UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN JONES and JANE JONES; and MACY ROE, Plaintiffs, vs. BOYERTOWN AREA SCHOOL DISTRICT; DR. RICHARD FAIDLEY, in his official capacity as Superintendent of the Boyertown Area School District; DR. BRETT COOPER, in his official capacity as Principal; and DR. E. WAYNE FOLEY, in his official capacity as Assistant Principal, Defendants, And PENNSYLVANIA YOUTH CONGRESS FOUNDATION, Defendant Intervenor.	**Case No. 17-1249-EGS** **The Honorable Edward G. Smith** **PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Court's Order of May 24, 2017, Plaintiffs' submit their

Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Boyertown Area School District ("District") is a public school district organized under the laws of the Commonwealth of Pennsylvania. (Am. Complaint at 14-15).

2. The District receives federal financial assistance. (Pl. Ex. 42).

3. Dr. Richard Faidley is the current Superintendent of the District. (Am. Complaint at 20).

4. Dr. Brett Cooper is the current Principal of Boyertown Area High School. (Am. Complaint at 21).

5. Dr. E. Wayne Foley is a current Assistant Principal of Boyertown Area High School. (Am. Complaint at 22).

6. Up until the 2016-17 school year, the Boyertown Area School District had a practice that privacy facilities like locker rooms and restrooms were provided exclusively on the basis of biological sex. (Foley Dep. 23; Cooper Dep. 27:21-25).

7. The reason for this practice was to protect the personal privacy of students from members of the opposite biological sex while in such facilities. (Cooper Dep. 35:14-22; Foley Dep. 26, 53-54).

8. Under this prior practice, students were disciplined for entering privacy facilities of the opposite sex. (Cooper Dep. 31:17-19; Foley Dep. 24-25).

9. In the 2014-15 school year, Dr. Cooper was approached by a school counselor who communicated that Student ee, a biological female, no longer wanted to share the privacy facilities with other females. (Cooper Dep. 75:8-15, 78:13-17).

10. Student ee was given access to a single-user privacy facility. (Cooper Dep. 79:12-15; Faidley Dep. 28:20-24).

11. Prior to the start of the 2016-17 school year, Student ee asked to use the boys' privacy facilities. (Cooper Dep. 80:9-23).

12. Dr. Cooper sought direction from and consulted with Central Administration, which is headed by Dr. Faidley. (Cooper Dep. 20:25-21:5, 80:24-81:2; Faidley Dep. 30:3-12).

13. After discussions between Dr. Faidley and Assistant Superintendent Scoboria, Mr. Scoboria advised Dr. Cooper that in light of the *Dear Colleague* letter sent by the Obama Administration on May 13, 2016, the school should allow students identifying with the opposite sex to use to privacy facilities of the opposite sex if that make them more comfortable. (Faidley Dep. 31:14-21; Cooper Dep. 107:22-108:21).

14. Dr. Cooper then communicated the decision to his administrative team at the high school. (Cooper Dep. 109:21-110:2).

15. As a result, when two biological females, Student A and Student ee, and when a biological male, Student B, asked to use the privacy facilities

of the opposite sex, Dr. Cooper granted them permission. (Cooper Dep. 80:24-81:2, 89:3-8, 92:19-93:16).

16. There are three other students, Student ff, Student gg, and Student hh, who identify with the opposite sex. (Cooper Dep. 94:7-12, 98:21-25, 103:1-3).

17. Dr. Cooper is not aware of any requests from these students to use the privacy facilities of the opposite sex, nor is he aware if they actually use those facilities. (Cooper Dep. 96:1-12, 100:13-20, 101:22-23).

18. A student who identifies with the opposite sex is not required to use the privacy facilities of the sex with which they identify. (Cooper Dep. 103:19-23).

19. Student ee, though sharing the privacy facilities of the *opposite* sex, shared overnight accommodations with three students of the *same* biological sex. (Cooper Dep. 113:15-17).

20. The only criteria for using the privacy facilities of the opposite sex if identifying with the opposite sex is whether it makes that student comfortable. (Cooper Dep. 114:21-115:3).

21. Such students need not dress or groom as the opposite sex, and they need not change their names or pronouns, receive hormone treatments, or undergo surgery. All that matters is what makes those students most comfortable. (Cooper Dep. 115:4-25).

22. Parents and other students were not informed about this change in practice. (Faidley Dep. 46:22-47:11; Foley Dep. 30; Cooper Dep. 29:13-16).

23. The privacy facilities are marked with signs with the universal symbol for men and women and/or the words "boys" or "girls." (Cooper Dep. 60:8-11, 60:24-61:3, 69:6-11, 70:11-13, 71:15-16).

Joel Doe

24. During the 2016-17 school year, Plaintiff Joel Doe was a junior at the Boyertown Area High School. (Am. Complaint at 10).

25. On October 31, 2016, Joel Doe began changing in the locker room for PE class, and when he was standing in his underwear about to put his gym clothes on, he suddenly realized there was a member of the opposite sex changing with him in the locker room, who was at the time wearing nothing but shorts and a bra. (Am. Complaint at 50).

26. Joel Doe experienced immediate confusion, embarrassment, humiliation, and loss of dignity upon finding himself in this circumstance and quickly put his clothes on and left the locker room. (Am. Complaint at 51).

27. Joel Doe, along with various classmates, went to speak to Assistant Principal, Dr. Foley, to let him know what had happened. (Am. Complaint at 52).

28. During the meeting, as Dr. Foley testified was his custom, the door of his office remained open. Dr. Foley acknowledged he had no expectation of confidentiality during the meeting. (Foley Dep. 42-43).

29. The conversation went as follows:

Joel: So I have a quick, a few quick questions. There was a girl in our locker room today.

Dr. Foley: Mhm.

Joel: Um, I was questioning the legality of that.

Dr. Foley: The legality of that right now as it stands is anybody that is a transgender student. . .

Joel: Okay. . .

Dr. Foley: . . . may choose the bathroom and/or locker room in which they identify their gender with.

Joel: Okay.

Dr. Foley: And we are trying to get another ruling on that too, because that law continues to change instantaneously.

Joel: Can you define transgender for me?

Dr. Foley: Sure.

Joel: Just so that we are on the same page.

Dr. Foley: Transgender could be any mental state that a person has that they believe that they identify with.

Joel: So mental, not physical.

Dr. Foley: It does not have to be physical at this point.

(Exhibit Audio Doe-Foley).

30. Joel Doe asked whether there was anything that Dr. Foley could do to protect the boys in the locker room. Specifically, the interaction went as follows:

Joel: I guess the question is: Is there anything you can do as in separating this group of boys from that situation?

Dr. Foley: There is nothing that I can do instantaneously.

(Exhibit Audio Doe-Foley).

31. Dr. Foley told Joel Doe, "In the meantime I just need you to, unfortunately, tolerate it." He also stated, "You know, try and make it as unnatural [sic] as possible. You know, just make it as natural as you possibly can." (Exhibit Audio Doe-Foley).

32. When asked if Dr. Foley would tell Joel when he knew whether this would continue, Dr. Foley replied, "Yeah, well, you'll know because either Student A will stay there or Student A will no longer be there." (Exhibit Audio Doe-Foley).

33. As the students were leaving, Dr. Foley reemphasized, "As natural as possible, as kind as you can be." (Exhibit Audio Doe-Foley).

34. The anxiety, embarrassment, and stress Joel feels as a result of his loss of privacy has caused him to refrain from using restrooms as much as possible, stress about when and if he can use a given restroom without

running into persons of the opposite sex, and opting often to hold his bladder rather than using the school's restroom. This has caused an ever-present distraction throughout the school day. (Am. Complaint at 63).

35. Joel has altogether stopped using the boys' locker room. (Am. Complaint at 73).

Jack Jones

36. Plaintiff Jack Jones was a junior at Boyertown Area High School in the 2016-17 school year. (Jack Trial Dep. 4:19-21, 7:11-13).

37. On or about the first week of November, 2016, Jack began changing in the locker room after PE class. He was standing facing his locker, and Student cc was standing to his right. Just after Jack changed his shirt and when he was standing in his underwear about to put his shorts on, Student cc tapped Jack's shoulder. As Jack turned to face him, Student cc gestured at something behind Jack. When Jack turned around, he saw a member of the opposite sex in the locker room with him, while he was in his underwear. (Jack Trial Dep. 7:18-21, 17:20-18:4).

38. Jack experienced immediate confusion, embarrassment, humiliation, and loss of dignity upon finding himself in this circumstance. He quickly moved to another part of the locker room behind other boys and where he believed he would be most secluded from the member of the opposite sex, put his shorts on and left the locker room. (Jack Trial Dep. 18:6-13, 19:15-18, 19:21-20:1, 21:20-21).

39. The anxiety, embarrassment, and stress he feels as a result of his loss of privacy has caused him to refrain from using restrooms as much as possible, stress about when and if he can use the locker room or a given restroom without running into persons of the opposite sex, and opting to hold his bladder rather than using the school's restroom. This has caused an ever-present distraction throughout the school day. (Jack Trial Dep. 23:4-7, 23:24-24:10, 24:15-16).

Mary Smith

40. Mary Smith, a junior at Boyertown Area High School in the 2016-17 school year, entered a girls' bathroom in the High School in March, 2017, and saw a male student, Student B. (Am. Complaint at 98, 99).

41. Mary experienced immediate shock, confusion and embarrassment, and went to report the incident to the school office. (Am. Complaint at 104).

42. Mary Smith reported the incident to Dr. Foley. It was then that Mary learned for the first time that the school was now permitting members of the opposite sex to use the girls' bathrooms. (Am. Complaint at 107).

43. Mary told Dr. Foley that she had never heard this was happening and inquired whether the school ever told her parents about this. Dr. Foley responded that they had not told parents about this but he believed the school might be working on that. (Am. Complaint at 109).

44. Dr. Foley did not offer her any other options for her to use restrooms or locker rooms outside the presence of male students, whether the nurse's office or otherwise. (Am. Complaint at 110).

45. The anxiety, embarrassment, and stress she feels as a result of the loss of privacy has caused her to refrain from using restrooms as much as possible, stress about when and if she can use a given restroom without running into persons of the opposite sex, and opting to hold her bladder rather than using the school's restroom. This has caused an ever-present distraction throughout the school day. (Am. Complaint at 113).

46. As a result of the stress and anxiety caused by Defendant's actions and the new policy, she has determined that she will not return to the Boyertown Area School District for her senior year. (Am. Complaint at 117).

Macy Roe

47. Macy Roe was a senior at Boyertown Area High School during the 2016-17 school year. (Macy Trial Dep. 5:18-20).

48. The anxiety and stress she felt as a direct result of the loss of privacy caused her to refrain from using restrooms as much as possible, stress about when and if she can use a given restroom without running into persons of the opposite sex, and opting to hold her bladder rather than using the school's restroom. (Macy Trial Dep. 10:1-24, 15:25-16:3).

Additional Findings

49. The term "sex" refers to one's biological/anatomical status as either male or female. Sex is fixed at conception, binary, objectively verifiable, and rooted in our human reproductive nature. (*Random House College Dict*. 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *American Heritage Dict*. 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *The American College Dict*. 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished ..."); 9 *Oxford English Dict*. 578 (1961) ("[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.")).

50. Transgender means "a person whose gender identity differs from their biological sex." (Cooper Dep. 27:6-9).

51. Gender identity is "a person's internal sense of being a man or a woman or someone outside of the gender binary." (Cooper Dep. 27:2-5).

52. When asked whether students who are genderfluid could choose the privacy facility that makes them most comfortable, Dr. Cooper indicated that such decisions have not yet been made. He also indicated no plan is

in place to handle requests from students who identify as third gender or non-binary. (Cooper Dep. 84:17-19, 85:7-18).

53. Rather than constituting a binary replacement for biological sex that conveniently dictates which of the two separate facilities we use, gender identity theory defies binary categories and is entirely unworkable for maintaining distinct privacy facilities. *See, e.g.*, American Psychological Association. *Answers to your questions about transgender people, gender identity, and gender expression*. 1-2 (2011), *available at* http://www.apa.org/topics/lgbt/transgender.aspx (explaining that "Genderqueer is a term that some people use who identify their gender as falling outside the binary constructs of 'male' and 'female.'" Other terms "include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people." These "often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive."); Asaf Orr, Esq., et al., National Center for Lesbian Rights, Schools in Transition: *A Guide for Supporting Transgender Students in K-12 Schools* 5 (describing gender and gender identity as falling on a "gender spectrum") and 7 (defining "gender identity" as "a personal, deeply-felt sense of being male, female, both or neither") (2015), *available at* http://bit.ly/2kc8Ooi.

54. The District contends that toilet stalls, urinal dividers, and shower stalls provide personal privacy (Cooper Dep. 123:20-124:10).

55. It is possible to see under and over toilet stalls. (Pl. Ex. 30-31, 34).

56. Macy Roe testified that people can see through gaps in the bathroom stalls. Specifically, Macy stated that "there are large gaps in the stalls that I have made eye contact through before. It happens." (Macy Trial Dep. 15:18-21)

57. Macy Roe testified that she can be heard relieving herself in the bathroom, and female students can be heard attending to their periods. Specifically, Macy stated, "It's awkward because you can hear someone opening a pad or a tampon, so it can be heard when I do need to take care of my period, and it's terrifying that a boy could walk in as I'm doing such." (Macy Trial Dep. 11:17-24, 15:18-19).

58. Shower stalls are not accessible unless walking through the locker room. (Jack Trial Dep. 28:17-22).

59. Toilet stalls, urinal dividers, and shower stalls are designed to give privacy between persons of the same sex. (Faidley Dep. 22:14-23:4).

60. The District contends that there is no expectation of privacy in the common areas of restrooms or locker rooms. (Cooper Dep. 126:7-23).

61. Students not only change in the common areas of the locker rooms, but also in the common areas of the restrooms. (Macy Trial Dep. 12:3-8).

62. Students see other students' private parts in the common areas of the locker room. (Macy Trial Dep. 14:11-13; Jack Trial Dep. 9:23-10:6).

63. It is mandatory that students in PE class change into clothing appropriate for PE class. Students who do not change into appropriate clothing lose points and receive a bad grade, and if they fail PE class, will be unable to graduate. (Jack Trial Dep. 23:8-14).

64. New renovations have included "moving the lockers themselves to the outside walls and creating a large open space in the common area of the locker rooms." (Cooper Dep. 38:24-39:3).

65. Macy Roe testified that in the open space in the locker rooms, "there wasn't a lot of privacy. . . . You could see everyone." (Macy Trial Dep. 13:9-13).

66. Plaintiffs do not object to students of the same biological sex using private facilities with them, regardless of how they self-identify. (Am. Complaint at 40).

67. While Defendants Faidley, Cooper, and Foley implemented the practice pursuant to their roles in the school, the school board voted to continue the practice with a 6-3 vote on March 28, 2017.

CONCLUSIONS OF LAW

Constitutional Right to Bodily Privacy

1. The importance of privacy has long been considered central to our western notions of freedom: a measure of personal isolation and personal

control over the conditions of privacy's abandonment is of the very essence of personal freedom and dignity.

2. One has a "constitutionally protected privacy interest in his or her partially clothed body." *Doe v. Luzerne County*, 660 F.3d at 175-76 n.5 (3d Cir. 2011).

3. The "right to privacy is now firmly ensconced among the individual liberties protected by our Constitution." *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994).

4. There is a "right to privacy in one's unclothed or partially unclothed body." *Poe v. Leonard*, 282 F.3d at 138 (2d Cir. 2002) .

5. The Sixth Circuit located this right in the Fourth Amendment, *see Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008), but this circuit as well as the Second and Ninth Circuit located this right in the Fourteenth Amendment, *see Doe v. Luzerne County*, 660 F.3d at 176 n.5 (3d Cir. 2011); *Poe v. Leonard*, 282 F.3d 123, 136-39 (2d Cir. 2002) (locating this right in the Fourteenth Amendment); *York v. Story*, 324 F.2d 450, 454-56 (9th Cir. 1963).

6. The contours of the right are the same regardless of the constitutional basis. *See Doe v. Luzerne County*, 660 F.3d at 176 n.5 (3d Cir. 2011).

7. A "reasonable expectation of privacy" exists "particularly while in the presence of members of the *opposite sex*." *Doe v. Luzerne County*, 660 F.3d at 177 (3d Cir. 2011) (emphasis added).

8. "The desire to shield one's unclothed figure from views of strangers, and *particularly* strangers *of the opposite sex*, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d at 455 (9th Cir. 1963) (emphasis added).

9. Viewing a person in a bathroom would be sufficient to support an intrusion of privacy, even if they aren't viewed on a toilet, because "it is sufficient that the seclusion of the bathroom, a private area, was intruded upon." *Koeppel v. Speirs*, No. 9-902 / 08-1927, 2010 Iowa App. LEXIS 25, at * 16 (Iowa Ct. App. Jan. 22, 2010).

10. The collection of urine samples may constitute an invasion of privacy if "it involves the use of one's senses to oversee the private activities of another" since the performance in public of such activities are "generally prohibited by law as well as social custom." *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992) (Both "visual or aural observation" were of concern.).

11. "[M]ost people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

12. That feeling is magnified for teens, who are "extremely self-conscious about their bodies[.]" *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993).

13. Their "adolescent vulnerability intensifies the . . . intrusiveness of the exposure." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009).

14. Forcing minors to risk exposing their bodies to the opposite sex is an "embarrassing, frightening, and humiliating" experience. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 366 (2009).

15. The Constitution prohibits Defendants from placing students in situations where their bodies or private, intimate activities may be exposed to the opposite sex or where these students will use privacy facilities with someone of the opposite sex.

16. Fundamental rights like these are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

17. It is impossible to conceive of ordered liberty in the midst of the injustice of government pressuring our children to change clothing or to use the restroom in the presence of the opposite sex.

18. The District may not use its substantial power over those students in its care to condition the use of locker rooms and multi-user restrooms upon surrendering their fundamental right to bodily privacy.

19. Our understanding of personal privacy from persons of the opposite sex is so universal as to require the use of separate facilities on the basis of sex in a myriad of contexts. *See* Public School Code of 1949, 24 P.S. § 7-740 (requiring that privacy facilities "shall be suitably constructed for, and used separately by the sexes"). *See also* 43 P.S. § 109 (requiring application of industrial sanitation code to all employers, which involves separate restrooms); 7 Pa. Code § 1.57 (requiring separate facilities for meat packers); 7 Pa. Code § 78.75 (separate restrooms at eating establishments); 7 Pa. Code § 82.9 (requiring separate facilities on the basis of sex for seasonal farm labor, "distinctly marked 'for men' and 'for women' by signs printed in English and in the native languages of the persons" using those facilities); 28 Pa. Code § 18.62 (requiring "separate dressing facilities, showers, lavatories, toilets and appurtenances for each sex" at swimming pools); 25 Pa. Code § 171.16 (requiring schools to follow the provisions of the Public Bathing Law (35 P. S. § § 672—680d) and 28 Pa. Code Chapter 18 (requiring separate privacy facilities at swimming and bathing places); 28 Pa. Code §19.21 (requiring separate restrooms on the basis of sex at camps); 28 Pa. Code § 205.38 (requiring separate restrooms at long term care facilities); 31 Pa. Code § 41.121 (requiring

separate privacy facilities for each sex on railroads); 31 Pa. Code § 41.122 (requiring separate bathrooms to be provided for each sex and clearly designated and forbidding any person to use or frequent a toilet room assigned to the opposite sex); 31 Pa. Code § 47.127 (same); 34 Pa. Code § 403.28 (requiring restrooms for each sex); 43 Pa. Code § 41.24 (designating the entrance of "retiring rooms" to be clearly marked by sex and preventing opposite sex entry); 43 Pa. Code § 41.31 (requiring separate toilet rooms "for each sex" which shall be clearly designated and that "no person shall be permitted to use or frequent a toilet room assigned to the opposite sex"); 43 Pa. Code § 41.32 (requiring partitions separating toilet rooms on account of sex, which shall be "soundproof").

20. The requirement of separate facilities for men and women is also reflected in our national experience.

21. We recognize "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation. . . ." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).

22. When women began working in factories, the law began mandating sex-specific facilities. Massachusetts adopted the first such law, in 1887. *See* Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass Acts, 668, 669.

23. Later, when public buildings began offering multi-toilet restrooms, they designated one for men and one for women and this became an

American norm based on the real and relevant differences between the sexes.

24. This is why "same-sex restrooms [and] dressing rooms" are allowed "to accommodate privacy needs," and why "white only rooms," which have no basis in bodily privacy, are illegal. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010).

25. Females "using a women's restroom expect[] a certain degree of privacy from . . . members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. App. 2014).

26. Specifically, teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (Vir. 1988).

27. Students "have a significant privacy interest in their unclothed bodies" at school. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005).

28. "[P]rivacy matters" to children and is "central to their development and integrity." Samuel T. Summers, Jr., *Keeping Vermont's Public Libraries Safe*, 34 VT. L. REV. 655, 674 (2010) (quoting Ferdinand Schoeman, *Adolescent Confidentiality and Family Privacy*, in PERSON TO PERSON 213, 219 (George Graham & Hugh Lafollette eds., 1989)).

29. Allowing opposite-sex persons to view adolescents in restrooms and locker rooms, which exist exclusively so that intimate and private activities can take place, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

30. Students' right to privacy explains why a girl's locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009).

31. "Unquestionably, a girls' locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009). (recognizing the important privacy rights of a student who was showering, even while wearing a bathing suit).

32. That continued norm is why the Kentucky Supreme Court observed that "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commonwealth*, 865 S.W.2d 332, 336 (Ky. 1993).

33. The ideal of stamping out discrimination is undermined when we disregard the important differences between men and women and violate their bodily privacy.

34. Employers may hire on the basis of sex to vindicate "a juvenile's 'privacy interest'" that "would be violated if required to . . . disrobe and shower in front of a staff member of the opposite sex." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1289 (Pa. Commw. Ct. 1992) (citing *Philadelphia v. Pennsylvania Human Rights Comm'n*, 300 A.2d 97).

35. "[W]here there is a distinctly private activity involving exposure of intimate body parts, there exists an implied bona fide public accommodation qualification which may justify otherwise illegal sex discrimination. Otherwise . . . such sex segregated accommodations such as bathrooms, showers and locker rooms, would have to be open to the public." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1291 (Pa. Commw. Ct. 1992).

36. "The standard for recognizing a privacy interest as it relates to one's body is not limited to protecting one where there is an exposure of an 'intimate area,' but such a right may also be recognized where one has a reasonable basis to be protected against embarrassment or suffer a loss of dignity because of the activity taking place." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1291 (Pa. Commw. Ct. 1992).

37. "To hold otherwise would mean that separate changing rooms in factories, mines and construction sites where workers change from street

clothes to work clothes and back and where 'intimate areas' are not exposed, would not be permitted." *Livingwell, Inc. v. Pennsylvania Human Relations Com'n,* 606 A.2d at 1293 n.6 (Pa. Commw. Ct. 1992).

38. The right to bodily privacy from persons of the opposite sex under the Fourteenth Amendment is not coequal with the prohibition of sex discrimination under Title IX, and therefore is not subsumed under Title IX pursuant to *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981).

39. While the question of whether students may use opposite-sex facilities is new, "the applicable legal principles are well-settled." *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015).

40. The right to bodily privacy requires that Plaintiffs have locker rooms and multi-user restrooms that are separated from persons of the opposite sex and not be put in the humiliating and vulnerable position of seeking partial shelter behind a curtain or stall door under a standard that opens common areas of locker rooms and restrooms to members of the opposite sex.

41. A woman's right to bodily privacy does not spring into existence, or cease to exist, depending on what a man believes about his gender. Her right to bodily privacy is hers and hers alone. And the same is true of a man's right to bodily privacy.

42. Government cannot condition the use of multi-user restrooms and locker rooms on Plaintiffs waiving their right to bodily privacy.

43. No compelling interest justifies obligating students to accept members of the opposite sex into locker rooms and restrooms that are reserved for one sex.

44. Instead, Pennsylvania law governing this school requires that facilities "shall be suitably constructed for, and used separately by, the sexes." Public School Code of 1949, 24 P.S. § 7-740.

45. Defendants' practice violates the requirement of separate privacy facilities and denies Plaintiffs and all students the right to the protections afforded them in using such a sex separated facility, instead conditioning the use of the "boys'" and "girls'" locker rooms, showers, and restrooms on surrendering the right to bodily privacy from persons of the opposite sex.

46. The practice of permitting students of the opposite sex to access bathrooms and locker rooms of the opposite sex violates Plaintiffs' Fourteenth Amendment right to bodily privacy from persons of the opposite sex.

Title IX

47. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

48. A student has a right "to sue a school under Title IX for 'hostile environment' harassment." *Dejohn v. Temple University*, 537 F.3d 301, 316 n.14 (3d Cir. 2008) (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 205-06 (3d Cir. 2000)).

49. "To recover in such a case, a plaintiff must establish 'sexual harassment [ ] that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities.'" *Dejohn v. Temple University*, 537 F.3d at 316 n.14 (3d Cir. 2008) (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d at 205-06 (3d Cir. 2000)).

50. Title IX's protections on the basis of sex apply to biological sex.

51. Title IX's language uses binary phrases "one sex," "the other sex," and "both sexes." *See*, 28 U.S.C. § 1681(2) (some educational institutions admit "students of both sexes"); 28 U.S.C. § 1681(8) (if certain sex-specific activities are provided "for one sex," reasonably comparable ones must be provided to "the other sex"); 28 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes").

52. The legislative record also confirms that Title IX allows differential treatment among the biological sexes, such as "classes for pregnant girls . . ., in sport facilities *or other instances where personal privacy must be*

preserved." 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added).

53. Congress did not advance bills that would have added gender identity directives in the educational context. *See* H.R. 998, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/house-bill/998; S. 555, 112th Cong., (2011), https://www.congress.gov/bill/112th-congress/senate-bill/555; H.R. 1652, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/1652; S. 1088, https://www.congress.gov/bill/113th-congress/ senate-bill/1088; H.R. 848, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/846/related-bills; S. 439, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/439.

54. The plain language of Title IX, contemporary dictionary definitions, legislative history, and subsequent Congressional inaction on gender identity in schools all communicate that Congress intended to preserve distinct privacy facilities on the basis of sex, not theories of gender identity.

55. The analysis of a hostile educational environment on the basis of sex is similar to the analysis of a hostile work environment on the basis of sex.

56. A workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment

even if many people deem it to be harmless or insignificant." *See* EEOC policy guidance, https://www.eeoc.gov/policy/docs/currentissues.html.

57. Presence of a male in a dressing room and restroom of a female "intensified" "the hostile and offensive nature of that environment." *See Schonauer v. DCR Entm't, Inc.*, 905 P.2d 392, 401 (Wash. Ct. App. 1995).

58. Entry by a female into a men's locker room was sufficient to create a hostile work environment. *See Washington v. White*, 231 F. Supp. 2d 71, 80-81 (D.D.C. 2002).

59. A reasonable student would find the environment hostile and harassing. "Unquestionably, a girls locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009).

60. "[A] normal female who was showering in a girls locker room would unhesitatingly be shocked, irritated, and disturbed" if she saw a biological male "gazing at her, no matter how briefly he did so." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009).

61. Permitting opposite sex persons into restrooms even if only to clean, "would cause embarrassment and increased stress in both male and female washroom users." *See Norwood v. Dale Maint. Sys., Inc.,* 590 F.

Supp. at 1417 (N.D. Ill. 1984), (recognizing "the invasion of privacy that would be created [by the practice] would be extreme").

62. It is likewise hostile and offensive to allow students of the opposite sex into school locker rooms and restrooms.

63. Defendants' practice creates a hostile and offensive environment and causes Plaintiffs to suffer humiliation, loss of dignity, stress, apprehension, fear, and anxiety.

64. Federal and state law contemplates separate privacy facilities for boys and girls.

65. It is because the policy specifically provides for students to use the privacy facilities of the *opposite* sex that students are experiencing harassment.

66. The harassment that Plaintiffs are experiencing is precisely on the basis of sex because those students seeking to use opposite sex facilities are doing so because of the sex of those using those facilities.

67. "[I]n order for conduct to constitute harassment under a 'hostile environment' theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment." *Saxe*, 240 F.3d at 205.

68. Plaintiffs satisfy the subjective prong because they suffer humiliation, fear, anxiety, stress, and loss of dignity as a result of Defendants' practice.

69. "[T]he objective prong of this inquiry must be evaluated by looking at the 'totality of the circumstances.' 'These may include . . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citing *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23 (1993)).

70. These standards, continuing to reference employment, have been imported into the Title IX context. *See id.*

71. In the education context the "work performance" phrase is altered to apply to harassment that "so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities." *Dejohn*, 537 F.3d at 316 n.14 (quoting *Saxe*, 240 F.3d at 205-06).

72. The situation is severe because if Plaintiffs wish to use the locker room or multi-user restrooms, they know that students of the opposite sex may be present or walk in on them.

73. The situation is also pervasive because this is not an isolated occurrence that the school has since fixed or one involving a claim that the school failed to fix the harassment of another. Instead, the harassment is ongoing and is the direct, foreseeable result of a policy that directly sanctions the harassing activity.

74. The practice is threatening and humiliating to Plaintiffs because they must either give up their right to use the facilities designed for them or face the prospect of being viewed or viewing a person of the opposite sex.

75. A school is responsible for a victim's harassment, when the harassment "so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities." *Dejohn*, 537 F.3d at 316 n.14 (quoting *Saxe*, 240 F.3d at 205-06).

76. All students have a right to use the school facilities corresponding to their sex.

77. The harassment effectively denies Plaintiffs access to the locker rooms and multi-user restrooms corresponding to their sex because their use is conditioned on waiving their right to privacy.

78. Defendants are more than deliberately indifferent to the sexual harassment against Plaintiffs, because it is Defendant's purposeful practice to allow persons of the opposite sex to use these privacy facilities.

79. Defendants continue to violate Title IX even though they are offering the use of a single user bathroom to Plaintiffs because it is insufficient under Title IX to require victims to remove themselves from a harassing environment. *See Seiwert v. Spencer-Owen Cnty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

80. The District's practice also violates Title IX because Plaintiffs cannot use the facilities designed for their sex under state and federal law without being subjected to sexual harassment.

81. Allowing biological girls into boys' privacy facilities and biological boys into girls' privacy facilities creates a hostile environment on the basis of sex under Title IX.

82. Plaintiffs have established all the elements of sexual harassment under Title IX.

Invasion of Seclusion

83. The Restatement (Second) of Torts "most ably defines the elements of invasion of privacy as that tort has developed in Pennsylvania." *Id.*

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other person for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B (1977).

84. Unlike other privacy torts, no publication is required. *See Borse*, 963 F.2d at 621 (citing *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984)).

85. "The tort may occur by (1) physical intrusion into a place where the plaintiff has secluded himself or herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation or examination into plaintiff's private concerns." *Id.* at 621.

86. The intrusion must "cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." *Kline v. Security Guards, Inc.*, 386 F.3d 246, 260 (3d Cir. 2004).

87. "The importance of privacy has long been considered central to our western notions of freedom."

> "[A] measure of personal isolation and personal control over the conditions of [privacy's] abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant."

Koeppel v. Speirs, 808 N.W.2d 177, 180 (Iowa 2011) (citing Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 973-74 (1964)).

88. Joel Doe and Jack Jones had secluded themselves from people of the opposite sex when they entered and used the locker room, whose signs designated them for use by boys.

89. "There also can be no dispute a bathroom is a place where one enjoys seclusion." *Koeppel*, 2010 Iowa App. LEXIS 25, at * 6.

90. Even where a woman "did not expect privacy from other women in the women-only restroom, she reasonably expected her activities to be secluded from perception by men." *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005)

91. Here, Defendants caused and continue to cause physical intrusions into a place where Plaintiffs seclude themselves, and such intrusion is highly offensive.

92. While physical intrusion into a place where Plaintiffs seclude themselves is alone enough to support a violation, here the violations also include the second manner of intruding upon another's seclusion, the use of senses to oversee or overhear Plaintiffs' private affairs. *See Borse*, 963 F.2d at 621.

93. In the context of being viewed by a person of the opposite sex in a restroom or locker room, "[t]here is no question viewing or recording [a person] while in the bathroom would be considered 'highly offensive' by any reasonable person." *Koeppel*, 2010 Iowa App. LEXIS 25, at * 6.

94. Joel Doe's and Jack Jones' experience of being viewed in their underwear by a member of the opposite sex, and in Joel Doe's case, also seeing a member of the opposites sex in a state of undress, would be highly offensive to a reasonable person and was highly offensive to both Joel Doe and Jack Jones.

95. Plaintiffs all risk such experiences in the locker rooms and restrooms in the future in the absence of an injunction against Defendants' practice.

96. The objective offensiveness to the reasonable person is evident in the fact that we have long recognized the right to a private setting, free from persons of the opposite sex in restrooms and locker rooms, which are only

made necessary since we often enter into a state of undress or perform private functions therein.

97. The Public School Code of 1949 requires that facilities "shall be suitably constructed for, and used separately by, the sexes." 24 P.S. § 7-740.

98. Defendants' practice violates the requirement of separate facilities and denies Plaintiffs the right to use such a facility, instead conditioning the use of the "boys'" locker room on surrendering their right to bodily privacy from persons of the opposite sex.

99. The statutory requirement to have separate privacy facilities on the basis of sex is a clear recognition and directive by the legislature that privacy from the opposite sex is a fundamental need worthy of protection. *Cf. Harris*, 483 A.2d at 1387 ("statutory ban against disclosing the names of public assistance recipients is a clear recognition and directive by the legislature that the privacy of the recipient is a fundamental need worthy of protection" and "the court is bound to give great deference to this sound legislative judgment").

100. Even hearing the act of urination implicates privacy interests and could constitute an intrusion upon seclusion. *Borse*, 963 F.2d at 621.

101. Where the performance of an activity, if performed in public, would be "generally prohibited by law as well as social custom," that would also constitute an intrusion upon seclusion. *Id.* at 621.

102. Undressing, which is permitted in private, would be contrary to social norms and considered illegal in most contexts.

103. Invasions of seclusion will continue to occur in the absence of an injunction.

Preliminary Injunction

104. "A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 382 (3d Cir. 2013), *rev'd sub nom on other grounds*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (quoting *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)).

105. Plaintiffs are likely to prevail on the merits because their right to bodily privacy has been violated and continues to be violated, they have been sexually harassed and continue to experience sexual harassment under Title IX, and their seclusion has been invaded and will continue to be invaded.

106. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

107. Irreparable injury is presumed since Plaintiffs established likelihood of success in a case involving privacy rights. *See Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987). *See also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief").

108. In respect to Title IX, the irreparable harm question is simply what "injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

109. Plaintiffs suffer irreparable harm because the sexual harassment under Title IX cannot be adequately compensated through monetary damages.

110. Plaintiffs suffer irreparable harm because an invasion upon seclusion cannot be adequately compensated through monetary damages.

111. The balance of hardships always favors preventing violations of the constitutional right to privacy, sexual harassment under Title IX, and invasion of seclusion. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

112. Only an injunction will stop the irreparable harm experienced by Plaintiffs, but an injunction does no harm to Defendants because the policy is unconstitutional and illegal, and the government is not harmed when it is prevented from enforcing unconstitutional and otherwise illegal laws. *See Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004).

113. Issuing an injunction would restore the status quo prior to the 2016-17 school year of protecting student privacy via truly sex-separated privacy facilities and thereby effect a legal interest in privacy that is wholly consistent with Title IX and the referenced state and federal law.

114. The balance of hardships favors Plaintiffs.

115. "[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *United States v. Raines*, 362 U.S. 17, 27 (1960).

116. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

117. It is also in the public interest to prevent the government from "violat[ing] the requirements of federal law," *Ariz. Dream Act Coal.*, 757 F.3d at 1069, such as Title IX.

118. Waiving the bond requirement is warranted because Plaintiffs seek to vindicate constitutional and statutory rights, and so their lawsuit is in the

public interest. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 n.8 (3d Cir. 1989) (collecting cases); *Powelton Civic Home Owners Ass'n v. Dep't of Housing and Urban Development*, 284 F. Supp. 809, 840 (E.D. Pa. 1968); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (noting that courts have recognized that public interest litigation is an exception to the Rule 65 bond requirement); *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers*, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984) ("no bond is required in suits to enforce important federal rights or public interests.") (quotation marks omitted).

119. Waiving the bond requirement here is particularly appropriate because Plaintiffs raise important claims that serve the public interest by vindicating students' constitutional and statutory rights.

Respectfully submitted this 14th Day of July, 2017.

By: /s/ Randall L. Wenger

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on Friday, July 14, 2017, the foregoing was filed electronically and served on the other parties via the court's ECF system.

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