UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Privacy Matters, a voluntary unincorporated association; and **Parent A**, president of Privacy Matters,

Plaintiffs,

v.

United States Department of Education; **John B. King, Jr**., in his official capacity as United States Secretary of Education; **United States Department of Justice**; **Loretta E. Lynch**, in her official capacity as United States Attorney General; and **Independent School District Number 706, State of Minnesota**,

Defendants.

Case No. 0:16-cv-03015-WMW-LIB

Judge Wilhelmina M. Wright
Magistrate Judge Leo I. Brisbois

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Privacy Matters and its president bring this action against the U.S. Departments of Education ("ED") and Justice ("DOJ"), as well as the Secretary of Education, the Attorney General, and the Principal Deputy Assistant Attorney General. Plaintiffs seek to invalidate Defendants' interpretation that, under Title IX and its implementing regulations, schools must allow a transgender student to access the restrooms and other sex-segregated facilities that match the student's gender identity. Plaintiffs also seek an injunction preventing Independent School District Number 706 ("District 706") from acting consistent with that interpretation. But Plaintiffs cannot meet any of the requirements for a preliminary injunction.

First, for a number of reasons, Plaintiffs cannot show a likelihood of success on the merits. They lack Article III standing to challenge the guidance documents in which ED and DOJ have articulated their interpretation of Title IX and its regulations, because Plaintiffs' alleged injury stems from a school policy that neither was caused by the guidance documents nor would be redressed by their invalidation. Even if Plaintiffs had standing, they lack a cause of action under the Administrative Procedure Act ("APA"), because the challenged guidance documents do not carry the type of legal consequences necessary to constitute final agency action. They merely inform the public about Defendants' interpretation of Title IX and its regulations. In fact, ED maintained and applied that interpretation before the challenged documents were even issued.[1]

[1] Some of the guidance documents Plaintiffs identify are the subject of a preliminary injunction in *Texas v. United States*, No. 7:16-cv-54, 2016 WL 4426495 (N.D. Tex. Aug.

Nor are Plaintiffs' APA claims likely to succeed on the merits. The challenged guidance documents are at most interpretive rules that did not require notice-and-comment rulemaking. Those documents are not themselves necessary to sustain the validity of the interpretations they set forth. Plaintiffs' substantive APA claims fare no better, as Defendants' interpretations are consistent with Title IX and its implementing regulations, as well as other statutory and constitutional commands. Indeed, the only court of appeals to consider Defendants' interpretation has found it to be reasonable. Finally, the challenged interpretations do not implicate the requirement of clear notice nor the prohibition on coercion, and so Plaintiffs are unlikely to succeed in their Spending Clause claims.

Even if they could establish a likelihood of success, Plaintiffs have not satisfied the other requirements for a preliminary injunction. They waited almost seven months to bring this lawsuit and have put forward no evidence of irreparable harm. Both the balance of

21, 2016). For reasons explained below, Defendants disagree with the *Texas* court's ruling, and are considering whether to appeal. In any event, the preliminary injunction, as currently drafted, prohibits Defendants "from using the [enjoined guidance documents] or asserting the [enjoined guidance documents] carry weight in any litigation initiated following the date of" the entry of the injunction. *Id.* at *17. That prohibition could be read to apply to this litigation, because it was filed after the date of the *Texas* ruling. Defendants believe that any such prohibition would be improper if extended to litigation that does not involve the *Texas* plaintiffs for a number of reasons—including that it would deprive this Court of the benefit of the full development of competing legal positions—and have asked the *Texas* court for clarification of the scope of the preliminary injunction in this respect (and others). *See* Defs.' Mot. for Clarification at 12-16, *Texas v. United States*, No. 7:16-cv-54, ECF No. 65 (Sept. 12, 2016); *id.*, ECF Nos. 72, 74, 77. Nonetheless, until the *Texas* court clarifies the scope of its preliminary injunction, and in an abundance of caution, Defendants are proceeding as if the preliminary injunction prohibits them from "using the [enjoined guidance documents] or asserting [that] the [enjoined guidance documents] carry weight" in this case.

injuries and the public interest militate against the requested relief. This Court should deny Plaintiffs' motion for a preliminary injunction.

BACKGROUND

I. Statutory and Regulatory Background

Title IX prohibits discrimination on the basis of sex in education programs and activities by recipients of federal financial assistance. 20 U.S.C. § 1681 *et seq.* DOJ and ED share primary responsibility for enforcing Title IX and its implementing regulations. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this authority, ED's Office for Civil Rights ("OCR") investigates complaints and conducts compliance reviews, promulgates regulations, and issues guidance to clarify how it interprets applicable statutory and regulatory obligations. *See* 20 U.S.C. § 1682. Consistent with the statute's anti-discrimination mandate, ED's and DOJ's regulations prohibit recipients from providing "different aid, benefits, or services," or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31(b); 28 C.F.R. § 54.400(b). The regulations further explain that recipients may "provide separate toilet, locker room, and shower facilities on the basis of sex" without running afoul of Title IX, so long as the "facilities provided for students of one sex" are "comparable to [the] facilities provided for students of the other sex." 34 C.F.R. § 106.33; 28 C.F.R. § 54.410.

In response to requests for clarification from federal fund recipients, ED and DOJ have issued guidance that provides their interpretation of Title IX and its implementing regulations with respect to transgender individuals. Plaintiffs list four such guidance

documents in their Complaint. In April 2014, OCR issued guidance entitled "Questions and Answers on Title IX and Sexual Violence," in which the agency explained that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." Compl., Ex. B, ECF No. 1-2 (hereinafter "April 2014 Guidance"). In December 2014, OCR further explained that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Compl., Ex. C, ECF No. 1-3. In April 2015, OCR reiterated this interpretation in a Title IX Resource Guide. Compl., Ex. D, ECF No. 1-4. Finally, on May 13, 2016, ED and DOJ issued joint guidance in the form of a Dear Colleague Letter (DCL),[2] explaining that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Compl., Ex. A, ECF No. 1-1 (hereinafter "2016 DCL").

These guidance documents are the focal point of Plaintiff's claims. *See* PI Mem. 2, Compl. ¶ 68. But the documents are not legally binding, and they expose Plaintiff to no new liability or legal requirements. Rather, they are merely expressions of the agencies' interpretations of what existing statutes and regulations already provide. Guidance documents issued by ED "do not create or confer any rights for or on any person" and "do

[2] A Dear Colleague Letter is a guidance document issued by an agency to explain its interpretation of statutes and regulations. *See* Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

not impose any requirements beyond those required under applicable law and regulations." U.S. Dep't of Educ., *Types of Guidance Documents*.[3] Indeed, the guidance documents at issue in this case explicitly state that they do not have the force of law. *See, e.g.*, 2016 DCL at 1 ("This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations."); April 2014 Guidance at 1 n.1 (same).

II. Title IX's Enforcement Process

After completing an investigation, if OCR determines that a fund recipient is not complying with its Title IX obligations, ED can effectuate compliance with the statute in one of two ways: It can initiate administrative proceedings to withhold further funds; or it can refer the matter to DOJ to file a civil action to enjoin further violations. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a).

The administrative process begins when a complaint is filed with OCR or when OCR commences a compliance review. *See* 34 C.F.R. § 100.7(a), (b).[4] After OCR investigates, if it determines that a fund recipient is indeed violating Title IX, it must first seek to achieve voluntary compliance. *See* 20 U.S.C. § 1682(2); 34 C.F.R. §§ 100.7(c) - (d), 100.8(d). If voluntary compliance is not achieved, OCR may initiate the administrative process for terminating some or all ED funding. This process requires a hearing before an

[3] *Available at* http://www.ed.gov/policy/gen/guid/types-of-guidance-documents.html.

[4] ED's Title IX compliance process regulation incorporates ED's Title VI procedural regulations, *see* 34 C.F.R. § 106.71, which are therefore cited in the text.

administrative law judge, with a right to an administrative appeal, and discretionary review by the Secretary of Education. *See* 20 U.S.C. § 1682(1); 34 C.F.R. § 100.10(b), (e). If a fund recipient is found to be in violation of Title IX, it can restore its eligibility by complying with the terms of the final administrative decision. *Id.* § 100.10(g). After any adverse final administrative decision, a recipient is entitled to judicial review in the court of appeals for the circuit in which the recipient is located. *See* 20 U.S.C. § 1683.[5] ED cannot terminate any funding until 30 days after reporting the termination to both houses of Congress. *See* 20 U.S.C. § 1682; *see also N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 515 n.2 (1982) (summarizing this process).

The other enforcement procedure is judicial. When it determines that a fund recipient is violating Title IX, and that voluntary compliance cannot be secured, ED may refer the case to DOJ, which is empowered by statute to seek an injunction in federal district court to restrain the violations. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a)(1).

III. Factual and Procedural Background

OCR has not received a complaint or opened a compliance review regarding District 706. Nor has OCR initiated administrative proceedings against the District or referred any matter concerning the District to DOJ. Nonetheless, on September 7, 2016, Plaintiffs initiated this lawsuit, challenging ED's and DOJ's interpretation that, under Title IX and

[5] *Highland Bd. of Ed. v. U.S. Dep't of Ed.*, No. 16-cv-524, 2016 WL 5372349, at *7 (S.D. Ohio Sept. 26, 2016) ("[T]he judicial review provided 'for similar action' in § 1683 references the general provision for judicial review of funding termination decisions in 20 U.S.C. § 1234g(b), which provides that a recipient may seek judicial review in the appropriate court of appeals . . . .").

its regulations, schools must allow students to access the sex-segregated facilities that match their gender identity. The Complaint claims APA violations against Federal Defendants (Count I), violations of Title IX against District Defendants (Count II), substantive due process violations based on an alleged fundamental right to privacy against all Defendants (Count III), substantive due process violations based on an alleged fundamental right of parents to direct the upbringing of their children against all Defendants (Count IV), violations of the First Amendment Free against all Defendants (Count V), violations of the Minnesota Constitution against District Defendants (Count VI), and violations of the Religious Freedom Restoration Act against Federal Defendants (Count VII). Plaintiffs seek declaratory and injunctive relief, including vacatur of the agencies' guidance documents.[6] On September 16, 2016, Plaintiffs moved for a preliminary injunction on the first three counts of their Complaint.[7]

ARGUMENT

"A preliminary injunction is an extraordinary remedy." *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). To decide a motion for preliminary injunction, a court must balance (1) the movant's likelihood of success on the merits, (2) the threat of irreparable

[6] Some of the guidance documents also address issues other than the use of sex-segregated facilities by transgender individuals—*e.g.*, harassment and sexual violence. Nothing in the Complaint challenges those other aspects of the guidance documents, and thus those portions could not be the subject of any declaratory or injunctive relief.

[7] Plaintiffs make passing reference to their parental rights and free exercise claims, *see* PI Mem. 20, but present no argument as to these claims (either as standalone claims or as substantive APA claims). Thus, Federal Defendants do not understand Plaintiffs to be seeking a preliminary injunction based on those claims, and Plaintiffs have waived any right to do so.

harm to the movant absent the injunction, (3) the balance of harms between the movant and other litigants, and (4) the public interest. *Id.* "The party seeking injunctive relief bears the burden of proving all the [injunction] factors." *Id.* (citing *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987)).

I. Plaintiffs' Claims Are Unlikely to Overcome Threshold Defects

A. Plaintiffs Lack Standing to Bring Their Claims Against Federal Defendants

"To establish Article III standing, a party must suffer an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). Plaintiffs' asserted injury derives from the presence of a transgender student in the sex-segregated facilities that align with her gender identity, but that injury is neither fairly traceable to the challenged guidance documents nor likely to be redressed by a ruling against Federal Defendants. Transgender students use the facilities that align with their gender identities in District 706 because District policy allows them to do so, not because of any action by ED or DOJ, neither of which have initiated any investigation or enforcement action against the District.

District 706 adopted its new policy regarding access to sex-segregated facilities in February 2016, three months before the Dear Colleague Letter was issued. Compl. ¶¶ 106-12. In December 2015, after a more-than-year-long investigation triggered by a student complaint, OCR had reached an agreement with an Illinois school district, pursuant to which a transgender student was allowed to use the locker room that aligned with her

gender identity. Compl., Ex. F. On Plaintiffs' account of the facts, the superintendent for District 706 heard about this agreement and reached out to discuss the matter with the Illinois superintendent in February 2016. Compl. ¶¶ 102-04. Shortly thereafter, District 706 adopted its new policy. Compl. ¶¶ 106, 112. No student ever submitted a complaint about District 706 to OCR, and OCR never opened an investigation into District 706.

On the facts alleged, Plaintiffs' purported injury is not "fairly traceable" to the challenged guidance documents. The immediate source of Plaintiffs' alleged injury is the presence of a transgender student in the facilities that accord with her gender identity. Her presence, in turn, can be traced to the District 706 policy granting her access to those facilities. That policy was adopted before one of the challenged guidance documents—the 2016 DCL—was issued, and well after the others were published. Although the actions of OCR in Illinois may have played a role in District 706's policy decision, those actions are not (and could not be) challenged here. Plaintiffs challenge the issuance of four guidance documents that had little or nothing to do with the District policy that they say is harming them. Because Plaintiffs' injury is not "fairly traceable to the challenged action," their claims against ED and DOJ cannot support standing. *Iowa Right to Life Committee*, 717 F.3d at 584 (quoting *Monsanto*, 561 U.S. at 149).

For similar reasons, Plaintiffs' purported injury would not be "redressable by a favorable ruling" against ED or DOJ. *Id.* (quoting *Monsanto*, 561 U.S. at 149). Even if this Court were to vacate the challenged documents, *see* Compl. at 64-65, that remedy would not alter the District's policy or, for that matter, the agencies' interpretations, and so would not redress Plaintiffs' alleged injury. As discussed above, the challenged policy

was independently adopted by District 706. Even an order declaring the agencies' interpretation invalid would not force the District to alter its policy.

B. The Challenged Guidance Documents Are Not Final Agency Action

Plaintiffs' APA claims fail as a threshold matter because they do not challenge any "final agency action." 5 U.S.C. § 704. To be final, an agency action must satisfy two requirements: (1) the decision must "mark the 'consummation' of the agency's decisionmaking process," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Plaintiffs' APA challenges fail the second *Bennett* prong. The guidance documents are *explicit* that they merely announce ED's and DOJ's views as to the proper interpretation of Title IX and its regulations. For instance, the 2016 DCL explains that it "does not add requirements to applicable law, but [rather] provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations." 2016 DCL at 1. The same is true of the April 2014 Guidance. *See* April 2014 Guidance at 1 n.1. Final agency action is not found "when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *AT&T Co. v. E.E.O.C.*, 270 F.3d 973, 975 (D.C. Cir. 2001). Such is the case here.

Plaintiffs suggest, however, that the guidance documents constitute final agency action because they allegedly "establish[] legal rights." PI Mem. at 8. This argument erroneously equates the imposition of legal consequences, which connotes final agency

action, with practical effects, which do not. Final agency action only occurs when the actions of an agency "give rise to 'direct and appreciable legal consequences.'" *U.S. Army Corps of Engineers v. Hawkes Co*., 136 S. Ct. 1807, 1814 (2016) (quoting *Bennett*, 520 U.S. at 178). Thus, for example, the Supreme Court in *Sackett v. EPA* deemed a compliance order issued by the EPA to be final agency action because it imposed a "legal obligation to 'restore' [the plaintiffs'] property according to an agency-approved Restoration Work Plan" and "expose[d] the[m] to double penalties in a future enforcement proceeding" if they failed to do so. 132 S. Ct. 1367, 1371-72 (2012). Similarly, in *Hawkes*, the Supreme Court found final agency action where the U.S. Army Corps of Engineers ("Corps") issued a jurisdictional determination that denied the plaintiffs a "five year safe harbor from [civil enforcement] proceedings" by the Corps and EPA under the Clean Water Act. 136 S. Ct. at 1814.

None of the guidance documents imposes any such legal obligations or consequences. Plaintiffs' allegations that school districts have had to modify their behavior and prepare for a potential loss of federal funds do not suffice as an alternative. "The flaw in [Plaintiffs'] argument is that the 'consequences' to which they allude are practical, not legal." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin*., 452 F.3d 798, 811 (D.C. Cir. 2006). Although guidance by an agency may be "voluntarily followed by [regulated parties,] . . . de facto compliance is not enough to establish that [agency guidance] [has] legal consequences." *Id*. Indeed, "while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall about what will be needed," no final agency action exists "where there has been no order compelling

the regulated entity to do anything." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (quotation marks omitted).[8]

Any legal consequences or obligations suffered by school districts would arise as a result of violating Title IX or its implementing regulations, and not as a result of the guidance documents. *See Hadley-Mem'l Hosp. v. Kynard*, 981 F. Supp. 690, 693 (D.D.C. 1997) ("The 'new burdens' of which plaintiff complains were created not by DOD's notice, but by the statute, which DOD implemented."). Indeed, if an investigation of a Title IX complaint had resulted in an administrative finding of non-compliance, ED or DOJ could have initiated enforcement actions in the absence of the guidance documents at issue. For example, in October 2011—five years prior to the issuance of the 2016 DCL—ED and DOJ initiated a joint investigation into the Arcadia Unified School District regarding allegations that the district was discriminating against a student because he was transgender. *See* Letter from Anurima Bhargava and Arthur Zeidman to Dr. Joel Shawn (July 24, 2013).[9] Having expressed their view that "[a]ll students, including transgender students . . . are protected from sex-based discrimination under Title IX," ED and DOJ resolved the matter by entering into a resolution agreement with the district. *Id*. *See also*

[8] As the D.C. Circuit recently held, "interpretive rules or statements of policy generally do not qualify [as final agency action] because they are not 'finally determinative of the issues or rights to which they are addressed.'" *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (quoting Edwards, Elliott & Levy, Federal Standards of Review 157 (2d ed. 2013)). As will be discussed in further detail below, the challenged guidance documents at most constitute interpretive rules that are not required to undergo notice-and-comment rulemaking. *See infra* Part II.A.

[9] *Available at* https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf.

Letter from Arthur Zeidman to Dr. John Garcia (Oct. 14, 2014) (concluding, based on an investigation opened in November 2011, that a transgender student was being subjected to worse treatment in violation of Title IX).[10] Although these matters were resolved through resolution agreements, if voluntary compliance had not been achieved, either ED or DOJ would have been able to commence enforcement proceedings on the basis of their interpretation of Title IX and its regulations, with no assistance from the challenged guidance documents, which had not yet been issued. *See also* Amicus Br. of United States, *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2015 WL 6585237 (4th Cir.) (asserting ED's challenged interpretation prior to the issuance of the 2016 DCL).

II. Plaintiffs' Claims Are Unlikely to Succeed on the Merits

A. The Guidance Documents Are Exempt from Notice-and-Comment Rulemaking

Plaintiffs allege that ED and DOJ violated the APA by "creat[ing] a new legal norm and expand[ing] the footprint of Title IX," so as to "impose[] new rights for students" and "create[] new duties for schools," without going through the notice-and-comment procedure. Compl. ¶¶ 301-02; PI Mem. 22-23. Plaintiffs' Complaint identifies four guidance documents setting forth the alleged rules they mean to challenge. Compl. ¶ 68. Because each of these documents at most articulates an interpretive rule that does not require notice-and-comment rulemaking, this claim is unlikely to succeed on its merits.

The APA specifically excludes interpretive rules from its notice-and-comment requirement. 5 U.S.C. § 553(b)(3)(A). The Supreme Court has explained that the "critical

[10] *Available at* https://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf.

feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204, 1204 (2015). Interpretive rules encourage predictability in the administrative process because they "clarif[y] or explain[] existing law or regulations." *McKenzie v. Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986). An agency that enforces "less than crystalline" statutes and regulations must interpret them, "and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement, which the [APA] assimilates to an interpretive rule." *Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996). Courts should not "discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities." *Id.* Here, by announcing their interpretations of Title IX and its regulations, Defendants have "advise[d] the public of the agency's construction of the statutes and rules which it administers"—and no more. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). The guidance documents thus announce paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA. *Id.*

Plaintiffs argue that Defendants' interpretation is actually legislative because it "has the force and effect of law." PI Mem. 23. That is simply not so. As explained above, the guidance documents and the interpretations therein merely explain what ED and DOJ think Title IX and its implementing regulations already require. The guidance documents impose no additional liability. And while Defendants' interpretation of the law—irrespective of any guidance documents—is entitled to some deference, the Supreme Court recently

confirmed that receiving *Auer* deference does not transform a mere interpretation into a legislative rule. *See Perez*, 135 S. Ct. at 1208 n.4.

Nor are the documents legislative simply because they use "mandatory language" to describe the mandatory requirements imposed by Title IX and its regulations. *See* PI Mem. 23. Descriptions of binding authorities necessarily use mandatory terms. But those mandates derive from the underlying statutes and regulations themselves, not from the agencies' interpretations. The binding nature of an interpreted statute or regulation does not transform an agency's explication into a legislative rule. If that were so, "every interpretive rule would become legislative." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 681 (6th Cir. 2005).

Finally, the guidance documents do not impose new obligations on school districts, as Plaintiffs argue. *See* PI Mem. 22. To the contrary, they simply provide an interpretation of the applicable statutes and regulations in a context that may not have been considered before. As the Fourth Circuit has explained, for most of their existence, the Title IX regulations at 34 C.F.R. § 106.33 were understood simply to mean that a school may provide sex-segregated facilities, without much further specificity. *See G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016), *mandate recalled and stayed*, *Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016).[11] In recent years, as schools have

[11] The Fourth Circuit's decision in *Gloucester* remains good law despite the Supreme Court's stay pending a decision on certiorari. *See Carcaño*, 2016 WL 4508192, at *13 ("[D]espite the stay and recall of the mandate, the Supreme Court did not vacate or reverse the Fourth Circuit's decision. Thus, . . . at present [*Gloucester*] remains the law in this circuit."); *Highland*, 2016 WL 5372349, at *18 (explaining reliance on *Gloucester* despite the Supreme Court's stay).

confronted the reality that some students' gender identities do not align with their birth-assigned sex, schools have begun to look to ED for guidance on the question of how its regulations apply to transgender students. *Id.* at 720. The challenged interpretation thus simply applies a preexisting statute and regulations to newly salient circumstances.

In sum, the guidance documents and the interpretations contained therein merely supply "crisper and more detailed lines than the authority being interpreted." *Iowa League of Cities v. EPA*, 711 F.3d 844, 875 (8th Cir. 2013); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Accordingly, the guidance documents set forth interpretive rules only, which are not subject to the notice-and-comment requirements of the APA.

B. Defendants' Interpretation Is Consistent with Title IX and Its Regulations

Title IX's implementing regulations allow schools to "provide separate toilet, locker room, and shower facilities on the basis of sex," as long as "facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The regulation does not, however, define "sex," or resolve how a student should be assigned to sex-specific facilities when the various indicators of that student's sex diverge. ED's interpretation resolves that question, consistent with Title IX's mandate of equal access to educational opportunities, *see* 20 U.S.C. § 1681(a), by recognizing that in order to provide transgender students access to communal facilities—and to avoid subjecting them to stigma and isolation—they must be allowed to use the facilities that

match their gender identity. The Supreme Court has held that courts must defer to agencies' reasonable interpretations of their own ambiguous regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). The only court of appeals to consider ED's interpretation did just that. *See Gloucester*, 822 F.3d at 720. A growing chorus of district courts has largely agreed. *See Highland*, 2016 WL 5372349, at *11; Decision and Order Granting in Part Motion for Preliminary Injunction, *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-cv-943, Dkt. No. 10 (E.D. Wis. Sept. 22, 2016); *Carcaño v. McCrory*, 2016 WL 4508192, at *11-16 (M.D.N.C. Aug. 26, 2016).[12]

1. Title IX and Its Regulations Are Silent as to How Transgender Students Should Be Assigned to Sex-Specific Facilities

Section 106.33—the bathroom and locker room regulation at issue here—does not specify which sex-segregated facilities transgender students may use. *See* 34 C.F.R. § 106.33. Neither does the statute, which prohibits sex discrimination with limited exceptions, *see* 20 U.S.C. §§ 1681(a), 1686, but never purports to define "sex" or mandate how transgender students should be assigned to any sex-specific facilities the recipient may choose to maintain. Plaintiffs repeatedly dwell on the regulation's reference to "students of one sex" and "students of the other sex," arguing that the regulation therefore refers to males and females. PI Mem. 10, 14. But that "straightforward conclusion" does not answer the question in this case, because the regulation remains "silent as to how a school should

[12] One district court has held otherwise. *See Texas*, 2016 WL 4426495. That decision is addressed below.

determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." *Gloucester*, 822 F.3d at 720.

"Sex" in section 106.33 also does not unambiguously refer to any particular component of a person's sex. Dictionaries at the time of Title IX's enactment "defined 'sex' in myriad ways." *Highland*, 2016 WL 5372349, at *11. *See, e.g.*, Am. Heritage Dictionary 548, 1187 (1973) (defining sex as "the physiological, functional, and psychological differences that distinguish the male and the female"); Webster's Third New Int'l Dictionary 2081 (1971) (defining sex as the "sum" of "morphological, physiological, and behavioral peculiarities"); Webster's Seventh New Collegiate Dictionary 347, 795 (1970) (defining sex to include the "behavioral peculiarities" that "distinguish males and females"). Modern dictionaries similarly define sex in ways that encompass multiple components, including social, psychological, and behavioral factors. *See Gloucester*, 822 F.3d at 721 n.7 (citing modern dictionaries).

Those factors sometimes diverge. For instance, a person who has undergone sex reassignment surgery may have genitalia that indicate a different sex from their chromosomes. A transgender person's gender identity does not match their birth-assigned sex. An intersex person may have ambiguities as to multiple components of their sex. *See id.* at 720-21 (collecting examples); *Radtke v. Misc. Drivers & Helpers Union Local No. 683 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) ("An individual's sex includes many components, . . . some of which could be ambiguous or in conflict."). As multiple courts have now recognized, neither Title IX nor section 106.33 purport to favor any particular component of sex over any others; the text therefore

"sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge." *Highland*, 2016 WL 5372349, at *13 (quoting *Gloucester*, 822 F.3d at 722); *see also Radtke*, 867 F. Supp. 2d at 1032 (rejecting the argument that "'sex' is narrowly defined as an immutable biological determination at birth").[13]

Plaintiffs maintain that Title IX's legislative history sheds light on that question, *see* PI Mem. 14, but nothing they cite has anything to do with the definition of sex, or the assignment of transgender students to sex-specific facilities. All Plaintiffs have shown is that legislators expected that Title IX and its regulations would allow for certain sex-segregated activities. But the permissibility of sex segregation does not help to define sex in the first place, or to determine which sex-specific facility transgender students may use. *See Gloucester*, 822 F.3d at 720. Plaintiffs have identified no legislative history about transgender students specifically. And even if they had, any argument based on the

[13] Plaintiffs attempt to draw a hard distinction between biological and non-biological factors (though they concede that the biological determinants of sex are numerous, and therefore potentially divergent: "chromosomes, gonads, hormones, and genitalia," PI Mem. 1 n.1). But there are increasing indications that gender identity itself has biological roots. "[N]umerous medical studies conducted in the past six years . . . 'point in the direction of hormonal and genetic causes for the in utero development'" of gender identity that is inconsistent with an individual's genitalia. Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, *in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE, ch.16, at 16-72 to 16-74 & n.282 (Christine Michelle Duffy ed. Bloomberg BNA 2014); *see also* E.S. Smith et al., *The Transexual Brain—A Review of Findings on the Neural Basis of Transsexualism*, 59 NEUROSCIENCE AND BIOBEHAVIORAL REVIEWS 251-66 (Dec. 2015) (citing numerous studies and concluding that "[t]he available data from structural and functional neuroimaging-studies promote the view of transsexualism as a condition that has biological underpinnings").

subjective intent of legislators in 1972 is foreclosed by the Supreme Court's decision in *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 79 (1998). There, the Court explained that "statutory prohibitions often go beyond the principal evil" in the minds of the enacting legislators "to cover reasonably comparable evils" fairly encompassed by the statutory text. *Id.* The Court therefore held that Title VII prohibited "male-on-male sexual harassment," even though that "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.*[14]

Plaintiffs also argue that other, later statutes should control the Court's interpretation of Title IX and its regulations. They cite the Violence Against Women Reauthorization Act of 2013 ("VAWA"), Pub. L. No. 113-4, 127 Stat. 61, which added "gender identity" alongside "sex" in its list of prohibited grounds for discrimination. *See* 42 U.S.C. § 13925(b)(13)(A); *see* PI Mem. 10. But Congress's expansion of VAWA in 2013 evinced no intent to amend Title IX to withhold equivalent protections. In general, "later enacted laws . . . do not declare the meaning of earlier law," especially when "[t]hey do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) ("Consequently, we do not find in them any forward looking legislative mandate, guidance, or direct suggestion about how courts should interpret the earlier provisions."). Congress

[14] Courts use Title VII case law to interpret Title IX, and vice versa. *See, e.g.*, *Davis*, 526 U.S. at 561.

is entitled to remove uncertainty from a later statute without unwittingly revising an earlier one.[15]

Plaintiffs' invocations of failed legislative proposals are equally unpersuasive. *See* PI Mem. 11. "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quotation marks omitted). Nor is a single legislator's website, 45 years after a statute's enactment, *see* PI Mem. 11, a relevant interpretive data point. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994).

One district court has preliminarily concluded that section 106.33 is not ambiguous and requires facilities to be segregated according to birth-assigned sex. *See Texas v. United States*, 2016 WL 4426495, at *14-15 (N.D. Tex. Aug. 21, 2016). But there are multiple problems with that court's analysis, which this Court should not follow. First, the *Texas* court relied heavily on what it assumed was "the intent of the drafter," *id.* at *14, despite the Supreme Court's clear instruction that the coverage of anti-discrimination laws is not limited to "the principal concerns of our legislators." *Oncale*, 523 U.S. at 79-80. The court

[15] Plaintiffs also cite two provisions that do not use the word "sex" at all. *See* 42 U.S.C. § 12211(b); 29 U.S.C. § 705(20)(F)(i); *see* PI Mem. 11. These statutes shed no light on whether "sex" is ambiguous in Title IX or its regulations.

did not discuss *Oncale* or mention any legislative history discussing transgender people that would indicate an intent to exclude them from statutory protection against sex discrimination. Second, while acknowledging that "the use of dictionary definitions is appropriate in interpreting undefined statutory terms," *Texas*, 2016 WL 4426495, at *14, the court did not mention, analyze, or distinguish the numerous dictionaries that have defined sex to include behavioral and social factors like gender identity. *See, e.g.*, *Gloucester*, 822 F.3d at 721 & n.7; *Highland*, 2016 WL 5372349, at *11 & n.4. Third, the *Texas* court did not address the many ambiguities created by defining sex based on genitalia alone, or the evidence that gender identity itself has biological roots. *See Gloucester*, 822 F.3d at 720-21. Fourth, the court relied on the fact that section 106.33 is binary (*i.e.*, it speaks of "one sex" and "the other sex"), *see Texas*, 2016 WL 4426495, at *15, without explaining how that fact alone could dictate, unambiguously, how transgender students should be assigned to male and female facilities.

In sum, Plaintiffs have not carried their heavy burden to establish that Title IX's regulations *unambiguously* preclude schools from considering gender identity when assigning students to communal facilities. *Cf. Stanley v. Cottrell, Inc.*, 784 F.3d 454, 465-66 (8th Cir. 2015) (explaining that a provision is only "unambiguous" when it is not "susceptible to more than one interpretation"). This Court should therefore apply *Auer* to Defendants' interpretation.

2. ED Reasonably Interpreted Its Regulations Consistent with Title IX's Mandate of Equal Educational Opportunities

An agency's interpretation of its own ambiguous regulation is controlling as long as it is not "plainly erroneous or inconsistent with the regulation." *See Auer*, 519 U.S. at 461. Two courts have considered whether ED's resolution of any ambiguity was reasonable, and both courts concluded that it was. *See Gloucester*, 822 F.3d at 721-23; *Highland*, 2016 WL 5372349, at *13 ("The agencies easily satisfy this deferential standard."). This Court should as well. Defendants' interpretation is consistent with those of numerous other federal agencies. *Id.* ED has never taken a definitive position to the contrary.[16] And while its present interpretation is fairly new, "novelty alone is no reason to refuse deference." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 64 (2011). As in *Talk America*, "the issue in th[is] case[] did not arise until recently," as school districts began to seek ED's guidance on how to assign transgender students to sex-specific facilities under the Title IX regulations. *Id.* Plaintiffs have not argued—nor could they—that ED's interpretation represents "a convenient litigation position or a *post hoc* rationalization." *Highland*, 2016 WL 5372349, at *13 (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012)). Thus, if the Court concludes that section 106.33 does not provide an unambiguous answer as to which facilities transgender students must use, there is no reason to withhold *Auer* deference.

[16] Although DOJ revised its defensive litigating position on the scope of Title VII, this change was made in response to adverse court decisions rejecting DOJ's previous litigating position, as well as evolving case law. *See* Memorandum from Attorney General Eric Holder (Dec. 15, 2014), *available* at https://www.justice.gov/file/188671/download; *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008).

ED's interpretation of its bathroom regulation is rooted in Title IX's overriding concern for equal access to educational opportunities. Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.'" *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)); *see also* 34 C.F.R. § 106.31(b). Consistent with this broad prohibition, schools can separate facilities such as bathrooms or locker rooms, *see, e.g.*, 34 C.F.R. § 106.33, but they may only do so within the narrow confines of the regulation. *See Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 175 (2005) ("Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition."). Interpreting that exception consistent with Title IX "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81.

After multiple years of studying this issue in consultation with school administrators and transgender students, among others, ED concluded that preserving transgender students' access to communal facilities required that they have access to the facilities that matched their gender identity. *See, e.g.*, Resolution Agreement, *In re Dorchester Cnty. Sch. Dist. 2, SC*, OCR Case No. 11-15-1348 (Jun. 16, 2016) (one-year investigation); Resolution Agreement, *Township High School Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 3, 2015) (two-year investigation); Resolution Agreement, *Central Piedmont Cmty. College, NC*, OCR Case No. 11-14-2265 (Aug. 13, 2015) (one-year investigation); Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095

(Oct. 8, 2014) (three-year investigation); Resolution Agreement, *Student v. Arcadia Unified Sch. Dist., CA*, OCR Case No. 09-12-1020/DOJ Case Number 169-12C-70 (Jul. 24, 2013) (two-year investigation). As this case and others attest, using the facilities that *conflict* with their gender identity is not a meaningful option for most transgender people. A transgender female student who lives as a girl, dresses and presents as a girl, and who is perceived by others to be a girl, cannot reasonably be expected to use the boy's restroom. ED's interpretation thus ensures that transgender students can use communal facilities, and that they are not subject to the daily stigma of a school negating their "very identity." *See Lusardi v. Dep't of the Army*, 2015 WL 1607756, at *10 (E.E.O.C. Apr. 1, 2015) (explaining why denying a transgender woman access to the women's restroom denied her "equal status, respect, and dignity"). ED reached this conclusion through investigations, collaboration with school administrators, and decades of experience with on-the-ground realities in schools. *See, e.g.*, U.S. Dep't of Ed., *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 2016) ("*Emerging Practices*").[17] Its conclusions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" under any level of deference. *Skidmore v. Swift & Co.*, 323 US. 134, 140 (1944); *see id.* at 139 (affording greater deference to agency interpretations "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"). ED's experience is crucial in assessing the "constellation of

[17] *Available at* http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

surrounding circumstances" necessary to preserve equal access to school programs. *Oncale*, 523 U.S. at 82.

ED's interpretation is bolstered by case law recognizing that federal protections against sex discrimination extend beyond discrimination motivated simply by the victim's genitalia or chromosomes. Since the Supreme Court's decision in *Price Waterhouse v. Hopkins*, it has been clear that discrimination "because of . . . sex" extends to the behavioral and social aspects of sex: "sex-based considerations," in the Supreme Court's words. 490 U.S. 228, 240, 242 (1989) (quoting 42 U.S.C. § 2000e-2(a)(1)). In *Price Waterhouse*, the Court held that an employer engaged in sex discrimination when it failed to promote an employee because of "her failure to conform to certain gender stereotypes." *Id.* at 272.

Applying *Price Waterhouse* in the context of transgender employees, numerous courts of appeals have held that "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/*or identify* with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*." *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (emphasis added). As the Eleventh Circuit has explained, "[t]he very acts that define transgender people are those that contradict stereotypes of gender-appropriate appearance and behavior." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (quotation marks omitted). "There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Id.* at 1316; *see also Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (rejecting pre-*Price Waterhouse* cases that failed to apply Title VII to discrimination based on a person's "sexual identity"). These cases

support ED's interpretation of its regulations because they are rooted in the understanding that, after *Price Waterhouse*, "'sex' under Title VII encompasses *both* the anatomical differences between men and women *and* gender." *Schwenk*, 204 F.3d at 1202 (emphasis added). In other words, "sex" in the civil rights laws includes "sex as viewed as social rather than biological classes." *Smith*, 378 F.3d at 572 (quotations omitted). *See Schwenk*, 204 F.3d at 1201 (rejecting pre-*Price Waterhouse* cases for "construing 'sex' in Title VII narrowly to mean only anatomical sex rather than gender").

Plaintiffs rely on a pre-*Price Waterhouse* case, *Sommers v. Budget Marketing, Inc.*, for its conclusion that a transgender plaintiff had not stated a claim under Title VII. 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *see* PI Mem. 11-12. But *Sommers* did not speak to the question in this case: how to assign transgender students to sex-specific facilities, *see* 34 C.F.R. § 106.33, such that they retain access to "education program[s] and activit[ies]." 20 U.S.C. § 1681(a). That question was not presented to the *Sommers* court, and the court did not consider it.

Moreover, district courts within this circuit have repeatedly recognized that "the 'narrow view' of the term 'sex' in Title VII in . . . *Sommers* 'has been eviscerated by *Price Waterhouse*.'" *Radtke*, 867 F. Supp. 2d at 1032 (quoting *Smith*, 378 F.3d at 573 (citing *Price Waterhouse*, 490 U.S. 228)); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Plaintiff's transgender status is necessarily part of his 'sex' or 'gender' identity."). The Eighth Circuit itself has moved beyond *Sommers* to acknowledge that, under Title VII, transgender people fall within a "protected status." *Hunter v. United Parcel Service, Inc.*, 697 F.3d 697, 703, 704 (8th Cir.

2012); *see id.* at 704 (holding that transgender plaintiff failed to state a claim only because he "failed to establish that [the defendant] *knew* [he] was transgendered or gender non-conforming") (emphasis added). Other circuits have agreed. *See Schwenk*, 204 F.3d at 1201 (explaining that "[t]he initial judicial approach" in cases like *Sommers* was "overruled by the logic and language of *Price Waterhouse*"); *Smith*, 378 F.3d at 573. Indeed, once *Price Waterhouse* was decided, the Ninth Circuit acknowledged that its own prior decision—on which *Sommers* relied—had been abrogated by the Supreme Court. *Schwenk*, 204 F.3d at 1201 (recognizing that *Holloway v. Arthur Anderson*, 566 F.2d 659 (9th Cir. 1977), was no longer good law); *see Sommers*, 667 F.2d at 750 (relying on *Holloway*).[18]

Courts in this circuit have been correct to treat *Sommers* as abrogated by intervening Supreme Court rulings. *See, e.g.*, *K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 472 F.3d

[18] Plaintiffs rely on a Seventh Circuit panel that declined to overrule its *Sommers* analog—*Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)—in *Hively v. Ivy Tech Cmty. College*, 2016 WL 4039703 (7th Cir. 2016); *see* PI Mem. 13. But the Seventh Circuit subsequently vacated the *Hively* panel opinion and is rehearing the case en banc. *See* Order, *Hively v. Ivy Tech Cmty. College*, No. 15-1720, Oct. 11, 2016, ECF No. 60.

In any event, *Hively* does not involve a transgender plaintiff, the panel did not address gender identity (except to recite *Ulane*'s facts), and it certainly did not address the assignment of transgender students to sex-specific facilities. The panel only addressed *sexual orientation*, which is distinct from gender identity. *See, e.g.*, *Rumble*, 2015 WL 1197415, at *2 ("[A]n individual's transgender status in no way indicates that person's sexual orientation."). Indeed, even courts that have explicitly recognized *Sommers*'s abrogation have held, separately, that Title VII does not reach sexual orientation discrimination, demonstrating that the two concepts are separate. *Compare, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (Title VII does not cover discrimination based on sexual orientation), *with Smith*, 378 F.3d at 570-75 (6th Cir. 2004) (Title VII covers discrimination based on gender identity). Plaintiffs' suggestion that nearly every circuit "align[s] with *Sommers*" is therefore plainly wrong. PI Mem. 13.

1009, 1022 (8th Cir. 2007) ("[W]e may disregard the decision of another panel of this court on the basis of an intervening Supreme Court precedent that undermines or casts doubt on the earlier panel decision."); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir.1993) (explaining that "[t]he general rule does not apply, however, when a Supreme Court decision casts doubt on the earlier panel's decision" and reversing district court for following outdated circuit precedent); *Locke v. United States*, 215 F. Supp. 2d 1033, 1040 (D.S.D. 2002) ("Although this court is bound, of course, by Eighth Circuit precedent, *Gross* has essentially been overruled by later Supreme Court cases."). Neither the reasoning nor the conclusion in *Sommers* can be reconciled with *Oncale* and *Price Waterhouse*. The *Sommers* court framed the question as "whether Congress intended Title VII . . . to protect transsexuals from discrimination." 667 F.2d at 750. Yet the Supreme Court has since held that Title VII extends beyond "the principal evil Congress was concerned with." *Oncale*, 523 U.S. at 79. The *Sommers* court concluded that "Congress has not shown an intention to protect transsexuals." 667 F.2d at 750. The enacting Congress showed no greater intention to protect males from harassment by other males, or to prohibit discrimination based on the failure to conform to gender-based behavioral norms, yet the Supreme Court has since held that both fall within Title VII's text, which prohibits *all* discrimination "because of . . . sex." *See Oncale*, 523 U.S. at 79; *Price Waterhouse*, 490 U.S. at 242; *compare* 20 U.S.C. § 1681(a) (prohibiting discrimination

"on the basis of sex"). Thus, even if *Sommers* spoke to the facility-assignment question in this case—which it does not—it would not control this Court's decision.[19]

Lastly, Plaintiffs briefly argue that ED's interpretation is arbitrary and capricious. PI Mem. 17-20. First, their argument that "Congress did not include" gender identity in Title IX simply rehashes their claim that ED has misinterpreted its regulation, without any new reasoning. PI Mem. 18. Second, ED closely studied the "practical ramifications" that Plaintiffs claim it ignored. *Id.* ED adopted its interpretation in consultation with school districts and administrators. Based on its practical experience, it concluded that schools do not have to deny transgender students equal access to school facilities in order to protect privacy and prevent disruption. *See, e.g.*, ED, *Emerging Practices*, *supra* (describing how schools have successfully implemented ED's interpretation). School officials across the country have agreed. *See* Amicus Br. of Sch. Admins., *Highland v. Dep't of Ed.*, No. 2:16-cv-524, ECF No. 91-1 (S.D. Ohio).

C. Defendants' Interpretation Does Not Violate the Spending Clause

Plaintiffs take two short paragraphs to assert four separate theories for how Defendants' interpretation violates the Spending Clause. *See* PI Mem. 21-22 (purporting

[19] Furthermore, even if *Sommers* retained any vitality in the Title VII context, in the Title IX context, its statement that sex discrimination must not be given "an expansive interpretation" directly conflicts with the Supreme Court's admonitions that "[c]ourts must accord Title IX a sweep as broad as its language," and that its "cases . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 175, 183 (quotation marks omitted); *see id.* at 174 ("The Court of Appeals' conclusion that Title IX does not prohibit retaliation because the statute makes no mention of retaliation ignores the import of our repeated holdings construing discrimination under Title IX broadly.") (quotation marks omitted).

to advance notice, coercion, germaneness, and individual-rights claims). Plaintiffs are wrong on all counts.

First, the challenged interpretation does not violate the notice requirement announced in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Since 1972, recipients of federal funds have known that they must comply with Title IX's ban on sex discrimination—wherever it might apply. Each time a new application of Title IX has prompted a notice claim like the one in this case, the Supreme Court has rejected it. The Court rejected a notice claim while holding that Title IX prohibits deliberate indifference to student-on-student harassment. *Davis*, 526 U.S. at 650-51 ("Congress need not specifically identify and proscribe each condition in the legislation" once the "statute made clear that there were some conditions placed on receipt of federal funds.") (quotation marks omitted). It rejected a notice claim in holding that Title IX prohibits retaliation. *Jackson*, 544 U.S. at 183 (same). As the Court has explained, recipients are on notice that the Court has "consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Id.* Once the statutory condition is clear—in this case, compliance with Title IX—particular applications of that condition cannot violate *Pennhurst*'s notice requirement. Indeed, the Court has explicitly held that the Spending Clause does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a spending condition. *Bennett v. Kentucky Dep't of Ed.*, 470 U.S. 656, 669 (1985); *see id.* at 666 ("[E]very improper expenditure" need not be "specifically identified and proscribed in advance."); *Van Wyhe*

v. Reisch, 581 F.3d 639, 650-51 (8th Cir. 2009) ("[S]etting forth every conceivable variation in the statute is neither feasible nor required.").

Second, Plaintiffs have no coercion claim. The Supreme Court has explained "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *see also Nat'l Fed. of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2606 (2012). Coercion may occur when Congress leverages an old and large program to force states to participate in a new one. *See NFIB*, 132 S. Ct. at 2607 ("What Congress is not free to do is to penalize States that choose not to participate in [a] *new* program by taking away their existing . . . funding.") (emphasis added). But there is no coercion where, as here, the only issue is the interpretation of a longstanding spending condition. Title IX is not some separate program, nor is it new. It is an integral part of federal education spending, and has prohibited sex discrimination for more than forty years. *See id.* at 2603–04 (reaffirming Congress's authority to place "restrictions on the use of [federal] funds"). No court has ever suggested that coercion might occur when an existing statutory condition is interpreted in a new context—a routine task for courts and agencies applying cooperative spending statutes. This Court should not be the first. *See, e.g., Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (rejecting analogous coercion claim against disability anti-discrimination condition).

Third, Title IX and all of its applications are germane to the purpose of federal funds. Congress enacted Title IX "to avoid the use of federal resources to support discriminatory practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). It understood that sex

discrimination in schools "undermines and detracts from [students'] educational experiences." *Davis*, 526 U.S. at 651. This is true of *every* application of Title IX and its regulations, including the present one. At any rate, courts have analyzed germaneness deferentially. *See, e.g.*, *Dole*, 483 U.S. at 208; *Van Wyhe*, 581 F.3d at 651. Title IX, and this particular application, easily satisfy this requirement.

Fourth, Defendants' interpretation does not require schools to violate anyone's constitutional rights. That claim is addressed below, in Section II.E.

D. ED's Interpretation Does Not Force Schools to Violate Title IX

Plaintiffs argue that District 706's policy—which simply allows one transgender student to use the bathrooms and locker rooms that match her gender identity—violates Title IX. They advance two theories: First, Plaintiffs claim the District's policy "excludes Girl Plaintiffs from" sports teams, locker rooms, and restrooms. PI Mem. 24. Second, they claim the District's policy automatically "creates a sexually harassing hostile environment." *Id.* at 25-27.

The exclusion claim fails because District 706 gives all girls the same right to use female facilities. Plaintiffs have identified no school rule, policy, or practice that purports to bar their use of female restrooms or locker rooms. All they offer is the fact that some students prefer to avoid communal facilities rather than share them with a transgender student. *Id.* at 24. But that cannot by itself establish a violation of Title IX, and Plaintiffs cite no cases in support. To the contrary, courts have regularly held that the preferences of others cannot be used to discriminate on the basis of sex. *See, e.g.*, *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (holding that an employer could not fire a

female employee based on its clients' preference for working with males); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (holding that airline could not fire male flight attendant based on customer preference for female flight attendants). Beyond that, Plaintiffs simply repeat, twice, that allowing a transgender girl to use the girl's room "excludes" non-transgender girls, with no further explanation. PI Mem. 24, 25. Absent some allegation of outright exclusion, this claim has no independent force.

The harassment claim also fails. Such a claim requires proof that the school was deliberately indifferent to sexual harassment "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. This standard is "demanding—to be actionable, conduct must be extreme and not merely rude or unpleasant." *LeGrand v. Area Resources for Comm. & Human Servs.*, 394 F.3d 1098, 1101 (8th Cir. 2005). It is important to note exactly what Plaintiffs are claiming violates this standard: simply allowing one student to use facilities that match her gender identity. *See* PI Mem. 23 ("The District *Policy* Violates Title IX"), 24 ("The *Policy* excludes Girl Plaintiffs"), 25 ("The *Policy* creates a sexually harassing hostile environment") (emphases added). Plaintiffs' claim is not tied to any particular incident, or any pattern of behavior, both of which the school remains able to address, if appropriate. Rather, Plaintiffs argue that sharing facilities with a transgender student *per se* constitutes sexual harassment in violation of Title IX, no matter what.

The Eighth Circuit has rejected that position. In *Cruzan v. Special School District # 1*, 294 F.3d 981 (8th Cir. 2002), the court held that a transgender woman "merely being present in the women's faculty restroom" did not constitute sexual harassment under Title VII. *Id.* at 984; *see also Doe v. Perry Comm. Sch. Dist.*, 316 F. Supp. 2d 809, 833 (S.D. Iowa 2004) ("Title VII precedent is appropriate for analyzing hostile environment sexual harassment claims under Title IX.") (quotation marks omitted). The mere presence of a transgender person comes nowhere near what is necessary for conduct to be "extreme" and "objectively offensive." *See, e.g.*, *Eich v. Bd. of Regents*, 350 F.3d 752, 760 (8th Cir. 2003) ("sexual touching and sexual innuendos . . . over a continuous period of time . . . over a period of seven years"); *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997) (being "physically touched in a sexually suggestive and intimate manner," followed by eight months in which co-workers "proceeded to laugh, snicker, and make suggestive noises"); *see also LeGrand*, 394 F.3d at 1102 (describing numerous factual scenarios that did not rise to the level of actionable sexual harassment).

As mentioned, schools retain the ability and duty to prevent harassment by any student, transgender or otherwise. To the extent students engage in harassing behavior, schools can and must address that behavior. And ED's interpretation does not prevent schools from providing partitions, stalls, or single-user facilities for all students—transgender and non-transgender alike—who desire greater privacy. *See, e.g.*, ED, *Emerging Practices*, *supra*, at 7-8. But other students' discomfort sharing communal facilities with a transgender student cannot justify denying the transgender student access to an "education program or activity" "on the basis of sex." 20 U.S.C. § 1681(a).

E. Defendants' Actions Do Not Violate Students' Fundamental Rights to Privacy

Plaintiffs also bring a substantive due process claim based on their allegation that Defendants have violated "the fundamental right to bodily privacy." PI Mem. 28. This claim also fails. "A substantive due process claim can be stated two different ways." *Riley v. St. Louis Cnty.*, 153 F.3d 627, 631 (8th Cir. 1998). First, "substantive due process is violated when the state infringes 'fundamental' liberty interests without narrowly tailoring that infringement to serve a compelling state interest." *Id.* Second, "substantive due process is offended when the state's actions either 'shock[] the conscience' or 'offend [] judicial notions of fairness . . . or . . . human dignity.'" *Id.* (quoting *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc)) (alterations in original).

Here, Plaintiffs seem to allege a violation of a fundamental constitutional right, rather than government action that shocks the conscience.[20] A fundamental constitutional right protected by the Due Process Clause is one that is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has mandated extreme caution in elevating particular interests to the status of fundamental constitutional rights, because recognizing such rights, "to a great extent, places the matter

[20] Nor would Plaintiffs be able to satisfy the "shocks the conscience" standard, which generally is implicated only by "violations of personal rights so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002) (quoting *In re Scott County Master Docket*, 672 F. Supp. 1152, 1166 (D. Minn. 1987)) (alterations and quotation marks omitted); *see also Singleton v. Cecil*, 176 F.3d 419, 425 n.7 (8th Cir. 1999).

outside the arena of public debate and legislative action" and risks transforming the Due Process Clause "into the policy preferences of the Members of the Court." *Id.* In determining whether a claimed right is fundamental, courts first require "a careful description of the asserted fundamental liberty interest." *Id.* at 721. "[V]ague generalities . . . will not suffice." *Chavez v. Martinez*, 538 U.S. 760, 776 (2003); *see, e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005). "The list of fundamental rights is short," *Doe v. Ohio State Univ.*, 136 F. Supp. 3d 854, 868 (S.D. Ohio 2016) (listing fundamental rights), and Courts "are generally hesitant to extend substantive due process into new arenas," *Riley*, 153 F.3d at 631; *see also Dixon v. Tanksley*, 94 F. Supp. 3d 1061, 1070 (E.D. Mo. 2015) ("The Supreme Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.") (quotation marks omitted).

The alleged right identified by Plaintiffs is "bodily privacy." This description fails to narrowly and accurately define the interest that Plaintiffs actually seek to vindicate, which is an alleged right to use school locker room and bathroom facilities from which transgender students are excluded.[21] There is, however, no such fundamental right, and Plaintiffs cannot simply use the word "privacy" and then automatically invoke the

[21] Plaintiffs frame the alleged right as including "shielding one's body and private activities from view by the opposite sex." PI Mem. 28. But, among other problems, Plaintiffs simply presume that a transgender individual who uses a locker room or bathroom consistent with his or her gender identity is doing so as a member of the opposite sex. Plaintiffs provide no support for the proposition that the alleged right to bodily privacy extends this far.

protections of the Due Process Clause. *See Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (explaining the contours of the constitutional "right to privacy"); *Doe*, 136 F. Supp. 3d at 869 (explaining that the right to privacy only "take[s] on a constitutional dimension" in limited circumstances); *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (explaining that lower courts should not expand privacy rights that have not been clearly recognized by the Supreme Court). Neither the Supreme Court nor the Eighth Circuit has recognized the type of interest that Plaintiffs assert here as a fundamental constitutional right. Courts have recognized that individuals may have privacy interests in the exposure of their unclothed bodies, but the scope of this interest is neither limitless nor fundamental. To the extent that the Eighth Circuit has recognized a constitutional right to privacy, it has been articulated as a right to be free from "unwarranted governmental intrusions into [individuals'] personal lives." *Riley*, 153 F.3d at 631; *see Eagle*, 88 F.3d at 625 (same). Similarly, the Supreme Court and the Eighth Circuit have "recognized a substantive due process right to bodily integrity," which is best described as "protect[ing] against nonconsensual *intrusion* into one's body," including rape and sexual assault by police officers. *Rogers v. City of Little Rock*, 152 F.3d 790, 795 (8th Cir. 1998) (emphasis added). The alleged right at issue in this case is a far cry from either of these categories.[22]

[22] The cases relied on by Plaintiffs, *see* PI Mem. 28, are not precedential in this Circuit. In any event, they are inapposite. For example, *York v. Story*, 324 F.2d 450 (9th Cir. 1953), *Doe v. Luzerne County*, 660 F.3d 169 (3d Cir. 2011), and *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002), all involved the taking and distribution of nude photographs or videos by police officers. The circumstances of this case—that is, the mere presence of a transgender student in communal facilities—are quite different.

Furthermore, even if Defendants' actions somehow implicated the fundamental privacy rights of students—which they do not—Plaintiffs' substantive due process claim would fail because the Federal Defendants have not interfered "directly" or "substantially" with those rights. *See Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978). Incidental effects on fundamental rights are not cognizable under the Due Process Clause. *See Christensen v. Cnty. of Boone*, 483 F.3d 454, 463 (7th Cir. 2007). Plaintiffs fail to plausibly allege how Defendants' interpretation of Title IX and its implementing regulations "directly and substantially" infringes students' rights to privacy, particularly where students who want additional privacy may have access to alternative restroom and changing facilities.

Because Plaintiffs have entirely failed to allege that any fundamental rights to privacy have been substantially impaired, the rational basis test governs this Court's review. *See Glucksberg*, 521 U.S. at 728. Under this test, the Court must simply ask if the government action bears "a reasonable relation to a legitimate state interest." *Id.* at 722. Defendants' actions easily meet this standard. But even if the Court were to evaluate Defendants' actions under the higher standard used to analyze substantial burdens on fundamental rights, Plaintiffs' claim would fail. The government undoubtedly has a compelling interest in protecting the rights of all students to an equal education by enforcing the antidiscrimination provisions of Title IX and its regulations.[23] Accordingly, Plaintiffs' substantive due process claim is unlikely to succeed.

[23] It is also relevant that this case arises in the context of schools, where students have a diminished expectation of privacy to begin with. *See Vernonia Sch. Dist. 47J v. Acton*, 515

III. Plaintiffs Have Not Satisfied the Other Requirements for a Preliminary Injunction

Before this Court can issue a preliminary injunction, Plaintiffs "bear[] the burden of proving *all* the [preliminary injunction] factors." *Watkins*, 346 F.3d at 844 (emphasis added). They have not carried this burden for the three remaining factors.

A party seeking a preliminary injunction must establish that it is likely to suffer irreparable injury in the absence of the requested relief. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The threat of irreparable injury must be "real," "substantial," and "immediate," not speculative or conjectural. *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983).

As an initial matter, Plaintiffs' delay in seeking relief—allowing almost seven months to pass between District 706's implementation of the challenged policy and the filing of their Complaint—belies their claim of irreparable harm. "[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Aviva Sports, Inc. v. Fingerhut Direct Marketing, Inc.*, 2010 WL 2131007, at *1 (D. Minn. May 25, 2010) (quotation marks and citations omitted); *see Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999) (holding that plaintiff's delay in seeking preliminary injunction "belies any claim of irreparable injury" and recognizing that delay in seeking injunction, standing alone, may justify denying request).

U.S. 646, 654, 657 (1995); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 496 (6th Cir. 2008) ("The Supreme Court has acknowledged that generally, students have a less robust expectation of privacy than is afforded the general population.").

In any event, Plaintiffs' motion papers underscore the lack of irreparable injury here. Plaintiffs assert in a single factually-unsupported paragraph that they face irreparable harm because students are suffering from "stress, anxiety, emotional distress, embarrassment, and apprehension" as a result of Defendants' actions. PI Mem. 32. But Plaintiffs have put forward no evidence to substantiate these allegations. Nor can irreparable harm be presumed based on Plaintiffs' substantive due process claims, because those claims are unlikely to succeed. *See supra* Part II.E. Only "a 'showing [of] interfere[nce] with the exercise of . . . constitutional rights,' not a mere allegation, 'supports a finding of irreparable injury." *Saldana v. Lahm*, 2013 WL 5658233, at *7 n.1 (D. Neb. Oct. 11, 2013) (quoting *Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977)). *See also Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985) (holding that unexplained nine-month delay between notice of dispute and request for injunction *overcame* presumption of irreparable harm).

The balance of harms also cuts against an injunction. As explained above, Plaintiffs' alleged harms are entirely unsupported by evidence. Against this weighs the substantial public interest in achieving Title IX's goal of eliminating discrimination in educational settings. As a general matter, "there is inherent harm to an agency" in preventing it from enforcing statutes and regulations that "Congress found it in the public interest to direct that [it] develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 296 (6th Cir. 1998) ("[T]he granting of an injunction against the enforcement of a likely constitutional statute would harm the government.").

Granting a preliminary injunction would also harm the public interest. As Judge Davis stated in *Gloucester*, "[e]nforcing [a transgender student's] right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." 822 F.3d at 729 (Davis, J., concurring). Enjoining Defendants from implementing the antidiscrimination provisions of Title IX would inflict a very real harm on the public and, in particular, on a readily identifiable group of transgender individuals. *See Nken v. Holder*, 556 U.S. 418, 420 (2009) (harm to opposing party and public interest "merge when the Government is the opposing party").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied.

Dated: October 12, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum complies with Local Rule 7.1(f), because the Memorandum contains 11,997 words, including headings, footnotes, and quotations, according to the word count calculated by Microsoft Word (2013 version). I further certify that the foregoing Memorandum complies with the requirements of Local Rule 7.1(h), because its text is size 13 font.

/s/ *Spencer E. Amdur*
Spencer E. Amdur

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2016, a copy of the foregoing Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ *Spencer E. Amdur*
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