No.

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer* v. *Robbins*, 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent—who was born a girl but identifies as a boy—to use the boys' restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

PARTIES TO THE PROCEEDING

Petitioner Gloucester County School Board was Defendant-Appellee in the court of appeals in No. 15-2056, and Defendant-Appellant in the court of appeals in No. 16-1733.

Respondent G.G., by his next friend and mother, Deirdre Grimm, was Plaintiff-Appellant in the court of appeals in No. 15-2056 and Plaintiff-Appellee in the court of appeals in No. 16-1733.

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INTRODUCTION

As petitioner Gloucester County School Board (the Board) pointed out in the stay application that the Court granted on August 3, 2016, this case presents an extreme example of judicial deference to an administrative agency's purported interpretation of its own regulation. For that and several other reasons, this case provides the perfect vehicle for revisiting the deference doctrine articulated in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and subsequently criticized by several Justices of this Court.

The statute at the heart of the administrative interpretation here is Title IX of the Education Amendments of 1972. Enacted over forty years ago, Title IX and its implementing regulation have always allowed schools to provide "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. No one ever thought this was discriminatory or illegal. And for decades our Nation's schools have structured their facilities and programs around the idea that in certain intimate settings men and women may be separated "to afford members of each sex privacy from the other sex." *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996).

The Fourth Circuit's decision turns that longstanding expectation upside down. Deferring to the views of a relatively low-level official in the Department of Education (Department), the court reasoned that for purposes of Title IX the term "sex" does not simply mean physiological males and females, which is what Congress and the Department (and everyone else) thought the term meant when the regulation was promulgated. Instead, the Department and the Fourth Circuit now tell us that "sex" is ambiguous as applied to persons whose subjective gen-

der identity diverges from their physiological sex. App. 17a–20a. According to the Fourth Circuit, this means a physiologically female student who self-identifies as a male—as does the plaintiff here—must be allowed under Title IX to use the boys' restroom.

The Fourth Circuit reached this conclusion, not by interpreting the text of Title IX or its implementing regulation (neither of which refers to gender identity), but by deferring to an agency opinion letter written just last year by James Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights. App. 121a. The letter is unpublished; its advice has never been subject to notice and comment; and it was generated in direct response to an inquiry about the Board's restroom policy *in this very case*. Nonetheless, the Fourth Circuit concluded—over Judge Niemeyer's dissent—that the letter was due "controlling" deference under *Auer*. App. 25a. On that basis, the district court immediately entered a preliminary injunction allowing the plaintiff to use the boys' restroom.

Shortly after the Fourth Circuit's decision, the Department (along with the Department of Justice) issued a "Dear Colleague" letter seeking to impose that same requirement on every Title IX-covered educational institution in the Nation. But just last week, the Departments' effort was halted by a nationwide injunction issued by a federal district judge in Texas.

These recent developments highlight the urgent need for this Court to grant this petition and resolve the is-

sues presented by the Fourth Circuit's decision. As explained in more detail below, the Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering—and abolishing or refining—the *Auer* doctrine. Second, if the Court decides to retain *Auer* in some form, this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX reflected in the Ferg-Cadima and "Dear Colleague" letters must be given effect—thereby resolving once and for all the current nationwide controversy generated by these directives.

OPINIONS BELOW

This petition seeks review of two related cases in the court of appeals, Nos. 15-2056 and 16-1733. No. 15-2056 is G.G's appeal of the district court's order denying his request for a preliminary injunction. The opinion of the court of appeals in that case is available at 822 F.3d 709 (4th Cir. 2016). App. 1a–60a. The district court's opinion in that case is available at 132 F.Supp.3d 736 (E.D. Va. 2015). App. 84a–117a.

No. 16-1733 is the Board's appeal of the district court's order granting a preliminary injunction after the remand in No. 15-2056. The district court's opinion in that case is available at 2016 U.S. Dist. LEXIS 93164. App. 71a–72a.

JURISDICTION

In No. 15-2056, the court of appeals entered its judgment on April 19, 2016. App. 3a. It denied the Board's petition for rehearing en banc on May 31, 2016. App. 61a. No. 16-1733 remains pending in the court of appeals. The Board timely filed this petition for a writ of certiorari on August 29, 2016. See 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a).

34 C.F.R. § 106.33 provides:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

STATEMENT

A. Facts

G.G. is a 17-year-old student at Gloucester High School. G.G. is biologically female, meaning that G.G. was born a girl and recorded as a girl on the birth certificate. "However, at a very young age, G.G. did not feel like a girl," and around age twelve began identifying as a boy. App. 85a. In July 2014, between G.G.'s freshman and sophomore years, G.G. changed his first name to a boy's name and began referring to himself with male pronouns.[1] He has also started hormone therapy, but has not had a sex-change operation.

In August 2014, before the start of G.G.'s sophomore year, G.G. and his mother met with the principal and guidance counselor to discuss G.G.'s situation. The school officials were supportive of G.G. and promised a welcoming environment. School records were changed to reflect G.G.'s new name, and the guidance counselor helped G.G. e-mail his teachers asking them to address G.G. using his male name and male pronouns. App. 87a–88a. As G.G. admits, teachers and staff have honored these requests. *Id.* at 148a.

Neither G.G. nor school officials, however, thought that G.G. should start using the boys' restrooms, locker

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[1] This petition uses "he," "him," and "his" to respect G.G.'s desire to be referred to with male pronouns. That choice does not concede anything on the legal question of what G.G.'s "sex" is for purposes of Title IX and its implementing regulation.

rooms, or shower facilities. Instead, G.G. and his mother suggested G.G. use a separate restroom in the nurse's office rather than the boys' room, and the school agreed. App. 149a. G.G. claims he accepted this arrangement because he was "unsure how other students would react to [his] transition." *Id.* But four weeks into the school year G.G. changed his mind and sought permission to use the boys' restroom. The principal granted G.G.'s request on October 20, 2014. G.G. says he asked for access to the boys' restroom because he found it "stigmatizing" to use the restroom in the nurse's office. *Id.*

Immediately after G.G. started using the boys' restrooms, the Board began receiving complaints from parents and students who regarded G.G.'s presence in the boys' room as an invasion of student privacy. App. 144a. Parents also expressed general concerns that allowing students into restrooms and locker rooms of the opposite biological sex could enable voyeurism or sexual assault. The Board held public meetings on November 11 and December 9, 2014, to consider the issue, and citizens on both sides expressed their views in thoughtful and respectful terms.[2] At the December 9 meeting, the Board

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[2] The Fourth Circuit's opinion tries to depict the citizens who opposed G.G's presence in the boys' room as largely "hostil[e]" to G.G., selectively quoting the few intemperate statements and subtly implying they represented the whole. App. 10a. The video of the meetings, however, shows that the overwhelming majority of those expressing concern did so with courtesy and decency, not "hostility." *See* http://bit.ly/2bsVO6h (Dec. 9, 2014 meeting); http://www.gloucesterva.info/channels47and48 (containing link to Nov. 11, 2014 meeting video).

adopted a resolution recognizing "that some students question their gender identities," and encouraging "such students to seek support, advice, and guidance from parents, professionals and other trusted adults." The resolution then concluded:

> Whereas the [Board] seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the [Board] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. at 144a.

Before the Board adopted this resolution, the high school announced it would install three single-stall unisex bathrooms throughout the building—regardless of whether the Board approved the December 9 resolution. These unisex restrooms would be open to *all* students who, for whatever reason, desire greater privacy. They opened for use shortly after the Board adopted the resolution. G.G., however, refuses to use these unisex bathrooms because, he says, they "make me feel even more stigmatized and isolated than when I use the restroom in the nurse's office." App. 151a.

A few days after the Board's decision, a lawyer named Emily T. Prince[3] sent an e-mail about the Board's resolution to the Department, asking whether it had any "guidance or rules" relevant to the Board's decision. App. 118a–120a. In response, on January 7, 2015, James A. Ferg-Cadima, an Acting Deputy Assistant Secretary for Policy in the Department's Office of Civil Rights sent a letter stating that "Title IX . . . prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity*," and further opining that:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms locker rooms, shower facilities, housing, athletic teams, and single-sex classes *under certain circumstances*. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.

App. 121a, 123a (emphasis added).

The Ferg-Cadima letter cites no document requiring schools to treat transgender students "consistent with their gender identity" regarding restroom, locker room, or shower access. It instead cites a Q&A sheet on the

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[3] Ms. Prince describes herself as the "Sworn Knight of the Transsexual Empire." *See* https://twitter.com/emily_esque?lang=en. Her name appears in the signature of the e-mail that DOJ filed in the district court, when the file is opened in Preview for Mac.

Department website, which says only that schools must treat transgender students consistent with their gender identity *when holding single-sex classes*. See United States Department of Education, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), http://bit.ly/1HRS6yI (emphasis added) (last visited Aug. 29, 2016) (Q&A #31) (opining "[h]ow . . . the Title IX requirements *on single-sex classes* apply to transgender students) (emphasis added).

B. District Court Proceedings

G.G. filed suit against the Board on June 11, 2015—two days after the end of the 2014–15 school year. His complaint alleged that the Board's resolution violated Title IX and the Equal Protection Clause, and sought declaratory and injunctive relief, damages, and attorneys fees.

On June 29, 2015, the Department of Justice ("DOJ") filed a "statement of interest" accusing the Board of violating Title IX. See App. 160a–183a. The statement did not even cite 34 C.F.R. § 106.33, let alone explain how the Board's policy could be unlawful under the regulation's text. Instead, DOJ trumpeted the Ferg-Cadima letter as the "controlling" interpretation of Title IX and the regulation, even though DOJ acknowledged that the letter had never been "publicly issued." See *id.* at 171.[4] DOJ

[4] DOJ cited two other documents issued by the Department of Education, but neither addresses whether schools must allow transgender students into restrooms or locker rooms that corre-
(continued…)

also asserted that "an individual's gender identity is one aspect of an individual's sex," *id.* at 169a, but failed to cite any statute or regulation adopting or supporting that view.

Without ruling on G.G.'s equal-protection claim, the district court dismissed G.G.'s Title IX claim and denied a preliminary injunction. See App. 82a–83a (order); 84a–117a (opinion). It held that G.G.'s Title IX claim was foreclosed by 34 C.F.R. § 106.33, the regulation allowing comparable separate restrooms and other facilities "on the basis of sex." App. 97a–98a.

The district court assumed, for the sake of argument, that the phrase "on the basis of sex" includes distinctions based on *both* gender identity as well as biological sex. App. 99a, 102a. Yet even under this broad reading of "sex," it would remain permissible under section 106.33 to separate restrooms by biological sex *or* gender identity. Consequently, as the district court pointed out, section 106.33 would forbid the Board's policy only if "sex" refers *solely* to distinctions based on gender identity, and excludes those based on biological sex. *Id.* at 99a. The district court held that this would be an absurd construction, however. Indeed, if applied to the Title IX *statute*, it would permit discrimination against men or women, so long as the recipient discriminates on account of gender identity rather than biological sex. *Id.* at 102a.

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spond with their gender identity. See ECF No. 28 at 9; see also, *supra*, at 7–8.

Consequently, the district court refused to give controlling weight to the interpretation of Title IX and 34 C.F.R. § 106.33 in the Ferg-Cadima letter. First, the district court observed that letters of this sort lack the force of law under *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), and cannot receive *Chevron* deference when interpreting Title IX. App. 101a. The Court also held that the letter should not receive deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), because it contradicts the unambiguous language of 34 C.F.R. § 106.33, which allows schools to establish separate restrooms "on the basis of sex"—even if one assumes that "on the basis of sex" refers to *both* gender identity *and* biological sex. Thus, the district court regarded the Ferg-Cadima letter as an attempted amendment to, rather than an interpretation of, 34 C.F.R. § 106.33, and held that to be binding any such amendment must go through notice-and-comment rulemaking. App. 102a–103a.

C. Appeal to the Fourth Circuit in No. 15-2056

Over Judge Niemeyer's dissent, the Fourth Circuit reversed the district court's dismissal of G.G.'s Title IX claim, and held that the district court should have enforced the Ferg-Cadima letter as the authoritative construction of Title IX and 34 C.F.R. § 106.33 under *Auer*. App. 13a–25a.

First, the panel held that section 106.33 was "ambiguous" as applied to "whether a transgender individual is a male or a female for the purpose of access to sex-segregated restrooms," and that the Ferg-Cadima letter

"resolve[d]" this ambiguity by determining sex solely by reference to "gender identity." *Id.* at 19a, 18a.

Second, the panel held that the letter's interpretation—"although perhaps not the intuitive one," *id.* at 23a—was not, in the words of *Auer*, "plainly erroneous or inconsistent with the regulation or the statute." *Id.* at 20a. In the panel's view, the term "sex" does not necessarily suggest "a hard-and-fast binary division [of males and females] on the basis of reproductive organs." *Id.* at 22a.

Third, the panel found that the letter's interpretation was a result of the agency's "fair and considered judgment," because the agency had consistently enforced this position "since 2014"—that is, for the previous several *months*—and it was "in line with" other federal agency guidance. *Id.* at 24a. While conceding that the Ferg-Cadima interpretation was "novel," given that "there was no interpretation of how section 106.33 applied to transgender individuals before January 2015," the panel nonetheless thought this novelty was no reason to deny *Auer* deference. *Id.* at 23a.

The panel, however, did not address the district court's reason for rejecting the agency interpretation—namely, that it would make the phrase "on the basis of sex" *exclude* biological sex and refer *only* to gender identity, a construction that would absurdly mean that Title IX no longer protects men or women from discrimination on the basis of biological sex. App. 99a, 102a. Nor did the panel acknowledge that the agency was expressly interpreting the Title IX *statute*, not merely the regula-

tion. See App. 121a (stating that "*Title IX* . . . prohibits [funding] recipients . . . from discriminating on the basis of sex, *including gender identity* . . . .") (emphases added). The panel thus did not address the district court's conclusion that giving the letter controlling deference would permit agencies to "avoid the process of formal rulemaking by announcing regulations through simple question and answer publications." App. 103a

Judge Niemeyer dissented from the panel's decision to give controlling effect to the Ferg-Cadima letter, for many of the reasons given by the district court. App. 40a–60a. Judge Niemeyer explained that the premise for applying *Auer* was absent, because "Title IX and its implementing regulations are not ambiguous" in allowing separate restrooms and other facilities on the basis of "sex." *Id.* at 43a. To the contrary, those provisions "employ[ ] the term 'sex' as was generally understood at the time of enactment," as referring to "the physiological distinctions between males and females, particularly with respect to their reproductive functions." *Id.* at 53a–55a. He also explained that the DOJ's conflation of "sex" in Title IX with "gender identity" would produce "unworkable and illogical result[s]," undermining the privacy and safety concerns that motivated the allowance of sex-separated facilities in the first place. *Id.* at 42a–43a.

Judge Niemeyer also noted that the Fourth Circuit's endorsement of the Ferg-Cadima letter will require schools to allow students with gender-identity issues not only into the restrooms but also into the locker rooms and showers reserved for the opposite biological sex. In Judge Niemeyer's view, this would violate other stu-

dents' "legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex." *Id.* at 50a.

The Board moved for rehearing en banc, which the panel denied on May 31, 2016. *Id.* at 61a–66a. Judge Niemeyer dissented but declined to call for an en banc poll, stating that "the momentous nature of the issue deserves an open road to the Supreme Court." *Id.* at 65a. The Board then asked for a stay of the Fourth Circuit's mandate pending the filing of a certiorari petition. This, too, was denied, again over Judge Niemeyer's dissent. *Id.* at 67a–70a. The mandate in No. 15-2056 issued on June 17, 2016.

D. The "Dear Colleague" Letter Of May 13, 2016

After the Fourth Circuit's ruling, two federal officials, the Department's Catherine E. Lhamon and DOJ's Vanita Gupta, quickly issued a "Dear Colleague" letter to every Title IX recipient in the country. *Id.* at 126a–142a. This document expands on the Ferg-Cadima letter by imposing detailed requirements on how schools must accommodate students with gender-identity issues, including the following edicts:

- Every student claiming to be transgender must be allowed to access restrooms, locker rooms, shower facilities, and athletic teams consistent with his or her gender identity. The Ferg-Cadima letter had hedged this requirement by including the word "generally." App.

123a. The "Dear Colleague" letter removes the hedge and allows for no exceptions. *Id.* at 134a.

- A school must allow a student access to the restrooms, locker rooms, and showers of the opposite biological sex after the "student *or* the student's parent or guardian, as appropriate" merely notifies the school that the student will *assert* a gender identity different from his or her biological sex. App. 130a (emphasis added). No medical or psychological diagnosis or evidence of professional treatment need be provided. *Id.*

- Non-transgender students who are unwilling to use restrooms, locker rooms, or showers at the same time as a classmate of the opposite biological sex may be relegated to a separate, individual-user facility. App. 134a. But a school cannot require the transgender student to use that separate, individual-user facility, no matter how many non-transgender students object to the presence of a student of the opposite biological sex in restrooms, locker rooms, or showers. *Id.*

The letter went out on May 13, 2016, only 24 days after the Fourth Circuit's decision. Needless to say, it did not go through notice-and-comment rulemaking.

The Dear Colleague letter has been challenged by over twenty States in two federal lawsuits. See *Texas* v. *United States of America*, No. 7:16-cv-00054 (N.D. Tex.

May 25, 2016); *Nebraska* v. *United States of America*, No. 4:16-cv-03117 (D. Neb. July 8, 2016). On August 21, 2016, a federal district court in Texas issued a nationwide preliminary injunction against enforcement of the regulatory interpretation contained in the Dear Colleague letter and in similar guidance documents. See *Texas, supra*, ECF No. 58; Pet. App. 183a–229a.

E. The Proceedings After Remand, Including No. 16-1733

Meanwhile, on remand from the Fourth Circuit, the district court promptly entered a preliminary injunction without giving the Board any notice or opportunity to submit additional briefing or evidence. App. 71–72a. The injunction orders the Board to permit G.G. to use the boys' restroom at Gloucester High School "until further order of this Court." *Id.* at 72a. It does not enjoin the Board from enforcing its policy with respect to locker rooms and showers — even though the Ferg-Cadima letter, which the Fourth Circuit endorsed as "controlling" authority, generally requires schools to allow transgender students to access locker rooms, shower facilities, housing, and athletic teams that accord with their gender identity. App. 123a.

The Board appealed this preliminary-injunction order, which created a second case in the Fourth Circuit, No. 16-1733. The district court denied the Board's request to stay its injunction pending appeal. App. 73a–75a. The Board's request that the Fourth Circuit stay the injunction pending appeal was also denied, again over Judge Niemeyer's dissent. App. 76a–81a.

Finally, the Board asked this Court to recall and stay the Fourth Circuit's mandate in No. 15-2056, and to stay the district court's preliminary injunction, pending this certiorari petition. This Court granted the Board's request on August 3, 2016. *Gloucester Cnty. Sch. Bd.* v. *G.G.*, 136 S. Ct. 2442 (2016) (per curiam). In this combined petition, the Board seeks a writ of certiorari as to No. 15-2056, and a writ of certiorari before judgment at to No. 16-1733. See S. Ct. R. 12.4.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering—and abolishing or refining—the doctrine of *Auer* deference that has recently been questioned by several Justices. Second, if the Court decides to retain *Auer*, this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX and section 106.33—an understanding it has recently sought to impose upon educational institutions throughout the Nation—is controlling.

I. THE COURT SHOULD GRANT CERTIORARI TO RECONSIDER THE DOCTRINE OF *AUER* DEFERENCE.

As to the first reason: The Fourth Circuit did not even attempt to show that the Ferg-Cadima letter reflects the most plausible construction of 34 C.F.R. § 106.33. Instead, its ruling hinged entirely on *Auer* deference—a doctrine that requires courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation omitted); see also *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945). Several members of this Court have expressed interest in revisiting the doctrine of *Auer* defer-

ence, which gives agencies enormous power over policy issues of interest across the political spectrum.[5] This case presents an ideal vehicle for doing so, because the issue is fully preserved and because the Fourth Circuit discussed the *Auer* framework extensively and regarded it as outcome-determinative. App. 15a–24a.[6]

The problems with *Auer* deference have been well rehearsed. See, *e.g.*, *Decker*, 133 S. Ct. at 1339–42 (Scalia, J., concurring in part and dissenting in part); *Perez*, 135 S. Ct. at 1213–25 (Thomas, J., concurring in the judgment); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 4–12 (1996). Four of the most important reasons for this Court to abandon or limit the scope of the *Auer*-deference regime are as follows:

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[5] See, *e.g.*, *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., concurring in part and dissenting in part); *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

[6] By contrast, in *Foster* v. *Vilsack*, 820 F.3d 330 (8th Cir. 2016) (petition for certiorari pending), the Eighth Circuit's opinion does not cite or discuss *Auer* or any *Auer*-related rulings from this Court. It simply declares, without analysis, that the agency's "reasonable interpretation" is "owe[d] deference." *Id.* at 335.

First, as this case illustrates, *Auer* deference effectively gives an agency the power to invade the province of both Congress and the courts in determining federal law on all kinds of issues of interest to all kinds of constituencies. See, *e.g., Decker*, 133 S. Ct. at 1342 (Scalia, J., dissenting) (*Auer* "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation."); *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment) (*Auer* is an unconstitutional "transfer of judicial power to the Executive branch," and "an erosion of the judicial obligation to serve as a 'check' on the political branches."); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment) (noting that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect").

Here, in purporting to interpret section 106.33, the Department effectively changed the meaning of the *statutory* term "sex" in Title IX. To be sure, it did so in a manner that furthered the views of the present Administration. But that same strategy could easily be adopted by a future administration with radically different views. Indeed, it could be deployed to effectively amend in a different direction, and without any meaningful judicial review, not only Title IX, but also other federal statutes dealing with matters such as health care, the environment, labor relations, and financial-services regulation. For those reasons, the type of *Auer* deference applied by the Fourth Circuit here raises serious separation-of-powers problems. See, *e.g.,* Manning, *supra,* at 631–54.

Second, the *Auer* doctrine is poorly formulated. It instructs courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous *or* inconsistent with the regulation." *Auer*, 519 U.S. at 461 (emphasis added). But that disjunctive formulation leaves substantial ambiguity: The phrase "inconsistent with the regulation" implies *de novo* rather than deferential review. And it is not apparent how the "plainly erroneous" prong of the *Auer* deference test will ever do any work: Every "plainly erroneous" interpretation of a regulation will also be "inconsistent with the regulation," and the disjunctive "or" means that a litigant challenging the interpretation need only show that the agency's interpretation fails under the less deferential half of this test. This petition presents a prime opportunity for the Court to resolve this ambiguity—even if a majority of the Court wishes to retain some form of *Auer* deference.

The third problem for the *Auer* doctrine is the text of the Administrative Procedure Act, which plainly states that:

> *[T]he reviewing court shall decide* all relevant questions of law, interpret constitutional and statutory provisions, and *determine the meaning or applicability of the terms of an agency action.*

5 U.S.C. § 706 (emphases added). How can this statutory command be reconciled with a regime that requires the judiciary to *defer* to an agency's interpretation of its regulations, rather than "determine the meaning" of

those agency rules for itself? No one thinks the APA's command to "interpret constitutional . . . provisions" requires courts to defer to an agency's beliefs on what the Constitution means. So why do matters suddenly become different when an agency purports to "determine the meaning" of one of its rules?

To be sure, some APA provisions require courts to defer to some forms of agency decisionmaking, but those provisions do so in unmistakable language. See, *e.g.*, 5 U.S.C. § 706(2)(E) (authorizing courts to set aside agency factfinding only when "unsupported by substantial evidence"); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) (holding that section 706(2)(E) requires deferential judicial review of agency factfinding). In contrast to those provisions, the APA's straightforward instruction that courts "decide all relevant questions of law" and "determine the meaning . . . of an agency action" leaves the *Auer* doctrine in a precarious position. The APA tells the *courts* to "determine the meaning" of an agency's rules, but *Auer* tells the *agency* to "determine the meaning" of its rules so long as it stays within the boundaries of reasonableness.

The opinion in *Seminole Rock* said nothing about how its ostensible deference regime might be reconciled with the text of the APA, see 325 U.S. 410, but it had good reason for that omission: the APA had not been enacted yet. So the *Seminole Rock* Court can be forgiven for failing to explain how its deference concept can co-exist with section 706 of the APA. It is harder to justify the post-*Seminole Rock* decisions that reflexively followed this pre-APA decision without acknowledging the intervening

statute or attempting to explain how *Seminole Rock* could survive the APA.[7]

Nor can *Auer* be defended on the ground that *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), likewise ignored section 706 of the APA. This Court eventually supplied a rationale for *Chevron* that comports with the APA: Influenced heavily by Justice Breyer's scholarship,[8] the Court held in *United States* v. *Mead Corp.* that *Chevron* can apply only when Congress affirmatively intends to delegate interpretive or gap-filling authority to an agency. See 533 U.S. 218, 229–34 (2001). After *Mead*, a court that applies *Chevron* is not "deferring" to an agency's interpretation of a statute. Rather, it is interpreting the statute *de novo*, and asking whether Congress intended to authorize the agency to act within certain statutory boundaries. If the answer is "yes," the statute *means* that the agency gets to decide and that reviewing courts must respect the agency's decision. *Mead* enables *Chevron* to co-exist with

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[7] See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16–17 (1965); *Thorpe* v. *Hous. Auth. of City of Durham*, 393 U.S. 268, 276 (1969).

[8] See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986); *id.* at 373 (criticizing notion that *Chevron* should apply to all agency interpretations of law as "seriously overbroad, counterproductive and sometimes senseless."); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006) (explaining how Justice Breyer's views influenced this Court's rulings in *Christensen*, *Mead* and *Barnhart* v. *Walton*, 535 U.S. 212 (2002)).

section 706 of the APA. No such rationale has ever been provided for *Auer*.

This leads to the fourth problem with *Auer* deference: It cannot be sustained in its current form after this Court's decisions in *Christensen*, *Mead*, and *Barnhart* v. *Walton*, 535 U.S. 212 (2002). In pre-*Mead* days, when the *Chevron* framework established a blanket presumption that agencies rather than courts would fill gaps and resolve ambiguities in statutory language, *Auer* deference could be defended as *Chevron*'s logical corollary. If an agency's interpretive rules or informal correspondence would receive *Chevron* deference when courts interpret federal statutes, it was reasonable to accord those documents equal weight when interpreting agency regulations—which, after all, have the same force and effect as a federal statute.

Auer became much harder to defend after *Mead*, which withholds *Chevron* deference from interpretive rules and other agency correspondence that never went through notice-and-comment rulemaking. For example, how can a document like the Ferg-Cadima letter receive nothing more than *Skidmore* deference when interpreting a statute,[9] but trigger much higher deference as soon as it purports to interpret an agency regulation? And if the Ferg-Cadima letter is entitled to *Chevron*-like deference when it purports to interpret 34 C.F.R. § 106.33, why doesn't that make it into a substantive rule that car-

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[9] See *Mead*, 533 U.S. at 229–34; *Christensen*, 529 U.S. at 587.

ries the force of law and therefore must go through notice and comment? See 5 U.S.C. § 553.

In short, *Mead* established symmetry between the *Chevron–Skidmore* divide and the distinction between substantive and interpretive rules. "Interpretive rules" need not go through notice and comment because they lack the force of law, but for this reason cannot receive *Chevron* deference. To confer *Chevron* deference upon such interpretive rules would give them the force of law, thereby triggering section 553's notice-and-comment requirements. But *Auer* deference throws a wrench into this perfectly crafted arrangement, by allowing such things as the Ferg-Cadima letter to receive the force of law even though they never went through notice and comment. If nothing else, the Court should grant certiorari to align the *Auer*-deference regime with the post-*Mead Chevron* regime. That alone would require reversing the Fourth Circuit's decision.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE DISAGREEMENTS AMONG THE LOWER COURTS OVER WHEN THE *AUER*-DEFERENCE FRAMEWORK, IF IT SURVIVES, SHOULD BE APPLIED.

Assuming *Auer* survives, this case also presents an opportunity for the Court to resolve serious disagreements among the lower courts on the proper application of *Auer* deference. As explained below, there currently exists a serious circuit conflict on the question whether *Auer* deference can apply at all to informal agency pronouncements. There is also deep disagreement among

the circuits about whether *Auer* deference can apply to agency positions that—like the Ferg-Cadima letter—are developed in the context of the very dispute in which deference is sought. And the Texas district court's recent decision to enjoin the Department's efforts to impose its interpretation on schools throughout the Nation both exacerbates the conflict and illustrates the urgent need for this Court to resolve the questions presented here.

A. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Conflicts With Rulings From The First, Seventh, And Eleventh Circuits.

As noted, the Ferg-Cadima letter did not go through notice and comment, and it is about as informal an agency document as one can imagine. The letter was not publicized; there is no evidence it was approved by the head of an agency; and it was signed only by a relatively low-level federal functionary, an Acting Deputy Assistant Secretary for Policy. The Fourth Circuit did not think any of this mattered; it was enough that the Department was willing to stand by the letter in the federal amicus brief. App. 16a–17a. But a letter such as this would not have received *Auer* deference in the First, Seventh or Eleventh Circuits.

For example, the First Circuit's ruling in *United States* v. *Lachman*, 387 F.3d 42, 54 (1st Cir. 2004), refused to extend *Auer* deference to non-public or informal agency interpretations—and it linked *Auer* deference to the same formality requirements that trigger *Chevron* deference under *Mead*:

> [A]gency interpretations are only relevant if they are reflected in public documents. . . . [U]nder *Chevron,* the Supreme Court has made clear that informal agency interpretations of statutes, even if public, are not entitled to deference. See generally *United States v. Mead Corp.,* 533 U.S. 218 (2001). While this is not a situation involving the interpretation of a statute, *the same requirements of public accessibility and formality are applicable in the context of agency interpretations of regulations.* . . . The non-public or informal understandings of agency officials concerning the meaning of a regulation are thus not relevant.

387 F.3d at 54 (emphasis added).

The Seventh Circuit has likewise held that it will not extend *Auer* deference to informal agency pronouncements such as the Ferg-Cadima letter. In *Keys* v. *Barnhart*, 347 F.3d 990 (7th Cir. 2003), that court explained that *Christensen* and *Mead* have curtailed the scope of *Auer* deference, limiting it to agency pronouncements that carry the "force of law" and that would qualify for deference under *Chevron* if they were purporting to interpret statutes:

> *Auer* . . . gave full *Chevron* deference to an agency's amicus curiae brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforce-

> ment guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." . . . Briefs certainly don't have "the force of law." . . .
>
> Probably there is little left of *Auer*. The theory of *Chevron* is that Congress delegates to agencies the power to make law to fill gaps in statutes. See, *e.g.*, *United States* v. *Mead Corp.*, *supra*, 533 U.S. at 226–27. . . . It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

347 F.3d at 993–94 (Posner, J.). And in *U.S. Freightways Corp.* v. *Commissioner*, 270 F.3d 1137 (7th Cir. 2001), the Seventh Circuit applied *Skidmore* rather than *Auer* to the IRS Commissioner's interpretation of his regulations, because "the interpretive methodologies he has used have been informal." *Id.* at 1141–42.

Likewise, the Eleventh Circuit's decision in *Arriaga* v. *Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002), applied *Skidmore* rather than *Auer* to agency opinion letters that purport to interpret the agency's regulations.

Against the First, Seventh, and Eleventh Circuits stand the Fourth Circuit as well as other courts of appeals that have found the lack of procedural formality

irrelevant to whether the *Auer*-deference framework should apply—even after this Court's decisions in *Christensen* and *Mead*. See, *e.g.*, *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 207–08 (2nd Cir. 2009) (holding that "agency interpretations that lack the force of law," while not warranting deference when interpreting ambiguous statutes, "do normally warrant deference when they interpret ambiguous *regulations*"); *Encarnacion ex. rel George* v. *Astrue*, 568 F.3d 72, 78 (2nd Cir. 2009) (holding agency's interpretation is entitled to *Auer* deference "regardless of the formality of the procedures used to formulate it") (quotation omitted); *Bassiri* v. *Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (granting *Auer* deference to agency interpretation "even if [adopted] through an informal process" that "is not reached through the normal notice-and-comment procedure" and that "does not have the force of law"); *Smith* v. *Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006) (affording *Seminole Rock* deference "even when [the agency's interpretation] is offered in informal rulings such as in a litigating document").

It appears the circuits are currently divided 4-3 on whether an agency's regulatory interpretation produced through informal processes can qualify for *Auer* deference after *Christensen* and *Mead*. The Fourth Circuit's decision here directly implicates this circuit split, and it is ripe for this Court's review.

B. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Is In Substantial Tension With Decisions In The Ninth And Federal Circuits.

Another relevant feature of the Ferg-Cadima letter is that it was issued solely in response to G.G.'s dispute with the Board. Days after the Board passed its resolution of December 9, 2014, a transgender activist e-mailed the Department and solicited the letter, specifically with respect to the Board's policy. App. 118a–120a. But this fact was of no moment to the Fourth Circuit, which held that *Auer* deference should apply even if the agency had never before expressed these views apart from G.G.'s dispute with Board. App. 17a. The Fourth Circuit had company in reaching this conclusion: At least four other courts of appeals agree that *Auer* deference should apply even when the agency adopts its interpretation solely in the context of the dispute before the court.[10]

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[10] *Intracomm, Inc.* v. *Bajaj,* 492 F.3d 285, 293 & n.6 (4th Cir. 2007) (deferring to Secretary's interpretation advanced in case under review); *Woudenberg* v. *U.S. Dep't of Agric.*, 794 F.3d 595, 599, 601 (6th Cir. 2015) (deferring to agency ruling in the case under review); *Bible ex rel. Proposed Class* v. *United Student Aid Funds, Inc.,* 799 F.3d 633, 639, 651 (7th Cir. 2015) (deferring to agency's interpretation advanced in amicus briefs), *cert. denied*, 136 S. Ct. 1607 (2016); *Biodiversity Conservation All.* v. *Jiron*, 762 F.3d 1036, 1062–68 (10th Cir. 2014) (deferring to agency interpretation advanced during administrative appeal); *Polycarpe* v. *E&S Landscaping Serv. Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010) (deferring to agency interpretation advanced in amicus brief).

But opinions from the Ninth Circuit and the Federal Circuit have refused to extend *Auer* deference in similar situations. In *Vietnam Veterans of America* v. *CIA*, 811 F.3d 1068 (9th Cir. 2015), the Ninth Circuit refused to apply *Auer* deference to an interpretation of agency rules that was "'developed . . . only in the context of this litigation.'" *Id.* at 1078. And in *Massachusetts Mutual Life Insurance Co.* v. *United States*, 782 F.3d 1354 (Fed. Cir. 2015), the Federal Circuit refused to apply the *Auer* framework to an IRS interpretation that was "advanced for the first time in litigation." *Id.* at 1369–70. So the Fourth Circuit's ruling implicates yet another division among the courts of appeals, and the Court should grant certiorari to resolve it.[11]

C. The Nationwide Federal Injunction Decision From Texas Also Conflicts With The Fourth Circuit's Approach.

The lower courts are also divided over whether *Auer* deference should extend to the specific agency interpretations at issue in this case. Eight days ago, on August 21, 2016, a federal district court in Texas refused to ex-

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[11] To be sure, the Fourth Circuit's decision to invoke *Auer* deference in the circumstances presented here was also wrong for a host of other reasons, see Application for Stay, No. 16A52, at 18–29, including this Court's reminder in *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), that *Auer* deference is inappropriate where that pronouncement "cannot be considered an interpretation of the regulation" as opposed to the underlying statute. *Id.* at 247. As discussed, the Ferg-Cadima letter offered an interpretation of Title IX itself, and not merely the regulation. See *supra* at 11.

tend *Auer* deference to the Department's bathroom, locker room and shower edicts, finding that 34 C.F.R. § 106.33 unambiguously allows Title IX recipients to establish separate facilities on the basis of biological sex. See *Texas* v. *United States of America*, Case No. 7:16-cv-00054, ECF No. 58; Pet. App. 183a–229a. That decision is significant here for two distinct reasons.

First, as a practical matter, it exacerbates the existing conflicts and disagreements over the proper application of *Auer* deference and Title IX to transgender individuals. Indeed, given that decision, and based on competing views of *Auer,* schools in one section of the Nation—states within the Fourth Circuit—are now bound by the Department's view of Title IX, while at the same time the Department is currently prohibited from even attempting to impose that same view on schools in the rest of the Nation.

Second, the Texas decision highlights the urgent, nationwide importance of the issues presented in this petition. Every recipient of Title IX funds throughout the Nation—ranging from universities to elementary schools—is now being substantially affected by the disagreement among the lower courts about the proper application of *Auer* deference. That is an additional reason for this court's review, especially given the deep disagreements that already exist over whether *Auer* deference should extend to agency documents such as the Ferg-Cadima letter.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEPARTMENT'S INTERPRETATION OF TITLE IX AND 34 C.F.R. § 106.33 IS BINDING.

Finally, granting this petition will give the Court an excellent opportunity to determine whether the Department's specific interpretation of Title IX is binding. In fact, that interpretation is flatly wrong and therefore, under any reasonable view of *Auer*, is not legally binding on anyone.

1. Nothing in Title IX's text or structure supports the foundational premise of the Ferg-Cadima letter—namely, that the proscription of discrimination "on the basis of sex . . . includ[es] gender identity." App. 121a. The term "gender identity" is nowhere in Title IX. Congress knows how to legislate protection against gender identity discrimination: it has done so elsewhere, but not in Title IX.[12] Conversely, numerous bills have attempted to introduce the concept of gender identity into federal laws, but failed.[13] The interpretive alchemy of deeming

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[12] See, *e.g.*, 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination based on "sex, gender identity …, sexual orientation, or disability"); 42 U.S.C. § 3796gg (assisting victims "whose ability to access traditional services and responses is affected by their … gender identity").

[13] See, *e.g.*, H.R. 2015 (110th Cong. 2007); H.R. 3017 (111th Cong. 2009); S. 1584 (111th Cong. 2009); H.R. 1397 (112th Cong. 2011); S. 811 (112th Cong. 2011); H.R. 1755 (113th Cong. 2013); S. 815 (113th Cong. 2013) (unenacted versions of Employment Non-

(continued…)

"sex" to include "gender identity" would revise those legislative defeats into victories. That is not how statutory interpretation works. See, *e.g.*, *Hively* v. *Ivy Tech Cmty. Coll.*, __ F.3d __, 2016 U.S. App. LEXIS 13746, at *7 & n.2 (7th Cir. July 28, 2016) (noting, "despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation").

To the contrary, when federal law deploys the term "sex" in anti-discrimination statutes, it prohibits discrimination based on "nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston* v. *Univ. of Pittsburgh*, 97 F.Supp.3d 657, 676 (W.D. Pa. 2015) (citing *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007). As Judge Niemeyer's dissent explained, during the period when Title IX was enacted and its regulations promulgated, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions." App. 54a (collecting definitions). In other words, the prohibition on "sex" discrimination in laws like Title IX and Title VII "do[es] not outlaw discrimination against . . . a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be a male."

Discrimination Act, which would have prohibited gender identity discrimination).

Ulane v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

2. Moreover, reading "sex" to include "gender identity" would make a hash of Title IX's scheme allowing facilities and programs to be separated by "sex."[14] If "sex" signifies, not biology, but rather one's "internal" sense of maleness or femaleness, the whole concept of permissible sex-separation collapses. What sense could there be in allowing "separate living facilities for the different sexes," 20 U.S.C. § 1686, if a biological male could legally qualify as a woman based merely on his *subjective* perception of being one? The answer is none. *Cf. United States* v. *Virginia*, 518 U.S. 515, 550 n. 19 (1996) (admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

3. Nor is the Ferg-Cadima interpretation supported by the theory of sex-stereotyping discrimination in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). *Cf.* App. 122a n.2 (relying on *Price Waterhouse*). A *Price Waterhouse* claim is "based on behaviors, mannerisms, and appearances," such as when a male employee is fired because he "wear[s] jewelry . . . considered too effeminate,

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[14] See, *e.g.*, 20 U.S.C. § 1686 (allowing "separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing "separate housing on the basis of sex," provided facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact").

carr[ies] a serving tray too gracefully, or tak[es] too active a role in child rearing." *Johnston*, 97 F.Supp.3d at 680 (internal quotations and citation omitted). But *Price Waterhouse* does not require "employers to allow biological males to use women's restrooms," because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. If anything, the Board's policy is the *opposite* of sex stereotyping: it designates male and female restrooms based solely on biology, regardless of whether a man or a woman satisfies some stereotypical notion of masculinity or femininity. See, *e.g.*, *Johnston*, 97 F.Supp.3d at 680–81 (rejecting sex stereotyping claim on this basis).

4. Furthermore, an interpretation of Title IX according to the Ferg-Cadima view would render the statute unconstitutional, and must be avoided for that reason alone. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 190 (1991) (describing constitutional avoidance canon). For instance, it would cause Title IX to violate the Spending Clause by failing to give "clear notice" of conditions attached to federal funding.[15] No funding recipient could have had "clear notice" of the novel interpretation of Title IX in

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[15] *Arlington Cent. Sch. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297 (2006) (clear notice absent where text "does not even hint" fees due to prevailing party); *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2606 (2012) (Congress's spending clause power "does not include surprising participating States with post-acceptance or retroactive conditions" (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 25 (1981)).

this case. Indeed, the *G.G.* majority confirmed as much by finding the Title IX regulation was ambiguous as applied to transgender individuals. App. 18a. *Cf. Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985) (no "clear notice" violation where there was "no ambiguity with respect to" funding condition).

5. Finally, taking the Ferg-Cadima letter's construction of "sex" seriously would turn Title IX against itself. As the district court pointed out, the relevant regulation would bar the Board's policy only if "sex" means *solely* "gender identity" and excludes any notion of "biological sex." App. 99a–102a. As applied to Title IX, that preposterous construction would legalize just the kind of biologically based discrimination against men and women that Title IX was enacted to prevent. For instance, schools could exclude biological women from taking science classes or joining the chess team, so long as they allowed biological men who identify as females to do so. Only transgendered people would be protected under this Title IX regime; men and women who identify with their biological sex would receive no protection at all.

Indeed, if "sex" means *only* "gender identity," the Board's policy would not implicate Title IX *at all* because it addresses only "biological sex" and *excludes* consideration of gender identity. But that is absurd: everyone agrees that the Title IX regulation squarely addresses—and expressly allows—sex-separated restrooms, exactly like the ones provided by the Board's policy.

CONCLUSION

Some regard transgender restroom access as one of the great civil-rights issues of our time. But that makes it all the more important to insist that federal officials follow the procedures for lawmaking prescribed in the Constitution and the Administrative Procedure Act. To condone the agency behavior displayed in this case is to condone future use of these maneuvers by other agency officials, and in support of other causes—without any way of ensuring that the Executive Branch will always be controlled by people who share one's most deeply held beliefs.

At bottom, then, this case is not really about whether G.G. should be allowed to access the boys' restrooms, nor even primarily about whether Title IX can be interpreted to require recipients to allow transgender students into the restrooms and locker rooms that accord with their gender identity. Fundamentally, this case is about whether an agency employee can impose that policy in a piece of private correspondence. If the Court looks the other way, then the agency officials in this case—and in a host of others to come—will have become a law unto themselves.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 29, 2016

APPENDIX

TABLE OF CONTENTS

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056

G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee.

JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin;

SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE,

In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert G. Doumar, Senior District Judge. (4:15-cv-00054-RGD-DEM)

Argued: January 27, 2016 Decided: April 19, 2016

Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

Reversed in part, vacated in part, and remanded by published opinion. Judge Floyd wrote the opinion, in which Senior Judge Davis joined. Senior Judge Davis wrote a separate concurring opinion. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part.

ARGUED: Joshua A. Block, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant. David Patrick Corrigan, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. **ON BRIEF:** Rebecca K. Glenberg, Gail Deady, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC., Richmond, Virginia; Leslie Cooper, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant. Jeremy D. Capps, M. Scott Fisher, Jr., HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. Cynthia Cook Robertson, Washington, D.C., Narumi Ito, Amy L. Pierce, Los Angeles, California, Alexander P. Hardiman, Shawn P. Thomas, New York, New York, Richard M. Segal, Nathaniel R. Smith, PILLSBURY WINTHROP SHAW PITTMAN LLP, San Diego, California; Tara L. Borelli, Atlanta, Georgia, Kyle A. Palazzolo, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Chicago, Illinois; Alison Pennington, TRANSGENDER LAW CENTER, Oakland, California, for Amici School Administrators Judy Chiasson, David Vannasdall, Diana K. Bruce, Denise Palazzo, Jeremy Majeski, Thomas A. Aberli, Robert Bourgeois, Mary Doran, Valeria Silva, Rudy Rudolph, John O'Reilly, Lisa Love, Dylan Pauly, and Sherie Hohs. Suzanne B. Goldberg, Sexuality and

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Family Foundation of Virginia, John Walsh, Lorraine Walsh, Mark Frechette, Jon Lynsky, Bradly Friedlin, Lisa Terry, Lee Terry, Donald Caulder, Wendy Caulder, Kim Ward, Alice May, Jim Rutan, Issac Rutan, Doretha Guju, Rodney Autry, James Larsen, David Thornton, Kathy Thornton, Joshua Cuba, Claudia Clifton, Ilona Gambill, and Tim Byrd. Lawrence J. Joseph, Washington, D.C., for Amicus Eagle Forum Education and Legal Defense Fund.

FLOYD, Circuit Judge:

G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education's (the Department) regulations implementing Title IX permit the provision of "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 for students of the other sex." 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." J.A. 55. Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned

sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery.[1]

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom.[2] G.G. used this restroom without incident for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." J.A. 15. Hook proposed the following resolution (hereinafter the "transgender restroom policy" or "the policy"):

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[1] The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association. *Id.* The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

[2] G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case.

> Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 15–16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a "young lady." J.A. 16. Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or "young lady." J.A. 18. One speaker called G.G. a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* Following this second comment period, the Board voted 6-1 to adopt the proposed policy, thereby barring G.G. from using the boys' restroom at school.

G.G. alleges that he cannot use the girls' restroom because women and girls in those facilities "react[] negatively because they perceive[] G.G. to be a boy." *Id.* Further, using the girls' restroom would "cause severe psychological distress" to G.G. and would be incompatible with his treatment for gender dysphoria. J.A. 19. As a corollary to the policy, the Board announced a series of updates to the school's restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they "make him feel even more stigmatized . . . . Being required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different.'" *Id.* G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences "severe and persistent emotional and social harms." *Id.* G.G. avoids using the restroom while at

school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys' restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution. On July 27, 2015, the district court held a hearing on G.G.'s motion for a preliminary injunction and on the Board's motion to dismiss G.G.'s lawsuit. At the hearing, the district court orally dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. The district court followed its ruling from the bench with a written order dated September 4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.'s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed that the regulations implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.'s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.'s request for an injunction, the district court found that G.G. had not made the

required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.'s presence in the boys' restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court's dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court's rulings and also asks us to dismiss G.G.'s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an *amicus* brief supporting G.G.'s Title IX claim in order to defend the government's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

We turn first to the district court's dismissal of G.G.'s Title IX claim.[3] We review *de novo* the district court's

[3] We decline the Board's invitation to preemptively dismiss G.G.'s equal protection claim before it has been fully considered by the district court. "[W]e are a court of review, not of first view." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (citation and quotation marks omitted). We will not proceed to the merits of G.G.'s equal protection claim on appeal without the benefit of the district court's prior consideration.

grant of a motion to dismiss. *Cruz v. Maypa*, 773 F.3d 138, 143 (4th Cir. 2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotations omitted).

As noted earlier, Title IX provides: "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm.[4] *See Preston v. Virginia ex rel. New*

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[4] The Board suggests that a restroom may not be educational in nature and thus is not an educational program covered by Title IX. Appellee's Br. 35 (quoting Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 682 (W.D. Pa. 2015)). The Department's regulation pertaining to "Education programs or activities" provides:

> Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
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> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;

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River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979)). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department's regulations implementing Title IX permit the provision of "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. The Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote: "When a school elects to separate or treat students differently on

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. . .

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). We have little difficulty concluding that access to a restroom at a school, under this regulation, can be considered either an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity," which, when offered by a recipient institution, falls within the meaning of "educational program" as used in Title IX and defined by the Department's implementing regulations.

the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."[5] J.A. 55.

G.G., and the United States as amicus curiae, ask us to give the Department's interpretation of its own regulation controlling weight pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* requires that an agency's in-

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[5] The opinion letter cites to OCR's December 2014 "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities." This document, denoted a "significant guidance document" per Office of Management and Budget regulations, states: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) *available at* http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

The dissent suggests that we ignore the part of OCR's opinion letter in which the agency "also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities," as the Board did here. Post at 66. However, because G.G. does want to use shared sex-segregated facilities, the agency's suggestion regarding students who do not want to use such shared sex-segregated facilities is immaterial to the resolution of G.G.'s claim. Nothing in today's opinion restricts any school's ability to provide individual-user facilities.

terpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Id.* at 461. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, "reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded *Auer* deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a *post hoc* rationalization. *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citations omitted).

The district court declined to afford deference to the Department's interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because "[i]t clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 WL 5560190, at *8 (E.D. Va. Sept. 17, 2015). The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone. *Id.*

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls "without running afoul of Title IX." Br. for the United States as Amicus Curiae 24–25 (hereinafter "U.S. Br.").

However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because "the regulation is silent on what the phrases 'students of one sex' and 'students of the other sex' mean in the context of transgender students." *Id.* at 25. The United States contends that the interpretation contained in OCR's January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

We will not accord an agency's interpretation of an unambiguous regulation *Auer* deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to 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.

"[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine *de novo*." *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004). We determine ambiguity by analyzing the language under the three-part framework set forth in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole. *Id.* at 341.

First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory

language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX . . . ." U.S. Br. 22 n.8. Third, the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited."[6] This repeated formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to

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[6] For example, § 106.32(b)(2) provides that "[h]ousing provided . . . to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: proportionate in quantity . . . and [c]omparable in quality and cost to the student"; § 106.37(a)(3) provides that an institution generally cannot "[a]pply any rule . . . concerning eligibility [for financial assistance] which treats persons of one sex differently from persons of the other sex with regard to marital or parental status"; and § 106.41(b) provides that "where [an institution] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex . . . members of the excluded sex must be allowed to try-out for the team offered . . . ."

sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity. *Cf. Dickenson-Russell Coal Co. v. Sec'y of Labor*, 747 F.3d 251, 258 (4th Cir. 2014) (refusing to afford *Auer* deference where the language of the regulation at issue was "not susceptible to more than one plausible reading" (citation and quotation marks omitted)). It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

C.

Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to *Auer* deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Auer*, 519 U.S. at 461. "Our review of the agency's interpretation in this context is therefore highly def-

erential." *Dickenson-Russell Coal*, 747 F.3d at 257 (citation and quotation marks omitted). "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). An agency's view need only be reasonable to warrant deference. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) ("[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency's] view need be only reasonable to warrant deference.").

Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. 45 Fed. Reg. 30802, 30955 (May 9, 1980). Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished . . . ." *American College Dictionary* 1109 (1970). The second defines "sex" as:

> the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . .

Webster's Third New International Dictionary 2081 (1971).

Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive.[7] The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness." Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual "dichotomous occurrence" of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the "character of being either male or female" where those indicators diverge. We conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the

[7] Modern definitions of "sex" also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." *Black's Law Dictionary* 1583 (10th ed. 2014). The American Heritage Dictionary includes in the definition of "sex" "[o]ne's identity as either female or male." *American Heritage Dictionary* 1605 (5th ed. 2011).

text of the regulation. The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, "the morphological, physiological, and behavioral peculiarities"—included in the term "sex."

D.

Finally, we consider whether the Department's interpretation of § 106.33 is the result of the agency's fair and considered judgment. Even a valid interpretation will not be accorded *Auer* deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a *post hoc* rationalization. *Christopher*, 132 S. Ct. at 2166 (citations omitted).

Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011). As the United States explains, the issue in this case "did not arise until recently," *see id.*, because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities. The Department contends that "[i]t is to those 'newfound' policies that [the Department's] interpretation of the regulation responds." U.S. Br. 29. We see no

reason to doubt this explanation. *See Talk Am., Inc.*, 131 S. Ct. at 2264.

Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014. *See* J.A. 55 n.5 & n.6 (providing examples of OCR enforcement actions to secure transgender students access to restrooms congruent with their gender identities). Finally, this interpretation cannot properly be considered a *post hoc* rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.[8] U.S. Br. 17 n.5 & n.6 (citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management). None of the *Christopher* grounds for withholding *Auer* deference are present in this case.

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[8] We disagree with the dissent's suggestion that the result we reach today renders the enforcement of separate restroom facilities impossible because it "would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity." Post at 65. Accepting the Board's position would equally require the school to assume "biological sex" based on "appearances, social expectations, or explicit declarations of [biological sex]." Certainly, no one is suggesting mandatory verification of the "correct" genitalia before admittance to a restroom. The Department's vision of sex-segregated restrooms which takes account of gender identity presents no greater "impossibility of enforcement" problem than does the Board's "biological gender" vision of sex-segregated restrooms.

E.

We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.[9] We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that "sex" should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex. We agree that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed.[10] Post at 56. It is not ap-

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[9] The Board urges us to reach a contrary conclusion regarding the validity of the Department's interpretation, citing *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 657 (W.D. Pa. 2015). Although we recognize that the *Johnston* court confronted a case similar in most material facts to the one before us, that court did not consider the Department's interpretation of § 106.33. Because the *Johnston* court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in *Johnston* to be unpersuasive.

[10] We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent. For example, G.G.'s use — or for that matter any individual's appropriate use — of a restroom will not involve the type

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parent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys' restroom pursuant to the Department's interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court's guidance in *Chevron*, *Auer*, and *Christopher* and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns[11]—fundamentally questions

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of intrusion present in *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (involving the videotaping of students dressing and undressing in school locker rooms), *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) (involving the indiscriminate strip searching of twenty male and five female students), or *Supelveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).

[11] The dissent accepts the Board's invocation of amorphous safety concerns as a reason for refusing deference to the Department's interpretation. We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the existence of danger caused by "sexual responses prompted by students' exposure to the private

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of policy—is a task committed to the agency, not to the courts.

The Supreme Court's admonition in Chevron points to the balance courts must strike:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984). Not only may a subsequent ad-

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body parts of students of the other biological sex." Post at 58. The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent's formulation, present a safety risk because of the "sexual responses prompted" by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.

ministration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our *Auer* analysis complete, we leave policy formulation to the political branches.

III.

G.G. also asks us to reverse the district court's denial of the preliminary injunction he sought which would have allowed him to use the boys' restroom during the pendency of this lawsuit. "To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citation omitted). We review a district court's denial of a preliminary injunction for abuse of discretion. *Id.* at 235. "A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006) (citation and quotations omitted). "We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter de novo." *Id.* (citation omitted). Instead, "we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclu-

sion it reached upon a weighing of the relevant factors." *Id.* (citations and quotations omitted).

The district court analyzed G.G.'s request only with reference to the third factor—the balance of hardships—and found that the balance of hardships did not weigh in G.G.'s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions." *G.G.*, 2015 WL 5560190, at *11.

The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." *Id.* at *9. Preliminary injunctions, however, are governed by less strict rules of evidence:

> 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. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); *see also Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976) (taking as true the "well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support

of the motion for a preliminary injunction"); *compare* Fed. R. Civ. P. 56 (requiring affidavits supporting summary judgment to be "made on personal knowledge, [and to] set out facts that would be admissible in evidence), *with* Fed R. Civ. P. 65 (providing no such requirement in the preliminary injunction context). Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial.

Additionally, the district court completely excluded some of G.G.'s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to "weight, not preclusion" and have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010); *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." (citation and internal quotations omitted)); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are

less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986); *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.'s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was "guided by erroneous legal principles." We therefore conclude that the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence. We vacate the district court's denial of G.G.'s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein.

IV.

Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge's sake and the ap-

pearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir. 1991) (citation and internal quotation marks omitted). In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Id.* (citation omitted).

G.G. argues that both the first and second *Guglielmi* factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." Appellant's Br. 53. For example, the court accepted the Board's concern by noting:

> There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teen-age years. All of that is accepted by all medical science, as far as I can determine in reading information.

J.A. 85–86.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. J.A. 111–12. The district court characterized gender dysphoria as a "mental disorder" and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. *See* J.A. 88–91; 101–02. The district court also seemed to reject G.G.'s representation of what it meant to be transgender, repeatedly noting that G.G. "wants" to be a boy and not a girl, but that "he is biologically a female." J.A. 103–04; *see also* J.A. 104 ("It's his mind. It's not physical that causes that, it's what he believes."). The district court's memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Further, although the district court has a distinct way of proceeding in court, the hearing record and the district court's written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the *Guglielmi* standard. We deny G.G.'s request for reassignment to a different district judge on remand.

V.

For the foregoing reasons, the judgment of the district court is

REVERSED IN PART, VACATED IN PART, AND REMANDED.

DAVIS, Senior Circuit Judge, concurring:

I concur in Judge Floyd's fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, *this Court* would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board's restroom policy discriminates against him "on the basis of sex" in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context of analogous statutes and our holding here that the Department's interpretation of

34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (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).

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse's office. *See* J.A. 32–33. His affidavit also indicates that he has "repeatedly developed painful urinary tract infections" as a result of holding his urine in order to avoid using the restroom at school. *Id.*

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.'s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is "inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child" and explains why access to a restroom appropriate to one's gender identity is important for transgender youth. J.A. 39. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board's restroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing life-

long psychological harm." J.A. 41. In particular, Dr. Ettner opines that

> [a]s a result of the School Board's restroom policy, . . . G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his 'otherness,' undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

J.A. 42.

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.'s or Dr. Ettner's affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.'s presentation in support of his claim of irreparable harm, such as "evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s'] restroom," evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner "differentiating between the distress that G.G. may suffer by not using the boy[s'] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12." Br. Appellee 42–43. As to the alleged deficiency concerning Dr. Ettner's opinion, the Board's argument is belied by Dr. Ettner's affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing "[a]s a result of the School Board's restroom policy." J.A. 42. With respect to the other purported inadequacies, the absence of such

evidence does nothing to undermine the uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board's policy or Dr. Ettner's unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.'s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.

C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students' constitutional right to privacy will be imperiled by G.G.'s presence in the boys' restroom.

As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students' unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school's restrooms already undertaken by the Board. To the extent

that a student simply objects to using the restroom in the presence of a transgender student even where there is no possibility that either student's genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.'s presence in the communal restroom thus does not tip the scale in the Board's favor. The balance of hardships weighs heavily toward G.G.

D.

Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest. *Cf. Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (citation omitted) (observing that upholding constitutional rights is in the public interest).

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that discrimination based on transgender status is already prohibited by the lan-

guage of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.

II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) (expressly observing that appellate courts have the power to vacate a denial of a preliminary injunction and direct entry of an injunction); *Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs.*, 197 F.3d 123, 134 (4th Cir. 1999) (directing entry of injunction "because the record clearly establishes the plaintiff's right to an injunction and [an evidentiary] hearing would not have altered the result").

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year.

With these additional observations, I concur fully in Judge Floyd's thoughtful and thorough opinion for the panel.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court's opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G's motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.'s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority's decision on those issues.

G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school's policy for assigning students to restrooms and locker rooms based on biological sex. The school's policy provides: (1) that the girls' restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys' restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school's three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls' restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates against him because it denies him, as one who identifies as male, the use of the boys' restrooms,

and he seeks an injunction compelling the high school to allow him to use the boys' restrooms.

The district court dismissed G.G.'s Title IX claim, explaining that the school complied with Title IX and its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex," so long as the facilities are "comparable." 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

Strikingly, the majority now reverses the district court's ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute's and regulations' use of the term "sex" means a person's gender identity, not the person's biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education's Office for Civil Rights to G.G., in which the Office for Civil Rights stated, "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally *must treat transgender students consistent with their gender identity*." (Emphasis added). Accepting that new definition of the statutory term "sex," the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls' restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys' restrooms and locker

rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And, unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the "severe psychological distress" it would inflict on him and because female students had "reacted negatively" to his presence in girls' restrooms. Surely biological males who identify as females would encounter similar reactions in the girls' restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is *not* law but which is the only authority on which the majority relies, states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]." This appears to approve the course that G.G.'s school followed when it created unisex restrooms in addition to the boys' and girls' restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, provided that the facilities are "proportionate" and "comparable," 34 C.F.R. § 106.32(b), and to provide "separate toilet, locker room, and shower facilities on the basis of sex," again provided that the facilities are "comparable," 34 C.F.R. § 106.33. Because the school's policy that G.G. challenges in this action comports with Title IX and its regulations, I would affirm the district court's dismissal of G.G.'s Title IX claim.

I

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but "did not feel like a girl" from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one's biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of his requests. Officials changed school records to reflect G.G.'s new male name; the guidance counselor supported G.G.'s sending

an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical education requirement through a home-bound program, as he preferred not to use the school's locker rooms; and the school allowed G.G. to use a restroom in the nurse's office "because [he] was unsure how other students would react to [his] transition." G.G. was grateful for the school's "welcoming environment." As he stated, "no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns." And he was "pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy."

As the school year began, however, G.G. found it "stigmatizing" to continue using the nurse's restroom, and he requested to use the boys' restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving "numerous complaints from parents and students about [G.G.'s] use of the boys' restrooms." The School Board thus faced a dilemma. It recognized G.G.'s feelings, as he expressed them, that "[u]sing the girls' restroom[s] [was] not possible" because of the "severe psychological distress" it would inflict on him and because female students had previously "reacted negatively" to his presence in the girls' restrooms. It now also had to recognize that boys had similar feelings caused by G.G.'s use of the boys' restrooms, although G.G. stated that he continued using the boys' restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education's Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain

> circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board's policy was discriminatory, in violation of the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction "requiring the School Board to allow [him] to use the boys' restrooms at school."

The district court dismissed G.G.'s Title IX claim because Title IX's implementing regulations permit schools to provide separate restrooms "on the basis of sex." The court also denied G.G.'s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it "will hear evidence" and "get a date set" for trial to better assess the claim.

From the district court's order denying G.G.'s motion for a preliminary injunction, G.G. filed this appeal, in which he also challenges the district court's Title IX ruling as inextricably intertwined with the district court's denial of the motion for a preliminary injunction.

II

G.G. recognizes that persons who are born biologically female "typically" identify psychologically as female, and likewise, that persons who are born biologically male "typically" identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for "different and unequal treatment," "discriminat[ing] against him based on sex [by denying him use of the boys' restrooms], in violation of Title IX." He argues, "discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account." He concludes that the School Board's policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is "prevent[ed] . . . from using the same restrooms as other students and relegat[ed] . . . to separate, single-stall facilities."

As noted, the School Board's policy designates the use of restrooms and locker rooms based on the student's biological sex—biological females are assigned to the girls' restrooms and unisex restrooms; biological males are assigned to the boys' restrooms and unisex restrooms. G.G. is thus assigned to the girls' restrooms and the unisex restrooms, but is denied the use of the boys' restrooms. He asserts, however, that because neither he nor the girls would accept his use of the girls' restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

> The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

> No person in the United States shall, *on the*

> *basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a) (emphasis added). The Act, however, provides, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities *for the different sexes*." *Id.* § 1686 (emphasis added); *see also* 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing *on the basis of sex*" as long as the housing is "proportionate" and "comparable" (emphasis added)). Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

> A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33 (emphasis added). Thus, although Title IX and its regulations provide generally that a school receiving federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning

separate living facilities, locker rooms, and shower facilities as well. All are based on "sex," a term that must be construed uniformly throughout Title IX and its implementing regulations. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)); *In re Total Realty Mgmt.*, LLC, 706 F.3d 245, 251 (4th Cir. 2013) ("Canons of construction . . . require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning. This presumption of consistent usage . . . ensure[s] that the statutory scheme is coherent and consistent" (alterations in original) (internal quotation marks and citations omitted)); *see also Kentuckians for Commonwealth Inc. v. Riverburgh*, 317 F.3d 425, 440 (4th Cir. 2003) ("[B]ecause a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well" (quoting John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 627 n.78 (1996))).

Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the op-

posite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. *See, e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1989) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating").

Moreover, we have explained that separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of sepa-

rate public rest rooms for men and women based on privacy concerns"). Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women," which, as the Supreme Court explained, are "enduring" and render "the two sexes . . . not fungible," *id.* at 533 (distinguishing sex from race and national origin), not because of "one's sense of oneself as belonging to a particular gender," as G.G. and the government as amicus contend.

Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote *the privacy and safety* of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an environment where children are still developing, both emotionally and physically."

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term "sex" were to encompass only a person's gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls' dorm or shower in a girls' shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower. G.G.'s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to "restroom access by transgender individuals." *Ante* at 26. But this effort to restrict the effect of G.G.'s argument hardly matters when the term "sex" would have to be applied uniformly throughout the statute and regulations, as noted above and, indeed, as agreed to by the majority. *See ante* at 26.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of enactment. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (explaining that courts should not defer to an agency's interpretation of its own regulation if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secre-

tary's intent *at the time of the regulation's promulgation*" (emphasis added) (internal quotation marks and citation omitted)); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (discussing dictionary definitions of the regulation's "critical phrase" to help determine whether the agency's interpretation was "plainly erroneous or inconsistent with the regulation" (internal quotation marks and citation omitted)). Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions. *See, e.g.*, *The Random House College Dictionary* 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . . "). Indeed, although the contemporaneous meaning controls our analy-

sis, it is notable that, *even today*, the term "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g.*, *Webster's New World College Dictionary* 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"). Any new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of "sex" as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term "sex" in Title IX and its regulations refers to a person's "gender identity" simply to accommodate G.G.'s wish to use the boys' restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term "sex" as used in Title IX and its regulations refers (1) to *both* biological sex *and* gender identity;

(2) to *either* biological sex *or* gender identity; or (3) to *only* "gender identity." In his brief, G.G. seems to take the position that the term "sex" *at least* includes a reference to gender identity. This is the position taken in his complaint when he alleges, "Under Title IX, discrimination 'on the basis of sex' encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity." The government seems to be taking the same position, contending that the term "sex" "encompasses both sex—that is, the biological differences between men and women—*and* gender [identity]." (Emphasis in original). The majority, however, seems to suggest that the term "sex" refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights' letter of January 7, 2015, which said, "When a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally must treat transgender students consistent with *their gender identity*." (Emphasis added). But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term "sex" as used in the statute and regulations refers to *both* biological sex *and* gender identity, then, while the School Board's policy is in compliance with respect to most students, whose biological sex aligns with their gender identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished

consistent with the regulation because a transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools' ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms, a position that G.G. does not advocate.

If the position of G.G., the government, and the majority is that the term "sex" means *either* biological sex *or* gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys' restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that "sex" as used in Title IX and its regulations means *only* gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a *separate* use "on the basis of sex," and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender

identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom.

Yet, by interpreting Title IX and the regulations as "requiring schools to treat students consistent with their gender identity," and by disallowing schools from treating students based on their biological sex, the government's position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls' restrooms, G.G. states that "it makes no sense to place a transgender boy in the girls' restroom in the name of protecting student privacy" because "girls objected to his presence in the girls' restrooms because they perceived him as male." But the same argument applies to his use of the boys' restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker

rooms, and shower facilities "on the basis of sex" if "sex" means gender identity.

The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools "generally must treat transgender students consistent with their gender identity," whatever that means, and in the next sentence, it encourages schools to provide "gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High School, to provide unisex single-stall restrooms for any students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, *on the basis of sex*, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.'s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse's restroom. And, after both girls and boys objected to his using the girls' and boys' restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that

provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm the district court's decision dismissing G.G.'s Title IX claim and therefore dissent.

I also dissent from the majority's decision to vacate the district court's denial of G.G.'s motion for a preliminary injunction. As the Supreme Court has consistently explained, "[a] preliminary injunction is an extraordinary remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," and "'[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.'" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22–24 (2008) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can "form a definite and firm conviction that the court below committed a clear error of judgment," *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006) (quotation marks and citation omitted), particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

As noted, however, I concur in Part IV of the court's opinion.

PUBLISHED

FILED: May 31, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056
(4:15-cv-0054-RGD-DEM)

G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee.

JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon;

JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee.

ORDER

Appellee's petition for rehearing en banc and filings relating to the petition were circulated to the full court.

No judge having requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc, the petition is denied.

Judge Niemeyer wrote an opinion dissenting from the denial of the petition for rehearing.

Entered at the direction of Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

NIEMEYER, Circuit Judge, dissenting from the denial of the petition for rehearing:

Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom. Have we not universally condemned as inhumane such forced exposure throughout history as it occurred in various contexts, such as in prisons? And do parents not universally find it offensive to think of having their children's bodies exposed to persons of the opposite biological sex?

Somehow, all of this is lost in the current Administration's service of the politically correct acceptance of gender identification as the meaning of "sex"—indeed, even when the statutory text of Title IX provides no basis for the position. The Department of Education and the Justice Department, in a circular maneuver, now rely on the majority's opinion to mandate application of their position across the country, while the majority's opinion had relied solely on the Department of Education's earlier unprecedented position. The majority and the Administration—novelly and without congressional authorization—conclude that despite Congress's unambiguous

authorization in Title IX to provide for the separation of restrooms, showers, locker rooms, and dorms on the basis of sex, *see* 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32, 106.33, they can override these provisions by redefining sex to mean how any given person identifies himself or herself at any given time, thereby, of necessity, denying all affected persons the dignity and freedom of bodily privacy. Virtually every civilization's norms on this issue stand in protest.

These longstanding norms are not a protest against persons who identify with a gender different from their biological sex. To the contrary, schools and the courts must, with care, seek to understand their condition and address it in permissible ways that are as helpful as possible in the circumstances. But that is not to say that, to do so, we must bring down all protections of bodily privacy that are inherent in individual human dignity and freedom. Nor must we reject separation-of-powers principles designed to safeguard Congress's policymaking role and the States' traditional powers.

While I could call for a poll of the court in an effort to require counsel to reargue their positions before an en banc court, the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application. And the facts of this case, in particular, are especially "clean," such as to enable the Court to address the issue without the distraction of subservient issues. For this reason only and not because the issue is not sufficiently weighty for our en banc court, I am not requesting a poll on the petition for rehearing en banc. I do, however, vote to grant panel rehearing, which I recognize can only be symbolic in view of the majority's ap-

proach, which deferred to the Administration's novel position with a questionable application of *Auer v. Robbins*, 519 U.S. 452 (1997). Time is of the essence, and I can only urge the parties to seek Supreme Court review.

FILED: June 9, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056
(4:15-cv-0054-RGD-DEM)

G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee.

JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Ad-

ministrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee,

CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; PUBLIC ADVOCATE OF THE UNITED STATES; STATE OF KANSAS; STATE OF NEBRASKA; STATE OF TEXAS; STATE OF UTAH; 50 GLOUCESTER STUDENTS, PARENTS, GRANDPARENTS, AND COMMUNITY MEMBERS; UNITED STATES JUSTICE FOUNDATION,

Amici Supporting Rehearing Petition.

ORDER

Upon consideration of the motion to stay mandate pending filing of petition for writ of certiorari, the court denies the motion.

Judge Floyd and Senior Judge Davis voted to deny the motion. Judge Niemeyer voted to grant the motion.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

FILED
June 23, 2016

Clerk, US District Court
Norfolk, VA

G.G., by his next friend and mother,
DEIRDRE GRIMM,

Plaintiff

v. CIVIL NO. 4:15cv54

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

ORDER

This matter is before the Court on Plaintiff G.G.'s Motion for Preliminary Injunction. ECF No. 11. On September 4, 2015, this Court denied the Motion. ECF No. 53. On appeal, the Court of Appeals vacated this denial and remanded the case for reevaluation of the Motion under a different evidentiary standard. Op. of USCA, ECF No. 62 at 33. The Court of Appeals also reversed this Court's dismissal of G.G.'s claim under Title IX. *Id.* at 26. In a concurrence, Judge Davis explained why the Preliminary Injunction should issue in light of the Court

of Appeals' analysis of Title IX. *Id.* at 37–44. It appears to the Court from the unrebutted declarations submitted by the parties that the plaintiff is entitled to use the boys' restroom. Therefore, for the reasons set forth in the aforesaid concurrence and based on the declarations submitted by the parties, the Court finds that the plaintiff is entitled to a preliminary injunction.

As noted in the Opinion of the Court of Appeals, this case is only about G.G.'s access to the boys' restrooms; G.G. has not requested access to the boys' locker rooms. *Id.* at 7 n. 2 ("G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case."). Accordingly, this injunction is limited to restroom access and does not cover access to any other facilities.

Based on the evidence submitted through declarations previously proffered for the purpose of the hearing on the Preliminary Injunction, this Court, pursuant to Title IX, hereby **ORDERS** that Gloucester County School Board permit the plaintiff, G.G., to use the boys' restroom at Gloucester High School until further order of this Court.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/ Robert G. Doumar
Robert G. Doumar
Senior United States District Judge

Newport News, VA
June 23, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

FILED
July 6, 2016

Clerk, US District Court
Norfolk, VA

G.G., by his next friend and mother,
DEIRDRE GRIMM,

Plaintiff

v. CIVIL NO. 4:15cv54

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

ORDER

This matter is before the Court on Defendant's Motion for Stay Pending Appeal. ECF No. 71. With this Motion the defendant, Gloucester County School Board ("Defendant"), asks this Court to stay the Preliminary Injunction issued by the Court on June 23, 2016 pending Defendant's appeal of that Order. *Id.*

On June 11, 2015, the plaintiff in this case, G.G. ("Plaintiff"), filed a Motion for Preliminary Injunction. ECF No. 11. On September 4, 2015, this Court denied the Motion. ECF No. 53. On appeal, the Court of Ap-

peals vacated this denial and remanded the case for reevalualion of the Motion under a different evidentiary standard. Op. of USCA, ECF No. 62 at 33. The Court of Appeals also reversed this Court's dismissal of G.G.'s claim under Title IX. *Id.* at 26. In a concurrence, Judge Davis explained why the Preliminary Injunction should issue in light of the Court of Appeals' analysis of Title IX. *Id.* at 37–44.

The Court of Appeals denied Defendant's motion for a rehearing *en banc*. Order of USCA, ECF No. 65, and its motion to stay the mandate pending the filing of a writ of certiorari, Order of USCA, ECF No. 67. On June 17, 2016, the Court of Appeals issued its mandate. ECF No. 68.

Based on the opinion of the Fourth Circuit and the evidence submitted by declaration, the Court granted the Preliminary Injunction on June 23, 2016. Order, ECF No. 69. Defendant filed a notice of appeal on June 27, 2016. ECF No. 70. On June 28, 2016, Defendant filed the instant Motion to Stay along with a Memorandum in Support. ECF Nos. 71–72. Plaintiff responded to the Motion on July 1, 2016. ECF No. 75.

This Court is bound by the Judgment of the Court of Appeals. The Court of Appeals' actions in denying a rehearing *en banc* and a stay of its mandate indicate that it desires that its Judgment take effect immediately. The Court of Appeals itself is bound by its own prior precedents. Although Defendant has filed an appeal of the Preliminary Injunction, the Court of Appeals' prior opinion in this case will control in that appeal. This Court believes that based on the law as laid out in that opinion and the evidence submitted by declarations in this case, the Preliminary Injunction was warranted. There are no

grounds for a stay. Accordingly, the Court **DENIES** the Motion for Stay Pending Appeal. ECF No. 71.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/ Robert G. Doumar
Robert G. Doumar
Senior United States District Judge

Newport News, VA
July 6, 2016

UNPUBLISHED

FILED: July 12, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1733
(4:15-cv-0054-RGD-DEM)

G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff - Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellant.

ORDER

Upon consideration of submissions relative to the motion of appellant for stay pending appeal, the court denies the motion.

Entered at the direction of Judge Floyd. Senior Judge Davis wrote an opinion concurring in the denial of a stay pending the filing of, and action on, a petition for certiorari. Judge Niemeyer wrote an opinion dissenting from the denial of a stay pending appeal.

For the Court

/s/ Patricia S. Connor, Clerk

DAVIS, Senior Circuit Judge, concurring in the denial of a stay pending the filing of, and action on, a petition for *certiorari*:

I vote to deny the motion for stay.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989), plaintiff Ann Hopkins received comments from partners describing her as "macho," suggesting that she "overcompensated for being a woman," and "advis[ing] her to take a course at charm school" during her bid for partnership. *Price Waterhouse*, 490 U.S. 228, 235 (1989) (citations omitted). Hopkins was told that to improve her chances of attaining partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (citation omitted). Rejecting Price Waterhouse's insinuation that acting in reliance on sex stereotyping was not prohibited by Title VII, the Supreme Court unequivocally stated otherwise:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Id. at 251 (second alteration in original) (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)). The Supreme Court has expressly recognized that claims based on an individual's failure to conform to societal expectations based on that person's gender constitute discrimination "because of sex" under Title VII. *Id.* at 250–51 (plurality); *Price Waterhouse*, 490 U.S. at 272–73 (O'Connor, J., concurring); *Price Waterhouse*, 490 U.S. at 260–61 (White, J., concurring).

The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution. *See Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause following the reasoning of *Price Waterhouse*); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004) (holding that transgender employee had stated a claim under Title VII based on the reasoning of *Price Waterhouse*); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act based on *Price Waterhouse*); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (holding that a transgender individual could state a claim under the Gender Motivated Violence Act under the reasoning of *Price Waterhouse*).

On this long-settled jurisprudential foundation, our friend's assertion that the majority opinion issued when

this case was previously before us is "unprecedented" misses the mark. In any event, as regards the standards for a stay, the dissent contains its own rebuttal. Contrary to the dissent's assertion that "the School Board has constructed three unisex bathrooms to accommodate any person who feels uncomfortable using facilities separated on the basis of sex," the three unisex bathrooms are in fact available to "any student" at the school. Mot. for Stay at 5.

In short, there is no reason to disturb the district court's exercise of discretion in denying the motion to stay its preliminary injunction.

NIEMEYER, Circuit Judge, dissenting from the denial of a stay pending appeal:

I would grant Gloucester County School Board's motion for a stay pending appeal. *See Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970); *cf. Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Facially, the district court conducted no analysis required by *Winter* for the entry of a preliminary injunction, relying only on our earlier decision in this case. And under the balancing analysis prescribed by *Long*, I conclude that a stay is appropriate, based on the following:

1. The earlier groundbreaking decision of this court is, as I have noted previously, unprecedented. Indeed, it appears to violate the clear, unambiguous language of Title IX, which *explicitly* authorizes the provision of various separate facilities "on the basis of sex." Moreover, the court's decision applying deference under *Auer v. Robins*, 519 U.S. 452 (1997), is questionable, and, even if deference were appropriate, it relies solely on a letter

from the U.S. Department of Education, imposing an entirely new interpretation of "sex" in Title IX without the support of any law. In view of this, it is difficult to understand how the decision is sustainable.

2. By enforcing the injunction now, male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents. These consequences are likely to cause disruption both in the school and among the parents.

3. While I recognize the sensitivities of G.G.'s gender transition, I nonetheless conclude that he is unlikely to suffer substantial injury from a stay of the district court's injunction, particularly because the School Board has constructed three unisex bathrooms to accommodate any person who feels uncomfortable using facilities separated on the basis of sex.

4. The public interest in a final and orderly resolution of G.G.'s claims before enforcement of this court's decision is served by a stay pending appeal. The changes that this injunction would require—and that the Department of Justice and Department of Education now seek to impose nationwide on the basis of our earlier decision—mark a dramatic departure from the responsibilities local school boards have heretofore understood and the authorizations that Congress has long provided. These school boards and the communities they serve would benefit from the thoughtful and final disposition of G.G.'s claims, and from ultimate guidance from the Supreme Court or Congress, before having to undertake these sweeping reforms.

In short, I conclude that the Gloucester County School Board has adequately made its case for a stay pending appeal, and I would grant its motion for such a stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother,
DEIRDRE GRIMM,

Plaintiff

v. CIVIL NO. 4:15cv54

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

ORDER

This matter is before the Court on Plaintiff G.G.'s challenge to a recent resolution (the "Resolution") passed by the Gloucester County School Board (the "School Board") on December 9, 2014. This Resolution addresses the restroom and locker room policy for all students in Gloucester County Public Schools. Specifically, G.G. brings claims under both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972, seeking to contest the School Board's restroom policy under the Resolution.

On June 11, 2015, G.G. filed a Motion for Preliminary Injunction. ECF No. 11. A hearing on this motion was held on July 27, 2015. ECF No. 47. No testimony was elicited at this hearing. *Id.* The Court hereby **DENIES** the Plaintiff's Motion for Preliminary Injunction. A memorandum opinion detailing the reasons for the denial will be forthcoming shortly.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/ Robert G. Doumar
Robert G. Doumar
Senior United States District Judge

Newport News, VA
September 4, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

FILED
September 17, 2015

Clerk, US District Court
Norfolk, VA

G.G., by his next friend and mother,
DEIRDRE GRIMM,

Plaintiff

v. CIVIL NO. 4:15cv54

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on Plaintiff G.G.'s challenge to a recent resolution (the "Resolution") passed by the Gloucester County School Board (the "School Board) on December 9, 2014. This Resolution addresses the restroom and locker room policy for all students in Gloucester County Public Schools. Specifically, G.G. brings claims under both the Equal Protection Clause of the Fourteenth Amendment (the "Equal Protection Clause") and Title IX of the Education Amend-

ments of 1972 ("Title IX"), seeking to contest the School Board's restroom policy under the Resolution.

On June 11, 2015, G.G. filed a Motion for Preliminary Injunction, ECF No. 11, and on July 7, 2015, the School Board filed a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court **GRANTED** the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court **DENIED** the Motion for Preliminary Injunction. ECF No. 53. This opinion memorializes the reasons for these orders.

I. FACTUAL AND PROCEDURAL HISTORY

The following summary is taken from the factual allegations contained in Plaintiff's Complaint, which, for purposes of ruling on the Motion to Dismiss as to Count II, the Court accepts as true. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com. Inc.*, 591 F.3d 250. 253 (4th Cir. 2009).

This case arises from a student's challenge to a recent restroom policy passed by the School Board. Plaintiff G.G. was born in Gloucester County on [**redacted**], 1999 and designated female.[1] Compl. ¶¶ 12, 14. However, at a very young age, G.G. did not feel like a girl. *Id.* at 16. Before age six, Plaintiff "refused to wear girl clothes."

[1] For the sake of brevity occasionally in this opinion the term "birth sex" may be used to describe the sex assigned to individuals at their birth. "Natal female" will be used to describe the gender assigned to G.G. at birth.

Id. ¶ 17. Starting at approximately age twelve, "G.G acknowledged his male gender identity to himself."[2] *Id.* ¶ 18. In 2013–14, during G.G.'s freshman year of high school, most of his friends were aware that he identified as male. *Id.* ¶¶ 18–19. Furthermore, away from home and school, G.G. presented himself as a male. *Id.* ¶ 19.

During G.G.'s freshman year of high school, which began in September 2013, he experienced severe depression and anxiety related to the stress of concealing his gender identity from his family. *Id.* ¶ 20. This is the reason he alleges that he did not attend school during the spring semester of his freshman year, from January 2014 to June 2014, and instead took classes through a home-bound program. *Id.* In April 2014, G.G. first informed his parents that he is transgender, that is, he believed that he was a man.[3] *Id.* ¶ 21. Sometime after informing his parents that he is transgender in April 2014, G.G., at his own request, began to see a psychologist,

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[2] The American Psychiatric Association ("APA") defines "gender identity" as "an individual's identification as male, female, or, occasionally, some category other than male or female." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM"). The DSM is "a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders." *Id.* at xli. Although the DSM was included in G.G.'s briefs, it was not alleged in the Complaint and will consequently not be considered for the purpose of the Motion to Dismiss. However, the Court finds it instructive for definitional purposes.

[3] The APA defines "transgender" as "the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender." *Id.*

who subsequently diagnosed him with Gender Dysphoria.[4] *Id.* ¶ 21. As part of G.G.'s treatment, his psychologist recommended that G.G. begin living in accordance with his male gender identity in all respects. *Id.* ¶ 23. The psychologist provided G.G. with a "Treatment Documentation Letter" that confirmed that "he was receiving treatment for Gender Dysphoria and that, as part of that treatment, he should be treated as a boy in all respects, including with respect to his use of the restroom." *Id.* The psychologist also recommended that G.G. "see an endocrinologist and begin hormone treatment." *Id.* ¶ 26.

Subsequently, G.G. sought to implement his psychologist's recommendation. *Id.* ¶ 25. In July 2014, G.G. petitioned the Circuit Court of Gloucester County to change his legal name to his present masculine name and, the court granted his petition. *Id.* At his own request, G.G.'s new name is used for all purposes, and his friends and family refer to him using male pronouns. *Id.* Additionally, when out in public, G.G. uses the boys' restroom. *Id.*

G.G. also sought to implement his lifestyle transition at school. In August 2014, G.G. and his mother notified officials at Gloucester High School that G.G. is transgender and that he had changed his name. *Id.* ¶ 27. Consequently, officials changed school records to reflect G.G.'s new masculine name. *Id.* Furthermore, before the beginning of the 2014–15 school year, G.G. and his mother met with the school principal and guidance counselor to discuss his social transition. *Id.* ¶ 28. The school rep-

[4] The APA defines "gender dysphoria" as "the distress that may accompany the incongruence between one's experienced and expressed gender and one's assigned gender." *Id.*

resentatives allowed G.G. to email teachers and inform them that he preferred to be addressed using his new name and male pronouns. *Id.* Being unsure how students would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office. *Id.* ¶ 30. G.G. was also permitted to continue his physical education requirement through his home school program. *Id.* ¶ 29. Consequently, G.G. "has not and does not intend to use a locker room at school." *Id.*

However, after 2014–15 school year began, G.G. found it stigmatizing to use a separate restroom. *Id.* ¶ 31. G.G. requested to use the male restroom. *Id.* On or around October 20, 2014, the school principal agreed to G.G.'s request. *Id.* ¶ 32. For the next seven weeks, G.G. used the boys' restroom. *Id.*

Some members of the community disapproved of G.G.'s use of the men's bathroom when they learned of it. *Id.* ¶ 33. Some of these individuals contacted members of the School Board and asked that G.G. be prohibited from using the men's restroom. *Id.* Shortly before the School Board's meeting on November 11, 2014, one of its members added an item to the agenda, titled "Discussion of Use of Restrooms/Locker Room Facilities," along with a proposed resolution. *Id.* ¶ 34. This proposed resolution stated as follows:

> Whereas the [Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the [Gloucester County Public Schools] encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and

> Whereas the [Gloucester County Public Schools] seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the [Gloucester County Public Schools] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. ¶ 34. At the meeting, a majority of the twenty-seven people who spoke were in favor of the proposal. *Id.* ¶ 37. Some proponents argued that transgender students' use of the restrooms would violate the privacy of other students and might "lead to sexual assault in the bathrooms." *Id.* It was suggested that a non-transgender boy could come to the school in a dress and demand to use the girls' restroom. *Id.* G.G. addressed the group and spoke against the proposed resolution and thus identified himself to the entire community. *Id.* ¶ 38. At the end of the meeting, the School Board voted 4-3 to defer a vote on the policy until its meeting on December 9, 2014. *Id.* ¶ 39.

On December 3, 2014, the School Board issued a news release stating that regardless of the outcome, it intended to take measures to increase privacy for all students using school restrooms, including "expanding partitions between urinals in male restrooms"; "adding privacy strips to the doors of stalls in all restrooms"; and "designat[ing] single-stall, unisex restrooms, similar to

what's in many other public spaces." *Id.* ¶ 41. On December 9, 2014, the School Board held a meeting to vote on the proposed resolution. *Id.* Before the vote was conducted, a Citizens' Comments Period was held to allow a discussion on the proposed resolution. *Id.* Again, a majority of the speakers supported the resolution. *Id.* ¶ 42. Speakers again raised concerns about the privacy of other students. *Id.* After thirty-seven people spoke during the Citizens' Comment Period, the School Board voted 6-1 to pass the Resolution. *Id.* ¶ 43.

On December 10, 2015, the day after the School Board passed the Resolution, the school principal informed G.G. that he could no longer use the boys' restroom and would be disciplined if he did. *Id.* ¶ 45.

Since the adoption of the restroom policy, certain physical improvements have been made to the school restrooms at Gloucester High School. The school has installed three unisex single-stall restrooms. *Id.* ¶ 47. The school has also raised the doors and walls around the bathroom stalls so that students cannot see into an adjoining stall. *Id.* Additionally, partitions were installed between the urinals in the boys' restrooms. *Id.*

Sometime after the actions of the School Board, G.G. began receiving hormone treatment in December 2014. *Id.* ¶ 26. These treatments have deepened his voice, increased the growth of his facial hair, and given him a more masculine appearance. *Id.*

It is alleged that "[u]sing the girls' restroom is not possible for G.G." *Id.* ¶ 46. G.G. alleges that prior to his treatment for Gender Dysphoria, girls and women who encountered G.G. in female restrooms would react negatively because of his masculine appearance; that in eighth and ninth grade, the period from September 2012

to June 2014, girls at school would ask him to leave the female restroom; and that use of the girls' restroom would also cause G.G. "severe psychological stress" and would be "incompatible with his medically necessary treatment for Gender Dysphoria." *Id.*

G.G. further alleges that he refuses to use the separate single-stall restrooms installed by the school because the use of them would stigmatize and isolate him; that the use of these restrooms would serve as a reminder that the school views him as "different"; and that the school community knows that the restrooms were installed for him. *Id.*

From these alleged facts, on June 11, 2015, G.G. brought the present challenge to the School Board's restroom policy under the Equal Protection Clause and Title IX. ECF No. 8. On that same day, G.G. filed the instant Motion for Preliminary Injunction, requesting that the Court issue an injunction allowing G.G. to use the boys' bathroom at Gloucester High School until this case is decided at trial. ECF No. 11. On June 29, 2015, the United States ("the Government"), through the Department of Justice, filed a Statement of Interest, asserting that the School Board's bathroom policy violated Title IX. ECF No. 28. The School Board filed an Opposition to the Motion for Preliminary Injunction on July 7, 2015, ECF No. 30, along with a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court granted the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court denied the Motion for Preliminary Injunction.

ECF No. 53. This opinion memorializes the reasons for these orders.

II. MOTION TO DISMISS

A. STANDARD OF REVIEW

The function of a motion to dismiss under Rule 12(b)(6) is to test "the sufficiency of a complaint." *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013). "[I]mportantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). "To survive such a motion, the complaint must allege facts sufficient 'to raise a right to relief above the speculative level' and 'state a claim to relief that is plausible on its face.'" *Haley*, 738 F.3d at 116. When reviewing the legal sufficiency of a complaint, the Court must accept "all well-pleaded allegations in the plaintiffs complaint as true" and draw "all reasonable factual inferences from those facts in the plaintiffs favor." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Legal conclusions, on the other hand, are not entitled to the assumption of truth if they are not supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, a motion to dismiss should be granted only in "very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989).

B. COUNT II - TITLE IX

G.G. also alleges that the School Board's bathroom policy violates Title IX. Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program . . . ." 20 U.S.C. § 1681(a). "Under Title IX, a prima facie case is established by a plaintiff showing (1) that [he or] she was excluded from participation in (or denied the benefits of, or subjected to discrimination in) an educational program; (2) that the program receives federal assistance; and (3) that the exclusion was on the basis of sex." *Manolov v. Borough of Manhattan Comm. Coll.*, 952 F. Supp. 2d 522, 532 (S.D.N.Y. 2013) (quoting *Murray v. N.Y. Univ. Coll. of Dentistry*, No. 93 Civ. 8771, 1994 WL 533411, at *5 (S.D.N.Y. Sept. 29, 1994)); *Bougher v. Univ. of Pittsburgh*, 713 F. Supp. 139, 143–44 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989)).

The School Board Resolution expressly differentiates between students who have a gender identity congruent with their birth sex and those who do not. Compl. ¶ 34. G.G. alleges that this exclusion from the boys' bathroom based on his gender identity constitutes sex discrimination under Title IX. Compl. ¶¶ 64, 65.

1. Arguments

The parties contest whether discrimination based on gender identity is barred under Title IX. To support their respective contentions, both parties cite to cases interpreting Title VII, upon which courts have routinely relied in determining the breadth of Title IX. *See Jen-*

nings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

The School Board argues that sex discrimination does not include discrimination based on gender identity. For support, the School Board cites *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, --- F. Supp. 3d ----, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015). In *Johnston*, the Western District of Pennsylvania found that a policy separating the bathrooms by birth sex at the University of Pittsburgh did not violate Title IX because sex discrimination does not include discrimination against transgender individuals. 2015 WL 1497753, at *12–19. The School Board asserts that *Johnston* establishes that Title IX does not incorporate discrimination based on gender or transgender status.

In response, G.G. maintains that sex discrimination includes discrimination based on gender. G.G. cites to a number of Title VII cases in which courts have found sex discrimination to include gender discrimination. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004); *Finkle v. Howard Cnty., Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("'[S]ex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.").

In addition, G.G. contends that the cases *Johnston* cited to support its proposition, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and, *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982), *cert. denied*, 471 U.S. 1017 (1985),[5] are no longer good law. In both *Ulane* and *Sommers*, the courts refused to extend sex discrimination to include discrimination against transgender individuals or those with nonconforming gender types. However, G.G. asserts that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), overruled these cases. In *Price Waterhouse*, the Supreme Court considered a Title VII claim based on allegations that an employee at *Price Waterhouse* was denied partnership because she was considered "macho" and "overcompensated for being a woman." 490 U.S. at 235. She had been advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Court found that such comments were indicative of gender stereotyping, which Title VII prohibited as sex discrimination. The Court explained that

> we are beyond the day when an employer could evaluate employees by assuming or insisting

[5] The more recent case *Johnston* cites is a Tenth Circuit case, in which the court avoided deciding the issue. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) ("This court need not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex' and we need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex.").

> that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

Id. at 251 (quoting *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Accordingly, the Court found that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be" has acted on the basis of sex. *Id.* at 251.

Other courts have found that *Price Waterhouse* overruled the cases cited in *Johnston*. "[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that 'the approach in . . . *Sommers*, and *Ulane* . . . has been eviscerated' by *Price Waterhouse*'s holding." *Glenn*, 663 F.3d at 1318 n.5 (quoting *City of Salem*, 378 F.3d at 573)); *see also Schwenk*, 204 F.3d at 1201 ("The initial judicial approach taken in cases such as *Hollowav* has been overruled by the logic and language of *Price Waterhouse*."); *Lopez*, 542 F. Supp. 2d at 660. Based on *Price Waterhouse* and its progeny, G.G. claims that discrimination against transgender individuals or other nonconforming gender types is now prohibited as a form of sex discrimination. Accordingly, G.G. asserts that the Resolution's differentiation between students who have a gender identity congruent with their birth sex, and those who do not, amounts to sex discrimination under Title IX.

2. Analysis

Although the primary contention between the parties is whether gender discrimination fits within the definition of sex discrimination under Title IX, G.G.'s claim does not rest on this distinction. Rather, the Court concludes that G.G.'s Title IX claim is precluded by Department of Education regulations. As noted above, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681. However, this prohibition on sex-based decision making is not without exceptions. Among the exceptions listed in Title IX is a provision stating that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Although the statute does not expressly state that educational institutions may maintain separate bathrooms for the different sexes, Department of Education regulations stipulate:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33. This regulation (hereinafter, "Section 106.33") expressly allows schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable. When Congress delegates authority to any agency to "elucidate a specific provision of

the statute by regulation, any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). The Department of Education's regulation is not "arbitrary, capricious, or manifestly contrary to the statute."[6] Rather, Section 106.33 seems to effectuate Title IX's provision allowing separate living facilities based on sex.[7] Therefore, Section 106.33 is given controlling weight.

In light of Section 106.33, G.G. fails to state a valid claim under Title IX. G.G. alleges that the School Board violated Title IX by preventing him from using the boys' restrooms despite the fact that his gender identity is male. Compl. ¶¶ 64, 65. According to G.G., the School Board's determination was based on the belief that Plaintiff is biologically female, not biologically male.[8] *Id.*

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[6] It is significant that neither party raised, nor even hinted at raising, a challenge to the validity of Section 106.33 under Title IX.

[7] The term "living facilities" in 20 U.S.C. § 1686 is ambiguous, and legislative history of Title IX does not provide clear guidance as to its meaning. This term could be narrowly interpreted to mean living quarters, such as dormitories, or it could be broadly interpreted to include other facilities, such as bathrooms. *See Implementing Title IX: The New Regulations*, 124 U. Pa. L. Rev. 806, 811 (1976). Because the Department of Education's inclusion of bathrooms within "living facilities" is reasonable, the Court defers to its interpretation. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

[8] The Court is sensitive to the fact the G.G. disapproves of the School Board's term "biological gender." *See* Compl. ¶ 66 (placing biological in dismissive quotation marks). G.G. may also take issue with the Court's phrase biological sex. The Court is guided in its usage by the APA "Definition of Terms: Sex, Gender, Gender Iden-

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¶ 65. However, Section 106.33 specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable. Therefore, the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex.

In fact, the only way to square G.G.'s allegations with Section 106.33 is to interpret the use of the term "sex" in Section 106.33 to mean *only* "gender identity." Under this interpretation, Section 106.33 would permit the use of separate bathrooms on the basis of gender identity and not on the basis of birth or biological sex. However, under any fair reading, "sex" in Section 106.33 clearly includes biological sex. Because the School Board's policy of providing separate bathrooms on the basis of biological sex is permissible under the regulation, the Court need not decide whether "sex" in the Section 106.33 also includes "gender identity."

Instead, the Court need only decide whether the School Board's bathroom policy satisfies Section 106.33. Section 106.33 states that sex-segregated bathrooms are permissible unless such facilities are not comparable. G.G. fails to allege that the bathrooms to which he is allowed access by the School Board—the girls' restrooms and the single-stall restrooms—are incomparable to those provided for individuals who are biologically male. In fact, none of the allegations in the Complaint even

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tity, Sexual Orientation" from 2011, which the School Board submitted with its Brief in Opposition to Motion for Preliminary Injunction. Ex. 3, ECF No. 30. The APA defines "sex" as "a person's biological status," and identifies "a number of indicators of biological sex." *Id.*

mention or imply that the facilities in the bathrooms are not comparable. Consequently, G.G. fails to state a claim under Title IX.

Nonetheless, despite Section 106.33, the Government urges the Court to defer to the Department of Education's interpretation of Title IX, which maintains that a policy that segregates bathrooms based on biological sex and without regard for students' gender identities violates Title IX. In support of its position, the Government attaches a letter (the "Letter"), dated January 7, 2015, issued by the Department of Education, through the Office for Civil Rights, apparently clarifying its stance on the treatment of transgender students with regard to sex-segregated restrooms. Statement of Interest 9, ECF No. 28; *id.* Ex. B, at 2, ECF No. 28-2. In the Letter, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights, writes:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school must treat transgender students consistent with their gender identity.

Id. at 9–10, Ex. B, at 2. The Letter cites a Department of Education significant guidance document (the "Guidance Document") published in 2014 in support of this interpretation. According to the Guidance Document:

> Under Title IX, a recipient must generally treat transgender students consistent with

> their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.

See Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 25 (Dec. 1, 2014). Despite the fact that Section 106.33 has been in effect since 1975,[9] the Department of Education does not cite any documents published before 2014 to support the interpretation it now adopts.

The Department of Education's interpretation does not stand up to scrutiny. Unlike regulations, interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines "do not warrant *Chevron*-style deference" with regard to statutes. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Therefore, the interpretations in the Letter and the Guidance Document cannot supplant Section 106.33. Nonetheless, these documents can inform the meaning of Section 106.33. An agency's interpretation of its own regulation, even one contained in an opinion letter or a guidance document, is given controlling weight if (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. *Id.* at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Auer v. Robbins*, 519

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[9] Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and adopted by the Department of Education upon its establishment in 1980. 45 Fed. Reg. 30802, 30955 (May, 9, 1980) (codified at 34 C.F.R. §§ 106.1–.71).

U.S. 452, 461 (1997) ("[The agency's] interpretation of [its own regulation] is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.").

Upon review, the Department of Education's interpretation should not be given controlling weight. To begin with, Section 106.33 is not ambiguous. It clearly allows the School Board to limit bathroom access "on the basis of sex," including birth or biological sex. Furthermore, the Department of Education's interpretation of Section 106.33 is plainly erroneous and inconsistent with the regulation. Even under the most liberal reading, "on the basis of sex" in Section 106.33 means both "on the basis of gender" *and* "on the basis of biological sex." It does not mean "only on the basis of gender." Indeed, the Government itself states that "under *Price Waterhouse*, 'sex' . . . encompasses both sex—that is, the biological differences between men and women—*and* gender." Statement of Interest 6–7, ECF No. 28. Thus, at most, Section 106.33 allows the separation of bathroom facilities on the basis of gender. It does not, however, require that sex-segregated bathrooms be separated on the basis of gender, rather than on the basis of birth or biological sex. Gender discrimination did not suddenly supplant sex discrimination as a result of *Price Waterhouse*; it supplemented it.

To defer to the Department of Education's newfound interpretation would be nothing less than to allow the Department of Education to "create *de facto* a new regulation" through the use of a mere letter and guidance document. *See Christensen*, 529 U.S. at 588. If the Department of Education wishes to amend its regulations, it is of course entitled to do so. However, it must go

through notice and comment rulemaking, as required by the Administrative Procedure Act. *See* 5 U.S.C. § 553. It will not be permitted to disinterpret its own regulations for the purposes of litigation. As the Court noted throughout the hearing, it is concerned about the implications of such rulings. Mot. to Dismiss & Prelim. Inj. Hr'g at Tr. 65:23–66:19; 73:6–74:7. Allowing the Department of Education's Letter to control here would set a precedent that agencies could avoid the process of formal rulemaking by announcing regulations through simple question and answer publications. Such a precedent would be dangerous and could open the door to allow further attempts to circumvent the rule of law—further degrading our well-designed system of checks and balances.

In light of Section 106.33, the Court cannot find that the School Board's bathroom policy violates Title IX.

III. MOTION FOR PRELIMINARY INJUNCTION

The Motion for Preliminary Injunction is entirely different. The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence. G.G. has sought a preliminary injunction. This Motion requests that the Court issue an injunction allowing G.G. to resume using the boys' restrooms at Gloucester High School until there is a final judgment on the merits.[10]

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[10] G.G. claims that he does not intend to use the locker room at school. Mem. in Supp. of Mot. for Prelim. Inj., 8 n.2, ECF No. 18 ("Prelim. Inj."). However, the requested injunction allowing him to use the male restrooms would apply to the male restroom in the

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ECF No. 11. In support of his motion for a preliminary injunction, G.G. has submitted two declarations: one from G.G. and another from an expert in the field of Gender Dysphoria. Decl. of G.G, ECF No. 9 ("G.G. Decl."); The Expert Declaration of Randi Ettner, Ph.D, ECF No. 10 ("Ettner Decl."). The School Board contests the injunction and attaches single a declaration to its Opposition to the Motion for Preliminary Injunction from Troy Andersen, a member of the School Board and the 2014–15 Gloucester Point District Representative for the Gloucester County School Board. Decl. of Troy Andersen, ECF No. 30-1 ("Andersen Decl."). On July 27, 2015, the parties appeared before the Court to argue this Motion, and both parties were given the opportunity to introduce evidence supporting their respective positions. ECF No. 47. At the hearing, neither G.G. nor the School Board introduced additional evidence for support. *Id.*

As the Court has granted the School Board's motion to dismiss as to Count II, G.G.'s claim under Title IX, it need not discuss reasons for denying the Motion for Preliminary Injunction on this Count. While the Court has not yet ruled on whether G.G. has stated a claim under the Equal Protection Clause, the Court finds that, even if he has stated a claim, G.G. has not submitted enough evidence to establish that the balance of hardships weigh in his favor. Accordingly, the issuance of a preliminary injunction is not warranted.

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locker room.

A. STANDARD OF REVIEW

"The grant of preliminary injunctions [is] . . . an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in the limited circumstances' which clearly demand it." *Direx Israel. Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1992) (quoting *Instant Air Freight Co. v. C.F. Air Freight. Inc.*, 882 F.2d 797, 800 (3d Cir. 1989)). A plaintiff must overcome the "uphill battle" of satisfying each of the four factors necessary to obtain a preliminary injunction. *Real Truth About Obama. Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (stating that the four factors must be "satisfied as articulated"), *vacated on other grounds*, 559 U.S. 1089 (2010). To obtain a preliminary injunction, "[p]laintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). The failure to make a clear showing of any one of these four factors requires the Court to deny the preliminary injunction."[11] *Real Truth About Obama, Inc.*, 575 F.3d at 346.

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[11] The parties dispute whether the injunction sought is mandatory or prohibitory in nature. "Whereas mandatory injunctions alter the status quo, prohibitory injunctions 'aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.'" *League of Women Voters of N.C.*, 769 F.3d at 236 (quoting *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013)). There is a heightened standard for mandatory injunctions. *Taylor v. Freeman*m 34 F.3d

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A plaintiff seeking a preliminary injunction does not benefit from the presumption that the facts contained in the complaint are true. A plaintiff must introduce evidence in support of a Motion for Preliminary Injunction. While oral testimony is not strictly necessary, this Court has never granted a Preliminary Injunction without first hearing oral testimony. Declarations are frequently drafted by lawyers, and the evidence presented within them is not subject to the rigors of cross examination. A plaintiff relying solely on such weak evidence is unlikely to make the clear showing required for the issuance of a preliminary injunction. Additionally, this Court will not consider evidence that would be inadmissible at trial, such as hearsay, that is contained within affidavits.

B. Arguments of the Parties and Facts in Evidence

G.G. characterizes the question of competing hardships as "not a close question." Mem. in Supp. of Mot. for Prelim. Inj., 40, ECF No. 18 ("Prelim. Inj."). He argues that this Court must weigh "the severe, documented, and scientifically supported harms" that the restroom policy continues to inflict upon G.G, who has been diagnosed with Gender Dysphoria, against the "School Board's unfounded speculation about harms that might occur to

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266, 270 n.2 (4th Cir. 1994) ("Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances."). Because the Court finds that G.G. fails to show that a preliminary injunction is warranted even if the injunction sought is prohibitory, the Court does not decide the issue.

others at some future date." *Id.* The School Board by contrast implores this Court to consider the safety and privacy interests of all its students. Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. It emphasizes that while litigation is ongoing, G.G. may use the "girls' restroom, the three single-stall restrooms, or the restroom in the nurse's office." *Id.*

1. Facts and Arguments Concerning the Hardship to G.G.

G.G. relies on two declarations to establish the hardships he would suffer should this Court deny his Motion for Preliminary Injunction. ECF Nos. 9, 10. G.G.'s Declaration largely repeats the material in his complaint. *Compare* ECF Nos. 8 and 9. The Court recounts only those assertions that concern the effect that G.G.'s Gender Dysphoria has had on his schooling. G.G. alleges other harms he has suffered, such as being humiliated and forced to speak at the School Board hearing, G.G. Decl. ¶ 23, but these harms are not relevant to the issuance of an injunction allowing G.G. to use the male restroom during this litigation. Here the declaration of G.G. is a recital of the allegations in the complaint and is replete with inadmissible evidence including thoughts of others, hearsay, and suppositions. The Court recounts these allegations before analyzing their credibility.

G.G. claims that during his freshman year, which began in September 2013, he "experienced severe depression and anxiety related to his untreated Gender Dysphoria." *Id.* ¶ 9. The depression and anxiety were so severe that G.G. did not attend school during the spring semester which began in January 2014. *Id.* There is

nothing to corroborate that his "untreated Gender Dysphoria" was the reason for his absence. In April of 2014, weeks before his fifteenth birthday, G.G. first informed his parents that he is transgender. *Id.* ¶ 10. After his parents learned of his gender identity, G.G. began "therapy with a psychologist who had experience with working with transgender patients." *Id.* He claims that this psychologist diagnosed him with Gender Dysphoria and recommended that he begin to live as a boy in all respects, including in his use of the restroom. *Id.* ¶ 11. There is no report or declaration from this psychologist. In August 2014, G.G. and his mother informed officials at Gloucester High School of his gender identity. *Id.* ¶ 15. At the start of the school year, G.G. agreed to use a separate restroom in the nurse's office. *Id.* ¶ 19. G.G. then determined that it "was not necessary to continue to use the nurse's restroom." *Id.* He claims that he "found it stigmatizing to use a separate restroom." *Id.*

On December 9, 2014, the School Board adopted the restroom policy. *Id.* ¶ 22. With the new transgender restroom policy, G.G. feels like he has been "stripped of [his] privacy and dignity." *Id.* ¶ 23. He is unwilling to use the girls' restroom because, he claims, girls and women object to his presence there. *Id.* ¶ 25. Additionally, use of the girls' restroom would be incompatible with his treatment for Gender Dysphoria. *Id.* He claims that the new unisex restrooms are not located near his classes and that only one of these restrooms is located near where the single-sex restrooms are located. *Id.* ¶ 26. He refuses to use these restrooms because "they make him feel even more stigmatized and isolated than when [he] use[d] the restroom in the nurse's office." *Id.* ¶ 27. He claims that everyone knows that the restrooms were in-

stalled for him. *Id.* Because G.G. refuses to use any of the restrooms permitted for his use, he has held his urine and developed urinary tract infections. *Id.* ¶ 28.

The Expert Declaration of Randi Ettner, Ph.D, adds little to these factual claims. Ettner is not the psychologist who analyzed G.G. after he first told his parents he was transgender; rather, he was retained by G.G.'s counsel in preparation for this litigation. *See* Ettner Decl. ¶¶ 1, 7, 9. Ettner met G.G. once before preparing his report. *Id.* ¶ 7. The bulk of his declaration describes the diagnosis and treatment of Gender Dysphoria. It defines Gender Dysphoria as the feeling of incongruence between one's gender identity and the sex assigned one at birth. *Id.* ¶ 11–12. It notes that Gender Dysphoria is "codified in the Diagnostic and Statistical [M]anual of Mental Disorders (DSM-V) (American Psychiatric Association) and the International Classifications of Diseases-10 (World Health Organization)." *Id.* ¶ 12. It describes the studies that have looked at transgender youth who could not use restrooms corresponding to their gender identity. *Id.* ¶¶ 18–27. However, beyond confirming that G.G. has a "*severe* degree of Gender Dysphoria," *id.* ¶ 29, there are no facts particular to G.G. in the report. *See id.* ¶¶ 28–30.

The School Board, supported by the declaration of Troy Andersen, emphasizes that any student may use the three unisex restrooms that were installed and open for use by December 16, 2014. Andersen Decl. ¶ 7; Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. Any student may also use the restroom in the nurse's office. Andersen Decl. ¶ 7. Moreover, the School Board contends that G.G. may use the female restrooms and locker rooms, Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No.

30, and G.G. has made no showing that he is not permitted to use them.

2. Facts and Arguments Concerning Student Privacy

The School Board contends that granting the preliminary injunction and allowing G.G. to use the male restroom would endanger the safety and privacy of other students. Br. in Opp'n to Mot. for Prelim. Inj., 18, ECF No. 30. G.G. argues in response, without any independent factual support, that his presence in the male restroom would not infringe upon the privacy rights of his fellow students. He claims that the student body itself is comfortable with his presence in the restroom because during the seven weeks in which he used the male restroom, he "never encountered any problems from other students." G.G. Decl. ¶ 20. The Andersen Declaration describes a different reaction to G.G.'s use of the male restroom. Andersen Decl. ¶ 4. According to Andersen, the School Board "began receiving numerous complaints from parents and students" the day after G.G. was granted permission to use the boys' bathroom. *Id.*

G.G. also contends that the improvements that the School Board made to the restrooms alleviated any concerns that parents or students may have had about "nudity involving students of different sexes." Prelim. Inj. at 33. His complaint describes these improvements, which include raising the doors and walls around the bathroom stalls so that students cannot see into an adjoining stall, and adding three unisex, single-stall restrooms. Compl. ¶¶ 47, 52. The School Board disputes the extent to which the improvements have increased privacy and claims

that the restrooms, "and specifically the urinals," are "not completely private," although it also does not submit any evidence in support of this contention. Br. in Opp'n to Mot. for Prelim. Inj., 18 n.17, ECF No. 30.

Finally, G.G. argues that any student uncomfortable with his presence in the male restrooms may use the new unisex restrooms. Prelim. Inj. at 35, 39.

C. Analysis

G.G.'s Motion for Preliminary Injunction asks this Court to allow him, a natal female, to use the male restroom at Gloucester High School. Mot. for Prelim. Inj., ECF No. 11. Restrooms and locker rooms are designed differently because of the biological differences between the sexes. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("differences between the genders demand a facility for each gender that is different"). Male restrooms, for instance, contain urinals, while female restrooms do not. Men tend to prefer urinals because of the convenience. Furthermore, society demands that male and female restrooms be separate because of privacy concerns. *Id.*; *see also Virginia v. United States*, 518 U.S. 515, 550 n.16 (1996) ("[admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements"). The Court must consider G.G.'s claims of stigma and distress against the privacy interests of the other students protected by separate restrooms.

In protecting the privacy of the other students, the School Board is protecting a constitutional right. The Fourth Circuit has recognized that prisoners have a con-

stitutional right to bodily privacy. *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981). Although the Fourth Circuit has never held that the right to bodily privacy applies to all individuals, it would be perverse to suppose that prisoners, who forfeit so many privacy rights, nevertheless gained a constitutional right to bodily privacy. In recognizing the right of prisoners to bodily privacy the court spoke in universal terms: "Most people ... have a special sense of privacy in their own genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating." *Id.*

Several circuits have recognized the right to bodily privacy outside the context of prisoner litigation. *Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (holding that a student's "constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms"); *Poe v. Leonard*. 282 F.3d 123, 138–39 (2d Cir. 2002) ("there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). In these circuits, violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum*, 516 F.3d at 494 ("the

constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of defendant and plaintiff in *York*).

Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public school education is a protective environment. Furthermore, the School Board is tasked with providing safe and appropriate facilities for these students. *Linnon v. Commonwealth*, 752 S.E.2d 822, 826 (Va. 2014) (finding that "school administrators have a responsibility 'to supervise and ensure that students could have an education in an atmosphere conducive to learning, free of disruption, and threat to person.'" (quoting *Burns v. Gagnon*, 727 S.E.2d 634, 643 (Va. 2012)).

G.G.'s unsupported claims, which are mostly inadmissible hearsay, fail to show that his presence in the male restroom would not infringe upon the privacy of other students. G.G.'s claim that he "never encountered any problems from other students," G.G. Decl. ¶ 20, is directly contradicted by the Andersen Declaration. Andersen Decl. ¶ 4. Moreover, even if the Court accepted G.G.'s self-serving assertion, it would still not find that there was no discomfort among the students. It would not be surprising if students, rather than confronting G.G. himself, expressed their discomfort to their parents who then went to the School Board.

G.G. further contends that the improvements that the School Board made to the restrooms minimize any priva-

cy concerns. Prelim. Inj. at 33. However, G.G. does not introduce any evidence that would help the Court understand the extent of the improvements. He fails to recognize that no amount of improvements to the urinals can make them completely private because people sometimes turn while closing their pants. He does not submit any evidence that would show that other students would be comfortable with his presence in the male restroom because of the improvements. Finally, he fails to recognize that the School Board's interests go beyond preventing most exposures of genitalia. The mere presence of a member of the opposite sex in the restroom may embarrass many students and be felt a violation of their privacy. Accordingly, the privacy concerns of the School Board do not diminish in proportion to the size of the stall doors.

G.G.'s argument that other students may use the unisex restrooms if they are uncomfortable with his presence in the male restroom unintentionally reveals the hardship that the injunction he seeks would impose on other students. It does not occur to G.G. that other students may experience feelings of exclusion when they can no longer use the restrooms they were accustomed to using because they feel that G.G.'s presence in the male restroom violates their privacy. He would have any number of students use the unisex restrooms rather than use them himself while this Court resolves his novel constitutional challenge.

G.G.'s dismissal of the School Board's privacy concerns only makes sense if assumes that there are fewer or no privacy concerns when a student shares a restroom with another student of different birth sex but the same gender identity. If there were no privacy concerns in this

situation, there would be no hardship if G.G. used the male restroom while this litigation proceeds. Of course, this litigation is proof that not everyone—certainly not the Gloucester County School Board—shares in this belief. The Court gives great weight to the concerns of the School Board—which represents the students and parents in the community—on the question of the privacy concerns of students, especially at this early stage of litigation and in the complete absence of credible evidence to the contrary.

Against the School Board's strong interest in protecting student privacy, the Court must consider G.G.'s largely unsubstantiated claims of hardship. G.G. acknowledges that he may use the unisex restrooms or the nurse's restroom. His declaration fails to articulate the specific harms that would occur to him if he uses those restrooms while this litigation proceeds; it simply says that using these restrooms would cause him distress and make him feel stigmatized. It is telling to the Court that his declaration mirrors his complaint, a sign that it was drafted by his lawyers and not by him. G.G. attempts to support his claims of distress by describing the diagnosis of the first psychologist who saw him, but these allegations are hearsay and will not be considered.

Similarly, G.G. makes several claims about the thoughts and feelings of other students for which he has not submitted any admissible evidence or corroboration. He has nothing to substantiate his claims that other students view the unisex restrooms as designed solely for him. Nor has he submitted a layout of the school that would confirm his claim that the unisex restrooms are inconvenient for him to use.

The declaration of Dr. Ettner is almost completely devoid of facts specific to G.G. Dr. Ettner is not the psychologist who allegedly first diagnosed G.G. with Gender Dysphoria. Rather, he has been retained for this litigation. Having met G.G. only once, he has little to say about the harm that would occur to G.G. specifically if G.G. is not allowed to use the male restrooms during this litigation.

G.G. has been given an option of using a restroom in addition to the female restroom that corresponds to his biological sex. He has not described his hardship in concrete terms and has supported his claims with nothing more than his own declaration and that of a psychologist who met him only once, for the purpose of litigation and not for treatment. The School Board seeks to protect an interest in bodily privacy that the Fourth Circuit has recognized as a constitutional right while G.G. seeks to overturn a long tradition of segregating bathrooms based on biological differences between the sexes. Because G.G. has failed to show that the balance of hardships weighs in his favor, an injunction is not warranted while the Court considers this claim.

Having found that G.G. has not shown that the balance of the hardships are in his favor, the Court docs not need to consider the other showings required for a preliminary injunction. However, the Court notes that just as G.G. has failed to provide adequate proof of the hardship that would occur if the injunction is not granted, he has also failed to make a clear showing of irreparable injury.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTED** the Motion to Dismiss as to Count II, Plaintiff's claim under Title IX, and **DENIED** the Plaintiffs Motion for a Preliminary Injunction. The Clerk is **DIRECTED** to forward a copy of this Opinion to all Counsel of Record.

IT IS SO ORDERED.

/s/ Robert G. Doumar
Robert G. Doumar
Senior United States District Judge

Newport News, VA
September 17, 2015

Ms. Massie Ritsch
Acting Assistant Secretary
Office of Communications and Outreach
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Transmitted via e-mail

Dear Ms. Ritsch:

Last week, numerous reporters wrote stories regarding the actions of a school board in Gloucester County, Virginia. In response to the presence of a transgender student in the local high school, the school board passed the following proposal, establishing it as official policy for Gloucester County Public Schools:

> Whereas the GCPS (Gloucester County Public Schools) recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support and advice from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with sincere gender identity issues shall be provided an alternative private facility.

The U.S. Department of Education has recently received praise from the transgender community for noting in several guidance documents that Title IX's ban on discrimination on the basis of sex includes, consistent with the Equal Employment Opportunity Commission's decision in *Macy v. Holder*, discrimination on the basis of gender identity. It is my sincere hope that the Department will continue to provide such guidance, particularly on this issue that so frequently erupts whenever states or localities consider prohibiting discrimination on the basis of gender identity.

While I understand that the Department is unable to comment on any matters that may be under investigation, this story does raise a question: does the Department have any guidance or rules for what is or is not acceptable for a school to do when establishing policies for transgender students to access restrooms and other similar sex-segregated facilities? Specifically, the articles lead the reader to a number of questions:

- Does the Department have guidance or rules on whether a transgender student may be required to use a different restroom than other students, such as a restroom in a nurse's office or a restroom designated for school employees?
- Does the Department have guidance or rules on whether an organization such as a school, a school district, or a university may limit access to facilities to only those whose gender identity is consistent with their sex assigned at birth (i.e., cisgender individuals)?

- Has the Department communicated any guidance or rules on these questions to organizations such as schools, school districts, or universities to eliminate unnecessary confusion over proper implementation of Title IX?

I have copied one of the writers, Ms. Barbara King, a contributor to NPR and Chancellor Professor of Anthropology at the College of William and Mary, who wrote about the topic in an NPR blog post on December 11, 2014. I will gladly share your response with the authors of the other news stories I have seen on this issue, such as Dominic Holden of BuzzFeed and John Riley of Metro Weekly.

I look forward to working with your office to answer these questions.

Sincerely,

/s/ Emily T. Prince
Emily T. Prince, Esq.

cc: Barbara J. King, Chancellor Professor of Anthropology, College of William and Mary.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REDACTED - PII January 7, 2015

Dear REDACTED - PII

I write in response to your letter, sent via email to the U.S. Department of Education (the Department) on December 14, 2014, regarding transgender students' access to facilities such as restrooms. In your letter, you mentioned statements in recent guidance documents issued by the Department concerning the application of Title IX of the Education Amendments of 1972 (Title IX) to gender identity discrimination. In addition, you identified a particular school district's policy about access to restrooms and asked about the existence and distribution of any guidance by the Department about policies or practices regarding transgender students' access to restrooms. Your letter has been referred to the Department's Office for Civil Rights (OCR), and I am happy to respond.

As you know, OCR's mission includes enforcing Title IX, which prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity and failure to conform to stereotypical notions of masculinity or femininity.[1] OCR enforces and

[1] *See* OCR's April 2014 Questions and Answers on Title IX and Sexual Violence at B-2, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

interprets Title IX consistent with case law,[2] and with the adjudications and guidance documents of other Federal agencies.[3]

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[2] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII of the Civil Rights Act of 1964's (Title VII) prohibition on sex discrimination bars discrimination based on gender stereotyping, that is "insisting that [individuals] matched the stereotype associated with their group"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–39 (6th Cir. 2005) (holding that demotion of transgender police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004) ("[Discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (applying *Price Waterhouse* to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire. . . . did not accord with his male gender"); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (holding that discrimination against transgender females — *i.e.*, "as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity" — is actionable discrimination "because of sex" under the Gender Motivated Violence Act").

[3] *See, e.g.*, U.S. Dept. of Justice, Memorandum from the Attorney General regarding the Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014) (stating that the protection of Title VII extends to claims of discrimination based on an individual's gender identity, including transgender status), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; *see also Macy v. Holder*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012) (holding that gender identity and transgender status did not need to be specifically

Continued …

The Department's Title IX regulations permit schools to provide sex-segregated restrooms locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.[4] OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

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addressed in Title VII in order to be prohibited bases of discrimination, as they are simply part of the protected category of "sex"), http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOT%20ATF.txt; U.S. Dept. of Health & Human Services, Office for Civil Rights, *Letter to Maya Rupert, Esq.*, Transaction No. 12-0008000 (July 12, 2012) (stating that Section 1557 of the Affordable Care Act, which incorporates Title IX's prohibition on sex discrimination, "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity"), http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services; U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, *Gender Identity and Sex Discrimination*, Directive 2014-02 (Aug. 14, 2014) (directing that for purposes of Executive Order 11246, which prohibits employment discrimination on the basis of sex by federal contractors and subcontractors, "discrimination based on gender identity or transgender status . . . is discrimination based on sex"), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[4] *See, e.g.*, OCR's December 2014 Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, at Q. 31, http://www2.ed.gov/about/offices/list/ocr/docs/faQs-title-ix-single-sex-201412.pdf.

OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation, and does not release information about its pending investigations. Nevertheless, it may be useful to be aware that in response to OCR's recent investigations of two complaints of gender identity discrimination, recipients have agreed to revise policies to make clear that transgender students should be treated consistent with their gender identity for purposes of restroom access. For examples of how OCR enforces Title IX in this area, please review the following resolutions of OCR investigations involving transgender students: Arcadia Unified School District;[5] and Downey Unified School District.[6]

OCR is committed to helping all students thrive at school and ensuring that schools take action to prevent and respond promptly and effectively to all forms of discrimination, including gender-identity discrimination. OCR staff is also available to offer schools technical assistance on how to comply with Title IX and ensure all students, including transgender students, have equal access to safe learning environments.

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[5] OCR Case No. 09-12-1020 (July 24, 2013), http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf (resolution letter); and http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf (resolution agreement).

[6] OCR Case No. 09-12-1095 (October 14, 2014), http://www2.ed.gov/documents/press-releases/downev-school-district-letter.pdf (resolution letter); and http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (resolution agreement).

If you have questions, want additional information or technical assistance, or believe that a school is engaging in discrimination based on gender identity or another basis protected by the laws enforced by OCR, you may visit OCR's website at www.ed.gov/ocr or contact OCR at (800) 421-3481 (TDD: 800-877-8339) or at ocr@ed.gov. You may also fill out a complaint form online at www.ed.gov/ocr/complaintintro.html.

I hope that this information is helpful and thank you for contacting the Department.

Sincerely,

/s/ James A. Ferg-Cadima
James A. Ferg-Cadima
Acting Deputy Assistant Secretary for Policy
Office for Civil Rights

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

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

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

tion (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is significant guidance.[2] This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

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

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

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

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Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A transgender male is someone who identifies as male but was assigned the sex of female at birth; a transgender female is someone who identifies as female but was assigned the sex of male at birth.

- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may un-

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fy examples of ways OCR and recipients have resolved some issues addressed in this guidance.

dergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

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

[5] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008); Continued …

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are

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

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

unable to obtain identification documents that reflect their gender identity (e.g., due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

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

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contrib-

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

ute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

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

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

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

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms.** A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

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

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a Continued …

- **Athletics**. Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

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nearby private area (such as a single-use facility); or a separate schedule of use.").

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

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

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student*

Continued …

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

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permit-

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Athletes (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30–31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

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

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

Continued …

ted under Title IX to set their own sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

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

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sex a "substantially equal single-sex school or coeducational school").

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

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

[23] *See, e.g.*, Resolution Agreement, *In re Arcadia Unified. Sch. Dist.*,

Continued …

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

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, in-

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CA, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

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

cluding their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

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

[25] 34 C.F.R. § 106.31(b)(7).

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

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

transgender students' right under Title IX to be treated consistent with their gender identity.

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

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them con-

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

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

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

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

sistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

- Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
- Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20–99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

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

Sincerely,

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

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

[35] 34 C.F.R. § 106.8(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G.,

Plaintiff,

v. Case No. 4:15-cv-00054-RGD-TEM

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

DECLARATION OF TROY M. ANDERSEN

On this 7th day of July 2015, I, Troy M. Andersen, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.

2. I am the Gloucester Point District Representative for the Gloucester County School Board ("the School Board" or "GCSB"), and I served in that capacity during the 2014–2015 school year. I am still a member of the School Board and currently serve as its chairman.

3. It has always been the practice of Gloucester County Schools to separate restrooms and locker rooms at school facilities on the basis of the students' biological sex, and this practice has been in place the entire time

that Plaintiff has been a student within the Gloucester County school system. It is my understanding that plaintiff enrolled as a freshman at Gloucester High School for the 2013–2014 school year as a female student.

4. While Plaintiff was granted permission at the school level to begin using the boys' restrooms at Gloucester High School on October 20, 2014, no decision was made by the School Board until December 9, 2014. Beginning on October 21, 2014, the School Board began receiving numerous complaints from parents and students about Plaintiff's use of the boys' restrooms.

5. On December 9, 2014, the School Board adopted a restroom and locker room resolution that provided:

> Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

6. The restroom and locker room resolution reflects what has always been the practice of the schools. The resolution was developed to treat all students and situations the same.

7. The School Board had three single-stall unisex bathrooms constructed at Gloucester High School. All three restrooms were open for use by December 16, 2014. Any student can use these unisex bathrooms, regardless of their biological sex, if they are uncomfortable using a communal bathroom, or for any other privacy reason. Students may also use a restroom located in the nurse's office.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on 7/7/15 (date) /s/ Troy M. Andersen
Troy M. Andersen

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother,
DEIRDRE GRIMM,

Plaintiffs,

v. Civil No. 4:15-cv-00054-RGD-DEM

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

CORRECTED DECLARATION OF G.G.

1. I am the plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. My name is G.G.

3. Several photographs of me taken over the past year are attached to this declaration as Exhibit A.

4. I was born in Gloucester County on May 4, 1999, and have lived in Gloucester County my entire life.

5. I am a student at Gloucester High School. I will begin my junior year of high school in September 2015.

6. Although my sex assigned at birth was female, I was aware at a very young age that I did not feel like a girl. I have always felt uncomfortable wearing "girl" clothes, and by the age of six, I adamantly refused to do

so. I insisted upon buying all of my clothes in the boys' department.

7. At approximately age twelve, I acknowledged my male gender identity to myself. I gradually began disclosing this fact to close friends. Since the reactions of my friends were generally positive and supportive, I disclosed my gender identity to more friends.

8. In approximately ninth grade, most of my friends were aware of my gender identity, and I lived openly as a boy when socializing with friends away from home and school.

9. During my freshman year, I experienced severe depression and anxiety related to my untreated Gender Dysphoria and the stress of concealing my gender identity from my family. The depression and anxiety was so severe that I could not attend school during the spring semester of my freshman year. Instead, I took classes through a home-bound program that follows the public high school curriculum.

10. In April 2014, I told my parents that I am transgender. At my request, I began therapy with a psychologist who had experience with working with transgender patients.

11. The psychologist diagnosed me with Gender Dysphoria. The psychologist recommended that I immediately begin living as a boy in all respects. That included using a male name and pronouns and using boys' restrooms. The psychologist gave me a "Treatment Documentation Letter" confirming that I am receiving treatment for Gender Dysphoria and that, as part of that treatment, I should be treated as a boy in all respects, including with respect to my use of the restroom. In addition, the psychologist recommended that I see an en-

docrinologist to begin hormone treatment for Gender Dysphoria.

12. In July 2014, I petitioned the Circuit Court of Gloucester County to change my legal name to G.G., and the court granted the petition. I now use that name for all purposes, and my friends and family refer to me using male pronouns.

13. I use the boys' restrooms when out in public, e.g., at restaurants, libraries, shopping centers.

14. I have been receiving hormone treatment since December 2014. The hormone treatment has deepened my voice, increased my growth of facial hair, and given me a more masculine appearance.

15. In August 2014, my mother and I informed officials at Gloucester High School that I am transgender and that I changed my legal name. The high school agreed to change my name in my official school records.

16. Before the beginning of my sophomore year, my mother and I met with Gloucester High School Principal T. Nathan Collins and guidance counselor Tiffany Durr to discuss my treatment for Gender Dysphoria and the need for me to socially transition at school as part of my medical treatment. Mr. Collins and Ms. Durr both expressed support for me and a willingness to ensure a welcoming environment for me at school.

17. Ms. Durr and I agreed that I would send an email to teachers explaining that I was to be addressed using the name G.G. and to be referred to using male pronouns. To the best of my knowledge, no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling me by my legal name or referring to me using male pronouns.

18. I requested, and was permitted, to continue with the home-bound program only for my physical education requirement while returning to school for the rest of my classes. For this reason, I do not intend to use a locker room at school.

19. I initially agreed to use a separate restroom in the nurse's office because I was unsure how other students would react to my transition. When the 2014–15 school year began, I was pleased to discover that my teachers and the vast majority of my peers respected the fact that I am a boy. I quickly determined that it was not necessary for me to continue to use the nurse's restroom, and I found it stigmatizing to use a separate restroom. The nurse's bathroom was also very inconvenient to reach from my classrooms, making it difficult for me to use the restroom between classes. For these reasons, I asked Mr. Collins to be allowed to use the boys' restrooms.

20. On or about October 20, 2014, Mr. Collins agreed that I could use the boys' restrooms. For approximately the next seven weeks, I used the boys' restrooms at school. When I used the boys' restrooms, I never encountered any problems from other students.

21. On November 10, 2014, I learned that the School Board would be voting on a proposal at its meeting on November 11, 2014, to adopt a transgender restroom policy that would prohibit me from continuing to use the boys' restroom. My parents and I attended the meeting to speak against the policy. In doing so, I was forced to identify myself to the entire community, including local press covering the meeting, as the transgender student whose restroom use was at issue.

22. I also attended the School Board's meeting on December 9, 2014, when it adopted the transgender restroom policy.

23. As a result of the School Board meetings and the new transgender restroom policy, I feel like I have been stripped of my privacy and dignity. Having the entire community discuss my genitals and my medical condition in a public setting has made me feel like a walking freak show. This personal information about my medical status, and about my very anatomy, has become a public spectacle. My entire community can now identify me as "the transgender student who wants to use the boys' room," which makes me incredibly anxious and fearful.

24. The day after the school board meeting, Mr. Collins told me that I would no longer be allowed to use the boys' restrooms and that there would be disciplinary consequences if I tried to do so.

25. Using the girls' restroom is not a possibility for me. Even before I began receiving treatment for Gender Dysphoria, girls and women who encountered me in female restrooms reacted negatively because they perceived me to be a boy. For example, when I used the girls' restroom in eighth and ninth grade, girls would tell me "this is the girls' room" and ask me to leave. My appearance now is even more masculine. In addition, using the girls' room would cause me to experience severe psychological distress and would be incompatible with my treatment for Gender Dysphoria.

26. To the best of my knowledge, there are now three single-stall unisex restrooms at Gloucester High School that I am permitted to use. Only one of the single-stall restrooms is located anywhere near the restrooms used by other students. Unlike some of the boys' restrooms,

none of the new single stall restrooms are located near my classes. As far as I am aware, none of the other students uses the single-stall unisex restrooms.

27. I refuse to use the separate single-stall restrooms because they make me feel even more stigmatized and isolated than when I use the restroom in the nurse's office. They designate me as some type of "other" or "third" sex that is treated differently than everyone else. Everyone knows that they were installed for me in particular so that other boys would not have to share the same restroom as me.

28. Instead of using the separate restrooms, I try to avoid using the restrooms entirely while at school, and, if that is not possible, I use the nurse's restroom. I limit the amount of liquids I drink and try to "hold it" when I need to urinate during the school day. As a result of trying to avoid using the restroom, I have repeatedly developed painful urinary tract infections. "Holding it" is also uncomfortable and distracting when I am trying to focus in class.

29. Every time I use the restroom at school, I am reminded that nearly every person in my community now knows I am transgender and that I have now been publically identified as "different." It also stark reminder that I was born in the wrong sex, which increases my feelings of dysphoria, anxiety, and distress.

30. It is embarrassing that, every time I use the restroom, everyone who sees me enter the nurse's office knows exactly why I am in there. They know it is because I am transgender and I have been prohibited from using the same boys' restrooms that the other boys use.

31. It also feels humiliating that, whenever I have to use the restroom, I am effectively reminding anyone who

sees me go to the nurse's office that, even though I am living and interacting with the world in accordance with my gender identity as a boy, my genitals look different.

32. I just want to live my life like any other boy. And I want to perform the basic human function of using the restroom without being made to feel alienated, humiliated, and different than everyone else.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 3, 2015.

By: [SIGNATURE FILED UNDER SEAL]
G.G.

Agenda Item Details

Meeting	Jun 09, 2016 - Regular Meeting No. 21
Category	4. Action Items 8:45 p.m.
Subject	4.03 Student Rights and Responsibilities, Regulation 2601.30P
Type	Action
Recommended Action	That the School Board adopt Regulation 2601.30P, Student Rights and Responsibilities, as detailed in the agenda item.

Staff Contact: Jane H. Lipp, assistant superintendent, Department of Special Services

Meeting Category: June 9, 2016 Regular Meeting

Subject: Student Rights and Responsibilities, Regulation 2601.30P

School Board Action Required: Decision

Related To: Legal Requirement

Key Points:

Note: The cover sheet and attached Regulation 2601 posted on June 2, 2016 for consideration at the June 9, 2016 Board meeting, included a proposed change regard-

ing Chapter 1, Section J. This proposal has been withdrawn.

A. In chapter I.I.2., changed "The principal's decision on a complaint may be appealed by the student or parent to the regional assistant superintendent within two school days following receipt of the principal's decision" to read "The principal's decision on a complaint may be submitted for review by the student or parent to the regional assistant superintendent within two school days following receipt of the principal's decision." (page 9)

B. In chapter II.A.3.a.(1) footnote 8 deleted "High school students shall participate in the FCPS Tobacco Intervention Seminar. Elementary and middle schools students shall participate in an in-school intervention support program to be conducted by the Student Safety and Wellness Office" and added "to be conducted by the Student Safety and Wellness Office." (page 16)

C. In chapter II,A.3.d.(2)(c), changed "Theft or attempted theft of a student's prescription drug. A report shall be made to the police in accordance with the Code of Virginia" to read "Theft of a student's prescription drug. A report shall be made to the police in accordance with the Code of Virginia." (page 20)

D. In chapter II,A.4.b.(4), added "Attempted theft of another person's prescription medication. A report shall be made to the police in accordance with the Code of Virginia where the attempted theft is of student medication(s)." (page 21)

E. In chapter II,C.3.e., changed "Emergency Suspension" to read "Emergency Temporary Removal" and change "disruption may be summarily removed" to read "disruption may be removed." (page 29)

F. In chapter II.C.6., removed "or the Restorative Behavior Intervention Seminar." (page 32)

Proposed Board Amendments

1. I move that the Board's action regarding R2601 be postponed until the June 30 Board meeting. **[Wilson]**

2. I move to amend the motion by replacing the first sentence of Chapter I, Section J with the following: No student in FCPS shall, on the basis of age, race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity. **[McElveen]**

3. I move to delay consideration of Mr. McElveen's motion until the June 30 Board meeting to i) allow public notice of a significant, substantive change to R2601, (ii) give time for Board discussions with staff at a work session on issues related to Mr. McElveen's proposed changes, and (iii) provide time for the Board to discuss proposed changes with each other and our communities. **[Wilson]**

4. I believe the numerous questions raised by Mr. McElveen's amendment raise unique and complex ques-

tions that require considerably more study and investigation than is possible tonight. Thus, I move to refer the proposed new language to a special committee to study and investigate with staff these questions. I propose that the committee be made up of several Board members, including, but not limited to, Mr. McElveen, Mrs. Hough, Mrs. Corbett-Sanders and me. **[Wilson]**

Recommendation:

That the School Board adopt Regulation 2601.30P, Student Rights and Responsibilities, as detailed in the agenda item.

Attachment:
R2601.30P – 6-9-16 Strikethrough copy FY2016-17
R2601.30P – 6-9-16 Clean copy FY2016-17

6-9-16 R2601.30P Aug 2016 StrikeThroughCopy.pdf (692 KB)

6-9-16 R2601.30P Aug 2016 CleanCopy.pdf (566 KB)

Motion & Voting

I believe the numerous questions raised by Mr. McElveen's amendment raise unique and complex questions that require considerably more study and investigation than is possible tonight. Thus I move to postpone the vote on Mr. McElveen's amendment for an indefinite period of time so that we may refer the proposed new language to a special committee to study and investigate with staff these questions. I propose that the committee

be made up of several Board members, including, but not limited to, Mr. McElveen, Mrs. Hough. Mrs. Corbett Sanders and me.

Motion by Tom Wilson, second by Elizabeth Schultz.
Final Resolution: Motion Fails
Yes: Jeanette Hough, Tom Wilson, Elizabeth Schultz
No: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Megan McLaughlin, Dalia Palchik

I move to delay consideration of Mr. McElveen's motion until the June 30 Board meeting to i) allow public notice of a significant, substantive change to R2601, (ii) give time for Board discussions with staff at a work session on issues related to Mr. McElveen's proposed changes, and (iii) provide time for the Board to discuss proposed changes with each other and our communities.

Motion by Tom Wilson, second by Megan McLaughlin.
Final Resolution: Motion Fails
Yes: Jeanette Hough, Tom Wilson, Megan McLaughlin, Elizabeth Schultz
No: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Dalia Palchik
Abstain: Karen Corbett Sanders

I move to amend the motion by replacing the first sentence of Chapter I, Section J with the following: No student in FCPS shall, on the basis of age, race, color, sex, sexual orientation, gender identity, religion, national

origin, marital status, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity.

Motion by Ryan McElveen, second by Ilryong Moon.
Final Resolution: Motion Carries
Yes: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Megan McLaughlin, Dalia Palchik
No: Jeanette Hough, Tom Wilson, Elizabeth Schultz

I move that the Board's action regarding R2601 be postponed until the June 30 Board meeting.

Motion by Tom Wilson, second by Elizabeth Schultz.
Final Resolution: Motion Fails
Yes: Jeanette Hough, Tom Wilson, Elizabeth Schultz
No: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Dalia Palchik
Abstain: Megan McLaughlin

That the School Board adopt Regulation 2601.30P, Student Rights and Responsibilities, as amended and as detailed in the agenda item.

Motion by Sandra S Evans - Vice Chairman, second by Tamara D Kaufax.
Final Resolution: Motion Carries

Yes: Tamara D Kaufax, Ryan McElveen, Jane K Strauss, Karen Corbett Sanders, Sandra S Evans - Vice Chairman, Patricia Hynes - Chairman, Ilryong Moon, Megan McLaughlin, Dalia Palchik
No: Jeanette Hough, Tom Wilson, Elizabeth Schultz

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NEWPORT NEWS DIVISION

FILED
June 29, 2015

Clerk, US District Court
Norfolk, VA

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

Civil No. 4:15cv54

Judge Robert G. Doumar
Magistrate Judge Tommy E. Miller

STATEMENT OF INTEREST OF THE UNITED STATES

[Tables of contents and authorities omitted]

INTRODUCTION

Plaintiff G.G. is a 16-year-old student who is enrolled at Gloucester High School in Gloucester Public School

District (the "District"). Declaration of G.G. ("G.G. Decl.") ¶¶ 4–5. Defendant Gloucester County School Board is an elected body responsible for the operation of the District. *See* Plaintiffs Complaint ("Compl.") at ¶ 11. G.G. is a transgender boy.[1] *See* G.G. Decl. at ¶ 10. He was assigned the female sex at birth, but his gender identity is male and he presents as a boy in all aspects of his life. *See id.* at ¶¶ 6, 11. GG alleges that the District denied him equal treatment and benefits and subjected him to discrimination based on sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, when it passed a policy banning his continued use of the boys' restrooms because the School Board did deem him to be "'biologically' male," despite his use of those facilities without incident for seven weeks. Compl. ¶¶ 6, 65; *see also* G.G. Decl. at ¶¶ 20, 22–23. G.G. has moved for a preliminary injunction requiring the District to allow him to resume using the boys' restrooms at Gloucester High School when he returns for the first day of classes on September 8, 2015. Plaintiff's Memorandum In Support of Motion for Preliminary Injunction at 1 ("Plaintiff Memo").

The United States files this Statement of Interest to assist the Court in evaluating G.G.'s request for a preliminary injunction, specifically, in determining whether G.G. has established a likelihood of success on the merits and whether an injunction is in the public interest.[2] Un-

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[1] A transgender person has a gender identity (*i.e.*, one's internal sense of gender) that is different from the individual's assigned sex at birth (*i.e.*, the gender designation listed on one's original birth certificate).

[2] The United States does not address the factors of irreparable harm
Continued …

der Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex. As such, prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX. There is a public interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of sex discrimination.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. The United States has a significant interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of sex discrimination and that the proper legal standards are applied to claims under Title IX.[3] The United States De-

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or the balance of hardships that are also used to establish the need for a preliminary injunction. *See infra* p. 4.

[3] The United States has furthered its significant interests noted above by intervening or submitting briefs in lawsuits involving claims of sex discrimination based on sex stereotyping and gender-based harassment against students under Title IX. *See, e.g.*, United States' Amicus Curiae Brief Supporting Plaintiffs-Appellants and Urging Reversal in *Carmichael v. Galbraith*, No. 12-11074 (5th Cir. Apr. 1, 2013) (explaining that the prohibitions against sex discrimination under Title IX prohibit sex-based harassment predicated on sex stereotyping), available at http://www.justice.gov/crt/about/app/briefs/carmichaelbrf.pdf; United States' Complaint-in- Intervention, *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 0:11-cv-01999 (D. Continued …

partments of Justice and Education enforce Title IX and its implementing regulations in the education context. *See* 20 U.S.C. §§ 1681–1688 (2006); 34 C.F.R. Part 106 (2010); 28 C.F.R. Part 54 (2000).[4]

The United States thus respectfully submits this Statement of Interest to provide the correct legal standards governing sex discrimination claims under Title IX. Applying these standards, there is a strong likelihood of success on the merits of G.G.'s allegation of discrimination based on sex because the District has adopted and is enforcing a policy that discriminates based on sex (*e.g.*, one's gender identity, including one's transgender status) and there is a strong public interest in eliminating discrimination based on sex in public schools.

Minn. Mar. 6, 2012) (explaining that the prohibitions against sex discrimination under Title IX and the Equal Protection Clause prohibit sex-based harassment because of gender non-conformity), available at http://www.justice.gov/crt/about/edu/documents/anokacompint.pdf; and United States' Mem. as *Amicus Curiae* in Response to Defs. Mot. to Dismiss/Mot. for Summary Judgment, *Pratt v. Indian River Cent. Sch. Dist.*, No. 7:09-cv-00411 (N.D.N.Y. Jan. 3, 2011) (same), available at http://www.justice.gov/crt/about/edu/documents/prattamicus.pdf.

[4] The Departments of Justice and Education have also enforced Title IX in matters involving claims of sex discrimination against transgender students. *See, e.g.*, Resolution Agreement between United States & Arcadia Unified Sch. Dist., July 24, 2013, available at http://www.justice.gOv/crt/about/edu/documents/casesummary.php#arcadia; Resolution Agreement between U.S. Dep't of Educ. Office for Civil Rights ("OCR") & Downey Unified Sch. Dist. (Oct. 8, 2014), available at http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf.

I. BACKGROUND

The United States recites the following facts drawn from Plaintiff's Complaint and Declaration. *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976) ("[U]ncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true."). Gloucester County Public Schools and Gloucester High School are education programs receiving Federal financial assistance. Compl. ¶ 63. G.G. is a transgender student who completed his sophomore year at Gloucester High School. *See* G.G. Decl. at ¶¶ 5, 10. G.G. alleges that the District denied him the treatment and benefits afforded to other male students and that he was subjected to discrimination in violation of Title IX. *See* Plaintiff Memo; G.G. Decl. at ¶¶ 23, 32. Specifically, G.G. alleges that, although the school had allowed him to use the boys' restroom for approximately seven weeks without incident, the school board passed a policy limiting the use of restroom facilities to students with "corresponding biological genders" and required students with "gender identity issues" to use an alternative private facility. Plaintiff Memo at 17. By passing this policy, the school board prohibited G.G. from continuing his use of the boys' restrooms. G.G. Decl. at ¶ 24. G.G. seeks a preliminary injunction to reinstate his access to the boys' restrooms, the status quo prior to the District's approval of the policy in question. G.G. Decl. at ¶ 20. G.G. asks this Court to order that injunction before the first day of classes on September 8, 2015. Plaintiff Memo at 15.

II. ARGUMENT

A. Preliminary Injunction Standard

To obtain a preliminary injunction, "Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (*citing Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *see also Doe v. Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771, 773 (S.D. W. Va. 2012) (granting preliminary injunction in case alleging Title IX violations, relying on U.S. Department of Education regulations). To demonstrate that a plaintiff is likely to succeed on the merits, a plaintiff must make a "clear showing" that he is likely to succeed at trial, but "need not show a certainty of success." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013). The Supreme Court has also instructed courts to "pay particular regard" to public interest considerations. *Winter*, 555 U.S. at 24.

B. G.G. Has Established a Likelihood of Success on the Merits Because Title IX Prohibits Discrimination Based on Sex, Including Gender Identity, Transgender Status, and Nonconformity to Sex Stereotypes.

In considering G.G.'s request for a preliminary injunction, this Court must consider G.G.'s likelihood of success on the merits—that is, whether either Title IX prohibits a school district from passing, and then enforcing, a policy that prohibits a student from using the restroom that matches his gender identity. *See League of*

Women, 769 F.3d at 236. For the reasons set forth below, Title IX prohibits such a policy as unlawful sex discrimination. Therefore, G.G. is likely to succeed on the merits.

1. Discrimination Based on Gender Identity, Including Transgender Status, is Discrimination Based on Sex.

G.G. is likely to succeed on the merits under Title IX. Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31(a); 28 C.F.R. § 54.400(a).[5] The plain language of the statute thus affirms that Title IX protects all persons, including transgender students, from sex discrimination. Title IX's implementing regulations specifically prohibit recipients from engaging in differential or adverse treatment on the basis of sex, including, inter alia,

- "[t]reat[ing] any one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;"

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[5] The District's restroom policy is part of its "educational program or activity." *See* 20 U.S.C. § 1687(2)(b) (defining "program or activity" to mean "all the operations" of a "local education agency . . . any part of which is extended Federal financial assistance").

- "[p]rovid[ing] different aid, benefits, or services or provid[ing] aid, benefits, or services in a different manner;"
- "[d]eny[ing] any person any such aid, benefit, or service;"
- "[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment"
- "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R § 106.31(b); 28 C.F.R. § 54.400(b). Therefore, any student, including a transgender student, may state a valid claim under Title IX by alleging that the defendant denied or limited the student's ability to participate in or benefit from the school's programs or activities on the basis of sex.[6]

The term "sex" as it is used in Title IX is broad and encompasses gender identity, including transgender status. "There is no doubt that 'if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.'" *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (brackets omitted). In *Price Waterhouse v. Hopkins*, the Supreme Court flatly rejected the notion that "sex" encompasses only one's biological status as male or female, concluding, instead,

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[6] See OCR, Questions and Answers on Title IX and Sexual Violence (Apr. 29,2014), available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("OCR Sexual Violence Q&A"), at 5 ("[T]he actual or perceived sexual orientation or gender identity of the parties does not change a school's [Title IX] obligations.").

that sex discrimination also encompasses differential treatment based on one's failure to conform to socially-constructed gender expectations.[7] 490 U.S. 228, 250 (1989) (plurality opinion). Thus, "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender." *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (court's italics); *see also Macy v. Holder*, 2012 WL 1435995, at *6 (EEOC Apr. 20, 2012).[8] This is

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[7] All the cases cited in this paragraph except for North Haven interpret Title VII of the Civil Rights Act ("Title VII"). Federal courts routinely rely on Title VII's analogous prohibition of sex discrimination in employment when construing the meaning of Title IX's anti-discrimination provisions. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (applying Supreme Court's interpretation of sex discrimination under Title VII to Title IX); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); *Preston v. Virginia ex rel New River Comm. Coll.*, 31 F.3d 203, 207–08 (4th Cir. 1994) (holding that Title IX discrimination claim should be interpreted in accordance with principles governing Title VII).

[8] In *Johnston v. Univ. of Pittsburgh*, No. 13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015), *appeal docketed* No. 15-2022 (3d Cir. Apr. 22, 2015), the district court adopted a "narrow view of the meaning of the statutory term 'sex' " in concluding that Title IX does not prohibit discrimination based on gender identity or transgender status. *Id.* at*14. Under that narrow view, the court interpreted the term to mean "nothing more than male or female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Id.* at *13. The district court's reasoning in that case was faulty and should not be followed. As several courts have recognized, the decades-old Title VII case law the court cited for this sex-gender distinction has been "eviscerated" by the Supreme Court's decision in *Price Waterhouse*. *See Smith*, 378 F.3d at 573; *see also Schwenk*, 204 F.3d at 1202 (noting that the judge-made distinction between
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because an individual's gender identity is one aspect of an individual's sex. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566,575 (6th Cir. 2004); *Schroer v. Billington*, 424 F. Supp. 2d 203,211 (D.D.C 2006) ("scientific observation may well confirm . . . that sex is not a cut-and-dried matter of chromosomes") (internal citations omitted). Consequently, discrimination on the basis of gender identity is "literally" discrimination on the basis of sex. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).[9]

Furthermore, Title IX prohibits sex discrimination based on the perception that an individual has undergone, or is undergoing a gender transition. In *Schroer*, the court offered the following analogy to help explain how discrimination against an individual because he or she has undertaken, or is undertaking, a gender transition[10] is sex discrimination:

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sex and gender "has been overruled by the logic and language of *Price Waterhouse*"). Ultimately, the district court in Johnston attempted to discern the state of mind of the legislators when Congress prohibited sex discrimination in 1972, but that was not the proper inquiry. *See Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998) (explaining that "[s]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *accord Macy*, 2012 WL 1435995, at *9–10 and n.10.

[9] This is so even though the words gender identity or transgender are not explicitly used in Title IX. The statute's literal language "demonstrates breadth" and may not be judicially narrowed even if it results in the statute being "applied in situations not expressly anticipated by Congress." *PA Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

[10] A gender transition is the process in which transgender individu-

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> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306 (emphasis in original). Denying Title IX's protections to a student because he has changed or is changing his sex would be "blind . . . to the statutory language itself." *Id.* at 307; *see also Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756, at *7–8 (EEOC Apr. 1, 2015) (concluding that federal agency violated Title VII where the complainant's "transgender status was the motivation" for the agency to bar her from using the common women's restrooms); *Macy*, 2012 WL 1435995, at *11 (concluding that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII").

This conclusion is reinforced, for purposes of Title IX, by the enforcing agencies' interpretation of that

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als assert the sex that corresponds to their gender identity instead of their sex assigned at birth. A gender transition includes a "social transition," during which an individual begins to live and identify as the sex consistent with the individual's gender identity.

statute and its regulations, which is controlling unless it is "plainly erroneous or inconsistent with the regulation." *D.L. ex rel K.L. v. Balt. Bd. of Sch. Comm'rs*, 706 F.3d 256, 259 (4th Cir. 2013) (deferring to agency opinion letter) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to federal government amicus brief)); *see, e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 647–48 (1999) (applying OCR's Title IX guidance when evaluating Title IX's application to student-on-student harassment); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 97 (2d Cir. 2012) (holding that OCR's guidance is entitled to "substantial deference" in interpreting Title IX). The United States Department of Education ("ED") through its Office for Civil Rights ("OCR") has issued guidance recognizing that Title IX protects transgender students against discrimination based on their gender identity. *See* OCR, Questions and Answers on Title IX and Sexual Violence (April 29, 2014), available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf, at 5 (clarifying that Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity).

ED has also explained, in other guidance, how its interpretation of Title IX applies when a school is permitted by Title IX to offer sex-segregated programs. Specifically, in the context of single-sex classes, "[u]nder Title IX, a [school district] generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation." OCR, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1, 2014), available at http://www.ed.gov/ocr/docs/faqs-title-ix-

single-sex-201412.pdfCOCRSingle-Sex Classes and Activities Q&A"), at 25. And, in the context of Title IX's application to gender identity discrimination in sex-segregated facilities such as restrooms, OCR issued a letter in response to an inquiry specifically about a school district's restroom policies.[11] In its response, OCR clarified: "The Department's Title IX regulations permit schools to provide sex-segregated restrooms . . . under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity." Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary of Policy, Office for Civil Rights, U.S. Department of Education, January 7, 2015 (attached as Exhibit B).[12]

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[11] Although the Department did not publicly issue its response, the inquiry letter and the Department's response are attached respectively as Exhibit A and Exhibit B.

[12] *See also Kastl v. Maricopa Cnty. Cmty. Coll.*, 2004 WL 200895, at *3 (D. Ariz. June 3, 2004) (the fact that Title VII permits employers to "create restrooms for each sex" does not mean they can "require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's anatomy"); *cf. Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 605 (Me. 2014) (holding that school district could not defend its decision to exclude a transgender girl from the girls' restrooms based on a state statute requiring sex-separated bathrooms in public schools because that statute "does not purport to establish guidelines for the use of school bathrooms" nor "address how schools should monitor which students use which bathroom, and it certainly offers no guidance concerning how gender identity relates to the use of sex-separated facilities").

Thus, the expansive construction of "sex" as spelled out in *Price Waterhouse* and its progeny; and the consistent interpretation of that term by the relevant enforcing federal agencies, which is entitled to substantial deference, both confirm that Title IX and its regulations protect G.G. from discrimination on the basis of gender identity, including transgender status.

2. Discrimination Based on a Transgender Individual's Nonconformity to Sex Stereotypes is Discrimination Based on Sex.

G.G. is also likely to succeed on the merits of his Title IX claim under an alternative sex stereotyping theory. The Supreme Court made clear in *Price Waterhouse* that discrimination based on an employee's nonconformity to sex stereotypes is a form of sex discrimination. 490 U.S. at 239–40, 250–51; *see also Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151–52 (N.D.N.Y. 2011) (denying defendant's motion to dismiss because harassment based on nonconformity to sex stereotypes is a legally cognizable claim under Title IX and the Equal Protection Clause). These protections have also been applied to students in the school context under Title IX.[13]

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[13] Federal courts have consistently held that plaintiffs alleging discrimination based on nonconformity to sex stereotypes may state an actionable claim of sex discrimination under Title IX. *See Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 964–65 (D. Kan. 2005); *Montgomery v. Indep Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090–93 (D. Minn. 2000).

Federal courts have recognized that discrimination based on stereotypes about how individuals express their gender identity, including generalizations about the relationship between one's gender identity and anatomy, is an actionable form of sex discrimination under federal law.[14] The district court in *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.* denied a school's motion to dismiss Title VII and Title IX sex discrimination claims by a transgender plaintiff who was denied access to restrooms consistent with his gender identity. No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 3, 2004). The court found that the nature of the discrimination prohibited by *Price Waterhouse* included differential treatment based stereotypes about an individual's

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[14] See, e.g., *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 454 (5th Cir. 2013) (finding that sex stereotyping evidence may be used to establish a sex discrimination claim where there is a perception that a plaintiff does not "conform to traditional gender stereotypes"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 735–39 (6th Cir. 2005) (transgender plaintiff stated claim for sex discrimination under Title VII and Equal Protection Clause based on failure to conform to sex stereotypes); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*"); *Glenn*, 663 F.3d at 1320–21 (finding "ample direct evidence" that plaintiff, a transgender woman, had been discriminated against because of sex where defendant testified that his decision to fire her was based "on his perception of [plaintiff] as 'a man dressed as a woman and made up as a woman'"); *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (holding that plaintiff's claim that she was discriminated against "because of her obvious transgendered status" is a cognizable claim of sex discrimination under Title VII).

"behavior, appearance, or anatomical features."[15] *Id.* at *3. The *Kastl* court made clear that neither a "woman with male genitalia nor a man with stereotypically female anatomy" may be discriminated against "by reason of that nonconforming trait." *Id.* at *2.[16] ED has also issued

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[15] Some courts have limited the ability of transgender people to rely on the sex stereotyping theory when their claims of discrimination involve access to gender identity-appropriate restrooms. *See, e.g.*, *Michaels v. Akal Sec, Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 WL 2573988 (D. Colo. June 24, 2010) ("*Etsitty* [*v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007)] precludes such a claim [*i.e.*, gender stereotyping under *Price Waterhouse*] based solely upon restrictions on Plaintiff's usage of certain bathrooms.") (emphasis added). But the *Johnston* court's recent assertion that sex stereotyping claims can only be "based on behaviors, mannerisms, and appearances" and cannot be based on gender-nonconforming anatomy has no support in law or logic. *Johnston*, 2015 WL 1497753, at *16; *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007). Both cases are grounded in a flawed premise: namely, that the "sex" of the transgender plaintiff, for Title VII purposes, is the sex he was assigned at birth, not the gender with which he identifies. It is true that sex stereotyping claims brought by transgender plaintiffs often involve claims that the defendant discriminated against the plaintiff because the plaintiff's gender presentation did not conform to the defendant's belief about how a person of the plaintiff's assigned birth sex should look, speak, or behave. However, nothing in *Price Waterhouse* or its progeny purported to limit the availability of the theory to only those forms of sex stereotyping. Indeed, sex-based stereotyping regarding anatomy (*e.g.*, that women have breasts or that men have two testicles), is also prohibited discrimination based on sex.

[16] On a subsequent summary judgment motion, the district court ruled that the Plaintiff failed to meet her burden of establishing a prima facie case of discrimination because she "failed to properly present evidence supporting her theory that there are other determinants of biological sex or which, if any, of those determinants ap-

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guidance stating that Title IX prohibits discrimination based on sex stereotypes, including when that discrimination is directed at transgender individuals. OCR Sexual Violence Q&A at 5–6 ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation.").[17]

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plies to Plaintiff." *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 2006 WL 2460636, at *6 (D. Ariz. Aug. 22, 2006). In an unpublished decision, the Ninth Circuit affirmed the district court's grant of summary judgment to the college on the ground that the transgender female plaintiff failed to show that the college's asserted reason for barring her from the women's restroom — namely, safety — was pretextual. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 494 (9th Cir. 2009). Apart from the fact that there is no indication of a safety concern here — Gloucester school officials had readily allowed G.G. to use the boys' restrooms for nearly two months without incident — the Ninth Circuit's reliance on plaintiff's failure to meet the standards under the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) was misplaced. "[A]n employee need not use the *McDonnell Douglas* framework when there is direct evidence that an adverse employment action has been taken on the basis of a sex-based consideration such as an employee's transgender status." *Lusardi*, EEOC Decision No. 0120133395 at n.6. For purposes of G.G.'s allegations, the critical point is that even the Ninth Circuit upheld the district court's conclusion that the *Kastl* plaintiff alleged a valid *prima facie* sex stereotyping claim based on her nonconformity with the college's stereotypes about what anatomy one must have to be female. *See Kastl*, 325 Fed. Appx. at 493.

[17] *See also* OCR Single-Sex Classes and Activities Q&A, at 25; OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001), available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide. pdf, at v.

Here, the District adopted a policy to prevent G.G., who presents and identifies as male, from using male restroom facilities, despite the fact that he had been using those facilities without incident for seven weeks. That policy, and its application to G.G., is based on impermissible sex stereotypes about what it means to be a boy. For that reason, G.G. is likely to succeed on the merits of his Title IX claim under a sex stereotyping theory as well.

C. Granting a Preliminary Injunction is in the Public Interest.

Finally, granting the injunctive relief G.G. seeks would serve the public interest. Requiring public schools to comply with their Title IX obligation not to discriminate on the basis of sex serves the public interest. *See Cohen v. Brown Univ.*, 991 F. 2d 888, 906 (1st Cir. 1993) (affirming district court's conclusion "that the overriding public interest lay in the firm enforcement of Title IX").

In the education context in particular, the public interest favors eliminating policies that single out a minority of public school students for different treatment on the basis of sex. When a State makes free public education available to the children in its jurisdiction (and, in fact, adopts compulsory attendance laws that presumptively require attendance), educational opportunity must "be made available to all on equal terms." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). In the Gloucester Public School District, however, G.G. and any other transgender students like him are being singled out and denied access to restrooms consistent with their gender identity solely on that basis—a basic right that all other students enjoy. That singling out results in isolation and

exclusion and perpetuates a sense that the student is not "worthy of equal treatment and respect." *Lusardi*, EEOC Decision No. 0120133395 at 13; *see also Brown*, 374 U.S. at 494 ("A sense of inferiority affects the motivation of a child to learn." (quoting state court)). Granting transgender students access to restrooms consistent with their gender identity will serve the public interest by ensuring that the District treats all students within its bounds with respect and dignity.

Singling out transgender students and subjecting them to differential treatment can also make them more vulnerable to bullying and harassment, a problem that transgender students already face. For example, during the 2008–2009 school year, "more than 90 percent of [lesbian, gay, bisexual, and transgender] students in grades 6 through 12 reported being verbally harassed—and almost half reported being physically harassed." Dear Colleague Letter from Sec'y Duncan (June 14, 2011), available at http://www2.ed.gov/policy/elsec/guid/secletter/110607.html. Allowing transgender students to use the restrooms consistent with their gender identity will help prevent stigma that results in bullying and harassment and will ensure that the District fosters a safe and supportive learning environment for all students, a result that is unquestionably in the public interest.[18]

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[18] It is well-established that academic excellence and student success depend on the school environment being both safe and supportive. *See* "Guiding Principles: A Resource Guide for Improving School Climate and Discipline," ED (Jan. 2014), at 5; *see also* "School Climate," ED, American Institute for Research, Safe Supportive Learning, available at http://safesupportivelearning.ed.gov/school-climate. By contrast, students who are bullied suffer from negative physical, social, and mental health issues. The White House and var-

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Numerous jurisdictions around the country allow transgender students to use facilities corresponding to their gender identity.[19] Likewise, the federal government has recognized the importance of establishing policies in the workplace that allow transgender employees to use facilities corresponding to their gender identity, see U.S. Office of Personnel Management ("OPM"), "Gender Identity Guidance" (stating that federal agencies "should allow access to restrooms and (if provided to other employees) locker room facilities consistent with [a transgender employee's] gender identity"); *see* U.S. Dept. of Labor, Occupational Safety and Health Admin-

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ious Federal agencies, including the Departments of Justice and Education, have worked, and continue to work, to prevent bullying and educate the public about the negative effects of bullying. *See, e.g.*, www.stopbullying.gov (providing information from various government agencies on what bullying is, what cyberbullying is, who is at risk, and how one can prevent and respond to bullying); "Background on White House Conference on Bullying Prevention," White House Press Release (Mar. 10, 2011), available at https://www.whitehouse.gov/the-press-office/2011/03/10/background-white-house-conference-bullying-prevention.

[19] Cal. Ed. Code § 221.5(f) (permitting students to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with the student's gender identity, irrespective of the gender listed on the student's records); § 81.11, 3 Colo. Code Regs. (Dec. 2014) (allowing individuals the use of gender-segregated facilities consistent with their gender identity); Mass. Dep't of Elem. & Sec. Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity* 9–10 (2013); Conn. Safe Schools Coalition, *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non- Discrimination Laws* 12–13 (2012).

istration, "A Guide to Restroom Access for Transgender Workers" (stating that, for employees of companies regulated by OSHA, "all employees should be permitted to use the facilities that correspond with their gender identity").[20] Such policies protect against the adverse impact brought on by discriminatory policies, discussed *supra*, and the public interest would be well served by providing the same protections to students in school as are provided to adults in the workplace.

Although certain parents and community members may object to students sharing a common use restroom with transgender students, any recognition of this discomfort as a basis for discriminating would undermine the public interest.[21] It is axiomatic that a school district cannot justify sex discrimination by asserting that it acted upon a "desire to accommodate other people's prejudices or discomfort." *Macy*, 2012 WL 1435995, at *10 and n.15. As the EEOC stated in *Lusardi*, "[a]llowing the

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[20] The federal government has also established similar policies for participants in other federally funded education programs. *See* U.S. Dept. of Labor, Office of Job Corps, at 3-4, "Directive: Job Corps Program Instruction Notice No. 14-31" (stating that the overriding factor in assigning students to sex-specific facilities should be the student's gender identity).

[21] Moreover, courts have rejected similar claims brought by individuals who have objected to sharing facilities with a transgender person. *See, e.g.*, *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983–984 (8th Cir. 2002) (rejecting argument that being required to share restroom facilities with a transgender coworker constituted an "adverse employment action" under Title VII); *Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting claim that placing a transgender person in a jail cell with someone who was not transgender violated clearly established right to privacy).

preferences of [others] to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices" the law prohibits. *Lusardi*, EEOC Decision No. 0120133395 at 10; *see also* "Directive: Job Corps Program Instruction Notice No. 14-31," Dept. of Labor Job Corps at 4 ("[M]ost courts have concluded that an entity's desire to cater to the perceived biases of its customers, employees, or other third parties is not a defense for unlawful discrimination. The same principle applies to discrimination against transgender persons."); *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear . . . are not permissible bases for" government action).

For all these reasons, it is the view of the United States that it is in the public interest to allow G.G., whose gender identity is male and who presents as male in all aspects of his life, to use the male restrooms at Gloucester High School.

CONCLUSION

The United States respectfully requests that this Court find that Plaintiffs Motion for a Preliminary Injunction has established a likelihood of success on the merits under Title IX, and that there is a strong public interest in requiring the District to treat G.G., a transgender male student, like all other male students, including allowing him to use the male restrooms at Gloucester High School.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS WICHITA FALLS DIVISION

STATE OF TEXAS et al.,

Plaintiffs,

v. Civil Action No. 7:16-cv-00054–O

UNITED STATES OF AMERICA, et al.

Defendants.

PRELIMINARY INJUNCTION ORDER

Before the Court are Plaintiffs' Application for Preliminary Injunction (ECF No. 11), filed July 6, 2016; Defendants' Opposition to Plaintiffs Application for Preliminary Injunction (ECF No. 40), filed July 27, 2016; and Plaintiffs' Reply (ECF No. 52), filed August 3, 2016. The Court held a preliminary injunction hearing on August 12, 2016, and counsel for the parties presented their arguments. See ECF No. 56.[1]

[1] The Court also considers various amicus briefs filed by interested parties. *See* ECF Nos. 16, 28, 34, 36- 1, 38-1.

This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school. The sensitivity to this matter is heightened because Defendants' actions apply to the youngest child attending school and continues for every year throughout each child's educational career. The resolution of this difficult policy issue is not, however, the subject of this Order. Instead, the Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

That being the case, the issues Plaintiffs present require this Court to first decide whether there is authority to hear this matter. If so, then the Court must determine whether Defendants failed to follow the proper legal procedures before issuing the Guidelines in dispute and, if they failed to do so, whether the Guidelines must be suspended until Congress acts or Defendants follow the proper legal procedure. For the following reasons, the Court concludes that jurisdiction is proper here and that Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing the Administrative Procedures Act's notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts. Accordingly, Plaintiffs' Motion should be and is hereby **GRANTED**.

I. BACKGROUND

The following factual recitation is taken from Plaintiffs' Application for Preliminary Injunction (ECF No. 11) unless stated otherwise. Plaintiffs are composed of 13

states and agencies represented by various state leaders, as well as Harrold Independent School District of Texas and Heber-Overgaard Unified School District of Arizona.[2] They have sued the U.S. Departments of Education ("DOE"), Justice ("DOJ"), Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials (collectively "Defendants"), challenging Defendants' assertions that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex.[3] Plaintiffs

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[2] Plaintiffs include: (1) the State of Texas; (2) Harrold Independent School District (TX); (3) the State of Alabama; (4) the State of Wisconsin; (5) the State of West Virginia; (6) the State of Tennessee; (7) Arizona Department of Education; (8) Heber-Overgaard Unified School District (Arizona); (9) Paul LePage, Governor of the State of Maine; (10) the State of Oklahoma; (11) the State of Louisiana; (12) the State of Utah; (13) the state of Georgia; (14) the State of Mississippi, by and through Governor Phil Bryant; (15) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.

[3] Plaintiffs refer to a person's "biological sex" when discussing the differences between males and females, while Defendants refer to a person's sex based on the sex assigned to them at birth and reflected on their birth certificate or based on "gender identity" which is "an individual's internal sense of gender." *See* Am. Compl. 12, ECF No. 6; Mot. Injunction 1, ECF No. 11; Am. Compl. Ex. C (Holder Transgender Title VII Memo) ("Holder Memo 2014") App. 1 n.1, ECF No. 6-3 ("'[G]ender identity' [is defined] as an individual's internal senses of being male or female."); *Id.* at Ex. J. (DOJ/DOE Letter) 2, ECF No. 6-10. When referring to a transgendered person, Defendants' Guidelines state "transgender individuals are people with a gender identity that is different from the sex assigned to them at birth . . . ." Am. Compl., Ex. C (Holder Memo 2014), App. 1 n.1, ECF No. 6-3. "For example, a transgender man may have been

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claim that on May 13, 2016, Defendants wrote to schools across the country in a Dear Colleague Letter on Transgender Students (the "DOJ/DOE Letter") and told them that they must "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk losing Title IX-linked funding." Mot. Injunction 1, ECF No. 11. Plaintiffs also allege Defendants have asserted that employers who "refuse to permit employees to utilize the intimate areas of their choice face legal liability under Title VII." Id. Plaintiffs complain that Defendants' interpretation of the definition of "sex" in the various written directives (collectively "the Guidelines")[4] as applied to Title IX of the Education Amendments of 1972 ("Title IX") and Title VII of the Civil Rights Act of 1964 ("Title VII") is unlawful and has placed them in legal jeopardy.

Plaintiffs contend that when Title IX was signed into law, neither Congress nor agency regulators and third parties "believed that the law opened all bathrooms and other intimate facilities to members of both sexes." Mot. Injunction. 1, ECF No. 11. Instead, they argue one of

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assigned female at birth and raised as a girl, but identify as a man." *Id.* at Ex. D (OSHA Best Practices Guide to Restroom Access for Transgender Employees) ("OSHA Best Practice Guide"), App. 1, ECF No. 6-4. The Court attempts to use the parties' descriptions throughout this Order for the sake of clarity.

[4] The Guidelines refer to the documents attached to Plaintiffs' Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) ("DOE Q&A Memo), ECF No. 6-2; (3) Ex. C ("Holder Memo 2014"), ECF No. 6-3, (4) Ex. D (OSHA Best Practice Guide), ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet), ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.

Title IX's initial implementing regulations, 34 C.F.R. § 106.33 ("§ 106.33" or "Section 106.33"), expressly authorized separate restrooms on the basis of sex. Section 106.33 provides: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Plaintiffs assert the term sex in the pertinent statutes and regulations means the biological differences between a male and female. Mot. Injunction 2, ECF No. 11. Plaintiffs state that Defendants' swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines, coupled with Defendants' actions to enforce these new agency policies through investigations and compliance reviews, causes Plaintiffs to suffer irreparable harm for which a preliminary injunction is needed. *Id.* at 3–8; Pls.' Reply 3–7, ECF No. 54.

Defendants contend that the Guidelines and recent enforcement actions are designed to prohibit sex discrimination on the basis of gender identity and are "[c]onsistent with the nondiscrimination mandate of [Title IX]," and that "these guidance documents . . . are merely expressions of the agencies' views as to what the law requires." Defs.' Resp. 2–4, ECF No. 40. Defendants also contend that the Guidelines "are not legally binding, and they expose [P]laintiffs to no new liability or legal requirements" because DOE "has issued documents of this nature for decades, across multiple administrations, in order to notify schools and other recipients of federal funds about how the agency interprets the law and how

it views new and emerging issues." *Id.* at 4–5.[5] Defendants also state that the "[g]uidance documents issued by [DOE] 'do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations'" and these documents expressly state that they do not carry the force of law. *Id.* at 5 (citing Holder Memo 2, ECF No. 6-10, to clarify that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status," but the memo "is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case").

A. Title IX

Title IX, enacted in 1972, is the landmark legislation which prohibits discrimination among federal fund recipients by providing that no person "shall, on the basis of sex, . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 USC § 1681. The legislative history shows Congress hailed Title IX as an indelible step forward for women's rights. Mot. Injunction at 2–4. After its passage, the DOE and its predecessor implemented a number of regulations which sought to enforce Title IX, chief among them, and at issue here, § 106.33. *See G.G. ex rel*

[5] Defendants cited to U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance, http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html (last visited August 5, 2016) (discussing the purpose of guidance documents and providing links to guidance documents).

Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016) (stating that the Department of Health, Education, and Welfare ("HEW") adopted its Title IX regulations in 1975 pursuant to 40 Fed. Reg. 24,128 (June 4, 1975), and DOE implemented its regulations in 1980 pursuant to 45 Fed. Reg. 30802, 30955 (May 9, 1980)). Section 106.33, as well as several other related regulations, permit educational institutions to separate students on the basis of sex, provided the separate accommodations are comparable.

II. LEGAL STANDARDS

A. The Administrative Procedure Act (the "APA")

"The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004) (quoting 5 U.S.C. § 702). "Where no other statute provides a private right of action, the 'agency action' complained of must be final agency action.'" *Id.* at 61–62 (quoting 5 U.S.C. § 704).[6] In the Fifth

[6] Agency action is defined in 5 U.S.C. § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (quoting 5 U.S.C. § 551(13)). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: 'an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy' (rule); 'a final disposition . . . in a matter other than rule making' (order); a 'permit . . . or other form of permission' (license); a 'prohibition . . . or . . . taking [of] other compulsory or restrictive action' (sanction); or a 'grant of money, assistance, license, authority,' etc., or 'recognition of a claim, right, immunity,' etc., or
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Circuit, "final agency action" is a jurisdictional threshold, not a merits inquiry. *Texas v. Equal Employment Opportunity Comm'n*, No. 14-10949, 2016 WL 3524242 at *5 (5th Cir. June 27, 2016) ("EEOC"); *see also Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir. 2004) ("If there is no 'final agency action,' a federal court lacks subject matter jurisdiction." (citing *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999))).

An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). "In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *EEOC*, 2016 WL 3524242, at *5; *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50 (1967)). When final agency actions are presented for judicial review, the APA provides that reviewing courts should hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise

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'taking of other action on the application or petition of, and beneficial to, a person' (relief)." *Id.* (quoting § 551(4), (6), (8), (10), (11)).

not in accordance with the law. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150–151 (1991).

B. Preliminary Injunction

The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.*; *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001). A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*,

760 F.2d 618, 621 (5th Cir. 1985) (citing *Canal*, 489 F.2d at 572). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). Even when a movant satisfies each of the four Canal factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light Co.*, 760 F.2d at 621. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.*

III. ANALYSIS

Plaintiffs argue that: (1) Defendants skirted the notice and comment process—a necessity for legislative rules; (2) the new mandates are incompatible with Title VII and Title IX and the agencies are not entitled to deference; (3) the mandates violate the clear notice and anti-coercion requirements which the federal government may attach to spending programs; and (4) nationwide relief is necessary to prevent the irreparable harm Defendants will cause Plaintiffs. Mot. Injunction 2–3, ECF No. 11.

Defendants assert that Plaintiffs are not entitled to a preliminary injunction because: (1) Plaintiffs do not have standing to bring their claims; (2) this matter is not ripe for review; (3) Defendants' Guidelines do not violate the APA; (4) Plaintiffs cannot demonstrate irreparable harm and they have an alternative remedy; (5) Defendants did not violate the Spending Clause; (6) and an injunction would harm Defendants and third parties. Defs.' Resp.

1–3, ECF No. 40. Defendants allege that should an injunction be granted, it should be implemented only to Plaintiffs in the Fifth Circuit. *Id.* The Court addresses these issues, beginning with Defendants' jurisdictional arguments.[7]

A. Jurisdiction

1. Standing

Defendants allege that "[P]laintiffs' suit fails the jurisdictional requirements of standing and ripeness . . . because they have not alleged a cognizable concrete or imminent injury." Defs.' Resp. 12, ECF No. 40 (citing *Lopez v. City of Hous.*, 617 F.3d 336, 342 (5th Cir. 2015)). Defendants allege "a plaintiff must demonstrate that it has 'suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Defendants contend that "[t]he

[7] The parties have requested that the Court provide expedited consideration of the preliminary injunction. The briefing on this request was completed on August 3, 2016, and the matter was not ripe until after the hearing was completed on August 12, 2016. Because further legal issues concerning the basis for Plaintiffs' Spending Clause claim were raised at the hearing and require further briefing, the Court will not await that briefing at this time. *See* Hr'g Tr. 35, 44, 52–53 (discussing new program requirements and whether a new program is the same as annual grants). Therefore, the Spending Clause issue is not addressed in this Order. *See* ECF Nos. 11–12. Finally, where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX because the two statutes are commonly linked. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 546 (1982).

agencies have merely set forth their views as to what the law requires" regarding whether gender identity is included in the definition of sex, and "[a]t this stage, [P]laintiffs have alleged no more than an abstract disagreement with the agencies' interpretation of the law," since "[n]o concrete situation has emerged that would permit the Court to evaluate [P]laintiffs' claims in terms of specific facts rather than abstract principles." *Id.* at 13–14.

Defendants also allege that Plaintiffs "have [not] identified any enforcement action to which they are or are about to be subject in which a defendant agency is seeking to enforce its view of the law. As such, any injury alleged by plaintiffs is entirely speculative, as it depended on the initiation of some kind of enforcement action . . . which may never occur." Defs.' Resp. 14, ECF No. 40.

Plaintiffs state that Defendants are affirmatively using the Guidelines to force compliance as evidenced by various resolution agreements reached in enforcement cases across the country and from the litigation against the state of North Carolina, all of which is designed to force Plaintiffs to amend their policies to comply or place their federal funding in jeopardy. Hr'g Tr. at 78. Plaintiffs argue they are clearly the object of the Defendants' Guidelines, and those directives run afoul of various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities.[8] Hr'g Tr. at 77. Plaintiffs contend all of this

[8] Plaintiffs' motion provides the following citations to their state laws which give them legal control over the management of the safety and security policies of educational buildings in their states and Continued …

which the Guidelines will compel them to disregard. Texas cites to Tex. Const. art 7 § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); Tex. Educ. Code §§ 4.001(b) (stating the objectives of public education, including Objective 8: "School campuses will maintain a safe and disciplined environment conducive to student learning."); 11.051 ("An independent school district is governed by a board of trustees who, as a corporate body, shall: (1) oversee the management of the district; and (2) ensure the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations."); 11.201 (listing the duties of the superintendent including "assuming administrative responsibility and leadership for planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district . . . ."); and 46.008 ("The commissioner shall establish standards for adequacy of school facilities. The standards must include requirements related to space, educational adequacy, and construction quality."); Pls.' Reply Ex. (Belew Decl.) 4, ECF No. 52-1 (stating the Texas Education Agency ("TEA") is responsible for "[t]he regulation and administration of physical buildings and facilities within Texas public schools" among other duties). Plaintiffs also provided an exhaustive list of similar state constitution citations, statutes, codes, and regulations that grant each Plaintiff the power to control the regulations that govern the administration of public education and public education facilities. *See* Mot. Injunction 9–11 n. 9-22, ECF No. 11 (quoting Ala. Code §§ 16-3-11, 16-3-12, 16-8-8–16-8-12 ("Alabama law authorizes state, county, and city boards of education to control school buildings and property."); Wis. stat. chs. 115, 118 ("In Wisconsin, local school boards and officials govern public school operations and facilities . . . with the Legislature providing additional supervisory powers to a Department of Public Instruction."); Wis. Stat. § 120.12(1) ("School boards and local officials are vested with the 'possession, care, control and management of the property and affairs of the school district, and must regulate the use of school property and facilities."); Wis. Stat. § 120.13(17) ("Wisconsin law also requires school boards to '[p]rovide and maintain enough suitable

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and separate toilets and other sanitary facilities for both sexes.'"); W. Va. Const. art. XII, § 2; W. Va. code § 18-5-1, 18-5-9(4) ("West Virginia law establishes state and local boards of education . . . and charges the latter to ensure the good order of the school grounds, buildings, and equipment."); Tenn. Code Ann. §§ 49-12, 1-302, 49-1-201 ("In Tennessee, the state board of education sets statewide academic policies, . . . and the department of education is responsible for implementing those polices[, while] [e]ach local board of education has the duty to "[m]anage and control all public schools established or that may be established under its jurisdiction."); Tenn. Code Ann. §§ 49-1-201(a)-(c)(5), 49-2-203(a)(2) ("The State Board is also responsible for "implementation of law" established by the General Assembly, . . . and ensuring that the 'regulations of the state board of education are faithfully executed.' "); Ariz. Rev. Stat. §§ 15-203(A)(1), 15-341(A)(1), 15-341(A)(3) ("Arizona law establishes state and local boards of education, . . . and empowers local school districts to '[m]anage and control the school property within its district.'"); Me. Rev. Stat. tit. 20-A, §§ 201–406, 1001(2), 6501 ("Maine provides for state and local control over public education. While state education authorities supervise the public education system, control over management of all school property, including care of school buildings[,] . . . [a]nd Maine law provides requirements related to school restrooms."); Okla. Const. art. XIII, §§ 5, 5-117 ("Oklahoma law establishes a state board of education to supervise public schools. Local school boards are authorized by the board to operate and maintain school facilities and buildings."); La. Const. art VIII, § 3, LSA-R. Stat. § 17:100.6 ("In Louisiana, a state board of education oversees public schools, . . . while local school boards are charged with the management, administration, and control of buildings and facilities within their jurisdiction."); Utah Code §§ 53A-1-101, 53A-3-402(3) ("Utah law provides for state and local board of educations, . . . and authorizes the local boards to exercise control over school buildings and facilities."); Ga. Code § 20-2-59, 520 ("Georgia places public schools under the control of a board of education, . . . and delegates control over local schools, including the management of school property, to county school boards govern local schools."); Miss. Code Ann. § 37-7-301 ("In Mississippi, the state board of education oversees local school boards, which exercise con-

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confers standing according to the Fifth Circuit's opinion in *Texas v. Equal Employment Opportunity Commission*, No. 14-10940, 2016 WL 3524242 (5th Cir. June 27, 2016). Hr'g Tr. 78.

Defendants counter that *EEOC* was wrongly decided and, regardless, the facts here are distinguishable from that case.[9] *Id.* Defendants primarily distinguish *EEOC* from this case based on the *EEOC* majority's view that the "guidance [at issue] contained a 'safe harbor' [provision]" and "the [guidance at issue had] the immediate effect of altering the rights and obligations of the 'regulated community' . . . by offering them [] detailed and conclusive means to avoid an adverse EEOC finding." Defs.' Resp. 15, ECF No. 40. Defendants claim that the same kind of facts are not present here. Defendants contend further that "the [transgender] guidance documents do not provide 'an exhaustive procedural framework,' [or] . . . a safe harbor, but merely express[] the agencies' opinion about the proper interpretation of Title VII and Title IX." *Id.* Thus, they argue, the Court lacks jurisdic-

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trol over local school property."); Ky. Rev. Stat. §§ 156.070, 160.290 ("In Kentucky, the state board of education governs the state's public school system, . . . while local boards of education control "*all* public school property" within their jurisdictions, . . . and can make and adopt rules applicable to such property.").

[9] *Id.* at 14 ("[T]he government respectfully disagrees with that decision for many of the reasons stated in Judge Higginbotham's dissenting opinion, and . . . EEOC is distinguishable from this case in important respects."); Hr'g Tr. 53 ("Let me say at the outset . . . the Government disagrees with that decision.").

tion and should decline to enter a preliminary injunction. *Id.*[10]

The Court finds that Plaintiffs have standing. "The doctrine of standing asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560–61. The injury in fact must be "concrete and particularized" and "actual or imminent," as opposed to "conjectural" or "hypothetical." *Id.* at 560. When "a plaintiff can establish that it is an 'object' of the agency regulation at issue, 'there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.'" *EEOC*, 2016 WL 3524242 at *2; Lujan, 504 U.S. at 561–62. The Fifth Circuit provided, "[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *Id.* at *6 (quoting *Contender Farms LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015)).

In *EEOC*, Texas sued the EEOC over employment guidance the EEOC issued to employers concerning their Title VII obligations. In response, the EEOC argued Texas lacked standing because the guidance was advisory only and imposed no affirmative obligation. The

[10] The Court addresses Defendants' claim that Plaintiffs have an adequate alternate remedy in Section III.A.4.

Fifth Circuit held that Texas had standing to seek relief because it was an object of the EEOC's guidance as the guidance applied to Texas as an employer. *Id.* at *4.

This case is analogous. Defendants' Guidelines are clearly designed to target Plaintiffs' conduct. At the hearing, Defendants conceded that using the definition in the Guidelines means Plaintiffs are not in compliance with their Title VII and Title IX obligations. Hr'g Tr. 74. Defendants argue that that this does not confer standing because the Guidelines are advisory only. Defs.' Resp. 14, ECF No. 40. But this conflates standing with final agency action and the Fifth Circuit instructed district courts to address the two concepts separately. *See EEOC*, 2016 WL 3524242 at *3. Defendants' Guidelines direct Plaintiffs to alter their policies concerning students' access to single sex toilet, locker room, and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations.[11] Plaintiffs' counsel argued the Guidelines will force Plaintiffs to consider ways to build or reconstruct restrooms, and how to accommodate students who may seek to use private single person facilities, as other school districts and employers who have been subjected to Defendants' enforcement actions have had to do. Hr'g Tr. 80–81. That the Guidelines spur this added regulatory compliance

[11] For example, Plaintiffs list Wisconsin's state statutes regarding this matter, which state that school boards are required to "[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes." Mot. Injunction 10 n.9, ECF No. 11 (citing Wis. Stat. s. 120.12(12)). Plaintiffs interpret this to mean that Wisconsin has the authority to maintain separate intimate facilities that correspond to a person's biological sex. *Id.*

analysis satisfies the injury in fact requirement. *EEOC*, 2016 WL 3524242 at *4 ("[T]he guidance does, at the very least, force Texas to undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations . . . overrides the State's interest . . . . [T]hese injuries are sufficient to confer constitutional standing, especially when considering Texas's unique position as a sovereign state . . . ."). That Plaintiffs have standing is strengthened by the fact that Texas and other Plaintiffs have a "stake in protecting [their] quasi-sovereign interests . . . [as] special solicitude[s]." *Mass. v. E.P.A.*, 549 U.S. 497, 520 (2007) ("Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.").

Accordingly, Plaintiffs have standing to pursue this lawsuit.

2. Ripeness

Defendants also argue that this case is not ripe for review. According to Defendants, this Court should avoid premature adjudication to avoid entangling itself in abstract disagreements over administrative policies. Defs.' Resp. 13, ECF No. 40 (citing *Nat'l Park Hosp. Ass'n v. Dep.'t Interior*, 538 U.S. 803, 807 (2003)). Defendants argue that more time should be given to allow the administrative process to run its course and develop more facts before the Court can address this case. *Id.* at 13 (citing *Abbott Labs*, 387 U.S. 136, 149 (1967)); Hr'g Tr. 62. Plaintiffs counter that, taking into account recent events where Defendants have investigated other entities that

do not comply with the Guidelines, this case is ripe. Pls.' Reply 4–7, ECF No. 52; Hr'g Tr. 79.

"A challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.'" *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir. 2007) (citing *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812).

The Court finds that Plaintiffs' case is ripe for review. Here, the parties agree that the questions at issue are purely legal. Hr'g Tr. 61. Defendants asserted at the hearing that Plaintiffs are not in compliance with their obligations under Title IX given their refusal to change their policies. Hr'g Tr. 74. Furthermore, for the reasons set out below, the Court finds that Defendants' actions amount to final agency action under the APA.[12] *EEOC*, 2016 WL 3524242 at *11 n.9 ("Having determined that the Guidance is 'final agency action' under the APA, it follows naturally that Texas's APA claim is ripe for review. Texas's challenge to the EEOC Guidance is a purely legal one, and as such it is unnecessary to wait for further factual development before rendering a decision.") (Internal citations omitted).

Finally, the facts of this case have sufficiently developed to address the legal impact Defendants' Guidelines have on Plaintiffs' legal questions in this case. *Texas*, 497 F.3d at 498–99. The only other factual development that may occur, given Defendants' conclusion Plaintiffs are

[12] The Court further addresses this issue in section III.A.3.

not in legal compliance, is whether Defendants actually seek to take action against Plaintiffs. But it is not clear how waiting for Defendants to actually take action would "significantly advance [the court's] ability to deal with the legal issues presented." *Texas*, 497 F.3d at 498–99. As previously stated, Defendants' Guidelines clash with Plaintiffs' state laws and policies in relation to public school facilities and Plaintiffs have called into question the legality of those Guidelines. Mot. Injunction 9–12, ECF No. 11. Therefore, "further factual development would not 'significantly advance the courts ability to deal with the legal issues presented.'" Texas, 497 F.3d at 498−99. Accordingly, the Court finds that this case is ripe for review.

3. Final Agency Action under the APA

The Court now evaluates whether the Guidelines are final agency action meeting the jurisdictional threshold under the APA. *EEOC*, 2016 WL 3524242 at *5. Defendants argue that there has been no final agency action as the documents in question are merely "paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." Defs.' Resp. 18, ECF No. 40. Defendants also allege that the Guidelines are "[v]alid interpretations of the statutory and regulatory authorities on which they are premised" because although Title IX and § 106.33 provide that federal recipients may provide for separate, comparable facilities, the regulation and statute "do not address how they apply when a transgender student seeks to use those facilities . . . ." *Id.* at 20−21.

Plaintiffs allege that the agencies' Guidelines are binding nationwide and the Defendants' enforcement patterns in various states clearly demonstrate that legal

actions against those that do not comply will follow. Mot. Injunction 9–12, ECF No. 11; Reply 2–8, ECF No. 52. Plaintiffs identify a number of similar cases where Defendants have investigated schools that refused to comply with the new Guidelines and where they sued North Carolina over its state law which, in part, made it legal to require a person to use the public restroom according to their biological sex. Reply 6, ECF No. 52.

An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177–78. "In evaluating whether a challenged agency action meets these two conditions, the court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *EEOC*, 2016 WL 3524242 at *5 (quoting *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011)).

The Court finds that the Guidelines are final agency action under the APA. Defendants do not dispute that the Guidelines are a "consummation" of the agencies' decision-making process. Hr'g Tr. 61; *Nat'l Pork Producers Council v. E.P.A.*, 635 F.3d 738, 755–56 (5th Cir. 2011) (citing *Her Majesty the Queen in Right of Ontario v. Envtl. Prot. Agency*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (deciding that EPA guidance letters constitute final agency actions as they "serve[d] to confirm a definitive position that has a direct and immediate impact on the parties . . . .")).

The second consideration is also satisfied in this case because legal consequences flow from the Defendants'

actions. Defendants argue no legal consequences flow to Plaintiffs because there has been no enforcement action, or threat of enforcement action. Hr'g Tr. 71. The Fifth Circuit held in *EEOC* however that "an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties." 2016 WL 3524242 at *8. According to the Fifth Circuit, "'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability." Id. (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814–15 (May 31, 2016) (holding that using the pragmatic approach, an agency action asserting that plaintiff's land was subject to the Clean Water Act's permitting process was a final agency action which carried legal consequences). The Fifth Circuit concluded that "[i]t is also sufficient that the Enforcement Guidance [at issue in *EEOC*] has the immediate effect of altering the rights and obligations of the 'regulated community' (i.e. virtually all state and private employers) by offering them a detailed and conclusive means to avoid an adverse EEOC finding . . . ." 2016 WL 3524242 at * 6.

In this case, although the Guidelines provide no safe harbor provision, the DOJ/DOE Letter provides not only must Plaintiffs permit individuals to use the restrooms, locker rooms, showers, and housing consistent with their gender identity, but that they find no safe harbor in providing transgender students individual-user facilities as an alternative accommodation. Indeed, the Guidelines provide that schools may, consistent with Title IX, make

individual-user facilitates available for *other* students who "voluntarily seek additional privacy." *See* DOJ/DOE Letter 3, ECF No. 6-10. Using a pragmatic and common sense approach, Defendants' Guidelines and actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants' Guidelines.[13] *EEOC*, 2016 WL 3524242 at *8 ("Instead, 'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability."); *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1056–57 (5th Cir. 1993) (stating that "[w]ere HUD to formally define the phrase [at issue] . . . [the plaintiffs] would undoubtedly have the right to review HUD's final agency action under § 702 [of the APA]"); *Frozen Foods Express v. United States*, 351 U.S. 40, 44–45 (1956) (holding an order specifying which commodities the Interstate Commerce Commission believed were exempt was final agency action, even though the order simply gave notice of how it would interpret the statute and would apply only when an action was brought): *compare with AT&T Co. v. E.E.O.C.*, 27 F.3d 973, 975–76 (D.C. Cir. 2001) (holding that the EEOC's compliance manual was not a final agency action because the policy guidance did not intend

[13] The Holder Memorandum concludes, "For these reasons, the [DOJ] will no longer assert that Title VII's prohibition of discrimination based on sex does not encompass gender identity per se (including transgender discrimination)." Holder Memo 2, ECF No. 6-3. Other guidance from Defendants take similar actions. *See also* DOJ/DOE Letter 4–5, ECF No. 6-10.

to bind EEOC staff in their official conduct, the manual simply expressed the agency's view with respect to employers' actions and compliance with Title VII).

Accordingly, the Court finds that Defendants' Guidelines are final agency action such that the jurisdictional threshold is met. EEOC, 2016 WL 3524242 at *5.

4. Alternative Legal Remedy

Defendants also contend that district court review is precluded and Plaintiffs should not be allowed to avoid the administrative process by utilizing the APA at this time. Defs.' Resp. 16, ECF No. 40. Defendants allege that "review by a court of appeals is an 'adequate remedy' within the meaning of the APA," and "[s]ection 704 of the APA thus prevents plaintiffs from circumventing the administrative and judicial process Congress provided them." *Id.* Defendants argue "Congress has precluded district court jurisdiction over pre-enforcement actions like this." *Id.* at 17. Defendants cite several cases, including the Supreme Court's opinions in *Thunder Basin v. Reich*, 510 U.S. 200 (1994) and *Elgin v. Department of Treasury*, 132 S. Ct. 2126 (2012), in support of this argument.[14]

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[14] Defendants also assert *NAACP v. Meese* supports this argument but the Court disagrees. In that case, the plaintiffs sought to enjoin the Attorney General from reopening or agreeing to reopen any consent decree in any civil rights action pending in any other court. The district court denied this request, holding such actions would violate principles of separation of powers and comity. 615 F. Supp. 200, 201–02 (D.D.C. 1985) ("Plaintiffs' action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States."). The *Meese* court Continued …

Defendants' assertion that there is no jurisdiction to review Plaintiffs' APA claims fails and their reliance on *Thunder Basin*, *Elgin*, and the other cited cases is misplaced. In *Thunder Basin*, the Supreme Court held that the Mine Act's statutory review scheme precluded the district court from exercising subject-matter jurisdiction over a pre-enforcement challenge. To determine whether pre-enforcement challenges are prohibited courts look to whether this "intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin*, 510 U.S. at 207 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984)). The Supreme Court held that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history . . . and whether the claims can be afforded meaningful review." *Id.* (internal citation omitted).

Although the Mine Act was silent about pre-enforcement claims, the Supreme Court held that "its comprehensive enforcement structure demonstrate[d] that Congress intended to preclude challenges," and the Mine Act "expressly authorize[d] district court jurisdiction in only two provisions . . . [which allowed] the Secretary [of Labor] to enjoin [] violations of health and safety standards and to coerce payment of civil penalties." *Id.*

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also concluded there was no final agency action to enjoin and, by definition, there would be an alternative legal remedy related to those cases where a consent decree existed because those decrees were already subject to a presiding judge. *Id.* at 203 n.9. Additionally, Defendants reliance on *Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953 (5th Cir. 1991) does not apply because there was no final agency action in that case.

at 209. Thus, plaintiffs had to "complain to the Commission and then to the court of appeals." *Id.* (italics omitted).

Elgin reached a similar conclusion, holding that the Civil Service Reform Act ("CSRA") was the exclusive avenue to judicial review for petitioners' claims against the Treasury Department. 132 S. Ct. 2126, 2128 ("Just as the CSRA's 'elaborate' framework [citation omitted] demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA denies statutory review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review.").

No similar elaborate statutory framework exists covering Plaintiffs' claims. Neither Title VII nor Title IX presents statutory schemes that would preclude Plaintiffs from bringing these claims in federal district court. Indeed, the Supreme Court has held that Title IX's enforcement provisions, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory remedy for violations. *See Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (holding that Title IX did not preclude a private right of action for damages). Given Defendants lack of authority to the contrary, the presumption of reviewability for all agency actions applies. *EEOC*, 2016 WL 3524242 at *11 (citing *Abbott Labs.*, 387 U.S. at 140) ("To wholly deny judicial review, however, would be to ignore the presumption of reviewability, and to disregard the Supreme Court's instruction that courts should adopt a pragmatic approach for the purposes of determining reviewability under the APA.").

Having concluded that Plaintiffs claims are properly subject to judicial review, the Court next evaluates whether a preliminary injunction is appropriate.

B. Preliminary Injunction

1. Likelihood of Success on the Merits

The first consideration is whether Plaintiffs have shown a likelihood of success on the merits for their claims. Plaintiffs aver that they have shown a substantial likelihood that they will prevail on the merits because Defendants have violated the APA by (1) circumventing the notice and comment process and (2) by issuing final agency action that is contrary to law. Mot. Injunction 12–16, ECF No. 11. Furthermore, Plaintiffs contend that Defendants' new policies are not valid agency interpretations that should be granted deference because "[a]gencies do not receive deference where a new interpretation conflicts with a prior interpretation." Pls.' Reply 11, ECF No. 52 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

Defendants contend that their actions do not violate the APA because the Guidelines are interpretive rules and are therefore exempt from the notice and comment requirements. Defs.' Resp. 12–18, ECF No. 40. Defendants argue the Guidelines are exempt because they do not carry the force of law, even though "the agencies' interpretations of the law are entitled to some deference." Further, they argue because their interpretation is reasonable, this interpretation is entitled to deference.[15] De-

[15] Defendants argue the Court should be guided in this decision by the Fourth Circuit's decision in *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) ("*G.G.*"). Defendants con-

Continued …

fendants also assert they did not act contrary to law because the Guidelines are valid interpretations of Title IX as the statute and regulations "do not address how [the laws] apply when a transgender student seeks to use those facilities" or "how a school should determine a transgender student's sex when providing access to sex-

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tend the Fourth Circuit's majority opinion in *G.G.* should be followed as it provides the proper analysis. The Supreme Court recalled the Fourth Circuit's mandate and stayed the preliminary injunction entered by the district court in that case. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-A-52, 2016 WL 4131636 at *1 (Aug. 3, 2016) (Breyer, J. concurring) ("In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy."). The Supreme Court takes such actions only on the rarest of occasions. *Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) ("On such an application, since the Court of Appeals refused the stay '* * * this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari."); *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) ("If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted."). Because it is impossible to know the precise issue(s) that prompted the Supreme Court to grant the stay, it is difficult to conclude that G.G. would control the outcome here. *See New Motor Vehicle Bd. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (declaring it is very difficult to predict anticipated Supreme Court decision). Nevertheless, the Court has reviewed the opinion and considers the well-expressed views of each member of the panel in reaching the decision in this case.

segregated facilities." *Id.* at 20–21. Thus, according to Defendants, this situation presents an ambiguity in the regulatory scheme and Defendants are allowed to provide guidelines to federal fund recipients on this matter. *Id.* at 21.[16]

In their Reply, Plaintiffs counter that DOE's implementing regulation, § 106.33, is not "ambiguous[,] [a]s a physiologically-grounded regulation, it covers every human being and therefor all those within the reach of Title IX." Reply 8, ECF No. 52. They contend further, "[t]o create legal room to undo what Congress (and preceding regulators) had done, Defendants manufacture an ambiguity, claiming that 'these regulations do not address how they apply when a transgender student seeks to use those facilities . . . .'" *Id.* (citing Defs.' Response 20–21, ECF No. 40). Plaintiffs continue, "[i]n enacting Title IX, Congress was concerned that women receive the same opportunities as men, [t]hus, Congress utilized 'sex' in an exclusively biological context[,] [and] "[t]he two sexes are not fungible." *Id.* at 8–9 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946). It is the biological differences between men and women, Plaintiffs allege, that led Congress in 1972 to "permit differential treatment by sex only[,]" provide a basis for DOE "to approve 'separate toilet, locker rooms, and shower facilities on the basis of sex" in § 106.33, and led the Supreme Court "to conclude that educational institutions must 'afford mem-

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[16] Defendants characterize their Guidelines as, "supply[ing] 'crisper and more detailed lines' than the statutes and regulations that they interpret," without "alter[ing] the legal obligations of regulated entities." *Id.* at 20 (citing *Am. Mining Cong. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

bers of each sex privacy from the other sex.'" *Id.* at 9 (quoting 118 Cong. Rec. 5807 (1972)); *United States v. Virginia*, 518 U.S., 550 n.19 (1996)).

The Court finds that Plaintiffs have shown a likelihood of success on the merits because: (1) Defendants bypassed the notice and comment process required by the APA; (2) Title IX and § 106.33's text is not ambiguous; and (3) Defendants are not entitled to agency deference under *Auer v. Robbins*, 519 U.S. 452 (1997).[17]

i. Notice and Comment under the APA

Defendants state that "[t]he APA does not require agencies to follow notice and comment procedures in all situations [, and the APA] specifically excludes interpretive rules and statements of agency policy from these procedures." Defs.' Resp. 17–18, ECF No. 40. Defendants allege "[t]he guidance documents are . . . paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." *Id.* at 18. According to Defendants, "the interpretations themselves do not carry the force of law . . . ." *Id.* at 19. Defendants rely on *G.G.*, 822 F.3d 709, 720 (4th Cir. 2016) to support their claim that DOE's "interpretation of the single-sex facility regulation implementing Title IX is reasonable, and does not conflict with those regulations in any way." *Id.*

Plaintiffs contend that Defendants' rules are legislative because: "(1) they grant rights while also imposing significant obligations; (2) they amend prior legislative

[17] Defendants' counsel stated at the hearing that Defendants would not be entitled to *Chevron* deference for the Guidelines. *See* Hr'g Tr. 72. Thus, the Court addresses only Defendants' claim that they are entitled to *Auer* deference when interpreting § 106.33.

rules or longstanding agency practice; and (3) bind the agencies and regulated entities," requiring them to go through the notice and comment process. Mot. Injunction 12, ECF No. 11.

The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them. 5 U.S.C. §§ 553(b)−(c). This is referred to as the notice and comment requirement. The purpose is to permit the agency to understand and perhaps adjust its rules based on the comments of affected individuals. *Prof'ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). However, not every action an agency takes is required to go through the notice and comment process. "The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). "Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not." *Id.* (citing 5 U.S.C. § 553). "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03, (1979).

The APA does not define a legislative or "substantive" rule, but in *Morton v. Ruiz*, 415 U.S. 199, 234 (1974), the Supreme Court held that a substantive rule or "a legislative-type rule," is one that "affect[s] individual rights and obligations." *Id.* at 232. The Supreme Court also held, "the promulgation of these regulations must conform with any procedural requirements imposed by Congress." *Chrysler Corp.*, 441 U.S. at 303. Thus, agency

discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)). If a rule is substantive, notice and comment requirements must be adhered to scrupulously. *Prof'ls and Patients for Customized Care*, 56 F.3d at 595.

"[L]egislative rules (and sometimes interpretive rules) may be subject to pre-enforcement review" because they subject a party to a binding obligation which can be the subject of an enforcement action. *McCarthy*, 758 F.3d at 251. ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule . . . ."). The APA treats interpretive rules and general statements of policy differently. *Id.* ("As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.").[18]

Courts have focused on several factors to evaluate whether rules are interpretative or legislative. Courts analyze the agency's characterization of the guidance and post-guidance events to determine whether the

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[18] *Catawba Cty.* provides: "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.").

agency has applied the guidance as if it were binding on regulated parties. *McCarthy*, 758 F.3d at 252–53. However, "the most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *McCarthy*, 758 F.3d at 252 (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34; *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002)). "A touchstone of a substantive rule is that it establishes a binding norm." *Prof'ls and Patients for Customized Care*, 56 F.3d at 596; *see also Texas v. United States*, 809 F.3d 134, 202 (5th Cir. 2015) (King, J., dissenting) (declaring that an agency action establishing binding norms which permit no discretion is a substantive rule requiring notice and comment). If agency action "draws a 'line in the sand' that, once crossed, removes all discretion from the agency" the rule is substantive. *Id.* at 601.

Here, the Court finds that Defendants rules are legislative and substantive. Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are "compulsory in nature." *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000);[19] *see also Prof'ls and Patients for Customized Care*, 56 F.3d at 596 (the label an agency places on its exercise of ad-

[19] In *Appalachian Power*, the D.C. Circuit held that an EPA guidance was a legislative rule despite the guidance document's statement that it was advisory. The Court analyzed the document as a whole and found that "the entire Guidance, from beginning to end — except the last paragraph — reads like a ukase. It commands, it requires, it orders, it dictates." 208 F.3d at 1022–23. Similarly, the DOJ/DOE Letter uses the words "must," and various forms of the word "require" numerous times throughout the document. Am. Compl. Ex. J (DOJ/DOE Letter), ECF No. 6-10.

ministrative power is not conclusive, rather it is what the agency does with that policy that determines the type of action). Defendants confirmed at the hearing that schools not acting in conformity with Defendants' Guidelines are not in compliance with Title IX. Hr'g Tr. 71. Further, post-Guidelines events, where Defendants have moved to enforce the Guidelines as binding, buttress this conclusion. *Id.* at 7; Mot. Injunction 15–16, ECF No. 11; Reply 4–8, ECF No. 52. The information before the Court demonstrates Defendants have "drawn a line in the sand" in that they have concluded Plaintiffs must abide by the Guidelines, without exception, or they are in breach of their Title IX obligations. Thus, it would follow that the "actual legal effect" of the Guidelines is to force Plaintiffs to risk the consequences of noncompliance. *McCarthy*, 758 F.3d at 252; *Catawba Cty.*, 571 F.3d at 33–34; *Gen. Elec. Co.*, 290 F.3d at 382; *see also Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). Plaintiffs, therefore, are legally affected in a way they were not before Defendants issued the Guidelines. The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. *Panhandle Producers and Royalty Owners Ass'n v. Econ. Regulatory Admin*, 847 F.2d 1168, 1174 (5th Cir. 1988) (stating that a substantive rule is one that establishes standards of conduct that carry the force of law). As such, Defendants should have complied with the APA's notice and comment requirement. 5 U.S.C. § 553; *Nat'l Min. Ass'n*, 758 F.3d at 251; *Chrysler Corp.*, 441 U.S. at 301–03. Permitting the definition of sex to be defined in this way would allow Defendants to "create de facto new regulation" by agency action without complying with the proper procedures.

Christensen v. Harris Cty., 529 U.S. 576, 586–88 (2000). This is not permitted.

Accordingly the Court finds that Plaintiffs would likely succeed on the merits that Defendants violated the notice and comment requirements of the APA.

ii. Agency Action Contrary to Law (5 U.S.C. § 553)

Plaintiffs contend that Defendants' Guidelines are contrary to the statutory and regulatory text, Congressional intent, and the plain meaning of the term. Mot. Injunction 14, ECF No. 11. When an agency acts contrary to law, its action must be set aside. 5 U.S.C. § 706(2)(A). Plaintiffs argue that Defendants' interpretation of the meaning of the term "sex" as set out in the Guidelines contradicts its meaning in Title VII, Title IX, and § 106.33. They assert "the meaning of the terms 'sex,' on the one hand, and 'gender identity,' on the other, both now and at the time Titles VII and IX were enacted, forecloses alternate constructions." Mot. Injunction 16, ECF No. 11 (citing *Thomas Jefferson Univ.*, 512 U.S. at 512. They also allege that the ordinary meaning of the term controls. *Id.* at 17 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

Defendants contend that Plaintiffs' arguments for legislative history and intent at the time of passage are irrelevant. Hr'g Tr. 33 ("But it may very well be that Congress did not intend the law to protect transgender individuals. [But,] . . . as the Supreme Court has made it absolutely clear in *Oncale*, the fact that Congress may have understood the term sex to mean anatomical sex at birth is largely irrelevant.") Defendants also allege that "Title IX and Title VII should be construed broadly" to

protect any person, including transgendered persons, from discrimination. Hr'g Tr. 33–34.

The starting point to analyze this dispute begins with the actual text of the statute or regulation, where the words should be given their ordinary meaning. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). When the words are unambiguous, the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). The pertinent statutory text at issue in this case provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681. Title IX expressly permits educational institutions to maintain separate living facilities for the different sexes. *Id.* at § 1686. The other language at issue comes from one of the DOE regulations promulgated to implement Title IX, which states: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

Defendants assert the Guidelines simply provide clarity to an ambiguity in this regulation, and that ambiguity is how to define the term sex when dealing with transgendered students. Defs.' Resp. 20, ECF No. 40. Because they contend the regulation is ambiguous, Defendants argue "[f]oundational principles of administrative law instruct [the Court] to give controlling weight to [their] interpretations of their own ambiguous regulations unless [they are] plainly erroneous." *Id.*

Plaintiffs contend the text of both Title VII and Title IX is not ambiguous. Mot. Injunction 16–19, ECF No. 11. They argue when Congress passed both statutes it clearly intended sex to be defined based on the biological and anatomical differences between males and females. *See id.* at 17–18 (citing legislative history and common understanding of its meaning at the time of passage). Plaintiffs likewise assert § 106.33 is unambiguous, for the same reason, as it was designed to separate students based on their biological differences because they have a privacy right to avoid exhibiting their "nude or partially nude body, genitalia, and other private parts" before members of the opposite sex. Pls.' Reply 8–9, ECF No. 52. Based on this, they argue Defendants have manufactured an ambiguity so they can then unilaterally change the law to suit their policy preferences. *Id.* at 8.

iii. Auer Deference

Because Defendants assert their regulation is ambiguous, the Court must determine whether their interpretation is entitled to deference. Defendants contend an agency may interpret its own regulation by issuing an opinion letter or other guidance which should be given controlling weight if: (1) the regulation is ambiguous; and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. Defs.' Resp. 21, ECF No. 40; *Christensen*, 529 U.S. at 588 ("Auer deference is warranted only when the language of the regulation is ambiguous."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("[An agency's] interpretation of [its regulation] is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)).

This deference is only warranted however when the language of the regulation is ambiguous. *Moore v. Hannon Food Services, Inc.*, 317 F.3d 489, 495 (5th Cir. 2003). Legislation is ambiguous if it is susceptible to more than one accepted meaning. *Calix v. Lynch*, 784 F.3d 1000, 1005 (5th Cir. 2015). "Multiple accepted meanings do not exist merely because a statute's 'authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.'" *Id.* (citing *Moore*, 317 F.3d at 497 *and* applying this rule of construction to regulations).

If a regulation is not ambiguous, the agency's interpretation may be considered but only according to its persuasive power. *Moore*, 317 F.3d at 495. "Thus, a court must determine whether 'all but one of the meanings is ordinarily eliminated by context.'" *Calix*, 784 F.3d at 1005 (quoting *Deal v. United States*, 508 U.S. 129, 132–33 (1993)). When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent. *D.C. Bd. of Elections & Ethics v. D.C.*, 866 A.2d 788, 798 n.18 (D.C. 2005) ("In finding the ordinary meaning, 'the use of dictionary definitions is appropriate in interpreting undefined statutory terms.'"); *1618 Twenty–First St. Tenants Ass'n, Inc. v. Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003) (same). Furthermore, "an agency is not entitled to deference when it offers up an interpretation of [a regulation] that [courts] have already said to be unambiguously foreclosed by the regulatory text." *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014) (citing *Christensen*, 529 U.S. at 588).

Based on the foregoing authority, the Court concludes § 106.33 is not ambiguous. It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth. *See* 34 C.F.R. § 106.33; 45 Fed. Reg. 30955 (May 9, 1980); *Thomas Jefferson Univ.*, 512 U.S. at 512 (holding that intent determined at the time the regulations are promulgated). It appears Defendants at least tacitly agree this distinction was the intent of the drafter. *See* Holder Memo 1, ECF No. 6-3 ("The federal government's approach to this issue has also evolved over time."); *see also* Hr'g Tr. 33 ("[I]t may very well be that Congress did not intend the law to protect transgender individuals.").

Additionally, it cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students. Pls.' Mot. Injunction 17–18, ECF No. 11 (citing legislative history and common understanding of its meaning at the time of passage). As the support identified by Plaintiffs shows, this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33. *See* Pls.' Am. Compl. ¶¶ 8–13, ECF No. 6; *see also G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (providing comprehensive list of various definitions from the 1970s which demonstrated "during that time period, virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females, particularly with respect to their reproduc-

tive functions."). This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their "nude or partially nude body, genitalia, and other private parts," and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy. *See G.G.*, 822 F.3d at 723.

This conclusion is also supported by the text and structure of the regulations. Section 106.33 specifically permits educational institutions to provide separate toilets, locker rooms, and showers based on sex, *provided* that the separate facilities are comparable. The sections immediately preceding and following § 106.33 likewise permit educational institutions to separate students on the basis of sex. For instance, § 106.32 permits educational institutions to provide separate housing for students on the basis of sex, again so long as the separate housing is comparable, and § 106.33 permits separate educational sessions for boys and girls when dealing with instruction concerning human sexuality. 34 C.F.R. §§ 106.32, 106.34. Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality, was to protect students' personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex. *G.G.*, 822 F.3d at 723. Accordingly, this interpretation of § 106.33 is consistent with the structure and purpose of the regulations.

Based on the foregoing, the Court concludes § 106.33 is not ambiguous. Given this regulation is not ambiguous, Defendants' definition is not entitled to *Auer* deference,

meaning it does not receive controlling weight. *Auer*, 519 U.S. at 461. Instead, Defendants' interpretation is entitled to respect, but only to the extent it has the power to persuade. *Christensen*, 529 U.S. at 587. In his dissent in *G.G.*, Judge Niemeyer characterized Defendants' definition as "illogical and unworkable." *G.G.*, 822 F.3d at 737. He outlined a number of scenarios, which need not be repeated here, where the Defendants' interpretation only causes more confusion for educational institutions. *Id.* A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased. *See Morton*, 415 U.S. at 237; *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (holding that an agency announcement of an interpretation preceded by a very lengthy period with no interpretation indicates agency considered prior practice lawful). Accordingly, the Court concludes Defendants' interpretation is insufficient to overcome the regulation's plain language and for the reasons stated above is contrary to law.

2. Threat of Irreparable Harm

The Court next addresses irreparable harm. Defendants allege that Plaintiffs have not identified any pending or imminent enforcement action, and the Guidelines "expose [P]laintiffs to no new liability or legal requirements." Defs.' Resp. 7, ECF No. 40 (citing *Google v. Hood*, 822 F.3d 212, 227 (5th Cir. 2016). Defendants argue that, "[a]lthough [P]laintiffs *do* identify a small number of specific 'policies and practices' that they claim are in conflict with [D]efendants' interpretation of Title IX, they have identified no enforcement action being

taken against them — now or in the future — as a result of these polices." Defs.' Resp. 8–9, ECF No. 40. They assert that even if DOE were "to decide to bring an administrative enforcement action against plaintiffs for noncompliance . . . at some point in the future, [P]laintiffs *still* would be unable to make a showing of irreparable harm because they would have an opportunity to challenge the interpretation in an administrative process prior to any loss of federal funds." *Id.* at 9 (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975)).

Plaintiffs counter that "Defendants' actions cause irreparable harm by forcing policy changes, imposing drastic financial consequences, and usurping [Plaintiffs'] legitimate authority." Mot. Injunction 21, ECF No. 11. According to Plaintiffs, Defendants' actions present "a Hobson's choice between violating federal rules (labeled as regulations, guidance, and interpretations) on the one hand, and transgressing longstanding policies and practices, on the other." *Id.* Thus, Plaintiffs characterize Defendants' administrative letters and notices as "mandates" which effectively carry the force of law. *Id.* Plaintiffs also allege that Defendants' rules are "irreconcilable with countless polices regarding restrooms, showers, and intimate facilities," while threatening to override the practices of "countless schools," which had previously been allowed to differentiate intimate facilities on the basis of biological sex consistent with Title IX, federal regulations, and laws protecting privacy and dignity. *Id.* (citing Mot. Injunction, Ex. P. (Thweatt Dec.) 5–7, ECF No. 11-2).

Defendants' appear to concede the Guidelines conflict with Plaintiffs' policies and practices, *see* Defs.' Resp. 8–9; ECF No. 40 ("[P]laintiffs do identify a small number

of specific 'policies and practices' . . . ."); however, they argue that additional threats of enforcement are required before irreparable harm exists. Case law does not support this contention. Instead the authorities hold, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (stating, whenever an enactment of a state's people is enjoined, the state suffers irreparable injury); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

As Defendants have conceded the conflict between the Guidelines and Plaintiffs' policies, and Plaintiffs have identified a number of statutes that conflict, the Court concludes Plaintiffs have sufficiently demonstrated a threat of irreparable harm.[20]

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[20] Defendants also contend the injunction should be denied because Plaintiffs delayed in seeking this relief. The DOJ/DOE Letter is dated May 13, 2016. This case was filed very soon after on May 25, 2016, and the parties reached an agreement on a briefing schedule to consider this request. The Court concludes Plaintiffs did not fail to act timely.

3. Balance of Hardships and Public Interest[21]

The Court next considers whether the threatened injury to the Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants and its impact on the public interest. *Nichols*, 532 F.3d at 372. Plaintiffs risk either running afoul of Defendants' Guidelines or complying and violating various state statutes and, in some cases, their state constitutions. Mot. Injunction 21, ECF No. 11. Plaintiffs also state that they likely risk legal action from parents, students, and other members of their respective communities should they actually comply with Defendants' Guidelines. Defendants argue these harms do not outweigh the damage that granting the injunction will cause because it will impede their ability to eliminate discrimination in the workplace and educational settings, prevent them from definitively explaining to the public the rights and obligations under these statutes, and it would have a deleterious effect on the transgendered.

The Court concludes Plaintiffs have established that the failure to grant an injunction will place them in the position of either maintaining their current policies in the face of the federal government's view that they are violating the law, or changing them to comply with the Guidelines and cede their authority over this issue. *See* DOJ/DOE Letter, ECF No. 6-10 ("This letter summarizes a school's Title IX obligations regarding transgender students and explains how [DOE and DOJ] evaluate a school's compliance with these obligations.").

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[21] The Parties address the third and fourth Canal factors together, therefore they are treated together in this Order as well.

Plaintiffs' harms in this regard outweigh those identified by Defendants, particularly since the Supreme Court stayed the Fourth Circuit's decision supporting Defendants' position, and a decision from the Supreme Court in the near future may obviate the issues in this lawsuit. As a result, Plaintiffs interests outweigh those identified by Defendants. Further, Defendants have not offered evidence that Plaintiffs are not accommodating students who request an alternative arrangement. Indeed, the school district at issue in *G.G.* provided its student an accommodation.

Accordingly, the Court finds that Plaintiffs have met their burden and these factors weigh in favor of granting the preliminary injunction.

C. Scope of the Injunction

Finally, the Court must determine the scope of the injunction. Plaintiffs seek to apply the injunction nationwide. Mot. Injunction 3, ECF No. 11; Pls.' Reply 13, ECF No. 52. Defendants counter that the injunction should be narrowly tailored to Plaintiffs in the Fifth Circuit. Defs.' Resp. 28, ECF No. 40.

"Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.* at 702 (permitting a nationwide injunction because the class action was proper and finding that a nationwide injunction was not more burdensome than necessary to redress plaintiffs' complaints).

The Court concludes this injunction should apply nationwide. As the separate facilities provision in § 106.33 is permissive, states that authorize schools to define sex to include gender identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by it. Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation. However, an injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of the state law. As such, the parties should file a pleading describing those cases so the Court can appropriately narrow the scope if appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' application for a preliminary injunction (ECF No. 11) should be and is hereby **GRANTED**. *See* Fed. R. Civ. P. 65. It is **FURTHER ORDERED** that bond is set in the amount of one hundred dollars.[22] *See* Fed. R. Civ. P. 65(c). Defendants are enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrim-

[22] Neither party addressed the appropriate bond amount should an injunction be entered.

ination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals. This preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).

SO ORDERED on this **21st day** of **August, 2016**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE