' and girls' facilities, which themselves offer considerable privacy, including locked doors on restroom stalls and private curtained changing areas and showers in locker rooms. Plaintiffs' Title IX claim, which is based on the assertion that the mere *presence* of transgender boys in boys' facilities and transgender girls in girls' facilities—as opposed to any alleged misconduct—constitutes a sexually harassing environment is as legally baseless as it is insulting. Indeed, Plaintiffs turn Title IX on its head: as the Seventh Circuit recently recognized, the exclusion of transgender students from facilities that accord with their gender identity (the very relief sought by Plaintiffs) violates Title IX. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 WL 2331751, at *11 (7th Cir. May 30, 2017).

None of the remaining preliminary injunction factors support granting the relief Plaintiffs seek. Plaintiffs will suffer no irreparable harm if the preliminary injunction is denied because they can easily avoid the facilities they claim cause them harm by using separate private facilities the High School offers to all students. Moreover, even in the common facilities, there is no unavoidable exposure to nudity, let alone exposure of the kind that could implicate constitutional concerns. In contrast, granting the preliminary injunction would result in significant harm to transgender students who would be kicked out of the common facilities they have been using and subjected to the humiliation and stigma of being the only students *required* to use separate facilities than everyone else (as opposed to being offered that option as a choice), given that transgender boys could not use the girls' facilities any more than other boys could (and vice versa).

II. FACTUAL BACKGROUND

The High School is a public school for grades ten through twelve, with a student body comprised of approximately 1,700 students. It has common restrooms and locker rooms that are designated for girls and common restrooms and locker rooms that are designated for boys. All of the common restrooms have stalls with doors that lock. The common locker rooms also have bathroom stalls with doors that lock, as well as private changing areas with curtains and private showers. Students do not shower or completely undress before or after PE class. The High School also has single user facilities available for any students who are uncomfortable using the communal facilities or who otherwise seek greater privacy when using the restroom or changing clothes. *See* DeStefano Decl. ¶¶ 15, 18 (ECF No. 7, Ex. 3).

Among those who would be directly affected if the injunctive relief sought by Plaintiffs is granted is Aidan DeStefano.[1] Aidan graduated this week from the High School but intends to visit as an alumnus to attend events including basketball games to cheer on his friends. DeStefano Supp. Decl. ¶ 3 (ECF No. 31). Aidan is a transgender boy. Like other boys at the High School, he uses the boys' restrooms and locker rooms. He has done so since August 2016 without incident. DeStefano Decl. ¶ 11.

Aidan's public transition began in the tenth grade, and by senior year, he was on hormone therapy and had chest surgery to align his body with his male gender identity, changed his legal name to Aidan (a name traditionally associated with boys and men), and had the gender marker changed to "male" on his legal documents, including his birth certificate. Aidan competed on the boys' track team. *Id.* at ¶ 10. If the District were required to exclude him from the boys' facilities, he could not use the girls' facilities any more than any other boy could. Even before

[1] Aidan's motion for leave to intervene is pending. For simplicity, he and intervenor Pennsylvania Youth Congress Foundation will be referred to collectively as "Intervenors."

starting on hormone therapy and having chest surgery, when he entered girls' facilities, he was correctly perceived as a boy in the girls' room. Now he has facial hair, a male chest, a deep voice and everyone knows he's a guy. *Id.* at ¶ 17.

III. ARGUMENT

Preliminary injunctive relief is "an extraordinary remedy, which should be granted only in limited circumstances." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The "failure to establish any element . . . renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). The movant bears the burden of showing that these four factors weigh in favor of granting the injunction. *See Opticians Ass'n of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990).

A. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

1. Plaintiffs are unlikely to succeed on their privacy claims

a. Constitutional privacy claim

Plaintiffs' constitutional privacy claim does not even get out of the gate because they are not required to use the common restrooms and locker rooms and, thus, they are not being subjected to any alleged intrusion on their right to privacy. Their presence in those facilities is voluntary. Conversely, the constitutional privacy cases cited by Plaintiffs involve involuntary exposure of one's unclothed body.

Even if Plaintiffs were required to use the common restrooms and locker rooms, the mere presence of transgender boys in the common areas of the boys' facilities and the presence of transgender girls in the common areas of the girls' facilities does not constitute a violation of anyone's constitutional right to privacy. The restrooms have private stalls with locked doors and the locker rooms have private changing areas and private showers. *See* DeStefano Decl. ¶ 15. And students do not fully undress in the locker rooms. *Id.* Thus, there is no need for Plaintiffs using the common restrooms or locker rooms to undress even partially in the presence of other students. This is fatal to Plaintiffs' constitutional privacy claim.

In *Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011), the Third Circuit addressed the question of whether there may be a constitutionally protected privacy interest in one's partially unclothed body. In that case, a deputy sheriff was secretly videotaped while partially naked by colleagues who then showed the video to other employees of the department. *Id.* The Third Circuit explained that the zone of privacy protected by the Fourteenth Amendment includes a privacy interest in avoiding disclosure "highly personal matters representing the most intimate aspects of human affairs." *Id.* at 175-76. The court held that although the plaintiff had an expectation of privacy while she stood unclothed, it was unclear whether her colleagues' conduct in surreptitiously filming her and sharing the video with others, as egregious as it was, constituted a violation of this right because there was a factual dispute over whether her breasts or buttocks could be seen. *Id.* at 177-78.

As an initial matter, it is insulting to equate a person's ordinary use of restrooms or locker rooms with the outrageous conduct at issue in *Doe*.[2] Moreover, Plaintiffs' constitutional

[2] Most of the other Fourteenth Amendment privacy cases cited by Plaintiffs involved similar misconduct by law enforcement officers. *See Poe v. Leonard*, 282 F.3d 123, 125 (2d Cir. 2002) (state trooper surreptitiously videotaped plaintiff undressing); *Fortner v. Thomas*, 983 F.2d 1024,

claim fails under *Doe* because they are not required to expose their unclothed bodies to any other student in the locker rooms.

Other courts that have addressed constitutional privacy arguments related to transgender students' use of common facilities have rejected them. In *Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *1-2 (N.D. Ill. Oct. 18, 2016), a United States Magistrate Judge issued a report and recommendation to deny a motion for a preliminary injunction in a case in Illinois virtually identical to this one. The court explained:

> This case also does not involve the type of forced invasion of privacy that animated the cases cited by Plaintiffs. The restrooms and the physical education locker room at Fremd High School have traditional privacy stalls that can be used when toileting, changing clothes, and showering. Kovack's Declaration [ECF No. 78-1, at ¶¶ 8, 15]. There is no reason why a student who does not want to do so would have to take off clothing or reveal an intimate part of his or her body outside of the private stalls. Inside the stalls, there is no meaningful risk that any part of a student's unclothed body would be seen by another person. Therefore, these protections almost entirely mitigate any potential risk of unwanted exposure either by or to any Student Plaintiff.

Id. at *29.

The Western District of Pennsylvania recently considered an identical privacy argument raised by a school district that refused to allow transgender students to use facilities that matched their gender identity. *See Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, 2017 WL 770619, at *14 (W.D. Pa. Feb. 27, 2017). In holding that the school district's policy violated the transgender students' rights under the Equal Protection Clause, the court rejected the school district's argument that the policy implicated any actual privacy concerns at all

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1027 (11th Cir. 1993) (correctional officers behaving unprofessionally while supervising inmates in their living quarters); *York v. Story*, 324 F.2d 450, 451-52 (9th Cir. 1963) (police officer taking indecent photographs of assault victim). The remaining cases involved strip searches of students or prisoner. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368 (2009) (thirteen-year-old girl subjected to search of her bra and underpants over suspicion she brought ibuprofen and naproxen to school); *Canedy v. Boardman*, 16 F.3d 183, 184-85 (7th Cir. 1994) (inmate strip search during "shakedown" of housing unit).

"given the actual physical layout of the student restrooms at the High School," which meant that "anyone using the toilets or urinals at the High School is afforded actual physical privacy from others." *Id.*

To the extent Plaintiffs' claim turns on the notion that Plaintiffs may catch a glimpse of other students in their underwear when en route from a private changing area to the door to exit the locker room, that is easily avoidable, and Plaintiffs cite no cases supporting the proposition that this rises to the level of an invasion of the constitutional right to privacy. Nor do Plaintiffs cite any authority that supports their position that the mere presence of someone they perceive to be of the opposite sex in the common area of the restrooms while Plaintiffs use the facilities violates their constitutional right to privacy.[3] Indeed, applying *Doe v. Luzerne County* to a school district's purported privacy concerns about transgender students' use of shared facilities, the Western District of Pennsylvania found that "the reputed presence (and presence alone) of a [transgender student] in a restroom matching her gender identity" does not establish "any threatened or actually occurring violations of personal privacy." *Evancho*, 2017 WL 770619, at *14.

Plaintiffs attempt to cobble together support for their constitutional privacy claim by relying on cases that are not about the constitutional right to privacy at all, but rather circumstances under which employers may treat male and female employees differently because

[3] The two cases relied on by Plaintiffs do not support the proposition that the right to privacy covers the common spaces of restrooms. In *Koeppel v. Speirs*, 779 N.W.2d 494, 2010 WL 200417, at *1 (Iowa Ct. App. 2011), which involved a privacy tort claim under Iowa law, the intrusion at issue was secret filming in a private, single-user bathroom, not common space in a communal restroom. In *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992), the court noted that monitoring the collection of urine for urinalysis by visual or aural observation could, depending on the method used, intrude upon the statutory right to seclusion. The court did not suggest that the presence of other individuals (regardless of sex) in the common space of a restroom constitutes such an intrusion.

of privacy considerations. Plaintiffs repeatedly and incorrectly confuse this statutory permissibility with a constitutional mandate. *See, e.g.*, *Norwood v. Dale Maint. Sys., Inc*., 590 F. Supp. 1410, 1423 (N.D. Ill. 1984) (janitors' sex may constitute bona fide occupational qualification (BFOQ) under Title VII for cleaning restrooms); *City of Phila. v. Pennsylvania Human Relations Comm'n*, 300 A.2d 97, 103-04 (Pa. Commw. Ct. 1973) (employer had established a BFOQ defense to hiring same-sex youth center workers out of a concern of having opposite sex workers inspecting nude children housed at the center).

Even if there were any intrusion on the constitutional right to privacy of non-transgender students associated with transgender boys using the boys' facilities and transgender girls using the girls' facilities—and there is not—under *Doe v. Luzerne County*, that would have to be balanced against the District's interest in permitting transgender students to use facilities that match their gender identity.[4] The District will certainly speak for itself. But it could have reasonably made the judgment that, particularly given the privacy against exposure to nudity available within the common restrooms and locker rooms, it is far more protective of students' sense of privacy and modesty for transgender boys to use the boys' facilities and transgender girls to use the girls' facilities than the opposite. Plaintiffs express concern about encountering a "female" in the boys' room or a "male" in the girls' room. But the policy they seek would force the school to send boys who are transgender into the girls' room, and girls who are transgender into the boys' room. Some of these students may not be known by other students to be transgender—they would just be viewed as any other boy in the

[4] In *Doe*, the Third Circuit said that "a person's right to avoid disclosure of personal matters is not absolute," and "[d]isclosure may be required if the government interest in disclosure outweighs the individual's privacy interest." *Doe*, 660 F.3d at 178 (internal citations omitted). Strict scrutiny is not applicable as suggested by Plaintiffs. But even if it were, allowing transgender students to use facilities that accord with their gender identity would easily meet that standard.

girls' room or vice versa. And while Plaintiffs repeatedly focus on "anatomical differences," a transgender girl may have breasts, body shape, and other physical characteristics that are no different than other girls, and a transgender boy may have a male chest, facial hair and the musculature typical of boys. *See* DeStefano Decl. ¶ 17.[5]

Moreover, allowing transgender students to use facilities that match their gender identity serves the important interest of ensuring that these students can fully participate in school life without being singled out for unequal treatment and stigma. Aidan's declaration explains how hurtful and stigmatizing it would be to be banished from the boys' facilities. *See* DeStefano Decl. ¶ 17. And Intervenors intend to present expert testimony explaining how excluding transgender students from restrooms and locker rooms that accord with their gender identity interferes with accepted protocols for the treatment of gender dysphoria and can have a detrimental effect on mental health.

Unlike in *Doe v. Luzerne County*, there are significant interests on the District's side. The District's practice appropriately addresses all students' interests and Plaintiffs have identified no reason why the Constitution compels this Court to enjoin it. *See Students*, 2016 WL 6134121, at *30 (denying preliminary injunction where school restroom and locker policies "represent a careful and sensitive balancing of the interests of all the students in District 211.").

b. State-law privacy claim

Plaintiffs' state-law privacy claim similarly fails. Plaintiffs are unlikely to succeed on their merits of this claim because there is nothing intrusive or offensive about transgender students' ordinary use of shared facilities. To prevail on a claim of intrusion upon seclusion

[5] Intervenors intend to present expert testimony regarding the physiological effects of treatments that may be provided to adolescents with gender dysphoria.

under Pennsylvania law, Plaintiffs must show that (1) there was an intentional intrusion, (2) upon their solitude or seclusion, or their private affairs or concerns, that was (3) substantial and (4) highly offensive to a reasonable person. *See Burger v. Blair Med. Assocs., Inc.*, 946 A.2d 374, 379 (Pa. 2009) (citing Restatement (Second) of Torts § 652 B); *see also Gabriel v. Giant Eagle, Inc.*, 124 F. Supp. 3d 550, 571-72 (W.D. Pa. 2015); *Ruder v. Pequea Valley Sch. Dist.*, 790 F. Supp. 2d 377, 404 (E.D. Pa. 2011).

Plaintiffs fail to plead any "intrusion" upon "solitude or seclusion." Rather, Plaintiffs complain of the presence of other students at the communal sinks in the restrooms or in the communal changing facilities in the locker rooms. That is not intrusion; that is the intended use of communal facilities. Importantly, the District has made available within these facilities private stalls for showering or changing as well as separate private facilities for any students who seek additional privacy. Plaintiffs do not allege that anyone intruded on them in the private stalls or changing areas or in separate private facilities.

Even if the mere presence of other students in shared areas of shared facilities could be deemed an intrusion on anyone's privacy, that intrusion would not be substantial. The presence of others is always a feature of communal facilities in schools. The marginal addition of a transgender student among other students who are necessarily present in communal areas cannot be a substantial intrusion.

Finally, Plaintiffs have not alleged any improper conduct, let alone conduct that is highly offensive. The complaint merely describes the usual comings and goings of students changing or using a bathroom. What Plaintiffs object to is the presence of transgender students. But there is nothing highly offensive about a transgender person.

2. Plaintiffs are unlikely to succeed on their Title IX claim

Plaintiffs' theory that the mere presence of a transgender student in the restroom or locker room somehow amounts to sexual harassment is both offensive and devoid of legal support. To establish a case of sexual harassment under Title IX, Plaintiffs must show sexual harassment that is "severe, pervasive, *and* objectively offensive."[6] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2001) (emphasis added); *see also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). The sexual harassment must "so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651.

The conduct that Plaintiffs challenge—other students' ordinary use of shared facilities—is not severe, pervasive, *or* objectively offensive, let alone all of those things, as would be required to make out a violation of Title IX. The magistrate judge in the similar case in Illinois rejected this same argument because "[t]he mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases." *Students*, 2016 WL 6134121, at *32; *see, e.g.*, *Davis*, 526 U.S. at 653 (sexually suggestive rubbing and making vulgar statements objectively offensive); *Bruning ex rel. v. Carrol Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (repeated acts of touching and sexual groping objectively offensive). Plaintiffs do not allege that they have been subjected to any offensive conduct. Rather, they claim that other

[6] Plaintiffs cite *Saxe* for the proposition that the conduct must be severe *or* pervasive, but the cited portion of the opinion references the standard applicable to sexual harassment in the workplace, not schools. 240 F.3d at 205. In the Title IX context, by contrast, student-on-student sexual harassment can be actionable only if it is severe, pervasive, *and* objectively offensive. *Id.* at 206.

students' ordinary use of shared restrooms and locker rooms is "objectively offensive" simply because those students are transgender. Being transgender is not "objectively offensive."

The lack of objectively offensive conduct dooms Plaintiffs' Title IX claim. *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002), is directly on point. Cruzan, a female teacher, brought a hostile work environment sex discrimination claim after the school where she worked allowed Davis, a transgender female teacher, to use the women's faculty restroom. *Id*. at 983. The Eighth Circuit determined that

> Cruzan failed to show the school district's policy allowing Davis to use the women's faculty restroom created a working environment that rose to this level. The school district's policy was not directed at Cruzan . . . . Cruzan does not assert Davis engaged in any inappropriate conduct other than merely being present in the women's faculty restroom. Given the totality of the circumstances, we conclude a reasonable person would not have found the work environment hostile or abusive.

Id. at 984 (internal citations omitted). Here, similarly, there is no allegation that transgender students have done anything other than "merely being present" in the restrooms and locker rooms that match their gender.

Plaintiffs mischaracterize the cases they claim establish that the mere presence of a person of the "opposite sex"[7] in a single-sex facility can constitute actionable harassment. For instance, they describe *Lewis v. Triborough Bridge & Tunnel Auth.*, 31 F. App'x 746 (2d Cir. 2002), as holding that "a company created a hostile environment when it allowed male cleaners inside the women's locker room while female employees were changing clothes." Pls.' Br. at 31. Plaintiffs conspicuously omit that the case involved "a variety of specific acts of sexual harassment." *Lewis*, 31 F. App'x at 747; *see also Lewis v. Triborough Bridge & Tunnel Auth.*,

[7] Intervenors reject Plaintiffs' characterization of transgender boys as the "opposite sex" of other boys and transgender girls as the "opposite sex" of other girls. But even if that characterization were correct, Plaintiffs still fail to establish a sexually harassing environment.

77 F. Supp. 2d 376, 378 (S.D.N.Y. 1999) (cleaning service employees were leering at the female plaintiff and would crowd the entrance of the locker room, forcing her to "run the gauntlet" and brush up against them; the supervisor referred to the employees who complained of the conduct as "cunts" and "fucking crybabies;" and the supervisor said "boss man don't want no women with tiny hinnies [sic] on this job"). They similarly omit from the description of facts in *Schonauer v. DCR Entm't Inc*., 905 P.2d 392, 400-01 (Wash. Ct. App. 1995), that the defendant "pressured [plaintiff], repeatedly and intentionally, to provide fantasized sexual information and to dance on stage in sexually provocative ways" and that she was fired for refusing to dance nude on stage. Plaintiffs' reliance on *Dauven v. George Fox University* for the notion that increased "tension" at school is sufficient to make out a sexually harassing environment claim is similarly misplaced. *Dauven* involved a professor who "repeatedly criticized [the plaintiff] and encouraged students to do the same" thereby raising the "level of tension" and fostering an abusive classroom environment. No. CV 09-305-PK, 2010 WL 6089077, at *14 (D. Or. Dec. 3, 2010), *report and recommendation adopted*, No. 09-CV-305-PK, 2011 WL 901026 (D. Or. Mar. 15, 2011). Finally, *Washington v. White* also did not involve the mere presence of a woman in the men's locker room. Rather, the harasser in *Washington* repeatedly entered the men's facilities in violation of her employer's policy and, when the plaintiff complained about it, she went through the plaintiff's clothing and later "accosted" him. 231 F. Supp. 2d 71, 80-81 (D.D.C. 2002).

Even if Plaintiffs could establish that the mere presence of another student in a shared locker room, without more, were objectively offensive—and they cannot—their Title IX sex discrimination claim would nonetheless fail because they cannot show that they have been targeted "on the basis of sex." *See* 20 U.S.C. § 1681. The District allows both transgender

boys and transgender girls to use facilities that match their gender. Any discomfort that Plaintiffs claim they experience stems from a practice that is not directed at Joel Doe and Jack Jones because they are male or at Mary Smith and Macy Roe because they are female. The District's practice concerning single-sex facilities is not directed at non-transgender students at all. As the Magistrate Judge in the Illinois case noted, "Girl Plaintiffs are not being targeted or singled out by District 211 on the basis of their sex, nor are they being treated any different than boys who attend school within District 211. The Restroom Policy applies to *all* restrooms. . . . All of Plaintiffs' Title IX claims suffer from this threshold problem." *Students*, 2016 WL 6134121, at *31; *cf. Moeck v. Pleasant Valley Sch. Dist.*, 179 F. Supp. 3d 442, 448 (M.D. Pa. 2016) (no Title IX violation where school staff "'harassed' everyone on the team, male and female").

Plaintiffs' Title IX claim not only fails as a matter of law; it turns Title IX on its head. As the Seventh Circuit recently held, the exclusion of transgender students from facilities that accord with their gender identity—precisely the relief sought by Plaintiffs—violates Title IX. *See Whitaker*, 2017 WL 2331751, at *11; *see also Evancho*, 2017 WL 770619, at *23 (violates Equal Protection Clause). In *Whitaker*, the Seventh Circuit joined every other federal appellate court that has considered sex discrimination claims brought by transgender people after *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to affirm that laws prohibiting sex discrimination do not exclude transgender people from their protections. *See Whitaker*, 2017 WL 2331751, at *9-10. In *Price Waterhouse*, the Supreme Court recognized that sex discrimination includes adverse actions based on sex stereotypes, including a person's gender expression and conformity (or lack of conformity) with social gender roles. 490 U.S. at 250 (plurality opinion). As many courts have recognized, because "[a] person is defined as transgender precisely

because of the perception that his or her behavior transgresses gender stereotypes," discrimination based on transgender status is a form of impermissible sex stereotyping. *See Glenn v. Brumby*, 663 F.3d 1312, 1316-18 (11th Cir. 2011) (collecting cases). And "[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." *Whitaker*, 2017 WL 2331751, at *11; *see also Evancho*, 2017 WL 770619, at *11 (excluding transgender students from shared restrooms "is essentially the epitome of discrimination based on gender nonconformity").[8]

B. PLAINTIFFS CANNOT SATISFY THE OTHER REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

Plaintiffs have failed to demonstrate irreparable harm absent injunctive relief. Plaintiffs allege distress at the thought of encountering transgender students in the common areas of the restrooms and locker rooms. In discovery, the parties will explore Plaintiffs' allegations, but, in any case, the alleged distress is not alone sufficient to establish irreparable harm, especially where Plaintiffs themselves can so easily avoid the circumstances they say distress them.

> The fact that District 211 provides significant privacy protections and alternate facilities for students who, like Student Plaintiffs, are uncomfortable at the risk of encountering a transgender student in a state of undress also undermines Plaintiffs' ability to establish irreparable injury. In the context of a request for preliminary injunctive relief, the movants' failure to investigate potentially mitigating alternatives undermines any claim of irreparable harm. Further, harm is not irreparable if the moving parties fail to take advantage of readily available alternatives and thereby effectively inflict the harm on themselves.

Students, 2016 WL 6134121, at *38 (citations omitted).

[8] In *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), one court rejected a Title IX claim brought by a transgender male student seeking access to male facilities, relying on pre-*Price Waterhouse* case law to conclude that a transgender student cannot state a claim under Title IX, but that conclusion flies in the face of *Price Waterhouse*. *See Whitaker*, 2017 WL 2331751, at *8-10.

Plaintiffs also suggest that non-transgender boys could "take advantage of the [District's] policy for lewd purposes," Pls.' Br. at 34, although they have not alleged that such misconduct has occurred despite the fact that the school's practice at issue has been in place for a full school year. DeStefano Decl. ¶ 9. *See Whitaker*, 2017 WL 2331751, at *15 (in balancing the harms related to the requested injunctive relief, court pointed to the fact that a transgender student "used the bathroom for nearly six months *without incident*"). Moreover, the District will be able to address its practice with respect to the use of single-sex facilities by transgender students, but if it is anything similar to practices followed in numerous school districts around the country, it does not create opportunities for or result in such mischief. *See id.* at *15 (discussing experiences of school administrators from twenty-one states and the District of Columbia who have experience implementing transgender-inclusive restroom policies and concluding that "hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized"). As the *Evancho* court recognized, the exclusion of transgender students from shared facilities is unnecessary "to proscribe unlawful malicious 'peeping Tom' activity by anyone pretending to be transgender" because such conduct already is prohibited by school policy and Pennsylvania law. 2017 WL 770619, at *15. Moreover, the school district in that case—like Plaintiffs here—failed to provide any "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." *Id.*

On the other side of the scale are real, demonstrable harms. Aidan has explained why being excluded from the boys' facilities and forced to use alternative facilities is so harmful:

> [T]o be told that I am ***required*** to use separate facilities than those used by the other boys, including my teammates, would be humiliating and stigmatizing. That

> would send the message to all transgender students – and our classmates—that we are not fit to be among our peers.

DeStefano Decl. ¶ 18. In *Evancho*, the court recognized that to "compel [transgender students] to use only restrooms inconsistent with their gender identities or to use the 'special' restrooms" is impermissible and would "further separate[e transgender students] from their peers." 2017 WL 770619, at *16. Intervenors will also present expert testimony similar to that other courts have found to demonstrate irreparable injury to transgender students who are denied access to facilities that correspond to their gender. *See Whitaker*, 2017 WL 2331751, at *7 (discussing expert testimony addressing negative impact on transgender students' mental health); *see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727-28 (4th Cir. 2016) (Davis, J., concurring), *vacated on other grounds*, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No 4:15cv54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016) (order granting preliminary injunction). In all, the balance of harms overwhelmingly supports denying Plaintiffs' motion.

IV. CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

Dated: June 9, 2017

/s Mary Catherine Roper

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2017 the foregoing Response in Opposition was filed electronically with the Court and a true and correct copy was served on all counsel of records via the Court's ECF system.

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