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

STUDENTS AND PARENTS FOR PRIVACY, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants.

No. 1:16-CV-4945

Hon. Jorge L. Alonso, District Judge
Hon. Jeffrey T. Gilbert, Magistrate Judge

FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Plaintiffs bring this action against the U.S. Departments of Education ("ED") and Justice ("DOJ"), as well as the Secretary of Education and the Attorney General in their official capacities (collectively, the "Federal Defendants"), seeking to enjoin the Federal Defendants from enforcing the antidiscrimination provisions of Title IX and its implementing regulations. *See* 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. pt. 106. Specifically, Plaintiffs ask this Court to issue a broad and sweeping injunction to prevent the Federal Defendants from taking "any action" based on their interpretation of Title IX as requiring schools to treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. Plaintiffs further seek to enjoin the enforcement of a December 2015 Agreement to Resolve ("Agreement") between ED and Defendant School Directors of Township High School District 211 ("District"), which promotes a safe and nondiscriminatory environment for all students in District 211.[1] But Plaintiffs have entirely failed to establish that they are entitled to this extraordinary form of relief. Indeed, they cannot demonstrate by a clear showing that they face irreparable harm absent the injunction, much less a likelihood of success on the merits of their claims or a balance of interests tipping in their favor. Because Plaintiffs cannot carry the burden of persuasion on any of these necessary elements, their motion for preliminary injunctive relief should be denied.

As an initial matter, Plaintiffs have not demonstrated that they will suffer irreparable harm in the absence of preliminary injunctive relief. The Federal Defendants' challenged interpretation of Title IX's implementing regulations — which informed ED's review and

[1] Specifically, the Agreement resolved the investigative findings of ED's Office for Civil Rights ("OCR") and requires the District to grant a transgender female student ("Student A") access to the girls' locker room. *See* Ex. A at 2. It further requires the District to take steps to protect the privacy of all students by installing private changing stations within the girls' locker room, and providing alternative changing stations (such as single-use facilities) for any student who requests additional privacy. *Id.*

resolution of a complaint alleging that a transgender student in District 211 was being discriminated against on the basis of sex — was set forth in a number of guidance documents issued in 2014, 2015, and 2016 (the "Guidance"). *See infra* pp. 4-5. Now, years after that Guidance was first announced and more than seven months since the Agreement was implemented throughout District 211, Plaintiffs try to manufacture a sense of urgency near the end of the school year to justify their request for emergency injunctive relief. Yet the purported urgency of their request is belied by its tardiness. Plaintiffs' long and unexplained delay in filing this lawsuit strongly counsels against a finding that any injuries they allegedly suffer from the status quo are "irreparable." This delay, standing alone, warrants denial of their motion.

Even putting aside their unexplained delay, Plaintiffs have adduced no evidence to substantiate their assertion of any harm, much less irreparable harm. Instead, their generalized allegations of injury are speculative, conclusory, and baseless — and therefore inadequate. Moreover, they cannot establish that an injunction is necessary to prevent harm to students' privacy interests, as the Agreement requires the District to install and maintain privacy curtains in the girls' locker rooms and to provide alternative changing facilities for students seeking additional privacy. Plaintiffs do not allege that they ever asked to use these facilities and this omission is fatal to their assertion of harm, as they cannot obtain preliminary injunctive relief to avoid an alleged injury to which they expose themselves voluntarily. Without a showing that any threatened injury is "substantial," "immediate," and "likely" absent the injunction, Plaintiffs' motion must be denied.

Nor can Plaintiffs establish that they are likely to succeed on the merits of their claims. Plaintiffs assert that the Guidance was issued in violation of the notice-and-comment provisions of the Administrative Procedure Act ("APA"), as well as the APA's substantive requirements,

and that the Guidance and Agreement violate Title IX and infringe on students' fundamental rights to privacy. These arguments are baseless. First, the challenged Guidance comports with the procedural requirements of the APA, as it is an interpretive rule that is exempt from notice-and-comment rulemaking. The Guidance explains how ED evaluates whether recipients of federal funds are complying with their legal obligations under Title IX and its implementing regulations; those obligations themselves flow from the statute and regulations, not from the Guidance itself. Nor are the Guidance and Agreement arbitrary or capricious or otherwise violative of the APA, as they are consistent with Title IX and its implementing regulations, as well as other statutory and constitutional commands. Indeed, the only Circuit to have considered the Federal Defendants' interpretation of the regulations challenged here has found it to be reasonable — an outcome that strongly suggests that Plaintiffs' claims are unlikely to succeed here. Finally, Plaintiffs have no reasonable likelihood of success on the merits of their substantive due process/privacy claim, as they have not identified a fundamental right that has been substantially burdened by the Guidance and Agreement. Indeed, Plaintiffs' description of the "right to privacy in their unclothed bodies" grossly overstates the interest that they actually seek to vindicate, which is an alleged right to change in a locker room from which transgender students are excluded. There is, however, no such right. And even if Plaintiffs' fundamental rights were implicated by the Agreement and had been substantially burdened, the Federal Defendants' actions come nowhere near "shocking the conscience," as is necessary to sustain a substantive due process claim.

Although Plaintiffs' failure to demonstrate irreparable harm or any likelihood of success on the merits more than suffices to defeat their motion, the final two factors of the preliminary injunction analysis also militate against entering injunctive relief at this juncture. Specifically,

the balance of the equities and public interest weigh overwhelmingly against Plaintiffs and their request for relief. Plaintiffs' disagreement with the Federal Defendants' interpretation of Title IX and its implementing regulations, and their dissatisfaction with the Agreement's alternative changing facilities, clearly are insufficient grounds on which this Court should take the extraordinary step of striking down the Guidance and enjoining the Agreement, thereby denying transgender students their right under Title IX to receive an education in a setting free from discrimination. Because Plaintiffs have failed to demonstrate — as they must — that their alleged injury outweighs the harms that the injunction would cause the Defendants and third parties, their motion should be denied.

BACKGROUND

I. Statutory and Regulatory Background

Title IX prohibits discrimination on the basis of sex in education programs and activities by recipients of federal financial assistance. 20 U.S.C. § 1681 *et seq.* DOJ and ED share responsibility for enforcing Title IX and its implementing regulations. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this grant of authority, ED's Office of Civil Rights investigates complaints and conducts compliance reviews, promulgates regulations, and issues guidance to clarify how OCR evaluates a school's compliance with its statutory and regulatory obligations.

ED's regulations implementing Title IX provide, in relevant part, that "no person 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 operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a). The regulations permit recipients to provide sex-segregated "toilet, locker room, and shower facilities," so long as "facilities

provided for students of one sex [are] comparable to such facilities for students of the other sex." *Id.* § 106.33.

In a series of guidance documents, ED has explained how recipients should comply with Title IX and its implementing regulations with respect to transgender students. In April 2014, in response to requests for clarification from various funding recipients, OCR issued guidance explaining that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." Pls.' Ex. 7 at 5. In December 2014, OCR further explained that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Pls.' Ex. 6 at 25. In April 2015, OCR reiterated this interpretation, stating that recipients must ensure that "transgender students are treated consistent with their gender identity in the context of single-sex classes." Pls.' Ex. 5 at 25. Finally, on May 13, 2016, after the District had implemented the Agreement and Plaintiffs had filed their Complaint, ED and DOJ issued joint guidance in the form of a Dear Colleague Letter,[2] explaining that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Pls.' Ex. 4 at 3.[3]

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[2] A Dear Colleague Letter is a guidance document issued by ED pursuant to its regulatory authority. *See* 72 Fed. Reg. 3432 (January 25, 2007).

[3] Plaintiffs do not challenge the Dear Colleague Letter in their Complaint, as the Letter was issued after the Complaint was filed, and therefore cannot seek a preliminary injunction on the basis of the interpretations set forth in the Letter. *See, e.g., Turner-El v. Ill. Bd. of Ed.*, 1996 WL 480341, at *2 (N.D. Ill. Aug. 21, 1996) ("As a general rule, a party cannot insert new claims into a case through motions for a preliminary injunction." (citing *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994)). In any event, they lack standing to challenge the Dear Colleague Letter, as they obviously experienced no harm from it, given that it was issued five months after the District entered into the Agreement.

II. Factual and Procedural Background

Student A is a transgender girl entering her senior year at William Fremd High School, a public high school in Palatine, Illinois.[4] Since August 2013, the District has allowed her to use the girls' restroom, in accordance with her gender identity (the "Restroom Policy"). In December 2013, Student A filed a complaint with OCR, alleging that the District had violated Title IX by denying her access to the girls' locker room. After investigating the complaint for over a year, OCR notified the District by letter dated November 2, 2015, that excluding Student A from the girls' locker room violates Title IX's implementing regulations and that the "alternative" arrangements the District had in place for Student A did not comply with the District's obligations under Title IX's implementing regulations. *See* Ex. B at 13 ("Based on the specific facts and circumstances in this case, OCR concludes that the District, on the basis of sex, excluded Student A from participation in and denied her the benefits of its education program, provided her different benefits or benefits in a different manner, subjected her to different rules of behavior, and subjected her to different treatment in violation of the Title IX regulation, at 34 C.F.R. § 106.31."). The letter further explained that if OCR and the District were not able to negotiate an agreement to bring the District into compliance with its obligations, OCR would issue a Letter of Impending Enforcement Action. *Id.* On December 2, 2015, OCR and the District entered into an agreement to resolve the complaint. *See* Ex. A. The Agreement provides, *inter alia*, that

> Based on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room

[4] Student A was assigned the sex of male at birth, but from a young age has identified as female. During her middle school years, she transitioned to living full-time as a female. Since then, she has presented a female appearance, completed a legal name change, obtained a passport reflecting a gender change, received a diagnosis of and treatment for gender dysphoria, and has taken an ongoing course of hormone therapy. *See* Ex. B.

> facilities designated for female students at school and to take steps to protect the privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker rooms to accommodate Student A and any students who wish to be assured of privacy while changing.

Id. The Agreement further provides that

> If any student requests additional privacy in the use of sex-specific facilities designed for female students beyond the private changing stations described [above], the District will provide that student with access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.

Id. The Agreement went into immediate effect.

More than five months later, on May 4, 2016, the unincorporated association Students and Parents for Privacy, as well as a number of anonymous students and parents of students enrolled in the District, filed this lawsuit, challenging the Agreement, the Restroom Policy, and the Guidance. Compl., ECF No. 1. Plaintiffs assert claims for violations of the APA (Count I); the right to privacy (Count II); parents' right to direct the education and upbringing of their children (Count III); Title IX (Count IV); the Illinois and Federal Religious Freedom Restoration Acts (Counts V and VI); and the Free Exercise Clause of the First Amendment (Count VII). Counts I and VI are brought against the Federal Defendants only; Counts IV and V are against the District only; and the remaining counts are brought against all defendants.

On May 23, 2016, Plaintiffs moved for a preliminary injunction on Counts I, II, and IV of their Complaint. In their motion, Plaintiffs seek to enjoin the Federal Defendants from "taking any action" based on their interpretation of Title IX's implementing regulations as requiring schools to grant transgender students access to the sex-segregated facilities that are consistent with their gender identity. *See* Mot., ECF No. 21, at 2. They

further seek an injunction restraining all Defendants from enforcing the Agreement and the District's Restroom Policy. *Id.*

LEGAL STANDARD

A party seeking a preliminary injunction must establish that (1) it will suffer irreparable harm without the injunction; (2) there is no adequate remedy at law; and (3) it has a reasonable likelihood of success on the merits. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661-62 (7th Cir. 2015). If it cannot clearly establish each of these threshold requirements, the injunction must be denied. *Id.* at 662. If the moving party makes this threshold showing, the court then must determine whether the harm to the moving party in the absence of relief outweighs any harm that may be suffered by the non-moving party if the injunction is granted. *Id.* The court should also consider the effects, if any, that the injunction would have on nonparties. "The court weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Id.*

ARGUMENT

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Goodman v. Ill. Dep't of Fin.*, 430 F.3d 432, 437 (7th Cir. 2005). Plaintiffs here cannot satisfy this heavy burden.

I. Plaintiffs Cannot Demonstrate a Likelihood of Irreparable Harm

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

in a single factually-unsupported paragraph of their motion, that they face irreparable harm because students are "suffering humiliation, dignity loss, stress, apprehension, fear, and anxiety" because of the Restroom Policy and Agreement, which are "interfering with their ability to receive an education." Mem., ECF No. 23, at 24. This conclusory assertion is entirely insufficient to establish the irreparable injury necessary to justify preliminary injunctive relief.[5]

As an initial matter, Plaintiffs' unjustified and lengthy delay in seeking relief belies their claim of irreparable harm. "[U]nexcused delay on the part of parties seeking extraordinary injunctive relief is grounds for denial of a motion because such delay implies a lack of urgency and irreparable harm." *Ixmation, Inc. v. Switch Bulb Co., Inc.*, 2014 WL 5420273, at *7 (N.D. Ill. Oct. 23, 2014) (collecting cases); *Johnson Publ'g, Co., Inc. v. Willitts Designs Int'l, Inc.*, 1998 WL 341618, at *8 (N.D. Ill. June 22, 1998) (presumption of irreparable harm weak where the plaintiff waited four months to request injunctive relief with no explanation). Indeed, failure to timely file an action and seek preliminary relief "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *see also Shaffer v. Globe Prot.*, 721 F.2d 1121, 1123 (7th Cir. 1983); *Ty, Inc. v. Jones Grp.*, 237 F.3d 891, 903 (7th Cir. 2001). Delay weighs particularly heavily against a moving party where, as here, it was aware of the underlying facts of the case well before seeking relief. *Ixmation*, 2014 WL 5420273 at *7.

[5] The allegations in the Complaint further underscore the lack of irreparable harm. For example, Plaintiffs allege that "[o]ne Girl Plaintiff has experienced Student A walking into a restroom while she was washing her hands and staring at her in a way that made her feel very awkward and uncomfortable." Compl. ¶ 234. Although being stared at by anyone may make someone feel uncomfortable, that discomfort is not a result of the individual being transgender and, in any event, does not constitute the sort of irreparable harm necessary to obtain the emergency measure of preliminary injunctive relief. *See also id.* ¶ 233 ("Other Girl Plaintiffs have experienced Student A staring at them in the restroom, which makes them uncomfortable.").

Here, the District's Restroom Policy, pursuant to which Student A has been using the girls' restroom, has been in place for nearly three years (since 2013), the challenged Guidance was first issued more than two years ago (in April 2014), and the Agreement has been in effect for over seven months (since December 2015). Yet Plaintiffs waited until May 4, 2016 to file their Complaint, and an additional fifteen days — until May 19, 2016 — to even serve the Federal Defendants. Such a substantial and unexplained delay in pursuing this action fatally undermines their assertion that they will suffer irreparable harm in the absence of injunctive relief. For this reason alone, Plaintiffs' motion should be denied. *See, e.g.*, *Shaffer*, 721 F.2d at 1123 (denying injunction where plaintiff "made no serious attempt to press her claim for injunctive relief," waiting two months to seek relief and offering no explanation for this delay).[6]

In any event, examination of Plaintiffs' motion papers underscores the lack of irreparable injury here. Plaintiffs assert that the Agreement and Restroom Policy are causing the students dignitary and emotional harms and are interfering with their ability to receive an education, but they have not put forth any evidence to substantiate these allegations. Instead, they offer nothing more than generalized assertions of injury, which fall far short of the necessary showing to warrant preliminary relief. *See McDavid Knee Guard, Inc. v. Nike USA, Inc.*, 683 F. Supp. 2d 740, 749 (N.D. Ill. 2010) ("[A] district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff."); *Ditton v. Rusch*, 2014 WL 4435928, at *3 (N.D. Ill. Sept. 9, 2014) (same); *see also* Mem. at 24 ("Student Plaintiffs are suffering humiliation, dignity loss, stress, apprehension, fear, and anxiety because of the Policies."). Moreover, courts have rejected claims by plaintiffs who object to sharing facilities

[6] This delay is all the more inexcusable because other parties, including Student A, have relied on the Agreement and Guidance. Indeed, Student A has been using the girls' locker room for months and the girls' restroom for years. *See Ty*, 237 F.3d at 903 (explaining that whether parties have "acted in reliance on the plaintiff's delay influences whether we will find that a plaintiff's decision to delay in moving for a preliminary injunction is acceptable or not").

with transgender individuals, belying any argument that some countervailing privacy right trumps the right of Student A to receive an education in an environment free from discrimination. *See, e.g.*, *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-984 (8th Cir. 2002) (rejecting argument that being required to share restroom facilities with a transgender coworker constituted an "adverse employment action" under Title VII); *Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting claim that placing a transgender person in a jail cell with someone who was not transgender violated clearly established right to privacy).

Although Plaintiffs ask this Court to presume that they will suffer irreparable harm because their constitutional rights have been infringed, "injury to constitutional rights does not *a priori* entitle a party to a finding of irreparable harm." *Ditton*, 2014 WL 4435928, at *5 (collecting cases). Nor is the Court required to presume that Plaintiffs' constitutional rights have been violated, as this inquiry involves a question of law. And in any event, Plaintiffs have not established that their constitutional rights have been violated, as discussed below. Even if a presumption of irreparable harm attached to their claims, however, that presumption is easily overcome here, where Plaintiffs waited more than five months after the Agreement was implemented and three years after the Restroom Policy was instituted to initiate this action, and where they offer no evidence to substantiate their claims of injury. *See, e.g.*, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985) (unexplained nine-month delay between notice of dispute and request for injunction overcame presumption of irreparable harm).

Finally, Plaintiffs have not established that a preliminary injunction is necessary to avoid irreparable harm to their privacy interests because, under the Agreement, the District must "install[] and maintain[] sufficient privacy curtains (private changing stations) within the girls' locker rooms" and provide "a reasonable alternative, such as assignment of a student locker in

near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use," to students who seek additional privacy. *See* Ex. A at 2. These alternative facilities eliminate the privacy concerns about which Plaintiffs complain. Plaintiffs do not allege that they asked to use these facilities — much less that any such request was denied — and their failure to do so vitiates their claim of irreparable harm. *See Orth v. Wis. State Emps. Union Council*, 2007 WL 1029220, at *2 (E.D. Wis. Mar. 29, 2007) ("[Plaintiffs] have apparently not explored any alternatives to insurance . . . a fact which undermines their claim that the absence of preliminary relief here would cause them irreparable harm."). Even if Plaintiffs had established that these alternative facilities are less convenient than the girls' locker room, their motion should be denied because any inconvenience from choosing to use alternative facilities because of a desire for additional privacy does not constitute the type of irreparable harm necessary to justify preliminary injunctive relief. *See Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 813 (2d Cir. 1996) (holding that movants did not show risk of irreparable injury when they had alternatives, even when alternatives were less convenient); *Corbett v. United States*, 2011 WL 1226074, at *5 (S.D. Fla. Mar. 2, 2011) (same).[7]

The irreparable harm requirement is "the single most important prerequisite for the issuance of a preliminary injunction." *Craig v. Pepperidge Farm, Inc.*, 2008 WL 4280154, at *2 (S.D. Ind. Sept. 15, 2008); *see also Reinders Brothers, Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 52-53 (7th Cir. 1980). Because Plaintiffs have not established by a clear showing that they will suffer irreparable harm in the absence of injunctive relief, their motion should be denied. *See*

[7] Moreover, any inconvenience that Plaintiffs allegedly suffer from *choosing* to use these alternative facilities cannot be compared to the inconveniences *imposed* on Student A when she was prohibited from using the girls' locker room prior to the implementation of the Agreement.

Cox v. City of Chi., 868 F.2d 217, 223 (7th Cir. 1989) ("If a plaintiff fails to meet just one of the prerequisites for a preliminary injunction, the injunction must be denied.").

II. Plaintiffs Have Not Established a Likelihood of Success on the Merits

Even if Plaintiffs had shown that they face irreparable harm in the absence of preliminary injunctive relief, their motion should be denied for failure to establish a likelihood of success on the merits. "Likelihood" means more than "better than negligible" and "more than a mere possibility of relief." *Truth Found. Min. v. Vill. of Romeoville*, 2016 WL 757982, at *8 (N.D. Ill. Feb. 26, 2016) (quoting *Nken v. Holder*, 556 U.S. 418 (2009)). Plaintiffs assert that they are entitled to injunctive relief because the Guidance and Agreement violate the APA, Title IX, and students' fundamental rights to privacy. As discussed below, none of these claims is likely to succeed.[8]

A. The Guidance and Agreement Do Not Violate the APA

In general, the APA permits agency action to be set aside only if it is "in excess of statutory jurisdiction, authority or limitations, or short of statutory right," "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). Under these deferential standards, an agency's decision is entitled to a "presumption of regularity," *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), and must be upheld if rationally based, *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 43 (1983). Here, Plaintiffs have not met their heavy burden to show that the Federal Defendants' interpretation of the Title IX implementing regulations is

[8] Plaintiffs also are unlikely to succeed on their hostile environment claim, brought against the District. *See Hendrichsen v. Ball State Univ.*, 107 F. App'x 680, 684 (7th Cir. 2004) (explaining that to succeed on a hostile environment claim, a plaintiff must establish severe, pervasive, and objectively offensive harassment); *see also Cruzan*, 294 F.3d at 984 (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment).

procedurally deficient or otherwise unlawful under the APA. Accordingly, they are unlikely to succeed on the merits of these claims.

1. The Guidance Is An Interpretive Rule Exempt From the Notice-and-Comment Requirements of the APA

The APA does not require agencies to follow notice-and-comment procedures in all situations. Instead, the statute specifically excludes "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," from these procedures. 5 U.S.C. § 553(b)(3)(A). Here, the challenged guidance documents merely announce ED's interpretation of an ambiguity in its own regulations. The Guidance is, therefore, an interpretive rule, which is not subject to the notice-and-comment requirements of the APA.

In determining whether a rule is legislative or interpretive, the "starting point" is "the agency's characterization of the rule." *Randolph v. Colvin*, 2016 WL 524460, at *4 (S.D. Ill. Feb. 10, 2016); *see also Metro. Sch. Dist. v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992) ("The agency's characterization is not dispositive, but is a relevant factor."). A court also must consider the type of reasoning the agency used to formulate the rule: a rule is interpretive if the agency used appellate-court type reasoning, including reference to sources such as the text of the statute and regulations, the statute's legislative history, and case law. *Davila*, 969 F.2d at 490, 492. Finally, a court should consider the character of the rule itself. "An interpretive rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights, or duties, the rule is properly considered to be a legislative rule." *Id.* at 489; *see also id.* at 493 ("[T]he impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals.").

Here, the Guidance has all the indicia of an interpretive rule. First, the language of the Guidance itself makes clear that the Federal Defendants do not intend it to have the force of law. For example, the first page of the December 2014 Guidance prominently states that the document "does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations." Pls.' Ex. 6 at 1. Those obligations flow from Title IX and its implementing regulations, not the Guidance itself. *See also* Pl.'s Ex. 4 at 1 (same); Pls.' Ex. 7 at 1 n.1 (same).

Second, in interpreting the terms "one sex" and "the other sex" in Title IX's implementing regulations, ED relied heavily on the statutory language of Title IX itself, the interplay between the statute and the regulations, and case law — manifesting the interpretive nature of the Guidance. *See Davila*, 969 F.2d at 490 (agency's reliance on precedent, statutory and regulatory language, and legislative history in issuing guidance supports conclusion that it is interpretative rule); *see also, e.g.*, Pls.' Ex. 6 at 28-31; Pls.' Ex. 4 at 8-10.

Finally, the Guidance does not add substantively to existing laws, but simply informs the public of how ED interprets Title IX and its implementing regulations and how the Federal Defendants evaluate whether covered entities are complying with their legal obligations. In contrast to a legislative rule, the Guidance creates no extra-statutory (or extra-regulatory) requirements and does not have "effects *completely independent* of the statute." *Davila*, 969 F.2d at 490. It is non-binding, does not have the force and effect of law, and does not contain any threat to withhold funding. Rather, the Guidance simply "advise[s] the public of the agency's construction of the statutes and rules which it administers," and therefore is a paradigmatic

interpretive rule, exempt from the notice-and-comment requirements of the APA. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).[9]

As noted above, the Guidance was issued in response to questions from parents, teachers, and school administrators regarding schools' Title IX obligations when transgender students seek to use sex-segregated facilities. That the Federal Defendants "chose[] to inform the public of their judgment does not render the [Guidance] legislative or requiring of notice and comment rulemaking procedures." *Randolph*, 2016 WL 524460, at *5. To the contrary, "[a]ll agencies charged with enforcing and administering a statute have inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Davila*, 969 F.2d at 490. Such interpretive rules allow an agency to expeditiously inform the public about the interpretive judgments it will necessarily make when enforcing the statutes Congress has charged it to enforce and the regulations it has promulgated pursuant to that authority. *Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996). Indeed, agencies often publish their interpretations to help interested parties understand how the agencies interpret those statutes and regulations, so that the public can take those views into account.

In urging this Court to conclude that the Guidance is a legislative rule, Plaintiffs argue that ED's interpretation of the Title IX implementing regulations as requiring schools to treat a student's gender identity as the student's sex contradicts longstanding policy and, therefore, is subject to the APA's notice-and-comment requirements. As the Fourth Circuit recently concluded, there is no merit to this argument. *See G.G. v. Gloucester Cnty. Sch. Bd.*, 2016 WL 1567467, at *7 (4th Cir. 2016). For most of their existence, Title IX's regulations were

[9] The Guidance also is not final agency action under the APA because it does not determine rights or obligations and no "legal consequences" flow from it. *See, e.g.*, *AT&T v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1286 (D.C. Cir. 2005).

understood simply to mean that a school may provide sex-segregated facilities. *Id.* Only in recent years, as schools have confronted the reality that some students' gender identities do not align with their birth-assigned sex, have schools looked to ED for guidance on the question of how the regulations apply to transgender students. *Id.* Providing guidance regarding how its regulations apply in this new context is precisely the role of a federal agency, and does not transform a non-binding interpretation into a legislative rule. *See, e.g., Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 64 (2011) ("[A]lthough the FCC concedes that it is advancing a novel interpretation of its longstanding interconnection regulations, novelty alone is not a reason to refuse deference."). In any event, an agency may change its interpretation of a statute or regulation without engaging in notice-and-comment rulemaking so long it does not alter a previous legislative rule. *Perez*, 135 S. Ct. at 1306. Here, no legislative rule has been altered and Plaintiffs do not claim otherwise. Therefore, the Federal Defendants were not required to follow the APA's notice-and-comment procedures prior to issuing the Guidance.[10]

In sum, although the Guidance "supplies crisper and more detailed lines" than the statutory provision and regulations being interpreted, it does not alter the legal obligations of the regulated entities. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). It does not have any force of law independent of Title IX and its implementing regulations, but instead represents "nothing more than a privileged viewpoint in the legal debate." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006). Accordingly, it is not subject to the notice-and-comment requirements of the APA.

[10] Plaintiffs also contend that the Guidance is procedurally invalid because it was not approved by the President. Mem. at 3. 20 U.S.C. § 1682 provides in part that any "rule, regulation, or order" issued by a federal agency to effectuate Title IX must be approved by the President. As with the APA's notice-and-comment requirements, however, the requirement of presidential approval does not apply to the issuance of interpretive rules. *See, e.g., Equity In Athletics v. Dep't of Educ.*, 639 F.3d 91, 106 (4th Cir. 2011).

2. The Guidance Is Consistent with Title IX and Its Implementing Regulations and Is Owed Deference By This Court

Plaintiffs also cannot establish that they are likely to succeed in their claims that the Federal Defendants' actions were arbitrary or capricious or otherwise violated the APA. As noted above, the scope of review under the arbitrary and capricious standard is narrow, highly deferential, and presumes the validity of agency action. *Overton Park*, 401 U.S. at 414-16. Plaintiffs argue that the Federal Defendants' interpretation of Title IX as requiring schools to treat a student's gender identity as the student's sex is contrary to the statute and its implementing regulations. But as the agencies tasked with implementing Title IX, DOJ and ED's regulations and their interpretation of those regulations are owed substantial deference by this Court. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984) and *Auer v. Robbins*, 519 U.S. 452, 461 (1997), *respectively*. Indeed, under *Auer*, the Federal Defendants' interpretations of their own regulations are "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Id.* Under this deferential standard of review, Plaintiffs are unlikely to succeed on the merits of their claims.

Title IX prohibits sex discrimination in education programs or activities by recipients of federal financial assistance. Consistent with the nondiscrimination mandate of the statute, ED and DOJ's implementing regulations prohibit recipients from, *inter alia*, providing "different aid, benefits, or services," or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31; 28 C.F.R. § 54.400. The regulations also explain that schools may "provide separate toilet, locker room, and shower facilities on the basis of sex" without running afoul of Title IX, so long as the "facilities provided for students of the one sex" are "comparable to [the] facilities provided for the other sex." 34 C.F.R. § 106.33; 28 C.F.R. § 54.410.

ED and DOJ's regulations do not address, however, how these regulations operate when a transgender student seeks to use sex-segregated facilities. Nor do they explain how a school should determine a transgender student's sex for purposes of access to those facilities. This ambiguity in the regulatory scheme is central to the issues before the Court.[11] On the one hand, the regulations could mean that a school should determine "maleness or femaleness with reference exclusively to genitalia"; on the other, they could mean (as the Federal Defendants assert) that a school should "determin[e] maleness or femaleness with reference to gender identity." *Gloucester*, 2016 WL 1567467, at *6.[12] Plaintiffs ask the Court to ignore this ambiguity and conclude that the only reasonable interpretation of these provisions is that transgender girls must be treated as boys for purposes of sex-segregated facilities. *See* Mem. at 8. But, as the Fourth Circuit rightly concluded, the regulations simply do not speak with such clarity. *See Gloucester*, 2016 WL 1567467, at *5, *6. In light of this ambiguity, foundational principles of administrative law require that the Court give controlling weight to ED's interpretation of its own regulations unless that interpretation is plainly erroneous. *Auer*, 519 U.S. at 461-62; *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (agency's construction is

[11] Indeed, the Agreement — on which Plaintiffs' asserted standing to sue is predicated — was designed to bring the District into compliance with "the regulations implementing Title IX." *See* Ex. A at 5; *see also* Ex. B at 13 ("Based on the specific facts and circumstances in this case, OCR concludes that the District, on the basis of sex, excluded Student A from participation in and denied her the benefits of its education program, provided her different benefits or benefits in a different manner, subjected her to different rules of behavior, and subjected her to different treatment *in violation of the Title IX regulation, at 34 C.F.R. § 106.31*." (emphasis added)).

[12] As the Fourth Circuit noted, reducing "sex" solely to genitalia creates unresolvable ambiguities about how laws and regulations governing sex discrimination and the lawfulness of sex-segregated facilities would apply to "an intersex individual," and "an individual born with X-X-Y chromosomes," and "an individual who lost external genitalia in an accident." *Gloucester*, 2016 WL 1567467, at *6. The court further explained that "[m]odern definitions of 'sex' also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines 'sex' as '[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.' The American Heritage Dictionary includes in the definition of 'sex' '[o]ne's identity as either female or male.'" *Id.* at *7 n.11 (quoting Black's Law Dictionary 1583 (10th ed. 2014) and American Heritage Dictionary 1605 (5th ed. 2011)).

controlling unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"). Here, Plaintiffs fall far short of meeting this demanding standard.

Indeed, the Fourth Circuit is the only federal court of appeals to have considered the Federal Defendants' interpretation of Title IX's regulations and, as noted above, it found this interpretation to be reasonable. Specifically, the court concluded that the regulations are ambiguous "as to how a school should determine whether a transgender student is a male or a female for the purpose of access to sex-segregated" facilities,[13] explaining that although section 106.33 "assumes a student population composed of individuals of what has traditionally been understood as the usual 'dichotomous occurrence' of male and female where the various indicators of sex all point in the same direction," the regulation "sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge." 2016 WL 1567467, at *5, *6; *see also id.* (noting that there are many situations in which it is unclear how an individual's sex should be determined). Because section 106.33 is "ambiguous as applied to transgender individuals," the Fourth Circuit deferred to ED's considered interpretation of the regulation. Specifically, the court concluded that ED's interpretation — which allows sex to be determined on the basis of gender identity — "although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects . . . included in the term 'sex.'" *Id.* at *5, *6.[14]

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[13] In reaching this conclusion, the court consulted contemporaneous dictionaries from the drafting era, which "suggest that a hard-and-fast binary division on the basis of reproductive organs — although useful in most cases — was not universally descriptive [of the term 'sex']." *Id.* at *7.

[14] The Maine Supreme Court reached a similar conclusion when evaluating a state law that requires restrooms in school buildings to be "[s]eparated according to sex." Me. Rev. Stat. Ann. Tit. 20-a, § 6501 (2013). In *Doe v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014), that court determined that the statute "does not mandate, or even suggest, the manner in which transgender students should be permitted to use sex-segregated facilities." *Id.* at 605-06.

The Fourth Circuit's decision in *Gloucester* should weigh heavily in this Court's consideration of Plaintiffs' likelihood of success on the merits. Indeed, that court's clear rejection of Plaintiffs' primary argument — that Title IX's regulations do not permit a transgender individual to access sex-segregated facilities consistent with her gender identity — is strong evidence that their claims will fail here. *See, e.g.*, *Butts v. NCAA*, 600 F. Supp. 73, 74 (E.D. Pa. 1984) (where plaintiff's argument was "considered, and firmly rejected" by a court of appeals, likelihood of success was low); *see also Metro Found. Contractors, Inc. v. Arch Ins. Co.*, 2011 WL 2947003 (S.D.N.Y. July 18, 2011) (finding no likelihood of success on the merits of appeal where "other courts of appeals . . . have rejected" plaintiff's argument).

In arguing otherwise, Plaintiffs principally rely on a series of cases that predate the Supreme Court's decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[15] Specifically, Plaintiffs point to the Seventh Circuit's decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984), in which the court concluded that Title VII does not prohibit discrimination on the basis of transgender status. In *Ulane*, a transgender female was fired by her employer after undergoing sex-reassignment surgery. The district court determined that she had been fired because she was transgender and held that discrimination against transgender individuals violates Title VII. The Seventh Circuit reversed, concluding that Title VII merely prohibits discrimination "against women because they are women and against men because they are men." *Id.* at 1085. Despite Plaintiffs' assertions otherwise, *Ulane* does not control the outcome here.

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[15] In *Price Waterhouse*, the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered not "feminine enough" in dress and behavior. 490 U.S. at 235. Finding that such conduct amounted to prohibited "sex stereotyping," the Court concluded that Title VII prohibits not just discrimination on the basis of biological sex, but also discrimination for failing to conform to stereotypes associated with one's gender. *See id.*

As an initial matter, in *Ulane*, the Seventh Circuit concluded that discrimination against transgender individuals *on the basis of their transgender status* is not actionable under Title VII; however, the court did not categorically exclude transgender individuals from Title VII's protections. To the contrary, the *Ulane* Court acknowledged that "[transgender individuals] claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII." *Ulane*, 742 F.2d at 1087. In any event, despite the court's statement in dicta that "'sex' as it is used in Title VII" refers to "biological male or biological female," the *Ulane* Court did not attempt to answer the question of whether a transgender female should be treated as a man or as a woman for purposes of access to same-sex facilities in educational institutions. Instead, the court explicitly allowed for the possibility "that society, as the trial judge found, considers Ulane [a transgender female] to be female," and went on to analyze whether she had established that she was discriminated against because she was a woman. *Id.* In short, while the *Ulane* Court concluded that discrimination on the basis of "transsexuality" is not actionable under Title VII, it did not purport to determine whether a transgender female should be treated as a female (the crucial question here), let alone consider whether Title IX's regulations permit a transgender individual to access sex-segregated facilities consistent with her gender identity. For those reasons, neither *Ulane* nor any other authority cited in Plaintiffs' brief suggests that Plaintiffs are likely to succeed on the merits of their Title IX claims.[16]

[16] The other cases cited in Plaintiffs' brief have been equally agnostic on the question of how to determine the sex of a transgender individual for purposes of sex-segregated facilities. *See Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (noting that "even medical experts disagree as to whether [the transgender plaintiff] is properly classified as male or female"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("[T]ranssexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female."). Similarly, although the Seventh Circuit has continued to cite *Ulane* for the proposition that, in Title VII, "Congress intended the term 'sex' to mean 'biological male or biological female, and not one's sexuality or sexual orientation," it has not purported to answer the question of how

In any event, even if *Ulane* did address these questions, Plaintiffs' reliance on that decision would be misplaced. "[F]ederal courts have recognized with near-total uniformity that the approach in [*Ulane*] has been eviscerated" by the Supreme Court's decision in *Price Waterhouse*, in which the Court concluded that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Glenn v. Brumby*, 663 F.3d 1312, 1318 & n.5 (11th Cir. 2011) (citing *Price Waterhouse*, 490 U.S. at 235); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004).

Indeed, in *Price Waterhouse* the Supreme Court rejected the *Ulane* Court's conclusion that Title VII's prohibition on sex discrimination extends only to discrimination on the basis of one's status as "biological male or biological female." 742 F.2d at 1087. *See also Price Waterhouse*, 490 U.S. at 244 ("[A]n employer may not take gender into account in making an employment decision."). Similarly, in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the Supreme Court explicitly rejected the notion — central to the *Ulane* Court's holding and Plaintiffs' arguments here — that Title VII proscribes only the types of discrimination specifically contemplated by Congress at the time the statute was enacted. As Justice Scalia wrote for a unanimous Court:

> Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately

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a transgender individual's sex should be determined for purposes of Title IX's regulations. *See Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 704 (7th Cir. 2000); *see also Doe by Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), *judgment vacated on other grounds by City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998). Plaintiffs are simply wrong to argue that Federal Defendants have redefined "sex" in a way that contravenes *Ulane*'s understanding of congressional intent. Mem. at 9.

> the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Id. at 79. *See also Doe by Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997), *judgment vacated on other grounds by City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998) ("[T]he legislative history suggests that legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII.").[17]

Because *Ulane* relied on logic that the Supreme Court has subsequently rejected — and, in any event, is inapposite — it does not control the outcome of this case. At a minimum, it does not foreclose the Federal Defendants' reasonable interpretation of Title IX and its implementing regulations challenged here. *See Decker v. Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) ("[It] is well established that an agency's interpretation need not be the only possible reading of a regulation — or even the best one — to prevail.").

Finally, Plaintiffs allege that the Federal Defendants' actions violate the Spending Clause because schools "could [not] have known" that the Title IX funds that they received "were conditioned on prohibiting biological sex-specific restrooms and locker rooms." Mem. at 10-11.

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[17] Plaintiffs further argue that this Court should reject the Federal Defendants' interpretation of the ambiguous regulations because "Congress had repeatedly rejected attempts to expand Title VII protections beyond biological sex" and has "rejected the Student Non-Discrimination Act, which would have provided remedies for gender identity discrimination in schools modeled on Title IX's prohibition of sex discrimination." Mem. at 7. But "Congress does not express its intent by a failure to legislate." *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (citing *United States v. Estate of Romani*, 523 U.S. 517, 534 (1998) (Scalia, J., concurring)); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). Indeed, an amendment can be rejected for the simple reason that Congress believes the proposed change is not needed because its substance is already included in the statute. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"). In any event, those legislative efforts did not address the question raised here — namely, how to determine the sex of a transgender student for purposes of access to sex-segregated facilities under Title IX's regulations.

This argument is baseless. The Constitution vests Congress with the power to "fix the terms under which it disburses federal money to the States." *Suter v. Artist*, 503 U.S. 347, 356 (1992). "The Supreme Court has explained that so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)). For example, in *Davis*, the Supreme Court held that Title IX's prohibition on sex discrimination in the school context provided adequate notice to federal funds recipients that severe student-on-student sexual harassment was actionable, even though "the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships." 526 U.S. at 651. *See also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 1509 (2005) (noting that Title IX's conditions have been "broadly" interpreted "to encompass diverse forms of intentional sex discrimination"). Here, recipients of federal funds are clearly on notice that they must comply with the antidiscrimination provisions of Title IX, and "the possibility that application of [the condition] might be unclear in [some] contexts" does not render it unenforceable under the Spending Clause. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 665-66 (1985) (where statute makes clear that conditions apply to receipt of federal funds, Congress need not "specifically identif[y] and proscrib[e]" each action that will violate its terms). In any event, the District agreed to adopt ED's interpretation of Title IX and its implementing regulations challenged in this case and there has never been a threat by ED (or DOJ) to seek a repayment of any federal funds provided to the District before the Agreement or after. Instead, ED seeks to achieve prospective compliance voluntarily, so there is no viable notice claim here.

Because Plaintiffs have not met their burden of showing that they are likely to succeed on the merits of their APA claims, their motion should be denied.

B. Plaintiffs' Substantive Due Process Claim Is Without Merit

Plaintiffs are also unlikely to succeed on their claim under the Fifth Amendment's substantive due process provision.[18] Substantive due process rights guard against the government's arbitrary exercise of power without reasonable justification. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998). These claims are examined under a two-part analysis. First, a plaintiff must establish that she has been deprived of a life, liberty, or property interest sufficient to trigger the protections of the Due Process Clause in the first place. Only after identifying such a right does a court consider whether the government's deprivation of that right "shocks the conscience." *Id.* Here, Plaintiffs fail to allege the violation of any right sufficient to trigger the protections of the Due Process Clause, nor do they allege any conscience-shocking behavior that would support a substantive due process claim. Accordingly, Plaintiffs are unlikely to succeed on this claim.

1. *Plaintiffs Do Not Allege That Any Fundamental Right Has Been Substantially Burdened*

A fundamental constitutional right protected by the Due Process Clause is one that is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has mandated extreme caution in elevating individual liberty interests to the status of fundamental constitutional rights because recognizing such rights, "to a great extent, places the

[18] Plaintiffs do not assert a claim under the Fifth Amendment, but instead point to the Fourteenth Amendment as the source of their substantive due process rights. *See* Compl. ¶ 359. However, the Fourteenth Amendment does not apply to the federal government. *See, e.g., S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543 n.21 (1987).

matter outside the arena of public debate and legislative action" and risks transforming the Due Process Clause "into the policy preferences of the Members of the Court." *Id.* In determining whether a claimed right is fundamental, courts first require a "careful description" of the asserted interest. *Christensen v. Cnty. of Boone*, 483 F.3d 454, 462 (7th Cir. 2007). "[V]ague generalities . . . will not suffice." *Chavez v. Martinez*, 538 U.S. 760, 776 (2003). This requirement prevents "the reviewing court from venturing into vaster constitutional vistas than are called for by the facts of the case at hand." *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1240 (11th Cir. 2004).[19] Next, a reviewing court must determine whether that asserted interest is "fundamental" — that is, whether "it is so deeply rooted and sacrosanct that no amount of process would justify its deprivation." *Christensen*, 483 F.3d at 462. Once a court is satisfied that a fundamental right is at stake, it must then "determine whether the government has interfered 'directly' and 'substantially' with the Plaintiffs' exercise of that right." *Id.* (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978)).

Here, Plaintiffs' factual allegations do not implicate any fundamental right protected by the Due Process Clause. Plaintiffs assert that the Federal Defendants have violated students' fundamental right to privacy "in their unclothed bodies" and their right "to be free from government-compelled risk of intimate exposure to the opposite sex." Compl. ¶ 393. To be sure,

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[19] For example, in *Glucksberg*, a case challenging Washington's ban on assisted suicide, the Supreme Court refused to characterize the interest at stake as the "right to die" or "the right to choose a humane, dignified death"; instead, the Court narrowly phrased the question as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 722-23. Similarly, in *Reno v. Flores*, a case involving juvenile aliens challenging regulations governing their detention on due process grounds, the Court rejected several asserted fundamental rights, such as the right of "freedom from physical restraint" and the "right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives." 507 U.S. 292, 302 (1993). Instead, the Court narrowly characterized the right as "the right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.*

courts have recognized that individuals may have privacy interests in the exposure of their unclothed bodies, but the scope of this interest is not limitless and does not include the situation where, as here, the individuals are not forced to expose their naked bodies and are, at most, at risk of incidental viewing if they decide not to use the alternative changing facilities made available to them. Contrary to Plaintiffs' unsupported assertions otherwise, the Agreement does not "force[] [students] to undress," nor does it "force children to shower, change clothing, or use the restroom in the presence of the opposite sex." Pls.' Mem. at 13-14. Instead, students choose whether to undress in a locker room or in an alternative changing facility; the Agreement simply provides Student A the same access to the girls' locker room as other female students and specifically requires the District to provide alternative changing facilities for any student who desires additional privacy. *See* Ex. A at 1-2. Plaintiffs' description of the "right to privacy in their unclothed bodies" fails to narrowly and accurately define the interest that they actually seek to vindicate, which is an alleged right to change in a locker room from which transgender female students are excluded. There is, however, no such fundamental right, and Plaintiffs cannot merely use the word "privacy" and then automatically invoke the protections of the Due Process Clause. *See, e.g.*, *Moran v. Beyer*, 734 F.2d 1245, 1246 (7th Cir. 1984) (explaining that "not every choice made in the context of marriage implicates the privacy and family interests . . . that the decision itself accedes to the status of a fundamental right"); *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (explaining that lower courts should not expand privacy rights that have not been clearly recognized by the Supreme Court).[20]

[20] The precedents cited by Plaintiffs do not suggest otherwise. *See* Mem. at 13. For example, in *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993), the Seventh Circuit *upheld* the validity of a strip search against a student's Fourth Amendment challenge, and in *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009), the Supreme Court explicitly contrasted the investigatory strip search at issue in that case from "the experience of nakedness or near undress in other school circumstances" such as "[c]hanging for gym."

Even if the Agreement and Guidance somehow implicated Plaintiffs' fundamental privacy rights, their substantive due process claim would fail because the Federal Defendants have not interfered "directly" and "substantially" with those rights. *See Zablocki*, 434 U.S. at 387 n.12. The Seventh Circuit has made clear that incidental effects on fundamental rights are not cognizable pursuant to the Due Process Clause. *Christensen*, 483 F.3d at 463 ("The Constitution prevents fundamental rights from being aimed at; it does not, however, prevent side effects that may occur if the government is aiming at some other objective."). For example, in *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir. 1985), the court concluded that regulations designed to keep undocumented immigrants out of the country that had the indirect effect of separating parents from children "do not bring the constitutional rights of family association into play" because these effects are mere "collateral consequences of regulations not directed at the family." The court explained that "regulations are not unconstitutional deprivations of the right of family association unless they regulate the family directly." *Id.*; *see also Johnson v. City of Kankakee*, 260 F. App'x 922, 925 (7th Cir. 2008) (applying directness test to privacy).

The same conclusion is warranted here, where Plaintiffs fail to plausibly allege how the Federal Defendants' enforcement of Title IX and its implementing regulations "directly and substantially" infringed their rights to privacy. Instead, Plaintiffs can complain only of the Agreement's indirect effects, such as requiring students who want additional privacy to use alternative restroom and changing facilities at their option. These indirect effects most assuredly do not reach the level of a constitutional deprivation. To hold otherwise would mean that every inconvenience related to restroom and locker room usage would "carry the seed of a constitutional claim, and thus would improperly open '[b]reathtaking vistas of liability.'" *Walls v. Lombard Police Officers*, 2002 WL 548675, at *5 (N.D. Ill. Apr. 4, 2002) (quoting

Hameetman, 776 F.2d at 643).

In short, Plaintiffs have entirely failed to plausibly allege that any fundamental rights to privacy have been substantially impaired. Accordingly, the rational basis test governs this Court's review of the Agreement and Guidance. *See Glucksberg*, 521 U.S. at 728. Under this test, the Court must simply ask if the government action bears "a reasonable relation to a legitimate state interest." *Id.* at 722. The Agreement and Guidance easily meet this standard. And even if the Court were to evaluate the Federal Defendants' actions under the higher standard used to analyze substantial burdens on fundamental rights, Plaintiffs' claim would fail.[21]

2. The Governmental Action Does Not Shock the Conscience

As noted above, if a court finds that an individual's fundamental rights have been impaired, it then must ask "whether the governmental action can find 'reasonable justification in the service of a legitimate governmental objective,' or if instead it more properly is 'characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Christensen*, 483 F.3d at 462 (quoting *Lewis*, 523 U.S. at 846-47).[22] Conduct that "shocks the conscience" includes deliberate government action that is "arbitrary" and "unrestrained by the established principles of private right and distributive justice." *Maglaya v. Kumiga*, 2015 WL 4624884, at *7 (N.D. Ill. Aug. 3, 2015) (quoting *Lewis*, 523 U.S. at 846). *See also Beary Landscaping, Inc. v. Ludwig*, 479 F. Supp. 2d 857, 874 (N.D. Ill. 2007) ("The Seventh Circuit has repeatedly emphasized that [t]he scope of substantive due process is very limited and protects Plaintiffs only against arbitrary government action that shocks the conscience." (collecting cases)).

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[21] Because Plaintiffs have not identified any constitutional deficiency, there was no arbitrariness in the Federal Defendants' consideration of their constitutional concerns. *See* Mem. at 9-10.

[22] As the Seventh Circuit has explained, when, as here, a plaintiff complains "of abusive executive action," the "'conscience shocking' test determines liability, rather than the traditional strict scrutiny standard used to measure the constitutionality of legislative acts." *Christensen*, 483 F.3d at 462 n.2.

Here, far from being egregious or "conscience-shocking," the Federal Defendants' actions serve the important government interests in enforcing the antidiscrimination provisions of Title IX and its regulations and protecting the right of all students to receive an education in an environment free from discrimination. The Agreement furthers these interests by providing Student A with access to the girls' locker room, while protecting the privacy of all students by requiring the District to provide "reasonable" alternative changing facilities. Ex. A at 2.[23]

In considering whether these measures "shock the conscience," it is of central importance that this case arises in the context of a school. As the Supreme Court has explained, "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). For example, in *Vernonia School District*, the Court upheld a school's policy of requiring students participating in interscholastic athletics to submit to random drug testing against a Fourth Amendment challenge. In upholding the policy, the Court emphasized the diminished privacy interests of students in public schools: "Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." 515 U.S. at 654. The Court noted that minors do not have the same rights as adults, explaining that they "lack some of the most fundamental rights of self-determination — including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will." *Id.*; *see also id.* at 657 ("Public school locker rooms . . . are not notable for the privacy they afford."). *Cf. Darryl H. v. Coler*, 801 F.2d 893, 901 n.7 (7th Cir.

[23] Moreover, it cannot be said that by offering a considered interpretation of their own regulations, the Federal Defendants' actions rise to the level of conscience-shocking behavior. *See Lewis*, 523 U.S. at 846 ("[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense."); *Tessler v. Paterson*, 451 F. App'x 30, 33 (2d Cir. 2011) (affirming dismissal of substantive due process claim where defendant "was acting pursuant to a reasonable interpretation of the applicable regulations").

1986) (recognizing that the "same basic analysis is utilized" for claims arising under the Fourth Amendment and the substantive due process clause); *Piekarczyk v. City of Chi. ex rel Daley*, 2006 WL 566449, at *3 (N.D. Ill. Mar. 3, 2006) (same for privacy claim).

These precepts should guide the Court's inquiry here and make plain that, particularly when viewed in context, the Federal Defendants' efforts to protect the dignity of all students and promote a learning environment free from discrimination cannot be said to "shock the conscience." *Cf. Maglaya*, 2015 WL 4624884, at *7 ("[D]etermining the presence of a due process violation requires an appraisal of 'the totality of facts in a given case.'" (quoting *Lewis*, 523 U.S. at 850)). Accordingly, Plaintiffs' substantive due process claim is unlikely to succeed.

III. Granting a Preliminary Injunction Would Harm the Federal Defendants, Third Parties, and the Public Interest

Because Plaintiffs have not made the threshold showings of irreparable harm and a likelihood of success on the merits, there is no need for the Court to proceed to the balancing phase of the preliminary injunction analysis. *See Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 972 (7th Cir. 2012). However, even if the Court were to consider the balance of equities and public interest, it should still deny Plaintiffs' motion because these factors tip sharply in favor of the Federal Defendants.

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

enforcement of a likely constitutional statute would harm the government."). That harm is all the greater here, where the agency action being challenged protects the rights of unrepresented minors. As Judge Davis stated in *G.G. v. Gloucester County School Board*, "[e]nforcing [a transgender student's] right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." 2016 WL 1567467, at *14 (Davis, J., concurring); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[Courts] should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

Enjoining the Agreement would prevent the Federal Defendants from implementing the antidiscrimination provisions of Title IX, which ED and DOJ are charged with enforcing, *see* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54, and would inflict a very real harm on the public and, in particular, a readily identifiable group of individuals. *See* Ex. B (detailing some of the harms suffered by Student A when she was excluded from the girls' locker room); *see also Nken*, 556 U.S. at 420 (consideration of harm to the opposing party and the public interest "merge when the Government is the opposing party"); *Weinberger*, 456 U.S. at 313 ("even though irreparable injury may otherwise result to the plaintiff," courts may postpone issuing an injunction "until a final determination of the rights of the parties" if the injunction would "adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate"). Accordingly, the requested injunction should be denied.

IV. If the Court Determines that a Preliminary Injunction is Warranted, Such Relief Should be Narrowly Tailored to Remedy Plaintiffs' Alleged Injury and Not to Limit the Rights of Third Parties Outside This Court's Jurisdiction

Even setting aside all the other defects with their motion, Plaintiffs' requested injunction is also completely disproportionate to the harm alleged. Plaintiffs not only seek to enjoin the Agreement, but also to prevent Federal Defendants from taking "any action" — seemingly in any

jurisdiction — based on their interpretation of Title IX as prohibiting discrimination on the basis of gender identity. *See* Mot. at 2. Such overly broad relief far exceeds any alleged injury and is not tailored to remedying the alleged injuries about which Plaintiffs complain. *See Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 193 (2000) (courts should ensure "the framing of relief no broader than required by the precise facts"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established.").

The purpose of preliminary injunctive relief is to preserve the status quo that existed between parties prior to the filing of the underlying action. Indeed, a preliminary injunction, standing on its own, should not constitute an adjudication of the merits of a case. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (courts disfavor preliminary injunctions that essentially grant a movant the ultimate relief he seeks). Moreover, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the Plaintiffs." *Yamasaki*, 442 U.S. at 702. Here, instead of seeking to preserve the status quo, Plaintiffs argue for an injunction more comprehensive than any they could hope to obtain upon full adjudication of the merits. *See* Mem. at 4, 9, 12 (suggesting that ED's interpretation of Title IX "should be set aside" and that the Court should "declare [it] unlawful"). That relief — essentially striking down the Federal Defendants' interpretation of Title IX and its implementing regulations — would impose disproportionate burdens upon the Federal Defendants and affected third parties.[24] As

[24] While potentially seeking a nationwide injunction, Plaintiffs only attempt to identify harms arising in District 211, and fail to establish even those. But a court should issue an injunction only to the extent necessary to redress the injuries of the plaintiffs before the court. *See Horne v. Flores*, 557 U.S. 433 (2009) (finding statewide injunction improper for violation involving one school district); *Califano*, 442 U.S. at 700-01 ("[L]itigation is conducted by and on behalf of the individual named parties only.").

These strictures apply with particular force in considering an injunction that would limit the ability of the federal government to enforce a law duly enacted by Congress, or defend its application in other tribunals. Whereas enjoining the actions of a private party leaves intact the ability of other entities that are covered by a challenged law to litigate whether their actions are permissible, an order enjoining the government from enforcing their interpretation of Title IX and its implementing regulations anywhere

demonstrated herein, there is no threat of imminent harm that could possibly justify such sweeping relief at any stage other than upon full review of the merits.

In short, even if Plaintiffs had established all the factors for a preliminary injunction (which they have not), they are not entitled to the injunctive remedy of their choice. Accordingly, their overly-broad request for injunctive relief should be denied.

CONCLUSION

For the reasons discussed above, the Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: July 8, 2016

Respectfully submitted,

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effectively precludes any further consideration of this interpretation by any court other than the Seventh Circuit or the Supreme Court. Such an approach "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (rejecting the application of non-mutual collateral estoppel against the government).