IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; **C.A.**, a minor, by and through her parent and guardian, **N.A.**; **A.M.**, 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.**,	)	Case No. 16-cv-4945
Plaintiffs,	)	Judge Jorge L. Alonso
v.	)	Magistrate Judge Jeffrey T. Gilbert
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.	)	

DEFENDANT BOARD OF EDUCATION OF
TOWNSHIP HIGH SCHOOL DISTRICT NO. 211'S
RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Statutes

Other Authorities

INTRODUCTION

Township High School District 211's mission is to develop and implement quality education programs which challenge students to achieve their potential to become contributing, informed citizens capable of meeting the demands of a changing world. To do so, the District must provide an environment conducive to learning for all of its 12,000 students. And as part of that environment, the District has a compelling interest in ensuring that all of its students – including transgender students – have safe access to restroom and locker room facilities. The District balances appropriate facility access for transgender students with privacy safeguards for all students by guaranteeing private changing stations and the availability of other privacy options upon request. The District has always focused on safeguarding student privacy and upholding dignity for all students in the District.

FACTS

Since enrolling as a high school freshman at the beginning of the 2013-2014 school year, Student A has presented a uniform and consistent female gender identity by using a traditionally female name, female pronouns, and having a traditionally female hair style, clothing style, and overall appearance. Kovack Decl., ¶ 6-7. The District allowed her to use girls' restrooms, which have stalls protecting individuals using the toilet from view. *Id.* ¶ 8-9. Student A also has access to single-user restrooms in the nurse's office, which is where she uses the toilet at school. *Id.* ¶ 9. Initially, the District granted Student A access only to the restroom portion of the girls' locker room where she and other students had access to the toilet stalls for privacy. *Id.* ¶ 11. Instead of using the restroom stall area in the girls' locker room, Student A selected a separate, single-user locker room. *Id.* ¶ 12.

In the fall of 2013, Student A filed a complaint with the United States Department of Education Office for Civil Rights (OCR) alleging that the District's locker room limitations

violated Title IX. *Id.* ¶ 13. In December 2015, the District entered into a Resolution Agreement with the OCR that allowed Student A to access the communal girls' locker room based on her representation that she would change in private changing stations. *Id.* ¶ 14. The District also agreed that it would install sufficient private changing stations within the girls' locker room to accommodate Student A and any other students seeking privacy. *Id.* The District agreed to provide a reasonable alternative, such as a different locker assignment, use of a nearby separate locker room, or a different time to use the locker room, for any student requesting additional privacy. *Id.*

The Resolution Agreement applies only to Student A and took effect in January 2016 for the second semester. *Id.* ¶ 19. The District does not have a Board policy specific to facility access for transgender students. *Id.* ¶¶ 22-25. The District makes decisions regarding facility access for transgender students based on the individual needs of every student and family. *Id.* ¶ 25.

Student A's second semester physical education ("PE") course met every day, but the class only participated in physical activities that required sportswear on Tuesdays and Thursdays. *Id.* ¶ 20. For that PE course on Tuesday and Thursdays, students are not required to wear a designated uniform; they may wear any appropriate athletic apparel, such as yoga pants or running gear. *Id.* Some students choose not to change for PE and instead wear their sportswear throughout the day. *Id.* ¶ 20. Student A only rarely changed clothes in the locker room, and when she did, she used a stall in the locker room for privacy. *Id.* ¶ 21. More often, Student A instead wore sportswear to school to avoid changing clothes in the locker room. *Id.*

ARGUMENT

I. Legal Standard

Preliminary injunctions are an "exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Girl Scouts of Manitou Council Inc. v. Girl*

Scouts of USA, Inc., 549 F.3d 1079, 1085 (7th Cir. 2008). Because a preliminary injunction is an "extraordinary and drastic remedy," the moving party bears the burden of making a clear showing that it is entitled to the relief it seeks. *Goodman v. Illinois Dep't of Fin. & Prof'l. Reg.*, 430 F.3d 432, 437 (7th Cir. 2005). A court analyzes a request for injunctive relief in two distinct phases: a threshold phase and a balancing phase. *Girl Scouts*, 549 F.3d at 1085-86. To survive the threshold phase, the party seeking injunctive relief must prove a likelihood of success on the merits, irreparable harm, and the absence of an adequate remedy at law. *Id.* at 1086. In the balancing phase, the moving party must demonstrate that its harm in the absence of such relief outweighs any harm that may be suffered by the non-moving party if the injunction is granted. *Id.* If the party fails to establish these requirements, the court must deny its request. *Id.*

II. Plaintiffs Are Unlikely to Succeed On The Merits

A. Plaintiffs Cannot Prevail On Their Constitutional Claim

Plaintiffs will not succeed on the merits of their claim that the District is violating the Student Plaintiffs' constitutional right to privacy. Plaintiffs posit the issue as whether a transgender girl's use of the girls' locker rooms and restrooms, subjecting the Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite "biological" sex, violates their constitutional right to privacy. Dkt. No. 50 at 6. The allegations on which Plaintiffs rely include: the District's policies allow Student A access to the girls' facilities; Student A has used the girls' facilities while some Girl Plaintiffs were present; and Girl Plaintiffs know that any time they use the restroom or locker room, Student A has the right to be present with them. Dkt. No. 50 at 6.[1]

[1] The District does not concede that Student A has used the girls' facilities while Plaintiffs were present. The District sought discovery on this issue, which was denied based on Plaintiffs' representation that issues of "who saw who in the state of undress or naked" are not relevant to their claims. Ex. B at 18:11-24. Should such facts be material to the outcome, the District will renew its request for discovery.

If the Court upholds the OCR's determination that the term "sex" in Title IX encompasses a person's gender identity, Plaintiffs' constitutional claim fails because they do not have even a "risk" of sharing a restroom or locker room with a person of the opposite sex. If the OCR's determination is not entitled to deference, Plaintiffs' constitutional claim still fails, because the District's practices, which allow Student A to use restrooms and locker rooms consistent with her gender identity and which provide privacy accommodations to any student who requests it, violate no recognized constitutional right of the Plaintiffs.

1. The Supreme Court Recognizes Only Limited Privacy Rights

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court acknowledged that the Constitution did not specifically grant a "right of privacy," but nevertheless reasoned that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Accordingly, the Court held that substantive due process under the Fourteenth Amendment confers a right to privacy in one's marital relations and use of contraceptives. *Id.* at 485-86.

Since *Griswold*, the Supreme Court has granted constitutional protection to "privacy" interests in limited circumstances. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court acknowledged the Constitution protected "certain areas or zones of privacy," but "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'… are included in this guarantee of personal privacy." *Id.* at 152. The Court held that the right to privacy "found in the Fourteenth Amendment's concept of personal liberty…is broad enough to encompass a woman's decision" to terminate a pregnancy. *Id.* at 153. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a law criminalizing sodomy and held that "individual decisions. . . concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a

form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id*. at 578, (citing *Bowers v. Hardwick*, 478 U.S. 185, 216 (1986) (Stevens, J. dissenting)). The Court reaffirmed "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id*. at 573-74 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court observed that "cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id*. at 599-600. In *Whalen*, the Court held that a New York law, which established a database of names and addresses of persons who received prescriptions for certain drugs sold on the black market, did not pose an unconstitutional invasion of privacy under either prong. *Id*. at 600.

In *Katz v. United States*, 389 U.S. 347 (1967), the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no "general constitutional 'right to privacy.'" *Id*. at 350. Only certain, clearly established rights have been recognized by the Supreme Court as fundamental, and the Court has "always been reluctant to expand the concept of substantive due process because guide posts for responsible decision making in this area are scarce and open-ended." *Washington v. Glucskberg*, 521 U.S. 702, 720 (1997) (citing *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992)). '"Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citing *Collins*, 503 U.S. at 125). Accordingly, the Seventh Circuit has

observed that the "Supreme Court of the United States has made clear, and this court similarly cautioned, that the scope of substantive due process is very limited." *Belcher v. Norton*, 497 F.3d 742, 753 (7th Cir. 2007). The court further described that "substantive due process, at its essence, protects an individual from the exercise of governmental power without a reasonable justification. . . . and . . . affords protection of the individual against arbitrary action of the government." *Id*.

2. The Constitution Does Not Protect Against The "Risk" That A Transgender Girl May Be Present In A Female Facility

Plaintiffs contend that their "constitutional privacy rights are violated every time the government compels them to endure the risk that biological males may be present in their private facilities while they change clothing or attend to intimate bodily needs." Dkt. No. 50 at 2. They are both factually and legally wrong. They are factually wrong because the District does not allow males in the girls' locker room or restrooms. It allows Student A, who identifies and presents as a girl, conditional access to the girls' locker room and access to girls' restrooms. This is not the same as allowing males in the girls' facilities; and it is disingenuous and hyperbolic to suggest so. Additionally, all Girl Plaintiffs have the option to use a private changing area within the locker room, a separate changing area, or a private restroom. Ex. A, Kovack Decl., ¶¶ 14-15. No girl is "require[d] to undress, and attend to feminine hygiene needs, in locker rooms with a biological male present" nor are they "require[d] to risk being exposed to the opposite sex when they use the restroom" as Plaintiffs claim. Dkt. No. 23 at 24.

Plaintiffs are also legally wrong. Plaintiffs cite to no case in which a court has held that the Constitution is violated because of a mere "risk" of an intrusion into someone's privacy, and the Supreme Court has observed that the risk of a privacy intrusion does not create a constitutional violation. *See Whalen* at 605-06 (Supreme Court declined to find privacy violation

based on speculative future release of confidential data). None of the cases cited by Plaintiffs stand for the proposition that the risk of exposure to a transgender person in a locker room or restroom violates the Constitution. Given the caution about expanding constitutionally based privacy claims as noted above, Plaintiffs have no likelihood of success on the merits.

Plaintiffs rely on a number of lower court cases holding that forced bodily exposure to members of the opposite sex by government actors, such as school administrators and prison guards, may violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Dkt. No. 23 at 13-14. However, those cases are inapposite because no "search or seizure" is at issue in this case. As the Supreme Court noted in *Whalen*, the Fourth Amendment cases "involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." 429 U.S. at 604 fn. 32. Plaintiffs do not allege, nor can they, that the District's practice of allowing a transgender student to use the restroom and locker room of her identified gender constitutes a "search." Moreover, they cannot allege any "forced" exposure given the privacy options in place.

The cases cited by Plaintiffs each involved actual, unjustified and unwarranted viewing or touching of unclothed body parts by the opposite sex, not the mere "risk" that a person could be in the presence of a transgender person when undressing or using the restroom. Student A's appropriate use of a restroom or locker room does not involve the sort of intrusion at issue in *Safford Unified Sch. District #1 v. Redding*, 557 U.S. 364 (2009) (13 year old girl subjected to a search of her bra and underpants over suspicion she brought ibuprofen and naproxen to school) or *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (forceful removal of plaintiff's underwear in presence of male guards held unreasonable; though later search of vagina by female nurse in the presence of male guards was reasonable).

As recently noted by the Fourth Circuit, a transgender student's use of the restroom of his choice does not threaten the type of constitutional abuses present in these forced exposure cases:

> For example, G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present in *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (involving the videotaping of students dressing and undressing in school locker rooms), *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) (involving the indiscriminate strip searching of twenty male and five female students), or *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, 2016 WL 1567467, at fn. 10 (4th Cir. Apr. 19, 2016).

Plaintiffs also rely on cases in which prisoners were forced to shower or otherwise be in a state of nudity in front of members of the opposite sex, but these cases are contrary to binding Seventh Circuit authority. Dkt. No. 23 at 15. In *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), the Seventh Circuit expressly held that the court's prior decision in *Torres v. Wisconsin Dep't of Health & Soc. Servs.*, 859 F.2d 1523 (7th Cir. 1988) *(en banc)*, cited by Plaintiffs, did not create or acknowledge any constitutionally protected right to privacy that was violated by allowing opposite-sex monitoring and searching of prisoners.[2] In *Johnson*, a male detainee alleged that female guards' ability to view men in their cells, the shower, and the toilet violated his constitutional privacy rights. *Id.* at 145. The court disagreed, reasoning that female guards "are bound to see the male prisoners in states of undress. Frequently. Deliberately. Otherwise they are not doing their jobs." *Id.* at 146. More importantly, the court rejected the idea that the Constitution compels single-sex monitoring under substantive due process, holding that "*Torres* did not say that the Constitution requires [excluding male guards from a women's prison];

[2] The Court distinguished *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994) which addressed tactile inspections and held that a right of privacy limits (but did not eliminate) the ability of prisons to subject men to body searches by women. Plaintiffs' reliance on *Canedy* has no relevance to this case.

instead we deferred to the judgment of prison administrators that they needed to limit cross-sex monitoring to achieve penological objectives…" *Id.* at 147.[3] Similarly, in this case, the court should defer to the District's judgement on how best to balance the needs and interests of all students, including Plaintiffs, Student A, and other transgender students.

The District acknowledges that students have an interest in maintaining a level of privacy and students do not surrender all of their constitutional rights upon entering a school. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Restrooms and locker rooms are often segregated by sex and have been for many years. Plaintiffs complain about the "risk" of being in the same restroom or locker room with someone whom the Plaintiffs contend is a member of the opposite sex, but who presents and identifies herself as a female. They also acknowledge that biological sex and gender identity are not the same. Dkt. No. 23 at 2, 13. Plaintiffs have not identified any binding precedent or persuasive authority that holds privacy rights are violated when a transgender student has access to facilities that conform to her gender identity.

3. The District Has Not Violated Any Constitutional Right To Privacy

In determining whether Plaintiffs are likely to succeed on the merits of their constitutional claim, this court must balance the Plaintiffs' asserted privacy interests with the District's legitimate need to protect the interests of Student A and other transgender students. Privacy claims under the Fourteenth Amendment "necessarily require fact-intensive and context-

[3] Plaintiffs repeatedly and incorrectly confuse statutory permissibility with a constitutional mandate. *See Norwood v. Dale Maint. Sys., Inc*., 590 F. Supp. 1410 (N.D. Ill. 1984) (janitors' sex may constitute bona fide occupational qualification under Title VII for cleaning restrooms); *see also Ulane v. E. Airlines, Inc*., 742 F.2d 1081 (7th Cir. 1984) (discrimination against "transsexuals" not prohibited by Title VII). In a recent case, *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ*., 97 F. Supp. 3d 657 (W.D. Pa. 2015), a transgender male student brought discrimination claims against the University when he was denied access to the men's locker rooms and restrooms. The court only held that the University's policy of separating bathrooms and locker rooms on the basis of birth sex is permissible under Title IX and the Constitution, not that such a policy is necessary under substantive due process to protect fundamental bodily privacy rights. *Id.* at 678.

specific analyses, and . . . bright lines generally cannot be drawn." *Doe v. Luzerne Cty.*, 660 F.3d 169, 176 (3rd Cir. 2011). In determining whether a potential intrusion on a private matter rises to the level of a constitutional violation, the Supreme Court has stressed that government action "which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen*, 429 U.S. at 597. Further, the Court has acknowledged that students within the school environment have a less robust expectation of privacy than is afforded the general population. *T.L.O.*, 469 U.S. at 348, 105 S.Ct. 733 (Powell, J., concurring). This expectation is even less for students in locker rooms, which the Court has observed are "not notable for the privacy they afford." *Vernonia School Dist. 47 v. Acton*, 515 U.S. 646, 657 (1995).

As explained above, even under Plaintiffs' assertion that Student A is biologically male, any invasion of privacy is minimal to non-existent because of the privacy stalls and other privacy alternatives offered by the District. *See Whalen*, 429 U.S. at 607 (Brennan, J., concurring) (no constitutional violation where procedural safeguards ensured risk of privacy violation was minimal). This minimal risk must be balanced against the District's "responsibility to provide an environment conducive to learning for all its 12,000+ students." Dkt. No. 21, Ex. 3. The District has a compelling interest in ensuring that all of its students – including transgender students – have safe access to restroom and locker room facilities.[4] The goal of the District is to protect the privacy rights of all students while also providing reasonable accommodations to meet the

[4] Plaintiffs assert, without support, that allowing a transgender student to use her preferred locker room and restroom "infringe fundamental rights" and "must survive strict scrutiny." Dkt. No. 23 at p. 18. They do so without any support for either assertion, and, as demonstrated above, they have not established a fundamental right to a restroom or locker room free of transgender students.

unique needs of individual students. As a transgender girl, Student A should be able to use toilets and have access to changing facilities that conform to her gender identity. In addition to the need to accommodate Student A, in balancing the interests, this Court should also take into account that the District faced a loss of millions of dollars in federal funds from the DOE if it failed to enter into the Resolution Agreement which Plaintiffs now challenge. *See Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639 (1999) (noting federal agencies may terminate federal funding to enforce Title IX); Ex A., ¶25.

In short, the District has struck a reasonable balance between Student A's needs and other girls' privacy concerns, and Plaintiffs have identified no reason why the Constitution either allows or compels this Court to disrupt this balance by entering a preliminary injunction.

B. Plaintiffs Cannot Prevail On Their Title IX Claims

Plaintiffs have narrowed their argument for preliminary relief under Title IX to two issues: (1) whether the District's decision to allow a transgender girl conditional access to the girls' locker room creates a hostile environment for the Girl Plaintiffs in violation of Title IX; and (2) whether the District's provision of optional, alternative facilities for Girl Plaintiffs seeking additional privacy violates the Title IX regulation's requirement that sex-separated facilities be comparable. Dkt. Nos. 23 at 18, 50 at 3. Plaintiffs do not allege or rely on any actual exposure, nudity, or any allegations of sexually harassing conduct. Dkt. No. 50 at 1-2.

If the Court upholds the DOE's determination that the term "sex" in Title IX encompasses gender identity, then the underlying premise of Plaintiffs' claim falls apart because under no circumstances are Plaintiffs required to share facilities with a person of the opposite sex. Additionally, regardless of whether the DOE's determination is adopted, Plaintiffs have no likelihood of success on their Title IX claims.

1. Plaintiffs Cannot Show That A Transgender Student's Conditional Access To The Locker Room Creates A Hostile Environment

Plaintiffs cannot show a likelihood of success on their claim that the District has created a hostile environment based on sex by granting Student A conditional access to the locker room consistent with her gender identity. To state a claim for sex discrimination under Title IX, plaintiffs must allege that they were "excluded from participation" in an education program "because of [their] sex." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 680 (1979). Deliberate indifference to student interactions that create a hostile environment may constitute sex discrimination for purposes of Title IX, but it is a high burden to prove. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). In order to prevail on a hostile environment claim under Title IX, plaintiffs must show that "the harassment was 'so severe, pervasive, and objectively offensive that it ... deprive[s] the victims of access to educational opportunities,' and officials were 'deliberately indifferent' to the harassment." *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014) (citing *Davis*, 526 U.S. at 650).

a. Plaintiffs Have Not Been Subjected to Severe, Pervasive and Objectively Offensive Conduct Based on Sex

Plaintiffs present no evidence of actual offensive conduct by Student A or any other student that has created a hostile environment. Rather, Plaintiffs argue that the mere possibility of a transgender student being in the girls' locker room or restroom, even where the transgender student must use private stalls for changing and all girls have the option of changing in private stalls or an alternative, private location, creates a hostile environment based on sex. This argument fails both because the challenged conduct is not discrimination based on the Plaintiffs' sex and because the mere presence of a transgender girl in a girls' locker room or restroom cannot establish a hostile environment under Title IX.

i. Plaintiffs have not alleged a Hostile Environment Based on Sex

Plaintiffs cannot establish that they have been subjected to a hostile environment because of their sex. As the Supreme Court noted in *Oncale v. Sundowner Offshore Serv., Inc.*, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex.'" 523 U.S. 75, 80 (1998). The Seventh Circuit has described that a hostile environment can be shown through either severe and pervasive unwelcome sexual advances or conduct that demonstrates an anti-female animus, stating that "a plaintiff can proceed on a claim when the work environment is hostile because it is 'sexist rather than sexual.'" *Passananti v. Cook Cnty.*, 689 F.3d 655, 664 (7th Cir. 2012). Courts have applied this same analysis under Title IX. *See Burwell v. Pekin Cmty. High Sch. Dist.*, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002). Without a particularized allegation that the restroom and locker room access was sexist or sexual and discriminated against them because of their sex, Plaintiffs fail to state a claim for sex discrimination. *Ludlow v. Northwestern Univ.*, 79 F. Supp. 3d 824, 835 (N.D. Ill. 2015) (finding an allegation that plaintiff professor was falsely accused of sexual harassment did not support his claim that he was discriminated because of sex in violation of Title IX).

For example, in *Frazier v. Fairhaven School Committee*, 122 F. Supp. 2d 104, 112 (D. Mass. 2000), the plaintiff complained that a school employee "did peek, leer, and stair (sic) through out (sic) the performance of [the student's] bodily function" and that this violated Title IX. The court held that this alleged conduct did not violate Title IX, notwithstanding the plaintiff's discomfort. The court reasoned that the employee was a "discipline matron" and the plaintiff provided no "allegation showing that [the employee] looked into the plaintiff's stall

because she was a female rather than because it was her job to inspect the girl's rooms." *Id.* Accordingly, "no claim for harassment lies under Title IX." *Id.*

Here, Plaintiffs complain that allowing a transgender girl conditional access to the girls' locker room and restroom creates a hostile environment, but the alleged hostility that Plaintiffs claim to experience is not because of Plaintiffs' sex. Any discomfort that Plaintiffs allege is not the result of conduct that is directed at them because they are female. There is no allegation Student A seeks access to the girls' facilities out of an animus against females or that the District's decision to allow limited access was motivated by an animus against females. Nor is there an allegation that Student A seeks to access the girls' facilities in order to engage in inappropriate sexual advances or that she is engaging in any conduct that is harassing or offensive to female students. Rather, Plaintiffs' own allegations confirm that their alleged discomfort is exclusively a function of what Plaintiffs believe to be the sex of Student A and other transgender students, not because of any hostility directed at them because of their own sex.[5] Because they do not allege any discrimination or hostile environment directed at them because of their own sex, Plaintiffs are unlikely to succeed on their Title IX claims.

ii. The Alleged Harassment Was Not Severe, Pervasive and Objectively Offensive

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

[5] Moreover, Plaintiffs' cannot show any discriminatory policy or practice resulting from allowing transgender access to restrooms or locker rooms consistent with their gender identity because the OCR requires that schools allow male transgender students access to male facilities and there is no evidence that the District would treat male students any differently in this scenario.

a) A Transgender Student's Use of School Facilities Is Not Objectively Offensive

Plaintiffs make no allegations that they were subjected to conduct that rises to the level of objectively offensive. The possible presence of a transgender student in the locker room certainly does not rise to the level of objectively offensive conduct found in other cases. *See, e.g.*, *Davis*, 526 U.S. at 653 (describing the plaintiff's allegations of touching which included sexually suggestive rubbing as objectively offensive); *Galster*, 768 F.3d at 618 (finding attacks including a punch in the face, repeated hits with metal track spikes, and hitting with a stick qualify as objectively offensive); *Bruning ex rel. v. Carrol Cmty.. Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (repeated acts of touching and sexual groping were objectively offensive).

The OCR has opined that "[a] school may not require transgender students to use facilities inconsistent with their gender identity." Catherine E. Lhamon & Vanita Gupta, *Joint Dear Colleague Letter on Transgender Students*, U.S. Dep't of Just. & U.S. Dep't of Educ. (May 13, 2016) at p. 3.[6] The Fourth Circuit Court of Appeals gave the OCR's guidance regarding transgender students' access to restrooms deference in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 2016 WL 1567467, at *8. Regardless of the arguments Plaintiffs present on whether the OCR complied with the Administrative Procedures Act, the OCR's transgender guidance and the *G.G.* decision deferring to such guidance is instructive for evaluating whether the practice is objectively offensive. An educational practice that complies with the OCR's guidance cannot be deemed objectively offensive.

Further, regardless of how the OCR defines "sex," the mere presence of an individual in the girls' locker room who presents and lives as a girl cannot be "objectively" offensive within the meaning of Title IX, even if the individual fits Plaintiffs' definition of a "biological male."

[6] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

Plaintiffs' offense at Student A's mere presence is inherently subjective because it is based solely on what the Plaintiffs and their parents believe about Student A's sex. Student A considers herself a female and has committed to living her life as a female; and the OCR and District appropriately have deferred to this determination. Plaintiffs' alleged discomfort with Student A's presence in restrooms and locker rooms is based solely on their (and their parents) belief that sex is immutable and can only be based on biological markers that are present at birth. Deferring to Student A's gender identity and decision to live life as a female under these circumstances cannot create an objectively hostile environment for Plaintiffs.

b) Plaintiffs Were Not Subjected To Severe or Pervasive Harassment

Here, Plaintiffs argue that the mere possibility of Student A being in the locker room establishes severe and pervasive conduct under Title IX and should be enjoined. There is no authority supporting Plaintiffs claim that they are entitled to relief based on their own subjective beliefs about Student A's sex and speculation about potential conduct that may result from her presence in the locker room or restroom. General accusations are insufficient to establish a Title IX violation. *Gabrielle M. v. Park Forest-Chicago Heights, Il. Sch. Dist. 163*, 315 F.3d 817, 822 (7th Cir. 2003) (finding accusation that a student did "nasty stuff" is insufficient to state a Title IX); *Trentadue v. Redmon*, 619 F.3d 648, 654 (7th Cir. 2010) (finding undeveloped allegations of student-on-student harassment cannot establish a Title IX claim). Plaintiffs' concession that they were not relying on or presenting any evidence of actual offensive conduct occurring in the locker room precludes them from establishing a likelihood of success on the merits of their Title IX claim. Transcript of Oral Argument at 9:6-11; 18:11-24 (June 9, 2016) (attached as Ex. B).

The cases relied upon by the Plaintiffs to support their hostile environment claim are so far removed from the situation presented here that, at best, they confirm the lack of any potential

Title IX violation and, at worst, offensively equate transgender students to sexual predators. For example, Plaintiffs rely on *People v. Grunau*, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009),[7] a criminal case where a man with two previous convictions for sexually molesting a 5-year-old girl and a 10-year-old girl was caught staring at a teenager showering in a locker room. Plaintiffs cite *New Jersey Div. of Youth & Family Servs. v. M.R.*, 2014 WL 1977014 (N.J. Super. Ct. App. Div. Feb. 25, 2014) for the proposition that "allowing teen girl to be unclothed and shower with a biological male risked mental and emotional injury." Dkt. No. 23 p. 22. They omit, however, that the "biological" male who showered with the girl was her father who was also accused of having sexual relations with his under-aged niece. *Id.* In *City of Philadelphia v. Pennsylvania Human Relations Commission*, 300 A.2d 97 (1973), the court found that the City of Philadelphia had established a BFOQ defense to allow for same-sex youth center workers, out of a concern of having opposite sex workers inspecting nude children housed at the center. *Id*. at 511-12.

Plaintiffs' Title VII cases are similarly inapposite and improperly equate allowing a transgender girl to use a girls' locker room to sexual deviancy. They describe *Lewis v. Triborough Bridge and Tunnel Authority*, 31 F.App'x 746 (2nd Cir. 2002)[8] as holding that a company created a hostile environment when it allowed male cleaners inside the women's locker room while female employees were changing clothes. Plaintiffs conspicuously omit that the cleaning service employees were leering at the female plaintiff and would crowd the entrance of the locker room, forcing her to "run the gauntlet" and brush up against them; the supervisor referred to the employees who complained of the conduct as "cunts" and "fucking crybabies;" and the supervisor said "boss man don't want no women with tiny hinnies [sic] on this job." *Lewis v. Triborough Bridge and Tunnel Authority*, 77 F. Supp. 2d 376, 378 (S.D.N.Y. 1999).

[7] This is an unpublished opinion that is not to be cited under the California Rules of Court.
[8] This decision also is unpublished and does not have precedential effect.

They similarly omit from the description of facts in *Schonauer v. DCR Entertainment Inc.*, 905 P.2d 392, 400-401 (Wash. Ct. App. 1995) that the defendant "pressured [plaintiff], repeatedly and intentionally, to provide fantasized sexual information and to dance on stage in sexually provocative ways" and that she was fired for refusing to dance nude on stage.

Plaintiffs' implication – that Student A's use of girls' restrooms and locker rooms is a ploy to achieve sexual gratification similar to a "Peeping Tom" or convicted sex offender – is wrong and demonstrates the total lack of merit in their Title IX claim.

c) Plaintiffs Cannot Show A Concrete, Negative Effect On Their Education

Plaintiffs cannot establish that the District's practice of allowing Student A conditional locker room access and restroom access negatively impacts Plaintiffs' education. Plaintiffs must demonstrate a "'concrete, negative effect' on their education." *Gabrielle M.*, 315 F.3d at 823. "Examples of a negative impact on access to education may include dropping grades, becoming homebound or hospitalized due to harassment, or physical violence." *Id.* In *Trentadue*, the Seventh Circuit noted that where "[plaintiff's] grades did not suffer, she was not extensively absent from school, she graduated with a class rank of 27 out of over 500, and thereafter enrolled in college," the record "simply does not suggest that she was subjected to student-on-student sexual harassment that was so pervasive, severe, and objectively offensive as to deny her equal access to education in violation of Title IX." 619 F.3d at 654.

Plaintiffs argue that they need not establish a concrete, negative effect on the Girl Plaintiffs' education by citing to *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220 (7th Cir. 1997), *N.K. v. St. Mary's Springs Acad. of Fond Du Lac Wis., Inc.*, 965 F. Supp. 2d 1025 (E.D. Wis. 2013), and *Dauven v. George Fox Univ.*, No. CV.09-305-PK, 2010 WL 6089077 (D.

Or. Dec. 3, 2010). None of these cases relieve Plaintiffs of the requirement that they demonstrate a concrete, negative effect on education to establish their Title IX claim.

Plaintiffs cite to *Mary M. v. N. Lawrence Cmty. Sch. Corp.* for the proposition that students need not withdraw from school or have their grades suffer for altered conditions to exist. Dkt. No. 23 at 22. *Mary M.* does not address this issue. Rather, the decision notes that it is virtually impossible for children to leave their assigned school in the context of distinguishing Title VII employment discrimination cases from Title IX student-student harassment cases. *Mary M.*, 131 F.3d at 1226.

Plaintiffs' reliance on *N.K.* is misplaced. Plaintiffs' contention that students need not "have their grades suffer" for altered conditions to exist is an incorrect reading. Rather, the court found that whether the plaintiff's grades suffered was an issue for trial and offered that "while N.K. succeeded in school, he perhaps could have *excelled* were it not for the alleged harassment." *N.K.*, 965 F. Supp. 2d at 1034 (emphasis in the original). Plaintiffs in this case have specifically declined to offer any evidence or allow any inquiry into their academic status or achievement. *See* Dkt. No. 50. Considering the complete lack of such evidence, they cannot establish a likelihood of success on the merits if this case were tried.

Plaintiffs' reliance on *Dauven* is similarly misplaced. The court in *Dauven* did not find that mere "tension" satisfies Title IX's requirement of showing a concrete, negative effect. Rather, the court cites one incident in which the plaintiff described tension in a long series of incidents that "[o]verall . . . portrays a hostile classroom environment." *Dauven*, 2010 WL 6089077, at *14 (D. Or. Dec. 3, 2010), *report and recommendation adopted*, No. 09-CV-305-PK, 2011 WL 901026 (D. Or. Mar. 15, 2011). Because Plaintiffs have offered no evidence

suggesting a concrete, negative impact on their education resulting from Student A's use of the girls' locker and restrooms, Plaintiffs cannot satisfy this element of their claim.

b. The District Did Not Have Actual Knowledge Of Peer Harassment

Plaintiffs argue that the District had knowledge of a hostile environment because of the decision to grant Student A restroom access and adopt a Resolution Agreement providing Student A conditional locker room access. Dkt. No. 23 at 23. As the Seventh Circuit has held, to demonstrate actual knowledge, a plaintiff must show that "an official of the school who at a minimum has authority to institute corrective measures ... has actual notice of, and is deliberately indifferent to, the misconduct." *Doe v. St. Francis Sch. Dist.*, 694 F.3d 869, 871 (7th Cir. 2012). Moreover, "actual knowledge" means "actual knowledge of misconduct, not just actual knowledge of the risk of misconduct." *Id.* (internal citations omitted). "[T]o know that someone suspects something is not to know the something and does not mean the something is obvious." *Id.* at 872. The information set forth in Plaintiffs' motion falls far short of establishing actual knowledge of any harassing conduct by Student A.

The District's practice of allowing Student A access to restroom and locker room facilities is not the same as knowledge of a severe and pervasive sexually hostile environment for all the reasons explained above. Among other things, Student A's use of girls' facilities is not directed at Plaintiffs because of their sex, and the mere use of a girls' locker room or restroom by a transgender girl does not create an objectively hostile education environment. Further, the District has ensured that all students have access to several reasonable alternatives granted upon request. Students have access to thirteen private changing areas within the locker room in a variety of configurations and access to entirely separate locker room facilities. Ex. A, ¶15. In Student A's physical education course, students are not required to change clothes in front of

Student A and any student could participate in any sportswear. *Id.* at ¶15. The District offered privacy options to any parent or student who inquired and was not aware of any student whose privacy needs were not accommodated. *Id.* at ¶¶ 16-17. Thus, Plaintiffs cannot establish the District had knowledge of severe, pervasive, and objectively offensive conduct as defined by established case law.

c. The District Was Not Deliberately Indifferent To Harassment

Plaintiffs fail to address the final element, which requires Plaintiffs to establish that the District was deliberately indifferent to sex discrimination. To constitute deliberate indifference, the institution's response must amount to an "official decision . . . not to remedy" the situation. *Id.* at 290. In addition, the institution's actions must be "clearly unreasonable" and, "at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645. An institution's liability is therefore limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known [sexual] harassment occurs." *Id.* at 645. As the Supreme Court has expressly recognized, dismissal of a Title IX claim is appropriate when an institution's alleged response is "not clearly unreasonable as a matter of law." *Id.* at 649 (internal quotations omitted).

Based on the circumstances known to the District, that Student A was a transgender student who agreed to use the privacy stalls in the girls' facilities, the District made a reasonable decision to allow Student A access to the girls' facilities. In order to accommodate the interests and rights of all students, the District constructed privacy stalls in both male and female locker rooms. Ex. A, ¶15. The District also provided alternatives to students who were uncomfortable using the girls' facilities. *Id.* at ¶17. It is overwhelmingly clear that the District acted reasonably in granting Student A access to the girls' facilities while providing privacy alternatives.

2. The Locker Room Facilities Do Not Violate Title IX

Plaintiffs argue that the District, by allowing Student A to use the girls' locker room, subjects the Girl Plaintiffs to inferior locker rooms in two ways: 1) girls may share a locker room with a biologically male student while boys do not share a locker room with biologically female students; and 2) the alternate private facilities are inferior to the boys' locker room. Under Title IX, schools may provide sex-separated, comparable restrooms and locker rooms. 34 C.F.R. § 106.33. Here, there is no dispute that the structural facilities are comparable, and so Plaintiffs' claim fails. Ex. A., ¶18. Likewise, the alternative private facilities are the same for both male and female students, so there is no basis for this claim either. *Id.* at ¶17.

Plaintiffs argue that the conditional access of the locker room by a transgender student makes the facility inferior, but that is not a sex-based distinction. Indeed, the OCR explicitly requires the same treatment of male and female transgender students, and Plaintiffs make no allegation that the District would not grant a male transgender student conditional access to male facilities if and when the situation presents itself.[9] Moreover, Plaintiffs themselves anticipate this scenario by including a male student and his parents as Plaintiffs, which undercuts their contention that female students are being discriminated against because of their sex. *See* Dkt. No. 1 at ¶ 35.

Finally, the presence of a transgender student in a facility does not make the facility inferior and any claim to the contrary is offensive and must fail.

III. Irreparable Harm

Plaintiffs do not rely on evidence of *actual* harm suffered by Plaintiffs, but rather rely solely on an alleged *risk* of harm for their motion. As framed by Plaintiffs:

[9] As it undoubtedly will when Intervening Defendants B and C matriculate. *See* Dkt. No. 32, pp. 5-6.

- "Plaintiffs constitutional privacy rights are violated every time government compels them to endure the *risk* that biological males may be present in their private facilities while they change clothing or attend to intimate bodily needs."

- "Forcing them to endure that *risk* creates an impermissible hostile environment in violation of Title IX."

Dkt. No. 50, pp. 1-2.

In response to the Board's Request to Conduct Fact Discovery, Plaintiffs confirmed that their claims were based on this mere "risk," without regard to any actual evidence or facts as to what has occurred in District locker rooms or restrooms or how those events have impacted Plaintiffs. *Id.*; *see also* Ex. B at 8-9, 16-17. The threat of irreparable injury necessary to justify the extraordinary remedy of preliminary injunctive relief must be "real," "substantial," and "immediate," and not simply speculative as it is here. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). The mere "risk" of harm alleged by Plaintiffs does not come close to meeting their evidentiary burden of establishing "that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Moreover, the District has installed privacy curtains and provided all students with privacy alternatives that ensure that no student will be forced to be in a state of undress in front of any other student if they feel uncomfortable. Ex. A, ¶15. Plaintiffs' assertions that these alternatives are less convenient than changing in the open locker rooms or may expose them to taunts from fellow students does not rise to the level of irreparable harm that justifies an injunction. *See, e.g., Hall v. Nat'l Collegiate Athletic Ass'n*, 985 F. Supp. 782, 800-01 (N.D. Ill. 1997) (basketball player missing a year of play, though inconvenient, was not irreparable).

IV. Balance of Harms

To obtain an injunction, Plaintiffs must demonstrate that the balance of harms weighs heavily in their favor**.** *Girl Scouts,* 549 F.3d at 1086 (balance of harms is a sliding-scale

analysis). For reasons explained above, Plaintiffs cannot make this showing because all they have presented are speculative and unsupported generalized concerns about sharing a restroom and locker room with a transgender girl. In contrast, the harm to the District and other students, such as Student A, resulting from an injunction is tangible, real and unquestionable. The District's ability to balance the privacy rights of all students with meeting the unique needs of individual students will be undermined. Dkt. No. 21, Ex. 3. Additionally, unless the Court also enjoins the DOE's enforcement of the Resolution Agreement, the District would be in the untenable position of either violating the OCR Resolution Agreement or an injunction issued by the Court.

Moreover, the Intervenor Defendants assert that Student A and other similarly situated students will be harmed if the District is forced to require transgender students to use restrooms and locker rooms consistent with their biological sex, rather than gender identity. In contrast to Plaintiffs' lack of evidence showing harm, Student A's parent submitted a signed declaration that sets out the harm that Student A suffers when she does not have access to girls' facilities. Dkt. No. 32-1 at ¶¶ 8-12. The District, in negotiating the Agreement reached with OCR, struck a reasonable balance between these competing interests. Specifically, the District has agreed, within the parameters set out in the Resolution Agreement, to allow Student A to use the facilities that are consistent with her gender identity while also offering additional privacy options that are equally available to all students who choose to use them. Ex A., ¶15. Plaintiffs cannot establish that the District has failed to strike an appropriate balance here and that the resolution reached with the OCR is violating Plaintiffs' legal rights or causing them irreparable harm. Accordingly, Plaintiffs' motion for preliminary injunction should be denied.

Respectfully submitted,

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211

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Dated: July 8, 2016

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she caused a true and correct copy of the foregoing **DEFENDANT BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** to be filed with the Clerk of the Court using the CM/ECF system which will send notification to the following counsel of record this 8th day of July, 2016:

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