IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor, by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor, by and through his parents JOHN JONES and JANE JONES; and MACY ROE:	:	
Plaintiffs,	:	No. 17-cv-1249-EGS
v.	:	
BOYERTOWN AREA SCHOOL DISTRICT; DR. RICHARD FAIDLEY; DR. BRETT COOPER and DR. E. WAYNE FOLEY,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO THE MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In this case, Plaintiffs – four high school students – challenge the Boyertown Area School District's decision to allow transgender students to use the restroom and locker rooms aligned with their gender identity rather than their biological sex. And specifically, Plaintiffs seek a preliminary injunction to prevent further use of those facilities by transgender students to begin the 2017-2018 school year in August. *See* Plfs.' Mot. For Prelim. Injunction [Docket 16] (the "Motion"). However, as described below, the Plaintiffs are unable to meet the stringent requirements to have this Court impose such an injunction.

I. FACTS

A. What Does It Mean To Be Transgender?

In deciding this issue, it is important to understand the term "transgender," which is a term used to describe people whose gender identity differs from the sex they were assigned at birth. Gender identity is a person's internal, personal sense of being a male or female. *See, e.g.*, GLAAD, "Transgender FAQ," *available at* https://www.glaad.org/transgender/transfaq.[1] For transgender people, the sex they were assigned at birth and their own internal gender identity do not match. Sexual orientation differs from gender identity in that sexual orientation describes a person's enduring physical, romantic, and/or emotional attraction to another person, while gender identity describes a person's internal sense of being a man or a woman, or someone outside of the gender binary. *Id.* In order to align themselves with their gender identity, transgender individuals may change their names, pronouns or style of dress. Many transgender people seek to bring their bodies into alignment with their gender identity through the use of

[1] A copy of this Internet web page is attached hereto as Exhibit 1.

hormones and/or surgery. However, not all transgender people can or will take those steps, and being transgender is not dependent upon medical procedures. *Id.*

B. U.S. Departments of Justice and Education Issue and Rescind Guidance

Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination based on sex in educational programs and activities operated by recipients of federal financial assistance, including all public school districts. 20 U.S.C. §§ 1681, 1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. The U.S. Department of Justice's ("DOJ") Civil Rights Division and the U.S. Department of Education's ("DOE") Office for Civil Rights previously issued guidance clearly permitting transgender students to use the restrooms and locker rooms of their gender identity. However, that guidance was rescinded in 2017, in an effort to provide local school districts with the autonomy to decide the issue for themselves.

On May 13, 2016, the DOJ and DOE issued a "Dear Colleague Letter on Transgender Students" (the "2016 Letter"), attached as Exhibit 2, summarizing public schools' obligations regarding transgender students under Title IX and explaining how those departments evaluate a school's compliance with those obligations. The 2016 Letter began by giving an overview of school districts' responsibilities under 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.[2] 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.[3]

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[2] 34 C.F.R. §§ 106.4, 106.31(a).

[3] *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,

DOJ/DOE, Dear Colleague Letter on Transgender Students, p. 2. The letter went on to specifically address the issue of 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.***[4] 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.[5]

Id., p. 3 (emphasis added). DOE and DOJ posited that the 2016 Letter was not making any change to the existing law and regulations, but was merely providing "information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations." *Id.*, p. 1.

In accordance with the guidance in the 2016 Letter, the School District's administration granted permission for transgender students, upon request, to use the restrooms and locker rooms

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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* USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015), *available at* https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf (accessed June 9, 2017), attached as Exhibit 3; DOJ, Memorandum from the Attorney General, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (2014), *available at* www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf (accessed June 9, 2017), attached as Exhibit 4.

[4] 34 C.F.R. § 106.33.

[5] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), *available at* www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (accessed June 9, 2017) (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."), attached as Exhibit 5.

aligned with their gender identity during the 2016-2017 school year. Requests are considered on a case-by-case basis. *See* Declaration of Dr. Brett Cooper, ¶¶ 3-4, attached hereto as Exhibit 6.

On February 22, 2017, DOE and DOJ issued another Dear Colleague Letter addressing the use of restrooms and locker rooms by transgender students (the "2017 Letter"), attached as Exhibit 7. The 2017 Letter rescinded the guidance provided in the 2016 Letter, as well as an earlier guidance letter on the topic issued by DOE's Office of Civil Rights in January 2015.[6] The 2017 Letter also noted conflicting interpretations by courts of the term "sex" in the regulations issued pursuant to Title IX, and stated, "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." 2017 Letter, p. 1 (emphasis added). Similarly to the 2016 Letter, the 2017 Letter stated, "This guidance does not add requirements to applicable law." *Id.*, p. 2.

C. The Transgender Students at Boyertown Area High School Referenced in The Plaintiffs' Complaint

The Amended Complaint and Motion address the Plaintiffs' observations of two transgender students – referenced here as Student A and Student B – in the locker rooms and restrooms at BASH.[7]

Student A is a transgender male student at Boyertown Area Senior High School ("BASH") and was assigned to the same physical education class as Plaintiffs Joel Doe and Jack Jones for the 2016-2017 school year. *See* Declaration of Dr. E. Wayne Foley, ¶¶ 3, 5, attached hereto as Exhibit 9. Student A requested, and was granted, permission to use the boys' locker

[6] *See* Letter from James A. Ferg-Cadima, OCR, to Emily T. Prince (Jan. 7, 2015), attached hereto as Exhibit 8.

[7] Non-plaintiff students are referred to by letters rather than their names or initials to protect their identities. The same letters used in this brief to reference students are the same letters used in the supporting declarations of Dr. Brett Cooper and Dr. E. Wayne Foley.

room to change for gym for the 2016-2017 school year. *Id.*, ¶ 4. On October 31, 2016, Student A used the boys' locker room for the first time in connection with his physical education class. He wears his gym clothes under his regular clothes so that he can change for gym without having to undress. *Id.*, ¶ 6. (Accordingly, Doe was apparently mistaken in claiming that he saw a "female wearing nothing above her waist other than a bra." *See* Am. Compl., ¶ 50.) After Student A used the locker room for the first time, that same day Doe spoke with BASH Assistant Principal E. Wayne Foley to express his displeasure that Student A was using the locker room. Foley Decl., ¶ 7. Foley informed Doe that he had the option to change in a single-user restroom in the school nurse's office near the gymnasium. *Id.*, ¶ 8. In addition to the typical multi-user restrooms for boys and girls, BASH has four individual restrooms that may be used by people of any sex or gender identity. Cooper Decl., ¶ 5.

Privacy is also available for students in the locker rooms themselves. The girls' locker room has four toilet stalls, each with a door for privacy. The boys' locker room has two toilet stalls, each with a door for privacy, and two urinals with a divider between them. Id., ¶ 7. Each locker room also has four individual shower stalls, and each shower stall has a curtain for privacy. Neither locker room has a multi-user shower area. (BASH students are not required to shower after gym class, and it is extremely rare for any student to shower after gym class.) *Id.*, ¶¶ 8-9. Furthermore, the Plaintiffs have not asserted that they are being prevented in any way from utilizing either the locker room stalls or the single-user restrooms.

Since Doe initiated this litigation regarding Student A's use of the boys' locker room, Student A has become uncomfortable around Joel Doe, and he has requested increased emotional support services from the School District. Foley Decl., ¶¶ 14-17. To the School District's knowledge, Student A is one of five transgender male students attending BASH during the 2016-

2017 school year. Three of those students, including Student A, are expected to return to BASH for the 2017-2018 school year. Cooper Decl., ¶ 15.

Student B is a transgender female and a 12th grade student at BASH. Foley Decl., ¶ 18. She requested, and was granted, permission to use the girls' restrooms during the 2016-2017 school year. *Id.*, ¶ 19. Student B expressed to School District administrators that she tried to use the girls' restroom as infrequently as possible to avoid raising privacy concerns for female cisgender[8] students. *Id.*, ¶ 20. As far as the School District administration is aware, Student B was the only transgender female student attending BASH during the 2016-2017 school year. *Id.*, ¶ 21. The School District is not aware of any transgender female students scheduled to attend BASH during the 2017-2018 school year. Cooper Decl., ¶ 14.

II. PRELIMINARY INJUNCTION STANDARD OF REVIEW

A preliminary injunction to restrain conduct is only appropriate in limited circumstances, and the movant must prove that: (1) it is likely to succeed on the merits of the underlying claim, (2) it will likely suffer irreparable harm if relief is denied, (3) granting relief will not result in greater harm to the nonmoving party, and (4) on balance, the public interest favors an injunction. *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014).

Preliminary injunctive relief is "an extraordinary remedy" and "should be granted only in limited circumstances." *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390 (1981).

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[8] A cisgender student is a student whose gender identity matches his or her biological sex at birth.

III. ARGUMENT

A. Plaintiffs Are Unlikely to Succeed on the Merits of Any of Their Claims

1. Right to Privacy under the Fourteenth Amendment

The United States Constitution does not mention an explicit right to privacy, and the United States Supreme Court has never proclaimed that such a generalized right exists. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178 (3d Cir. 2005); *but see Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000) (stating that the Supreme Court "acknowledged the individual's constitutional right to privacy" in *Griswold v. Connecticut*, 381 U.S. 479 (1965)). The Supreme Court, however, has found certain constitutional "zones of privacy." *C.N.*, 430 F.3d at 178 (*citing Roe v. Wade*, 410 U.S. 113, 152-53 (1973)). From these zones of privacy, the Third Circuit has articulated two types of privacy interests rooted in the Fourteenth Amendment. *Nunez v. Pachman*, 578 F.3d 228, 231 n.7 (3d Cir. 2009); *see also Malleus v. George*, 641 F.3d 560, 564 (3d Cir. 2011); *C.N.*, 430 F.3d at 178. The first privacy interest is the "individual interest in avoiding disclosure of personal matters," and the second is the "interest in independence in making certain kinds of important decisions." *C.N.*, 430 F.3d at 178; *see also Malleus*, 641 F.3d at 564; *Hedges v. Musco*, 204 F.3d 109, 121 (3d Cir.2000).

The first privacy interest – an interest in avoiding disclosure of personal matters – is at issue in this matter. The Plaintiffs claim that allowing transgender students to use the restrooms and locker rooms at BASH violates the Plaintiffs' "fundamental right to bodily privacy from persons of the opposite sex." Memorandum in Support of Mot. For Prelim. Inj. [hereinafter "Plf. Brf."], pp. 10-27. However, the Plaintiffs effectively take the position that a person's biological sex at birth is determinative of that individual's rights with regard to gender issues. However, it is becoming more and more evident that a transgender student's gender identity is an important

factor to be considered in determining whether his or her needs, as well as those of cisgender students, can be accommodated in the course of allocating or regulating the use of restrooms and locker rooms.

It is important to note that the Plaintiffs in this case are not *required* by a state actor – in this case the School District – to use restrooms or locker rooms with any transgender student. The School District allows transgender students to use restrooms consistent with their gender identity; however, no cisgender student is compelled to use a restroom with a transgender student if he or she does not want to do so. BASH has four single-user restrooms that can be used by any students. In addition, the School District does not require any cisgender student to use a locker room with a transgender student if he or she does not want to do so. If the privacy stalls that the School District provides in restrooms and locker rooms are not sufficient for the comfort of any student – whether cisgender, transgender, or otherwise – he or she can use the single-user restrooms as an alternative facility to satisfy his or her privacy needs. The absence of any compulsion distinguishes this case from those cited by the Plaintiffs that involve involuntary invasions of someone's privacy.

a. This is not a case of compelled government intrusion

Generally speaking, the penumbral rights of privacy the Supreme Court has recognized in other contexts protect certain aspects of a person's private space and decision-making from governmental intrusion. Even in the context of the right to privacy in one's own body, cases deal with compelled intrusion into, or with respect to, a person's intimate space or exposed body. No case recognizes a right to privacy such as the one Plaintiffs assert here that insulates a person from ever coming into any contact at all with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are

alternative means – in this case, single-user bathrooms – for both individuals to protect themselves from such contact, embarrassment, or discomfort.

Courts are very careful in extending constitutional protection in the area of personal privacy. "Although the Supreme Court has recognized fundamental rights in regard to some special liberty and privacy interests, it has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection." *Doe v. Moore*, 410 F.3d 1337, 1343-44 (11th Cir. 2005). In other words, "privacy" is not a magic term that automatically triggers constitutional protection. Instead, the same rules that govern every other substantive due process analysis apply in the privacy context. *See Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 591 (6th Cir. 2008). So an asserted privacy right is not fundamental unless it is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The list of rights that rise to this level is "a short one." *Sung Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012). This list generally has been limited to "'matters relating to marriage, family, procreation, and the right to bodily integrity.'" *Torres v. McLaughlin*, 163 F.3d 169, 174 (3d Cir. 1998) (*quoting Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion)); *see also Armbruster v. Cavanaugh*, 410 Fed. App'x 564, 567 (3d Cir. 2011).

The Plaintiffs' claims do not fit into any of these categories, nor do they rise ot the level of being fundamental for constitutional analysis. Accordingly, there is no reason to believe that the Plaintiffs' will ultimately be successful on their Fourteenth Amendment claim.

b. Rights must be balanced with schools' needs

In assessing the nature and scope of Plaintiffs' constitutional rights, and whether those rights have been infringed, the Court also must consider the need to preserve the discretion of schools to craft individualized approaches to difficult issues that are appropriate for their respective communities. Schools "have the difficult task of teaching 'the shared values of a civilized social order.'" *Doninger v. Niehoff*, 527 F.3d 41, 54 (2d Cir. 2008) (*quoting Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 683 (1986)). The public education system "has evolved" to rely "necessarily upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *see also Jeffrey v. Bd. of Trustees of Bells ISD*, 261 F. Supp. 2d 719, 728 (E.D. Tex. 2003), *aff'd* 96 Fed.Appx. 248 (5th Cir. 2004) ("Local school boards have broad discretion in the management of school affairs."). The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Even when confronting segregation, the Supreme Court emphasized that schools "have the primary responsibility for elucidating, assessing, and solving" problems that arise during desegregation. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299 (1955); *see also Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2214 (2016) ("Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."). Therefore, our nation's deeply rooted history and tradition of protecting school administrators' discretion require that this Court not unduly constrain schools from "fulfilling their role as 'a principal instrument in awakening the

child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 287 (1988) (*quoting Brown*, 349 U.S. at 493.).

It also is important to remember that constitutional privacy rights, whether rooted in the Fourth Amendment or the Fourteenth Amendment, "are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). "[I]t is well established that public school students enjoy a reduced expectation of privacy in comparison to the public at large." *Dominic J. v. Wyoming Valley W. High Sch.*, 362 F. Supp. 2d 560, 570 (M.D. Pa. 2005). Of particular relevance to this case, public school locker rooms in this country traditionally have been and remain "not notable for the privacy they afford." *Vernonia*, 515 U.S. at 657.

Given these precedents, the School District's decision to allow transgender students to use restrooms and locker rooms aligned with their gender identity should be given great deference.

c. Changing attitudes toward transgender individuals requires that their rights be considered

Contemporary notions of liberty and justice are inconsistent with the existence of the exceedingly broad right to privacy asserted by Plaintiffs. Transgender people were once forced to hide their gender identities for fear of retribution, so there was little need to consider the rights of people who chose to remain hidden away. That is no longer the case. A transgender person today does not live his or her life in conformance with their sex assigned at birth, but rather lives consistent with his or her gender identity, and they are usually able to find acceptance among the cisgender community, especially among young people. Two examples at BASH are Student A, a transgender male, and Student B, a transgender female.

BASH students who interact with Students A and B and other transgender students generally treat them respectfully and consistent with their gender identity. (This year, the student body elected one transgender male student to the Homecoming King's Court. Cooper Decl., ¶ 17.) In fact, many people who interact with BASH transgender students on a daily basis may have no idea, and may not care, what sex they were assigned at birth. For the 2016-2017 school year, the School District granted Student A's request to use the boys' locker room, as well as Student B's request to use the girls' restroom. Foley Decl., ¶¶ 4, 19. The School District's teachers, administrators, and staff have made an effort to treat these individuals and other transgender students consistent with their gender identity. And the vast majority of BASH students have shared these facilities with Student A and Student B without incident or complaint. Cooper Decl., ¶ 16.

Many groups have considered the issue of transgender individuals in recent years and have begun allowing transgender people to live openly rather than hiding who they are. For example, the U.S. military, which historically has served a vital role as a melting pot in our society, allows transgender personnel to serve openly and fully integrated in all military services. Matthew Rosenberg, "Transgender People Will Be Allowed to Serve Openly in Military," N.Y. TIMES, July 1, 2016, at A3, *available at* http://www.nytimes.com/2016/07/01/us/transgender-military.html (accessed on June 9, 2017), attached as Exhibit 10; *see also* Rand Corporation, "Assessing the Implications of Allowing Transgender Personnel to Serve Openly" (2016), *available at* http://www.rand.org/pubs/research_reports/RR1530.html (accessed on June 9, 2017) (citing as precedent the successful integration of transgender service members in the armed forces of Australia, Canada, Israel, and the United Kingdom). The National Collegiate Athletic Association includes transgender student-athletes in collegiate sports consistent with their gender

identity. Nat'l Collegiate Athletic Ass'n, "NCAA Inclusion of Transgender Student-Athletes" (2011), *available at* https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (accessed on June 9, 2017), attached as Exhibit 11.

More directly relevant to this case, the General Services Administration ("GSA") has issued a federal management regulation requiring that "[f]ederal agencies occupying space under the jurisdiction, custody, or control of GSA must allow individuals to use restroom facilities and related areas consistent with their gender identity." 81 Fed. Reg. 55148-01, 2016 WL 4377076, attached as Exhibit 12. Cities across the country have implemented various requirements for gender-neutral bathrooms. *See* Office of the New York City Comptroller, "Restrooms for All: A Plan to Expand Gender Neutral Restrooms in NYC" 2-3 (2015), *available at* https://comptroller.nyc.gov/wp-content/uploads/documents/Gender_Neutral_Bathrooms.pdf (accessed on June 9, 2017) (discussing such laws in Washington, D.C., Philadelphia, and Delaware), attached as Exhibit 13; The Associated Press, "California Governor Approves Gender-Neutral Restrooms," U.S. NEWS & WORLD REPORT (Sept. 29, 2016), *available at* https://www.usnews.com/news/politics/articles/2016-09-29/california-governor-approves-gender-neutral-restrooms (accessed on June 9, 2017) (describing a California law requiring all single-stall toilets in California be designated gender-neutral), attached as Exhibit 14. Likewise, major retailers allow employees and customers to use restrooms that correspond to their gender identity. *See, e.g.*, Abrams Rachel, "Target Steps Out in Front of Bathroom Choice Debate," N.Y. TIMES, Apr. 28, 2016, at B1, *available at* https://www.nytimes.com/2016/04/28/business/target-steps-out-in-front-of-bathroom-choice-debate.html (accessed on June 9, 2017), attached as Exhibit 15.

In summary, several factors – including the lack of compulsion, deference to school administrators, and changing social attitudes – strongly support the argument that high school students do not have a fundamental constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs. As such, the Plaintiffs are not likely to succeed on their Fourteenth Amendment claim.

2. Title IX

The Plaintiffs next allege that they are likely to prevail on their Title IX claim on the basis that that they allegedly have been subjected to sexual harassment. Plf. Brf., pp. 27-39. Plaintiffs' argument focuses on whether allowing transgender students to use restrooms and locker rooms that align with their gender identity creates a hostile environment in violation of Title IX. As discussed below, Plaintiffs have not shown they are likely to prevail on this argument.

a. Plaintiffs Have Not Shown They Are Suffering Discrimination On The Basis Of Sex

Title IX proscribes discrimination based on sex in the provision of educational programs funded by or with the assistance of the federal government. 20 U.S.C. § 1681(a). To establish a prima facie case of discrimination under Title IX, a plaintiff must allege (1) that he or she was subjected to discrimination in an educational program, (2) that the program receives federal assistance, and (3) that the discrimination was on the basis of sex. *See Bougher v. Univ. of Pittsburgh*, 713 F. Supp. 139, 143-44 (W.D. Pa. 1989) *aff'd*, 882 F.2d 74 (3d Cir. 1989). Some courts have concluded that the use by students of school restrooms is part and parcel of the provision of educational services covered by Title IX. *Bd. of Educ. of the Highland Local School Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016).

There is a threshold question under Title IX whether the harassment Plaintiffs allege they are suffering properly can be characterized as sexual harassment, or discrimination on the basis of sex. *See Burwell v. Pekin Community High Sch. Dist. 303*, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002); *see also C.R.K. v. U.S.D.*, 176 F. Supp. 2d 1145, 1163 (D. Kan. 2001); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 453-56 (S.D.N.Y. 2000). To be actionable under Title IX, the offensive behavior must be "on the basis of sex." *See Frazier v. Fairhaven School Community*, 276 F.3d 52, 66 (1st Cir. 2002); *Benjamin v. Metropolitan Sch. Dist. of Lawrence Township*, 2002 WL 977661, at *3 (S.D. Ind. 2002). Neither Title IX nor the implementing regulations define the term "sex" or mandate how to determine who is male and who is female when a school provides sex-segregated facilities.

Here, Plaintiffs complain that allowing transgender students to use restrooms and locker rooms based on gender identity creates a hostile environment. However, neither the male Plaintiffs nor the female Plaintiffs are being targeted or singled out by the School District on the basis of their sex, nor are the School District's male and female students being treated any differently. The School District's decision to allow students to use facilities based on their gender identity applies to both the boys' and girls' restrooms, as well as the boys' and girls' locker rooms. That means cisgender boys use the boys' restrooms and boys' locker room with transgender boys just like cisgender girls use the girls' restrooms and girls' locker room with transgender girls. Therefore, the alleged discrimination and hostile environment that the Plaintiffs claim to experience is not on the basis of their sex, and any discomfort Plaintiffs allege they feel is not the result of conduct that is directed at them because of their sex.

b. Plaintiffs Have Not Shown The Alleged Harassment Is Severe, Pervasive Or Objectively Offensive

In addition, to establish a hostile environment under Title IX, "a plaintiff must establish sexual harassment . . . that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis, Next Friend LaShona D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651-52 (1999); *Dejohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008). Plaintiffs argue that the presence of, and risk of, exposure to transgender students in restrooms and locker rooms, is severe, pervasive, and objectively offensive conduct that subjects them to a hostile environment in violation of Title IX. The facts do not support these propositions.

Plaintiff Joel Doe alleges to having seen a female (transgender male) student in the boys' locker room wearing a bra on one occasion.[9] Plaintiff Jack Jones alleges to have seen a female (transgender male) student in a locker room one time while he was changing clothes for gym. Plaintiff Mary Smith alleges to have seen a male (transgender female) student in a girls' restroom one time. Meanwhile, Plaintiff Macy Roe does not allege to have ever seen a male student in either the girls' restrooms or girls' locker room. Accordingly, three isolated instances can hardly be alleged to be pervasive.

Plaintiffs say they suffer anxiety, humiliation, embarrassment and distress and stress over the possibility of seeing or being seen by a transgender student in a restroom or locker room. Am. Compl., ¶ 63, 93, 115, 126. Yet none of the Plaintiffs allege that they ever have witnessed a

[9] As noted above, the School District denies that the student Joel Doe observed – Student A – ever exposes his undergarments while changing in the boys' locker room. Instead, he simply comes to school wearing his gym clothes under his regular clothes in order to avoid any embarrassment. Foley Decl., ¶ 6.

transgender student in a state of complete undress. Nor has it been alleged that any transgender student has attempted to either expose himself or herself to other students or view other students in a state of undress. Moreover, the risk of that occurring is very low given the privacy protections in place and the alternative facilities available for any student who does not want to use the common restrooms or locker rooms.

Generalized statements of fear and humiliation are not enough to establish severe, pervasive or objectively offensive conduct. General allegations have been held to be insufficient to establish a Title IX violation. *See, e.g.*, *Trentadue v. Redmon*, 619 F.3d 648, 654 (7th Cir. 2010) (finding undeveloped allegations of student-on-student harassment cannot establish a Title IX claim).

The mere presence of transgender students in restrooms or locker rooms is not severe, pervasive, or objectively offensive conduct. It is important to recognize that Title IX does not say schools cannot allow males and females to use the same restrooms or locker rooms under any circumstances. "Title IX is a broadly written general prohibition on [sex] discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). One of those exceptions says that a school "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. Nowhere does Title IX or its regulations say that schools must provide single-sex facilities. Furthermore, Title IX is written permissively with respect to single-sex facilities. Title IX does not require schools to provide separate facilities; it allows schools to do so as long as they provide comparable facilities for males and females. In other words, Title IX permits schools to decide whether to have sex-segregated restrooms. Gender-neutral

restrooms do not per se violate Title IX, so long as all students' privacy interests are protected. Therefore, the foundation upon which Plaintiffs build much of their Title IX argument – that it is a violation of Title IX for a biological boy to use a restroom also used by a biological girl under any circumstances and vice versa – does not hold the weight Plaintiffs place on it.

The 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.[10] Plaintiffs rely on *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97 (Pa. Commw. 1973) for the proposition that being viewed naked by members of the opposite sex is harassment that is severe, pervasive and objectively offensive. Plf. Brf., p. 36. However, that case is inapposite, as it involved the qualifications to be hired as a youth center supervisor for troubled youths in 1973. The Court noted that supervisors were required to search youths' bodies for possible contraband and observe the youths naked as they showered. As such, the

[10] *See, e.g.*, *Davis*, 526 U.S. at 653 (holding that over a period of five months, a fifth-grade male student harassed the plaintiff, a fifth-grade female student, by engaging in sexually suggestive behavior, including attempting to touch the plaintiff's breasts and genital area, rubbing against the plaintiff and making vulgar statements); *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 259-60 (6th Cir. 2000) (finding that a female student was repeatedly propositioned, groped and threatened and was also stabbed in the hand; during one incident, two boys held her hands while other male students grabbed her hair and started yanking off her shirt); *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243-44 (10th Cir. 1999) (finding that a disabled female student was sexually assaulted by a male student on multiple occasions); *Seiwert v. Spencer-Owen Community School Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (holding that the alleged harassment suffered by a male eighth-grade student, which included being called "faggot," being kicked by several boys during a dodge ball game, and receiving death threats, if proven, amounted to severe and pervasive conduct that was objectively offensive); *Bruning ex rel. v. Carrol County Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (finding repeated acts of touching and sexual groping were objectively offensive); *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001 WL 276975, at *1-3 (D.N.H. 2001) (finding widespread peer harassment, both verbal and physical, which involved referring to the plaintiff as a homosexual, as well as some harassment by coaches); *see also Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983 (8th Cir. 2002) (finding mere presence of transgender female teacher in women's faculty restroom did not create a hostile environment for cisgender female teachers).

invasion of privacy in that case well exceeds the possible contact or observation of or by transgender and cisgender students in the locker rooms and restrooms at Boyertown High School.

Plaintiffs maintain that the presence of a transgender student in a restroom or locker room with cisgender students violates Title IX because it creates a risk that students will see each other in an unclothed or partially clothed state by virtue of their sharing these facilities, and that is a severe, pervasive and objectively offensive hostile environment. The risk of unwanted exposure in this case, however, is substantively mitigated by the privacy protections that the School District provides in the restrooms and locker rooms – in the form of individual stalls with doors (or curtains in the case of showers) – and by the alternative facilities it provides for students who do not want to use the common facilities.

Plaintiffs allege that a transgender male changed clothes in the gym locker room at least once while students were present. Plaintiffs, however, do not allege any Plaintiff saw any private part of the student's body, or even that any part of his body was visible on that occasion. This is not evidence of a severe, pervasive, or objectively offensive hostile environment. Moreover, students who do not want to change or shower in the gym locker room can use alternate facilities that provide complete privacy.

Plaintiffs' challenge is also short on facts necessary to show a hostile environment. There are private toilet stalls in the restrooms. There are no allegations that any transgender student has harassed anyone in the restroom other than by mere presence. Moreover, there undoubtedly are remedies within the schools for situations when any student acts in a threatening, harassing, or inappropriate way in a restroom. *See also Cruzan*, 294 F.3d at 984 ("We agree with the district court that Cruzan failed to show the school district's policy allowing [a transgender

female teacher] to use the women's faculty restroom created a working environment that rose to the level of [sexual harassment or a hostile environment].").

In summary, the allegations in Amended Complaint and Motion are not comparable to the type of conduct that has been found to be severe, pervasive and objectively offensive in violation of Title IX. There is nothing objectively offensive about a transgender student being present in a restroom or a locker room when at no time is his or her unclothed body exposed to any Plaintiff, the risk of that happening is substantially mitigated by the various privacy options in place, and any Plaintiff who does not want to expose his or her body to a transgender student, or anyone else, is not compelled to do so. The risk of an unwanted exposure under these circumstances is minimal and not so severe, pervasive, or objectively offensive as to constitute a hostile environment, much less a hostile environment that denies any Plaintiff access to any educational benefits.

c. Courts look to Title VII cases for guidance

As to the interpretation of Title IX, its prohibition of discrimination based on sex is generally viewed as being parallel to the similar proscriptions contained in Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "sex" in the employment context. These statutes' prohibitions on sex discrimination are analogous.[11] Courts have long interpreted "sex" for Title VII purposes to go beyond assigned sex as defined by the respective presence of male or female genitalia. For instance, numerous courts have held that Title VII's prohibition of discrimination on the basis of "sex" includes discrimination on the basis of among

[11] *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617, n.1 (1999) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX.") (collecting cases); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S.629, 651 (1999) (applying Title VII principles in a Title IX action).

other things transgender status, gender nonconformity, sex stereotyping, and sexual orientation.[12] Accordingly, discrimination based on transgender status would appear to be prohibited under Title IX, and therefore the definition of "sex" under Title IX would include gender identity.

d. Issuance of 2017 Letter Does Not Favor Plaintiffs' Arguments

As previously stated, in February 2017, the U.S. Departments of Justice and Education issued the 2017 Letter rescinding prior guidance on Title IX, including the 2016 Letter. Importantly, the 2017 Letter did not reverse the departments' positions, but at most left Title IX open for interpretation without changing the law. As noted above, recent interpretations of Title VII clearly support the School District's view of "sex" as being more inclusive than simply

[12] *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (Title VII proscribes male-on-male sexual harassment); *Betz v. Temple Health Systems*, 659 Fed. App'x. 137 (3d Cir. 2016) (Title VII and gender stereotyping); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. App'x. 883 (11th Cir. 2016) (sex discrimination includes discrimination against a transgender person based on gender nonconformity); *Glenn v. Brumby*, 663 F.3d 1312 (Title VII and transgender status); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (Title VII and gender stereotyping); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 Fed. App'x. 492 (9th Cir. 2009) (Title VII proscribes discrimination against transgender person based on gender nonconformity); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII and gender nonconformity); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) (same); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (transgender status); *Valentine Ge v. Dun & Bradstreet, Inc.*, 2017 WL 347582 (M.D. Fla. Jan. 24, 2017) (Title VII covers sex discrimination against a transgender person for gender nonconformity); *EEOC v. Scott*, 217 F. Supp. 3d 834 (W.D. Pa. 2016) (sexual orientation under Title VII); *Roberts v. Clark Cty. Sch. Dist.*, 2016 WL 5843046 (D. Nev. 2016) (Title VII and transgender status); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016) (same); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594 (E.D. Mich. 2015) (Title VII applies to discrimination claims of transgender people based on alleged gender nonconformity); *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780 (D. Md. 2014) (Title VII and transgender status); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008) (Title VII applies to sex stereotyping claim of transgender plaintiff); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008) (Title VII and failure to conform to sex stereotype); *Mitchell v. Axcan Scandipharm*, No. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (Title VII and failure to conform to gender stereotype by a transgender person); *but see Eure v. Sage Corp.*, 61 F.Supp.3d 651 (W.D. Tex. 2014) (neither Supreme court nor Fifth Circuit caselaw have held discrimination based on transgender status per se unlawful under Title VII); *Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215 (10th Cir. 2007) (Title VII does not address transgender discrimination); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (same and collecting prior contrary authority).

biological sex at birth. By its own terms, the 2017 Letter stated that "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." 2017 Letter, p. 1 (emphasis added). Accordingly, the 2017 Letter does not support the Plaintiffs' request for a preliminary injunction.

For all of these reasons, it is apparent that the Plaintiffs do not have a likelihood of success on the merits of their claims that the School District is violating Title IX.

3. Intrusion Upon Seclusion Claim

As with their other claims, the Plaintiffs are not likely to prevail on their claim for intrusion upon seclusion. To begin the analysis, Defendants are entitled to immunity under Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541 (the "Tort Claims Act"). However, even if the Defendants are found to not have immunity, the Plaintiffs fail to meet the requirements to state their claim.

Under the Tort Claims Act, an employee of a local agency, including a public school district, is entitled to immunity for actions taken within the scope of his or her employment, unless: (1) the employee's acts fall into one of eight enumerated categories of negligence in 42 Pa. C.S. § 8542(b) (relating to: vehicle liability; care, custody or control of personal property; real property; trees, traffic control and street lighting; utility service facilities; streets; sidewalks; and care, custody or control of animals); or (2) the employee's acts constitute "a crime, actual fraud, or willful misconduct" under 42 Pa. C.S. § 8550. *Spiker v. Whittaker*, 553 Fed. App'x 275, 281 n.6 (3d Cir. 2014). The phrase "willful misconduct" is synonymous with "intentional tort" and requires that a plaintiff establish that the actor "desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue." *Coulter v. Graham*, No. 2421 C.D. 2010, 2011 WL 10876836, at *3 (Pa. Commw. June 14, 2011); *see also*

Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). The Boyertown Area School District is a "local agency" under the Tort Claims Act. *See* 42 Pa. C.S.A. § 8501 (defining "[l]ocal agencies" as "a government unit other than the Commonwealth government"). Thus, the individual Defendants, as employees of the School District, are entitled to immunity as provided in the Act unless one of the exceptions applies.

The alleged actions of Defendants clearly do not fall within any of the eight enumerated categories of negligence in § 8542(b). Moreover, Plaintiffs have not alleged that Defendants engaged in a "crime" or "actual fraud." Therefore, Plaintiffs must prove that the Defendants' actions constituted willful misconduct. This they cannot do. There is no allegation in the Amended Complaint that any of the Defendants desired to have any transgender student witness any of the Plaintiffs in a state of undress nor that the Defendants thought nor that it was substantially certain to occur. Indeed, the Plaintiffs had the opportunity to use other changing facilities and restrooms to avoid the situation entirely. All Defendants are therefore entitled to immunity under the Tort Claims Act.

Even if the Defendants lack immunity, the Plaintiffs are still unable to prove their intrusion upon seclusion claim. Intrusion upon seclusion may occur by (1) physical intrusion into a place where the plaintiff has secluded himself or herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation or examination into plaintiff's private concerns. *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1383 (Pa. Super. 1984).

There is no allegation that the individual Defendants physically intruded on any of the Plaintiffs nor used their senses to oversee or overhear any of the Plaintiffs' private affairs. Accordingly, the Defendants are presumably alleging that the Defendants made some other form

of investigation or examination into the Plaintiffs' private concerns. However, no factual averments have been made to support such a claim. Indeed any possible alleged "intrusion" against any of the Plaintiffs was merely an indirect result of the Defendants' decision to allow transgender students to use the restrooms and locker rooms of their gender identity. Therefore, any such intrusion was not willful misconduct. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985). Legitimate privacy expectations are even less with regard to students in school locker rooms. School sports require "suiting up" before each practice or event, and showering and changing afterward. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation," *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988).

Furthermore, liability attaches only when the intrusion is substantial and would be highly offensive to "the ordinary reasonable person." *Id.* at 1383-84. In many cases, courts must hypothesize how an ordinary reasonable person would react. That is not necessary in this case where scores of other cisgender students have been sharing locker rooms and restrooms with transgender students throughout the 2016-2017 school year. As noted above, the vast majority of BASH students have been supportive of transgender students and have shared the school restrooms and locker rooms with those students without incident or complaint. Accordingly, the Plaintiffs have failed to show a likelihood of success on the merits of their intrusion upon seclusion claim.

B. Plaintiffs Will Not Suffer Irreparable Harm if The Injunction Is Denied

The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages. *See Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102-03 (3d Cir. 1988). This is not an easy burden. *See, e.g.*, *Morton v. Beyer*, 822 F.2d 364, 371-72 (3d Cir. 1987).

Plaintiffs claim that if a preliminary injunction is not granted, they will suffer irreparable injury by being placed in "situations where their bodies or private intimate activities may be exposed to the opposite sex or where these students will use privacy facilities with someone of the opposite sex." Plf. Brf., p. 13. However, this is clearly not the case. The Plaintiffs – as well as any other cisgender students who express a desire not to share facilities with transgender student – have the opportunity to use single-person restroom/changing facilities. Accordingly, while the Defendants do not believe that the Plaintiffs have been subjected to any harm, the Plaintiffs can avoid any possible harm or embarrassment by using the alternate facilities.[13]

C. Preliminary Relief Would Result In Greater Harm to Transgender Students

As noted previously, a party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *See, e.g.*, *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). The Plaintiffs devote only two short paragraphs to arguing that the balance of hardships in this litigation favors the Plaintiffs, alleging that "the

[13] Plaintiff Macy Roe is a graduating senior at BASH and will not be returning for the 2017-2018 school year.

government is not harmed when it is prevented from enforcing unconstitutional and otherwise illegal laws." Plf. Brf., p. 45.

Of course, the Plaintiffs' argument belies the true balancing of hardships in this case not between the Plaintiffs on one hand, and the School District and other Defendants on the other hand. In reality, the competing hardships to be weighed on the scales of justice are the hardships that would be suffered by the Plaintiffs if the preliminary injunction is denied versus the hardships that the School District's transgender students will suffer if a preliminary injunction is granted. If the preliminary injunction is not granted, the Plaintiffs will have to decide whether to 1) use the locker rooms and restrooms of their biological sex, knowing that a transgender student might be using those same facilities, 2) use alternate facilities provided by the School District in essence segregating themselves from the transgender students as well as other students of their own sex, or 3) avoid using any restroom, locker room or other changing facility at the high school. Meanwhile, if the preliminary injunction is granted, the transgender students will be harmed by being forced to use the locker rooms and restrooms of their biological sex and not their gender identity, or be relegated to using single-person facilities. So a transgender male student would be forced to choose between being a boy being forced to change in the girls' locker room, or be stigmatized by being one of the only students using single-user restrooms.

It can be a difficult decision for a transgender student to progress to the point of being comfortable enough with themselves and their peers to choose to use the facilities aligned with their gender identity rather than their biological sex. At BASH, these decisions are handled after discussions between the transgender students and their counselors and often their parents. To remove students' ability to use the facilities of their gender identity could cause severe emotional difficulty for these students. Indeed, Student A has requested increased emotional support

services from the School District in light of Joel Doe's complaints about his use of the boys' locker room. Therefore, it is clear that when balancing potential harms, transgender students stand to be harmed much more by imposition of a preliminary injunction than the Plaintiffs would be by maintaining the status quo.

D. The Public Interest Does Not Favor Preliminary Relief

The Plaintiffs must also prove that the public interest favors preliminary relief. *Kos Pharms., Inc.*, 369 F.3d at 708. Continuing to allow transgender students to use facilities aligned with their gender identity on a case-by-case basis would cause relatively little "harm" in the preliminary injunction sense – if any harm at all – to the District and the High School community. As noted above, other than the Plaintiffs' complaints based on personal embarrassment rather than any negative interaction with transgender students, there have been no problems with the use of restrooms and locker rooms by transgender students during the current school year. Furthermore, the availability of private bathroom and shower stalls in the locker rooms, as well as the availability of single-user restrooms, fully protects any legitimate privacy interests of the Plaintiffs and any other students. In light of the minimal burdens that would flow from allowing the District to maintain the status quo, the public interest is furthered by denial of a preliminary injunction in this case.

E. The Plaintiffs' Request to Waive the Bond Requirement Is Moot

The Federal Rules of Civil Procedure state that "[t]he court may issue a preliminary injunction . . . 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." Fed. R. Civ. P. 65(c). The Plaintiffs request that this Court waive the security requirement in this case under an alleged public interest litigation exception to Rule 65. Plf. Brf.,

pp. 45-46. The Defendants do not object to the Plaintiffs' request. However, in light of the arguments above, the Defendants believe that the issue is moot because the Plaintiffs have failed to meet the standard for this Court to impose a preliminary injunction.

IV. CONCLUSION

Based on the foregoing facts and legal argument, Defendants Boyertown Area School District, Dr. Richard Faidley, Dr. Brett Cooper, and Dr. E. Wayne Foley respectfully request that the Motion be denied.

Respectfully submitted,

Date: June 9, 2017

/s/ David W. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2017, I caused the foregoing Defendants' Memorandum In Opposition To The Motion For Preliminary Injunction to be filed using the Court's Electronic Case Filing system, and a Notice of Electronic Case Filing was served upon all counsel in accordance with Fed. R. Civ. P. 5(b).

/s/ David W. Brown
David W. Brown