United States Court of Appeals
for the
Third Circuit

Case No. 17-3113

JOEL DOE, a minor, by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor, by and through his Parents JOHN JONES and JANE JONES; and MACY ROE,

Appellants,

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, [dismissed]; DR. E. WAYNE FOLEY, [dismissed]; and DAVID KREM [dismissed],

Appellees,

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

Appellee-Intervenor.

Appeal from an Order denying Appellants' Motion for Preliminary Injunction entered in the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR APPELLEES

Michael I. Levin, Esq.
David W. Brown, Esq.
LEVIN LEGAL GROUP, P.C.
1800 Byberry Road, Suite 1301
Huntingdon Valley, PA 19006
Phone: (215) 938-6378

Attorneys for Appellees

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I. JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction in this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a), as the Appellant-Plaintiffs alleged violations of their civil rights under the Fourteenth Amendment to the Constitution, 42 U.S.C. § 1983, and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), as the Appellants are appealing a decision of the district court denying the Appellants' motion for a preliminary injunction. Appellants timely filed their Notice of Appeal of the district court's August 25, 2017 Order on September 25, 2017. Appellants filed their corrected "Brief of Appellants" on November 14, 2017.[1] Accordingly, pursuant to Fed. R. App. P. 31(a)(1), the Appellees' brief was originally due on or before December 14, 2017. On November 28, 2017, Appellants filed an Unopposed Motion for Extension of Time for Filing of Appellee's Brief. On November 30, 2017, the Clerk's Office granted the motion, setting a new due date for the Brief for Appellees of January 16, 2018. Appellees timely filed this Brief for Appellees on January 16, 2018.

[1] Appellants originally filed the Brief of Appellants on November 10, 2017. The corrected brief was filed after the Clerk's Office notified the Appellants of a violation of Fed. R. App. P. 32(a)(7)(B).

II. STATEMENT OF ISSUES

1. Whether the court correctly determined that the Appellant-Plaintiffs failed to show a likelihood of success on the merits of their Section 1983 Constitutional privacy claim? ***Suggested answer: Yes.***

2. Whether the court correctly determined that the Appellant-Plaintiffs failed to show a likelihood of success on their Title IX claim? ***Suggested answer: Yes.***

3. Whether the court correctly determined that the Appellant-Plaintiffs failed to show a likelihood of success on their intrusion upon seclusion claim? ***Suggested answer: Yes.***

4. Whether the court committed clear error in finding that Appellant-Plaintiff students would not suffer irreparable injury in the absence of an injunction. ***Suggested answer: No.***

5. Whether the balancing of interests favors the Appellees. ***Suggested answer: Yes.***

6. Whether returning to the school district's former practice despite its potential harmful effects on transgender students is in the public interest. ***Suggested answer: No.***

III. STATEMENT OF THE CASE

Transgender individuals are those who gender identity – or sense of self – is incongruent with the gender associated with their assigned sex at birth as determined by external genitalia. There are an estimated 1.4 million American adults who identify as transgender. App'x 375-76 (July 17 Tr., pp. 143-44). In May 2016, the U.S. Departments of Education and Justice issued a "Dear

Colleague Letter" ("the 2016 Letter") stating that transgender students must be allowed to use the restrooms and locker rooms aligned with their gender identity. App'x 603, 784-85 (July 31 Tr., p. 109; Faidley Dep. Tr., pp. 24-25). Based on the 2016 Letter and communications with its solicitor, the Boyertown Area School District (the "School District") has, since the beginning of the 2016-2017 school year, permitted transgender students to use restrooms and locker rooms aligned with their gender identity upon request on a case-by-case basis. This practice and its implementation have not been reduced to writing. App'x 602-04, 784-85, 794, 2016 (July 31 Tr., pp. 108-10, 132-33; Faidley Dep. Tr., pp. 24-25, 34; Exh. P-49). By the end of the 2016-2017 school year, permission had been granted to two transgender males and one transgender female to use restrooms aligned with their gender identity. One transgender male also requested, and was given, permission to use the boys' locker room. App'x 1042-47 (Cooper Dep. Tr., p. 86-91). Also during the 2016-2017 school year, three other transgender male students requested permission to use different first names aligned with their gender identity, and to be addressed by male pronouns. However, none of these students requested to use restrooms and/or locker rooms aligned with their gender identity. App'x 1050-59 (Cooper Dep. Tr., p. 94-103).

Before a transgender student is granted permission to use the restrooms and/or locker room aligned with his or her gender identity, several conversations

occur between the student and his or her guidance counselor regarding the student's situation and intentions. Permission is not granted automatically. App'x 638, 642, 783 (July 31 Tr., p. 144, 148; Faidley Dep. Tr., p. 23). When a transgender student at Boyertown Area Senior High ("BASH") requests and is granted permission to use the restrooms and/or locker rooms aligned with their gender identity, they are no longer permitted to use the facilities of their assigned sex. App'x 606 (July 31 Tr., p. 112).

The practice of allowing transgender students to use the restrooms and locker rooms aligned with their gender identity has not resulted in any disruption to the educational program or activities of the district. BASH students have been very accepting of their transgender classmates. App'x 610 (July 31 Tr., p. 116).

In 2016, the School District reconstructed the showers in the locker rooms at the high school to remove group showers and replace them with individual shower stalls with curtains. App'x 1000 (Cooper Dep. Tr., p. 44). As part of ongoing renovations, BASH added several bathrooms for both students and staff – both multi-user and single user – for the 2017-2018 school year. The additions bring the number of single-user bathrooms available to students to eight. App'x 601-02, 612-16, 776-77, 2103-04 (July 31 Tr., pp. 107-08, 118-122; Faidley Dep Tr., pp. 16-17; Exhs. D-53, D-54). All of the multi-user restrooms at BASH have individual toilet stalls, each with a locking door for privacy. App'x 612-13 (July

31 Tr., pp. 118-19). Four of the single-user restrooms for students were to have lockers added for the 2017-2018 school year so that students changing in those restrooms can store their belongings without using their regular hall lockers. App'x 642-43 (July 31 Tr., pp. 148-49). Both the boys' and girls' locker rooms at BASH have individual bathroom stalls and shower stalls. App'x 1322-23, 1631-32, 619-20, 780, 1419, 1801 (Joel Doe Tr., p. 202-03; Jack Jones Dep. Tr., p. 34-35; July 31 Tr., pp. 125-26; Faidley Dep Tr., p. 19-20; Smith Dep. Tr., p. 48; Roe Dep. Tr., p. 40). BASH Principal Dr. Brett Cooper is not aware of any transgender student ever showering in either of the BASH locker rooms. App'x 619 (July 31 Tr., p. 125).

In addition to the gym locker rooms, there are "team" locker rooms near the gyms. These locker rooms have lockers, toilet stalls and showers. App'x 617-18 (July 31 Tr., pp. 123-24). The School District will permit any student who desires, because of privacy concerns, to use the team locker rooms. App'x 619, 635-36 (July 31 Tr., p. 125, 141-42). There is no need for a student using the team locker rooms to walk into or through the gym locker rooms. App'x 618 (July 31 Tr., p. 124).

No injunction is needed to protect the privacy concerns of the Appellant students as single-user bathrooms may be used by them, and alternative locker

rooms are available for them. App'x 643, 823-26 (July 31 Tr., p. 149; Faidley Dep. Tr., pp. 63-66).

Appellant Joel Doe[2] was in the 11th grade at BASH during the 2016-2017 school year. App'x 313-14 (July 17 Tr., pp. 81-82). Doe has never taken a shower at school, and has never seen anyone take a shower at the school. App'x 1193 (Joel Doe Tr., p. 73). On October 31, 2016, Doe witnessed "Student A," a transgender boy, changing in the boys' locker room at BASH. According to Doe, Student A was wearing shorts and a sports bra. App'x 317, 320 (July 17 Tr., p. 85, 88). Doe was partially undressed, *i.e.*, in his underpants and a shirt, and in the process of changing into his gym clothes when he noticed Student A. App'x 320 (July 17 Tr., p. 88). Before Doe ever had gym again, BASH Assistant Principal Dr. E. Wayne Foley met with Doe and offered him two alternative places to change for gym other than the boys' locker room – in the nurse's office bathroom or a single-user restroom near the gym. App'x 350-51, 353, 788-89 (July 17 Tr., pp. 118-19, 121; July 31 Tr., pp. 114-15).

Doe did not use the boys' locker room at BASH after October 31, 2016. App'x 344 (July 17 Tr., p. 112). He also chose not to change in the alternative private spaces that were available. App'x 342-43 (July 17 Tr., pp. 110-11).

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[2] The District Court granted a motion for each of the four Appellant students to proceed pseudonymously.

Despite not changing for gym class, Joel Doe was permitted to participate in gym classes. *Id.* Doe agreed that when using a single-user bathroom, his privacy was protected. App'x 353-54 (July 17 Tr., p. 121-22).

Doe has not experienced anxiety, embarrassment or stress requiring medical care. App'x 1317 (Joel Doe Tr., p. 197). Doe is not aware of any threat, disturbance or disruption caused by transgender students using restrooms or locker rooms aligned with their gender identity. App'x 1243, 1325 (Joel Doe Tr., p. 123, 205). Doe could not identify any action by any of the Defendants that shamed or intimidated him. App'x 1316 (Joel Doe Tr., p. 196). Doe testified that the School District can decide who qualifies as a boy. App'x 1348, 1367-69 (Joel Doe Tr., p. 228, 247-49).

Appellant Mary Smith was in the 11th grade at BASH during the 2016-2017 school year. App'x 263-64 (July 17 Tr., pp. 31-32). Smith testified that in March 2017 she walked into a girls' bathroom at BASH and saw "Student B," a transgender female student, washing her hands. Smith then immediately ran out of the bathroom. App'x 275-76, 279-80, 2021 (July 17 Tr., pp. 43-44, 47-48, Exh. P-62. Both Smith and Student B were fully dressed at the time. App'x 296-97 (July 17 Tr., pp. 64-65). After the incident, Smith still used girls' restrooms at BASH approximately three to four times per week. App'x 282-83 (July 17 Tr., pp. 50-51). Smith never saw any other transgender female in the girls' restrooms. App'x

1401-02 (Smith Dep. Tr., p. 30-31). Smith has no knowledge of ever seeing a transgender female in the girls' locker room. App'x 297 (July 17 Tr., 65). On March 24, 2017, Smith met with Foley and learned that transgender students were permitted to use the restrooms and locker rooms aligned with their gender identity. App'x 280-81 (July 17 Tr., pp. 48-49). When asked how to define sex for deciding who can use which restrooms, Smith testified, "[T]hat is up to the school to decide. . . . I don't know what the school needs to do. That is up to them." App'x 306 (July 17 Tr., p. 74). Smith is aware that there are single-user bathrooms for student use at BASH, and that she can utilize those restrooms. App'x 303 (July 17 Tr., p. 71).

Smith has not seen any doctor, psychologist, psychiatrist, therapist, or her school counselor since encountering Student B in the bathroom in March 2017. App'x 1444-45 (Smith Dep. Tr., p. 73-74). Smith testified that she has never received treatment from a health-care professional for any embarrassment or humiliation she may have suffered. App'x 1476 (Smith Dep. Tr., p. 105). Smith is not aware of any threats, disturbance, or disruption caused by the School District's practice of allowing transgender students to use restrooms and locker rooms aligned with their gender identity. App'x 1459 (Smith Dep. Tr., p. 88).

Appellant Jack Jones was in the 11th grade at BASH during the 2016-2017 school year. App'x 1611 (Jack Jones Dep. Tr., p. 14). During the first week of

November 2016, while changing in the BASH boys' locker room after gym class, a classmate alerted Jones to the presence of the transgender male standing next to him. App'x 1613, 1618 (Jack Jones Dep. Tr., p. 16, 21). Jones was wearing a shirt and underpants when he was alerted to the transgender student's presence. He then grabbed his belongings and moved toward a group of boys to be out of the transgender student's view. App'x 1620, 1625 (Jack Jones Dep. Tr., p. 23, 38). Jones never saw the transgender student in the locker room again. App'x 1615 (Jack Jones Dep. Tr., p. 18). Jones continued to change in the boys' locker room throughout the year after seeing the transgender male in the locker room. App'x 1629 (Jack Jones Dep. Tr., p. 32). Jones testified that he did not see the transgender student's breasts or genitalia to try to determine whether he was assigned female at birth. App'x 1636 (Jack Jones Dep. Tr., p. 39). Jones felt uncomfortable in the locker room after the November 2016 incident, but his comfort level did not rise enough for him to seek help from any counselor, doctor, psychologist or psychiatrist since November. App'x 1638-39 (Jack Jones Dep. Tr., p. 41-42). Jones never asked anyone at the School District whether he could change for gym elsewhere. But even if he could change elsewhere, he feels this would not solve the issue. App'x 1657-58 (Jack Jones Dep. Tr., p. 60-61). Jones never discussed any issue regarding transgender students with Faidley, Cooper or Foley. App'x 1659-60 (Jack Jones Dep. Tr., p. 62-63). Jones is not aware of any

threat, disturbance, or disruption of school activities caused by transgender students' use of the bathrooms or locker rooms aligned with their gender identity, other than his seeing a transgender male in the boys' locker room. App'x 1693 (Jack Jones Dep. Tr., p. 96). Jones testified that his alleged irreparable harm in this case was having to "be the guy who has to go and say that there was a girl in the locker room." App'x 1722 (Jack Jones Dep. Tr., p. 125).

Appellant Macy Roe was in 12th grade at BASH during the 2016-2017 school year, and graduated in June 2017. App'x 1771 (Roe Dep. Tr., p. 10). Roe does not know if she ever saw a transgender student in a girls' bathroom or locker room. App'x 1781, 1800, 1810 (Roe Dep. Tr., p. 20, 39, 49). Roe never discussed any issue regarding transgender students with Faidley, Cooper, Foley, administrators or teachers. App'x 1813-15, 1822 (Roe Dep. Tr., p. 52-54, 61). Roe did not receive any medical attention, therapy, or counseling because of the School District allowing transgender students to use the facilities aligned with their gender identity. App'x 1821 (Roe Dep. Tr., p. 60).

Intervenor's witness Aidan DeStefano was a senior at BASH during the 2016-2017 school year and graduated at the end of the school year. App'x 443-44 (July 17 Tr., pp. 211-12). DeStefano is a transgender male, and despite being assigned as female at birth, has always identified as a male. App'x 445 (July 17 Tr., p. 213). On his first day at BASH in 10th grade, DeStefano used a girls'

bathroom and was "yelled at by literally everyone that was in there." App'x 448 (July 17 Tr., p. 216). For the rest of his time at BASH, DeStefano used either a single-user bathroom in the nurse's office or boys' bathrooms. App'x 449, 470 (July 17 Tr., p. 217, 238). DeStefano has used men's restrooms in public places for several years, including in the courthouse on the day that he testified.[3] App'x 467 (July 17 Tr., p. 235). As a senior, DeStefano changed clothes for gym class in the boys' locker room. DeStefano did not experience any problems using the boys' locker room. He testified, "So literally everyone was okay with it." App'x 452 (July 17 Tr., p. 220).

Expert witness Dr. Scott Leibowitz has specialized training and expertise in the diagnosis and treatment of children and adolescents with gender dysphoria and related psychiatric conditions. App'x 365-66 (July 17 Tr., p. 133-34). Dr. Leibowitz is medical director for the behavioral health component for the THRIVE

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[3] DeStefano testified in the evidentiary hearing as follows:
Q: In public places, do you go to the boys' room or the girl's room, men's room or women's room?
A: Men's room.
Q: Cause any problem or ruckus when you go into the men's room?
A: Never. Ever since – like if I would go into the female bathroom with my mom, she would get questioned herself. I would get questioned. But if I go with my dad, nothing. Never. To this day, nothing.
Q: Did you use the men's room here in the courthouse?
A: I did. Three times.
Q: Security guards didn't stop you, did they?
A: Nope.

gender and sex development program at Nationwide Children's Hospital in Columbus, Ohio. He is also an associate clinical professor at the Ohio State University College of Medicine. App'x 366, 368, 2116 (July 17 Tr., p. 134, 136; Exh. I-6). Gender dysphoria is the clinical diagnostic classification used when an individual has clinically significant distress that results from a lack of alignment between an individual's gender identity and their assigned sex at birth that characterizes a transgender identity or experience. App'x 376-77, 591 (July 17 Tr., pp. 144-45; July 31 Tr., p. 97).

Clinical interventions for appropriately assessed children and adolescents with gender dysphoria include social role transition and potentially physical interventions in older and more mature youth, such as puberty blockers, hormone therapy, and sometimes surgery. App'x 384-85 (July 17 Tr., pp. 152-53). Social role transition refers to steps that one takes to present themselves as the gender with which they most identify. It typically includes the adoption of a different name, use of a different pronoun set, wearing clothes and hairstyles typically associated with their gender identity, and using sex-segregated spaces that correspond with their gender identity. App'x 385-86 (July 17 Tr., pp. 153-54). Social gender transition can help to alleviate gender dysphoria and is a useful and important tool use by clinicians to ascertain whether, and the extent to which,

living in the affirmed gender improves the psychological and emotional functioning of the individual. App'x 387, 394-95 (July 17 Tr., p. 155, 162-63).

The risk of not treating gender dysphoria has significant ramifications, including potentially exacerbating psychiatric illness, and leading to self-injury, suicidal ideation, and suicidal behavior. App'x 390, 567, 571-72 (July 17 Tr., p. 158; July 31 Tr., p. 73, 77-78). Prohibiting a transgender youth from using restrooms aligned with their gender identity can undermine the benefits of their social gender transition by sending the message that they are not really the person they identify as being. Data suggests that such youths have much higher rates of truancy and cutting class. App'x 396-97 (July 17 Tr., pp. 164-65). The major professional medical organizations have come out against policies that bar transgender people from accessing restrooms and other sex-segregated facilities that correspond to their gender identity. Such policies are harmful to the healthy psychological and emotional functioning of transgender youth, and these negative consequences can have ramifications through adulthood. App'x 397 (July 17 Tr., p. 165).

IV. SUMMARY OF THE ARGUMENT

Appellants challenge the decision of the District Court denying their motion for a preliminary injunction. In seeking a preliminary injunction, Appellants were required to show: (1) a likelihood of success on the merits; (2) that they would

suffer irreparable harm if the injunction were denied; (3) that granting preliminary relief would not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. The District found that the Appellants failed to meet either of the first two prongs of this test, obviating the need to analyze the other prongs. Appellants now allege that the District Court erred in its findings.

As will be shown, the District Court properly analyzed each of the Appellants' claims and correctly found in favor of Appellees. The District Court properly found that the Appellants failed to show a likelihood of success on the merits of any of their three claims: 1) violation of the Fourteenth Amendment, 2) violation of Title IX, and 3) a tort claim for intrusion upon seclusion. The District Court also fully analyzed the Appellants' claim of irreparable harm and found that the Appellants failed to provide any evidence of such harm. And even if Appellants were able to show an erroneous ruling by the District Court on any of these points, the Appellants would have to show that both a balancing of hardships and public interest favor the granting of a preliminary injunction, and they have failed to do so.

Moreover, on the facts of this case, and based on a consideration of all of the current law respecting the rights of transgender students to use the bathrooms and locker rooms that are consistent with their gender identities, the law currently favors the Appellees' position in this case. *See, e.g.*, *Evancho v. Pine-Richland*

Sch. Dist., 237 F. Supp. 3d 267, 294-95 (W.D. Pa. 2017) (granting injunction based on Plaintiff transgender students' likelihood of success)[4]; *Whitaker v. Kenosha Unified School Dist. No. 1 Board of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (holding that the statutory text of Title IX, as interpreted by the Supreme Court, protects transgender students from discrimination.); *see also Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 879 (S.D. Ohio 2016) (granting transgender student's motion for preliminary injunction and denying Plaintiff's motion), , *aff'd by Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220-22 (6th Cir. 2016).

V. ARGUMENT

A. Standard of Review on Appeal

A party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to

[4] The Pine-Richland School District has since settled the case, extending nondiscrimination protections to transgender students and allowing transgender student to use the restrooms aligned with their gender identities. *See* Balingat, Moriah, "Pennsylvania School District Settles With Transgender Teens Who Alleged Discrimination Over Bathroom Policy," WASH. POST (Aug. 9, 2017), *available at* https://www.washingtonpost.com/news/education/wp/2017/08/09/pennsylvania-school-district-settles-with-transgender-teens-who-alleged-discrimination-over-bathroom-policy/?utm_term=.fadd6c8bfe3a.

the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). A plaintiff seeking an injunction must meet all four criteria, as "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). Preliminary injunctive relief is "an extraordinary remedy" and "should be granted only in limited circumstances." *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390 (1981).

Courts of Appeal employ a tripartite standard of review for preliminary injunctions. The court reviews the District Court's findings of fact for clear error. A finding of fact is clearly erroneous only if it is "completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data." *Havens v. Mobex Network Servs., LLC*, 820 F.3d 80, 92 (3d Cir. 2016) (internal quotation marks omitted). Legal conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion. *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). An abuse of discretion occurs only if the decision reviewed rests upon a clearly erroneous finding of fact,

an errant conclusion of law, or an improper application of law to fact. *Mancini v. Northampton Cty.*, 836 F.3d 308, 314 (3d Cir. 2016).

The scope of review of a preliminary injunction is narrow, however, "because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing [that] is the responsibility of the district judge." *Am. Tel. & Tel. Co.*, 42 F.3d at 1426-27 (alteration in original) (citation and quotation marks omitted). Unless an abuse of discretion is "clearly established, or an obvious error has ocurred [sic] in the application of the law, or a serious and important mistake has been made in the consideration of the proof, the judgment of the trial court must be taken as presumptively correct." *Premier Dental Products Co. v. Darby Dental Supply Co., Inc.*, 794 F.2d 850, 852 (3d Cir. 1986), *quoting Stokes v. Williams*, 226 F. 148, 156 (3d Cir. 1915).

B. District Court Correctly Ruled That Appellants Were Unlikely to Succeed on The Merits of Their Section 1983 Privacy Claim

Appellants claim that the District Court failed to recognize the contours of the right to privacy, failed to recognize that the School District's practice allowing transgender students to use restrooms and locker rooms aligned with their gender identity violated the right to privacy, erred in concluding that the School District's practice advances a compelling interest, and erred in finding that the School

District's practice was narrowly tailored to that interest. However, as will be shown, the Appellants are in error.

1. The contours of the right of privacy are not broad enough to encompass the Appellants' novel claim

Plaintiffs rely on *Doe v. Luzerne County*, 660 F.3d 169 (3d Cir. 2011) for the proposition that a person has "a protected privacy interest in his or her partially clothed body." Appellants Brf., p. 13 (*quoting Doe* at 175-76). However, the District Court effectively analyzed *Doe* in great detail in denying the preliminary injunction. App'x 96-112 (Decision, pp. 91-107). Judge Smith began the analysis with an extended footnote recognizing that the facts in *Doe* were "not remotely analogous to the facts in this case." App'x 96 (Decision, p. 91). He then noted that the *Doe* court had pointed out that "privacy claims under the Fourteenth Amendment necessarily require fact-intensive and context-specific analyses, and unfortunately, bright lines generally cannot be drawn." App'x 98 (Decision, p. 93 (*quoting Doe* at 176)).

Judge Smith next pointed out that even if the right to privacy in one's partially clothed body exists as the Appellants claim, they still failed to provide any evidence that the right had been violated in this instance. App'x 99 (Decision, p. 94). Appellants Joel Doe and Jack Jones testified that they were each in their underwear when they noticed a transgender male, Student A, in the boys' locker

room, but neither testified that Student A ever noticed them, much less that Student A saw them in their underwear. App'x 320, 1620, 1625 (July 17 Tr., p. 88; Jack Jones Dep. Tr., pp. 23, 38). Meanwhile, Appellant Mary Smith testified that she was fully clothed when she saw a transgender female, Student B, in a girls' bathroom, and Appellant Mary Roe never witnessed a transgender female in either the girls' restrooms or girls' locker room. App'x 99 (Decision, p. 94).

Meanwhile, even if the students run the risk of being seen in a state of undress in a locker room, the court held that it is important to the analysis that cisgender students are not compelled to share facilities with transgender students because alternate facilities are available.

a. Appellants' understanding of bodily privacy is not a fundamental right

Appellants argue that students' bodily privacy in locker rooms, showers and restrooms is a fundamental right "deeply rooted in this Nation's history and tradition." Appellants' Brf., p. 17 (*quoting Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Yet the Plaintiffs' understanding of bodily privacy is not limited to not being seen in a state of undress, but also includes not having to be in the same restroom or locker room with someone who is transgender, regardless of whether either person is in a state of undress. And going even further, the Appellants believe their right to privacy precludes transgender students from

entering the restrooms and locker rooms aligned with their gender identity even if students are offered alternative changing/restroom areas that provide complete privacy from transgender students.

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

opinion)); *see also Armbruster v. Cavanaugh*, 410 Fed. App'x 564, 567 (3d Cir. 2011). The Appellants' claims do not fit into any of these categories, nor do they rise to the level of being fundamental for constitutional analysis. Accordingly, there is no reason to believe that they would ultimately be successful on their Fourteenth Amendment claim.

As Judge Smith stated in the Decision, "The Plaintiffs have not identified and this court has not located any court that has recognized a constitutional right of privacy as broadly defined by the plaintiffs." App'x 100 (Decision, p. 95). Judge Smith went on to acknowledge that the only court to address a similar constitutional claim was the U.S. District Court for the Northern District of Illinois in *Students and Parents for Privacy v. U.S. Dep't of Education*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016). In that case, plaintiffs sought a preliminary injunction to enjoin a school district policy permitting transgender students to use locker rooms and restrooms aligned with their gender identity – just as in this case. The plaintiffs in *Students* made a similar argument that their constitutional rights to "privacy in one's fully or partially unclothed body." *Id.* at 22. In any action under § 1983, the first step is to identify the exact contours of the underlying right allegedly violated. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Accordingly, the magistrate judge in *Students* issued a report and

recommendation holding that the plaintiff students did not have a constitutional right not to share restrooms or locker rooms with transgender students.[5]

Judge Smith correctly noted that the Appellants here are not seeking bodily privacy from the opposite sex as they claim,[6] as the School District's practice does not permit cisgender students to enter the locker rooms and restrooms of the opposite sex. App'x 105 (Decision, p. 100). Instead, as in *Students*, cisgender girls are seeking to avoid contact with transgender girls, and cisgender boys are

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[5] Since Judge Smith issued his decision, the report and recommendation of the magistrate in *Students* has been adopted. *Students and Parents for Privacy v. U.S. Dep't of Education*, No. 16-cv-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

[6] Appellants challenge Judge Smith's decision by claiming that "[t]he court conflated two incompatible theories of sex, treating the subjective perception of gender as controlling and treating male or female as determined by humans being a sexually reproducing species, as irrelevant." Appellants' Brf., p. 21. However, Judge Smith's decision does not hold that gender identity equates to biological sex. Instead he simply states that cisgender boys do not have a constitutional right not to share privacy facilities with transgender boys when the transgender students live their lives aligned with their gender identity and when the cisgender boys have the alternative to use other facilities if they so choose. Appellants further argue that some courts have ruled against transgender employees in Title VII cases. However, they fail to mention that several district courts have found that a transgender plaintiff can state a claim under Title VII for sex discrimination based on a sex-stereotyping theory. *See Valentine Ge v. Dun & Bradstreet, Inc.*, No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 527 (D. Conn. 2016); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594, 603 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, Inc., 542 F.Supp.2d 653, 660 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F.Supp.2d 293, 305 (D.D.C. 2008).

seeking to avoid contact with transgender boys, and "there is no evidence that any of the students that have requested and received permission from the School District have done anything other than live in a manner consistent with their gender identity."[7] App'x 106 (Decision, p. 101). Accordingly, Judge Smith correctly agreed with the court in *Students* that the Appellants do not have a constitutional right not to share locker rooms and restrooms with transgender students.

b. Lack of compulsion is a key element in the analysis

Appellants allege that the district court erred because in offering students the use of alternate privacy facilities, the School District is forcing the students to forego a constitutional right. Appellants' Brf., p. 24. Allegedly at issue is the "right to use the facilities that are, by state law, designated exclusively for one sex." *Id.* However, this argument is inapposite as the Appellants have no constitutional right to one set of locker rooms or restrooms over another provided by the School District.

Plaintiffs cite as one of the sources of this alleged right 34 C.F.R. § 106.33, which states, "A recipient [of federal education funds] ***may*** provide separate toilet,

[7] Judge Smith noted the testimony of Dr. Cooper, who stated that the transgender students who have received permission to use the privacy facilities of the opposite sex have all adopted names common to the opposite sex and have dressed and lived their lives in conformance with their gender identity rather than their sex at birth. App'x 106 (Decision, p. 101).

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." (emphasis added). Clearly the regulation does not require separate facilities for the sexes, but rather states only that when separate facilities are provided, they must be comparable. In this case, the School District offers comparable restroom and locker room facilities for the sexes. Similarly, the School District offers comparable alternate facilities for any students – of either sex – that prefer not to share facilities with other students (because they are uncomfortable with transgender students or any other reason).

Plaintiffs also claim that their right to use sex-segregated privacy facilities has a basis in state law. The Pennsylvania Public School Code of 1949 states:

> The board of school directors in every district shall, with every building used for school purposes, provide and maintain in a proper manner, a suitable number of water-closets or out-houses, not less than two for each building, where both sexes are in attendance. Such water-closets or out-houses shall be suitably constructed for, and used separately by, the sexes. When any water-closets or out-houses are outside and detached from the school building, the entrances thereto shall be properly screened, and they shall, unless constructed at a remote distance from each other, have separate means of access thereto, and, if possible, for not less than twenty-five (25) feet from such water-closets or out-houses, such means of access or walks leading thereto shall be separated by a closed partition, wall, or fence, not less than seven (7) feet high."

24 P.S. § 7-740. This statute does not include any provision giving students a right to use one "water-closet" or "out-house" over another provided for the same sex,

and there is no consideration nor mention of locker rooms.[8] The hallmark of both the federal regulation and the state statute is simply equality of facilities between the sexes. In that sense, the School District is providing the same primary facilities and alternate facilities for both males and female – including transgender males and females – at BASH. And importantly, neither the federal regulation nor the state statute provides guidance on which facilities transgender students should use.

In an effort to emphasize the privacy interest in separate restrooms for the sexes, Appellants cite *Koeppel v. Speirs*, 779 N.W.2d 494 (Iowa Ct. App. 2010) and *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992) for the proposition that a right to privacy exists in entire bathrooms, not just commode stalls. Appellants' Brf., p. 16. Yet both cases are inapposite, as they both involved direct observation of plaintiffs of which the plaintiffs were either unaware or unable to avoid without consequences.[9] In *Koeppel*, a male employer set up a

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[8] While the statute does provide for use of facilities to be "used separately by the sexes," it seems clear that the Pennsylvania Legislature in 1949 was not thinking ahead to which out-houses might eventually be used by transgender students.

[9] The *Koeppel* court stated, "The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that Cathy's activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a reasonable expectation of privacy." *Koeppel*, 779 N.W.2d 494 at *3.

hidden camera in a women's restroom, supposedly because he believed an employee was using drugs. In *Borse*, an employee refused her employer's demand that she submit to a urinalysis screening at work, which would involve a representative witnessing the testing to avoid possible cheating. In contrast, there is no allegation here that the Appellants were being secretly observed or that they would be forced to have their privacy violated in the future. Similarly, Appellants cite *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W.Va. 1988) for the proposition that teenagers are "embarrassed when a member of the opposite sex intrudes upon them in the lavatory." Appellants' Brf., p. 18. Yet *St. John's* is also inapposite, as it addressed a question of a forced violation of privacy as the case addressed whether females should be allowed to serve as cottage masters at an institution for "disturbed, male teenagers."

Plaintiffs in this case are not required by a state actor – in this case the School District – to use restrooms or locker rooms with any transgender student. The School District allows transgender students to use restrooms consistent with their gender identity; however, no cisgender student is compelled to use a restroom with a transgender student if he or she does not want to do so. BASH has eight single-user restrooms that can be used by students. App'x 601-02, 612-16, 776-77, 2103-04 (July 31 Tr., pp. 107-08, 118-122; Faidley Dep Tr., pp. 16-17; Exhs. D-53, D-54). Similarly, the School District does not require any cisgender student to

use a locker room with a transgender student if he or she does not want to do so. If the privacy stalls that the School District provides in restrooms and locker rooms are not sufficient for the comfort of any student – whether cisgender or transgender – he or she can use the single-user restrooms as an alternative facility to satisfy his or her privacy needs. Dr. Cooper testified that the School District would be willing to make team rooms at BASH accessible to students seeking an alternate place to change for gym. App'x 616-17 (July 31 Tr., pp. 122-23). The absence of any compulsion distinguishes this case from those cited by the Appellants that involve involuntary invasions of someone's privacy.

As Judge Smith noted, this is not a case of compelled government intrusion. The penumbral rights of privacy the Supreme Court has recognized in other contexts protect certain aspects of a person's private space and decision-making from governmental intrusion. Even in the context of the right to privacy in one's own body, cases deal with compelled intrusion into, or with respect to, a person's intimate space or exposed body. No case recognizes a right to privacy such as the one Appellants assert here that insulates a person from ever coming into any contact at all with someone who is different than they are, especially when there are alternative means to do so – in this case, private bathroom stalls or single-user bathrooms.

c. Rights must be balanced with School District's needs

In assessing the nature and scope of Plaintiffs' constitutional rights, and whether those rights have been infringed, the Court also must consider the need to preserve the discretion of schools to craft individualized approaches to difficult issues that are appropriate for their respective communities. The public education system "has evolved" to rely "necessarily upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). Therefore, our nation's deeply rooted history and tradition of protecting school administrators' discretion require that this Court not unduly constrain schools from "fulfilling their role as 'a principal instrument . . . in preparing him for later professional training, and in helping him to adjust normally to his environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (*quoting Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

Constitutional privacy rights, whether rooted in the Fourth Amendment or the Fourteenth Amendment, "are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). "[I]t is well

established that public school students enjoy a reduced expectation of privacy in comparison to the public at large." *Dominic J. v. Wyoming Valley W. High Sch.*, 362 F. Supp. 2d 560, 570 (M.D. Pa. 2005). Of relevance to this case, public school locker rooms in this country traditionally have been and remain "not notable for the privacy they afford." *Vernonia*, 515 U.S. at 657. Given these precedents, the School District's decision to allow transgender students to use restrooms and locker rooms aligned with their gender identity should be given great deference.

2. School District's practice was narrowly tailored to advance a compelling government interest

Appellants next allege that the District Court erroneously concluded that the School District's practice regarding transgender students advances a compelling government interest. Appellants' Brf., p. 27. Appellants claim that the government interest of avoiding discrimination against transgender students should not trump Appellants' right to privacy. As discussed above, there is no burden on Plaintiffs' constitutional right to bodily privacy, so there is no need for the District to demonstrate a compelling interest in its practice concerning single-sex facilities. However, even if the School District were required to show a compelling interest, the School District does have a compelling interest in not discriminating against transgender students.

The validity of state action infringing on the exercise of fundamental rights is subject to strict scrutiny by the courts. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Under strict scrutiny review, state action that impinges on fundamental rights will be sustained only if they are suitably tailored to serve a compelling state interest. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Yet as discussed above, there is no fundamental right at issue in this case.

In challenging the School District's compelling interest in protecting transgender students, Appellants cite a handful of employment cases recognizing the "customer preference" defense to claims of gender discrimination, focusing primarily on *Livingwell, Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287 (Pa. Commw. 1992). In *Livingwell*, the Commonwealth Court held:

> To establish a "customer gender privacy" defense in an employment situation, the federal courts have developed a three-prong test that a charged party must satisfy. A business must establish a factual basis for believing that not excluding members of one sex would undermine its business operation; that its customers' privacy interests are entitled to protection under the law; and that no reasonable alternative exists to protect the customers' privacy interests.

Id. at 1290. This case is inapposite because it is not a constitutional privacy case. But even if it were relevant, as noted by Judge Smith, the School District narrowly tailored its practice in order to protect the rights of both transgender students and the Appellants by, *inter alia*, providing alternate single-user facilities for

uncomfortable students and by requiring transgender students seeking to use the facilities aligned with their gender identity to first consult with their counselors and to seek administrative permission. App'x 112 (Decision, p. 107).

Appellants counter that the School District's practice could be more narrowly tailored by requiring transgender students to use single-user restrooms. Appellants' Brf., p. 32. However, forcing transgender students to use single-user restrooms would not prevent discrimination as it would effectively segregate transgender students from other students. Requiring transgender students to use separate facilities because they are deemed unacceptable to be among their peers is quite a different thing than giving students – including Appellants – the choice to use separate facilities if they want greater privacy than what is afforded in the common facilities. Indeed, Dr. Leibowitz testified at the evidentiary hearing that transgender students prevented from using facilities aligned with their gender identity have "much higher rates of not going to school, leaving school, cutting class, leaving the school to find a bathroom that . . . they feel comfortable using where nobody knows them." App'x 396 (July 17 Transcript, p. 164). Therefore, the District Court was correct in ruling that the School District's policy is narrowly tailored to advance a compelling government interest, and that the Appellants are unable to show a likelihood of success on the merits of their constitutional claim.

C. District Court Correctly Ruled That Appellants Were Unlikely to Succeed on The Merits of Their Title IX Claim

Title IX proscribes discrimination based on sex in the provision of educational programs funded by or with the assistance of the federal government. 20 U.S.C. § 1681 (a). To establish a prima facie case of discrimination under Title IX, a plaintiff must allege (1) that he or she was subjected to discrimination in an educational program, (2) that the program receives federal assistance, and (3) that the discrimination was on the basis of sex. *See Bougher v. Univ. of Pittsburgh*, 713 F. Supp. 139, 143-44 (W.D. Pa. 1989) *aff'd*, 882 F.2d 74 (3d Cir. 1989). Neither Title IX nor the implementing regulations define the term "sex," nor do they mandate how to determine who is male and who is female when a school provides sex-segregated facilities. And some of the Appellants in this case admit that they do not know how the District should do so. App'x 306, 1661, 1835-36 (July 17 Tr., p. 74; Jack Jones Dep. Tr., p. 64; Roe Dep. Tr. 74-75).

Appellants claim that the District Court erred by "treating gender identity and sex as interchangeable in the privacy facility context." Appellants' Brf., p. 34. However, this is not true. Judge Smith's decision specifically addresses how the Appellants failed to allege discrimination on the basis of sex.

> As noted by the defendants and PYC, the School District treats all students at school similarly. Under the current practice, the plaintiffs (and the other students at BASH) are not targeted on the basis of their sex because the School District treats both male and female students

> similarly. The practice applies to both the boys' and girls' locker rooms and bathrooms, meaning that cisgender boys potentially may use the boys' locker room and bathrooms with transgender boys and cisgender girls potentially may use the girls' locker room and bathrooms with transgender girls. In addition, with regard to the transgender students, both transgender boys and transgender girls are treated similarly …. The School District's similar treatment of all students is fatal to the plaintiffs' Title IX claim.

App'x 119 (Decision, p. 114). Indeed, neither the male Appellants nor the female Appellants are being targeted or singled out by the School District because of their sex, nor are the School District's male and female students being treated any differently. The School District's decision to allow students to use facilities based on their gender identity applies to both the boys' and girls' restrooms, as well as the boys' and girls' locker rooms. Therefore, the alleged discrimination and hostile environment that the Appellants claim to experience is not because of their sex, and any discomfort Appellants allege they feel is not the result of conduct that is directed at them because of their sex.

1. Appellants' Claim Regarding Congressional Intent for Separate Restrooms is a Red Herring

Appellants attempt to cloud the Title IX issue by alleging that "Congress intended to preserve distinct privacy facilities on the basis of sex, not gender identity." Appellants' Brf., p. 35. However, Title IX does not say schools cannot allow males and females to use the same restrooms or locker rooms under any circumstances. "Title IX is a broadly written general prohibition on [sex]

discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). One of those exceptions says that a school "***may*** provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33 (emphasis added). Nowhere does Title IX or its regulations say that schools must provide single-sex facilities. Furthermore, Title IX is written permissively with respect to single-sex facilities. Title IX does not require schools to provide separate facilities; it simply allows schools to do so if they provide comparable facilities for males and females, which the School District has done.

2. Court Ruled Properly That Appellants Failed to Establish Elements of a Hostile Environment Claim

To establish a hostile environment under Title IX, "a plaintiff must establish sexual harassment . . . that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis, Next Friend LaShona D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651-52 (1999); *Dejohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008). Plaintiff Joel Doe alleges to having seen a transgender male student in the boys' locker room wearing a sports bra on one occasion. Plaintiff Jack Jones

alleges to have seen a transgender male student in a locker room one time while he was changing clothes for gym. Plaintiff Mary Smith alleges to have seen a transgender female student in a girls' restroom one time while both were fully clothed. Plaintiff Macy Roe does not allege to have ever seen a transgender student in either the girls' restrooms or girls' locker room. As the District Court correctly noted, the mere presence of transgender boys in the boys' facilities and transgender girls in the girls' facilities does not constitutes sexual harassment. App'x 122 (Decision, p. 117).

Appellants claim they suffered anxiety, humiliation, embarrassment and distress and stress over the possibility of seeing or being seen by a transgender student in a restroom or locker room. App'x 166, 170, 173, 175 (Am. Compl., ¶ 63, 93, 115, 126). Yet none of the Appellants alleged that they ever witnessed a transgender student in a state of complete undress, nor that they were observed completely undressed. Furthermore, it has not been alleged that any transgender student attempted to either expose himself or herself to other students, or viewed other students in a state of undress. Most importantly, Appellants have the option of fully private facilities, which they acknowledge protect their privacy. App'x 353-54 (July 17 Tr., pp. 121-22).

Generalized statements of fear and humiliation are not enough to establish severe, pervasive or objectively offensive conduct. General allegations have been

held to be insufficient to establish a Title IX violation. *See, e.g., Trentadue v. Redmon*, 619 F.3d 648, 654 (7th Cir. 2010) (finding undeveloped allegations of student-on-student harassment cannot establish a Title IX claim). The District Court properly held that the mere presence of transgender students in restrooms or locker rooms is not severe, pervasive, or objectively offensive conduct, especially when the School District allows students who are uncomfortable to use other facilities. App'x 123 (Decision, p. 118). Nor does the mere presence of a transgender student in a restroom or locker room does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile, in other cases.[10]

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[10] *See, e.g.*, *Davis*, 526 U.S. at 653 (holding that over a period of five months, a fifth-grade male student harassed the plaintiff, a fifth-grade female student, by engaging in sexually suggestive behavior, including attempting to touch the plaintiff's breasts and genital area, rubbing against the plaintiff and making vulgar statements); *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 259-60 (6th Cir. 2000) (finding that a female student was repeatedly propositioned, groped and threatened and was also stabbed in the hand; during one incident, two boys held her hands while other male students grabbed her hair and started yanking off her shirt); *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243-44 (10th Cir. 1999) (finding that a disabled female student was sexually assaulted by a male student on multiple occasions); *Seiwert v. Spencer-Owen Community School Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (holding that the alleged harassment suffered by a male eighth-grade student, which included being called "faggot," being kicked by several boys during a dodge ball game, and receiving death threats, if proven, amounted to severe and pervasive conduct that was objectively offensive); *Bruning ex rel. v. Carrol County Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (finding repeated acts of touching and sexual groping were objectively offensive); *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001

In their brief, Appellants cite several cases for the proposition that the presence of a person of the opposite sex in a restroom or locker room violates Title IX. Appellants' Brf., pp. 40-44. However, each of these cases was distinguished in the District Court's decision. Effectively each case involved some harassing activity in addition to the mere presence of a person of the opposite sex. App'x 123-128 (Decision, pp. 118-123). That is not the case here. Moreover, as the court noted after making extensive findings of fact about what it means to be transgender App'x 70-73 (Decision, pp. 65-68), this case does not "merely involve members of the opposite sex." App'x 105 (Decision, pp. 100). Furthermore, any risk of unwanted exposure in this case, however, is eliminated by the privacy protections that the School District provides in the restrooms and locker rooms – in the form of individual stalls with doors (or curtains in the case of showers) – and by the alternative facilities it provides for students who do not want to use the common facilities.

Because the Appellants have failed to allege discrimination on the basis of sex, and because they failed to properly allege that any harassment was objectively

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WL 276975, at *1-3 (D.N.H. 2001) (finding widespread peer harassment, both verbal and physical, which involved referring to the plaintiff as a homosexual, as well as some harassment by coaches); *see also Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983 (8th Cir. 2002) (finding mere presence of transgender female teacher in women's faculty restroom did not create a hostile environment for cisgender female teachers).

offensive and either pervasive or severe, the Court was correct is holding that the Appellants failed to show a likelihood of success on their Title IX claim.

3. The Change in District Practice Sought by Appellants Would Violate Title IX

As to the interpretation of Title IX, its prohibition of discrimination based on sex is generally viewed as being parallel to the similar proscriptions contained in Title VII of the Civil Rights Act of 1964, which prohibits discrimination because of "sex" in the employment context. These statutes' prohibitions on sex discrimination are analogous.[11] Courts have long interpreted "sex" for Title VII purposes to go beyond assigned sex as defined by the respective presence of male or female genitalia. For instance, numerous courts have held that Title VII's prohibition of discrimination on the basis of "sex" includes discrimination on the basis of among other things transgender status, gender nonconformity, sex stereotyping, and sexual orientation.[12] Accordingly, discrimination based on

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

[12] *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (Title VII proscribes male-on-male sexual harassment); *Betz v. Temple Health Systems*, 659 Fed. App'x. 137 (3d Cir. 2016) (Title VII and gender stereotyping); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. App'x. 883 (11th Cir. 2016) (sex discrimination includes discrimination against a transgender person based on gender nonconformity); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Title VII and transgender status); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d

transgender status would appear to be prohibited under Title IX, and therefore the definition of "sex" under Title IX would include gender identity.

This view was clearly supported by the Seventh Circuit in *Whitaker*. In that case, a transgender male brought suit in an effort to be able to use the boys' bathrooms at his high school and sought a preliminary injunction. The school district claimed that Whitaker could not show a likelihood of success on his Title

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

IX claim because he could not show discrimination on the basis of sex, in part because Congress had not explicitly added transgender status as a protected characteristic to either Title VII or Title IX. *Whitaker*, 858 F.3d at 1048-49. However, the court rejected this argument, holding that Whitaker had demonstrated a likelihood of success.

> A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects Ash [Whitaker], as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.

Whitaker at 1049-50. Accordingly, granting the Appellants a preliminary injunction in this case would be a similar violation of Title IX. Therefore, it is clear that the Appellants have failed to show a likelihood of success on their Title IX claim.

D. District Court Correctly Ruled That Appellants Were Unlikely to Succeed on The Merits of Their Intrusion Upon Seclusion Claim

Appellants next contend that the District Court erred in finding that permitting transgender students to use locker rooms and restrooms aligned with their gender identity constituted an intrusion upon seclusion. Appellants claim that the court based its decision on the fact that neither the School District nor its agents conducted the intrusion. Appellants' Brf., p. 49. However, this argument

mischaracterizes the court's decision, which was instead based on the fact that a reasonable person would not be offended by the presence of a transgender student in the bathroom or locker room with them. App'x 38 (Decision, p. 33).

Pennsylvania follows Section 652B of the Restatement (Second) of Torts, which defines intrusion upon seclusion as "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1383 (Pa. Super. 1984) (*citing* Restatement (Second) of Torts § 652B). In addition, the intrusion must "cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." *Harris by Harris* at 1384-85.

In tort claims for intrusion upon seclusion in a public restroom, the intrusion generally involves a preconceived or planned intrusion by surveillance equipment, or by surreptitious observations. *See Elmore v. Atlantic Zayre, Inc.*, 341 S.E.2d 905, 906-07 (Ga. App. 1986); *Harkey v. Abate*, 346 N.W.2d 74, 75 (1983); *Cf. New Summit Assocs. v. Nistle*, 533 A.2d 1350, 1354 (Md. App. 1987) (absent evidence named defendants, or their agents, actually participated in observation through mirror in plaintiff's apartment bathroom, there was no basis for claim for intentional intrusion upon seclusion against those defendants); *Lewis v. Dayton*

Hudson Corp., 339 N.W.2d 857, 858 (Mich. App. 1983) (surveillance of plaintiff in department store fitting room); *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 422 (S.D. 1994) (sufficient evidence to submit intrusion upon seclusion claim to jury where there was evidence male employer observed three female employees on different occasions through hole in workplace bathroom wall).

In *Elmore*, a store customer complained about sexual activity in the store's public restroom, and the store's loss prevention manager observed suspicious behavior while inspecting the restroom. Using a location above the restroom, the store's security staff observed individuals in an enclosed stall, and based on those observations, an individual was arrested and pled guilty to sodomy. That individual subsequently sued the store for intrusion upon seclusion. The Georgia Court of Appeals affirmed summary judgment for the store. *Elmore*, 341 S.E.2d at 907. These cases recognize a privacy interest (in an enclosed stall in a public restroom) but also acknowledge that privacy interest is not absolute. The viability of those tort cases generally turns on the purpose of the intrusion and whether the method of surveillance constitutes an intentional intrusion which is objectionable to a reasonable person.

In this instance, there was no surveillance of the Appellants, and no intrusion on their privacy. Accordingly the District Court did not act erroneously in holding

that the Appellants failed to show a likelihood of success on their intrusion upon seclusion claim.

E. Appellants Will Not Suffer Irreparable Harm in the Absence of an Injunction

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

Judge Smith held that the privacy protections in place at BASH for the 2017-2018 school year "mitigate against a finding of irreparable harm." App'x 143 (Decision, p. 138). Indeed, Appellants admit that the single-user facilities protect their privacy. App'x 353-54 (July 17 Tr., pp. 121-22). Appellants do not explain why Judge Smith's ruling is allegedly erroneous. Appellants' Brf., p. 52. Accordingly, the ruling must stand.

F. The Balance of Hardships Favors Appellees

Appellants argue that issuance of a preliminary injunction would not harm the School District. Appellants' Brf., p. 53. However, this argument fails to take

into account a full balancing of the hardships in this matter, as it does not consider the harm that preliminary relief would cause for transgender students.

If the preliminary injunction is not granted, Appellants may have to decide whether to: 1) use the locker rooms and restrooms of their sex, knowing that a transgender student might be using those same facilities, or 2) use alternate private facilities provided by the School District.[13] If the preliminary injunction were granted, transgender students would be harmed by being the only students required to use single-person facilities, which would be profoundly stigmatizing. Continuing to allow transgender students to use facilities aligned with their gender identity on a case-by-case basis would cause no harm to the Appellants and the high school community, considering the availability of private bathroom and shower stalls in the locker rooms, and the availability of single-user restrooms. Meanwhile, based on the unrefuted expert testimony of Dr. Leibowitz, the court found that the potential psychological damage to the transgender students is significant. App'x 78-79 (Decision, pp. 73-74). It can be a difficult decision for a transgender student to progress to the point of being comfortable enough with themselves and their peers to choose to use the facilities aligned with their gender

[13] The 2017-2018 school year has been under way for more than four months, so Appellants have already faced dealing with the School District's continuing practice with regard to transgender students.

identity rather than their assigned sex. To remove students' ability to use the facilities of their gender identity could cause severe emotional difficulty for these students. Therefore, it is clear that when balancing potential harms, transgender students stand to be harmed much more by imposition of a preliminary injunction than the Appellants would be by maintaining the status quo.

G. Public Interest Does Not Support a Preliminary Injunction

The final factor to be considered to determine whether a preliminary injunction should issue is whether the public interest favors a preliminary injunction. Appellants argue simply that "there is the highest public interest in the due observance of all the constitutional guarantees." Appellants' Brf., p. 53 (*citing United States v. Raines*, 362 U.S. 17, 27 (1960)). However, as described *supra*, the Appellants have failed to show a likelihood of success on their constitutional claim, thereby mooting their argument that the public interest favors a preliminary injunction in this matter.

Moreover, public policy supports allowing transgender students to use restrooms and locker rooms aligned with their gender identities. Transgender people were once forced to hide their gender identities for fear of retribution, so there was little need to consider the rights of people who chose to remain hidden away. That is no longer the case. A transgender person today does not live his or her life in conformance with their sex assigned at birth, but rather lives consistent

with his or her gender identity. It is in the public interest to support transgender students by having society accept them as they are, rather than forcing them to pretend to be something they are not. Therefore this final factor further weighs in favor of affirming the District Court's decision denying the preliminary injunction.

VI. CONCLUSION

For the reasons stated above, Appellees respectfully request that this Court affirm the ruling of the district granting judgment in favor of all Appellees and against all Appellants.

Respectfully submitted,

Date: January 16, 2018

/s/ David W. Brown

Michael I. Levin (PA 21232)
mlevin@levinlegalgroup.com
David W. Brown (PA 201553)
dbrown@levinlegalgroup.com
LEVIN LEGAL GROUP, P.C.
1800 Byberry Road, Suite 1301
Huntingdon Valley, PA 19006
Phone: (215) 938-6378

Attorneys for Appellees Boyertown Area School District, Dr. Brett Cooper, Dr. E. Wayne Foley, and David Krem

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOEL DOE, a minor, by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor, by and through his parents JOHN JONES and JANE JONES; and MACY ROE	:	
Plaintiffs,	:	Case No. 17-3113
v.	:	
BOYERTOWN AREA SCHOOL DISTRICT; DAVID KREM; DR. BRETT COOPER and DR. E. WAYNE FOLEY,	:	on appeal from order denying motion for prelim. injunction in Eastern District of Penn.
Defendants.	:	

CERTIFICATE OF COMPLIANCE

i. This document complies with the word limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,997 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: January 16, 2018

/s/ David W. Brown
David W. Brown

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to L.A.R. 28.3(d), I hereby certify that both attorneys for the Appellees – Michael I. Levin and David W. Brown – are members of the bar of the U.S. Court of Appeals for the Third Circuit.

Date: January 16, 2018

/s/ David W. Brown
David W. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2018, I electronically re-transmitted the foregoing Brief for Appellees to be filed to the Clerk's Office using the Court's Electronic Case Filing system ("ECF") for filing and transmittal of a Notice of Electronic Case Filing to all counsel at the following e-mail addresses in accordance with Fed. R. App. P. 25(a)(2)(D), L.A.R. 25.1, and L.A.R. 113.4, as all counsel are filing users.

[See next page for addresses]

Mary Catherine Roper
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19106
mroper@aclupa.org

Amanda Lynn Nelson
Harper Samuel Seldin
Cozen O'Connor
1650 Market Street, Ste. 2800
Philadelphia, PA 19103
HSeldin@cozen.com
ANelson@cozen.com

Cathy R. Gordon
Jacob Kratt
Litchfield Cavo LLP
420 Fort Duquesne Blvd., Ste. 600
Pittsburgh, PA 15222
gordon@litchfieldcavo.com
jkratt@litchfieldcavo.com

Randall Wenger
Jeremy Samek
Independence Law Center
23 North Front Street
Harrisburg, PA 17101
rwenger@indlawcenter.org
jsamek@indlawcenter.org

Gary McCaleb
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, AZ 85260
gmccaleb@ADFlegal.org

Leslie Cooper
Ria Tabacco Mar
American Civil Liberties Union
125 Broad Street, 18th floor
New York, N.Y. 10004
lcooper@aclu.org
rmar@aclu.org

Kellie Fiedorek
Christiana Holcomb
Alliance Defending Freedom
440 First Street NW, Ste. 600
Washington, D.C. 20001
kfiedorek@ADFlegal.org
cholcomb@ADFlegal.org

Matthew J. Clark
Foundation for Moral Law
1 Dexter Avenue
Montgomery, AL 36104
matt@morallaw.org

/s/ David W. Brown
David W. Brown

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to L.A.R. 31.1(c), I hereby certify that this Brief for Appellees has been filed with the Court in both electronic and paper form, and that the text of the electronic brief is identical to the text in the paper copies.

Date: January 16, 2018

/s/ David W. Brown
David W. Brown

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CERTIFICATE OF ANTI-VIRUS DETECTION PROGRAM USE

Pursuant to L.A.R. 31.1(c), I hereby certify that a computer virus detection program was run on the electronic version of this Brief for Appellees, and that no virus was detected. The virus detection program utilized was Symantec.cloud – Endpoint Protection, NIS-22.8.0.50 / Symantec.cloud – Cloud Agent 3.00.10.2737.

Date: January 16, 2018

/s/ David W. Brown
David W. Brown