

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

JOEL DOE, a minor, by and through his
Guardians JOHN DOE and JANE DOE, et al.,

Plaintiffs,

v.

BOYERTOWN AREA SCHOOL DISTRICT,
et al.,

Defendants,

and

PENNSYLVANIA YOUTH CONGRESS
FOUNDATION,

Intervenor-Defendant.

Civil Action No. 17-1249-EGS

**INTERVENOR-DEFENDANT PENNSYLVANIA YOUTH CONGRESS
FOUNDATION'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Intervenor-Defendant Pennsylvania Youth Congress Foundation, in support of its opposition to Plaintiffs' motion for a preliminary injunction, respectfully submits the following proposed Findings of Fact and Conclusions of Law.

PROPOSED FINDINGS OF FACT

Transgender Adolescents

1. Intervenor offered the expert testimony of Dr. Scott Leibowitz, a clinical psychiatrist with extensive experience in treating children and adolescents with gender dysphoria, as an expert in gender dysphoria and gender identity issues in children and

adolescents. Dr. Leibowitz has the qualifications and experience to testify on these topics and the Court found his testimony reliable and relevant. No party refuted Dr. Leibowitz's testimony.

2. The term "transgender" describes a person whose gender identity – that is, their deeply held sense of self as male, female, or both or in between – is different from the sex that person was assigned at birth. July 17, 2017 Tr. 143:7-15. Typically, sex is assigned at birth based on a baby's genitalia. July 17, 2017 Tr. 143:16-23. That is, a baby born with a penis is assigned male, and a baby born with a vagina is assigned female. Id.

3. A transgender boy is a person who has a lasting, persistent male gender identity but was assigned the sex female at birth. Exhibit I-6; Leibowitz Decl. ¶5. A transgender girl is a person who has a lasting, persistent female gender identity but was assigned the sex male at birth. Id.

4. Approximately 1.4 million American adults, or about 0.6% of the adult population, identify as transgender. July 17, 2017 Tr. 143:24-144:4.

5. Gender nonconforming is a broader term that refers to a person whose gender expression is different from what is traditionally associated with their sex assigned at birth. For instance, a girl may be said to be gender non-conforming when she rejects the clothes or behaviors that our society associates with young females, but that does not mean that she will – or will not – identify herself as something other than female. July 31, 2017 Tr. 82:3-24.

6. Being transgender is not a medical or psychiatric condition, but many people who are transgender experience a clinically significant level of distress because of the incongruence between their gender identity and their sex assigned at birth. Id. 148:2-8. Gender dysphoria is the clinical classification for this condition in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). Id. 144:22-145:9.

7. Gender dysphoria, if not addressed, places adolescents at greater risk for mental health problems, including suicide. July 17, 2017 Tr. 158:12-159:1. Transgender youth are at much higher risk for suicidal behavior when compared to youth who are not transgender. Studies show that 45% – or nearly half – of transgender adolescents have had thoughts of suicide, compared to 17% in that age group, in 2015. Leibowitz Decl. ¶ 25. Data from gender clinic referred samples indicate that co-occurring psychiatric diagnoses occur in much higher rates in youths with gender dysphoria, such as depression, anxiety, self-injurious behavior, and suicidal ideation. Leibowitz Decl. and July 31, 2017 Tr. 77:8-78:6.

8. The accepted standards in the medical and mental health fields for treating gender dysphoria in adolescents are documented in the World Professional Association for Transgender Health (WPATH) Standards of Care, currently in its seventh edition. Id. 150:19-151:3; see generally Ex. I-19 (WPATH Standards of Care).

9. The WPATH Standards of Care are accepted as the appropriate treatment protocols by the major medical and mental health professional associations including the American Medical Association, the American Psychological Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the Endocrine Society, and the American College of Obstetrics and Gynecology. July 31, 2017 Tr. 63:4-25.

10. The WPATH Standards of Care are widely used and accepted in the field by clinicians. July 17, 2017 Tr. 151:19-23.

11. The goal of treatment for adolescents with gender dysphoria is to alleviate the distress due to the lack of alignment between their gender identity and assigned sex at birth, or in other words, “to help one not experience that internal sense of chaos that they live day-to-day,

being and feeling as though they were born with a sex assigned at birth that differs from their core sense of self, that deep conviction of who they are.” July 17, 2017 Tr. 159:17-23.

12. What is never recommended as a course of treatment for gender dysphoria is to attempt to change an adolescent’s gender identity to match the sex they were assigned at birth. July 17, 2017 Tr. 160:2-5. That would be considered unethical. Id. 160:6-7. In fact, the medical consensus on so-called “conversion therapy” – efforts to change a person’s gender identity or sexual orientation – is that such therapy is not only ineffective, but actually harmful. Id. 160:8-24; Ex. Ex. I-19 (WPATH Standards of Care) at 32 (“Treatment aimed at trying to change a person’s gender identity and lived gender expression to become more congruent with sex assigned at birth has been attempted in the past, yet without success, particularly in the long term. Such treatment is no longer considered ethical.” (citations omitted)).

13. Among the accepted clinical interventions to treat adolescents with gender dysphoria are social transition, pubertal suppression, hormone therapy, and, in some cases, surgery. Leibowitz Decl. ¶13; *see generally* Ex. I-19 (WPATH Standards of Care), Part VI, Assessment and Treatment of Children and Adolescents with Gender Dysphoria.

14. Social transition refers to the process of living in accordance with one’s gender identity. For example, a transgender girl might adopt a name traditionally associated with girls, use feminine pronouns, and grow her hair. Leibowitz Decl. ¶ 14; July 17, 2017 Tr. 153:6-154:12. Social transition also involves using single-sex facilities, like restrooms and locker rooms, consistent with one’s gender identity. July 17, 2017 Tr. 154:13-15.

15. It is difficult for a person who is not transgender to understand the significance for a transgender boy of using the boys’ facilities, or for a transgender girl to use the girls’ facilities. Every time we use the restroom we are confronted with a sign that demands that we identify

ourselves as male or female. This is something most people never think twice about, but for transgender people, this is a ubiquitous, constant reminder of a profound conflict in their lives – the conflict between who they are and how others see them. July 17, 2017 Tr. 162:24-163:22.

16. When adolescents with gender dysphoria are able to use restrooms and lockers that match their gender identity, it can have a significant positive effect on their mental well-being. July 31, 2017 Tr. 70:2-71:10. A “burden [] gets lifted for those kids the minute they are able to use” the restroom that matches their gender identity. July 31, 2017 Tr. 70:13-17. *See also* DeStefano Decl. ¶11 (being able to use the male facilities at BASH “feels so good—I am finally ‘one of the guys,’ something I have waited for my whole life.”); *id.* at ¶12 (“Being able to be my true self is more important than I can describe. I am on track to make the Honor Roll for the third marking period in a row, something I have never done before because I was too distracted and stressed.”).

17. Conversely, barring transgender adolescents from using restrooms and other sex-segregated facilities consistent with their gender identity can erode their psychological well-being. It can cause anxiety and depression, including an increased risk of suicide, and negatively impact their self-esteem and self-worth, ability to trust others, and willingness to go out into the world, during a crucial aspect of development. Leibowitz Decl. ¶ 20; July 17, 2017 Tr. 164:17-165:2, July 31, 2017 Tr. 71:18-72:20, 74: 7-10, 76:2-24.

18. Transgender youth who cannot use the restroom or other facilities consistent with their gender identity may leave school and resist leaving home for any reason. Leibowitz Decl. ¶ 22; July 17, 2017 Tr. 164:17-165:2, July 31, 2017 Tr. 71:11-72:20. This hampers their ability to access opportunities traditionally associated with growing up and maturing into adults, such as getting a job or exploring educational enrichment opportunities. Leibowitz Decl. ¶ 22. The

loss of these activities during an important development stage of youth can have long term consequences on an individual's financial and employment prospects later in life, which can lead to many other psychiatric concerns. Leibowitz Decl. ¶ 22.

19. Forcing transgender youth to use a separate single-user restroom can undermine the benefits of their social gender transition by sending the message that they are not really who they identify as. Leibowitz Decl. ¶ 23. It is also stigmatizing for the individuals required to use them by reinforcing a sense of "otherness." Leibowitz Decl. ¶ 23.

20. The major medical and mental health professional organizations have taken the position that transgender people should be able to use restrooms that accord with their gender identity. July 17, 2017 Tr. 165:3-19; Decl. ¶ 26. Those organizations include the American Medical Association, the American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry. July 17, 2017 Tr. 165:3-19; *see also* Br. of Amici Curiae Am. Academy of Pediatrics et al. in Support of Plaintiff-Appellant, G.G. ex rel. Grimm v. Gloucester County Sch. Bd., No. 15-2056 (4th Cir. May 15, 2017), <https://www.aclu.org/legal-document/gg-v-gloucester-county-school-board-american-academy-pediatrics-et-al>.

21. Given the medical treatments available to adolescents with gender dysphoria, transgender boys do not necessarily physically align with non-transgender girls, and transgender girls do not necessarily physically align with non-transgender boys.

22. Adolescents treated with puberty suppressing drugs do not go through puberty of their assigned sex at birth. For example, an adolescent who was assigned female at birth will not develop breasts or widening of the hips. Leibowitz Decl. ¶ 27.

23. Hormone therapy – providing testosterone for transgender boys and estrogen for transgender girls – produces secondary sex characteristics that match one’s gender identity. July 17, 2017 Tr. 155:20-156:7. For example, a transgender girl who takes estrogen will develop breasts and the fat distribution typical of females. Leibowitz Decl. ¶ 28. A transgender boy who takes testosterone will develop facial and body hair, a deeper voice, and muscle mass typical of males. Id.

24. For transgender boys, another clinical intervention that may be used in adolescents is mastectomy to remove the breast tissue and create a male chest. July 17, 2017 Tr. 159:11-16.

25. Given the treatments available, transgender boys may look indistinguishable from other boys and transgender girls may look indistinguishable from other girls other than when completely undressed. July 17, 2017 Tr. 161:15-162:18.

26. Transgender youth who meet clinical criteria for gender dysphoria are far more likely to want to conceal their physical anatomy and are typically extremely hypervigilant within sex-segregated situations. Leibowitz Decl. ¶ 21. One of the criteria of the diagnostic classification Gender Dysphoria in Adolescence and Adulthood is a desire to be perceived as another gender and a rejection of aspects of their body that connote their assigned sex at birth. Leibowitz Decl. ¶ 21.

Transgender Students at BASH

27. BASD seeks to support the health and well-being of all of its students.

28. There are transgender students at Boyertown Area Senior High (“BASH”) and have been since at least the 2014-2015 school year.

29. Consistent with its commitment to supporting the health and well-being of all of its students, since the 2014-2015 school year, the administration at BASH has worked with transgender students to ensure that they are safe and supported. July 31, 2017 Tr. 136:25-137:3.

30. Since the 2014-2015 school year, the BASH administration have met with several transgender students and their families to discuss the students' individual needs and granted requests to change students' names on their academic records, requests to change the pronouns by which students would be addressed, and requests for alternative restroom and changing facilities when those students were not comfortable using the facilities that corresponded to their sex assigned at birth. July 31, 2017 Tr. 137:7-23.

31. Near the end of the 2015-2016 school year, the BASD administration became aware of the U.S. Department of Education's May 13, 2016 "Dear Colleague Letter," which reflected the federal government's view that Title IX's prohibition against sex discrimination in public schools means that schools must allow transgender students to use restrooms and locker rooms consistent with their gender identity. BASD Response to Plaintiffs' Interrogatory #4; Foley Dep: 15:15-22, 20:13 – 21:4; Faidley Dep. 24:12 – 25:2. After reviewing the Dear Colleague letter and consulting with the school solicitor, in the 2016-2017 school year the BASH administration began considering individual requests from transgender students to use facilities that match their gender identity.

32. Although the Department of Education's May 13, 2016 Dear Colleague Letter was rescinded by the current administration (although not replaced with alternative guidance), District officials have continued their practice with respect to sex-segregated facilities because "the district believes that transgender students should have the right to use school bathroom and locker facilities on the same basis as non-transgender students." BASD Frequently Asked

Questions About Issues Regarding Doe vs. BASD (March 27, 2017) (designated BASD Exhibit D-033). The District believes that its “position is consistent with guidance from the Pennsylvania School Boards Association, the National School Boards Association, our Solicitor and what the school district administration believe is fair and equitable under the circumstances.” BASD Exhibit D-033.

33. The District evaluates requests from transgender students to use facilities that match their gender identity on a case-by-case basis; all such requests have followed numerous conversations between students, families and the counselors. July 31, 2017 Tr. 110:6-9, 144:3-10.

34. Dr. Cooper testified that BASH administrators received such requests from six transgender students in the 2016-2017 school year. July 31, 2017 Tr. 110:10-117:17.

35. Dr. Cooper considered and, ultimately, approved each of those requests. In each of those six cases, the requesting student had previously worked with the school to facilitate his or her social transition by changing his or her names and pronouns. Additionally, in each of those six cases, the requesting student had previously stopped using the facilities that correspond to the sex they were assigned at birth and spent some time using alternative facilities before asking for permission to use the facilities that match his or her gender identity. July 31, 2017 Tr. 144:15-145:18.

36. Of the six transgender students who have been granted permission to use the facilities consistent with their gender identity, three are expected to return to BASH for the 2017-2018 school year. July 31, 2017 Tr. 111:17.

37. Transgender boys who are granted permission to use the boys' facilities may not use the girls' facilities, and transgender girls who are granted permission to use the girls' facilities may not use the boys' facilities. July 31, 2017 Tr. 111:23-112:2.

Restrooms at the High School

38. In addition to several multi-user boys' and girls' restrooms, the High School has four single-user restrooms throughout the school building for general student use and four additional single-user restrooms for students who have business in the attendance office, guidance office, In School Suspension room, or the principals' office. July 31, 2017 Tr. 119:7-122:12.

39. No student at BASH is required to use multi-user restrooms. July 31, 2017 Tr. 119:13-15.

40. Any of the single-user restrooms can be used by students to change their clothes. July 31, 2017 Tr. 125:4-4. To facilitate storage for students who choose to change in the single-user restrooms, the BASH administration has plans to install lockers for student use in the single user restrooms near the gym, in the new nurse's office, the old nurse's office, and on the second floor. July 31, 2017 Tr. 148:15-149:7.

41. Dr. Cooper testified that over his years in the BASD administration, there have been a handful of incidents in which girls went into the boys' restroom without permission, or vice versa. If the administration could identify the students, they were disciplined. That remains the District's practice. July 31, 2017 Tr. 112:8-19, 131:25-132:10.

Locker Rooms at the High School

42. The High School has one multi-user locker room for boys taking physical education classes and one multi-user locker room for girls in physical education classes. Each locker room has four individual shower stalls with privacy curtains. Each locker room also has individual toilet stalls with doors. July 31, 2017 Tr. 125:24-126:10; Cooper Dep. 39:4 - 40:18.

43. No student is required to change clothes in the multi-user locker rooms. It is the District's practice to work with all students, regardless of whether they are transgender, to offer them an area to change in which they feel comfortable. July 31, 2017 Tr. 124:23-125:8; Faidley Dep. 63:10-20; 65:19-66:5.

44. Students may change clothes in any of the single-user restrooms. *Id.*

45. Each of the Plaintiffs admitted that using a single-user facility to change clothes would protect their privacy.

Plaintiffs

46. Joel Doe is a rising senior at BASH. Joel Doe Dep. 16:12-18.

47. On October 31, 2016, Joel Doe saw Student A, a transgender boy, changing for gym class in the boys' locker room. July 17, 2017 Tr. 85:5-14, 88:1 – 90:14.

48. At the time Joel Doe observed him changing, Student A was wearing shorts and a sports bra. Student A did not remove his shorts, his sports bra, or his underwear. Joel Doe Dep. 116:20 – 117:19.

49. Joel Doe has never seen another student remove his underwear in the locker room. Joel Doe Dep. 213:9-14.

50. Joel Doe did not remove his underwear in Student A's presence, and he has never removed his underwear in the communal areas of the locker room. Joel Doe Dep. 231:15-21.

51. Joel Doe has never seen anyone take a shower in the boys' locker room. Joel Doe Dep. 73:14-19.

52. Joel Doe has no objection to sharing the boys' locker room with a student who has different anatomy than him, as long as that student was "born a male" in his opinion. Joel Doe Dep. 85:19-88:15; 220:23-221:10; 229:23 – 230:4.

53. Joel Doe testified that there is no way to tell whether a student was "born a male" based on appearance. Joel Doe Dep. 233:10-14.

54. Joel Doe has no objection to sharing the boys' locker room with a student who has a vagina. If a transgender girl had surgery to remove their penis and create a vagina, he would not object to that girl using the boys' locker room. Joel Doe Dep. 230:5-13.

55. Joel Doe has no objection to sharing the boys' locker room with a student who has breasts. If a transgender girl underwent hormone therapy that caused her to develop breasts, he would not object to that girl using the boys' locker room. Joel Doe Dep. 233:25 – 234:13, 235:21 – 236:6.

56. Joel Doe testified that using a single-user facility to use the restroom or change his clothes would protect his privacy. July 17, 2017 Tr. 115:3-20.

57. In November 2016, Dr. Cooper met with Joel Doe's legal guardians, John and Jane Doe, and informed them that Joel could change for gym class in the nurse's office or a particular single-user restroom if he was uncomfortable changing in the boys' locker room. Joel Doe response to BASD Interrogatory ## 10, 13, 19; BASD Response to Plaintiffs' Interrogatory #19; Foley Dep. 47:9 – 48:15; Cooper Dep. 120:13-17.

58. Dr. Foley then met with Joel Doe to inform him that he could change either in the nurse's office or a single-user restroom near the art room. July 17, 2017 Tr. 121:4-21.

59. Joel Doe indicated to Dr. Foley that he would change in the single-user restroom, but he never did so. Instead, he chose to participate in gym class in his street clothes for reduced credit. Joel Doe Dep. 175:9 – 177:6; July 27, 2017 Tr. 115:3-20, 121:4-21.

60. Joel Doe has not identified any harm that would stem from his using single-user facilities.

61. Joel Doe has not sought counseling or any other treatment after observing Student A in the locker room. Joel Doe Dep. 55:1 – 56:12.

62. Jack Jones is a rising senior at BASH. Jack Jones Dep. 14:3-10.

63. In early November 2016, Jack Jones was in the boys' locker room when someone tapped him on the shoulder and pointed out that Student A, a transgender boy, was changing for gym class in the locker room. Jack Jones Response to BASD Interrogatory #2; Jack Jones Dep. 29:3-9.

64. At the time Jack Jones saw him changing, Student A was wearing shorts and a sports bra. Jack Jones Dep. 20:25 – 22:25, 135:12 – 138:18. Student A did not remove his shorts, his sports bra, or his underwear.

65. Shortly after he saw Student A in the locker room, Jack Jones sent a text message to his parents saying, "Someone yelled if you don't have a d***, get the f*** out lol". Jack's mother, Jane Jones, responded, "Good". Jack Jones Trial Dep. 31:8 – 34:20.

66. Jack Jones now says he has no objection to sharing the boys' locker room with a student who has different anatomy than him, as long as that student was assigned the sex of male at birth. Jack Jones Trial Dep. 36:6-10, 40:8-12.

67. Jack Jones testified that there is no way to tell whether a student was assigned male at birth based on appearance. Jack Jones Trial Dep. 40:21 – 42:20.

68. Jack Jones has no objection to students with penises using the girls' locker room if those students were assigned female at birth. If a transgender boy had surgery to construct a penis, he would not object to that student using the girls' locker room. Jack Jones Trial Dep. 36:11 – 37:10, 39:24 – 40:12, 45:5 – 46:2.

69. Jack Jones's parents, John and Jane Jones, now say they have no objection to their children sharing locker rooms with students who have different anatomy from them. John Jones Dep. 20:16-22; Jane Jones Dep. 33:16-20.

70. Jack's mother testified that she would have no objection to her son sharing the boys' locker room with a transgender girl who has breasts or a vagina, as long as that girl was assigned male at birth. Jane Jones Dep. 33:16-20.

71. Jack's father testified that he would have no objection to his daughter sharing the girls' locker room with a transgender boy who has a penis, as long as that student was assigned female at birth. John Jones Dep. 20:23 – 21:9.

72. Jack Jones testified that using a single-user facility to use the restroom or change his clothes would protect his privacy. Jack Jones Trial Dep. 43:3-21.

73. Jack Jones has not identified any harm that would stem from his using single-user facilities.

74. Jack Jones has not sought counseling or any other treatment after observing Student A in the locker room. Jack Hones Dep. 41:1 – 42:14, 123:25 – 125:3.

75. Macy Roe is a 2017 graduate of BASH. Macy Roe Dep. 10:5-15

76. Macy Roe will not be a student at BASH in the fall. Macy Roe Dep. 10:5-15.

77. Macy Roe has never been in a girls' restroom or locker room at the same time as a transgender girl, as far as she knows. Macy Roe Response to BASD Interrogatory #2; Macy Roe Dep. 20:3-6.

78. Macy Roe would have no objection to sharing a restroom or locker room with a student who has different anatomy than her, as long as that student was "born female" in her opinion. Macy Roe Trial Dep. 17:2 – 18:7.

79. Macy Roe has no objection to sharing the girls' locker room with a student who has a penis. If a transgender boy had surgery to construct a penis, she would not object to that student using the girls' locker room. Macy Roe Trial Dep. 17:2 – 18:7.

80. Macy Roe testified that using a single-user facility to use the restroom or change her clothes would protect her privacy. Macy Roe Trial Dep. 18:25 – 19:13.

81. Macy Roe has not sought counseling or any other treatment after learning that transgender girls might be present in the girls' restroom or locker room at the same time as her. Macy Roe Dep. 60:10-14.

82. Mary Smith was an eleventh grade student at BASH in the 2016-17 year. Mary Smith Dep. 15:21 – 16:1.

83. Mary Smith at first testified that she would not be returning to BASH in the fall, but later stated that her choice of school will depend on how the Court rules. Mary Smith Dep. 126:4-24; July 17, 2017 Tr. 32:2-3.

84. On March 22, 2017, Mary Smith saw Student B, a transgender girl, washing her hands in the girls' restroom. Student B was fully clothed, as was Mary Smith. July 17, 2017 Tr. 43:3 – 44:15; Mary Smith Response to BASD Interrogatory #2; Mary Smith Dep. 17:3 – 20:2.

85. Mary Smith has no objection to sharing the girls' locker room with a boy or girl who has a different anatomy than her, as long as that student is the "same sex" as her in her opinion. Mary Smith Dep. 63:5-12; 153:8-22.

86. Mary Smith has no objection to sharing the girls' locker room with a student who has a penis. If a transgender boy had surgery to construct a penis, she would not object to that boy using the girls' locker room. Mary Smith Dep. 117:1-23.

87. Mary Smith testified that using a single-user facility to use the restroom or change her clothes would protect her privacy. July 27, 2017 Tr. 60:25 – 61:6.

88. Mary Smith has not sought counseling or any other treatment after observing Student B in the restroom. Mary Smith Dep. 104:21 – 105:4.

89. None of the plaintiffs was so distressed by the experience or possibility of encountering a transgender boy in the boys' facilities or a transgender girl in the girls' facilities that he or she sought any counseling or treatment.

90. Plaintiffs, like other people, vary in terms of their personal modesty. Some are uncomfortable with the presence of males or females when changing their clothes or attending to personal hygiene. Jack Jones testified that he always tried to change in the least public part of the locker room because he has never liked taking his clothes off in front of other students. Jack Jones Trial Dep. 54:22 – 56:4. Mary Smith didn't want anyone else around her while changing when she was dealing with her period and, thus, used the bathroom stalls or curtained shower areas at those times. July 27, 2017 Tr. 61:7-15, 72:3 – 73:14. Every one of Plaintiffs acknowledged that using a single-user facility would protect their privacy, but they chose not to use those facilities. July 27, 2017 Tr. 60:25 – 61:6, 115:3-20, 121:22 – 122:2; Jack Jones Trial

Dep. 43:2-21, 25:13-18; Jack Jones Dep. 118:2-14; Macy Roe Trial Dep. 15:11-14, 18:25 – 19:13.

91. None of Plaintiffs, or their parents, identified any harm that they would experience if they chose to use the single-user facilities.

PROPOSED CONCLUSIONS OF LAW

THE RELIEF REQUESTED BY PLAINTIFFS IS UNPRECEDENTED

92. The relief requested by Plaintiffs—an injunction that would bar the school district from allowing boys and girls who are transgender from using the restrooms and locker rooms used by other boys and girls—has never been granted by any court in this country. In the one case that has addressed such a request, *Students v. United States Dep’t of Educ.*, No. 16-CV-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), a magistrate judge in the U.S. District Court for the Northern District of Illinois recommended denial of the plaintiffs’ request for a preliminary injunction.

93. In fact, courts have held that the very relief requested by Plaintiffs—the exclusion of transgender students from facilities that accord with their gender identity—violates Title IX, the Equal Protection Clause, or both, and have issued injunctions barring such exclusions. *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034 (7th Cir. 2017) (Title IX and Equal Protection); *Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, -- F. Supp. 3d --, 2017 WL 770619, at *14 (W.D. Pa. Feb. 27, 2017) (Equal Protection).¹

¹After a preliminary injunction was granted enjoining the school from enforcing its policy of requiring students to use the restrooms applicable to their assigned sex at birth, the case settled. As part of the settlement, the school board voted to rescind the policy and the school district further agreed to update its nondiscrimination policy to include gender identity. <http://www.post-gazette.com/news/education/2017/08/08/Pine-Richland-School-District-transgender-students-lawsuit-settlement-bathroom-policy/stories/201708080093>.

LEGAL STANDARD FOR DISPOSING OF A MOTION FOR A PRELIMINARY

INJUNCTION

94. Preliminary injunctive relief is “an extraordinary remedy, which should be granted only in limited circumstances.” *Novartis Consumer Health v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002).

95. “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

96. The “failure to establish any element ... renders a preliminary injunction inappropriate.” *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999).

97. The movant bears the burden of showing that these four factors weigh in favor of granting the injunction. *See Opticians Ass’n of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990).

98. “A primary purpose of a preliminary injunction is to maintain the status quo until a decision on the merits of a case is rendered.” *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994). A party seeking a preliminary injunction that will alter the status quo “bears a particularly heavy burden in demonstrating its necessity.” *Id.* at 653.

99. A delay in seeking a preliminary injunction weighs against a finding that movant is entitled to the injunction. *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 404 (E.D. Pa. 2016) (“Plaintiffs unreasonably delayed filing their Complaint and Motion, something which weighs decidedly against granting the extraordinary relief they seek.”).

PLAINTIFFS HAVE NOT MET THEIR HEAVY BURDEN

Plaintiffs Will Not Suffer Irreparable Harm If Their Motion is Denied

100. Plaintiff Macy Roe will not suffer irreparable harm without a preliminary injunction because she has already graduated and no longer attends the High School.

101. The remaining Plaintiffs will suffer no irreparable harm if the requested injunctive relief is denied because they are not required to use the common locker rooms and restrooms and can use the private single-user facilities available to them and any other students at BASH. Plaintiffs and their parents acknowledge that if plaintiffs were to use these private facilities, that would fully protect their privacy. Thus, Plaintiffs can avoid all of the claimed harm if this Court denies their request for preliminary injunctive relief while the case runs its course.

102. As a magistrate judge in Illinois explained in recommending against a similar request for preliminary injunctive relief:

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

Students v. United States Dep't of Educ., No. 16-CV-4945, 2016 WL 6134121, at *37, *38 (internal citations omitted). *See also Evancho*, 2017 WL 770619 at *14 (rejecting protection of student privacy as justification for school's refusal to allow transgender students to use single-sex facilities consistent with their gender identity, noting that physical layout of the restrooms affords "actual physical privacy from others").

103. Finally, transgender students at BASH have been using the restrooms and locker rooms that match their gender identity since August 2016. Plaintiff Joel Doe was aware of this at least as early as October 31, 2016, when he complained about encountering a student in the boys' locker room. July 17, 2017 Tr. 85:5-14, 88:1 – 90:14. Plaintiffs filed their complaint on March 31, 2017, and filed their motion for a preliminary injunction on May 17, 2017. This significant delay strongly undermines Plaintiffs' assertion of irreparable harm. *See Students*, 2016 WL 6134121 at *39 (plaintiffs' 7 month delay before filing lawsuit "strongly indicates that the [challenged policy] is not causing them irreparable harm."); *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 404 (E.D. Pa. 2016) ("Plaintiffs unreasonably delayed filing their Complaint and Motion, something which weighs decidedly against granting the extraordinary relief they seek.").

The Balance of Equities Weighs Against Granting an Injunction

104. Even if the Plaintiffs could show irreparable harm, they could not satisfy the separate requirement of showing that there would be no greater harm from granting the relief they seek than from denying it.

105. The Plaintiffs' requested relief would require the District to prohibit transgender students from using the restrooms and locker rooms consistent with their gender identity – including transgender boys who already use the boys' facilities and transgender girls who already use the girls' facilities. This would be highly stigmatizing to these students. It would also violate their rights under Title IX. *See* pars. 127-129 *infra*. Moreover, being excluded from facilities that match their gender identity could also result in severe distress associated with gender dysphoria. *See* par. 136 *infra*.

106. The existence of private single-user facilities does not erase or reduce the harm of being excluded from the common facilities used by other students. There is a significant difference between making the choice to use private facilities to protect one's own sense of privacy and being required to use separate facilities because your presence in the common facilities is deemed unacceptable.

107. In contrast to the harms that would befall transgender students should the requested injunction be granted, none of the Plaintiffs has sought counseling for or claimed a clinically significant level of distress as a result of the school's practice of allowing boys who are transgender to use the boys' facilities and girls who are transgender to use the girls' facilities. And Plaintiffs have the power to fully avoid any harm by using the private facilities that are available to them at BASH.

108. Given the significant harm injunctive relief would impose on transgender students and the simple alternatives readily available to address Plaintiffs' privacy concerns, the balance of the equities weighs strongly against the injunctive relief requested.

An Injunction is Not in the Public Interest

109. Injunctive relief requiring the District to subject transgender students to harmful, stigmatizing, discriminatory treatment is not in the public interest, particularly where Plaintiffs' concerns can be addressed through the use of private facilities that are available to all students.

Likelihood of success on the merits

Plaintiffs Are Unlikely to Succeed on the Merits of Their Constitutional Privacy Claims

110. The zone of privacy protected by the Fourteenth Amendment includes a privacy interest in avoiding disclosure of "highly personal matters presenting the most intimate aspects

of human affairs.” *Doe v. Luzerne Cty.*, 660 F.3d 169, 175-76 (3d Cir. 2011). The Third Circuit has held that this right extends to avoiding involuntary disclosure of the intimate parts of one’s body. *Id.*

111. Plaintiffs are unlikely to succeed on the merits of their constitutional privacy claim, first, because the school’s restrooms and locker rooms afford actual physical privacy from all other students, so the practice of allowing transgender students to use the restrooms and locker rooms consistent with their gender identity does not implicate any actual privacy concerns. *See Students*, 2016 WL 6134121 (rejecting identical privacy claim); *Evancho*, 2017 WL 770619, at *14 (rejecting protection of student privacy as justification for school’s refusal to allow transgender students to use single-sex facilities consistent with their gender identity, noting that physical layout of the restrooms affords “actual physical privacy from others”).

112. There is no need for students to undress in the common areas of the locker rooms because of the availability of toilet stalls and private showers with curtains that enable students to undress out of sight of other students. Moreover, private single-user facilities are available for Plaintiffs and any other students who seek additional privacy. *Students*, 2016 WL 6134121 at *23 (“The absence of any compulsion distinguishes this case from others Plaintiffs cite which . . . involve involuntary invasions of someone’s privacy.”) No one is required to involuntarily expose the private parts of their body to anyone. *See Doe*, 660 F.3d at 169.

113. Plaintiffs also cite concern about viewing transgender boys undressing in the common areas of the boys’ locker rooms and transgender girls undressing in the common areas of the girls’ locker rooms. But the constitutional right to privacy protects against exposure of one’s own body, *Doe*, 660 F.3d 169, not the possibility of viewing someone else’s body. In any

case, the availability of private single-user facilities allows Plaintiffs and all students to avoid viewing any other student undressing.

114. Some of the Plaintiffs also raise a concern about being heard using the restroom by transgender girls who are present in the common spaces of girls' restrooms. They offer no cases supporting the proposition that the constitutional right to privacy extends to this context. But again, the availability of private single-user facilities allows Plaintiffs and any students to avoid using the restroom within earshot of any other student.

115. In addition, the mere presence of a transgender boy changing for gym in the boys' locker room or a transgender girl washing her hand in the girls' restroom does not establish any actual or threatened violation of bodily privacy. Plaintiffs' claimed privacy violation is wholly unlike those at issue in the constitutional bodily privacy cases cited in their brief, which involve surreptitious viewing or filming of undressed individuals or similar misconduct by law enforcement officers. *See* Intervenor's Response in Opposition to Preliminary Injunction, at 5-7.

116. Much of Plaintiffs' discomfort stems from changing clothes or attending to bodily functions in multi-user facilities, regardless of whether the other users are transgender. For example, Jack Jones testified that he always tried to change clothes in an area of the boys' locker room where he was the least visible because he has never liked taking his clothes off in front of other boys, transgender or not. Similarly, Mary Smith testified that she is uncomfortable attending to her period within earshot of other girls, transgender or not. These feelings are understandable, but they would not be ameliorated by barring transgender boys and girls from shared facilities. As the Seventh Circuit noted, "A transgender student's presence in the restroom

provides no more of a risk to other students' privacy rights than . . . any other student who uses the bathroom at the same time." *Whitaker*, 858 F.3d at 1052.

117. Plaintiffs' discomfort also cannot be attributed to the presence of students with different anatomy than theirs given that they disavowed that concern. For example, Joel Doe and Jack Jones testified that they have no objection to anyone assigned male at birth using the boys' facilities even if they have breasts and a vagina as a result of hormone therapy and surgery. The rule they seek would thus allow for breasts in the boys' facilities no less than the school's practice would.

118. Finally, the school district could have reasonably made the determination that it would be less protective of students' sense of privacy to require transgender boys to use the girls' restrooms and locker rooms and transgender girls to use of the boys' restrooms and locker rooms than allowing transgender students to use facilities that match their gender identity. The presence of a transgender boy like Aidan DeStefano—who is on hormone therapy and had chest surgery (DeStefano Decl. ¶¶ 8, 10, and 17) and, thus looks like any other boy—in the girls' restrooms or locker rooms could be more discomfiting to other students than the presence of a transgender girl. *Id.* at ¶17; July 17, 2017 Tr. 213:19-24, 216:4-13 (when Aidan used the girls' restroom, students reported to teachers that "[t]here's a guy in the bathroom."). And it could be especially concerning in the case of a student who is not known to be transgender.

Plaintiffs Are Unlikely to Succeed on the Merits of Their State Law Privacy Claim

119. To prevail on a claim of intrusion upon seclusion under Pennsylvania law, Plaintiffs must show that (1) there was an intentional intrusion, (2) upon their solitude or seclusion, or their private affairs or concerns, that was (3) substantial and (4) highly offensive to a reasonable person. *See Burger v. Blair Med. Assocs., Inc.*, 946 A.2d 374, 379 (Pa. 2009); *Gabriel v. Giant*

Eagle, Inc., 124 F. Supp. 3d 550, 571-72 (W.D. Pa. 2015); *Ruder v. Pequea Valley Sch. Dist.*, 790 F. Supp. 2d 377, 404 (E.D. Pa. 2011).

120. Plaintiffs do not allege that anyone intruded upon them in the private restroom stalls or showers or in separate facilities.

121. Mary Smith, on one occasion, saw a transgender female washing her hands at the sink in the girls' restroom. The mere presence of a transgender female in the girls' restrooms is not an intentional intrusion upon solitude, seclusion, or private affairs or concerns. Nor is the mere presence of a transgender female washing her hands in the common area of a girls' restroom highly offensive to a reasonable person.

122. Plaintiffs Joel Doe and Jack Jones, each on one occasion, saw a transgender boy in the common area of the boys' locker room. The mere presence of a transgender boy in the common area of the boys' locker room is not an intentional intrusion upon solitude, seclusion, or private affairs or concerns. Nor is the mere presence of a transgender boy in the common area of a boys' locker room highly offensive to a reasonable person.

Plaintiffs Are Unlikely to Succeed on the Merits of Their Title IX Claim

123. To establish sexual harassment under Title IX, Plaintiffs must demonstrate sexual harassment that is "severe, pervasive, *and* objectively offensive." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2001) (emphasis added); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). The sexual harassment must "so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resource and opportunities." *Davis*, 526 U.S. at 651.

124. 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.” *Students*, 2016 WL 6134121, at *32; *see also e.g., Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (rejecting female employee’s claim that a transgender female co-worker’s use of the women’s restrooms constituted sexual harassment). Plaintiffs allege only the mere presence of transgender students in the common spaces of locker rooms and restrooms, and their presence is not objectively offensive.

125. Plaintiffs have not been targeted on the basis of sex. *See* 20 U.S.C. § 1681. The District’s practice permits transgender boys and girls to use the facilities used by other boys and girls. Plaintiffs’ discomfort stems from a practice that is not directed at Joel Doe and Jack Jones because they are male or at Mary Smith and Macy Roe because they are female. The District’s practice applies to all students, transgender and non-transgender, and to all restrooms and locker rooms, for boys and girls. *See, e.g., Students*, 2016 WL 6134121, at *31 (rejecting Title IX claim in challenge to school policy allowing transgender students to use facilities that accord with their gender identity).

126. In addition, Plaintiffs are unlikely to succeed on their Title IX claim because the relief they seek, the exclusion of transgender students from facilities that accord with their gender identity, violates Title IX. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017); *see also Evancho*, 2017 WL 770619, at *23 (violates Equal Protection Clause).

127. Every federal appellate court that has considered sex discrimination claims by transgender people after *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), has affirmed that laws prohibiting sex discrimination do not exclude transgender people from their protections. *See Whitaker*, 858 F.3d at 1047-49. In *Price Waterhouse*, the Supreme Court recognized that sex discrimination includes adverse actions based on sex stereotypes, including a person’s gender

expression and conformity (or lack of conformity) with social gender roles. 490 U.S. at 250 (plurality opinion). Because “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes,” discrimination based on transgender status is a form of impermissible sex stereotyping. *See Glen v. Brumby*, 663 F.3d 1312, 1316-18 (11th Cir. 2011) (collecting cases).

128. A “policy that requires an individual to use a bathroom that does not conform with her or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Whitaker*, 858 F.3d at 1049; *see also Evancho*, 2017 WL 770619, at *11 (excluding transgender students from shared restrooms “is essentially the epitome of discrimination based on gender nonconformity”).

Dr. Leibowitz’s Expert Testimony Meets the Standards for Admissibility

129. Expert testimony may be properly admitted when the expert is qualified and his testimony is reliable and relevant. Fed. R. Evid. 702; *see generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The Court finds that all three requirements are easily satisfied here.

130. First, the Court finds that Dr. Leibowitz is qualified as an expert in gender dysphoria in children and adolescents. He has extensive education, training, and experience in the field. Dr. Leibowitz is board certified in both adult psychiatry and child and adolescent psychiatry and has spent virtually his entire career treating young people with gender identity issues. He has personally treated approximately 300 young people with gender dysphoria and has been involved in the treatment of many hundreds more through his work in multidisciplinary clinics. He is currently the medical director of the THRIVE program, a gender development program at Nationwide Children’s Hospital in Columbus. Additionally, Dr. Leibowitz serves as

the co-chairman of the Sexual Orientation and Gender Identity Issues Committee for the American Academy of Child and Adolescent Psychiatry and is a member of WPATH's Global Education Committee, through which he develops training for other professionals on gender identity issues. July 17 Tr. 133:10-139:23; *see also* Ex. I-6 (Leibowitz CV).

131. Second, the Court finds that Dr. Leibowitz's testimony is reliable. Dr. Leibowitz testified extensively about treatment for gender dysphoria in adolescents based on the WPATH Standards of Care, which are the protocols for treatment accepted within the medical and mental health profession and recognized by major medical organizations including the American Medical Association and the American Academy of Pediatrics.

132. Courts across the country routinely cite the WPATH Standards of Care as the authoritative protocols for the treatment of gender dysphoria, including among young people. *See, e.g., De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013) ("The Standards of Care, published by the World Professional Association for Transgender Health, are the generally accepted protocols for the treatment of [gender dysphoria]."); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 563 & n.4 (S.D.N.Y. 2016); *Diamond v. Owens*, 131 F. Supp. 3d 1346, 1354 n.3 (M.D. Ga. 2015); *Fields v. Smith*, 712 F. Supp. 2d 830, 844 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550, 553-54 (7th Cir. 2011).

133. Plaintiffs objected to testimony about treatments for gender dysphoria on the ground that the scientific support for those treatments does not include randomized, controlled trials, but that does not render testimony about those treatments unreliable. Dr. Leibowitz testified that there are many areas of medicine, and psychiatry in particular, in which randomized, controlled trials are not feasible or ethical. July 31 Tr. 67:21-69:12. That such studies are not available does not render the treatments unreliable or prevent an expert from testifying about

them. *See, e.g., In re Tylenol (Acetaminophen) Mktg. Sales Practices & Prod. Liab. Litig.*, 198 F. Supp. 3d 446, 454-58 (E.D. Pa. 2016) (admitting expert testimony of physician about risk of acetaminophen-induced liver failure despite lack of statistically significant data where condition was rare and placebo-controlled trials were not feasible or ethical).

134. As a psychiatrist, Dr. Leibowitz may testify based on his own clinical experience with the WPATH Standards of Care as well as the research that is available. That is sufficient grounds for an expert opinion. *See id.* at 458.

135. Finally, the Court finds that Dr. Leibowitz's testimony is relevant to the balancing of the equities because it addresses the harm transgender students can experience if they are excluded from the facilities that match their gender identity, as Plaintiffs' requested preliminary injunction would do. His testimony about the effects of hormone and other medical treatments available to adolescents with gender dysphoria is relevant in that it demonstrates that assigning multi-user facilities based on sex assigned at birth does not mean that only students with similar anatomy will share locker rooms

136. In sum, the Court finds that Dr. Leibowitz's expert testimony is admissible under Rule 702 of the Federal Rules of Evidence and *Daubert* and helpful to the trier of fact.

* * *

137. Plaintiffs have failed to demonstrate irreparable harm should the school district maintain its current practice while the Court considers the merits of this case. In contrast, granting the requested injunctive relief would cause significant harm to transgender boys and girls attending BASH, who would be barred from using the restrooms and locker rooms used by other boys and girls (in some cases, after having done so for a year). Moreover, based on the record presented and the law, there is little chance Plaintiffs will succeed on the merits of any of

their claims. While the Constitution and law protect against involuntary exposure of the intimate parts of one's body, the facilities at BASH ensure that no student is required to undress in view of any other student. Allowing transgender students to use the common facilities used by other students does nothing to intrude on protected privacy rights. Nor does the mere presence of transgender students in these facilities constitute sexual harassment in violation of Title IX. Thus, Plaintiffs have failed to meet their heavy burden required to entitle them to preliminary injunction relief while this case proceeds, especially given that they are asking the Court to change the status quo before making a final decision on the merits.

Dated: August 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2017, the foregoing Proposed Findings of Fact and Conclusions of Law was filed electronically with the Court and a true and correct copy was served on all counsel of record via the Court's ECF system.

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