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

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; and VICTORIA WILSON,	)	
Plaintiffs,	)	Case No. 1:16-cv-4945
v.	)	The Honorable Jorge L. Alonso
SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS,	)	Magistrate Judge Jeffrey T. Gilbert
Defendants,	)	
and	)	
STUDENTS A, B, and C, by and through their parents and legal guardians Parents A, B, and C, and the ILLINOIS SAFE SCHOOLS ALLIANCE,	)	
Intervenor-Defendants.	)	

DEFENDANT BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs, an association of unidentified parents and students and an official of the association with two children who are students at District schools, claim that the U.S. Constitution, Title IX of the Civil Rights Act, and the Illinois Religious Freedom Restoration Act protect them from contact with transgender students who are using public school restrooms and locker rooms consistent with their gender identity. They claim this despite acknowledging that the District has gone to significant lengths to provide privacy protections for each student, and even though the Seventh Circuit and this Court have previously held that federal law mandates that transgender students be given access to restrooms consistent with their gender identity. Under any of the legal theories stated in Counts I-V, this requested relief is legally unsupported, and, indeed, expressly contradicted by binding Seventh Circuit authority. Accordingly, Plaintiffs' Amended Complaint should be dismissed in its entirety with prejudice.

FACTUAL BACKGROUND[1]

Since enrolling as a high school freshman at the beginning of the 2013-2014 school year, Student A has consistently identified with a female gender identity by using a traditionally female name and female pronouns. Am. Compl., ¶¶ 52, 54. The District allowed her to use girls' restrooms, which have stalls protecting individuals using the toilet from view. *Id.* ¶¶ 54.f., 74.

In the fall of 2013, Student A filed a complaint with the U.S. Department of Education Office for Civil Rights (OCR) alleging that the District's locker room limitations violated Title IX. *Id.* ¶ 85. 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 within the locker room. *Id.* ¶¶ 95-96. The

[1] The facts of the Amended Complaint are taken as true for purposes of this motion only.

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.* ¶ 99. 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.* Student A graduated in 2017, but Plaintiffs' allege that the District has granted other transgender students similar access. *Id*. ¶¶ 155-56. The Amended Complaint, however, does not identify any other transgender student who has been observed by any other student using a restroom or locker room.

Plaintiffs have filed suit to prohibit transgender students from having access to restrooms and locker rooms that match their identified gender, but do not conform to the student's "biological sex" as defined by the Plaintiffs.

ARGUMENT

I. This Case Should Be Dismissed Under Rule 12(b)(1) Because the Remaining Plaintiffs Lack Standing

The only remaining plaintiffs identified in the Amended Complaint are Students and Parents for Privacy ("SPP"), which is "a voluntary unincorporated association comprised of students who currently attend, or will be attending, District high schools and their parents," and Victoria Wilson, the President of SPP and the mother of two students enrolled in District schools (*Id*. ¶¶ 39, 40). The Amended Complaint should be dismissed because neither party has standing to bring the claims asserted in the Amended Complaint.

Federal Rule 12(b)(1) provides for the dismissal of claims for lack of subject matter jurisdiction. In considering a Rule 12(b)(1) motion, district courts may look beyond the pleadings and consider all competent evidence. *Hay v. Indiana State Bd. of Tax Comm'rs*, 312 F.3d 876, 879 (7th Cir. 2002).

Standing is a threshold jurisdictional requirement in every federal lawsuit. *Horne v. Flores*, 557 U.S. 433, 445 (2009). Article III of the Constitution limits the jurisdiction of federal courts to actual "Cases" or "Controversies." *Milwaukee Police Ass'n v. Board of Fire & Police Com'rs of City of Milwaukee*, 708 F.3d 921, 926 (7th Cir. 2013). As such, federal courts are prohibited from rendering advisory opinions; they cannot divine on "abstract dispute[s] about the law." *Id.* (*quoting Alvarez v. Smith*, 558 U.S. 87 (2009)). This restriction is implemented in the principles of justiciability, including standing. *Id.* The burden of proof for establishing standing lies with the plaintiff. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).* Standing exists only when the following three conditions are met: (1) the plaintiff has suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 146-47 (7th Cir. 2011).

A. Victoria Wilson Lacks Standing

Wilson lacks standing because she identifies no particularized "injury in fact" that she has suffered. Assuming that she has standing to sue on behalf of her two children who are students within District Schools, she has not alleged any particularized injury to them either.

Her children's status as students does not give Wilson standing because the Amended Complaint alleges no facts that give them standing to sue. Thousands of students attend the District's five large high schools, and although Plaintiffs allege that multiple transgender students have been granted locker room and restroom access consistent with their gender identity, they identify only one actual transgender student who has been observed by another student in a locker room (Student A) and that student has graduated. There is no allegation that

Wilson's children are in the same school, the same grade, attend the same PE classes, or have a similar class schedule such that they have been or are likely to be physically present in a locker room or restroom with a transgender student, or that Wilson's children in particular have been harmed in any way by the District's practices of allowing students to use restrooms or locker room facilities consistent with their gender identity. Rather, Plaintiffs allege only potential risks to students' privacy in locker rooms and restrooms generally. (*Id*. ¶¶ 178-182).

In *O'Shea v. Littleton*, 414 US. 488, 495 (1974), the Supreme Court held that a group of 19 plaintiffs lacked standing to sue the city, county, and corresponding government officials for the discriminatory and unconstitutional administration of criminal justice in Alexander County, Illinois. The Court held that the plaintiffs lacked standing because none of the named plaintiffs was identified as having been subjected to or experienced any of the allegedly unlawful conduct at issue in the lawsuit. So too here, the Amended Complaint identifies only generalized risks and concerns with granting transgender locker room or restroom access consistent with student's gender identity, and it alleges no specific harm suffered by or likely to be suffered by Wilson or her children specifically. (*Id*. ¶¶ 178-182).

Wilson's generalized "fear" that her children might at some point in the future be present in a locker room or restroom with another student who identifies as the same gender as her children, but whom Wilson believes is "biologically" of a different sex, is not sufficient to give Wilson standing. *See Schmidling v. City of Chicago*, 1 F.3d 494, 498 (7th Cir. 1993) (plaintiffs' "genuine fear" of prosecution under city ordinance did not confer standing to challenge legality of that ordinance where there was no allegation that the city had prosecuted or threatened to prosecute plaintiffs). Wilson lacks standing because these generalized risks are merely abstract,

conjectural and hypothetical and are supported by no allegations that these risks have occurred or are substantially certain to occur to Wilson or her children.

B. SPP lacks Standing

When an organization seeks to assert standing, it can do so either on behalf of itself or on behalf its members. The first is known as organizational standing; the latter as associational standing. *Milwaukee Police Ass'n v. Board of Fire & Police Com'rs of City of Milwaukee*, 708 F.3d 921, 926 (7th Cir. 2013).

To bring suit in its own right, an organization must itself satisfy the requirements of standing." *Milwaukee Police Ass'n* 708 F.3d at 926.). Like Wilson, SPP identifies no "injury in fact" occurring to the organization itself that could be redressed through this lawsuit, accordingly there is no basis for organizational standing.

SPP also lacks associational standing to sue on behalf of its members. An organization has associational standing if "[1] its members would otherwise have standing to sue in their own right; [2] the interests it seeks to protect are germane to the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* (*quoting Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

SPP broadly identifies as its members "students who currently attend, or will be attending, District high schools and their parents." (*Id.* ¶ 39). SPP fails to identify or describe which students or parents are included in its membership and does not identify or allege any facts establishing that any SPP members have standing to sue in their own right.

Thousands of students attend the District's five large high schools. The Amended Complaint fails to identify who among these thousands of students are SPP students and fails to

identify any particularized injury or harm suffered by any SPP student. Like Wilson's children, there is no allegation that the SPP Students are in the same grade, attend the same PE classes, have the same class schedule, have been or are likely to be physically present in a locker room or restroom with a transgender student, or that any SPP student has been specifically harmed or threatened to be harmed in any way by the District allowing transgender students to use the restroom or locker room consistent with their gender identity. Rather, Plaintiffs allege only "risks to students" privacy in locker rooms and restrooms generally. As noted above, the generalized "risks to students" privacy alleged in the Amended Complaint (*Id*. ¶¶ 178-182) do not confer standing on SPP or the SPP students. *O'Shea v. Littleton*, 414 US. at 495.

SPP also cannot satisfy the third element of associational standing, which requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343; *see, e.g.*, *Minor I Doe ex rel. Parent I Doe v. Sch. Bd. for Santa Rosa County, Fla*., 264 F.R.D. 670, 688 (N.D. Fla. 2010) (noting that "associational standing fails where the nature of the claim or relief sought is not common to all members of the association or shared in equal degree, such that both the fact and extent of injury would require individualized proof.").

Proof of Plaintiffs' Title IX claim will require participation by individual SPP students. To establish a violation of Title IX based on a hostile environment theory, a plaintiff must prove, among other things, that school officials had "actual knowledge" of harassment "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). As the Seventh Circuit

has noted, this is an extremely stringent, individualized and fact-intensive standard. *Doe v. Galster*, 768 F.3d 612, 617-18 (7th Cir. 2014).

The same is true for the remainder of Plaintiffs' claims. Plaintiffs' constitutional claim of privacy rights also require fact-intensive, case by case, individualized inquires. "Privacy claims under the Fourteenth Amendment necessarily require fact-intensive and context-specific analyses" and "bright lines generally cannot be drawn." *Doe v. Luzerne County*, 660 F.3d 169, 176 (3d Cir. 2011). Similarly, Plaintiffs' claims that their right to bring up their children; their claim under the Illinois Religious Freedom Restoration Act, and their claim regarding the Free Exercise Clause of the First Amendment all require a fact-intensive inquiry into the SPP parents' and students' religious beliefs – none of which are specified – along with a fact intensive inquiry into whether any parent or individual SPP student has been subject to a situation that ability to raise their children or violates their religious beliefs.

Finally, to allow SPP to sue on behalf of unidentified "SPP Students" would completely eviscerate the requirements of Federal Rule 23 by allowing the Plaintiffs to effectively litigate this case as a class action without meeting any of the requirements of Rule 23, and also raise significant due process concerns because it would force the District to defend claims brought on behalf of unknown and unidentified students.

In summary, if the Court finds that Plaintiffs have alleged legally viable claims that survive the District's 12(b)(6) motion there is no way that this case can be litigated without the active participation of the individual SPP students, including allowing the District full and complete written discovery and depositions of individual SPP students. Because the individual participation of SPP students will be critical to the resolution of Plaintiffs' claims and these students are no longer parties, SPP lacks standing to litigate these claims on their behalf.

II. Plaintiffs' Amended Complaint Fails to State an Actionable Claim and Should Be Dismissed Pursuant to Rule 12(b)(6)

Federal Rule 12(b)(6) provides for the dismissal of claims that fail to state a claim upon which relief can be granted. For a claim to survive a motion to dismiss, the factual allegations "must plausibly suggest that the plaintiff has a right to relief, raising the possibility above a speculative level." *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions. . . ." *Bell Atl. v. Twombley*, 550 U.S. 544, 555-556 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level . . . *Id.* (internal citations omitted). Moreover, plaintiffs can plead themselves out of court by alleging facts that establish they have no claim. *Jackson v. Marion Cnty*, 66 F.3d 151, 153 (7th Cir. 1995). Plaintiffs' Amended Complaint should be dismissed with prejudice because the allegations in the Amended Complaint conflict with binding Seventh Circuit authority and fail to state any legally recognized cause of action.

A. Plaintiffs' Title IX Claims Fail as a Matter of Law

1. Plaintiffs' Theory of Liability Contradicts Binding Seventh Circuit Authority

In *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Education*, 858 F.3d 1034 (7th Cir. 2017), the Seventh Circuit held explicitly that "a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id.* at 1049. The court further held that prohibiting a transgender student from using the restroom that conforms with his or her gender identity also violated the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff's Amended Complaint, which alleges that the District violated Title IX by treating transgender students in the manner that Title IX and the Constitution require according to *Whitaker*, obviously fails as a matter of law. Plaintiffs' theory of liability cannot possibly be reconciled with the Seventh Circuit's holding in *Whitaker*; therefore, it must be rejected. This Court previously recognized this irreconcilable conflict in finding that Plaintiffs did not have a likelihood of success on the merits of their Title IX claim. Based on *Whitake*r, the Court must now dismiss Plaintiffs' Title IX claims, with prejudice, in their entirety.

2. Plaintiffs' Complaint Fails to Allege that Female Students Have Been Subjected to a Hostile Environment Because of Their Sex

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*, 526 U.S. at 650. 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." *Galaster*, 768 F.3d at 617 (citing *Davis*, 526 U.S. at 650). Even if Plaintiffs' theory of liability could be reconciled with *Whitaker*, the allegations in Plaintiffs Complaint, assumed to be true for purposes of this motion, fail to establish these essential elements of a Title IX hostile environment claim.

a. Cisgender Students were not Subjected to a Hostile Environment Because of Their Sex

Plaintiffs' Title IX claim fails as a matter of law because the Amended Complaint does not allege that the SPP students whom Plaintiffs purport to represent have been subjected to a hostile environment because of their own sex (i.e. because they are male or female). 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).

Plaintiffs' allegations that students are uncomfortable or even traumatized by the presence of a transgender student in a locker-room who has different genitalia from the cisgender students using the locker room, standing alone, does not state a claim of a hostile environment based on sex. 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 through out 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 assert that allowing transgender students conditional access to the girls' restroom and locker room creates a hostile environment, but the alleged hostility that the SPP Students claim to experience by virtue of this access is not because of their own sex. As alleged in the Amended Complaint, the District's decision to allow transgender students conditional access to locker rooms consistent with their gender identity, is based solely on a determination of the gender identity of the transgender individual. It is not directed to or based on hostility towards the sex of cisgender students.

Similarly, none of the factual allegations in the Amended Complaint permit an inference that any transgender student sought access to a restroom or locker room out of an animus against females because they are female or males because they are male, or that the District's decision to allow limited access was motivated by an animus against females or males. Notably, Plaintiffs' allegations confirm that the District's policies and practices concerning transgender access are "sex neutral" in that female and male students are treated identically.

Nor do Plaintiffs' allege that transgender students are seeking to access to facilities in order to engage in inappropriate sexual advances or that transgender students are engaging in any conduct that is harassing or offensive to female students because they are female or to male students because they are male. Rather, Plaintiffs' own allegations confirm that the alleged discomfort of the SPP Students is based on their personal views about transgender individuals and the "sex" of *those* individuals, not because of any hostility directed at the SPP Students because of their own sex. Because they do not allege any discrimination or hostile environment

directed at them because of the sex of the SPP Students who Plaintiffs purport to represent, Plaintiffs' Title IX claims fail as a matter of law.

b. Plaintiffs Do Not Allege Severe, Pervasive and Objectively Offensive Conduct

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' allegations, even assumed as true for purposes of this motion, do not meet this high standard.

Plaintiffs make no allegation that the SPP Students were subjected to severe and pervasive objectively offensive conduct. As a matter of law, the possible presence of a transgender student in a restroom or locker room does not rise to the level of severe and pervasive objectively offensive conduct, particularly in light of the Seventh Circuit's ruling in *Whitaker* that Title IX prohibits schools from denying such access to transgender students. Plaintiffs' reference to a student who allegedly saw Student A undressed on one or more occasion in 2014 and committed suicide several years later in 2017, does not, standing alone, permit an inference that the presence of a female transgender student in the locker room (even unclothed) is so objectively offensive so as to create a hostile environment for the students whom Plaintiffs purport to represent. Plaintiffs do not allege that Student A did anything in the locker room other than undress like other students. As a matter of law, when compared to the egregious and patently hostile conduct needed to support a hostile environment claim, Student A undressing like other students, is not so hostile, severe and pervasive that the District can be held legally responsible for her conduct under Title IX. *See e.g. 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).

Also, because Student A's conduct was not directed towards or witnessed by any of the SPP Students whom Plaintiffs purport to represent, the experience of the unnamed student who saw Student A in an unclothed state cannot support Plaintiffs' Title IX claim. *See Bermudez v. TRC Holdings, Inc.* 138 F.3d 1176, 1180 (7th Cir. 1980) (A plaintiff may not state a hostile environment claim based on offensive conduct experienced by others that the plaintiff did not experience).

Allegations regarding Student A being unclothed in the locker room in 2014 also do not support Plaintiffs' challenge to the District's current practice of allowing students to use the facilities consistent with their gender identity (what Plaintiffs misleadingly and confusingly refer to as a "Compelled Self-Affirmation Policy") because Plaintiffs' own allegations confirm that this policy did not go into effect until 2016. (Am. Compl. ¶¶ 76, 80, 95, 116). Moreover, the District's current practice specifically grants locker room access upon the condition that the transgender student changes in private changing areas within the locker room. (*Id.*. ¶ 99.a). Accordingly, the presence of an unclothed transgender student in a locker room cannot be attributed to the District's policy or practice.

In all other respects, Plaintiffs allege only the generalized fear and risk that cisgender female students will be in the restroom or locker room with a transgender female. Allegations of generalized fear and anxiety are insufficient as a matter of law to state an actionable hostile environment claim. *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 claim); *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).

c. Plaintiffs Do Not Allege a Concrete, Negative Effect on any SPP Students' Education

Plaintiffs Title IX claims fail for the additional reason that the Amended Complaint does not allege that the District's practice of allowing transgender students conditional locker room access and restroom access negatively impacts the educational opportunities of cisgender students whom Plaintiffs purportedly represent. To establish a Title IX violation based on a hostile environment theory, Plaintiffs must demonstrate a "'concrete, negative effect' on [the students'] 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.

d. As a Matter of Law, The District's Alleged Conduct is Not Clearly Unreasonable

Plaintiffs do not allege and cannot establish the final element of a Title IX hostile environment claim, namely that the District was deliberately indifferent to sex discrimination. To constitute deliberate indifference, the institution's actions must be "clearly unreasonable." *Davis*, 526 U.S. at 645. In *Davis*, 526 U.S. at 649, the Supreme Court explicitly recognized that the determination of whether a school administration's alleged conduct is "clearly unreasonable" is a legal determination, and should be resolved by a motion to dismiss in appropriate cases. *Id.* ("In

an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not "clearly unreasonable" as a matter of law.")

As alleged in the Amended Complaint, the District has balanced the interests of transgender students with potential privacy concerns of cisgender students such as the SPP Students through a careful and incremental approach. Initially the District allowed only restroom access (Am. Compl. ¶ 59). In 2016, pursuant to an agreement with the Office of Civil Rights of the Department of Education, the District allowed locker room access to Student A and subsequently other students on the condition that the transgender student use a private area within the locker room for changing (*Id.* ¶ 99). The District has also made private changing areas available for all students (*Id.* ¶ 99.b). No reasonable trier of fact could find that the District's actions as alleged in the Amended Complaint are "clearly unreasonable."

In its prior opinion denying Plaintiffs' Motion for Preliminary Injunction, this Court noted that Plaintiffs' Title IX claims failed to pass muster under the reasoning of *Whitaker*, especially given additional privacy protections like single stalls or privacy screens installed by the District (Mem. Op. at 10). For the same reason, this court should dismiss Plaintiffs' Title IX claim on the merits.

B. Plaintiffs' Claim of a Constitutional Right to Privacy Fails to State a Claim on which Relief Can Be Granted

Plaintiffs' second claim is that the District is violating the SPP Student's constitutional right to privacy. Plaintiffs posit that the District authorizes male students who claim a feminine gender to access female restrooms and locker rooms and authorizes female students who claim a masculine gender to access male restrooms and locker rooms. (Am. Compl. ¶¶ 260-263). Plaintiffs claim a "fundamental right to privacy in their unclothed bodies" and a "fundamental

right to be free from government-compelled risk of being exposed to unclothed members of the opposite sex, without any compelling justification." *Id.* ¶ 264.

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 *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 *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).

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

Applying these legal principles, Plaintiffs do not have a constitutional right not to share restrooms or locker rooms with transgender students whose gender identity is different than their sex at birth. There is no fundamental right to have restrooms or locker rooms free of a transgender person. The risk of exposure to a transgender person in a locker room or restroom simply does not violate any Constitutional "right to privacy." Given the caution about expanding constitutionally based privacy claims as noted above, Plaintiffs cannot state a claim.

Indeed, the Seventh Circuit has already rejected privacy arguments as the Plaintiffs make:

> A transgender student' s presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal

> restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.

Whitaker, 858 F.3d 1034, 1052 (7th Cir. 2017).

Even under Plaintiffs' stated facts, 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). Accordingly, this claim should be dismissed.

C. Count III Fails to State a Violation of Parental Rights Under the Fourteenth Amendment

Plaintiffs do not and cannot allege a claim for a violation of a parent's right to make decisions concerning the care, custody and control of their children under the Fourteenth Amendment's Due Process Clause. In *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the Supreme Court confirmed that "the interest of parents in the care, custody, and control of their children" is a fundamental liberty interest protected by the Due Process Clause. *Id.* However, no such right is implicated or violated by the District's practices as alleged in the Amended Complaint.

The Seventh Circuit has acknowledged the "fundamental right, secured by the due process clause, to direct the upbringing and education of [one's] child." *Thomas v. Evansville-Vanderburgh Sch. Corp.*, 258 F. Appx 50, 53-54 (7th Cir. 2007). However, the Court also held that this right is subject to important limitations in the public school setting and cited to the various other Circuits that have so held: "But a right to choose the type of school one's child attends, or to direct the *private* instruction of one's child, does not imply a parent's right to control every aspect of her child's education at a public school. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204–07 (9th Cir.2005); *Leebaert v. Harrington*, 332 F.3d 134, 140–42 (2d

Cir. 2003); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1st Cir. 1995)." *Id*. at 54.

Consistent with the Seventh Circuit's observations, the Ninth Circuit noted in *Fields*, "As with all constitutional rights, the rights of parents to make decisions concerning the care, custody, and control of their children is not without limitations." *Id*. at 1204. In support of this limitation the court cited several Supreme Court cases limiting parents' interest in the custody, care and nurture of their children, including *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing the state may require school attendance, regulate child labor etc.); *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (no parental right to educate children in private segregated schools); *Norwood v. Harrison*, 413 U.S. 455, 461-62 (1973) (reviewing the limited scope of *Pierce*); *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The *Fields* court also noted the "number of cases that have upheld the constitutionality of school programs that educate children in sexuality and health" and cited to: *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir.2003) (upholding school district's mandatory health classes against a father's claim of a violation of his fundamental rights); *Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260 (3d Cir.1998) (upholding school district's consensual condom distribution program); and *Brown v. Hot, Sexy & Safer Prods., Inc*., 68 F.3d 525 (1st Cir.1995) (upholding compulsory high school sex education assembly program). *Id*. at 1205.

The court concluded:

> Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District — whether those objections regard

> information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.

Id. at 1206.

Similarly in *Brown*, 68 F.3d 533-34, the First Circuit reasoned:

> We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.

While parents have a fundamental right to direct their children's education, that does not extend to a right to control the operation of a public school. Although Plaintiffs assert in their Amended Complaint that strict scrutiny must apply, the cases discussed above did not apply strict scrutiny because the school's conduct did not violate a fundamental right. For example, in *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003), the court reasoned that "requiring a public school to establish that a course of instruction objected to by a parent was narrowly tailored to meet a compelling state interest before the school could employ it with respect to the parent's child" would make it difficult or impossible for any public school to administer school curricula responsive to the overall educational needs of the community and its children. The court held that because the Due Process Clause did not recognize as fundamental the specific

right Leebaert invoked, the requirement that his child attend health class was subject to rational basis review, and was constitutional. *Id.* at 142-43.

Here too, the Court should not apply the right to parent so broadly as to interfere with the operation of the public school. The District must have flexibility over its operations sufficient to supervise students using the bathroom and changing for physical education and that flexibility must allow transgender students to access educational opportunities, particularly in light of the Seventh Circuit's holding in *Whitaker*. As in *Thomas, Leebaert*, *Fields* and *Brown*, this Court should decline to expand the right to parent into a right to micromanage public school education and dismiss Count III.

D. Count IV Fails to State an Illinois Religious Freedom Restoration Act Claim

Plaintiffs do not allege facts sufficient to state a claim for a violation of the IRFRA, 775 ILCS 35/1 *et seq.* Under the IRFRA, the "[g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." 775 ICLS 35/15. IRFRA defines "government" as the State of Illinois or political subdivision of the State. 775 ILCS 35/5. Plaintiffs fail to state a claim for the violation of the IRFRA because (1) their IRFRA claim is really an attack on federal law, not on a state government action; and (2) the alleged facts do not support a finding of a substantial burden on the plaintiffs' free exercise of religion and because the District has a compelling interest which it further using the least restrictive means.

1. Plaintiffs' Illinois RFRA Claim Cannot Trump Federal Law

Plaintiffs' Amended Complaint is framed as a challenge to the District's alleged practice of granting transgender students restroom and locker room access in accordance with the students' gender identity, but as this Court noted in its prior Memorandum and Opinion, the District's practices merely conform to federal law as interpreted by the Seventh Circuit in *Whitaker*, and thus Plaintiffs' claims really amount to a frontal assault on the *Whitaker* decision and federal law itself. As such the IRFRA does not apply 775 ILCS 35/5 (definition of "Government" subject to IRFRA limited to State of Illinois or political subdivision of the State). Also, any assertion by Plaintiffs that the IRFRA bars the District from taking action mandated by Title IX as interpreted in *Whitaker* is preempted by federal law. *Aux Sable Liquid Products v. Murphy*, 526 F.3d 1026,1033 (7th Cir. 2008)(conflict preemption "exists if it would be impossible for a party to comply with both local and federal requirements or where local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.') .

2. Plaintiffs Fail to Allege Facts That Would Establish a Substantial Burden on Their Free Exercise of Religion

In the Amended Complaint, Plaintiffs do not allege conduct by the District that imposes a substantial burden on Plaintiffs' free exercise of religion. To establish a substantial burden on one's free exercise of religion, "a plaintiff must demonstrate that the governmental action prevents him from engaging in conduct or having a religious experience that his faith mandates." *Diggs v. Snyder*, 333 Ill. App. 3d 189, 195 (5th Dist. 2002). "[A] law, regulation, or other governmental command substantially burdens religious exercise if it bears direct, primary, and fundamental responsibility for rendering [a] religious exercise ... effectively impracticable." *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *see also Harris Funeral Homes*, 2018 WL

1177669 at *17 (6th Cir., March 7, 2018) ("a government action that puts [a religious practitioner] to th[e] choice of engag[ing] in conduct that seriously violates [his] religious beliefs [or] ... fac[ing] serious consequences constitutes a substantial burden for the purposes of RFRA.") (internal quotations and citations omitted).

To establish a substantial burden on religion, a plaintiff must assert that the complained of conduct conflicts with a basic tenet of the plaintiff's religion. *Diggs*, 333 Ill. App. 3d at 190, 195. A plaintiff must minimally allege what religion he practices. *Allmon v. Butler*, 2007 WL 1302711 at *5, No. CV 06-981-PCT-MHM(MHB) (D. AZ. April 30, 2007) (dismissing a claim as "both conclusory and vague" where the plaintiff failed to allege "what religion he subscribes to or how he was prevented him from engaging in conduct mandated by his faith."); *Rosenberg v. Lappin*, 2009 WL 1583135 at *, No. CV 09-1722-PA(SH) (finding no cognizable claim is plead where "Plaintiff does not allege what kind of religious diet he requested. Nor does he allege what religion he practices or the circumstances of the alleged denial of his request for a religious diet, who denied his request, or when it was denied."). Plaintiffs do not allege that they, or the SPP students whom they purport to represent, collectively or individually practice any particular religion. This failure alone precludes Plaintiffs from establishing a substantial burden on religious exercise.

Without identifying any particular religion, Plaintiffs allege that the religious exercise at issue is the practice of personal modesty, which Plaintiffs describe as the belief that they "must not undress, or use the restroom, in the presence of the opposite sex, and also that they must not be in the presence of the opposite sex while the opposite sex is undressing or using the restroom." (Am. Compl., ¶ 294). However, Plaintiffs do not allege that a basic tenet of their religion prescribes that sex is determined by genitalia or chromosome, or otherwise in a manner

that would exclude transgender students from being of the same "sex" such that their religious practice of modesty is violated by the presence of transgender students in restrooms and locker rooms. (*Id.* ¶¶ 292-303). Furthermore, the Amended Complaint does not allege with any specificity how the privacy arrangements in restrooms and locker rooms burden the Plaintiffs' practice of modesty, or are insufficient to accommodate any legitimate religious principle.

As plead in the Amended Complaint, the District provides both multi-user and individual-user options with privacy protections. (*Id*. ¶¶ 3, 74). "If any student requests additional privacy in the use of sex-specific facilities designed for female students beyond the private changing stations…, 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*. ¶ 99). Given the wide array of privacy options for using the restroom and locker room, the Plaintiffs' practice of modesty is not burdened, let alone substantially so. The SPP students are not forced to use the bathroom or locker room with any other students if they choose to ensure modesty. This Court should dismiss Count V based on the failure of Plaintiffs to plead facts showing a substantial burden on religious exercise by the District.

3. The District Has a Compelling Interest in Providing Transgender Students Facility Access and Does So by the Least Restrictive Means

The Amended Complaint also fails to state a claim under the IRFRA because the District has a compelling interest to provide transgender students with access to restroom and locker room facilities. As the Seventh Circuit held in *Whitaker*, to fail to do so would violate Title IX and the Equal Protection Clause.

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2018 WL 1177669 (6th Cir. March 7, 2018), the Sixth Circuit granted summary judgment to the EEOC against a funeral home that had terminated a transgender employee and claimed a Federal Religious Freedom Restoration Act defense. The Sixth Circuit held that the government has a compelling interest under RFRA in eradicating discrimination. 2018 WL 1177669 at *20-21. The same is true here. As discussed above, the District is statutorily obligated under the holding of *Whitaker* to protect the rights of transgender students to access educational opportunities and its practices are necessary to ensure such opportunities. This provision of educational opportunities for transgender students is a compelling interest and the basis for the practices complained of in Count V.

The Supreme Court has recognized that compelling interests can override religious beliefs: "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

The District furthers the interest of providing transgender students access to its educational policies using the least restrictive means. All students can access a spectrum of privacy options from a privacy space within a communal facility to an individual facility. (Am. Compl. ¶ 99). The District's practices are individualized for every student, which makes them the least restrictive means for ensuring transgender students have the access to educational opportunities that they are guaranteed, while still allowing for all other students to access education without an undue burden on any religious practice..

E. Count V Fails to State a Violation of the First Amendment

Plaintiffs have failed to state a claim that the District has violated the First Amendment's Free Exercise clause. The Free Exercise clause states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Am. I. Under the Clause, an individual's freedom of religious belief is absolute, but freedom of conduct is not. *See Bowen v. Roy*, 476 U.S. 693, 699 (1986).

First, Plaintiffs have not plead the District has imposed a burden on either the parents' or students' ability to exercise their religion. Plaintiffs claim that the District "inhibits" the parents "ability to set standards for their children's behavior in respect to sexual modesty." (Am. Compl. ¶¶ 298, 306). But "the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently." *Parker v. Hurley*, 514 F.3d 87, 106 (2005) (affirming the grant of a motion to dismiss). "A parent whose 'child is exposed to sensitive topics or information [at school] remains free to discuss these matters and place them in the family's moral or religious context." *Id*., citations omitted.

Plaintiffs' claim regarding the SPP students fares no better. They assert that the District "prevents the SPP Students from practicing the modesty that their faith requires of them." (*Id*. ¶¶ 296, 306). Given the admitted privacy options in place, their assertion is not supported by the facts they plead. As the court in *Parker* observed: "Public schools are not obligated to shield individual students from ideas which potentially are religiously offensive." 514 F.3d 87, 106.

Second, a neutral law of general applicability that incidentally burdens religious exercise need only satisfy rational basis review, not strict scrutiny. *Employment Div. v. Smith*, 494 U.S. 872 (1990). "Neutrality and general applicability are interrelated..." *Lukumi Babalu Aye v. City*

of Hialeah, 508 U.S. 520, 532 (1993). A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. An impermissible objective may be discerned through the law's text, legislative history, and the actual effect of the law in operation. *Id.* at 533, 535, 540. A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Id*. at 543.

In this case, the Amended Complaint alleges that the District's practices of providing restroom and locker room access for transgender students were caused by the request of a transgender student to use those facilities when she enrolled in the District. (Am. Compl. ¶¶ 48-57). There is no allegation permitting an inference that the District at any time intended to restrict religiously motivated practices of other students. There is no support for Plaintiffs' conclusory statements that the District's practices are not neutral or generally applicable and so the Court should apply rational basis review.

Under the rational basis standard, a government practice passes constitutional scrutiny as long as it is supported by any rational legitimate justification. *See Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 712 (7th Cir. 2002). Here, the District has a compelling interest in complying with Title IX and anti-discrimination laws and in providing transgender students with educational opportunities. The District's practice of providing facility access to transgender students easily passes rational basis review. As the Seventh Circuit has observed, "If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public schools in shreds." *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994) citing *McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J. concurring).

CONCLUSION

Plaintiffs' Amended Complaint should be dismissed. The Amended Complaint fails as an initial matter because the Plaintiffs lack standing to pursue the claims set out in the complaint. Additionally, Counts I-V each fail to state claims as a matter of law. The defects in the Amended Complaint cannot be remedied as Plaintiffs' core theory—that transgender students' presence in public school facilities violates the rights of other students—has already been rejected and is offensive to the settled law in this Circuit. This Court should dismiss the Amended Complaint with prejudice.

Dated: April 2, 2018

Respectfully submitted,

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211

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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 211'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** 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 2nd day of April, 2018:

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