UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Privacy Matters, et al. Plaintiffs, vs. United States Department of Education, et al. Defendants.	Case No. 16-CV-3015 (WMW/LIB) **DEFENDANT INDEPENDENT SCHOOL DISTRICT NO. 706'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Independent School District No. 706, Virginia Public Schools (the "District"), strives to create a safe and welcoming space for all students and staff. The District's goal is to do everything it can to ensure that all students are treated with respect, which includes providing safe access to restrooms and locker rooms for all students, regardless of their sex or gender identity.

As part of a national campaign challenging the United States Department of Education's determination that transgender students are protected from discrimination in public schools, an unidentified group of Plaintiffs has sued the District over its inclusive practices. Relying on the same flawed arguments raised in jurisdictions across the nation, Plaintiffs seek to enjoin the District from permitting transgender students to use the restrooms and locker rooms consistent with the students' gender identities, and instead to force the District to implement a policy that would discriminate against those students.

STATEMENT OF FACTS

The District has an enrollment of roughly 1,800 students, almost 700 of whom attend its High School. Perkovich Dec., ¶ 6. The High School building houses grades seven through twelve, and the main elementary school is located in the same building. *Id.* at ¶¶ 6, 8. The building is a nearly 100-year-old facility that has four floors, multiple staircases, and different levels on each floor due to numerous construction projects over the years. *Id.* at ¶ 8. The facilities present some unique circumstances for students, as the classrooms are often on different floors or levels, and may require a significant walk for students to arrive to class on time. *Id.* at ¶ 9.

The District does not have a written School Board policy on the accommodation of transgender students, but allows students to use the restroom or locker room that is consistent with their demonstrated gender identity. *Id.* at ¶ 22. This practice is consistent with the District's harassment and discrimination policies, as well as state and federal laws and guidance from educational entities, such as the Federal Defendants in this case. *Id*. The District is a recipient of Federal funding for its educational programs. *Id.* at ¶ 7.

Student X[1] has consistently presented a uniform gender identity at school since at least the spring of the 2014-2015 school year. *Id.* at ¶ 30. She uses a traditionally female name, female pronouns, and has a traditionally female hair style, clothing style, and overall appearance. *Id.* She went through the stringent eligibility appeal process to the Minnesota State High School League ("MSHSL") in order to gain athletic eligibility to play girls' sports, and was ultimately granted full eligibility to participate on all girls' teams in the District. *Id*. During the 2015-2016 school year, the District permitted Student X to access the girls' locker rooms and restrooms, in accordance with her consistent presentation as a female, as well as the MSHSL determination of her eligibility for girls' athletics. *See id.* at ¶¶ 22, 30.

During the 2015-2016 school year, the District received a few parent complaints regarding the District's policy on accommodating transgender students, and a similar number of comments from parents or community members supporting the District's

[1] Plaintiffs confusingly refer to Student X as male and use masculine pronouns to refer to Student X. Student X consistently presents as female and uses feminine pronouns, which is how the District will refer to her in this Memorandum. *See Goins v. West Grp.*, 635 N.W.2d 717, 721 n. 1 (Minn. 2001) ("Because [the plaintiff] refers to herself as female, we will refer to her in this opinion using feminine pronouns").

policy. *Id.* at ¶ 25. However, the District received no harassment reports or specific complaints that students were being bullied for seeking restroom or locker room accommodations. *Id.* at ¶¶ 24, 26. There are numerous locker rooms and single-stall restrooms available throughout the building. *Id.* at ¶¶ 12-16. Each parent or student who made a complaint about the District's policy was told that the District respected the privacy of all students, and each student who so requested was granted the accommodation of conveniently-located alternative changing facilities for gym class or athletic activities to allow for additional privacy. *Id.* at ¶ 25. The Principal of the High School, Lisa Perkovich, led several parents on tours of the facilities that were available to students. *Id.*

In addition, after the 2015-2016 school year, the District spent roughly $250,000 to upgrade its locker room facilities to provide students with even more privacy. *Id.* at ¶ 19. The upgrade included the construction of twelve large privacy stalls with locking doors, as well as five individual shower stalls with locking doors in each main locker room. *Id*. In addition to the multiple locker rooms that are available to students, the main locker rooms now provide complete privacy for all students when they change for sports practices or physical education classes. *Id*. The District also provides individual, single-stall restrooms on the first three floors of the building that are located in close proximity to the classrooms on floors 2 and 3, and to the lunchroom on floor 1. *Id.* at ¶ 12. These facilities are open to any students who seek additional privacy when using the restroom. All other restrooms throughout the school have individual stalls, as well. *Id.* at ¶ 11.

Plaintiffs in this case are an unincorporated group of unidentified students and their parents ("Privacy Matters"), as well as one individual parent.[2] The student members of Privacy Matters allegedly attend or have attended school in the District. The Complaint is primarily based on allegations raised by five pseudonymously identified female students ("Students") and their parents.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy never awarded as a matter of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008). Courts in the Eighth Circuit apply the four *Dataphase* factors to determine whether a preliminary injunction should be granted. The factors are: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 112-13 (8th Cir. 1981). Plaintiffs have the "complete burden" to prove that the *Dataphase* factors support the issuance of a preliminary injunction. *Geico Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987); *see also Davis v. Francis Howell Sch. Dist.*, 104 F.3d 204, 205-06 (8th Cir. 1997) ("The party seeking the injunction has the burden of establishing these factors."). In this case, Plaintiffs' burden is "heavy" because "granting the preliminary injunction will give [Plaintiffs] substantially the relief [they] would obtain after a trial on the merits." *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991).

[2] *See* Argument Section I, *infra*.

ARGUMENT

I. PLAINTIFFS HAVE NOT PRODUCED EVIDENCE UPON WHICH A PRELIMINARY INJUNCTION MAY BE ISSUED.

A party requesting a preliminary injunction must present evidence indicating that they are clearly entitled to such drastic relief. At this stage, affidavits constitute proper evidence, as do verified pleadings. *See, e.g., Wounded Knee Legal Def./Offense Comm. v. Fed. Bureau of Investigation*, 507 F.2d 1281, 1287 (8th Cir. 1974) (stating that affidavits are proper evidence); *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088–89 (9th Cir. 1972) (stating a verified complaint or affidavits may support a preliminary injunction); *Eyler v. Babcox*, 582 F. Supp. 981, 986 (N.D. Ill. 1983) (denying a preliminary injunction for lack of verified pleading or affidavit); *Brooklyn Nat. League Baseball Club v. Pasquel*, 66 F. Supp. 117, 119–20 (E.D. Mo. 1946) (relying on verified complaint and affidavits in granting preliminary injunction). As a general rule, if the only evidence presented in support of a motion for preliminary injunction is written evidence, and a fact dispute remains after that evidence is considered, the motion should be denied. *See, e.g., Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (noting that issuing an injunction based solely on affidavits is undesirable and should not be done when factual disputes remain); *Gen. Elec. Co. v. Am. Wholesale Co.*, 235 F.2d 606, 609 (7th Cir. 1956) (stating that a preliminary injunction should not be awarded based on affidavits alone, except in "a very clear case"); *United Centrifugal Pumps v. Cusimano*, 708 F. Supp. 1038, 1042 (W.D. Ark. 1988) (noting an injunction supported by disputed written evidence should be denied), *aff'd* 889 F.2d 1090 (8th Cir.

1989). Where there is conflicting evidence, a court is justified in finding that an allegation does not support preliminary injunctive relief. *Minn. Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1327 (8th Cir. 1973). Plaintiffs have produced only the allegations in the Complaint and exhibits.

Plaintiffs apparently intend to have the Court consider the allegations in the Complaint as evidence in support of their motion, as they claim to have filed a verified Complaint. However, in order for a complaint to be verified, a plaintiff must either swear to its veracity or sign and date a written statement attesting to the fact that the complaint is true, under penalty of perjury. *See* 28 U.S.C. § 1746; *Roberson v. Hayti Police Dep't*, 241 F.3d 992, 995 (8th Cir. 2001). Plaintiffs have not properly used either method to verify this Complaint because they have failed to identify themselves in either the Complaint or their signatures. A "penalty of perjury" has little deterrent value when not attached to a known individual who could face consequences. Courts have noted "the dangers with permitting a party to proceed anonymously," including witnesses who fail to authenticate sworn affidavits or establish that they are the plaintiffs they purport to be. *Valdez v. Town of Brookhaven*, No. 05-CV-4323 JSARL, 2005 WL 3454708, at *3 (E.D.N.Y. Dec. 15, 2005). In the absence of a verified complaint or sworn affidavits, there is simply no evidence upon which to grant Plaintiffs' motion.

At a minimum, the anonymously verified complaint ought to be accorded less weight than a declaration of a known individual, such as the High School Principal. Principal Lisa Perkovich has declared, under penalty of perjury, certain facts that contradict the Complaint. The existence of such factual disputes weighs heavily against

the issuance of a preliminary injunction, especially where the purported Plaintiffs are unknown. In the face of conflicting written evidence, a preliminary injunction should be denied. *United Centrifugal Pumps*, 708 F. Supp. at 1042 (stating that "a motion for a preliminary injunction supported only by written evidence usually will be denied when the facts are in dispute").

II. PLAINTIFFS LACK STANDING TO SEEK A PRELIMINARY INJUNCTION.

Standing is a threshold question for all litigation because it determines whether a court has jurisdiction to consider the merits of an action. To seek injunctive relief, Plaintiffs must show they are "under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). If Plaintiffs lack standing, their motion for preliminary injunction must be denied. *E.g., Nails Const. Co. v. City of St. Paul*, Civ. No. 06-2657 (JNE/SER), 2007 WL 423187, at *5 (D. Minn. Feb. 6, 2007) (denying motion for preliminary injunction due to lack of standing).

A. The only properly identified Plaintiffs are Privacy Matters and Parent A.

To determine whose standing is relevant to the issuance of an injunction, the Court must first identify the proper parties. Federal Rule of Civil Procedure 10(a) states "[t]he title of the complaint must name all the parties." The title of Plaintiffs' verified

Complaint states that the Plaintiffs are "PRIVACY MATTERS, a voluntary unincorporated association; and PARENT A, president of Privacy Matters." Doc. 1 at 1. Naming a plaintiff in the body of a complaint, but not in the caption, violates this rule. *E.g. Kedra v. City of Philadelphia*, 454 F.Supp. 652, 657 n.1 (E.D. Pa. 1978).

Within the Complaint, Paragraph 13 refers to "Girl Plaintiffs A, B, D, E, and F" and Paragraph 14 asserts that Parents A, B, D, E and F "are Plaintiffs in their own rights." The Complaint further implies that there are "Student Plaintiffs" and "Boy Plaintiffs" who are members of Privacy Matters, in addition to the pseudonymously identified "Girl Plaintiffs" and their parents. Doc. 1, ¶ 17. Based on the Federal Rules of Civil Procedure, the only properly identified plaintiffs in this action, and therefore the only plaintiffs relevant for the preliminary injunction motion, are the Privacy Matters group and Parent A as President of Privacy Matters.

B. Parent A does not have standing because Parent A is not under imminent threat of suffering an injury in fact.

"Parent A" is the only individual Plaintiff identified in the caption. Parent A is the parent of Student A, who no longer attends school in the District. Doc. 1, ¶¶ 14, 15. Although Parent A is apparently a pseudonym, Plaintiffs did not seek permission from the Court to use a pseudonym, as is the appropriate practice. *Larsen v. Larsen*, Civ. No. 10-4728 (JNE/SER), 2012 WL 876786 at *1, n. 1 (citing Tenth Circuit decision requiring a petition for permission to proceed anonymously). Paragraph 16 of the Complaint purports to allege a basis for keeping the Students' identities confidential, but "fear of retaliation" is not the standard applied in the District of Minnesota, nor is it a reasonable

basis on which to protect the identity of Parent A, especially here where she has withdrawn her daughter from the District. *See, e.g., Luckett v. Beaudet*, 21 F.Supp.2d 1029, 1029 (D. Minn. 1998) (referring to the "strong presumption" against using pseudonyms and the public's First Amendment interest in knowing who is using the court system and identifying the factors considered when granting a motion to proceed anonymously).[3] Although the question has not been decided by the Eighth Circuit, the Sixth and Tenth Circuits hold that there is no jurisdiction over unnamed parties who do not seek permission to file under a pseudonym. *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 637 (6th Cir. 2005) (citing *Nat'l Commodity & Barter Ass'n v. Gibbs*, 866 F.2d 1240, 1245 (10th Cir. 1989)).

There is no imminent injury-in-fact to Parent A because Student A no longer attends school in the District. The only claim against the District that relates to an alleged violation of Parent A's rights is the fourth cause of action alleging interference with a parent's right to direct the upbringing of the parent's children, but again, there is no imminent threat to Parent A's rights because Student A is not subject to the District's policies.

[3] At this time, the District has not filed a motion regarding the propriety of the caption. However, the true identities of Parent A and the other pseudonymously identified students and parents in the Complaint are not known to the District. The District's counsel has advised Plaintiffs' counsel that such information is required by Rule 10(a), and as a purely practical matter, the District needs to know the identity of the individuals in order to investigate and respond to the Complaint. Plaintiffs' counsel have refused to provide this information unless the District agrees to an onerous protective order that inhibits the District's ability to fully investigate the allegations.

Plaintiffs have the burden to show that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Parent A cannot come close to meeting this standard and has no standing to be a Plaintiff in this case.

C. Privacy Matters does not have associational standing.

Privacy Matters is a "voluntary unincorporated association." Doc. 1, ¶ 10. Minnesota has adopted a statute that contravenes the ordinary common law rule that unincorporated entities have no legal rights independent of their members. *Minn. Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1049 (8th Cir. 2002). An unincorporated association derives its rights from the rights of its members, including rights sufficient to confer standing. *Id*.

An association has standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). "[E]ach of these three requirements must be met in order to establish representational standing." *Minn. Federation of Teachers v. Randall*, 891 F.2d 1354, 1358-59 (8th Cir. 1989).

Plaintiffs failed to identify sufficient facts to determine whether the members of Privacy Matters have standing to sue in their own right with respect to the injunction. The Complaint does, however, establish that several members of Privacy Matters would not have standing to seek a preliminary injunction because they do not face an actual or

imminent threat of irreparable harm. As previously outlined, Student A and Parent A lack standing to pursue an injunction. Similarly, Student F no longer attends school in the District, meaning that she and her parents lack standing. *See* Doc. 1, ¶ 15. To the extent there are male students who are members of Privacy Matters, there is no claim that they face an actual or imminent threat of irreparable harm because there are no claims related to them.

Even more significantly, the Court cannot determine whether Privacy Matters has standing because Plaintiffs have not identified the organization's purpose. In *Minnesota Federation of Teachers*, the Eighth Circuit looked at the organization's charter to determine its purpose and noted "nothing in the complaint or record demonstrates how these . . . interests are germane to the organization's specifically stated purposes." 891 F.2d at 1359. Since Plaintiffs bear the burden of proof to establish standing, their failure to plead this essential element is fatal to their request for preliminary relief, and this motion must be denied. *See Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) (holding "if a plaintiff lacks standing, the district court has no subject matter jurisdiction").

III. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS AGAINST THE DISTRICT.

A. Regardless of the federal law, the District cannot discriminate against students on the basis of gender identity.

Independent of the question of the enforceability of the Federal Defendants' position, the District is subject to state laws that prevent the District from discriminating against transgender students. The Minnesota Human Rights Act ("MHRA"), Minnesota

Statutes Chapter 363A, protects individuals from discrimination on the basis of sex and sexual orientation. Unlike the federal regulations discussed by Plaintiffs, the MHRA specifically includes gender identity as a protected class because "sexual orientation," is defined to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. §§ 363A.03, subd. 44 (definition of sexual orientation); 363A.13 (prohibiting an educational institution from discriminating against a person on the basis of sexual orientation).

Plaintiffs seek to have the District prohibit Student X from accessing locker rooms and restrooms because Student X's self-image or identity does not conform to her biological maleness. However, the District is specifically prohibited from discriminating against Student X on this basis, which includes "segregat[ing] or separat[ing]" the student. *See* Minn. Stat. §§ 363A.03, subd. 13 (defining "discriminate"); *see also* 363A.13.

Although the MHRA contains an exception permitting sex-specific restrooms and locker rooms in places of public accommodation, this exception is not applicable to the claims in this case because schools are not included in the definition of "places of public accommodation." *See* Minn. Stat. § 363A.24, subd. 1 (stating the anti-discrimination provisions do not apply to "such facilities as restrooms, locker rooms, and other similar places"). "Public accommodations" are only defined to include "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind." Minn. Stat. § 363A.03, subd. 34. Under the MHRA, schools are defined as "educational institutions," and are subject to different provisions than places of public

accommodation. Minn. Stat. § 363A.03, subd. 14. Moreover, even though the MHRA permits the use of *sex*-segregated facilities for places of public accommodation, it does not permit segregation on the basis of *sexual orientation*, which includes gender identity.

The Minnesota Supreme Court has held that Minnesota employers are free to determine whether to define sex-specific restrooms by biological sex or gender identity. *See Goins v. West Grp.*, 635 N.W.2d 717, 723 (Minn. 2001) (holding "the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological [sex]"). Under this standard, the District's decision to define its sex-specific facilities on the basis of gender identity is compliant with Minnesota law.

However, no court has extended the permissive *Goins* standard to entities beyond employers. Employers are prohibited from discriminating "with respect to . . . conditions, facilities, or privileges of employment." Minn. Stat. § 363A.08, subd. 2(3). Educational institutions, on the other hand, are prohibited from discriminating "in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby . . ." Minn. Stat. § 363A.13, subd. 1. Educational institutions are therefore subject to a broader "any manner" standard, and *Goins* is not dispositive of a school's obligation to avoid discrimination on the basis of gender identity. A future Minnesota court could reasonably hold that a practice of requiring students to use restrooms consistent with biological sex constitutes sexual orientation discrimination by an educational institution.

Moreover, the District is subject to the policies of the Minnesota State High School League ("MSHSL"). The MSHSL "allows participation for all students

consistent with their gender identity or expression." Helmers Decl., Ex. A p. 5 (MSHSL Bylaw 300.0, subd. 4A). A student is eligible to participate on a team consistent with her gender identity after presenting evidence that "the student has a consistent gender identity or that the gender identity is sincerely held as part of the student's core identity and the gender identity is different from the student's sex assigned at birth." *Id*. at subd. 4B. Although the MSHSL does not provide rules on locker rooms or restrooms, it appears discriminatory on its face to determine that Student X may participate in girls' athletics, but not use the locker room with her team. Such a standard would undoubtedly require the District to "separate or segregate" transgender students from their same gender-identity teammates in a manner prohibited by the MHRA.

Plaintiffs are unlikely to succeed on the merits of their claims against the District because the District has acted in reasonable reliance upon applicable state statutes, and may not discriminate against students on the basis of their gender identity.

B. The District's policy does not violate Title IX.

In seeking preliminary relief, Plaintiffs have narrowed their Title IX claims against the District to assert only that the District's policy "excludes" students from educational programs, and that it creates a sexually harassing hostile environment. Doc. 14 at 24-25. Plaintiffs are unlikely to succeed on either of these claims.

Notably, Plaintiffs' entire argument relies on their belief that the Court will find the Federal Defendants' definition of "sex" as including gender identity to be improper. If the Court concludes that "sex" includes gender identity, then Plaintiffs will have failed

to state a Title IX claim because the Students are not required to share facilities with a person of the opposite sex.

Independent of the definition of the term "sex," Plaintiffs have no likelihood of success on the merits of their Title IX claims. To state a claim for sex discrimination under Title IX, Plaintiffs must allege that they were "excluded from participation" in an education program "because of [their] sex." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 680 (1979).

1. The policy does not "exclude" Plaintiffs from educational programs.

Plaintiffs claim Students are "excluded" from "instructional classes, athletic teams, locker rooms, and restrooms" on the basis of their sex because Student X is allowed to use girls' locker rooms and restrooms. Doc. 14 at 24. Contrary to this claim, Students have full access to all instructional classes, athletic teams, girls' locker rooms, and girls' restrooms in the school. Perkovich Decl. ¶ 28. There is no allegation that the District's policies have prohibited Students from accessing any of these programs or facilities. Rather, Plaintiffs allege that Students are *constructively* excluded when they *choose* not to participate on a sports team or use a locker room or restroom to which Student X also has access. *See* Doc. 14 at 24 (stating the policy "effectively excludes" Students).

Plaintiffs fail to explain how the District's policy caused them to suffer these alleged losses rather than the Students' response to the policy. But, even if they had, none of the alleged harms amount to a deprivation of educational benefits. Because of

the size and configuration of the school, all students may miss a small amount of class time in order to use the restroom in between classes. Perkovich Decl. ¶ 9. Plaintiffs have not alleged that the amount of class or athletic time they missed was anything more than the *de minimis* amount of time any student might miss to attend to personal needs during the school day.

Title IX and its implementing regulations do not define the term "exclude" and Plaintiffs do not cite any case law to support their position that Students' voluntarily choice not to access facilities or programs constitutes exclusion on the basis of sex. When a statute is plain and unambiguous, courts construe its language based on its ordinary meaning. *E.g. Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n. 29 (1978). The plain meaning of "exclude" is "prevent from entering; keep out; bar." *Am. Heritage Dictionary of the English Lang*. 619 (5th Ed. 2011). The District has not "prevented" Students from participating in any activities or "barred" them from any facilities.

It is undisputed that the District made alternative restrooms or locker rooms available upon request. It is also undisputed that the District did not prohibit any student, including Student A, from attending school because she disagreed with the policy. Nor did the District prevent Students from using the restroom. Simply, there is no conduct *of the District* that deprived Students of educational opportunities.

Because the District has not excluded Plaintiffs, as required to support a Title IX claim, the preliminary injunction must be denied. Plaintiffs cannot succeed on the merits

of their claims by voluntarily choosing to avoid activities or facilities because they refuse to be in the same room as a transgender student.

2. Even if the policy "excludes" Students, it does not do so on the basis of sex.

At its core, Title IX prohibits sex discrimination. Plaintiffs must be able to demonstrate that they suffered discrimination because of Students' sex, and not some other reason. Here, there was no discrimination based on Students' sex, and they seek to require the District to discriminate against transgender students on the basis of their sex.

As an example of this requirement, in *Frazier v. Fairhaven School Committee*, 122 F. Supp.2d 104, 112 (D.Mass. 2000), the plaintiff complained that a school employee "did peek, leer, and stair [*sic*] throughout [*sic*] the performance of [the student's] bodily function" and that this violated Title IX. The court held that this alleged conduct did not violate Title IX, notwithstanding the plaintiff's discomfort. The court reasoned that the employee was a "discipline matron" and the plaintiff provided no "allegation showing that [the employee] looked into the plaintiff's stall because she was a female rather than because it was her job to inspect the girl's rooms." *Id.* Here, the District has decided to allow transgender students to use restrooms and locker rooms consistent with their gender identity in compliance with guidance from the Federal Defendants and the MHRA, not because of any animus toward female students.

Plaintiffs claim that the discrimination is on the basis of sex because the policy authorizes Student X to access private facilities "specifically because they are restricted to use by girls only." Doc. 14 at 26. Not only is this assertion nonsensical, but it

demonstrates the improper emphasis on Student X's sex in Plaintiffs' analysis rather than the sex of the Students. The policy was plainly not adopted for the purpose of treating Students differently because of their identity as female. In fact, the policy equally applies to male students. The mere fact that a transgender girl is utilizing the policy does not demonstrate that the policy targets other female students because of their sex.

3. Plaintiffs are unlikely to succeed on their hostile environment claim.

Deliberate indifference to student interactions that create a hostile environment may constitute sex discrimination for purposes of Title IX, but it is a high burden to prove. *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 633 (1999). To succeed on a Title IX claim for harassment, a plaintiff must show (1) harassment on the basis of sex that was (2) so severe, pervasive, and objectively offensive that it effectively deprived her of access to educational benefits and opportunities; and (3) that the school had actual knowledge of the harassment and (4) acted with deliberate indifference to the known acts of harassment. *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 864 (8th Cir. 2011). Plaintiffs have failed to plead facts sufficient to meet this high burden.

Since Plaintiffs have specifically pled a Title IX *harassment* claim separate from their exclusion claim, they must satisfy these elements by proving that there was harassment. Plaintiffs' attempt to instead rely on the District's policy as the basis for a harassment claim is misleading and insufficient under the law.

a. Students have not been subjected to severe, pervasive, or objectively offensive conduct on the basis of their sex.

Although Plaintiffs have claimed Student X engaged in sexually harassing behavior toward them, the allegations do not come close to the "severe, pervasive, or objectively offensive" standard required by Title IX. When Plaintiffs' allegations are stripped of their inflammatory and coded rhetoric, they reveal only situationally appropriate behavior or, at most, typical teenage behavior.[4] For example, Plaintiffs' alleged that a student commented on bra size and offered to trade body parts, a student danced in a locker room, a student was in her underwear in a locker room, a student changed clothes next to other students in a locker room, and a student entered a locker room while other students were in their underwear. *See* Doc. 1, ¶ 42. Teenagers sometimes make comments about their bodies, dancing is not prohibited and is not unusual in locker rooms, and locker rooms are designated spaces in which students undress.[5] Although Students appear to be equally concerned about restrooms, there are no allegations of harassment occurring in the restrooms.[6]

[4] The District does not concede that any of these allegations are true; however, solely for the purpose of this argument, the District will assume they are true.

[5] Despite Plaintiffs' concerns about modesty and privacy, the Complaint implies one or more Students observed Student X while she was undressed. Plaintiffs apparently do not extend their beliefs on privacy to other students, as they decided to use a publicly filed Complaint to identify the style of underwear Student X wears. *See* Doc. 1 at ¶ 154.

[6] Despite attempts to characterize the District's policy as the source of harassment, Plaintiffs ignore that the alleged harassment occurred *outside* the locker room. *See, e.g.*, Doc. 1 at ¶¶ 224-225 (referring to incidents "outside in the gym"). The allegations of incidents outside the locker room demonstrates that the injunctive relief requested by Plaintiffs will not remedy the alleged harms.

i. Plaintiffs have not alleged a hostile environment based on sex.

Harassment in violation of Title IX must be "on the basis of sex." *Wolfe*, 648 F.3d at 866. The alleged hostility that Plaintiffs claim to experience is not because of Students' sex. Any discomfort that Plaintiffs allege is not the result of conduct that is directed at them because they are female, and instead seems to be based on their own internal discomfort with transgender students.

There is no allegation Student X seeks access to the girls' facilities out of animus against females or that the District's decision to allow access was motivated by animus against females. Nor is there an allegation that Student X seeks to access the girls' facilities in order to engage in inappropriate sexual advances. Rather, Plaintiffs' own allegations confirm that their alleged discomfort is exclusively a function of Plaintiffs' belief that Student X is male, not because of any hostility directed at Students because of their own sex. Because they do not allege that any allegedly harassing behaviors were directed at them because of their sex, Plaintiffs are unlikely to succeed on their Title IX claims.

ii. Any alleged harassment was not severe or pervasive.

Under Title IX, an action "will lie only for [sexual] harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to educational opportunity or benefit." *Davis*, 526 U.S. at 633. Plaintiffs cannot meet this high standard.

Plaintiffs allege the harassment is severe and pervasive because it "impacts [Students] every time they use a school locker room or restroom" and because "some

[Students] have manifested severe emotional distress." Doc. 14 at 26. Plaintiffs correctly cite *Davis* as describing the "severe, pervasive, and objectively offensive" standard, but offer no authority in support of their position that the conduct in this case meets that high standard.

Plaintiffs' claim that they are subjected to harassment "every time" they use a sex-specific facility is plainly not supported by the allegations in the Complaint. At most, Plaintiffs have identified a few isolated incidents that occurred either inside or outside the locker room in which Student X's conduct made them uncomfortable because she was changing or dancing.[7] They have identified no harassment that took place in restrooms.

The Supreme Court cautions courts to recognize that "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Davis*, 526 U.S. at 651. Title IX therefore does not apply to "simple acts of teasing and name-calling among school children, even where these comments target differences in gender." *Id*. at 652. None of the allegations in Plaintiffs' lengthy Complaint allege anything more than ordinary conduct of teenage girls that Plaintiffs' almost certainly would not have complained about but for the fact that it was a transgender student who allegedly took these actions.

Even if Plaintiffs had identified any incidents that theoretically constituted harassment, isolated individual incidents are not "severe or pervasive enough to create a

[7] Student F claims Student X asked her and others about their bra sizes and asked her to "trade body parts." Doc. 1 at ¶¶ 224-25. Student F no longer attends school in the District and therefore Privacy Matters lacks standing to bring a request for a preliminary injunction on her behalf. *See* II. A., *supra*.

hostile educational environment." *Lam v. Curators of the Univ. of Missouri at Kansas City Dental Sch.*, 122 F.3d 654, 656-57 (8th Cir. 1997). In *Lam*, a single incident of showing an instructional film containing sexual innuendo was insufficient to reach this standard. *Id*. Unlike Lam, who was required to watch the film as part of a class, Plaintiffs have alleged no sexual comments or conduct that they were required to view or participate in; instead they claim only that Student X danced in the locker room, and provide no explanation for why Students could not have simply looked away from the dancing. Even if the music was "sexually explicit," Plaintiffs bear the burden of demonstrating that the *conduct* was based on sex, and not "merely tinged with offensive sexual connotations." *Wolfe*, 648 F.3d at 866 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998)).

Plaintiffs have failed to allege any sexually harassing conduct directed toward them because of their sex that is severe and pervasive. The allegations in the Complaint are insufficient to meet this high bar, and Plaintiffs are therefore unlikely to succeed on their claim.

iii. Any alleged harassment was not objectively offensive.

A transgender student's use of school facilities is not "objectively offensive" within the meaning of Title IX. Plaintiffs assert that the harassment is objectively offensive "because it puts a teenage girl in a situation where she must sacrifice privacy to pursue an education or participate in athletics." Doc. 14 at 26. Plaintiffs cite no authority that a purported sacrifice of privacy constitutes objectively offensive conduct pursuant to Title IX. The facts pled in this case are far from the types of conduct courts have found

objectively offensive. *See Davis*, 526 U.S. at 653 (plaintiff's allegations of inappropriate touching and sexually suggestive rubbing were objectively offensive); *Bruning ex rel. v. Carrol Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (repeated acts of touching and sexual groping were objectively offensive).

The allegations in this matter do not even rise to the level of the actions in *Johnson v. Independent School District No. 47*, 194 F. Supp.2d 939 (D. Minn. 2002), which were held not to be objectively offensive. In *Johnson*, several students asked a female student about masturbation approximately twenty times over a period of three months, and captioned a photograph of her in the yearbook with a reference to masturbation. *Id*. at 941. The Court concluded that this conduct was not objectively offensive, particularly in light of the lack of physical contact. *Id*. at 946. In analyzing cases from other circuits, the Court highlighted the extreme nature of conduct that rises to the level of objectively offensive, noting:

> The events in this case must be viewed in the context of other cases where Title IX claims have been sustained. *See, e.g.*, *Vance v. Spencer County Public School District*, 231 F.3d 253, 259 (6th Cir.2000) (female student was repeatedly propositioned, groped, threatened, stabbed in the hand; student-perpetrator removed her shirt, pulled her hair, took his pants off and told her he would have sex with her); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248–49 (10th Cir.1999) (disabled female student was sexually assaulted; the incident was discovered by a school-janitor who saw the perpetrator assaulting the victim in a secluded area; the janitor told the students to clean up the blood and vomit, returned them to class, told the teacher what happened, and the teachers merely tied clothing around the victim's waist to cover the blood on her clothing, and told the victim not to tell her mother and to forget it ever happened); *Soper v. Hoben*, 195 F.3d 845, 854–55 (6th Cir.1999) (female

> student was raped, fondled, and harassed by male classmate at school).

Id. at 946 n.3. Plainly, Students' feelings of discomfort in sharing spaces with Student X do not meet the high bar for objectively offensive conduct.

Plaintiffs have, at most, asserted that they are subjectively offended by Student X's presence in the girls' locker rooms and restrooms.[8] Their offense is based solely on their belief that Student X is male, despite her continuous presentation as female. The District's decision to define sex-specific facilities based on gender identity that is based on applicable laws, its own policies on harassment and discrimination, and federal guidance cannot create an objectively offensive environment merely because it inconsistent with Plaintiffs' subjective beliefs on gender.

iv. Plaintiffs cannot show that any harassment deprived them of access to educational benefits and opportunities.

A Title IX hostile environment claim also requires Plaintiffs to show they were deprived of access to educational benefits and opportunities. *Wolfe*, 648 F.3d at 864. Plaintiffs have exclusively focused on claiming that the District's policy denied them access to educational benefits. By focusing on the consequences of the policy, Plaintiffs ignore that the real issue they need to prove is that harassment resulted in a deprivation of educational opportunities. Plaintiffs do not allege that any specific harassment resulted in their decisions that allegedly deprived them of access to educational benefits.

[8] The subjective nature of their belief is highlighted by the fact that the majority of the students change in the main girls' locker room when Student X is present. *See* Doc. 1, ¶ 143 (alleging "nearly half of the girls' junior varsity basketball team changed in the secondary locker room").

b. The District did not have actual knowledge of peer harassment.

To find a school liable for peer to peer harassment, a school must have actual knowledge of the harassment. Although the District had knowledge that certain parents were uncomfortable with the policy, the District received no specific complaints of behavior that amounted to harassment. Perkovich Decl., ¶ 26. Plaintiffs allege that Parent A told the District she did not want her daughter using a locker room with a "male" student, that Student X engaged in "lewd" dancing, and made "rude comments" to her daughter. Doc. 1, ¶ 162-63. Nothing in this report rises to the level of providing the District with actual knowledge of severe and pervasive harassment based on sex. A teenage girl making rude comments about another girl is hardly novel or outrageous conduct that would have put the District on actual notice of harassment.

c. The District was not deliberately indifferent to harassment.

A critical element necessary for a Title IX harassment claim requires Plaintiffs to establish that the District was "deliberately indifferent" to sex discrimination. To satisfy this standard, the institution's actions must be "clearly unreasonable" and, "at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645. An institution's liability is therefore limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known [sexual] harassment occurs." *Id*. As the Supreme Court has recognized, dismissal of a Title IX claim is appropriate when an institution's alleged response is "not clearly unreasonable as a matter of law." *Id*. at 649 (internal quotations omitted).

Based on the circumstances known to the District, its decisions were reasonable. The District knew Student X was transgender. The District knew Federal Defendants had taken the position that transgender students were entitled to use facilities consistent with their gender identity, and that they had taken a strict stance indicating they were willing to revoke federal funding for districts that did not comply. The District knew the MHRA specifically prohibited discrimination on the basis of gender identity. Regardless of the ultimate outcome of any litigation over the Federal Defendants' position, it cannot be unreasonable for the District to comply with guidance from federal institutions to mitigate against the risk of losing federal funding. Nor can it be unreasonable for the District to rely on *Goins*, the only analogous Minnesota case, which permitted employers to designate sex-specific facilities based on gender identity. The District also made accommodations for students who requested additional privacy.

The District acted reasonably in its efforts to maintain privacy and respect for all students in the District. Its efforts at accommodation plainly do not amount to deliberate indifference and Plaintiffs are unlikely to succeed on their Title IX claims.

C. The District's policy does not violate the Students' "fundamental right to privacy."

Plaintiffs cannot succeed on their claim that the District's policy violates their constitutional right to privacy because their argument is both factually and legally flawed. Plaintiffs allege that the District has violated a substantive due process right to shield their bodies and private activities from the opposite sex by allowing a transgender female student to use the same multi-occupant restrooms and locker rooms that cisgender female

students use. There are three main problems with this argument: (1) there is no constitutionally guaranteed right to bodily privacy in front of a member of the opposite sex, (2) it is not clear that a transgender female student is properly considered a member of the opposite sex under the law, and (3) the District's actions do not compel any students to give up this supposed right.

1. The purported right to privacy does not exist.

Plaintiffs imagine a broad right to personal privacy that does not exist under the United States Constitution. In fact, there is no generalized "right to privacy." *See Katz v. United States*, 389 U.S. 347 (1967). Rather, substantive due process protects certain personal privacy rights that are "fundamental" or "implicit in the concept of ordered liberty." *Roe v. Wade*, 410 U.S. 113, 152 (1973); *See also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (stating that substantive liberties, including all fundamental rights encompassed by the term "liberty" are protected). The rights encompassed by substantive due process are few. *Id.* They include the right to make decisions relating to one's own intimate relationships, familial relationships, and bodily integrity. *E.g.*, *Casey*, 505 U.S. at 849.

The substantive due process right to bodily integrity is not nearly as extensive as the right that Plaintiffs ask this Court to recognize. Plaintiffs cite no authority that supports the existence of a blanket constitutional right to "shield one's body and private activities from view by the opposite sex," because no such authority exists. Plaintiffs not only claim that such a right is protected by the Constitution, but allege that this right begins "at the doorway" to all spaces "where people are engaged in activities that they

are 'self-conscious' or 'uncomfortable' attending to in the presence of the opposite sex." Doc. 14 at 28-29.

To support their claim that such a right exists, Plaintiffs cite to three substantive due process cases from other jurisdictions that do not address school issues: *York v. Story*, 324 F.2d 450 (9th Cir. 1963), *Doe v. Luzerne Cnty.*, 660 F.3d 169 (3d Cir. 2011) and *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002). Each of these cases is readily distinguishable.

Plaintiffs cite to *York* because it states that a "desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex" is natural. However, *York* characterized the right at issue in that case as "the security of one's privacy against arbitrary intrusion by the police," and held that this right was violated when a police officer insisted upon taking unnecessary nude photographs of an individual, in sexually provocative positions, and then distributed those pictures amongst his fellow government employees. Similarly, the plaintiff in *Poe* was manipulated into removing her clothing and was filmed nude from the waist up by a police officer, against her will. In *Doe*, the plaintiff was surreptitiously filmed by a sheriff's deputy while nude in a decontamination shower. Compelling an individual to take nude pictures, or taking nude video without consent, is a significantly more substantial privacy violation than what Plaintiffs allege they are required to do: undress and use the restroom in proximity to another student. Notably, all of these cases involve an intrusion by a member of the opposite sex cloaked with state authority as a police officer. There is no assertion that

any purported invasion of privacy to Students involves any member of the opposite sex cloaked with governmental authority.

To support the existence of such a broad constitutional privacy right, Plaintiffs quickly, and conspicuously, leave constitutional case law behind to cite to a Pennsylvania state court case, *Livingwell (North) Inc. v. Pa. Human Relations Com'n*, and two federal district court decisions related to employment discrimination. 147 Pa. Commw. 116 (1992). The use of these cases betrays the lack of support for Plaintiffs' argument. The employers in all the cases cited by the Plaintiffs are private entities that wished to discriminate on the basis of sex[9] when hiring, and were allowed to do so because a desire to make customers comfortable in locker rooms and bathhouses by hiring only members of the same sex was deemed reasonable. *Norwood v. Dale Maint. Sys. Inc*., 590 F. Supp. 1410 (N.D. Ill. 1984); *Brooks v. ACF Indus., Inc.* 537 F. Supp. 112 (S.D. W. Va. 1982); and *Livingwell*, 147 Pa. Commw. 116. The decisions did not *require* a division of the sexes, nor do they touch upon the regulation of public entities or the educational setting. *Id.* The fact that private employers may legally discriminate based on sex/gender when hiring employees to work in locker rooms or gyms that are segregated by sex is irrelevant to the question of whether there is a constitutional right to privacy from a non-state actor member of the opposite sex.

[9] Although the District uses the term "sex" to discuss this case, it is important to note that these cases do not define the term or indicate how an individual's gender identity might impact the rulings.

2. There is no individual of the opposite sex involved.

Even if we assume that Plaintiffs have correctly interpreted the Constitution as stating that the government may not force them to expose their bodies to a member of the opposite sex, it is far from clear that a transgender girl is properly considered a "member of the opposite sex." Student X has a gender identity that aligns with those of the Plaintiffs, and "sex" is not clearly defined in this context.

Many arguments support a determination that "sex" does, in fact, include "gender identity." Not only have the Federal Defendants issued guidance explicitly stating that "sex" includes gender identity for the purposes of the regulations they enforce,[10] but there is also a significant body of case law under Title VII that illustrates the analytical progression that has led courts to interpret that statute's sex discrimination protections to include protection for gender identity discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that Title VII protects against sex discrimination in the form of sex stereotyping); *see also Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (applying *Price Waterhouse* to protect transgender individual from discrimination); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (stating that "sex" under Title VII encompasses both sex and gender); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-CV-00388 JAD/PAL, 2016 WL 5843046, at *6-7 (D. Nev. Oct. 4, 2016) (reviewing precedent from multiple circuits and determining that gender identity discrimination is sex discrimination); *Rumble v. Fairview Health Servs., Inc.*, Civ. No.

[10] To the extent applicable, the District incorporates the arguments of the Federal Defendants in defending their interpretation of the term "sex."

14-2037 (SRN/FLN), 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) (recognizing "transgender status is necessarily part of [one's] 'sex' or 'gender' identity" and therefore *Price Waterhouse* prohibits discrimination on that basis). The District agrees with Plaintiffs that Title VII jurisprudence is applicable to Title IX claims, *see* Doc. 14 at 12 n. 2, but notes that Plaintiffs willfully ignore the post *Price Waterhouse* cases and instead rely on outdated precedent holding that gender identity is not protected by Title VII. *See Radtke v. Misc. Drivers & Helpers Union*, 867 F.Supp. 2d 1023, 1032 (D. Minn. 2012) (noting that the "narrow view of the term 'sex' . . . has been eviscerated by *Price Waterhouse*") (internal quotations and citation omitted).

Student X is properly considered a member of the female "sex" and, therefore, the Plaintiffs' alleged right to privacy has not been violated.

3. **The alleged violation of Plaintiffs' privacy was not caused by District action.**

In this case, Plaintiffs allege that a private transgender individual has and will share multi-occupant restrooms and locker rooms with them. Plaintiffs allege that her mere existence in a shared space constitutes a violation of their rights by the District because it allows her to use the girls' locker rooms and restrooms.

In order for a government entity to be responsible for the violation of an individual's constitutional rights, it must be government action that violates the right. *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589 (1977) Plaintiffs rely heavily on *York* to argue that the right to privacy covers this situation, but they ignore the fact that the use of police power was critical to Ninth Circuit's assessment in that case. 324 F.2d 450 (1963). That

opinion extensively discusses the fact that police engaged in the conduct in question, because the Constitution protects citizens against the government, but not against each other. In this case, the District has not acted in a manner that would violate Plaintiffs' purported privacy rights. The District authorized transgender students to use the main sex-segregated locker rooms and restrooms, but has not compelled any of the students to change or attend to their bodily needs in those same spaces. As previously outlined, there are numerous restroom and locker room options at varying levels of privacy that are available throughout the school.

D. The District's policy does not violate the Parents' right to control the upbringing of their children.

Plaintiffs allege that the District is violating their constitutional right to control and direct the upbringing of their children by allowing transgender students to access facilities that align with their gender identities. Plaintiffs claim that they have instructed their daughters about the importance of modesty in front of the opposite sex and allege that, by allowing a student who was born male to use the same restrooms and locker rooms, the District has impaired their right to continue to raise their children in accordance with these vales.

Once again, Plaintiffs attempt to expand the reach of a narrow constitutional right to cover this situation. Parents have a constitutionally protected right to control the upbringing of their children. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). However, this right has never been interpreted to allow private citizens to

change the policies of public educational institutions. On the contrary, it has historically been interpreted to allow parents to remove their children from a public educational institution and select a private institution, or school their children at home, in order to inculcate the children with their preferred values. *See Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995), *abrogated on other grounds by Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010);

For example, the Constitution protects a parent's right to teach their children that racial segregation is preferable. *Runyon v. McCrary*, 427 U.S. 160, 177 (1976). However, this right does not require, or entitle, a school to racially segregate its students in order to support such a viewpoint. *Id.* The Supreme Court has clearly stated that, simply because some parents wish to teach their children that such racial discrimination is not only permissible but positive, schools remain prohibited from doing so, and this prohibition does not violate this parental right. *Id.*

Once parents decide to send their children to public school, their constitutional right to control their child's education is limited to their right to remove the child from the school, and their right to teach them outside of school hours. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2006) (holding the right to control a child's education "does not extend beyond the threshold of the school door"). Parents "simply do not have the constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Swanson*, 135 F.3d at 699.

The District may regulate the use of its facilities, and has instituted the policy in question in order to accommodate all students. Parents' disagreement with school policy cannot be legitimately construed as a violation of their right to control their child's education. The fact that some parents have already removed their children from the school is not evidence of damage, as Plaintiffs claim, but rather shows that Parents remain capable of exercising their rights to control the upbringing of their children, as protected by the Constitution.

E. The District's policy does not violate the Plaintiffs' religious rights.

The District's approach does not implicate Students' rights to engage in the free exercise of religion, nor does it interfere with the guarantees of the Minnesota Constitution's freedom of conscience clause.

1. The District's policy does not violate the free exercise clause of the United States Constitution.

Plaintiffs claim that the District's policy impermissibly interferes with the students' right to the free exercise of religion, as guaranteed by the First Amendment, because it forces them to act in contradiction of those beliefs by changing clothes and using the restroom in proximity to an individual who they consider to be a member of the opposite sex. This claim is without merit.

The free exercise clause prohibits any governmental attempts to regulate sincerely held religious beliefs. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)). However, it does not afford the same level of protection to *actions* taken in accordance with those beliefs.

If such actions are impacted by the institution of a law or policy of general applicability that is neutral with respect to religion, the policy must only be rationally related to a legitimate government interest in order to be deemed permissible under the Free Exercise clause. *Smith,* 494 U.S. at 879. It is only when religious practices or groups are particularly targeted by a policy or law that heightened scrutiny applies. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993).

Plaintiffs have not claimed that the District policy was instituted as a means of targeting religion, and there is no evidence to support such a claim. The policy was instituted for completely secular reasons, is neutral with respect to religion, and applicable to all students. The District's policy is not intended to inhibit religion and does not prohibit the Plaintiffs from instructing their children in accordance with their religious beliefs, but rather supports the District's legitimate interests in protecting all students and regulating the use of its facilities in accordance with the law.

2. **The District's policy does not violate the freedom of conscience clause of the Minnesota Constitution.**

Plaintiffs also claim that the District's policy violates the freedom of conscience clause of the Minnesota Constitution. This clause has consistently been interpreted to afford "greater protection for religious liberties against governmental action than the first amendment of the federal constitution." *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn.1990). However, Plaintiffs' claims similarly cannot clear this evidentiary hurdle.

To determine whether government action violates the freedom of conscience clause, courts apply the *Hill-Murray* test. *E.g.*, *Hill-Murray Federation of Teachers v.*

Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). This test has four prongs: whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means. *Id*. (citing *Hershberger*, 462 N.W.2d at 398; *State v. Sports and Health Club*, 370 N.W.2d 844, 851 (Minn.1985)).

If a party's belief is not a sincerely held religious belief, it is not protected. Courts are entitled to "inquire as to whether a belief is held in good faith." *Id*. (citing *In re Jenison*, 125 N.W.2d 588 (Minn.1963)). Similarly, if a belief is not "burdened," by government action, then that government action is permissible, regardless of the sincerity of the belief. In order to establish that a sincere belief is "burdened," a party must demonstrate "that challenged provisions infringe on their religious autonomy or require conduct inconsistent with their religious beliefs." *Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 204 (Minn. App. 2008) (citing *Shagalow v. Minn. Dep't of Human Servs.*, 725 N.W.2d 380, 390-91 (Minn. App.2006)).

Plaintiffs do not specify the basis for their religious beliefs or provide any evidence that the exercise of those beliefs has been burdened by the District's actions. Whether the belief in modesty as applied to this situation is held "in good faith" is a fact question that the Court has not been provided sufficient evidence to answer.

However, assuming that the belief is sincere, it is not burdened by the District's policy because the policy does not compel "conduct inconsistent with [Plaintiffs'] religious beliefs." On the contrary, the District has repeatedly encouraged those who are

uncomfortable using the locker rooms and restrooms to speak with administration about accommodations. Those students have been offered alternatives and, in order to make it easier for all student to avail themselves of additional privacy, the District has fully remodeled its locker rooms to include numerous changing stalls and private showers, which will be available to the students before this Court hears Plaintiffs' motion.

Plaintiffs have failed to carry their burden to prove they are likely to succeed on the merits of their claims against the District and their motion for a preliminary injunction should be denied.

IV. PLAINTIFFS HAVE FAILED TO ESTABLISH A LIKELIHOOD OF IRREPARABLE HARM.

The failure to prove irreparable harm "is by itself, a sufficient ground on which to deny a preliminary injunction." *Geico Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). Plaintiffs' claim of irreparable harm is based solely on the flawed assertion that the District's policy violates a constitutional right. Doc. 14 at 32. As outlined at length above, no constitutional rights are being violated here. Thus, Plaintiffs have not carried their burden to prove irreparable harm, and the preliminary injunction must be denied.

Even if Plaintiffs later attempt to identify an irreparable harm that would result from their Title IX statutory claims, they are required to show a *likelihood* of irreparable harm, not merely a possibility. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The threat of irreparable injury necessary to justify the extraordinary remedy of preliminary injunctive relief must be "real," "substantial," and "immediate," and not

simply be the minor inconvenience of using a different facility. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

The District's new locker room facilities demonstrate that any alleged risk of irreparable harm does not exist. Any student may have access to a locked private stall to change or shower. Perkovich Decl., ¶ 19. In the unlikely event there is an insufficient number of private changing areas available, no student will be penalized for arriving late to class because she was waiting for access to a private stall. *Id*. at ¶ 20. If any student wishes to use a single-stall restroom, she may do so. *See id*. at ¶ 12. All students' privacy interests are respected under the status quo, and Plaintiffs have failed to demonstrate that they will suffer irreversible harm if a preliminary injunction does not issue. Their motion thus must be denied.

V. MAINTAINING THE STATUS QUO WILL NOT HARM STUDENTS, AND THE DISTRICT AND STUDENT X WILL BE HARMED IF THE INJUNCTION IS GRANTED.

The balance of harms clearly tips in favor of the District, as Plaintiffs have done nothing more than allege speculative harms. Notably, the District's new locker rooms permit any student access to a private, locked area to change, meaning that even the speculative harms alleged by Plaintiffs are no longer valid. It would be a significant expansion of the law to find that Plaintiffs have an unyielding right to bodily privacy in a school setting that is not adequately accommodated by the reasonable measures the District has put in place.

The harm to the District and Student X if an injunction is granted, on the other hand, would be significant. The District will have a student who consistently presents as

female and dresses in a stereotypical female manner entering the boys' restroom and locker rooms. The District has an obligation under the Family Educational Rights and Privacy Act ("FERPA") not to disclose personal information about students, including their transgender status, to those without a legitimate educational need to know the information. *See* 34 C.F.R. § 99.31(a)(1)(i)(A) (permitting disclosure to school officials with legitimate educational interests in the information); 34 C.F.R. § 99.3 (defining personally identifiable information). Should an injunction issue, the District will be forced to identify Student X as transgender in order to explain to students and staff why a student who presents as a girl is using the boys' facilities. Although Student X has been determined eligible to play girls' athletics, she will not be permitted to use a locker room with her female teammates—again requiring the District to identify her sex as different from her teammates. The District may then be forced to explain to opposing teams that it will need access to both a boys' and girls' locker room when the girls' basketball team plays away games, again requiring the District to divulge private information about Student X to those without a legal need to know that information.

Granting the preliminary injunction would not only require the District to violate FERPA, but the MHRA as well. As argued above, the District cannot discriminate "in any manner" on the basis of sexual orientation, including failure to conform to gender stereotypes. A preliminary injunction would place the District in the impossible position of choosing between violating this Court's Order and violating the MHRA, subjecting itself to multiplied damages and the payment of an aggrieved student's attorney's fees. *See Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995)

(holding trial court has discretion to multiply damages under MHRA); Minn. Stat. 363A.33, subd. 7 (permitting attorney's fees to successful MHRA plaintiff). Such harms to the District significantly outweigh any minor inconvenience the Students may face in waiting for an available privacy stall in which to change.

Plaintiffs attempt to support their lack of harms in this case by citing the Supreme Court's issuance of an injunction preserving the status quo in *Gloucester*, claiming that action shows Plaintiffs will suffer irreparable harm. *See G.G., ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.2d 709, 714-15 (4th Cir. 2016). This argument is misplaced because the Supreme Court's order in *Gloucester* merely preserves the status quo, as the District seeks to do here. The Supreme Court's order does not mandate a change from the status quo in this case.

Further, the same argument that the Court's action shows how it will ultimately rule on irreparable harm was recently rejected by Judge Marbley of the Southern District of Ohio in stating:

> The Supreme Court grants such stays when a court of appeals "tenders a ruling out of harmony with [its] prior decisions, or [presents] questions of transcending public importance[] or issues which would likely induce [the Supreme Court] to grant certiorari." *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) (Douglas, J.). It is not for this Court to speculate which, if any, of these justifications motivated the Supreme Court when it took action in *Gloucester*, and even if Highland has somehow been able to divine what the Supreme Court has "telegraphed" by staying the mandate in that case, this Court unfortunately lacks such powers of divination. Moreover, unlike in most cases in which the Supreme Court stays a mandate, one of the five Justices who voted for the stay, Justice Breyer, wrote a brief concurrence that made no mention of irreparable harm, stating only that he voted to

> grant the application "as a courtesy" and that the order would "preserve the status quo (as of the time the Court of Appeals made its decision)." *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (Breyer, J., concurring). When the Justice whose vote tips the scales issues a statement regarding his position and does not mention irreparable harm, it would be unreasonable for this Court to find that the stay of the mandate in *Gloucester* requires a finding of irreparable harm to Highland and its students. This Court follows statements of law from the Supreme Court, not whispers on the pond.

Bd. of Ed. of the Highland Local Sch. Dist. v. U. S. Dep't of Ed., No. 2:16-CV-524, 2016 WL 5372349, at *18 (S.D. Ohio Sept. 26, 2016). Absent any specific ruling from the Supreme Court, it is not for this Court and parties to intuit how it might rule. Plaintiffs' decision to file this action prior to the Court granting certiorari or ruling in *Gloucester* means they do not have the benefit of that decision, and cannot seek to use the case as binding precedent based on how they think the Court may rule.

Because Plaintiffs have failed to plead that the potential harms to the Students outweigh the harms to the District, the Plaintiffs have failed to carry their burden of proof.

VI. THE PUBLIC INTEREST IN MAINTAINING THE DISTRICT'S POLICY IS SIGNIFICANT.

The public interest weighs in favor of respecting all students, including their bodily privacy and the privacy of their educational data. The public interest in having governmental entities follow applicable laws and avoid discrimination against students is also important. The District's current facilities and policy appropriately address these concerns, and this Court should not disrupt the status quo.

Plaintiffs' public interest argument assumes success on their constitutional and statutory claims. However, given their failure to satisfactorily demonstrate a likelihood of success on the merits or irreparable harm, this argument falls flat and the balance of the public interests instead clearly favors the District.

Additionally, if the Court identifies any disputed questions of fact, "the public interest is best served by preserving the status quo until the issues can be fully adjudicated." *Northland Ins. Co. v. Blaylock*, 115 F. Supp.2d 1108, 1125 (D. Minn. 2000). Plaintiffs have failed to carry the heavy burden of demonstrating their entitlement to the extraordinary remedy of a preliminary injunction.

CONCLUSION

For all of the foregoing reasons, the Plaintiffs' Motion for Preliminary Injunction should be denied.

Respectfully Submitted,

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