

No. 15-2056

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

G.G., by his next friend and Mother, **DEIRDRE GRIMM**,

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

**BRIEF OF AMICUS CURIAE
ALLIANCE DEFENDING FREEDOM
IN SUPPORT OF DEFENDANT-APPELLEE**

Gary S. McCaleb
Kristen K. Waggoner
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
gmccaleb@ADFlegal.org
kwaggoner@ADFlegal.org

David A. Cortman
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. N.E.
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org
rgray@ADFlegal.org

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-2056 Caption: G.G. v. Gloucester County School Board

Pursuant to FRAP 26.1 and Local Rule 26.1,

Alliance Defending Freedom
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
N/A

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
N/A

- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

N/A

- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

N/A

- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

N/A

Signature: s/ Gary S. McCaleb

Date: 05/15/2017

Counsel for: Alliance Defending Freedom

CERTIFICATE OF SERVICE

I certify that on May 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Gary S. McCaleb
(signature)

05/15/2017
(date)

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	v
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT	9
I. Human reproductive nature establishes what sex is, and that nature gives rise to the human right of bodily privacy, the protection of which is consistent with the objectives of Title IX.	11
II. The transgender students’ claims are rooted in gender identity theory and enforcing their demand to have their self-perceived sex affirmed is inconsistent with the objectives of Title IX.	13
III. Title IX may enforce only those legal interests consistent with its objectives.	17
CONCLUSION	20
CERTIFICATE OF COMPLIANCE.....	22
CERTIFICATE OF SERVICE.....	23
APPEARANCE OF COUNSEL.....	24
ADDENDUM:	
Declaration of Parent C in <i>Students and Parents for Privacy v. United States Department of Education, et al.</i>	01A
Excerpts from Transcript in <i>Board of Education of the Highland Local School District v. U.S. Department of Education, et al.</i>	05A

Declaration of Parent A in *Students and Parents for Privacy v. United States Department of Education, et al.* 09A

Declaration of Parent B in *Students and Parents for Privacy v. United States Department of Education, et al.* 16A

Verified Complaint-In-Intervention in *Board of Education of the Highland Local School District v. United States Department of Education, et al.*..... 22A

Declaration of Jane Doe in *Privacy Matters v. United States Department of Education, et al.* 52A

TABLE OF AUTHORITIES

Cases:

<i>Board of Education of the Highland Local School District v. United States Department of Education,</i> No. 2:16-cv-00524 (S.D. Ohio June 10, 2016)	1, 2
<i>City of Philadelphia v. Pennsylvania Human Relations Commission,</i> 300 A.2d 97 (Pa. Commw. Ct. 1973)	12
<i>Doe v. Boyertown Area School District, et al.,</i> No. 5:17-cv-01249 (E.D. Pa. March 21, 2017).....	2
<i>FDA v. Brown & Williamson Tobacco Corp.,</i> 529 U.S. 120 (2000).....	17
<i>G.G. ex rel. Grimm v. Gloucester County School Board,</i> 822 F.3d 709 (4th Cir. 2016).....	4, 18
<i>Gloucester County School Board v. G.G. ex rel. Grimm,</i> 136 S. Ct. 2442 (2016).....	4, 18
<i>Gloucester County School Board v. G. G. ex rel. Grimm,</i> 137 S. Ct. 369 (2016).....	4, 18
<i>Gloucester County School Board v. G.G. ex rel. Grimm,</i> 137 S. Ct. 1239 (March 6, 2017)	4, 18
<i>Hendricks v. Commonwealth,</i> 865 S.W.2d 332 (Ky. 1993).....	13
<i>Jackson v. Birmingham Board of Education,</i> 544 U.S. 167 (2005).....	17
<i>MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,</i> 512 U.S. 218 (1994).....	17

<i>McLain v. Board of Education of Georgetown Community Unit School District No. 3 of Vermilion County, 384 N.E.2d 540 (Ill. App. Ct. 1978)</i>	13
<i>People v. Grunau, No. H015871, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009)</i>	13
<i>Privacy Matters v. United States Department of Education, No. 0:16-cv-03015 (D. Minn. Sept. 7, 2016)</i>	4, 16, 17
<i>St. John’s Home for Children v. West Virginia Human Rights Commission, 375 S.E.2d 769 (W. Va. 1988)</i>	12
<i>State v. Lawson, 340 P.3d 979 (Wash. Ct. App. 2014)</i>	12
<i>Students and Parents for Privacy v. United States Department of Education, No. 1:16-cv-04945 (N.D. Ill. October 18, 2016)</i>	1
<i>United States v. Virginia, 518 U.S. 515 (1996)</i>	10
 <u>Statutes:</u>	
20 U.S.C.A. § 1681(a)(2)	18
20 U.S.C.A. § 1681(a)(8)	18
20 U.S.C.A. § 1682	17
 <u>Rules and Regulations:</u>	
34 C.F.R. §106.33	<i>passim</i>
 <u>Other Authorities:</u>	
<i>American Heritage Dictionary (1976)</i>	18

American Psychological Association, <i>Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression</i> (3rd ed. 2014), http://bit.ly/1mZQCsH	14
American Psychological Association, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (5th ed. 2013)	11
Asaf Orr et al., <i>Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools</i> (2015), http://bit.ly/2di0ltr	14
Gilbert SF, <i>Developmental Biology</i> , 6th Ed., (Sunderland (MA): Sinauer Associates 2000), https://www.ncbi.nlm.nih.gov/books/NBK9967/	11
<i>Oxford Dictionary of Biology</i> (7th ed. 2015)	11
<i>The American College Dictionary</i> (1970)	18
<i>The Random House College Dictionary</i> (rev. ed. 1980).....	18
United States Department of Education, Office for Civil Rights, <i>Title IX Resource Guide</i> (Apr. 2015), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf	3
United States Department of Education, Office for Civil Rights, <i>Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities</i> (Dec. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf	3

United States Department of Education, Office for Civil Rights,
Questions and Answers on Title IX and Sexual Violence
 (Apr. 29, 2014),
<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>..... 3

United States Department of Education, Office for Civil Rights,
Resources for Transgender and Gender-Nonconforming Students
 (last modified February 24, 2017),
<http://www2.ed.gov/about/offices/list/ocr/lgbt.html>..... 4

United States Department of Justice, Civil Rights Division, and
 United States Department of Education, Office for Civil Rights,
Dear Colleague Letter on Transgender Students (May 13, 2016),
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>..... 3

United States Department of Justice, Civil Rights Division, and
 United States Department of Education, Office for Civil Rights,
Dear Colleague Letter on Transgender Students (Feb. 22, 2017),
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>..... 5

INTEREST OF AMICUS CURIAE¹

Alliance Defending Freedom (ADF) is a not-for-profit legal organization providing strategic planning, training, funding, and direct litigation services to protect civil liberties. Since its founding in 1994, ADF has served as lead counsel, co-counsel, or amicus curiae in dozens of cases before the United States Supreme Court, and similarly in hundreds of cases before the federal and state courts of appeals and trial courts across the United States as well as before foreign courts around the world.

ADF has a particular interest in the outcome of the instant case, as how this Court resolves the question of providing access to sex-specific school privacy facilities under Title IX will become persuasive authority for three student privacy cases that ADF attorneys are litigating: *Students and Parents for Privacy v. United States Department of Education, et al.*, No. 1:16-cv-04945 (N.D. Ill. October 18, 2016); *Board of Education of the Highland Local School District v. United States*

¹ Parties to this case have consented to the filing of this brief. Amicus states that no counsel for a party authored this brief in whole or in part, and no person other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Department of Education, et al., No. 2:16-cv-00524 (S.D. Ohio June 10, 2016); and *Joel Doe v. Boyertown Area School District, et al.*, No. 5:17-cv-01249 (E.D. Pa. March 21, 2017).

The gist of the issue is simply stated: if access to privacy facilities is regulated by gender identity theory, then there will be the intermingling of the sexes within male-only or female-only privacy facilities and the bodily privacy of the male or female students will be compromised. But if access to privacy facilities is based on sex—understood as being male or female as grounded in human reproductive biology—then the privacy of all will be ensured when using such facilities.

In *Students and Parents for Privacy* and *Joel Doe*, ADF represents students whose bodily privacy is being violated by their schools' interpretation of sex as being determined by gender identity. Similarly, in *Highland Local School District*, ADF represents a school district which, like the Gloucester County School Board, resisted gender identity theory because it desired to protect the bodily privacy of all of its students.

SUMMARY OF ARGUMENT

In broad outline, the actors in the instant case and several similar cases currently in federal courts fall into four categories: the federal Department of Education (“DOE”); a local school or school district; a student asserting a transgender identity; and the rest of the students within a given school or district. While the precise role of each may vary from case to case, the core issues and arguments are largely the same.

Earlier in the litigation over gender identity theory, the Federal Department of Education came to the fore in the instant case via its Ferg-Cadima letter which was later buttressed by more written “guidance”² issued to schools receiving federal education funds. The Ferg-Cadima letter and related guidance instructed schools that under Title IX, the

² None of this “guidance” was promulgated via notice-and-comment rulemaking, but the DOE nonetheless enforced it as binding on all schools receiving federal education funding. Those guidance documents included: U.S. Dep’t of Justice, Civil Rights Division, and U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, May 13, 2016; U.S. Dep’t of Educ., Office for Civil Rights, *Title IX Resource Guide*, Apr. 2015; U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, Dec. 1, 2014; and U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, Apr. 29, 2014.

term “sex” included “gender identity” and that schools risked losing their federal funding if they did not comply with that new definition.³ True to its word, the DOE directly enforced its novel mandate against schools⁴ which sought to maintain locally-decided policies which preserved sex as

³ The better reading of the federal position is that gender identity is the sole determinant of “sex” when regulating access to facilities under 34 C.F.R. §106.33, as logically proven by Judge Niemeyer in his dissent. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 737-38 (4th Cir. 2016) (Niemeyer, J., dissenting), *mandate recalled and stayed*, 136 S. Ct. 2442 (2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *vacated and remanded*, 137 S. Ct. 1239 (Mar. 6, 2017) (“Therefore, when asserting that G.G. must be allowed to use the boys’ restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that ‘sex’ as used in Title IX and its regulations means *only* gender identity.”)

⁴ Enforcement targets included Highland Local School District (OH); Township High School District 211 (IL); Dorchester County School District (SC); Broadalbin-Perth Central School District (NY); Central Piedmont Community College (NC); Downey Unified School District (CA); and Arcadia Unified School District (CA); see U.S. Dep’t of Educ., Office for Civil Rights, *Resources for Transgender and Gender Nonconforming Students*, <http://www2.ed.gov/about/offices/list/ocr/lgbt.html> (last modified February 24, 2017). Other schools, well aware of the Federal campaign against local decisions on this issue, attempted to avoid enforcement by preemptively adopting the federal reinterpretation of Title IX, as was the case in *Privacy Matters v. United States Department of Education, et al.*, No. 0:16-cv-03015 (D. Minn. Sept. 7, 2016) which ADF attorneys filed but voluntarily dismissed without prejudice after the defendant school district acted to protect student privacy. Voluntary Dismissal Without Prejudice, *Privacy Matters v. U.S. Dep’t of Educ., et al.*, No. 0:16-cv-03015 (D. Minn. Apr. 13, 2017), ECF No. 83.

meaning male or female, while others such as the Appellee Gloucester County School Board were sued by private individuals who demanded obeisance to gender identity theory. Where the federal actors were once the driving force advancing that theory, they have now repudiated that position by rescinding the Ferg-Cadima and the 2016 Dear Colleague letters and restored the unambiguous, historic understanding of sex under Title IX being male and female as grounded in human reproductive nature⁵.

Then there are the transgender students: in the instant case, it is Appellant G.G. who is female but presents as a boy, while in the currently active ADF cases, various students who profess to be transgender

⁵ See U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter* (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>. This letter withdraws the "statements of policy and guidance" reflected in the Ferg-Cadima letter and the *Dear Colleague Letter on Transgender Students*, dated May 13, 2016, from the U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights. While the Departments disclaim further reliance "on the views expressed" within those two letters, the Departments nonetheless announced that they would "further and more completely consider the legal issues involved." DCL, Feb. 22, 2017 at 1. As neither of the Dear Colleague Letters nor the Ferg-Cadima letter were produced via notice-and-comment rulemaking, ADF views the more recent letter as simply the voluntary cessation of unlawful acts by the two Departments.

intervened to assert similar gender identity claims. In any event, each of those students states that they are of a different sex than their birth sex, and each insists that school officials must affirm their self-perceived sex by authorizing them to use privacy facilities otherwise reserved under 34 C.F.R. §106.33 to the use of the opposite sex. They further allege that if such access is not granted, then several of their legal rights are violated. Of course, the other students in these schools are expected to comply with official policies that treat a student's professed gender identity as their sex.

Next up are those schools such as Highland and Gloucester which resisted such demands, yet nonetheless affirmatively accommodated transgender students' bodily privacy needs by providing individualized facilities for them to change their clothes, shower, or conduct personal hygiene without exposure to the opposite sex. This not only prevents any bodily privacy violation from arising by exposure to the opposite sex within privacy facilities (the very purpose of §106.33), but also mitigates any concern that a transgender student may have about being exposed to members of their birth sex while disrobing, showering, traveling on overnight school trips, or conducting personal hygiene.

Finally, there are all of the other students in the affected schools. These students hold—as all humans do—a right to bodily privacy. That right is more specifically defined in these cases as the right to use sex-specific privacy facilities free from government-mandated use by a member of the opposite sex. This legal interest in bodily privacy is raised in the various lawsuits either indirectly—by a school asserting the bodily privacy interests of its students as a basis for maintaining sex-specific facilities—or directly by students whose privacy is being violated by the gender identity theory being applied.

At bottom, accepting G.G.'s position results in a school intentionally placing a biological female into boys' privacy facilities, or vice versa. In both instances school officials by policy intermingle the sexes within restrooms, locker rooms, shower facilities, and even in overnight sleeping accommodations on school trips and thus violate the bodily privacy rights of myriad students.

By focusing on bodily privacy, we see that the two sides are advancing very different interests. On one hand, the Gloucester County School Board and Highland Local School District are concerned about protecting the bodily privacy of all boys and girls within a given school—

an interest which is squarely within the ambit of Title IX, as explicitly provided for by 34 C.F.R. §106.33.⁶

In stark contrast, G.G. and the professed transgender students in the other cases advance only one, very different interest: that an individual student's subjective self-perception of his or her sex must be affirmed and endorsed by the government, regardless of its impact on the bodily privacy of other students.

In short, those resisting gender identity theory do so to protect the bodily privacy right that impacts *all* students, and protecting bodily privacy is squarely within the purpose of Title IX and 34 C.F.R. §106.33. But the interest claimed by transgender students is solely a demand that the government affirm their subjectively perceived sex, an interest which is not only divorced from the plain text of Title IX and its implementing

⁶ Which in its entirety states: "A recipient [of federal educational funding] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

regulations, but as shown herein eliminates the ability of schools to protect bodily privacy under the authority of 34 C.F.R. §106.33.⁷

Because the affirmation of self-perception interest advanced by transgender students and their supporters is so far outside of Title IX's purposes, Appellee Gloucester County School Board is on sound ground in refusing to define sex under Title IX to include gender identity.

ARGUMENT

This difference in interests between Appellant and Appellee is dispositive: Title IX was enacted to prevent sex discrimination in federally-funded educational opportunities, where sex refers to the fixed, binary categories of male and female as grounded in our human reproductive nature. But Title IX does not prohibit making rational distinctions where the physical differences between males and females are important to privacy—hence, 34 C.F.R. §106.33 was issued to make clear that Title IX should not to be taken so literally as to obligate schools to intermingle the sexes within restrooms, locker rooms, or showers.

⁷ Some professed transgender students have claimed a privacy right to keep secret the transgender status that they claim—at least from some people. Whatever the merits of this dubious claim, it is distinct from, and irrelevant to, the right of bodily privacy.

The statute and regulation complement one another, with the statute barring invidious sex discrimination, while 34 C.F.R. §106.33 permits rational distinctions between the sexes that are rooted in the real physical differences between men and women. *See United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”).

But there is no hint in the text, history, or logic of Title IX to suggest that Congress intended that the government must affirm an individual student’s wholly subjective perception of his or her sex. That interest of affirming a student’s self-perception of their sex falls well outside of Title IX, and if it is to be enforced through federal law, then Congress must first pass a bill, and the President sign that bill into law.

I. Human reproductive nature establishes what sex is, and that nature gives rise to the human right of bodily privacy, the protection of which is consistent with the objectives of Title IX.

A person's sex is determined at conception⁸ and may be ascertained at or before birth, being evidenced by objective indicators such as chromosomes, gonads, and genitalia. *See* Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia.").

As a sexually reproducing⁹ species, we are equipped with phenomenally complex male or female reproductive systems which are most obviously manifest in gonads and genitalia—one's "privates"—that

⁸ Gilbert SF, *Developmental Biology*, 6th Ed., (Sunderland (MA): Sinauer Associates 2000), <https://www.ncbi.nlm.nih.gov/books/NBK9983/>.

⁹ Defined as "[a] form of reproduction that involves the fusion of two reproductive cells (gametes) in the process of fertilization. Normally, especially in animals, it requires two parents, one male and the other female." *Oxford Dictionary of Biology* (7th ed. 2015). It is essential to human survival, as "[s]exual reproduction, unlike asexual reproduction, therefore generates variability within a species." *Id.*

are essential to the reproductive act.¹⁰ Moreover, the human sensitivities surrounding sex (whether used as a noun or as a verb) create personal privacy needs that are protected by the right to bodily privacy.

That right is protected throughout the law. For example, 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. Ct. App. 2014). Similarly, 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 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, 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).

¹⁰ There are intersex conditions resulting from disorders of sexual physiological development in which there is an abnormal chromosomal complement; the development of deformed or ambiguous genitalia; or some combination of the two. Intersex conditions may be objectively diagnosed and are distinct from “genders” proposed by gender-identity theory. Intersex persons are not at issue in the instant case, nor in any of the cases litigated by ADF.

These privacy interests are why a girls' 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, at *3 (Cal. Ct. App. Dec. 29, 2009). As the Kentucky Supreme Court observed, "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993); *see also McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty.*, 384 N.E.2d 540, 542 (Ill. App. Ct. 1978) (refusing to place male teacher as overseer of school girls' locker room). And the right is reciprocal: what holds true for placing a male in girls' private facilities is no less true for placing a female in boys' private facilities.

II. The transgender students' claims are rooted in gender identity theory and enforcing their demand to have their self-perceived sex affirmed is inconsistent with the objectives of Title IX.

The Appellant's legal position ineluctably infringes bodily privacy rights which are rooted in the physical differences between males and females. Privacy violations became evident when transgender students invoked gender identity theory to force schools to affirm their self-perceived sex by ordering that the students access sex-specific facilities based upon their gender identity rather than their sex.

But unlike sex (which is binary, fixed, objectively discerned, and rooted in human reproduction), gender identity is a subjectively-determined fluid continuum ranging from male to female to something else:

Other categories of transgender people include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people. Exact definitions of these terms vary from person to person and may change over time but 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.

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression 2* (3rd ed. 2014), <http://www.apa.org/topics/lgbt/transgender.pdf>; see also Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015) at 5 (describing 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”), <http://bit.ly/2di0ltr> (last visited May 11, 2017).

Notably, such fluidity is not mere theory but has already arisen within the context of these Title IX cases. For example, one of the intervening students in *Students and Parents for Privacy* was born

female, then identified as “gender queer” before changing again to present herself for a number of months “in a masculine manner”. See Addendum 01A-04A, Decl. of Parent C at ¶ 4.

Moreover, this subjective perception of being somewhere on a gender identity continuum is necessarily detached from any primary sex characteristic, i.e., those human physiological systems that are essential to the male or female reproductive role.

This was brought home in the *Highland Local School District* case, when at oral argument the district court sought to confirm that the intervening, male-to-female transgender student had (as he did) male genitalia. The student’s counsel responded that it was “*inappropriate* to label any part of [the student’s] body as male.”¹¹ See Addendum 05A-08A, Excerpts from Transcript in *Board of Education of the Highland Local School District v. U.S. Department of Education, et al.* (emphasis added).

A long silence followed that comment, and rightly so, as the statement robs “male” and “female” of any real meaning. Indeed, the

¹¹ Which begs the question of how sex stereotypes can even be discerned when gender identity theory does not recognize the primary sexual characteristic of being male or female (as grounded in our reproductive nature) as being definitional.

reductio ad absurdum of the Appellant's position is that it treats every sex-related characteristic, including those physiological systems which are uniquely male or female, as if they are merely stereotypical of sex rather than being the very definitional characteristic of sex. The only exception is one's subjective gender identity, which becomes the sole factor to determine "sex" under the Appellant's position.

Because the fluid continuum of gender identity is divorced from the real physical differences between boys and girls, when transgender students demand access to opposite sex facilities, they are not asserting any interest in their bodily privacy. Rather, as consistently seen in their affidavits, their claim is that they must access communal facilities of the opposite sex so that their misperceived sex is affirmed as "real" by school authorities and fellow students.¹² And that is an interest that is nowhere

¹² This "affirmation" interest is evidenced in Appellant's affidavits, *see* JA 28-33 at ¶¶ 11, 19, 25, 27, and 31; and by the intervening students in *Students and Parents for Privacy*, *see* Addendum 09A-15A, Decl. of Parent A at ¶¶ 12, 19, and 22; Addendum 16A-21A, Decl. of Parent B at ¶¶ 8, 12, and 21; Addendum 01A-04A, Decl. of Parent C at ¶¶ 6, 10, and 12; and in *Highland Local School District*, *see* Addendum 22A-51A, Verified Complaint-in-Intervention at ¶ 31. As in the other cases, a professed transgender student had intervened in the voluntarily dismissed *Privacy Matters* case, and as with other such intervenors asserted only an affirmation interest in using the sex-specific privacy facilities. *Privacy Matters v. United States Department of Education*, No.

to be found in the text, legislative history, or plain meaning of Title IX and its implementing regulations.

III. Title IX may enforce only those legal interests consistent with its objectives.

Once the opposing parties' interests are laid out, the legal resolution of the matter is straightforward. An "agency's power to regulate . . . must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000). Here, Congress authorized agencies implementing Title IX to "issu[e] rules, regulations, or orders of general applicability which shall be *consistent with achievement of the objectives of the statute.*" 20 U.S.C.A. § 1682 (emphasis added); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994) (noting that every congressional delegation of power implies that the agency is "bound . . . by the ultimate purposes" of the statute).

Title IX's purpose is to "prohibit[] sex discrimination by recipients of federal education funding." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). When Congress enacted Title IX in 1972,

0:16-cv-03015 (D. Minn. Sept. 7, 2016), *see* Addendum 52A-56A, Decl. of Jane Doe at ¶¶ 5, 9, and 18.

dictionaries defined “sex” as referring to the biological distinctions between men and women.¹³ That Congress intended a binary understanding of the term “sex” is confirmed by Title IX’s text, which repeatedly references “both sexes” and “students of one sex” as compared with “students of the other sex.” *See, e.g.*, 20 U.S.C.A. § 1681(a)(2) (discussing “students of both sexes”); *id.* § 1681(a)(8) (discussing activities “provided for students of one sex” and “for students of the other sex”).

¹³ *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting), *mandate recalled and stayed*, 136 S. Ct. 2442 (2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *vacated and remanded*, 137 S. Ct. 1239 (Mar. 6, 2017) (noting dictionaries contemporaneous to Title IX’s enactment relied on biological distinctions to define sex, and including the following, among other, examples: *The Random House College Dictionary* 1206 (rev. ed. 1980) (“either the male or female division of a species, esp. as differentiated with reference to the reproductive functions”); *American Heritage Dictionary* 1187 (1976) (“The property or quality by which organisms are classified according to their reproductive functions”); *The American College Dictionary* 1109 (1970) (“the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished”). Where the *G.G.* majority erred was first admitting that the statute unambiguously dealt with “male” and “female” persons, *G.G.*, 822 F.3d at 720, but then proceeding as if male and female have no connection to human reproduction despite near-uniform reliance on “reproduction” in the dictionaries cited.

Despite this, G.G.'s legal position of advancing gender identity theory would obligate schools which provide sex-specific locker rooms, showers, and restrooms pursuant to 34 C.F.R. §106.33 to admit students asserting their transgender status to those private facilities based on gender identity rather than sex.

If humans reproduced asexually, 34 C.F.R. §106.33 would never have been conceived. But we do not reproduce that way. And our reproductive sexuality engenders privacy issues in these government-controlled privacy facilities where the right to bodily privacy should be protected by the school officials who stand *in loco parentis* and have the duty to protect that privacy.

Instead, the Appellant would impose gender identity theory to violate this vital privacy interest by intentionally placing a biological girl inside adolescent males' privacy facilities in this case, and should gender identity theory be imposed by the Courts nationwide, the sexes will be systematically intermingled in locker rooms, showers, restrooms, and overnight accommodations throughout the nation, which would utterly defeat the purpose of 34 C.F.R. §106.33.

CONCLUSION

Students' rights to bodily privacy are at the center of 34 C.F.R. §106.33 and wholly within the scope of Title IX. Appellee Gloucester County School Board therefore serves the purposes of Title IX by preserving the sex-specific nature of privacy facilities. In contrast, the putative right asserted by the Appellant, to have G.G.'s subjective perception of "gender" be affirmed by the government and fellow students, is wholly outside the ambit of Title IX and leads to the incongruous result of mixing the sexes in facilities specifically intended for only one sex under the authority of 34 C.F.R. §106.33.

Undoubtedly, the transgender students must have their bodily privacy protected, and schools such as Gloucester and Highland do well to provide individualized facilities to that worthy end. Certainly, G.G.'s challenging adolescence merits compassion, empathy, and support, which in fact Gloucester County School Board repeatedly provided.

But as with many other issues which lay outside a federal court's purview, G.G.'s recourse is to seek legal relief from Congress, not demand that a sex discrimination law be repurposed into a personal-

perception affirmation statute. And while all should show compassion to the transgender students in our society, this Court must dispassionately apply the plain text and Congressional intent of Title IX to protect the right of local school districts to provide for separate male and female privacy facilities under 34 C.F.R. §106.33, which is essential if the bodily privacy of all students is to be protected.

We thus urge the Court to confirm that “sex” under Title IX means male and female as determined by our human reproductive nature, and affirm the decision below.

Respectfully submitted this 15th day of May, 2017.

/s/ Gary S. McCaleb

Gary S. McCaleb
Kristen K. Waggoner
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
gmccaleb@ADFlegal.org
kwaggoner@ADFlegal.org

David A. Cortman
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. N.E.
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org
rgray@ADFlegal.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Amicus Curiae Alliance Defending Freedom, furnishes the following:

In compliance with Fed. R. App. P. 32(a)(7), I hereby certify that this brief, including headings, footnotes and quotations, but excluding parts exempted by Fed. R. App. P. 32(f), contains 4358 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

In compliance with Fed. R. App. P. 32(a)(5), I hereby certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: May 15, 2017

ALLIANCE DEFENDING FREEDOM

/s/ Gary S. McCaleb

Gary S. McCaleb

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Gary S. McCaleb

Gary S. McCaleb
Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 15-2056 as

Retained Court-appointed(CJA) Court-assigned(non-CJA) Federal Defender Pro Bono Government

COUNSEL FOR:

Alliance Defending Freedom as the (party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

s/ Gary S. McCaleb (signature)

Gary S. McCaleb Name (printed or typed)

480-444-0020 Voice Phone

Alliance Defending Freedom Firm Name (if applicable)

480-444-0028 Fax Number

15100 N 90th Street

Scottsdale, AZ 85260 Address

gmccaleb@ADFlegal.org E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on May 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Empty box for address 1

Empty box for address 2

s/ Gary S. McCaleb Signature

May 15, 2017 Date

ADDENDUM

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

STUDENTS AND PARENTS FOR
PRIVACY, a voluntary unincorporated
association; C.A., a minor, by and through
her parents and guardians, S.M. and R.M.;
N.G., a minor, by and through her parent
and guardian, R.G.; A.V., a minor, by and
through her parents and guardians, T.V.
and A. T.V.; and B.W., a minor, by and
through his parents and guardians, D.W.
and V.W.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION; JOHN B. KING, JR., in
his official capacity as United States
Secretary of Education; UNITED
STATES DEPARTMENT OF JUSTICE;
LORETTA E. LYNCH, in her official
capacity as United States Attorney
General, and SCHOOL DIRECTORS OF
TOWNSHIP HIGH SCHOOL DISTRICT
211, COUNTY OF COOK AND STATE
OF ILLINOIS.

Defendants.

Civil Action No. 1:16-cv-04945

Hon. Jorge L. Alonso

**DECLARATION OF PARENT C
IN SUPPORT OF MOTION TO INTERVENE BY STUDENT C, A MINOR CHILD,
BY AND THROUGH HIS FATHER AND LEGAL GUARDIAN, PARENT C**

I, Parent C, declare:

1. I am the father and legal guardian of Student C, a 14-year-old transgender boy. Student C's motion to intervene in the case is brought through me on his behalf. I am over eighteen (18) years of age and if called as a witness, I could and would testify competently to the facts set forth below.

2. Student C is a fourteen-year-old boy currently attending junior high school in District 54. He will be starting as a freshman at Hoffman Estates High School in District 211 for the 2016-2017 academic year. Student C lives with me, my wife, and his younger brother.

3. My son is a bright boy who does very well in school. He is enrolled in a number of advanced and honors classes. He is particularly interested in engineering. He has entered and has been selected for state academic contests.

4. Student C has been identifying as male for about six months. Before then, he identified as gender queer but has presented himself in a masculine manner since at least spring 2015.

5. Since coming out as transgender—and with his family’s full support—Student C has lived his life as a boy. Student C has legally changed his name to a traditionally male name. He has also completed a social security gender marker change, and he has changed the gender on his state ID to male. Student C refers to himself using male pronouns, and he has asked other people to do the same.

6. I am proud that Student C is a vocal advocate for himself at school. Student C’s school records identify him as male with his legal name (his male chosen name), and he has asked that students and teachers refer to him using his male name and male pronouns. Although there are occasional slip ups, the administrators, teachers, and staff at Student C’s school refer to him by his legal male name and male pronouns and treat him as they would treat any other boy at the school.

7. Other students in Student C’s school have reacted well to, and are supportive of, his transition. The school’s psychologist facilitated a meeting for Student C to tell the other students in his class about his transition.

8. Student C is currently seeing a medical doctor at Ann & Robert H. Lurie Children's Hospital of Chicago and a therapist. His medical providers have prescribed hormone suppressant therapy for him. I am supportive of ensuring that my son has the medical treatment his therapist and physician prescribe for him.

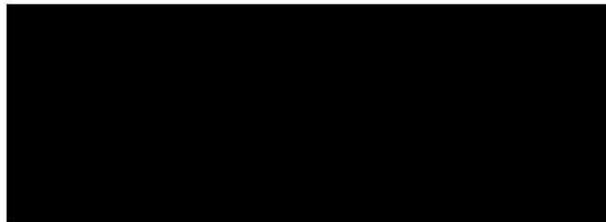
9. After coming out as transgender, Student C has become more outgoing and confident. Student C has grown into himself since transitioning, and I have noticed that he is more likely to ask for what he wants. He is also now much more social and is less apt to hide in his room. Overall, he is a lot happier and more carefree now that he can live his life as a boy.

10. Student C currently uses male restrooms in public, and he wants to use the boys' restrooms and locker rooms once he begins high school. There are a handful of students from his junior high school who are going to Hoffman Estates High School in the upcoming school year. He would like to enter high school in an environment where everyone identifies him and knows him as a boy. Part of presenting himself as a boy in high school includes the ability to enter and use the boys' restrooms and locker rooms. Student C would feel extreme distress and discomfort if he were denied access to the boys' facilities in a school where students otherwise identify him as a boy. Forcing my son to use a single-use restroom or to dress apart from the other boys is simply not an option, since it would separate him from the other students and send him the message that he is different and should be ashamed of who he is.

11. Given that Student C plans to begin hormone therapy in the near future, I expect that he will soon be exhibiting additional traditionally male characteristics. As a result, he would feel horribly embarrassed and uncomfortable being forced to use the girls' restrooms and locker rooms.

12. It is apparent to me that my son's confidence and well-being have improved significantly since coming out as transgender. I have witnessed how much happier Student C is living as a boy consistent with his gender identity, and I am afraid that denying him access to the boys' restrooms and locker rooms will be emotionally distressing to him. Student C is a boy and wants others to accept him as a boy.

I declare under penalty of perjury of the laws of the United States that to the best of my knowledge, information, and belief, the foregoing is true and correct. Executed in Chicago, Illinois on May 25, 2016.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE)	
HIGHLAND LOCAL SCHOOL DISTRICT,)	
)	
PLAINTIFF,)	CASE NO. 2:16-CV-524
)	
vs.)	SEPTEMBER 20, 2016
)	
U.S. DEPARTMENT OF EDUCATION,)	
et al.,)	2:00 P.M.
)	
DEFENDANTS.)	
)	

TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFF:

Alliance Defending Freedom
By: DOUGLAS G. WARDLOW, ESQ.
GARY S. MCCALED, ESQ.
JEANNA HALLOCK, ESQ.
STEVEN O'BAN, ESQ.
15100 North 90th Street
Scottsdale, Arizona 85260

Langdon Law LLC
By: DAVID R. LANGDON, ESQ.
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069

- - -

Proceedings recorded by mechanical stenography,
transcript produced by computer.

APPEARANCES CONTINUED:

FOR THE PLAINTIFF:

Renwick, Welch & Burton, LLC
By: ANDREW J. BURTON, ESQ.
9 North Mulberry Street
Mansfield, Ohio 44902

FOR THE DEFENDANTS:

U.S. Department of Justice
By: SPENCER E. AMDUR, ESQ.
20 Massachusetts Avenue
Washington, D.C. 20530

FOR THE THIRD-PARTY PLAINTIFF:

Hickman & Lowder
By: JOHN R. HARRISON, ESQ.
1300 East 9th Street
Cleveland, Ohio 44114

National Center for Lesbian Rights
By: ASAF ORR, ESQ.
SHANNON P. MINTER, ESQ.
870 Market Street
San Francisco, California 94102

Debevoise & Plimpton LLP
By: DEREK WIKSTROM, ESQ.
JENNIFER MINTZ, ESQ.
JOSEPH WEISSMAN, ESQ.
919 Third Avenue
New York, New York 10022

APPEARANCES CONTINUED:

FOR THE THIRD-PARTY DEFENDANT:

McGown & Markling Co, L.P.A.

By: MATTHEW J. MARKLING, ESQ.

PATRICK VROBEL, ESQ.

SEAN T. KORAN, ESQ.

1894 North Cleveland-Massillon Road

Akron, Ohio 44333

- - -

1 be a girl in order to access those facilities, one has not
2 materialized, but that those administrators have been able to
3 implement those policies in a way that ensures the dignity and
4 privacy of all students in school.

5 THE COURT: Well, there have been affidavits submitted
6 by parents. And the parents theoretically, at least, are
7 reflecting some of the concerns of their students. In this
8 calculus, where do I place the concerns of other girls who
9 don't want to be viewed or share a bathroom with someone who,
10 under Mr. Wardlow's definition, is biologically a boy, a person
11 who has male genitalia? What deference should the Court give
12 to those interests of those students?

13 MR. ORR: First, Your Honor, I would not say that Jane
14 has male genitalia. But secondly, school districts have shown
15 that --

16 THE COURT: Jane doesn't have male genitalia?

17 MR. ORR: No. As I indicated, gender and sex are much
18 more complex than that. I think it would be inappropriate to
19 label any part of her body as male.

20 THE COURT: How do you label, then, the means through
21 which she excretes liquid waste?

22 MR. ORR: Your Honor, having not ever seen her body, I
23 don't know. But I think it's important --

24 THE COURT: Has she had sex reassignment surgery?

25 MR. ORR: No. That would be inconsistent with

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; C.A., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A. T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his official capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as United States Attorney General; and SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS.

Defendants.

Civil Action No. 1:16-cv-04945

Hon. Jorge L. Alonso

**DECLARATION OF PARENT A
IN SUPPORT OF MOTION TO INTERVENE BY STUDENT A, A MINOR CHILD,
BY AND THROUGH HER MOTHER AND LEGAL GUARDIAN, PARENT A**

I, Parent A, declare:

1. I am the mother and legal guardian of the high school student referenced as “Student A” throughout the complaint in the above-captioned case. Student A’s motion to intervene in the case is brought through me on her behalf. I am over eighteen (18) years of age, and if called as a witness, I could and would testify competently as to the matters set forth below.

2. Student A is a seventeen year-old girl currently in her junior year of high school at William Fremd High School in Palatine, Illinois, which is part of Township High School District 211 (“District 211”). Student A will be in Fremd High School’s senior class during the 2016-2017 school year and expects to graduate in May 2017.

3. Student A is an outgoing young woman who receives good grades, participates on athletic teams and in various clubs at Fremd High School, and is close with her friends and family.

4. Student A is transgender. Although designated male at birth, Student A has identified as female from a young age. She came out to her father and me as transgender in spring 2011, when she was in seventh grade. With the help and support of her father and I, and under the supervision of medical providers, Student A transitioned to living consistently with her female gender identity in the fall of 2012, as she began her eighth grade year. She was diagnosed with Gender Dysphoria in January 2013.

5. As part of her treatment for Gender Dysphoria, Student A’s [health care provider] has recommended and prescribed that she live her life full-time as female. Accordingly, Student A has continued to live her life full-time as a girl by dressing as female, using a female name and pronouns, and using female bathrooms and any other facilities that are divided by sex. Student A completed a legal name change in May 2013, and obtained a passport listing her gender as female in July 2013. She has also taken steps to transition medically.

6. As Student A began high school at Fremd High School in fall of 2013, the three of us (Student A, her father and I), at times with the support and assistance of the Illinois Safe Schools Alliance, had several discussions with administrators at both Fremd High School and

District 211 to request that Student A be treated by the school as a female in all ways, including participation on girls' athletic teams and access to the girls' restrooms and locker room.

7. Representatives from Fremd High School and District 211 told us that Student A would be allowed to use the girls' restrooms and participate on girls' athletic teams, but that she would not be allowed to use the girls' locker room to change for her daily gym class or for athletic team practices or competitions. Instead, Student A was asked to use restrooms separate and apart from the locker room to change for gym and her athletic teams.

8. This ban from using the girls' locker room caused several logistical problems for Student A. One of the restrooms that she changed in was located far away from the locker room and was locked, and Student A sometimes had to locate someone to unlock it for her before she could change, which caused her to be late to class. Student A also, in trying to avoid entering the gym from a different door than the other students, had to take longer routes to get to the gym.

9. Student A was also allowed to use the nurse's office, and later, a restroom closer to the locker room, but even then Student A was not able to keep her belongings in the locker area where other girls kept their belongings. This would sometimes force Student A to keep her belongings in her car during after-school activities, again causing her inconvenience and making her late for participating in athletic teams. When Student A did go into the girls' locker room, to, for example, put her belongings in a locker, she was reprimanded.

10. During the swim unit in Student A's gym class, separate changing arrangements in another restroom were again made. Unlike the other female students, who had standard showers in a locker room, Student A only had access to a "rinse" shower and limited amenities to get ready after class. The rinse shower was less private, located in a narrow hallway through which all students had to pass to enter or exit the girls' swimming locker room.

11. On another occasion, Student A did not receive an announcement made in the locker room, stating that students would not have to dress for gym. Student A was embarrassed when she arrived in her gym uniform while others wore their street clothes, and had to go and change again.

12. The most important aspect of this, however, was how difficult this was for Student A on an emotional level. Although she would put on a brave face in front of other students, the stress and trauma of having to deal with these issues would frequently lead to her expressing anxiety and frustration at being treated differently by the school. Student A would talk about feeling alone and isolated in having to be in a separate space for changing, and feeling singled out as being different from other girls. Being singled out was embarrassing for her, and invited questions and speculation about her transgender status from other students. Student A would often not change for gym class, miss gym class, or even miss school related to her feelings of being isolated, upset and embarrassed related to this issue.

13. Student A, her father and I continued to try and get Student A access to the girls' locker room. After Fremd High School and District 211 confirmed their position that she would not be allowed such access, we engaged lawyers from the American Civil Liberties Union, who wrote several letters to Fremd High School and District 211 on our behalf requesting that Student A be allowed to change in the girls' locker room.

14. On December 5, 2013, when Fremd High School and District 211 would not change their position, the ACLU filed a discrimination complaint on our behalf with the Chicago Office of the Office for Civil Rights ("OCR") of the United States Department of Education. Student A and I fully participated in OCR's investigation. During the investigation, we learned

that District 211 had taken the position with OCR that they had not discriminated against Student A in prohibiting her from accessing the girls' locker room.

15. In June 2015, OCR advised us and District 211 of its findings. OCR had found that the District violated the Title IX regulation by, on the basis of sex, excluding Student A from participation in and denying her the benefits of its education program, providing her different benefits or benefits in a different manner, subjecting her to different rules of behavior, and subjecting her to different treatment. OCR gave District 211 a 90-day period before the findings would be released to try to reach an agreement with OCR to resolve District 211's Title IX violation voluntarily. In October 2015, District 211 stated publicly it would not resolve the Title IX violation voluntarily.

16. On November 2, 2015, OCR issued publicly the correspondence containing its findings that District 211 was in violation of Title IX. OCR found that the evidence showed that, as a result of District 211's denial of access to the girls' locker room, Student A not only received an unequal opportunity to benefit from District 211's educational program, but also experienced an ongoing sense of isolation and ostracism throughout her high school enrollment at the Fremd High School. OCR's findings can be found at <http://www.aclu-il.org/wp-content/uploads/2015/12/2015-11-02-DOE-Findings.pdf>, which was last visited on May 21, 2016.

17. On December 3, 2015, we were notified that OCR and District 211 reached a settlement and signed a resolution agreement. This agreement provided that Student A was to be provided equal access to the girls' locker room at Fremd High School. District 211 was to provide OCR with documentation of its compliance by January 15, 2016. The resolution

agreement can be found at <http://www.aclu-il.org/wp-content/uploads/2015/12/OCR-Agreement-12-2-2015.pdf>, which was last visited on May 21, 2016.

18. Since January 15, 2016, Student A has been allowed to use the girls' locker room at Fremd High School. For reasons unrelated to any issue in this case, she did not begin using the locker room with regularity until early March 2016.

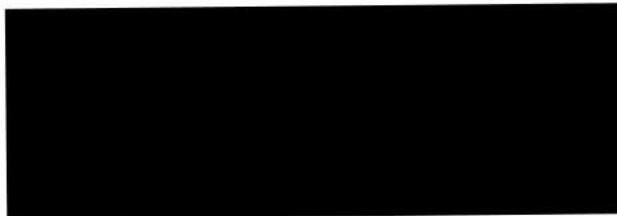
19. During the time that Student A was allowed full access to the girls' locker room, she was noticeably happier, more confident and more comfortable going to school. She talked about feeling more bonded with the other girls at school, and more connected to the athletic teams on which she participates. She no longer felt like she was missing out on part of these important high school experiences. She was more willing and eager to participate in after school activities. Student A talked about her access to the locker room making a big difference in everyone's acceptance of her at school, as it signaled to others that Student A should be treated equally with other girls.

20. Student A was devastated when she learned of this lawsuit and the threat of having the locker room access that she just gained taken away again. Having to use separate restrooms to change her clothes instead of the girls' locker room inconvenienced, stigmatized and embarrassed Student A, and led to her being very upset on a regular basis, disrupting her education and her overall self-assurance. Student A is not only concerned that the lawsuit will take away her locker room access, but also her ability to use the girls' restrooms at school, which she has always been allowed to use. Denying Student A access to the girls' restrooms would cause Student A inconvenience, embarrassment, and distress.

21. This lawsuit brought the entire controversy back to the attention of the students at Fremd High School. Since the lawsuit was filed, Student A has been reluctant to use the girls' locker room, attending gym class in her street clothes or missing gym class or school altogether.

22. Student A's use of the girls' locker room is essential for affirming her female gender identity and is consistent with that identity and with her prescribed course of medical treatment for Gender Dysphoria. We have observed that the more she is treated equally with the other girls, the more joyful, confident, and free she is to be herself. Continuing to allow her equal access to the girls' locker room and restrooms will improve Student A's emotional well-being so that she can achieve her full potential and will help others be more accepting of her.

I declare under penalty of perjury of the laws of the United States that to the best of my knowledge, information, and belief, the foregoing is true and correct. Executed in Palatine, Illinois on May 24, 2016.



**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; C.A., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A. T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his official capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as United States Attorney General; and SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS,

Defendants.

Civil Action No. 1:16-cv-04945

Hon. Jorge L. Alonso

**DECLARATION OF PARENT B
IN SUPPORT OF MOTION TO INTERVENE BY STUDENT B, A MINOR CHILD,
BY AND THROUGH HIS MOTHER AND LEGAL GUARDIAN, PARENT B**

I, Parent B, declare:

1. I am the mother and legal guardian of Student B, a twelve-year-old boy. Student B's motion to intervene in the case is brought through me on his behalf. I am over eighteen (18) years of age and if called as a witness, I could and would testify competently to the facts set forth below.

2. Student B is a twelve-year-old seventh-grader at Plum Grove Junior High School (“Plum Grove”) in Rolling Meadows, Illinois. In the fall of 2017, Student B will begin ninth grade at William Fremd High School in Palatine, Illinois, where the individual referenced in the above-captioned case as “Student A” is currently a student. Student B lives with me and his older brother, who is currently a senior at Fremd High School.

3. Student B is a sweet, intelligent boy who is close to his family and friends. He loves to read and listen to music and belongs to a writers’ club at his school.

4. Student B is transgender. In August 2015, shortly after beginning seventh grade, Student B came out to me as transgender. He told me that he had been thinking about it for a long time, and had been certain for the past year that he identified as male.

5. Since then, with my full support, Student B has lived his life full-time as a boy. He has adopted a traditionally male name and uses male pronouns; most of his family and all of his friends also use male pronouns to refer to him. Student B dresses as male: he wears boys’ clothing, keeps his hair short, and wears a sports bra to bind his chest.

6. Student B has just begun to see a therapist at the Howard Brown Health Center for Gay, Lesbian, Bisexual and Transgender Citizens in Chicago. Based on my conversations with the therapist, it is my understanding that Student B will be diagnosed with Gender Dysphoria. Gender Dysphoria is the medical diagnosis for the clinically significant distress that individuals whose gender identity differs from the sex they were assigned at birth can experience.

7. It is my further understanding that, as part of Student B’s treatment for Gender Dysphoria, Student B is likely to receive hormone therapy to give him a more masculine

appearance and voice. Student B is eager to begin hormone therapy, and I support his doing so as soon as his therapist and medical doctors believe it is appropriate.

8. A few days after coming out to me, Student B told the principal at Plum Grove, Dr. Kerry Wilson, that he identified as male, wanted to be called by his chosen male name, and wanted teachers, administrators, staff, and students at the school to refer to him using male pronouns. Dr. Wilson then called me and informed me of that conversation. To my and Student B's great relief, Dr. Wilson immediately expressed support of Student B and his preferences and complied with his requests. The teachers, administrators, and staff at Plum Grove have made an effort to treat Student B consistent with his gender identity.

9. Before coming out to me as transgender, Student B suffered from serious depression and anxiety. He was often withdrawn and uncommunicative, had difficulty sleeping, and had exhibited self-harming behaviors. He had been getting therapy, and it had made some difference, but he was still visibly unhappy much of the time.

10. Since coming out as transgender, however, Student B's mood and demeanor have changed radically. I have observed that he is visibly happier, more confident, and more comfortable in his everyday life. He no longer secludes himself in his room after school. His sleep issues have decreased in both frequency and severity. He talks to me all the time, and we are closer than we have ever been. He sings around the house, and loves to share with me the music he is interested in. Student B has developed an interest in drawing and painting, and together we created a little "studio" for him in our house. He has begun baking, which is something he never showed any interest in before. I feel like I am finally getting to know my preteen child, and I am loving every minute of it.

11. It is obvious to me that coming out and being accepted as transgender has relieved much of the significant emotional distress Student B was experiencing. He can now be on the outside what he has always been on the inside, and that is a huge relief and source of joy for him.

12. At first, I was not comfortable with Student B's using the boys' restrooms and locker rooms at Plum Grove. I wasn't sure that Student B was ready for that, and I didn't want Student B to be in an uncomfortable position in case he changed his mind. But it quickly became clear to me that this is who Student B is and always has been, and that he not only will not, but cannot just stop living consistent with his gender identity.

13. Currently, Student B uses the boys' restrooms at school, with my permission. Dr. Wilson and the other administrators, teachers, and staff at his school are supportive of his choice to use the boys' restrooms, and his friends encourage him to do so.

14. Student B has gym class twice a week, and is required to change his clothes to participate. Student B still uses the girls locker rooms to change for gym, but he has told me that once he begins hormone therapy, he would like to use the boys' locker rooms. Dr. Wilson has indicated that the administration at Plum Grove will be supportive if he makes that choice.

15. With one exception, Student B has not received or heard about any complaints from any students related to his use of the boys' restrooms. His impression, and mine, is that most of the students are supportive of or simply indifferent to his transgender status. The exception is one of the boys who is bullying him as described in the paragraph below, who complained about Student B's use of the boys' restrooms only after Student B reported his participation in the bullying.

16. Unfortunately, there are two boys in Student B's class who are bullying him on account of his transgender status. These boys regularly make nasty, rude comments to and in

front of Student B. For example, they have asked him if he is going to “grow a dick” and how he masturbates, and have announced, while Student B is nearby and within earshot, that Student B is not a “real boy” and is “faking.” The Plum Grove administration is taking the bullying very seriously and is working to eliminate it. Nonetheless, it has been very upsetting to Student B.

17. When Student B and I learned about the settlement between Student A and Fremd High School in January 2016, he was overjoyed. Student B knows Student A from a support group, and knows how happy Student A was when she was given full access to the girls’ locker rooms. Student B also was excited by the settlement because he believed that it meant that he would be able to use the boys’ restrooms and locker rooms without incident once he began ninth grade at Fremd.

18. Student B was shocked and disappointed when he learned of this lawsuit. He read the complaint and was appalled at its egregious and hurtful use of the male gender to refer to Student A, and told me that he does not understand why anyone would want to harm Student A in this way.

19. Student B is terribly upset at the thought if this lawsuit is successful, he will not be able to use the boys’ restrooms and locker rooms when he begins high school at Fremd. He expects that by then, he will be in hormone therapy and exhibiting traditionally male characteristics. As a result, he will be extremely uncomfortable in and embarrassed to use girls’ facilities.

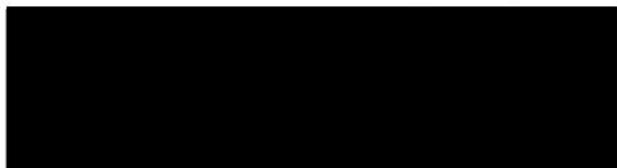
20. Given how compassionate and supportive the administration, staff, and teachers at Plum Grove have been towards Student B, I believe that entering an atmosphere where he is unable to live consistent with his true gender identity will be devastating to him emotionally. I

am equally afraid that a victory in this lawsuit will exacerbate and legitimize the bullying of Student B and other transgender kids.

21. All that Student B wants is to be able to live and be treated like any other boy. Student B has had a difficult adolescence as a result of his transgender status, and embracing his true gender identity has been a source of healing and solace. The more he is treated equally with other boys, the more free he is to be himself.

I declare under penalty of perjury of the laws of the United States that to the best of my knowledge, information, and belief, the foregoing is true and correct.

Executed in PALATINE, Illinois on May 24, 2016.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

----- X

BOARD OF EDUCATION OF THE :
HIGHLAND LOCAL SCHOOL DISTRICT, :

Plaintiff, :

vs. :

UNITED STATES DEPARTMENT OF :
EDUCATION; JOHN B. KING, JR., in his :
official capacity as United States Secretary of :
Education; UNITED STATES DEPARTMENT :
OF JUSTICE; LORETTA E. LYNCH, in her :
official capacity as United States Attorney :
General; and VANITA GUPTA, in her official :
capacity as Principal Deputy Assistant Attorney :
General, :

Defendants. :

----- :
JANE DOE, a minor, by and through her legal :
guardians JOYCE and JOHN DOE, :

Intervenor Third-Party Plaintiff, :

vs. :

BOARD OF EDUCATION OF THE :
HIGHLAND LOCAL SCHOOL DISTRICT; :
HIGHLAND LOCAL SCHOOL DISTRICT; :
WILLIAM DODDS, Superintendent of Highland :
Local School District; and SHAWN :
WINKELFOOS, Principal of Highland :
Elementary School, :

Third-Party Defendants. :

----- X

16 Civ. 524 (ALM/KAJ)

VERIFIED
COMPLAINT-IN-INTERVENTION

JANE DOE, by and through her legal guardians, JOYCE and JOHN DOE, and her undersigned counsel, for her third-party complaint-in-intervention against the Board of Education of the Highland Local School District and the Highland Local School District (together, “Highland”) and the other Third-Party Defendants, avers as follows:

INTRODUCTION

1. Jane Doe is an eleven-year-old transgender girl who attends Highland Elementary School in the Highland Local School District. For the past three years, Highland has refused to treat Jane the same as other girls, causing her to be ostracized and leading to frequent bullying and humiliation by teachers, staff, and students. Following an investigation, the U.S. Department of Education recently concluded that Highland is violating Title IX. But instead of trying to remedy that situation, Highland filed this lawsuit – purportedly concerned about protecting the “dignity and privacy” of other students – seeking court orders to try to ensure that the mistreatment of Jane and the violation of her rights, dignity, and privacy will continue unabated.

2. From a very young age, Jane began asserting her identity as female. Joyce and John Doe initially believed that this was a “phase,” but Jane’s statements and actions only became more consistent, persistent, and insistent. Those statements were accompanied by an increasing level of psychological distress at being treated like a boy. Uncertain about how to alleviate that distress, Joyce and John sought out the advice of professionals.

3. Prior to Jane’s first-grade year, with the guidance of medical and mental health professionals, Joyce and John helped Jane begin living as the girl she has always been. As part of that process, Joyce met with Third-Party Defendant Shawn Winkelfoos, the principal at Highland Elementary School, and Highland administrators to ensure that Jane would be affirmed and respected as a girl and treated the same as other girls throughout the school environment when she returned to first grade. Although Highland alleges that it has “admirably navigated a difficult

and sensitive situation,” in fact it has refused to acknowledge Jane’s identity as a girl and has repeatedly singled her out for adverse treatment and exposed her to stigma and harassment.

4. Unlike the other girls in her school, Highland refuses to allow Jane to use the girls’ restrooms. Instead, she must use specially designated restrooms that are inconvenient, place additional restrictions on her ability to use the restroom, and isolate and stigmatize her. In addition to placing Jane in a discriminatory situation that encourages other students to stigmatize and harass her, Highland refuses to investigate or effectively respond to the harassment, name-calling, and bullying Jane routinely faces and which Jane’s legal guardians have brought to the school’s attention on numerous occasions. The school refuses to correct teachers and staff who, years after being informed that Jane is transgender, insist on continuing to refer to her by male pronouns. Beyond failing to address the hostile school environment Jane must endure every day, the school has actively contributed to that environment. For example, the school’s one attempt at encouraging “sensitivity” involved a male teacher dressing up as a woman during a school assembly, generating raucous laughter and humiliating Jane in front of the entire school community.

5. In short, Highland’s treatment of Jane has been anything but “sensitive” or “admirable.” Instead, Highland has staunchly refused to respect or acknowledge Jane’s female gender, subjecting her to untold pain and anxiety, without any sound reason for doing so. Neither in its lawsuit, nor in its communications with Jane’s family, has the school ever articulated a basis for denying Jane’s use of the girls’ bathrooms, other than suggesting a vague, unsupported notion that such a policy reflects the balancing of privacy interests of all students, despite the policy’s ongoing violation of Jane’s privacy and the absence of any way in which treating a transgender girl the same as other girls would adversely affect anyone’s privacy. Nor has the

school stated why it permits the existence of a hostile school environment in which Jane is continually subjected to harassment due to her transgender status by both school personnel and students.

6. Behind the legal wrangling between the school district and the U.S. Department of Education is a child who is suffering. Last summer, as the school year approached, Jane (then only ten years old) began experiencing severe psychological distress and made serious attempts to end her own life. Jane, through her legal guardians, seeks to intervene in this action to assert her rights and seek appropriate remedies for the deprivation of those rights.

PARTIES

7. Jane Doe is an eleven-year-old resident of Morrow County and a citizen of the State of Ohio. She has been a student at Highland Elementary School in the Highland Local School District since August 2011.

8. John and Joyce Doe are Jane's legal guardians and sue as her next friends.

9. Third-Party Defendant Highland Local School District (the "School District" or the "District") is an education corporation and association in Morrow County, Ohio, existing pursuant to Section 3311 of the Revised Code of the State of Ohio. The School District is a "person" within the meaning of 42 U.S.C. § 1983. Upon information and belief, the School District and each of its component schools are recipients of federal financial assistance. The District operates one elementary school, Highland Elementary School, one middle school, and one high school.

10. Plaintiff/Third-Party Defendant Highland Local School District Board of Education (the "School Board," and collectively with the District, "Highland") is the governing body for the School District. The School Board is a "body politic and corporate" under Ohio law that is amenable to suit for the policies of the School District. Ohio Rev. Code § 3313.17. School

Board members are officers of the State of Ohio. Highland Local School District Bylaws & Policies § 118.

11. Third-Party Defendant William Dodds, sued in both his official and individual capacities, is and was at all relevant times the Superintendent of the School District. Upon information and belief, Superintendent Dodds has final policymaking authority for the School District and the School Board in circumstances not provided for in the School District Bylaws and Policies. This authority includes redressing complaints of discrimination and ensuring compliance with state and federal laws.

12. Third-Party Defendant Shawn Winkelfoos, sued in both his official and individual capacities, is and was at all relevant times the Principal of Highland Elementary School. Upon information and belief, Principal Winkelfoos has final policymaking authority for the School District and School Board with respect to the day-to-day enforcement of equal opportunity and anti-discrimination policies at Highland Elementary. This authority includes the responsibility to redress complaints of discrimination and to forward complaints to appropriately designated individuals in the School District.

JURISDICTION AND VENUE

13. This action arises under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, the Constitution of the United States, and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to Article III of the United States Constitution and 28 U.S.C. § 1331. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because the School District is located within the Southern District of Ohio and the claims alleged in this complaint arose from events that occurred within this district.

FACTUAL ALLEGATIONS

Gender Identity Development and Gender Dysphoria

15. Gender identity is a person's inner sense of belonging to a particular gender, such as male or female. It is a deeply felt and core component of human identity. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (hereinafter "DSM-5"). Everyone has a gender identity, and for most people, their gender identity is consistent with the gender they were assigned at birth. Transgender people have a gender identity, or affirmed gender, that is different from the gender they were assigned or assumed to be at birth.

16. At birth, infants are classified as male or female based on a cursory observation of their external genitalia. This classification becomes the person's birth-assigned gender, but may not be the same as the person's actual gender. Children typically become aware of their gender identity between the ages of two and four years old. DSM-5 at 455. Around this age, transgender children often begin to express their cross-gender identification to their family members and caregivers through statements and actions. The medical diagnosis of gender dysphoria refers to the severe and unremitting emotional pain resulting from this incongruity. People diagnosed with gender dysphoria have an intense and persistent discomfort with the primary and secondary sex characteristics of their assigned gender. Gender dysphoria is a serious medical condition codified in the DSM-5 and the World Health Organization's International Classification of Diseases.

17. The way in which a child with gender dysphoria expresses himself or herself differs greatly from children engaging in age-appropriate imaginative play; children expressing a gender identity that is different than their assigned gender exhibit a strong cross-gender identification that is insistent, persistent, and consistent. Although uncommon, a gender identity that is inconsistent with one's gender assigned at birth is a normal variation of human diversity.

18. Gender dysphoria was previously referred to as gender identity disorder. The American Psychiatric Association changed the name and diagnostic criteria for this condition to reflect that gender dysphoria “is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity per se.” DSM-5 at 451.

19. When provided with the love, support, and affirmation that all children need, transgender children thrive and grow into healthy adults who have the same capacity for happiness, achievement, and contributing to society as others. For these youth, that means supporting their need to live in a manner consistent with their actual gender, the gender they know themselves to be, as opposed to their assigned gender, which includes using sex-separated facilities that match their gender identity and consistently being referred to by their correct name and pronouns.

20. When parents and caregivers discourage or do not allow a transgender child to express cross-gender identification, or do not validate or accept the child’s gender identity, the child experiences psychological distress. Rejection or disapproval by the child’s parents, family, and caregivers leads to serious mental health consequences for the child, marked by serious negative health consequences such as low self-esteem, anxiety, depression, self-harming behaviors, and suicidal ideation.

21. These harmful symptoms interfere with the child’s healthy development across all domains. As a result, a transgender child whose gender identity is not affirmed will likely have difficulty developing and maintaining healthy interpersonal relationships with family as well as peers. Similarly, once that child enters school, the lack of familial support can have a detrimental effect on the child’s ability to focus in class and learn.

22. Given the amount of time that students spend in school, the school environment has a tremendous effect on a transgender student's well-being.

23. The longer these symptoms are allowed to persist without addressing the underlying gender dysphoria, the more significant and long-lasting the negative consequences can become. For example, a recent survey of transgender people revealed *forty-two percent* of transgender women had previously attempted suicide, a rate that is approximately twenty-five times the national average. Ann P. Haas, *et al.*, The Williams Institute, *Suicide Attempts among Transgender and Gender Non-Conforming Adults* 2 (2014); Jaime M. Grant, *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 82 (2011); *see also* Arnold H. Grossman, *et al.*, *Transgender Youth and Life-Threatening Behaviors*, 37 *Suicide & Life-Threatening Behavior* 527, 533-37 (2007). That survey also found that transgender adults who experienced discrimination in schools were more likely to have attempted suicide. Haas, *supra*, at 11. The National Transgender Discrimination Survey found that over one quarter of respondents used drugs and alcohol to cope with the mistreatment they experienced based on their gender identity. Grant, *supra*, at 81; *see also* Caitlyn Ryan, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual & Transgender Children* 5-7 (2009).

24. Part of supporting a transgender child is ensuring that the child has access to treatment for their gender dysphoria. The goal of treatment is to enable a transgender person to live authentically, based on their core gender identity, and typically involves bringing the person's body and social presentation into alignment with the person's gender. Treatment does not make a transgender person more of a man or more of a woman; rather, the person's core gender identity already exists. Treatment creates more alignment between the person's identity and the person's appearance, attenuating the dysphoria and symptoms.

25. Health care providers recognize that when a child has strong and persistent cross-gender identification, which is typically associated with gender dysphoria, “social transition” improves that child’s mental health and reduces the risk that the child will engage in self-harming behaviors. Kristina Olson, *et al.*, *Mental Health of Transgender Children who are Supported in Their Identities*, 137 *Pediatrics* 1 (2016). Social transition involves changes that bring the child’s outer appearance and lived experience into alignment with the child’s core gender. That includes wearing clothes, using a name and pronouns, and interacting with peers and the social environment in a manner that matches the child’s core gender. For most children, living and interacting with others consistently with their lived experience of who they are provides tremendous and immediate relief, because prior to puberty, there are few, if any, observable differences between boys and girls apart from the social and cultural conventions such as dress or hairstyle which, while distinct, children can adopt regardless of their birth-assigned gender.

Jane’s Gender Identity and Transition

26. Jane is an eleven-year-old transgender girl with disabilities, about to begin fifth grade at Highland Elementary.

27. Despite being assigned male at birth, from at least age four, Jane has asserted her female gender – that is, an innate sense of being female. Even as a young child, Jane would draw portraits of herself as a girl, try on and take Joyce’s make up, and wrap blankets and table cloths around herself to create dresses. This eventually grew into insisting on wearing girls’ clothing and shopping for girls’ toys.

28. Nevertheless, because her parents did not yet understand her transgender identity, Jane spent the majority of each day dressed in boys’ clothing with a boys’ haircut, an outward

appearance which was at odds with her core gender. This internal conflict caused Jane to experience great distress, which was compounded by the fact that she was not allowed to be herself. Jane's psychological distress manifested itself in tantrums where she would bite, kick, and hit when she was not being affirmed as female.

29. At first, her family thought Jane's identification as female and behavior were merely the passing play of childhood, but after repeated and persistent expressions, Joyce and John sought out the advice of medical and mental health professionals, including Jane's regular pediatrician, a therapist, a psychiatrist, and doctors at the transgender youth clinic at Nationwide Children's Hospital in Columbus, Ohio. Based on their examinations and treatment of Jane, these medical professionals determined that social transition was medically necessary to treat Jane's gender dysphoria. Consequently, Joyce and John ensured that Jane had appropriate clothing, obtained a court-ordered name change, treated her as their daughter in all respects, and advocated that others in the community do the same. This medically supervised transition occurred during the summer between kindergarten and first grade.

30. The impact of the transition on Jane's emotional and mental state was dramatic. Supported by her parents and free from the incongruity of being treated by others as male and able to dress and live consistent with her core female gender, Jane finally felt at ease with herself. She became joyful, more carefree, and her anger subsided.

31. Unfortunately, her social transition into the new school year for first grade was far from smooth. In the summer of 2012, prior to the start of first grade, Joyce informed Principal Winkelfoos about Jane's transition and requested that Jane be treated consistent with her female gender for all educational purposes. In response, Principal Winkelfoos requested a meeting with Joyce. At the meeting, Joyce provided Principal Winkelfoos with a letter from Jane's

pediatrician's office outlining the doctor's diagnosis of gender dysphoria and requesting that the school affirm and respect Jane's female gender. Joyce requested that Jane be addressed and referred to by her chosen name and by female pronouns. Joyce also requested that the school permit Jane to use the girls' bathrooms and generally treat her the same as other girls attending the school.

32. Principal Winkelfoos stated that the school, and its personnel, would begin to address and refer to Jane by her preferred name and with female pronouns. However, Principal Winkelfoos told Joyce that Jane would not be permitted to use the girls' bathrooms, a position reflecting Highland's policy, which, upon information and belief, held that students are assigned sex-segregated bathrooms based on the gender identified on their birth certificates.¹ Instead, Jane would be required to use the office bathroom, a bathroom used generally by school personnel and other adults, and very few students.

33. This discriminatory policy has remained in effect through first, second, third, and fourth grades. As a result of this policy, Jane is singled out due to her status as a transgender girl, continually "outed" and stigmatized as transgender, and made a target for bullying and harassment. Moreover, despite assurances that Highland personnel would refer to Jane by her chosen, and now legal, name and female pronouns, Highland implicitly sanctioned the routine use of Jane's male birth name and male pronouns by Highland personnel and students in addressing and referring to her. Highland has taken no steps to require use of Jane's female name and pronouns and routinely permitted personnel and students to do just the opposite, despite repeated requests that they stop doing so by Jane's parents.

¹ Ohio law does not permit one to change the gender on one's birth certificate. *See* Ohio Rev. Code § 3705.22.

34. As a result of Highland's refusal to treat Jane as a girl and to treat her the same as other girls at her school, Jane suffers from extreme anxiety and depression, and the joy Jane exhibited after her transition has slowly been sapped away. She suffers from a host of physical conditions that stem, in significant part, from the emotional toll of Highland's policies. Although only eleven years old, Jane has engaged in numerous acts of self-harm and has attempted suicide multiple times, including just days before the start of fourth grade.

Denial of Access to Girls' Bathrooms

35. Although, upon information and belief, Highland attempted to sidestep the bathroom issue for Jane in first grade by assigning her class to a room with a single-user restroom contained in the classroom, this measure fell far short of protecting her or treating her equally to other students. When outside the classroom, Jane still had to use the office restroom while her peers were all able to use the restroom that was consistent with their gender identity. That differential treatment did not go unnoticed by Jane or her peers. In fact, on at least one occasion, Jane attempted to use the girls' restroom but was prevented from doing so by school personnel. As the year progressed, Joyce and John began to notice the signs that this arrangement was taking a toll on Jane's mental health.

36. Unable to simply watch Jane's mental health deteriorate, Joyce renewed her request that Jane be permitted to use bathrooms consistent with her female gender in second grade. Recognizing that Jane is likely the first transgender student to have transitioned while at Highland Elementary, Joyce offered Highland personnel many resources to assist them in learning about the needs of transgender youth in schools including books, such as *The Transgender Child*, and articles, and even connected Principal Winkelfoos with TransYouth Family Allies, an organization that would have provided free or low-cost training to the school

on this issue. All of those offers were declined and, time and again, Highland denied Joyce's request that Jane be permitted to use the girls' bathrooms consistent with her female gender.

37. Throughout second grade, Jane was required to use a separate faculty office bathroom that no other students used. Due to the students' age, the teacher took the entire class for scheduled restroom breaks. To prepare for the restroom break, students would separate into two lines: one for boys and one for girls. While all of the other students waited their turn to use the restroom, Jane would walk, dejected, to the restroom by the school office. As she walked by her peers, some would ask Jane why she used a different bathroom, while others heckled her about her using the restroom by the office and called her a boy. Those comments caused significant internal distress, which often found its release at home in the form of negative and unhealthy behaviors. School personnel failed to effectively intervene to protect Jane from this harassment.

38. Then, after nearly an entire school year of being excluded from the bathroom routine and having her peers watch her go to a separate bathroom, the buildup of psychological distress became too great for Jane to handle. On May 2, 2014, Jane was hospitalized for suicidal ideation and depressed mood.

39. In September 2014, as Jane was preparing for yet another year of being segregated from her female peers, Joyce requested that Superintendent Dodds ask the Board of Education to permit Jane to use the girls' bathrooms. Superintendent Dodds eventually informed Joyce that the Board had refused. Superintendent Dodds did not invite Joyce, John, or Jane to the meeting or, upon information and belief, provide the Board with any educational material about transgender students.

40. For third grade, Jane was required to use a bathroom in the teachers' lounge, because her third-grade classroom was a significant distance from the unisex bathroom Jane was previously assigned. This required Jane to enter the teachers' lounge during the day, even though no other students were permitted to enter. Jane reported that teachers would glare at her and make her feel uncomfortable. She began to express to Joyce that the school was being mean to her, and to express how alone and segregated she felt.

41. Over the summer between third and fourth grades, Jane felt intense anxiety about returning to school. She expressed anger several times concerning the school's refusal to permit her to use the girls' bathrooms. Those emotions continued to build up throughout the summer vacation. Once again, Jane's coping skills were overloaded and Jane decided to end her life, which she attempted to do in the days leading up to her fourth-grade year.

42. This past year, Jane's fourth-grade year, was even more humiliating and demeaning than prior years. Highland required Jane to use a bathroom in the staff room in the fourth-grade hallway. However, the bathroom remained locked, and, in order for Jane to access the bathroom, a staff member had to walk Jane to the bathroom, unlock the bathroom, wait outside the door for Jane to finish, and escort her back to class. By contrast, other students in Jane's fourth-grade class were allowed to ask permission to leave to use the restroom, and could then go to and from the restroom on their own. Only Jane had to be escorted to a separate restroom by a Highland staff member.

43. Jane began refusing to use the bathroom at school during the day because she could not use the girls' bathrooms and she did not want the other children seeing her use the staff or office bathrooms. Jane limited her fluid intake during the day in order to limit her need to use the bathroom at school.

44. Jane would also return home from school agitated and combative much more regularly than she had in previous years.

45. In May 2016, after the U.S. Department of Education and Department of Justice released its guidance on Title IX's applicability to transgender students, Jane remarked to her teacher escort that President "Obama said I could use the girls' restroom," and asked when she would be allowed to do so. The teacher responded by accusing Jane of "lying" and threatened to discipline her.

46. Despite Highland's policy and practice of refusing Jane use of the girls' bathrooms, Jane has, on several occasions due to exigent circumstances, used girls' bathrooms. On none of these occasions has Jane's use of a girls' bathroom caused any harm or resulted in any incident:

- a. In April and May 2014, Jane participated in an afterschool running club. Her coach allowed her to use a girls' bathroom at the school, without incident.
- b. In October 2014, Jane began participating in a program called God's Kids afterschool. During this program, the school locks the office and teacher's lounge, and Jane is unable to use the unisex bathrooms. Jane has been permitted to use the girls' bathrooms at the school during this program, without incident.
- c. In April 2015, Jane went on a school field trip to the local zoo. Superintendent Dodds and Principal Winkelfoos deferred to Joyce's decision to let Jane use the girls' bathroom at the zoo. Jane used the girls' bathroom, without incident.
- d. Jane has used the girls' bathrooms, without incident, during after-school choir practice at the school.
- e. Jane used a girls' bathroom in Highland High School during a Highland Elementary summer volleyball camp, without incident.

47. Indeed, it is Jane's forced use of specially designated bathrooms that draws greater attention from the Highland Elementary student body because Jane is otherwise

perceived by her peers as a girl; however, being forced to use a separate bathroom constantly “outs” her as different and causes other students to question her gender and to harass her for being transgender.

48. Despite the serious social, emotional, and academic harms caused by denying Jane use of the girls’ bathroom, Highland clings to that discriminatory policy based on nothing more than an unsupported notion that Jane’s female classmates would somehow be put at risk by Jane’s presence.

Harassment and Bullying by Teachers, Staff, and Students

49. The foundation for the hostile school environment was laid even before Jane’s transition. In kindergarten, Joyce informed Principal Winkelfoos that Jane wanted to wear dresses to school. Principal Winkelfoos responded that he would not allow such behavior, without any further justification.

50. Since Joyce first informed the school about Jane’s transition in 2012, Joyce has repeatedly offered Highland officials information regarding the importance of affirming a transgender child’s chosen name and pronouns, with the goal of making the school environment safe and welcoming for Jane and her peers. Each time Joyce’s offer was rebuffed and Highland instead ignored, permitted, and even condoned acts of harassment and bullying by teachers, staff and students.

51. In fact, within a few months of Jane’s transition, the school hosted an assembly during which one of the male teachers dressed up like a woman, to pervasive laughter from the school audience. The event made a mockery of Jane’s transition and caused Jane significant emotional distress. In the days following that event, Jane reported numerous somatic complaints

(*i.e.*, headaches, stomach aches, general not feeling well) to Joyce and John in an attempt to avoid school.

52. Despite assurances from Principal Winkelfoos that the school, and its personnel, would address and refer to Jane by her chosen name and female pronouns, Jane's male birth name and male pronouns have been repeatedly used in addressing or referring to her, both verbally and in writing (*i.e.*, school-generated records, schoolwork).

53. On numerous occasions, teachers would not permit Jane to use her chosen name on assignments, even though other students were permitted to use nicknames on schoolwork.

54. This practice of deliberately refusing to acknowledge Jane's female gender and insistence upon treating her as a boy was not limited to schoolwork. For example, in January 2013, during Jane's first-grade year, a physical therapist contracted by Highland told Jane that it was her Christian duty to tell Jane that what Jane was doing was wrong, that God made Jane a boy, and that Jane would always be a boy.

55. After repeated attempts to address this problem at the school level, in August 2014, just as Jane started third grade, Joyce complained to Superintendent Dodds that at least four staff members continued to use the wrong pronouns and refer to Jane by her birth sex. Highland failed to effectively respond to that complaint. Now, for example, nearly three years after Jane legally changed her name, Jane's computer lab teacher still insists on using Jane's birth name and refers to her exclusively with male pronouns, and is not the only teacher to do so.

56. Taking cues from teachers and other school personnel, many students consistently refer to Jane by her birth name and are not corrected by school staff or informed that continuing to refer to Jane in that manner is unacceptable and could result in discipline.

57. In addition to creating a hostile school environment for Jane, Highland's continued refusal to acknowledge her female gender and to treat her the same as other girls results in a continual violation of her privacy. Highland's conduct continually discloses the fact that Jane is transgender, which is private medical information, without consent from Jane or Joyce and John. While the circumstances of Jane's transition mean that certain students and staff know that she is transgender, that does not diminish her right to and reasonable expectation of privacy regarding that information with respect to those students and staff who do not know Jane is transgender.

58. Disregarding Jane's interest in keeping the fact that she is transgender private, each time Jane moves up to a new grade, the school informs Jane's new teacher that she is transgender. The result is that Jane's gender immediately becomes an item of discussion for people strange and unfamiliar to her, without any legitimate reason for the disclosure, let alone consent from Jane, Joyce, or John. Joyce has expressly asked Highland to stop this practice, but upon information and belief, it continues.

59. In addition to being frequently referred to by the wrong name and pronoun, Jane suffered many other forms of harassment and abuse at school. In February 2014, a student yelled across the lunchroom, "you ARE a boy!" at Jane, loud enough for all the other students to hear. Just in case anyone missed the message, the student then proceeded to walk around the lunchroom repeating that information to each table. Jane asked the assistant principal for help. The assistant principal simply told Jane to be strong and ignore it.

60. In September 2014, Joyce filed a complaint with Superintendent Dodds against Principal Winkelfoos, describing his harmful attitude and actions towards Jane. Superintendent Dodds replied – following, upon information and belief, a cursory "investigation" which

involved only a “conversation” with Principal Winkelfoos and a review of documents – that Joyce’s complaint was without merit and that Principal Winkelfoos would never allow a hostile environment to take place.

61. In Jane’s third-grade year alone, she was called a “faggot” and “gay” on a regular basis, mocked because she is a girl who was assigned male at birth, and was frequently told by students that she was a boy and referred to by her former, male name. One student in particular would often comment that Jane looked like a boy with her glasses. As a result of those comments, Jane intentionally broke several pairs of glasses over the past two school years.

62. That mistreatment by her peers continued through Jane’s fourth-grade year as well, starting while she waited for the bus and persisting throughout the school day.

63. Highland teachers and staff similarly continued to refer to Jane by her former, male name and use male pronouns.

64. Jane’s attendance suffered as a result of the mistreatment to which she was subjected, as she missed days due to the need to attend counseling sessions to help her cope with the emotional and psychological impact of her situation at school.

65. The stigmatizing impact of the harassment and bullying targeted at Jane and of the requirement that she use separate bathrooms treats her differently than other girls and severely undermines her social transition process. Jane therefore suffers severe and persistent emotional and social harms. This harm is compounded by Jane’s youth and her fragile health.

Jane’s Name and Gender on School and District Records

66. Since Jane’s transition, Joyce has requested that the school and district records reflect Jane’s chosen name and correct gender marker. The purpose for this request was four-fold: (1) the records would be more accurate; (2) increasing the likelihood, if not ensuring, that

school personnel, especially those unfamiliar with Jane, would refer to her using the correct name and pronouns; (3) safeguarding Jane's privacy by not automatically disclosing that she is transgender to all the school personnel with whom she interacts; and (4) based on all of the above, reducing the likelihood that Jane would be bullied, harassed, and mistreated.

67. As with Joyce's other requests, Highland denied those requests and persisted in using Jane's birth name and assigned gender on all school records. Upon information and belief, Highland requires a student to obtain a court-ordered name change before that name can be used on any school records, and maintains a policy of using the gender listed on a student's birth certificate for the gender marker in the student information system.

68. For example, at Jane's March 2013 Individualized Educational Plan ("IEP") meeting, the first IEP meeting held after Jane's transition, Joyce requested that the IEP reflect Jane's chosen name and correct gender. Representatives from the Ohio Department of Education, who were present at the meeting, said the change was acceptable. Highland's director of special education immediately changed Jane's gender on her IEP. However, several months later, Principal Winkelfoos informed Joyce that the information would have to be changed back to be consistent with Jane's birth certificate.

69. Then, after November 2013, when Jane obtained her court-ordered name change, several documents continued to use her birth name and the male gender marker, including her IEPs, the school e-mail system, and the "scoreboard" link for the typing club. Some of those errors were not corrected until years after Jane's court-ordered name change. Upon information and belief, some Highland records continue to incorrectly state Jane's gender is male.

70. Upon information and belief, Highland uses Powerschool for its student information system. The Powerschool platform permits system administrators to customize the

database, allowing school districts to track additional student data that is not standard. Upon information and belief, other school districts have used that functionality to maintain transgender students' correct name and pronoun as well as the name and pronoun that appears on the student's birth certificate, allowing those districts to generate school records with the correct information while maintaining a student data set that will sync with the student database maintained by the state education agency.

71. Highland's refusal to correct the student information system has directly and indirectly disclosed Jane's transgender status without express permission, and has perpetuated and condoned the continued inappropriate use of Jane's birth name and male pronouns to address and refer to her. As a result, Jane has been exposed to continued harassment, causing and exacerbating her psychological distress regarding school, and impeding her ability to access and benefit from Highland's educational program.

OCR Complaint

72. In December 2013, Joyce filed a complaint with the U.S. Department of Education's Office for Civil Rights ("OCR"). The complaint alleged that Highland discriminated against Jane based on sex by requiring her to use a separate gender-neutral bathroom and denying her access to the same bathrooms used by other female students.

73. Joyce informed OCR that during first and second grades, Jane was subject to frequent and repetitive gender-based harassment by other students. As a result, in August 2014, OCR amended the complaint to include an additional allegation, that school staff members subjected Jane to harassment and that Highland failed to respond appropriately when staff members were made aware of frequent and repetitive incidents of harassment by other students.

74. Highland maintains bylaws and policies including a notice of nondiscrimination that prohibits discrimination on the basis of “[s]ex, including sexual orientation and gender identity.” This policy also states that OCR considers gender-based harassment to be a form of sex discrimination. The Superintendent is designated to handle or address any inquiry or complaint of discrimination, but OCR found that he was unaware of Highland’s specific policies referencing transgender students.

75. On March 29, 2016, OCR notified Highland that its investigation concluded that Highland’s actions failed to comply with Title IX regulations. Consistent with its operating procedures, OCR attempted to reach a mutually agreed-upon resolution, but negotiations broke down in June 2016.

76. Shortly thereafter, on June 26, 2016, OCR issued its letter of findings detailing the results of its investigations. On the issue of restroom access, OCR noted that Highland acknowledged it prohibits Jane from using the girls’ restrooms and instead requires her to use a single-user facility. A Highland administrator further confirmed that Jane could use the girls’ bathrooms only if her birth certificate indicated her gender identity. OCR concluded that by prohibiting Jane from using the girls’ restroom, Highland denied her equal access to and enjoyment of the facilities in the school in violation of Title IX.

77. In respect of the allegations regarding bullying and harassment, OCR’s investigation revealed that at least two teachers in the school acknowledged their continued refusal to use Jane’s name and female pronouns when referring to her. Moreover, the investigation found that, despite knowing about many incidents of bullying and harassment, Highland did not adequately investigate those incidents. For example, Highland failed to interview key witnesses in its investigations of bullying and harassment. The letter of findings

also noted that although Highland claimed to have responded appropriately to those incidents, it failed to produce evidence to corroborate those claims. Consequently, OCR concluded that Highland failed to investigate whether Jane experienced a hostile environment in violation of Title IX.

CLAIMS FOR RELIEF

COUNT I

Fourteenth Amendment to the United States Constitution

(Brought Pursuant to 42 U.S.C. § 1983 Against the School Board, the School District, William Dodds, and Shawn Winkelfoos)

78. Jane repeats and realleges each and every allegation above as if fully set forth herein.

79. The Third-Party Defendant School District is a person for purposes of Section 1983.

80. The Third-Party Defendant School Board is a person for purposes of Section 1983.

81. Third-Party Defendants Superintendent Dodds and Principal Winkelfoos possess final policymaking authority for the School District and Highland Elementary School, respectively, with respect to at least some of the discriminatory actions described herein.

82. By excluding Jane – a transgender girl – from the same restrooms used by other girls, the Third-Party Defendants, under color of state law, have treated and continue to treat Jane differently from other students based on her gender and her perceived non-conformity with gender stereotypes, including the expectation that a person's gender must conform to the gender assigned to the person at birth.

83. By failing to appropriately investigate and address reported incidents of bullying and harassment Jane was subjected to by staff and students due to her perceived gender non-

conformity and transgender status, the Third-Party Defendants have treated and continue to treat Jane differently from similarly situated students based on her gender.

84. Despite repeated reports of the bullying and harassment and requests that Highland personnel address the misconduct, the Third-Party Defendants acted with deliberate indifference by failing to investigate and remedy those incidents of bullying and harassment because Jane is transgender. In so doing, the Third-Party Defendants have violated Jane's clearly established constitutional right to equal protection of the laws and to be free from official gender-based discrimination.

85. Similarly, by refusing to correct Jane's name and gender marker on student records and other school- and District-generated information (*e.g.* student e-mails, ID cards) to be consistent with Jane's identity, some of which were not changed until years after she obtained a legal name change, the Third-Party Defendants have impermissibly discriminated against Jane on the basis of gender by singling her out for differential treatment.

86. The Third-Party Defendants' discrimination against Jane based on her gender denies her the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

87. The Third-Party Defendants' discrimination against Jane based on her gender is not substantially related to any important government interest.

88. The Third-Party Defendants' discrimination against Jane based on her gender is not rationally related to any legitimate government interest.

89. The Third-Party Defendants' discrimination against Jane based on her gender has injured Jane and has caused her severe psychological distress.

90. The Third-Party Defendants are liable for their violations of Jane’s Fourteenth Amendment rights under 42 U.S.C. § 1983, and Jane is entitled to declaratory, injunctive, and monetary relief.

COUNT II

Title IX of the Education Amendments of 1972

(Brought Pursuant to 42 U.S.C. § 1681, *et seq.*,
Against the School Board and the School District)

91. Jane repeats and realleges each and every allegation set forth above as if fully set forth herein.

92. 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).

93. Under Title IX, discrimination “on the basis of sex” encompasses discrimination based on a person’s gender identity, transgender status, or failure to conform to sex stereotypes.

94. Third-Party Defendant School District is an education program receiving federal financial assistance.

95. By requiring Jane – a transgender girl – to use a separate restroom, and by prohibiting her from using the same restrooms as other girls, the School Board and School District have, on a continuous and continuing basis, excluded Jane from participation in, denied her the benefits of, and subjected her to discrimination in educational programs and activities at Highland Elementary School “on the basis of sex.”

96. By refusing to enforce consequences and discipline against staff and students who harass and bully Jane because she is a transgender girl, the School Board and School District have made the school environment hostile and unwelcoming to Jane.

97. The School Board's and School District's actions and omissions amount to deliberate indifference, which permitted the bullying and harassment to become so severe and pervasive as to exclude Jane from participation in, deny her the benefits of, and subject her to discrimination in educational programs and activities at Highland Elementary School "on the basis of sex."

98. By refusing to correct Jane's name and gender marker on student records and other school- and District-generated information (*e.g.* student e-mails, ID cards), the School Board and School District have impermissibly discriminated against Jane on the basis of sex by singling her out for differential treatment and exposing her to stigma and harassment, including by effectively disclosing her transgender status to others on a continual basis.

99. The School District's and Highland Elementary's violations of Title IX were the actual, direct and proximate cause of injuries suffered by Jane as alleged herein.

100. Jane is entitled to declaratory, injunctive, and monetary relief.

COUNT III

Right to Privacy Under the United States Constitution

(Brought Pursuant to 42 U.S.C. § 1983 Against the School Board,
the School District, William Dodds, and Shawn Winkelfoos)

101. Jane repeats and realleges each and every allegation set forth above as if fully set forth herein.

102. Jane's fundamental right to privacy extends to preventing the disclosure of, and in deciding under what circumstances to disclose, highly sensitive, personal information related to

her being transgender, especially as the disclosure of such information would subject her to psychological harm and could additionally expose her to harassment and bodily harm.

103. By refusing to require that Jane be addressed and referred to by her chosen, and now legal, name and female pronouns, the Third-Party Defendants sanction, under color of state law, the disclosure of Jane's transgender status. Each time a teacher stands before the class and refers to Jane by her birth name or by male pronouns, her transgender status is impermissibly disclosed to every student in that class. Each time a Highland administrator looks up Jane's records and sees reference to her birth name or a male pronoun, Jane's transgender status is impermissibly disclosed.

104. The Third-Party Defendants' refusal to require that Jane be addressed and referred to by her legal name and female pronouns is not substantially related to any important government interest.

105. The Third-Party Defendants' refusal to require that Jane be addressed and referred to by her legal name and female pronouns is not rationally related to any legitimate government interest.

106. The Third-Party Defendants' refusal to require that Jane be addressed and referred to by her legal name and female pronouns denies her right to privacy, in violation of the United States Constitution.

107. The Third-Party Defendants' actions were taken with deliberate indifference to Jane's clearly established constitutional rights.

108. The Third-Party Defendants are liable for their violations of Jane's right to privacy under 42 U.S.C. § 1983, and Jane is entitled to declaratory and injunctive relief.

REQUEST FOR RELIEF

For the foregoing reasons, JANE DOE respectfully requests that the Court grant to her the following relief:

- A. A declaration that Third-Party Defendants violated Jane's rights under the United States Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*;
- B. An injunction requiring Highland to treat Jane as a girl for all purposes, including, but not limited to:
 - i. Use of the girls' restrooms and other sex-separated activities, programs and facilities;
 - ii. Addressing and referring to Jane by her legal name and female pronouns;
 - iii. Correcting Jane's name and gender marker in the student information system;
 - iv. Retaining a consultant to develop and provide training for all district personnel (i.e., board, district and school administrators, teachers, and staff), students, and community members on issues affecting transgender youth and the importance of affirming transgender students in school;
 - v. Retaining a consultant to develop protocols for receiving and investigating complaints of gender-based harassment, and to provide training to district and school staff on implementing those protocols; and
 - vi. Retaining a consultant to develop protocols for affirming and supporting transgender students, including ensuring use of the proper facilities, correcting school records, and privacy, and to provide training to district and school staff on implementing those protocols.
- C. Damages in an amount determined by the Court;
- D. Jane's reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988 and;
- E. Such other relief as the Court deems just and proper.

Dated: July 21, 2016

Respectfully submitted,

By: s/ John Harrison
John Harrison (OH Bar No. 0065286)
Linda Gorczynski (OH Bar No. 0070607)
HICKMAN & LOWDER, L.P.A.
1300 East 9th Street, Suite 1020
Cleveland, OH 44199
(216) 861-0360 (tel.)
(216) 861-3113 (fax)
JHarrison@Hickman-Lowder.com
LGorczynski@Hickman-Lowder.com

Jyotin Hamid (*pro hac vice* pending)
Joseph Weissman (*pro hac vice* pending)
Derek Wikstrom (*pro hac vice* pending)
Jennifer Mintz (*pro hac vice* pending)
Matthew Hartz (*pro hac vice* pending)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000 (tel.)
(212) 909-6836 (fax)
jhamid@debevoise.com
jweissman@debevoise.com
dwikstrom@debevoise.com
jfmintz@debevoise.com
mhartz@debevoise.com

Christopher Stoll (*pro hac vice* pending)
Asaf Orr (*pro hac vice* pending)
NATIONAL CENTER FOR LESBIAN
RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
(415) 392-6257 (tel.)
(415) 392-8442 (fax)
cstoll@nclrights.org
aorr@nclrights.org

Attorneys for JANE DOE

Verification

I, Joyce Doe, the legal guardian of proposed intervenor Jane Doe, a citizen of the United States and a resident of the State of Ohio, hereby declare that I have reviewed the foregoing Complaint-In-Intervention, and that the factual statements set forth therein are true to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 20 day of July, 2016, in Morrow County, Ohio.


Joyce Doe

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

PRIVACY MATTERS, a voluntary
unincorporated association; and
PARENT A, president of Privacy
Matters,

Plaintiffs,

vs.

**UNITED STATES DEPARTMENT
OF EDUCATION; JOHN B. KING,
JR.**, in his official capacity as United
States Secretary of Education; **UNITED
STATES DEPARTMENT OF
JUSTICE; LORETTA E. LYNCH**, in
her official capacity as United States
Attorney General, and **INDEPENDENT
SCHOOL DISTRICT NUMBER 706,
STATE OF MINNESOTA**,

Defendants,

Jane Doe, by and through her mother,
Sarah Doe,

Proposed Intervenor-
Defendant.

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

**DECLARATION OF JANE DOE IN
SUPPORT OF MOTION TO
INTERVENE BY JANE DOE, A MINOR
CHILD, BY AND THROUGH HER
MOTHER AND LEGAL GUARDIAN,
SARAH DOE**

I Jane Doe, declare:

1. I am Jane Doe, the high school student referenced as “Student X” throughout the complaint in the above-captioned case.
2. I am a fifteen year-old girl currently in my sophomore year of high school at Virginia High School in Virginia, MN. I expect to graduate from Virginia High School in May 2019.
3. In the spring of eighth grade in 2015—when I first began to live in accordance

with my female gender identity in all aspects of my life—my school initially refused to allow me to access the girls’ restrooms and locker rooms. Instead, they told me that I could use the restroom in the nurse’s office and, later, that I could also use a staff restroom that they converted to a gender-neutral restroom.

4. Both restrooms were difficult for me to use because of their location in relation to my classes. I would frequently be late for class as a result. It was especially difficult when I had to change for gym class because of the distance between the restrooms I could use and the gym. Often, the nurse’s office was occupied by a sick student and I would have to wait until the student was gone to use the restroom.
5. Along with the inconvenience was the fact that I felt like an outsider because I was not able to use the girls’ restrooms and locker rooms. It made me feel different and embarrassed to have to use a restroom that was different from everybody else. Even though it was emotionally difficult for me to have to use different facilities than the ones all the other girls use, I tried to make the best of it by focusing on the one positive thing, which was that the gender-neutral restrooms were higher quality facilities than the student restrooms.
6. Some students started rumors about me and I was ultimately called in to the principal’s office. The principal told me that she received complaints from other girls accusing me of asking to trade body parts with them and commenting on their breasts. Those allegations are completely false and hurtful. I told the principal that the allegations were false and she told me she believed me.
7. Towards the end of the fall of 2015, I learned more about my legal rights, including my right to use restrooms and locker room facilities in accordance with my identity as a girl. At that time, I had been living in accordance with my identity as a girl in all aspects of my life since the previous spring. Because I had learned about my legal rights, I began using the girls’ locker room to change for gym class. None of the other girls complained to me or said anything to me about my use of the girls’ locker room.
8. About a week after I started using the girls’ locker room to change for gym class, I was called down to the counselor’s office. Both my counselor and the dean of students were present. They wanted to talk to me about my use of the girls’ locker room. They agreed with me that, according to the law, I have the right to use the girls’ locker room but they were upset with me for not telling them in advance so that they would have time to notify parents and other students. I apologized for not

giving them advance notice. I did not receive any discipline and they did not instruct me to discontinue using the girls' locker room.

9. In January, 2016, I was finally allowed to play on the girls' basketball team and the school formally declared that I could use the girl's restrooms and locker rooms. Being able to play on girls' sports teams and to use girls' facilities has had a positive effect on me and my emotional health. I am grateful to be able to live fully as a girl and I feel more at ease and happy with myself as a person. I also feel like I can now fully enjoy my high school experience because I fit in more with my peers and I have a better bond with the other girls on my teams and in my classes.
10. In addition to playing on the basketball team in January 2016, I played on the track team in the spring of 2016 and am now playing on the volleyball team this semester.
11. When I learned about what was said about me in this complaint, I was devastated to hear and read about the terrible, false things they were claiming. I am very self-conscious about my own body and I do not make any comments about other girls' bodies. I have never intentionally followed girls who wanted to change in a separate area from me. I am not attracted to girls and do not use girls' restrooms and locker rooms to watch other girls undress.
12. When I am in the locker room, I never fully undress and I always wear at least a sports bra and bike shorts, which is virtually the same as the uniform that all girls on the volleyball team wear. If I ever have to undress beyond that, I use a bathroom stall.
13. I never made rude comments about other girls who did not want to change near me.
14. There were two instances where I unknowingly entered locker room facilities that were being used as alternative changing area by girls who did not want to change in the same locker room as me. In the first instance, during basketball season, I was with a friend who had left something in the locker room that was designated for the junior varsity (JV) girls. I played on the C-team and used a different locker room. My friend asked me to go with her to the JV locker room so she could get her things. When I entered the room, I saw a few girls who also play on the C-team. I did not think anything of it at the time but after we left the locker room, my friend told me that the C-team girls were staring at me. The following Monday, I

was called into the principal's office and talked to about entering the JV locker room. The principal told me that they had designated that locker room for use by girls who did not want to share a locker room with me. Nobody had informed me about that designation and I told her that I had no idea that I was doing anything wrong. I apologized and told her that it would not happen again.

15. The second time happened in the beginning of the track season. Because there are many girls on the track team, the locker room was very cramped and a lot of us had to put our things on the floor. Our coach came in to the locker room and announced that girls who wanted to could use the boy's locker room so that there would be more space for everybody. A few days later, it appeared that not very many girls were using the boys' locker room and a friend suggested that we go over and use the boys' locker room. Nobody complained to my face, but a few days later I was called into the principal's office and scolded for entering the alternative locker room for girls wanted to change in a different place than me. Once again, I had not been previously informed that the boys' locker room had been designated as an alternative locker room for girls who did not want to change near me. I told the principal that the coach announced that the boys' locker room was available so that there would be more room for everybody. Had I been told that it was an alternate facility for girls who did not want to change near me, I would not have used that locker room.
16. The complaint's allegations about dancing in the locker room are also distorted and hurtful. There is a stereo in the locker room and the music that is played on the stereo is chosen by the senior girls. I have no control over the music that is played in the locker room. There is a lot of music that is played that my friends and I enjoy listening to and dancing to. When I have danced in the locker room, it has been on occasions when my friends start dancing and I join in with them. We all dance in a similar way and I did not do anything different from any of the other girls who were dancing in the locker room.
17. The allegations in the complaint about my dancing felt especially hurtful to me. Virginia High School does not have very many students of color and there are usually only two other girls of color in the locker room. While the allegations in the complaint do not talk about my race, I feel that the description of my dancing as "twerking" has racial undertones.
18. I am very concerned about the possibility that I could be barred from using girls' restrooms and locker rooms as a result of this lawsuit. If that were to happen, I would again feel like an outcast and I would lose the bond that I have with my

friends. It would be harmful to my emotional well-being.

19. Attached as Exhibit 1 are true and correct copies of two recent pictures of me.

Dated: October 12, 2016

[REDACTED]
[REDACTED], identified above as "Jane Doe"