IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JULIET EVANCHO; *et al.*, *Plaintiffs*, v. PINE-RICHLAND SCHOOL DISTRICT; *et al.*, *Defendants*.	PITTSBURGH DIVISION Civil Action No. 2:16-cv-01537-MRH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

"There is no room in our schools for discrimination of any kind, including discrimination against transgender students on the basis of their sex." – U.S. Attorney General Loretta E. Lynch.[1]

Plaintiffs Juliet Evancho, Elissa Ridenour, and A.S. are seniors at Pine-Richland High School. Juliet and Elissa are girls. A.S. is a boy. They are also transgender. For several years prior to September 12, 2016, the Pine-Richland School District ("PRSD") had a practice of permitting students to use restrooms consistent with their gender identity. In so doing, PRSD respected the identity of all its students, including Plaintiffs.

On September 12, 2016, however, after months of vitriolic debate and weeks after Plaintiffs started their senior year at Pine-Richland High School, the Board of School Directors of Pine-Richland School District (the "School Board") passed a resolution, known as Resolution 2 (Ex. A)[2], barring Plaintiffs and other transgender students from using the restrooms consistent with their gender identity in a 5-4 vote. The following day, Defendants implemented the policy set forth by the School Board in Resolution 2. As a result, Plaintiffs now must use the restrooms and other sex-designated facilities that are *inconsistent* with their gender identity or single-stall restrooms no other students are forced to use, or avoid using the restroom altogether.

The School Board enacted Resolution 2 and Defendants implemented it despite their knowledge that doing so would violate Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*., and Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants also were aware that the passage and

[1] Press Release, U.S. Dep't of Justice, *U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students* (May 13, 2016), *available at* https://goo.gl/LByu5m.

[2] Except where otherwise specified, exhibit numbers herein (e.g., Ex. _) refer to exhibits to the Declaration of Omar Gonzalez-Pagan in Support of Plaintiffs' Motion for Preliminary Injunction.

implementation of Resolution 2 would endanger the health, safety, and well-being of Plaintiffs and other transgender students.

As a result of Defendants' actions, Plaintiffs have been and continue to be deprived of full and equal access and enjoyment of PRSD's educational programs, activities, and opportunities on the basis of their sex, and have suffered and continue to suffer educational, emotional, and physical harms. Indeed, through their actions, Defendants sought to diminish Plaintiffs' dignity, stigmatized Plaintiffs, attempted to erase their identities, and isolated them from the rest of the Pine-Richland student body.

Plaintiffs sue to vindicate their statutory and constitutional rights. As shown below, Plaintiffs are likely to succeed on their claims. Plaintiffs will suffer irreparable harms absent an injunction prohibiting the enforcement of Resolution 2 and the new policy and practice. Defendants, on the other hand, will not suffer any harm, and, in fact, granting Plaintiffs injunctive relief would serve the public interest. Accordingly, Plaintiffs now ask the Court to enter a preliminary injunction enjoining Defendants' enforcement of Resolution 2 and PRSD's new policy and practice until such time as final judgment is entered in this case.

II. BACKGROUND

A. Sex, Gender Identity, and Gender Dysphoria

A person's sex is determined by multiple factors, including hormones, external and internal morphological features, external and internal reproductive organs, chromosomes, and gender identity. Decl. of Diane Ehrensaft, Ph.D. ("Ehrensaft Decl.") ¶ 18, 20. These factors may not always be in alignment. *Id.* at ¶ 18.

Gender identity—a person's internal sense of their own gender—is the primary factor in determining a person's sex. *Id.* at ¶ 19. It is a deeply felt and core component of human identity. *Id.* at ¶ 19. Every person has a gender identity. *Id.* at ¶ 20. Gender identity is often established in

early childhood, as early as the ages of two and four. Ehrensaft Decl. ¶ 23. There is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health and well-being. *Id.* at ¶¶ 21-22. Biological factors, most notably sexual differentiation in the brain, have a role in gender identity development. *Id.* at ¶¶ 19, 21. Gender identity is the most important and determinative factor in establishing a person's sex. *Id.* at ¶ 18.

The phrase "sex assigned at birth" refers to the sex recorded on a person's birth certificate at the time of birth. *Id*. at. ¶ 17. Typically, individuals are assigned a sex on their birth certificate solely on the basis of the appearance of external genitalia at the time of birth. *Id*.

A transgender person is someone whose gender identity diverges from the person's sex assigned at birth. *Id.* at ¶ 17, 20. A cisgender person is someone whose gender identity aligns with the sex they were assigned at birth. *Id.* at ¶ 20.

Gender dysphoria is a serious medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (2013) (DSM-V), and by other leading medical and mental health professional groups, including the American Medical Association and the American Psychological Association. *Id.* at ¶ 24. Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth. *Id.* World Professional Association of Transgender Health ("WPATH") provides standards of care for the treatment of gender dysphoria. WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (7th ed. 2012).[3]

[3] "These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016).

Treatment for gender dysphoria typically includes a "social transition" during which transgender individuals live in accordance with their gender identity in all aspects of life, including the use of sex-designated facilities that correspond to that gender. Ehrensaft Decl. ¶ 27. Social transition can often be the most important and only aspect of transition for a transgender person. *Id.* at ¶ 30. Social transitioning requires that a transgender girl be recognized as a girl and treated the same as all other girls by parents, teachers, classmates and others in the community. *Id.* at ¶¶ 27, 35, 38. It also requires that a transgender boy be recognized as a boy and treated the same as all other boys by parents, teachers, classmates and others in the community. *Id.* This includes being permitted to use restrooms and other sex-designated facilities on the same footing as other students of the same gender. *Id.* at ¶ 38.

B. Plaintiffs' Favorable Experiences Under PRSD's Longstanding Inclusive Practice.

Plaintiffs, who are transgender, are all students within the PRSD school system. *See* Decl. of Juliet Evancho ¶¶ 4, 8 ("Juliet's Decl."); Decl. of Elissa Ridenour ¶¶ 5, 9 ("Elissa's Decl."); Decl. of A.S. ¶¶ 4, 9 ("A.S.'s Decl."); Decl. of Glenn Ridenour ¶¶ 3, 11 ("G. Ridenour Decl."); Decl. of Michael J. Evancho ¶¶ 7, 10 ("M. Evancho Decl."). They socially transitioned at school at different points in their lives. Juliet's Decl. ¶¶ 31, 32; Elissa's Decl. ¶ 18; A.S.'s Decl. ¶¶ 9-10, 15; G. Ridenour Decl. ¶¶ 12-13; M. Evancho Decl. ¶¶ 11-12. Elissa has been widely known and accepted as a girl by the Pine-Richland school community since eighth grade. Elissa's Decl. ¶¶ 20, 23, 39; G. Ridenour Decl. ¶ 12. She has been referred to by her female pronouns and used the girls' restroom without incident her entire tenure at Pine-Richland High School. Elissa's Decl. ¶¶ 21, 23, 39. Juliet socially transitioned during the summer before her junior year. Juliet's Decl. ¶¶ 29- 32; M. Evancho Decl. ¶¶ 11-12. Since the beginning of her junior year, Juliet has been widely known and accepted as a girl by the Pine-Richland school community. Juliet's Decl. ¶ 33; M. Evancho

Decl. ¶ 12. Until Defendants' recent discriminatory actions, Juliet used the girls' restrooms without incident. Juliet's Decl. ¶ 33. A.S. began to socially transition at school during his sophomore year. A.S.'s Decl. ¶¶ 9-10. Since his junior year, A.S. has been widely known and accepted as a boy by the Pine-Richland school community. *Id.* at ¶ 25. Until Defendants' recent discriminatory actions, A.S. used the boys' restrooms without incident. *Id.* at ¶ 22.

Defendants have confirmed that it was PRSD's longstanding inclusive practice to provide transgender students access to the restrooms consistent with their gender identity. For example, on March 11, 2016, Superintendent Miller emailed parents and guardians of PRSD students noting that there were transgender students at Pine-Richland and that PRSD had not previously communicated about the topic based on the strong desire to maintain the confidentiality of individual students and that the U.S. Department of Education ("ED") Office of Civil Rights ("OCR") had "taken a consistent stance that gender identity and expression are included in the[] terms [sex or gender] under Title IX that prohibits sex discrimination in schools." Ex. W at 1.

In his email, Superintendent Miller identified PRSD's longstanding inclusive practice with respect to restrooms:

> In our high school, transgender students have been able to use a private bathroom, such as the nurse's office, a single room unisex bathroom, or the bathroom of their gender identity. This has occurred for several years. To date, we are not aware of any inappropriate actions on the part of any student. The option also exists for any student to use a single stall bathroom.

Ex. W at 2. *See also* Ex. C at 3.

In general, all three Plaintiffs considered PRSD and Pine-Richland High School to be a safe and welcoming environment where they were accepted and supported. Juliet's Decl. ¶ 34; Elissa's Decl. ¶ 28; A.S.'s Decl. ¶ 21. On August 24, 2016, Plaintiffs began their senior year at

Pine-Richland High School looking forward to graduating in such a supportive and welcoming environment. Juliet's Decl. ¶ 41; Elissa's Decl. ¶ 29; A.S.'s Decl. ¶ 28.

C. Defendants' Adopt New and Discriminatory Rules Governing the Use of Restrooms.

On September 12, 2016, following months of contentious, vitriolic, and unnecessary debate regarding the use of restrooms by transgender students, the School Board adopted Resolution 2, which reversed PRSD's longstanding inclusive practice. Ex. F at 41 ("Five/four. Resolution Two is adopted."). Resolution 2 read, in whole:

> This resolution agreed to by a majority of the Board of Directors of the Pine-Richland School District indicates our support to return to the long-standing practice of providing sex specific facility usage. All students will have the choice of using either the facilities that correspond to their biological sex or unisex facilities. This practice will remain in place until such time that a policy may be developed and approved.

Ex. A. On September 13, 2016, Defendants immediately implemented Resolution 2 by barring transgender students from using the restrooms and other sex-designated spaces consistent with their gender identity and by mandating that transgender students utilize the restrooms that are not consistent with their gender identity or use single-stall unisex restrooms (hereinafter "PRSD's new policy and practice"). Juliet's Decl. ¶¶ 44-45; Elissa's Decl. ¶¶ 32-33; A.S.'s Decl. ¶¶ 31-31; M. Evancho Decl. ¶¶ 20-21, 23; G. Ridenour Decl. ¶¶ 35, 37; Ex. 1 to M. Evancho Decl. ¶ 27.

Defendants adopted Resolution 2 and implemented PRSD's new policy and practice with full knowledge that they were in violation of Title IX. Ex. D at 5-10; Ex. F. at 13 ("Certainly an individual plaintiff could file suit on the basis that sex in Title IX does include identity."); Ex. V at 2-5. Defendants also acted knowing that their actions could be in violation of the United States Constitution's guarantee of equal protection. Ex. D at 8. Indeed, the School Board voted for Resolution 2 even when it ran counter to the professional opinion of PRSD administrators, like Superintendent Miller. Ex. C at 5 ("[M]y recommendation to the board at this time is to maintain

the status quo at the high school while the topic could be considered in more depth. . . . I'm sharing my professional perspective, and that of other members of our senior leadership team, and the high school administration.") (Superintendent Miller); Ex. F at 25 ("It is difficult for me as a Superintendent to recommend action that goes against OCR while something is still unsettled.") (Superintendent Miller).

Further, Defendants adopted Resolution 2 and implemented PRSD's new policy and practice with full knowledge that the adoption of such a policy would harm Plaintiffs and other transgender students by endangering their health, safety, and well-being. On multiple occasions, counsel for Plaintiffs alerted Defendants of the risks posed by the institution of discriminatory practices and the importance of social transitioning for transgender students. *See* Ex. V at 8. Likewise, on April 21, 2016, Defendants heard from a panel of experts from Children's Hospital of Pittsburgh of UPMC, who provided background knowledge about transgender youth from medical, social, and psychological perspectives. Ex. B at 1-2; Ex. O. The Pittsburgh Children's Hospital experts also noted that some of the major health challenges faced by transgender youth are, *inter alia*, a lack of acceptance of their gender identity by family, peers, and schools; not being allowed to express their true gender identity; and bullying and victimization from peers, caregivers, and others. Ex. G at 21. Indeed, Defendants acted in knowing contravention of the policies and practices for supporting transgender students recommended by ED's Office of Safe and Healthy Students. Ex. I.

Notwithstanding the clear warnings that their actions were contrary to the law and harmful to Plaintiffs and other transgender students, Defendants confirmed on September 14, 2016 that they would not delay implementation of Resolution 2 and PRSD's new policy and practice, and that Plaintiffs would be disciplined should they use the restrooms that are consistent with their

gender identity. Ex. P ("Given the content and context of the Board Resolution, I must relate that its proscription of use of restrooms based on gender identity is in effect. We are not in a position to defer that effect to a later date. Should there be a violation of the rule embodied in Resolution 2, the Administration would respond in accordance with its usual disciplinary processes and sequences."); *see also* Juliet's Decl. ¶¶ 54-55; M. Evancho Decl. ¶ 30.

III. LEGAL STANDARD

"The decision to issue a preliminary injunction is governed by a four-factor test." *K.A. ex rel. Ayers v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). First, Plaintiffs must "demonstrate (1) that they are reasonably likely to prevail eventually in the litigation and (2) that they are likely to suffer irreparable injury without relief." *Id.* (quoting *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir.2002)) (citation omitted). "If these two threshold showings are made the District Court then considers, to the extent relevant, (3) whether an injunction would harm the [defendants] more than denying relief would harm the plaintiffs and (4) whether granting relief would serve the public interest." *Id.* (alteration in original).

The primary purpose of preliminary injunctive relief "is maintenance of the status quo until a decision on the merits of a case is rendered." *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994). "Status quo refers to the last, peaceable, noncontested status of the parties." *One Three Five, Inc. v. City of Pittsburgh*, 951 F. Supp. 2d 788, 807 (W.D. Pa. 2013) (citing *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)) (quotation marks omitted).

"In reaching its decision on the request for injunctive relief, the Court sits as both the arbiter of legal disputes and trier of fact and is therefore tasked with resolving factual disputes and assessing the credibility of witness testimony." *One Three Five, Inc.*, 951 F. Supp. 2d at 808. "[G]iven the haste that is often necessary . . . a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the

merits," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Kos Pharm., Inc.*, 369 F.3d at 718, and the Court may consider sworn declarations and other hearsay materials, that may otherwise be inadmissible at trial, *Kos Pharm., Inc.*, 369 F.3d at 718. *See also Brown v. City of Pittsburgh*, 586 F.3d 263, 291 (3d Cir. 2009); 11 Wright & Miller, Federal Practice & Procedure § 2949, at 471.

IV. ARGUMENT

A. Plaintiffs Are Likely To Succeed On Their Title IX Claim.

By enacting Resolution 2 and implementing PRSD's new policy and practice, Defendants have violated Title IX. 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). It protects both students and school employees. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982). To prove a violation, Plaintiffs must show that (1) they experienced discrimination in an education program or activity on the basis of sex, (2) the educational institution was receiving federal financial assistance at the time the discrimination occurred, and (3) the discrimination caused Plaintiffs harm. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. Apr. 19, 2016), *mandate recalled and stay issued by Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016);[4] *see also Board of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, --- F. Supp. 3d ---, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016);

[4] The Supreme Court issued a temporary stay of a preliminary injunction in *G.G.* "pending the timely filing and disposition of a petition for a writ of certiorari" by the school district. 136 S. Ct. at 2442. If certiorari is denied, the stay "shall terminate automatically." *Id*. The order does not affect the Fourth Circuit's analysis (or address how it will rule on the merits if certiorari is granted); indeed, the deciding vote from Justice Breyer was extended only as a "courtesy." *Id*. (Breyer, J., concurring).

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-cv-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016). Plaintiffs easily satisfy all three elements.

First, Plaintiffs have experienced sex-based discrimination in an education program. Title IX requires schools to provide transgender students access to restrooms that are consistent with their gender identity. *See* Ex. H; Ex. I. "Access to the bathroom is [] an education program or activity under Title IX." *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *10. And for purposes of Title IX, ED and U.S. Department of Justice ("DOJ") have made clear that schools must "treat a student's gender identity as the student's sex." Ex. H at 2.[5] "This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity." *Id.* Thus, "[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." *Id.* at 3. By adopting Resolution 2 and implementing their new policy and practice, Defendants have barred Plaintiffs from the restrooms consistent with their gender identity and therefore discriminated against Plaintiffs on the basis of sex.

In *G.G.*, *Highland Local Sch. Dist.*, and *Whitaker*, courts from three different circuits preliminary enjoined similar policies and practices barring transgender students from using the restrooms consistent with their gender identity, and held that Title IX requires schools to provide transgender students access to restrooms consistent with their gender identity. *G.G. v. Gloucester*

[5] This interpretation by ED and DOJ is not new. Over the past several years, ED has issued several guidance documents explaining the agency's interpretation of Title IX and its implementing regulations with respect to transgender students. In a 2010 Dear Colleague Letter, a guidance document explaining ED's interpretation of Title IX, OCR wrote that Title IX "protect[s] all students, including . . . transgender . . . students, from sex discrimination." Ex. R at 8. In April 2014, OCR issued a "significant guidance document" stating 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." Ex. S at 5. In December 2014, OCR published further guidance clarifying 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." Ex. T at 25. Likewise, in December 2014, DOJ "determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status." Ex. U at 2.

County Sch. Bd., No. 4:15CV54, 2016 WL 3581852 (E.D. Va. June 23, 2016); *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *14, 20; *Whitaker*, 2016 WL 5239829, at *3-4, 8. In all three cases, the courts concluded injunctive relief was warranted under Title IX based on substantially similar facts to those in the case at bar, and in the absence of controlling Third Circuit precedent, these cases should not only be persuasive on the merits of the Title IX claim itself, but also provide strong authority that Plaintiffs are likely to succeed on the merits of their Title IX claim.

Importantly, "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Thus, while there is an exception which permits the provision of "separate toilet, locker rooms, and shower facilities on the basis of sex," 34 C.F.R. § 106.33; *G.G.*, 822 F.3d at 718, such exception does not permit the exclusion of transgender students from the restrooms congruent with their gender identity, particularly in light of ED's interpretation of 34 C.F.R. § 106.33. *See G.G.*, 822 F.3d at 715.[6] ED's unequivocal interpretation of its own regulation as not permitting discrimination against transgender individuals through such exclusions, *see*, *e.g.*, Ex. H at 3-4; Ex. Q at 2; note 5, *supra*, is reasonable, reflects the agency's fair and considered judgment, and is entitled to controlling weight under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See G.G.*, 822 F.3d at 720; *Highland Local Sch. Dist.* at *10-13.

Second, it is undisputed, that as a recipient of federal financial assistance, PRSD is subject to Title IX's non-discrimination mandate. Ex. C. at 5 ("For awareness the total federal revenue for Pine-Richland for 2014-15 was approximately $1.4 million.") (Superintendent Miller); Ex. D at 3 ("Well it is important to note that the funds that make up the $1.4 million dollars that you're

[6] Even the dissent in *G.G.* agreed that the school board's exclusion of the plaintiff from the boys' restroom required an exception in order to escape liability under Title IX. *G.G.*, 822 F.3d at 734 (Niemeyer, J., dissenting).

referring to which are Federal funds[.]") (Therese Dawson); *id.* at 5 ("we received grants from the Federal Government and in essence we should think about those grants as coming with certain strings attached as would be appropriate") (Peter Lyons).[7]

Third, Resolution 2 and PRSD's new policy and practice impose a host of irreparable harms upon Plaintiffs, including distress, stigma, anxiety, depression, decreased academic performance, and possible disciplinary actions—all during their irreplaceable senior year of high school. *See* Part IV.C, *infra*. And, just as in *G.G.*, Resolution 2's widespread harms are not mitigated by the fiction that transgender students can simply use the restrooms corresponding to their birth-assigned sex. Such option is no option at all. The use of restrooms of a sex different than Plaintiffs' corresponding gender identity causes discomfort, anxiety, and distress on Plaintiffs. Juliet's Decl. ¶ 48; Elissa's Decl. ¶ 35; A.S.'s Decl. ¶ 34; Ehrensaft Decl. ¶¶ 33, 38. It also exposes them to violence and harassment. Juliet's Decl. ¶¶ 48, 51; Elissa's Decl. ¶ 35; A.S.'s Decl. ¶ 34.

Likewise, consigning transgender students to the use of single-stall unisex restrooms does not mitigate the harms imposed by Resolution 2 and PRSD's new policy and practice. Compelling Plaintiffs to use single-stall unisex restrooms, while not requiring it of others, marginalizes Plaintiffs from the rest of the student body and stigmatizes them. Juliet's Decl. ¶ 49; Elissa's Decl. ¶¶ 36-37; A.S.'s Decl. ¶ 35; M. Evancho Decl. ¶ 25; G. Ridenour Decl. ¶ 44. It also causes Plaintiffs to feel isolated and continually discloses their gender identity and outs them as transgender. Juliet's Decl. ¶ 49; Elissa's Decl. ¶¶ 36-37; A.S.'s Decl. ¶ 35; M. Evancho Decl. ¶ 25; G. Ridenour Decl.¶¶ 40, 42. And even when those facilities are available to Plaintiffs, they are not equal to the sex-specific facilities that others use. Forcing Plaintiffs to expend additional time simply to find a restroom disrupts their ability to work and learn alongside their colleagues and peers.

[7] *See* USASpending.gov at https://goo.gl/qgFQIx.

Given the clear holdings of *G.G.*, *Highland Local Sch. Dist.*, and *Whitaker* on the precise legal issues presented here, Plaintiffs are likely to succeed on their Title IX claim.

B. Plaintiffs Are Likely To Succeed On Their Equal Protection Claim.

Resolution 2 and PRSD's new policy and practice facially discriminate against transgender students in violation of the equal protection guarantee of the Fourteenth Amendment. *See Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *19. Although all students need to use facilities consistent with their gender identity, only transgender students are barred from doing so by Resolution 2 and PRSD's new policy and practice. This distinction is written into Resolution 2 by use of the term "biological sex," which purports to exclude transgender individuals like Plaintiffs from multi-user restrooms and other facilities consistent with their gender identity because their birth-assigned sex does not match their gender identity. Ex. D at 4 ("In my intent of this resolution is that biological, anatomical sex is what this stands for. Essentially for lack of a better term, your sex assigned at birth is what I'm referring to in this resolution.") (Greg DiTullio).

1. Heightened Scrutiny Applies to Resolution 2.

Resolution 2's discrimination against transgender individuals triggers heightened scrutiny for three reasons: (1) Under *G.G.*, *Highland Local Sch. Dist.*, and *Whitaker*, the exclusion of transgender individuals from facilities congruent with their gender identity is "based on sex"; (2) discrimination against transgender individuals necessarily relies upon sex stereotypes, gender identity, and gender transition, each of which is related to sex; and (3) discrimination against transgender individuals bears all the indicia of a suspect classification.

a) Under G.G., Highland Local Sch. Dist., *and* Whitaker, *Resolution 2 discriminates against transgender individuals on the basis of sex as a matter of law.*

For the same reason that barring a transgender student from restrooms consistent with the student's gender identity constitutes impermissible sex-based discrimination under Title IX, such

sex-based discrimination also triggers heightened equal protection scrutiny. When analyzing discrimination claims, courts rely upon a common body of law, regardless of whether the claim at issue arises under the Equal Protection Clause or a particular nondiscrimination statute. *See*, *e.g.*, *G.G.*, 822 F.3d at 718 ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); *Highland Local Sch. Dist.* at *15; *see also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (same); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (applying Title VII case law to decide equal protection claim); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 576-77 (6th Cir. 2004) (same); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (applying Title VII case law in interpreting analogous federal law). Thus, the analysis of sex-based discrimination in *G.G.*, *Highland Local Sch. Dist.* and *Whitaker* guides the analysis of Plaintiffs' claims under the Equal Protection Clause.

G.G. and *Highland Local Sch. Dist.* both held that excluding transgender individuals from restrooms congruent with their gender identity constitutes government action "on the basis of sex." *G.G.*, 822 F.3d at 727; *Highland Local Sch. Dist.*, 2016 WL 5372349, at *13 ("Jane has been denied access to the communal girls' restroom 'on the basis of [her] sex.'"). Because Resolution 2 excludes transgender students from facilities congruent with their gender identity, and because it relies on "biological sex," it is a sex-based classification. And there is no question that "all gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks omitted).

b) Discrimination against transgender individuals is inherently discrimination on the basis of sex.

Although the holdings of *G.G.*, *Highland Local Sch. Dist.*, and *Whitaker* are sufficient to resolve the parallel legal issue here of whether Resolution 2's sex-based classification triggers heightened scrutiny, there are multiple independent bases supporting that holding. Modern

precedent overwhelmingly holds that discrimination against transgender individuals is discrimination on the basis of sex. And the "weight of circuit authority" has recognized that "discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court." *G.G.*, 2016 WL 1567467, at *12, 14 (Davis, J., concurring). This precedent recognizes discrimination against transgender individuals as sex discrimination in at least three ways: (1) discrimination based on sex stereotypes; (2) discrimination based on gender identity and transgender status; and (3) discrimination based on gender transition.

Sex Stereotyping. Discrimination against transgender individuals is inherently rooted in sex stereotypes and accordingly triggers heightened scrutiny on that basis. Sex discrimination encompasses any differential treatment on the basis of "sex-based considerations," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), and the Supreme Court has "made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). *See also Price Waterhouse*, 490 U.S. at 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

Discrimination based on sex "is not only discrimination because of maleness and discrimination because of femaleness," but also "discrimination because of the properties or characteristics by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154, -- F. Supp. 3d --, 2016 WL 1089178, at *12 (D. Conn. Mar. 18, 2016). And discrimination because an individual is transgender necessarily relies upon sex stereotypes. By definition, a transgender person's gender "identity [does] not meet social definitions of masculinity [or femininity]" associated with one's birth-assigned sex. *Schwenk*, 204 F.3d at 1201.

"A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316; *accord Latta v. Otter*, 771 F.3d 456, 495 n.12 (9th Cir. 2014) ("discrimination on the basis of transgender status is also gender discrimination") (Berzon, J., concurring).[8] Ultimately, it does not matter whether a transgender individual is viewed as "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual," because discrimination on any of these bases is based on sex. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

Resolution 2 codifies sex stereotypes into law by banishing those whose gender identities do not match their birth-assigned sex from the facilities that others are permitted to use. That exclusion is necessarily based on sex stereotypes. *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015) (employer's policy banning a transgender woman from the women's facilities was discrimination because of sex).[9]

Gender Identity and Transgender Status. Laws distinguishing between transgender individuals and cisgender individuals constitute unlawful sex discrimination for an additional reason: such laws allow people to be treated consistent with their gender identity only if that identity is consistent with their sex assigned at birth. A law or governmental policy that discriminates against people because their birth-assigned sex and gender identity do not match necessarily is discriminating based on sex.

[8] Many courts have recognized an inextricable link between discrimination against transgender persons and discrimination based on gender nonconformity. *See, e.g.*, *Glenn*, 663 F.3d at 1316; *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk*, 204 F.3d at 1201; *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *cf. Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012).

[9] There is no exception to this rule for laws or policies that purport to regulate genital characteristics, as Resolution 2 appears to do. *See Lusardi*, 2015 WL 1607756, at *8-*9; *see also Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065-66 (9th Cir. 2002).

It is no answer that the law treats everyone consistently with their birth-assigned sex. *See Roberts v. Clark County Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *9 (D. Nev. Oct. 4, 2016) ("Although CCSD contends that it discriminated against Roberts based on his genitalia, not his status as a transgender person, this is a distinction without a difference here. Roberts was clearly treated differently than persons of both his biological sex and the gender he identifies as—in sum, because of his transgender status."). In analyzing whether "sex has been taken into account," *Smith v. Virginia Commonw. Univ.*, 84 F.3d 672, 676 (4th Cir. 1996) (quotation marks omitted), "[w]hat matters" is that "the discrimination is related to . . . sex," *Schwenk*, 204 F.3d at 1202. *Accord Fabian*, 2016 WL 1089178, at *13. Here, that is beyond serious dispute.

A robust body of case law has held that gender identity is a critical determinant of sex itself. *See*, *e.g.*, *G.G.*, 822 F.3d at 730 (recognizing that the "the term 'sex' means a person's gender identity") (Niemeyer, J., dissenting); *Schwenk*, 204 F.3d at 1201-02 (holding that conduct motivated by an individual's "gender or sexual identity" is because of "gender," which is interchangeable with "sex"); *Roberts*, 2016 WL 5843046, at *6; *Fabian*, 2016 WL 1089178, at *13; *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Rumble*, 2015 WL 1197415, at *2. Such conclusion is further confirmed by the opinion of experts, like Dr. Ehrensaft. Ehrensaft Decl. ¶ 18. Discrimination based on gender identity is thus literally sex discrimination.

Gender Transition. Discrimination based on gender transition is necessarily based on sex, just as discrimination based on religious conversion is necessarily based on religion. For example, firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion.'" *Schroer*, 577 F. Supp. 2d at 306. Even if the employer "harbors no bias toward either Christians or Jews but only 'converts[,]' . . . [n]o court would take seriously the notion that 'converts' are not covered" by the statutory ban on religious

discrimination. *Id.*; *accord Fabian*, 2016 WL 1089178, at *13; *Macy*, 2012 WL 1435995, at *11. "Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the 'wrong' way, is obviously discrimination 'because of religion.'" *Fabian*, 2016 WL 1089178, at *13.

A similar analysis applies here. Similarly, a government policy or practice that treats men and women equally as a general matter but nonetheless discriminate against those who undertake gender transition or who do not "complete" gender transition in the government's view constitutes discrimination on the because of sex. For example, if a student is a girl, lives openly as a girl, and has taken medical steps (including hormone therapy) to affirm her female identity, a school's policy, such as Resolution 2 here, would reflect a determination that the student's gender transition is not yet finished and so she is not "really" a girl until she obtains surgical treatment and updates her birth certificate. By defining the proper terms of gender transition and therefore writing into law what it means to be a "real" man or "real" woman, policies like Resolution 2 discriminate based on sex.

c) Discrimination based on transgender status itself is subject to heightened equal protection scrutiny.

In addition to triggering heightened scrutiny based on sex, Resolution 2 also separately triggers heightened scrutiny because it discriminates based on transgender status. In identifying whether a classification triggers heightened scrutiny, the Supreme Court has considered whether: (a) the class has historically been "subjected to discrimination," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quotation marks omitted); (b) the class's defining characteristic "frequently bears [a] relation to ability to perform or contribute to society," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (quotation marks omitted); (c) the class exhibits "obvious,

immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S. at 602 (quotation marks omitted); and (d) the class is "a minority or politically powerless," *id.* (quotation marks omitted). While not all four factors must be met to warrant heightened scrutiny, *see Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012), all four point in favor of heightened scrutiny with respect to laws that classify on the basis of transgender status. Without question, "transgender people have suffered a history of persecution and discrimination" and "are a politically powerless minority," and "transgender status bears no relation to ability to contribute to society" and "is a sufficiently discernible characteristic to define a discrete minority class." *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015).

First, transgender people have experienced a long history of discrimination, including pervasive discrimination in employment, housing, and access to places of public accommodation or government services. *See Adkins*, 143 F. Supp. 3d at 139; *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *16; *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) ("[t]he hostility and discrimination that transgender individuals face in our society today is well-documented"); *see also* Ex. L at 7 ("It is part of social and legal convention in the United States to discriminate against, ridicule, and abuse transgender and gender non-conforming people within foundational institutions such as the family, schools, the workplace and health care settings, every day."). And "there is obviously no relationship between transgender status and the ability to contribute to society." *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *16. Transgender individuals are a discrete minority—it is estimated that only 0.6% of the adults in the United States identify as transgender, Ex. M at 2—and there can be little dispute that they are relatively powerless politically. Further, a person's gender identity is an innate, effectively immutable characteristic

that cannot be altered or be expected to change. *See* Ehrensaft Decl. ¶¶ 22, 31; *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *16; *see also Hernandez-Montiel, v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

Recent federal decisions accordingly recognize that discrimination against transgender people must be evaluated under heightened scrutiny. *See Adkins*, 143 F. Supp. 3d at 139–40; *Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *15-17; *Norsworthy*, 87 F. Supp. 3d at 1119.

2. Resolution 2 Lacks Any Substantial or Even Rational Relationship to an Important Government Interest.

Resolution 2's class-based targeting of Plaintiffs demands meaningful review, as discrimination based on both sex and transgender status. All sex classifications must be evaluated under heightened scrutiny even when they are based on alleged "biological differences" between men and women. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). Under heightened scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State. . . . The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. "The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id*. (internal quotation marks and brackets omitted). Moreover, constitutionality is judged based on the "actual state purposes, not rationalizations for actions in fact differently grounded." *Id.* at 535-36.

And "even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be obtained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The justifications offered must have a "footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321.

Close scrutiny requires Defendants to demonstrate that the challenged actions are "a meaningful step[s] towards solving a real, not fanciful problem." *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1998); *see also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("The state must specifically identify an 'actual problem' in need of solving.").

Resolution 2 and PRSD's new policy and practice cannot meet these tests. Indeed, Defendants have no legitimate reason to treat Plaintiffs differently from their cisgender peers. Plaintiffs' unremarkable and uneventful use of the restrooms consistent with their gender identity for months, even years, without any incident is the best evidence that Defendants' decision to bar them from those same restrooms later was purely arbitrary and based on discriminatory motives. Any justifications that Defendants might proffer now would be plainly speculative and clearly not rooted in reality. Simply put, the bare rationales offered by the School Board for Resolution 2 cannot survive even the most deferential review, let alone the heavy burden Defendants must satisfy here.

a) Resolution 2 does not protect, but rather violates students' interest in bodily privacy.

Here, Defendants appear to have primarily based Resolution 2 on a purported interest to protect "bodily privacy," Ex. B at 4, meaning the interest of all students in not having their unclothed bodies observed by another person. Although the protection of students' privacy is a legitimate interest, in the circumstances presented here, Defendants cannot show that the "fit between the means and the important end is 'exceedingly persuasive.'" *Nguyen*, 533 U.S. at 70 (quoting *Virginia*, 518 U.S. at 533). Plaintiffs have the same interest in privacy as other cisgender students, and there is no basis for Defendants to conclude that allowing Plaintiffs to access the restrooms consistent with their gender identity would violate any student's privacy.

First, to the extent that Defendants argue that they are protecting students' privacy interest in not being observed or exposed to another student of a different sex, such argument is wholly without merit. *See Highland Local Sch. Dist.*, 2016 WL 5372349, at *17; *Whitaker*, 2016 WL 5239829, at *4 ("The defendants argue that students have a right to privacy; the court is not clear how allowing the plaintiff to use the boys' restroom violates other students' right to privacy."). A contention that the physical differences between Plaintiffs and cisgender students of the same gender identity does not justify Defendants' actions in barring Plaintiffs from shared restrooms and singling them out from their peers. Although physiological differences between the sexes in some cases may permit differential treatment in the achievement of an important objective, *see Nguyen*, 533 U.S. at 64 (differing methods of establishing U.S. citizenship through a citizen parent could take into account the fact that "the mother is always present at birth, but that the father need not be"), such differences cannot be used to "mask discrimination that is unlawful" or "embod[y] a gender-based stereotype," *id*. at 64, 68.

The notion that the presence of Plaintiffs, who are transgender, in areas of restrooms consistent with their gender identity and where all students are fully clothed would somehow invade the bodily privacy of other students in a way that the presence of cisgender students of the *same* gender identity in those very same areas would not is incorrect.[10] Such notion is not only based on groundless speculation, it is also one of the "overbroad generalizations" and gender-based assumptions about individuals that the Supreme Court has held cannot justify sex discrimination.

[10] On October 18, 2016, a magistrate judge recommended the denial of preliminary injunctive relief to a group challenging a school's practice of allowing transgender students to use the sex-designated facilities consistent with their gender identity. *See* Report and Recommendation, *Students and Parents for Priv. v. U.S. Dept. of Educ.*, No. 16 C 4945 (N.D. Ill. Oct. 18, 2016) (ECF No. 134) (Attached as Exhibit X). In doing so, the court found that the plaintiffs had not shown a likelihood of success on the merits of their claim that District 211 or the Federal Defendants were violating their right to privacy or Title IX "because transgender students are permitted to use restrooms consistent with their gender identity." *Id.* at 4.

Virginia, 518 U.S. at 531. Indeed, from a medical and scientific perspective, the most important determinants of a person's sex are neurological sex and gender identity, not external physical characteristics. *See* Ehrensaft Decl. ¶ 18. Elissa and Juliet, like cisgender girls at Pine-Richland High School, have a female gender identity. Juliet's Decl. ¶ 2; Elissa's Decl. ¶ 2. They are widely known and accepted as girls by the Pine-Richland school community. Juliet's Decl. ¶ 33, 56; Elissa's Decl. ¶¶ 20, 39. A.S., like cisgender boys at Pine-Richland High School, has a male gender identity. A.S.'s Decl. ¶ 2. He is widely known and accepted as a boy by the Pine-Richland school community. A.S.'s Decl. ¶ 25. Unlike cisgender students with their same gender identity, however, Elissa, Juliet, and A.S. are not permitted to use restrooms consistent with their gender identity. Juliet's Decl. ¶¶ 44-45; Elissa's Decl. ¶¶ 32-33 ; A.S.'s Decl. ¶ 32; M. Evancho Decl. ¶ 23; G. Ridenour Decl. ¶¶ 34, 37; Ex. P.

Second, privacy can be preserved without resorting to discrimination against transgender individuals. As a threshold issue, a purported concern for bodily exposure has no footing in the restroom context, given the divided and enclosed nature of restroom stalls, and the existence and availability of privacy dividers for urinals.

Third, Resolution 2 fails to promote privacy, even on its own terms. Resolution 2 and PRSD's new policy and practice continually invade transgender students' own interest in bodily privacy, stigmatizing them and exposing them to their peers as different. *See* Ex. J at 12 ("Such discrimination can also undermine transgender students' right to privacy, by effectively outing them as transgender to peers and school staff.").

The physiological differences upon which Defendants rely to justify their exclusionary and discriminatory actions do not advance any interest in protecting students' bodily privacy. To the contrary, Resolution 2 and Defendants' actions actually undermine any interest in protecting

students' privacy by making Plaintiffs' physiological features the subject of unwanted attention. Moreover, the fact that transgender students at PRSD, including Plaintiffs have been able to use the restrooms consistent with their gender identity "for several years," Ex. W at 2, before the discriminatory actions at issue here completely undermines any assertion that Plaintiffs' use of the restrooms consistent with their gender identity would violate other students' privacy. *See Whitaker*, 2016 WL 5239829, at *6 ("The evidence before the court indicates that Ash used the boys' restroom for some seven months without incident or notice . . . This evidence contradicts the defendants' assertions that allowing Ash to use the boys' restroom would violate other students' privacy rights.").

b) Resolution 2 lacks any connection to promoting safety.

Similarly, any generalized concerns about safety cannot justify Resolution 2 or Defendants' actions. There is no evidence that excluding Plaintiffs from the restrooms consistent with their gender identity implicated any safety concerns. Indeed, Defendants have admitted that transgender students have been able to use the restrooms consistent with their gender identity "for several years" and that they "are not aware of any inappropriate actions on the part of any student." Ex. W at 2. *See Highland Loc. Sch. Dist.,* 2016 WL 5372349, at *18 (noting that school district's "justifications of safety and lewdness concerns" were insufficient because "no incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have ever occurred"). There being no basis for Defendants' safety concerns, it is evident that Defendants simply acted based on "nightmare speculation." *Exodus Refugee Immig., Inc. v. Pence*, No. 16-1509, 2016 WL 5682711, at *1 (7th Cir. Oct. 3, 2016). Courts have rejects time and again the resort to such baseless fears. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016) ("Determined wrongdoers, already ignoring existing statutes and safety measures,

are unlikely to be [deterred] . . . by a new overlay of regulations."); *Exodus Refugee*, 2016 WL 5682711, at *1.

To the contrary, when it comes to safety risks, transgender people themselves are the group most vulnerable to harassment and violence in sex-separated spaces such as restrooms. *See* Ex. J at 9 ("Although proponents of bathroom and locker room restrictions cite student safety as a reason to require students to use facilities according to their sex assigned at birth, the reality is that transgender individuals face high rates of verbal harassment and even physical assault in bathrooms."); Ex. N (noting that 59% of respondents to the U.S. Transgender Survey have avoided restrooms because they feared confrontations and that 12% of respondents have reported being harassed, attacked, or sexually assaulted in restroom). "When schools require transgender girls to use the men's room or force transgender boys to use the women's room, they put them at risk of physical, verbal, or sexual assault from other students or adults." Ex J. at 9.

c) Resolution 2 is not related to any legitimate interest in protecting students' comfort.

Lastly, to the extent that Defendants might argue that they are seeking to protect cisgender students' comfort, such interest is illegitimate and cannot justify Resolution 2 or PRSD's new policy and practice. For one, every student at Pine-Richland High school that may feel uncomfortable using a shared restroom has "[t]he option also exists for any student to use a single stall bathroom." Ex. W at 2. And courts and federal agencies have correctly found that a transgender person's mere presence in a restroom does not violate the rights of cisgender individuals in those spaces. "[A]ssertions of emotional discomfort about sharing facilities with transgender individuals" share a common lineage with "similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation in housing, education, and access to public facilities like restrooms, locker rooms, swimming pools, eating

facilities and drinking fountains." *Dep't of Fair Emp't & Hous. v. Am. Pac. Corp.*, No. 34-2013-00151153, Order at 4 (Cal. Super. Ct. Mar. 13, 2014) (Ex. K); *Lusardi*, 2015 WL 1607756, at *9 ("Some co-workers may be . . . embarrassed or even afraid to share a restroom with a transgender co-worker. But . . . co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment."). *Cf. G.G.*, 822 F.3d at 724 n.11; *Glenn*, 663 F.3d at 1321; *Cruzan v. Special Sch. Dist.*, No. 1, 294 F.3d 981, 984 (8th Cir. 2002).

But more importantly, to the extent Resolution 2 seeks to validate an objection to seeing transgender people—which is to say, to their mere presence—that is not a legitimate government interest that this Court should dignify. Across history, there have been similar claims of "discomfort" about simply sharing spaces with those perceived as different—but the correct answer has never been to indulge that discomfort.

Impermissible prejudice "rises not from malice or hostile animus alone," but can instead be caused by "want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves" and who "might at first seem unsettling to us." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). Even if such beliefs are born of a "profound and deep conviction[]," *Lawrence v. Texas*, 539 U.S. 558, 571 (2003), "negative attitudes, or fear" cannot justify singling out one group for unequal treatment, *Cleburne*, 473 U.S. at 448. Discomfort with transgender people, even when wrapped in the cloak of privacy or safety, is simply not a legitimate basis for imposing unequal or stigmatizing treatment. That is particularly true here, where there are myriad ways to protect privacy interests without expelling transgender individuals from communal spaces.

C. Plaintiffs Will Suffer Irreparable Harm If the Court Does Not Enjoin Defendants' Discriminatory Actions.

By adopting new and discriminatory rules governing the use of restrooms by transgender students, Defendants have caused and continue to cause irreparable harm to Plaintiffs. As a result, of the School Board's debate surrounding the use of restrooms by transgender students, the adoption of Resolution 2, and the implementation of PRSD's new policy and practice, Plaintiffs are suffering irreparable harm each passing day. Time is of the essence. Despite debating the use of restrooms by transgender students and Resolution 2 for over six months, Defendants waited nearly three weeks *after* Plaintiffs started their senior year to change the rules governing the use of restrooms by transgender students. Plaintiffs are senior students. Their hope is to attend school and graduate from Pine-Richland under the same rules and welcoming environment that they experienced throughout their prior years at Pine-Richland High School. Preliminary relief is therefore necessary because any judgment in Plaintiffs' favor at the end of trial can never make up for the harms they currently experience.

Defendants' actions have caused and continue to cause Plaintiffs to suffer from distress, anxiety, discomfort, depression, and humiliation. Juliet's Decl. ¶¶ 46-52, 55, 62; Elissa's Decl. ¶¶ 28, 31, 34, 40; A.S.'s Decl. ¶¶ 24, 33-35, 40; G. Ridenour Decl. ¶¶ 39, 44; M. Evancho Decl. ¶¶ 18, 32, 35. *See also* Ehrensaft Decl. ¶¶ 37-38, 40; Ex. J at 10-12. The emotional distress and symptoms of gender dysphoria, including depression, anxiety, and suicidal ideation, surge significantly in transgender students after being instructed not to use the restrooms consistent with their gender identity and after each instance in which PRSD personnel fail to respect their gender identity. *See also* Ehrensaft Decl. ¶¶ 37-38, 40; Ex. J at 10-12. Here, Plaintiffs have already experienced some of those consequences. Plaintiffs also increasingly feel isolated, marginalized, and stigmatized by Defendants' actions. Juliet's Decl. ¶¶ 38-39, 46, 48-49, 62; Elissa's Decl. ¶¶

36-37, 40; A.S.'s Decl. ¶ 35. They live in constant fear of being stigmatized for using a restroom that is not consistent with their gender identity and being referred to by his female birth name and pronouns—which could lead to involuntary and consistent disclosure of their transgender status to others, harassment, or even violence. Juliet's Decl. ¶ 58; Elissa's Decl. ¶ 35; A.S.'s Decl. ¶ 35. Because neither of the options established by Resolution 2 and PRSD's new policy and practice are tenable, Plaintiffs have been compelled to choose a harmful alternative option: not using the restroom at all at school except when absolutely necessary, which causes them great discomfort. Juliet's Decl. ¶ 50; Elissa's Decl. ¶ 38; A.S.'s Decl. ¶ 36. The abstention of using the restroom can also lead to adverse health consequences. *See also* Ehrensaft Decl. ¶¶ 33-34, 38; Ex. J at 10-12.

Defendants' actions have caused a noticeable deterioration in the school climate, which has in turn caused Plaintiffs to fear for their safety and well-being. Juliet's Decl. ¶¶ 40, 52-53, 58; A.S.'s Decl. ¶¶ 38-39; M. Evancho Decl. ¶¶ 24, 28-29. *See also* Ehrensaft Decl. ¶ 36; Ex. J at 9-10. Defendants' actions have also negatively affected Plaintiffs' school work, just as they are in the process of deciding whether and where to go to college. Juliet's Decl. ¶ 59; A.S.'s Decl. ¶¶ 30, 37. *See also* Ehrensaft Decl. ¶ 32. And courts have found in the school context that even "diminished academic motivation" is sufficient to constitute irreparable harm. *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 853 (7th Cir. 1999).

Moreover, aside the aforementioned concrete harms, there is a presumption of irreparable harm when a plaintiff's constitutional rights or civil rights have been violated. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (constitutional rights are "intangible and unquantifiable interests" that "cannot be compensated by damages"); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) ("where a defendant has violated a civil rights statute," "irreparable injury [may be presumed] from the fact of the defendant's violation"); *Rogers*

v. Windmill Pointe Village Club Ass'n, 967 F.2d 525, 528 (11th Cir. 1992) (irreparable harm "may be presumed from the fact of discrimination"). And "where, as here, preliminary injunctive relief is requested to prevent the violation of constitutional rights, no further showing of irreparable injury is required." *Murray v. Silberstein*, 882 F.2d 61, 64 (3d Cir. 1989) (quoting *Elrod v. Burns*, 427 U.S. 347, 373–75 (1976)). Indeed, the violation of constitutional rights "constitutes irreparable injury." *Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007).

Moreover, Plaintiffs have no adequate remedy at law for the aforementioned harms. Irreparable harm is found where a final judgment would be insufficient to compensate for the harm caused by Defendants' actions. *See Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.,* 735 F.3d 735, 740 (7th Cir. 2013); *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992). "What constitutes an adequate remedy depends on the facts of each case." *LCI Commun., Inc. v. Wilson*, 700 F. Supp. 1390, 1398 (W.D. Pa. 1988). In this case, it is evident that Plaintiffs do not have an adequate remedy absent preliminary injunctive relief. Senior year only happens once in your lifetime. Here, Defendants' have upended the status quo during Plaintiffs' last year of high school. *See Amalgamated Food Emp. Union, Loc. No. 590 v. Natl. Tea Co.*, 346 F. Supp. 875, 883 (W.D. Pa. 1972) ("the purpose of a preliminary injunction is to preserve the status quo insofar as is possible and practicable."). Thus, even if, at the conclusion of this case, Plaintiffs "were to prevail, no recovery could give back to [Plaintiffs] the loss suffered if [they] spent [their] senior year focusing on avoiding using the restroom, rather than on [their] studies, [their] extracurricular activities and [their] college application process." *Whitaker*, 2016 WL 5239829, at *4. No amount of damages can compensate Plaintiffs' for such harm.

Plaintiffs will undoubtedly suffer serious and irremediable harm if the injunction is not granted. Final judgment at trial in their favor can never rectify the significant psychological,

academic, and physical harm that Defendants' continued discriminatory actions will cause.

D. The Balance of the Equities and the Public Interest Strong Favor the Issuance of a Preliminary Injunction.

The balance of equities favors granting a preliminary injunction. "The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor." *Kos Pharm., Inc.*, 369 F.3d at 729 (quotation omitted). "To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it." *Buck*, 485 F. Supp. 2d at 586. As stated above, it is highly likely that Plaintiffs will ultimately prevail in this matter. Furthermore, Plaintiffs have demonstrated that, absent preliminary relief, they will continue to suffer irreparable harms, including distress, stigma, anxiety, depression, decreased academic performance, and possible disciplinary actions—all during their irreplaceable senior year of high school. In turn, Defendants cannot point to any possible harms should the preliminary injunction be granted. For one, Plaintiffs simply request a return to the status quo, where for several years Defendants allowed transgender students to use the restrooms consistent with their gender identity. *See* Ex. C at 5; Ex. E at 35 ("The factual status quo here is that you've had at least two transgender female – transgender male –transgender female students using girls' restrooms. That is the factual status quo.") (School Solicitor Patrick Clair). Indeed, one factor that "weighs in the balance of hardships analysis is the goal of the preliminary injunction analysis of maintaining the status quo, defined as the last peaceable, noncontested status of the parties." *Kos Pharm., Inc.*, 369 F.3d at 729. This factor clearly weighs in Plaintiffs' favor.

In addition, Defendants have admitted that they are not aware of any problems or negative incidents while PRSD's longstanding inclusive practice was in place, i.e. during the status quo. Ex. W at 2. Furthermore, the experiences of school districts across the country with inclusive

policies and practices, similar to PRSD's previous longstanding practice, have demonstrated that allowing transgender students to use the sex-designated facilities consistent with their gender identity has not caused any disruption, but rather resulted in positive outcomes. *See Amici Curiae* Br. of Sch. Adm'rs from Cal. et al. in Support of Plaintiffs' Motion for Preliminary Injunction at 4, *Carcaño v. McCrory*, No. 16-cv-00236-TDS-JEP (M.D. N.C. filed July 14, 2016) (ECF No. 87) ("*Amici's* experiences refute the hypothetical concerns . . . that allowing all students to use multiple-occupancy restroom and locker room facilities that match their gender identity will lead to general disruption in these public spaces, violate the privacy and/or "comfort" of other students, and/or will lead to the abolition of gender-segregated restroom and locker room facilities. These same hypothetical concerns have been raised in some of *amici*'s schools. Although *amici* have addressed – and in some cases personally grappled with – many of the same fears and concerns, in their professional experience in the school context, *none of those fears and concerns have materialized in the form of actual problems in their schools.* Instead, inclusive policies have had the effect of not only fully supporting the reality of transgender students' circumstances, but also of fostering a safer and more welcoming learning environment for all.").

The public interest also strongly favors granting the requested injunction. Indeed, the public interest "demands respect for both constitutional rights and effective education." *Sypniewski v. Warren Hills Regl. Bd. of Educ.*, 307 F.3d 243, 258 (3d Cir. 2002). "In the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights." *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883–84 (3d Cir. 1997). Furthermore, "the overriding public interest lay[s] in the firm enforcement of Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir.1993); *see also Highland Loc. Sch. Dist.*, 2016 WL 5372349, at *20.

Thus, both the balance of the equities and the public interest strongly favor the issuance of a preliminary injunction in this case.

E. Because Defendants Will Not Suffer Any Financial Damage as a Result of Being Required to Allow Plaintiffs to Use Restrooms Consistent With Their Gender Identities, the Court Should Only Require a Nominal Bond, If Any.

The Third Circuit has interpreted the bond requirement under Federal Rule of Civil Procedure 65(c) to require a bond except in the circumstances where no risk of monetary loss to the Defendants is shown. *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988). Even in instances where there is some risk of monetary loss, the amount of the bond is left to the discretion of the court. *Id.*

This case clearly implicates the exception in *Frank's GMC Truck Center*. Unlike many business cases involving commercial, money-making activities or transactions, an injunction against the governmental Defendants here restores the status quo that governed restroom access for transgender students for years without incident. Restoring restroom access for these Plaintiffs during the pendency of this litigation poses no financial burden or cost, nor any risk of monetary loss, on the Defendants. Here, "the balance of [the] equities weighs overwhelmingly in favor of the [students] seeking the injunction" against their school and the Court should "make specific findings" that warrant invoking the rare and narrow exception to the bond requirement of Rule 65(c). *Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412, 425-26 (3d Cir. 2010).

The Court should excuse the necessity of a bond or, in the alternative, should only set it at a nominal amount.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction as soon as possible to avoid any further deprivation of Plaintiffs' right to equal educational opportunities at Pine-Richland High School.

Dated on this 20th day of October, 2016.

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2016, I electronically filed the foregoing with the Clerk of the Court for the for the U.S. District Court for the Western District of Pennsylvania using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan

October 20, 2016