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, v. BOYERTOWN AREA SCHOOL DISTRICT; DR. RICHARD FAIDLEY; DR. BRETT COOPER and DR. E. WAYNE FOLEY, Defendants.	:	No. 17-cv-1249-EGS

DEFENDANTS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW REGARDING
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Boyertown Area School District (the "District"), Dr. Richard Faidley, ("Faidley"), Dr. Brett Cooper ("Cooper"), and Dr. E. Wayne Foley ("Foley") (together "Defendants"), by and through their attorneys, Levin Legal Group, P.C., hereby submit the following proposed findings of fact and conclusions of law with regard to the Plaintiffs' Motion for Preliminary Injunction.

FINDINGS OF FACT

1. Defendant Faidley has been Superintendent of the District since August 1, 2013.

2. Defendant Cooper has been principal of Boyertown Area Senior High School ("BASH") since January 2009.

3. Defendant Foley is an Assistant Principal at BASH and is currently assigned to the senior class of 2018.

4. In May 2016, the U.S. Departments of Education and Justice issued a "Dear Colleague Letter" ("the 2016 Letter") stating that transgender students must be allowed to use the restrooms and locker rooms aligned with their gender identity.

5. Based on the 2016 Letter and communications with the School District's solicitor, since the beginning of the 2016-2017 school year, the School District has, upon request, permitted transgender students to use restrooms and locker rooms aligned with their gender identity on a case-by-case basis. This practice has not been reduced to writing.

6. In 2016, the School District reconstructed the showers in the locker rooms at the high school to remove gang showers and replace them with individual shower stalls with curtains.

7. As part of ongoing renovations, BASH has added several bathrooms for both students and staff – both multi-user and single user – for the upcoming 2017-2018 school year.

8. The boys' locker room at BASH has individual bathroom stalls and shower stalls. Joel Doe Tr., p. 202-03; Jack Jones Dep. Tr., p. 34-35.

9. The girls' locker room at BASH has individual bathroom stalls and individual shower stalls with curtains. Smith Dep. Tr., p. 48; Roe Dep. Tr., p. 40.

10. In addition to the gym locker rooms, there are "team" locker rooms near the gyms. These locker rooms have lockers, toilet stalls and showers.

11. The School District will permit the Plaintiff students and any other student who desires due to privacy concerns to use these team locker rooms.

12. There is no need for a student using the team locker rooms to walk into or through the gym locker rooms.

13. In February 2017, following the inauguration of President Trump, the U.S. Departments of Education and Justice issued another "Dear Colleague Letter" (the "2017 Letter") rescinding the guidance in the 2016 Letter.

14. The District has anti-discrimination policies and a sexual harassment policy. Those policies contain complaint procedures. The Plaintiffs never filed any internal complaints in accordance with those policies.

15. No injunction is needed in order to protect the privacy concerns of the Plaintiff students as single-user bathrooms may be used by them and alternative locker rooms are available for them.

Plaintiff Joel Doe

16. Plaintiff Joel Doe was in the 11th grade at BASH during the 2016-2017 school year.

17. During the 2016-2017 school year, Joel Doe was scheduled to attend a physical education class one day out of a six-day scheduling cycle. Joel Doe Tr., p. 68.

18. Joel Doe has never taken a shower at school, and has never seen anyone take a shower at the school. Joel Doe Tr., p. 73.

19. On October 31, 2016, Joel Doe witnessed Student A, a transgender boy, changing in the boys' locker room at BASH. According to Joel Doe, Student A was wearing shorts and a sports bra. Joel Doe Tr., p. 20-22, 117.

20. Joel Doe was partially undressed, *i.e.,* in his underpants and a shirt, and in the process of changing into his gym clothes when he noticed Student A. Joel Doe Tr., p. 25.

21. After the gym class, Joel Doe and four other boys from the same gym class went to the BASH main office to speak to an administrator to express concern about seeing a biological female in the boys' locker room. They spoke to Assistant Principal Dr. E. Wayne Foley. Joel Doe Tr., p. 34-35.

22. Joel Doe is not aware of any time that his rights were allegedly violated by the Defendants other than on October 31, 2016. Joel Doe Tr., p. 184.

23. In early November 2016, John and Jane Doe met with Cooper at BASH to discuss the locker room issue. Dr. Cooper explained the School District's practice and said that if Joel Doe was not comfortable changing in the locker room with a transgender male student, arrangements could be made for Joel to change in the nurse's office bathroom or a single-user restroom near the gym. That was not acceptable to John or Jane Doe. The only resolution that they wanted was to prohibit the transgender boy from being able to use the boys' locker room or boys' bathroom.

24. When Joel Doe was next scheduled to have gym, he refused to change for gym. Instead he went to the office and stated that he would not return to class until an administrator called his legal guardian. Joel Doe Tr., p. 58-59.

25. Joel Doe did not ask Dr. Foley or Dr. Cooper whether he could change for gym in a single-user bathroom. Joel Doe Tr., p. 102-03.

26. Joel Doe did not use the boys' locker room at BASH after October 31, 2016. Joel Doe Tr., p. 24.

27. Despite not changing for gym class, Joel Doe was permitted to participate in gym classes. Joel Doe Tr., p. 176.

28. Joel Doe is not aware of a biological girl ever using the boys' locker room with the exception of Student A on October 31, 2016. Joel Doe Tr., p. 74.

29. Joel Doe has never witnessed a biological girl in a boys' bathroom at BASH. Joel Doe Tr., p. 74.

30. Joel Doe used both the single-user and multi-user boys' bathrooms at BASH after October 31, 2016. Joel Doe Tr., p. 16.

31. Joel Doe believes that someone who is born male is always male and that someone who is born female is always female, regardless of any sex-change surgery or hormone replacement therapy. Joel Doe Tr., p. 87-88, 157-58, 168.

32. Joel Doe does not know how to determine whether any other student was born as a male or female. Joel Doe Tr., p. 88.

33. Joel Doe has not seen any doctor, psychologist, psychiatrist or therapist since encountering Student A in the locker room on October 31, 2016. Joel Doe Tr., p. 111.

34. Joel Doe admitted that he has not experienced anxiety, embarrassment or stress requiring medical care. Joel Doe Tr., p. 197.

35. Joel Doe is not aware of any threat, disturbance or disruption caused by transgender students using restrooms or locker rooms aligned with their gender identity. Joel Doe Tr., p. 123, 205.

36. Joel Doe could not identify any action by any of the Defendants that shamed or intimidated him. Joel Doe Tr., p. 196.

37. Joel Doe does not dispute that a large percentage of the BASH student body supports the school's transgender students.

38. Joel Doe testified that the School District can decide who qualifies as a boy. Joel Doe Tr., p. 228, 247-49.

39. Joel Doe never filed any internal complaint pursuant to the School District's sexual harassment policy.

40. Joe Doe and his guardians did not claim that they were subjected to sexual harassment until they filed the Complaint in court in this case.

Plaintiff Mary Smith

41. Mary Smith was in the 11th grade at BASH during the 2016-2017 school year. Smith Dep. Tr., p. 15.

42. In March 2017, Smith testified that she walked into a girls' bathroom at BASH and saw Student B, a transgender female student, washing her hands. Both Smith and Student B were fully dressed at the time. Smith then immediately ran out of the bathroom. Smith Dep. Tr., p. 17-18, 77-78.

43. Smith used the single-user restroom at the nurse's office at times during the 2016-2017 school year. Smith Dep. Tr., 111.

44. After the incident in March 2017, Smith still used girls' restrooms at BASH approximately twice per week. Smith Dep. Tr., 108.

45. Mary Smith never saw any other biological male in the girls' restrooms. She does not know if she ever saw a biological male in the girls' locker room at BASH. Smith Dep. Tr., p. 30-31.

46. Mary Smith has never taken a shower at school. She testified that she could not recall whether she has ever seen anyone shower in the girls' locker room. Smith Dep. Tr., p. 37-38, 40.

47. On March 24, 2017, Smith met with Foley and learned that transgender students were permitted to use the restrooms and locker rooms aligned with their gender identity. Smith Dep. Tr., p. 16, 27-28.

48. Smith never discussed the transgender issue with either Faidley or Cooper. Smith Dep. Tr., p. 74.

49. Smith has no objection to a lesbian who might be attracted to her using the girls' locker room. Smith Dep. Tr., p. 43.

50. Smith would like the Court in this case to "accommodate everyone," but she does not know how that can be achieved. Smith Dep. Tr., p. 45-46.

51. Smith is aware that there are single-user bathrooms for student use at BASH, and that she can utilize those restrooms. Smith Dep. Tr., p. 46, 49.

52. Smith believes that someone who is born male is always male and that someone who is born female is always female, regardless of any sex-change surgery or hormone replacement therapy. Smith Dep. Tr., p. 65-66.

53. Smith has not seen any doctor, psychologist, psychiatrist, therapist, or her school counselor since encountering Student B in the bathroom in March 2017. Smith Dep. Tr., p. 73-74.

54. Smith testified that she has never received treatment from a health-care professional for any embarrassment or humiliation she may have suffered. Smith Dep. Tr., p. 105.

55. Smith does not know whether transgender people experience clinically significant distress resulting from the disconnect between their gender identity and their biological sex at birth. Smith Dep. Tr., p. 85.

56. Smith is not aware of any threats, disturbance, or disruption caused by the School District's practice of allowing transgender students to use restrooms and locker rooms aligned with their gender identity. Smith Dep. Tr., p. 88.

Plaintiff Jack Jones

57. Plaintiff Jack Jones was in the 11th grade at BASH during the 2016-2017 school year. Jack Jones Dep. Tr., p. 14.

58. During the first week of November 2017, Jones was told by a classmate that a biological female was using the boys' locker room. Jack Jones Dep. Tr., p. 30-31.

59. A few days later, while changing in the BASH boys' locker room after gym class, a classmate alerted Jones to the presence of the biological female standing next to him. Jack Jones Dep. Tr., p. 16, 21.

60. Jones was wearing a shirt and underpants when he was alerted to the transgender student's presence. He then grabbed his belongings and moved toward a group of boys to be out of the transgender student's view. Jack Jones Dep. Tr., p. 23, 38.

61. Jones never saw the transgender student in the locker room again. Jack Jones Dep. Tr., p. 18.

62. Jones continued to change in the boys' locker room throughout the year after seeing the transgender student in the locker room. Jack Jones Dep. Tr., p. 32.

63. Jones testified that he did not see the transgender student's breasts or genitalia to try to determine whether she was a biological female. Jack Jones Dep. Tr., p. 39.

64. Jones has felt uncomfortable in the locker room since the November incident, but his comfort level has not risen enough for him to seek help from any counselor, doctor, psychologist or psychiatrist since November. Jack Jones Dep. Tr., p. 41-42.

65. Jones never saw the transgender student in a boys' bathroom. However, he visited the restroom less frequently after the locker room incident. Jack Jones Dep. Tr., p. 42-43.

66. Jones never felt sick or needed medical attention for holding in his urine. Jack Jones Dep. Tr., p. 43.

67. Jones was aware that there was a single-user restroom in the BASH nurse's office but does not know if students are allowed to use it in non-emergency situations. Jack Jones Dep. Tr., p. 44-45.

68. Jones was unaware that there is a single-user restroom for student use near the gym. Jack Jones Dep. Tr., p. 45.

69. Jones admitted that some beachwear is more revealing than underwear, but that has not stopped him from going to beaches or pools. Jack Jones Dep. Tr., p. 46.

70. Jones does not shower after gym class and has never seen any other student do so. Jack Jones Dep. Tr., p. 47.

71. Jones believes that someone who is born male is always male and that someone who is born female is always female, regardless of any sex-change surgery or hormone replacement therapy. Jack Jones Dep. Tr., p. 49-50, 83.

72. Jones does not know which bathroom a person with a vagina and breasts but male chromosomes should use. Jack Jones Dep. Tr., p. 52.

73. Jones never asked anyone at the School District whether he could change for gym elsewhere. But even if he could, he feels this would not solve the issue. Jack Jones Dep. Tr., p. 60-61.

74. Jones never discussed any issue regarding transgender students with Faidley, Cooper or Foley. Jack Jones Dep. Tr., p. 62-63.

75. Jones does not know what the School District has to do to verify the gender of a student as identified on that person's birth certificate. Jack Jones Dep. Tr., p. 64.

76. Jones admitted there could be situations in which a transgender male student uses a restroom or locker room but he would not know because he would have no way to verify the person's sex. Jack Jones Dep. Tr., p. 79-80.

77. Jones acknowledged that he could have changed his clothes in an individual bathroom stall. Jack Jones Dep. Tr., p. 90.

78. Jones is not aware of any threat, disturbance, or disruption of school activities caused by transgender students' use of the bathrooms or locker rooms aligned with their gender identity, other than his seeing a transgender student in the boys' locker room. Jack Jones Dep. Tr., p. 96.

79. Jones does not know whether prohibiting transgender students from using bathrooms and locker rooms aligned with their gender identity will cause distress, anxiety, discomfort and humiliation. Jack Jones Dep. Tr., p. 101.

80. Jones testified that his alleged irreparable harm in this case was having to "be the guy who has to go and say that there was a girl in the locker room." Jack Jones Dep. Tr., p. 125.

Plaintiff Macy Roe

81. Plaintiff Macy Roe was in 12th grade at BASH during the 2016-2017 school year, and graduated in June 2017. Roe Dep. Tr., p. 10.

82. Roe does not know if she has ever seen a transgender student in a girls' bathroom or locker room. Roe Dep. Tr., p. 20, 39, 49.

83. Roe did not shower at BASH during the 2016-2017 school year and did not see any other girl shower. Roe Dep. Tr., p. 40.

84. Roe does not know whether any transgender student showers at BASH. Roe Dep. Tr., p. 44.

85. Roe testified that swimwear is sometimes more revealing than underwear. However, it does not bother Roe for men and boys to see her in a bikini at a public pool or beach. Roe Dep. Tr., p. 42.

86. Roe never discussed any issue regarding transgender students with Faidley, Cooper, Foley, administrators or teachers. Roe Dep. Tr., p. 52-54, 61.

87. Roe does not know what bathroom someone should use if the person has the internal reproductive organs of one sex and the external reproductive organs of the opposite sex. Roe Dep. Tr., p. 56.

88. Roe has not received any medical attention, therapy, or counseling as a result of the district allowing transgender students to use the facilities aligned with their gender identity. Roe Dep. Tr., p. 60.

Expert Testimony of Dr. Scott Leibowitz

89. Dr. Scott Leibowitz has been retained as an expert witness by the intervenor, Pennsylvania Youth Congress. Expert Declaration of Dr. Scott Leibowitz, p. 1.

90. Dr. Leibowitz has specialized training and expertise in the diagnosis and treatment of children and adolescents with gender dysphoria and related psychiatric conditions. *Id.*, p. 2.

91. Transgender individuals are those who gender identity – or sense of self – is incongruent with the gender associated with their assigned sex at birth as determined by external genitalia. There are an estimated 1.4 million American adults who identify as transgender. *Id.*, p. 3.

92. Gender dysphoria is the clinical diagnostic classification used when an individual has clinically significant distress that results from a lack of alignment between an individual's gender identity and their assigned sex at birth that characterizes a transgender identity or experience. *Id.*, p. 4.

93. Clinical interventions for appropriately assessed children and adolescents with gender dysphoria include social gender transition and potentially

physical interventions in older and more mature youth, such as puberty blockers, hormone therapy, and sometimes surgery. *Id.*, p. 6.

94. Social gender transition refers to steps that one takes to present themselves as the gender with which they most identify. It typically includes the adoption of a different name, use of a different pronoun set, wearing clothes and hairstyles typically associated with their experiences gender identity, and using sex-segregated space and engaging in sex-segregated activities that correspond with their gender identity. *Id.*, p. 6.

95. Social gender transition can help to alleviate gender dysphoria and is a useful and important tool use by clinicians to ascertain whether, and the extent to which, living in the affirmed gender improves the psychological and emotional functioning of the individual. *Id.*, p. 7.

96. Policies that restrict the ability of individuals to use restrooms and other sex-segregated facilities consistent with their gender identity (*e.g.*, locker rooms) directly interfere with the ability of medical professionals to develop and implement clinically appropriate treatments for gender dysphoria. *Id.*, p. 8.

97. Forcing a transgender youth to use a separate single-user restroom can undermine the benefits of their social gender transition by sending the message that they are not really who they identify as. And it is stigmatizing for the individuals required to use them by reinforcing an inappropriate sense of "otherness." *Id.*, p. 9.

98. The risks associated with no being able to use all of the clinically appropriate tools to manage gender dysphoria are particularly grave. Gender dysphoria, if not addressed, places children at greater risk for mental health problems, including suicide. *Id.*, p. 10.

99. The major professional medical organizations have come out against policies that bar transgender people from accessing restrooms and other sex-segregated facilities that correspond to their gender identity. Such policies are harmful to the healthy psychological and emotional functioning of transgender youth, and these negative consequences can have ramifications through adulthood. *Id.*, p. 10.

CONCLUSIONS OF LAW

1. 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." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). A plaintiff seeking an injunction must meet all four criteria, as "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999).

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).

2. The Plaintiffs cannot establish that their right to relief is clear. Indeed, on the facts of this case, and based on a consideration of all of the current law respecting the rights of transgender students to use the bathrooms and locker rooms that are consistent with their gender identities, the law currently favors the Defendants' position in this case. *See, e.g.*, *Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, 2017 WL 770619, at *17 (W.D. Pa. Feb. 27, 2017) (granting injunction based on Plaintiff transgender students' likelihood of success); *Whitaker v. Kenosha Unified School Dist. No. 1 Board of Educ.*, 2017 WL 2331751 (7th Cir. May 30, 2017) (holding that the statutory text of Title IX, as interpreted by the Supreme Court, protects transgender students from discrimination.); *see also Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 879 (S.D. Ohio 2016) (granting transgender student's motion for preliminary injunction and denying Plaintiff's motion).

3. The United States Constitution does not mention an explicit right to privacy, and the United States Supreme Court has never proclaimed that a

generalized right to privacy 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)).

4. 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).

5. The first privacy interest – an interest in avoiding disclosure of personal matters – is at issue in this matter. The Plaintiffs have claimed 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 admit that alternate bathroom and

changing facilities offered by the Defendants would provide them with complete privacy.

6. 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.

7. 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, private bathroom stalls or single-user bathrooms – for both individuals to protect themselves from such contact, embarrassment, or discomfort. Similarly, no cases address the right of someone to be in a state of undress with others of their same biological sex.

8. Courts are very careful in extending constitutional protection in the area of personal privacy. "Although the Supreme Court has recognized fundamental rights regarding 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 to 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.

9. 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). 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). 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.).

10. 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.

11. Furthermore, the Plaintiffs likelihood of success on the merits is diminished because the Plaintiffs have failed to join required parties by not joining all transgender students who will attend BASH during the 2017-2018 school year. The Federal Rules of Civil Procedure state:

> "Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

Fed. R. Civ. P. 19(a)(1).

12. In this case, the transgender students have an interest in the outcome of the litigation. If a judgment were issued in favor of the Plaintiffs, the transgender students' rights to access restrooms and locker rooms aligned with their gender identity would be compromised. Accordingly, the Defendants would be at a substantial risk of incurring double obligations because it would have to choose between violating the rights of the successful Plaintiffs or violating the rights of the transgender students. Accordingly, the Court must order that the transgender students be made parties or "determine whether, in equity and good

conscience, the action should proceed among the existing parties or should be dismissed." *See* Fed.R. Civ. P. 19(a).

13. Public policy supports allowing transgender students to use restrooms and locker rooms aligned with their gender identities. 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. 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. And the vast majority of BASH students have shared these facilities with Student A and Student B without incident or complaint. Cooper Decl., ¶ 16.

14. 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).

15. 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. And some of the Plaintiffs in this case admit that they do not know how the District should do so.

16. 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. 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.

17. 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). Plaintiff Joel Doe alleges to having seen a transgender male student in the boys' locker room wearing a sports bra on one occasion. 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 while both were fully clothed. 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.

18. 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 transgender student in a state of complete undress nor that they have been witnessed completely undressed. Furthermore it has not 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.

19. 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.

20. 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.[1] Plaintiffs rely on City of Phila. v.

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[1] *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

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 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.

21. 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

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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).

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.

22. The allegations in Amended Complaint 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.

23. 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.[2] 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 other things transgender status, gender nonconformity, sex stereotyping, and sexual orientation.[3] Accordingly,

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[2] *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).

[3] *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); *EEOC 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.

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.

24. Issuance of the 2017 Letter does not favor Plaintiffs' arguments. 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 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

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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).

establishing educational policy." 2017 Letter, p. 1 (emphasis added). Accordingly, the 2017 Letter does not support the Plaintiffs' request for a preliminary injunction.

25. 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 may be exposed to the opposite sex or where these students will use privacy facilities with someone of the opposite sex. However, 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.

26. Preliminary relief would result in greater harm to transgender students. 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 to segregate 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. 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. 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 Plaintiffs and the High School community. Other than the Plaintiffs' complaints based on personal embarrassment rather than any negative interaction with transgender students, there were no problems with the use of restrooms and locker rooms by transgender students during the 2016-2017 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. Meanwhile the potential psychological damage to the transgender students, as outlined by Dr. Leibowitz in his declaration, is significant. 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. To remove students' ability to use the facilities of their gender identity could cause severe emotional difficulty for these students. 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.

27. Transgender people may have "gender dysphoria." *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 376 (N.J. App. Div. 2001). "Gender dysphoria" can be a disability as defined in the Americans with Disabilities Act. *Blatt v. Cabela's Retail, Inc.*, 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017). A student with gender dysphoria that qualifies as a disability, would be entitled to accommodations under such laws as the Individuals with Disabilities Act ("IDEA"), the American with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act ("Section 504), and the Pennsylvania Human Relations Act ("PHRA"). Under the IDEA and Section 504, and their implementing regulations, a team of educators must convene to determine what accommodations are required. The requested injunction, if granted, has significant likelihood that it will interfere with the processes established at law for responding to requested accommodations by students who may be entitled to such accommodations under a variety of law.

28. Accordingly, the balancing of interests favor allowing the School District to continue to allow transgender students to use facilities aligned with their gender identities.

29. The Plaintiffs have not met their burden for the issuance of a preliminary injunction.

Respectfully submitted,

Date: July 14, 2017

/s/ David W. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2017, I caused the foregoing Defendants' Findings of Fact and Conclusions of Law Regarding Plaintiffs' 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