UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; and **VICTORIA WILSON**, Plaintiffs, vs. **SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS**, 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.	Case No. 1:16-cv-04945 The Honorable Jorge L. Alonso

MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Intervenor-Defendants, Students A, B, and C, Parents A, B, and C, and the Illinois Safe Schools Alliance ("Intervenor-Defendants"), move to dismiss all counts of Plaintiffs' Amended Complaint. Assuming the truth of the allegations in the Complaint, Plaintiffs' claims are each legally baseless under recent and controlling Circuit and Supreme Court precedent.[1]

INTRODUCTION

Plaintiffs' Amended Complaint should be dismissed in its entirety. This Court has already held that Plaintiffs failed to demonstrate a likelihood of success on the merits of either their Title IX or constitutional right to bodily privacy claims. Memo Op. and Order (Dec. 29, 2017) ("Memo. Op."). In so ruling, this Court observed that the Supreme Court and Seventh Circuit have "conclusively held" that "federal protections against sex discrimination" in Titles VII and IX are "substantially broader than [discrimination] based only on genitalia or chromosome" and that controlling precedent thus flatly rejects Plaintiffs' narrow "sex-assigned-at-birth" theory of what "sex" means under Title IX. Memo. Op. 7. In fact, far from recognizing Plaintiffs' theory that allowing all students to use the restroom and locker room facilities appropriate to their gender (e.g., boys who are transgender and non-transgender use the boys' facilities) violates Plaintiffs' rights, this Court concluded that the opposite is true under *Whitaker*. "Rejecting arguments similar to those forwarded by Plaintiffs here, the Seventh Circuit found that a school policy that subjects a transgender student to different rules, sanctions, and treatment than non-transgender students violates Title IX." Memo. Op. 9, citing *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1049-50 (7th Cir. 2017). Nothing could now be clearer: "[d]iscrimination against transgender individuals is sex discrimination" under the federal antidiscrimination statutes. *Id.* Specifically, policies requiring students who are

[1] Although Intervenor-Defendants must treat Plaintiffs' well-pleaded factual allegations as true for purposes of this motion, they deny many of Plaintiffs' allegations and characterizations regarding transgender individuals, including the transgender students discussed in the Complaint.

transgender to use facilities that do not conform to their gender identity, or to use single-user facilities, "'punish[] that individual for his or her gender non-conformance which in turn *violates Title IX*.'" Memo. Op. 9, quoting *Whitaker*, 858 F.3d at 1049 (emphasis added). Accordingly, this Court has in effect already explained why Plaintiffs' Title IX claim must be dismissed.

The same is true of Plaintiffs' right to bodily privacy claim. This Court has already rejected, as inconsistent with Seventh Circuit law that "is now clear, and binding," Plaintiffs claim that the District's policy violated their "right to be free from government-enforced, unconsented risk of cross-sex exposure when either sex is partially or fully unclothed." Memo. Op. 13; Compl. ¶ 253. Plaintiffs allege no "forced or extreme invasions of privacy" that some courts have found could violate constitutional privacy. Memo. Op. 12. Plaintiffs may easily address any bodily privacy concerns they may have by using "privacy stalls" or "single-use facilities," such that "there is no meaningful risk that a student's unclothed body need be seen by any other person." *Id.* And nothing in this conclusion turns on "undeveloped facts." *Id.* "'Common sense tells us'" that in communal facilities "'individuals act in a discreet manner to protect their privacy'" and that "'those who have true privacy concerns'" can adapt their behavior so as not to punish all other users of the facilities for their personal views on what is appropriate. *Id.* at 12-13, quoting *Whitaker*, 858 F.3d at 1052. Constitutional privacy concepts are not defined by the most squeamish among us, but take account of these common sense propositions—and society could hardly function otherwise. Plaintiffs' bodily privacy claim must be dismissed, as the reasoning of this Court's prior order requires.

Plaintiffs attempt to overcome the Intervenor students' federal statutory right not to be discriminated against on the basis of being transgender, and constitutional equal protection right not to be forced into gender-inappropriate facilities, by pleading deeply flawed claims under the

First Amendment, a claimed right to direct the upbringing of children, and alleged rights under an Illinois statute protecting religious freedom. These were not addressed in this Court's prior Order, but similarly should be dismissed. The constitutional rights Plaintiffs assert are unrecognizable, with no support whatsoever in precedent. And, even apart from the fact that Plaintiffs distort the Illinois Religious Freedom Restoration Act beyond recognition, their flawed interpretation of it would obviously violate the Supremacy Clause: Illinois RFRA rights cannot override Intervenors' Title IX and Equal Protection rights. None of this turns on the development of more facts. As a matter of law, all Plaintiffs' claims are legally baseless and should be dismissed.

BACKGROUND

Plaintiffs are a voluntary unincorporated association comprised of current and future Township High School District 211 (the "District") students and their parents, and the president of the association. Compl. ¶¶ 39-40. Plaintiffs object to what they mislabel the "Compelled Affirmation Policy," which in actuality consists of the District's policies that authorize all students, including those who are transgender, to use restrooms and locker rooms aligned with their gender. *See, e.g.*, *id.* ¶ 117. Specifically, starting in the 2013-2014 school year, the District allowed intervenor-defendant Student A, a female student, to use the girls' restrooms. *Id.* ¶ 59. Soon after, the District expanded its restroom policy to all transgender students, noting that there are private stalls available in the restrooms for anyone who wishes to use them. *Id.* ¶¶ 72-74.

Then, on December 2, 2015, the District signed an agreement that allowed Student A to use the locker rooms used by other girls. Compl. ¶ 96. Part of the agreement was the implementation of private changing stations within the locker rooms, which any student could use during changing periods. *See id.* ¶ 99. There is also a separate locker room for students who are participating in a swimming activity or class. *Id.* ¶ 214(bb). Soon after, the District said that it

had expanded its locker room policy to allow all students to use the locker rooms aligned with their gender. *Id.* ¶¶ 115-16, 120.

Students change their clothes before and after PE class at high schools in the District and before attending after-school sports in which they participate. Compl. ¶¶ 171-72. There are no allegations that students see one another's genitals while changing their clothes. There are no allegations that students must change clothes in common areas rather than in private changing stations in the locker rooms. There are no allegations that students are required to shower together or at all, or that Student A or any transgender student was present when Plaintiffs showered at school in the swimming locker room. Plaintiffs acknowledge the protection offered by restroom stalls, where there is just a small gap between the floor and stall walls. *Id.* ¶ 180. There are no allegations that Student A or any transgender student has ever done anything harmful to anyone, inside restrooms and locker rooms or outside of them. Rather, Plaintiffs object to Student A simply using the restroom and locker room at the same time and in the same manner as other students.[2]

ARGUMENT

Plaintiffs have not stated any claim upon which relief may be granted. A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts must accept well-pleaded

[2] Plaintiffs make the sensationalist allegation that an unnamed student "was exposed to Student A's genitalia" in 2014, which, along with unspecified "subsequent similar incidents," traumatized the student, who committed suicide three years later. Compl. ¶¶ 77, 79. This impermissibly vague, wholly conclusory, and inflammatory allegation—designed to suggest that the individual committed suicide because of alleged "expos[ure]" to a transgender student in school facilities, and with no factual allegations at all to support that inference—cannot allow Plaintiffs' Complaint to survive a motion to dismiss. *See, e.g., Aref v. Holder*, 953 F. Supp.2d 133, 150 (D.D.C. 2013) ("[W]e will not strain to find inferences favorable to the plaintiffs which are not apparent on the face of this civil rights complaint.") (quoting *Coates v. Illinois State Bd. of Educ.*, 559 F.2d 445, 447 (7th Cir. 1977); *see also Williams v. Farmer*, 2013 WL 1156426, *2 (N.D. Ill. Mar. 20, 2013) (same).

facts as true, "legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption." *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011). Because Plaintiffs have not alleged sufficient facts that would plausibly entitle them to relief, their claims should be dismissed with prejudice. *See Iqbal*, 556 U.S. at 679.

I. The District's Policies Do Not Violate Title IX

A. Plaintiffs have not alleged facts that, if true, would support a finding of discrimination on the basis of sex.

To sustain a Title IX sexual harassment claim, Plaintiffs must establish that they experienced harassment based on sex that was "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." *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 821 (7th Cir. 2003) (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)).

Plaintiffs assert that a policy that allows students to use facilities that accord with their gender identities, in and of itself, "results in sexual harassment of SPP Students." Compl. ¶ 218. As a matter of law, it does not. Plaintiffs do not allege that any student, teacher, administrator, or staff member has ever engaged in any sexually harassing conduct against any of the SPP Students. Title IX does not reach simple acts of teasing and name-calling among school children; rather, the conduct must be severe, pervasive, and objectively offensive to merit damages under Title IX. Examples of sexually harassing conduct violative of Title IX include fondling a student's breasts, speaking in vulgar language, engaging in sexually suggestive behavior, acting in a suggestive manner, and sexual battery, harassment, and abuse. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651-52 (1999); *S.G. v. Rockford Bd. of Educ.*, 2008 WL 5070334, at *3 (N.D. Ill. Nov. 24, 2008).

No court has ever held that permitting transgender students to use restrooms and locker rooms consistent with their gender identity is sexual harassment. That would require finding that simply being transgender transforms the ordinary use of a restroom or locker room into an act of harassment. The mere presence of a transgender student in a restroom or locker room "does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile." *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 392 (E.D. Pa. 2017); *see Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (rejecting female employee's claim that a transgender female co-worker's use of the women's restrooms constituted sexual harassment).

Federal regulation 34 C.F.R. § 106.33 offers Plaintiffs no support. That regulation states that schools "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." It thus permits, but does not require, single-sex facilities. It does not permit, much less require, that schools force students out of the facilities consistent with their gender identity, health, safety, or dignity because they are transgender.

Further, the conduct Plaintiffs allege—allowing students to use single-sex facilities that accord with their gender—does not target Plaintiff Students on the basis of sex. *See* 20 U.S.C. § 1681; *Doe*, 276 F. Supp. 3d 324 (permitting transgender students to use facilities appropriate to their gender identity does not discriminate on the basis of sex "because the School District treats both male and female students similarly"). Plaintiffs have not alleged that Plaintiff Students are treated differently from others or harassed based on sex, or because they do not look or act in accord with sex stereotypes. As alleged, like any other students, Plaintiff Students are permitted to use a multi-occupancy restroom and locker room consistent with their gender identity; like any

other students, if they do not wish to do so, they may use a single-occupancy facility; and like any other students, they are entitled to protection against sexual harassment and bullying. The substance of Plaintiffs' claims is not an objection to Plaintiff Students receiving different or worse treatment than other students, but to students who are transgender receiving equal treatment. That is not a violation of Plaintiffs' rights under Title IX.[3]

B. In fact, the injunctive relief Plaintiffs seek would illegally discriminate on the basis of sex.

Instead of remedying sex discrimination, the injunctive relief Plaintiffs seek, because it would bar students who are transgender from using restrooms and locker rooms consistent with their gender identity (Compl. ¶ 213), would violate Title IX and the Equal Protection Clause. *Whitaker*, 858 F.3d at 1050; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294-95 (W.D. Pa. 2017) (violates Equal Protection Clause); *Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 877 (S.D. Ohio 2016) (same); *see also Dodds v. U.S. Dep't Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (transgender student likely to succeed on merits of Title IX claim); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 2017 WL 5632662, at *6-7 (M.D. Pa. Nov. 22, 2017) (denying motion to dismiss transgender student's equal protection and Title IX claim); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 2018 WL 1257097, at *16-*17 (D. Md. Mar. 12, 2018) (same). As this Court has recognized already in this case, under controlling precedent "[d]iscrimination against transgender individuals is sex discrimination." Memo. Op. 9.

Plaintiffs' claim rests on their definition of "sex" as "male or female, as grounded in the fact that humans reproduce sexually," which "requires a male and a female to each contribute

[3] Plaintiffs assert that the District Board Policy JFJK/GBMB Prohibition of Sexual Harassment sets a harassment threshold that has been met. Compl. ¶ 217. There is no legal basis in Title IX for such a threshold, and Plaintiffs make no showing that the harassment they allege was on the basis of their sex, so that policy is irrelevant.

their sex-specific gametes to form a zygote." Compl. ¶¶ 206-07. That definition is wrong as a matter of law, as this Court has already recognized. Memo. Op. 6-11. The Seventh Circuit in *Whitaker* conclusively rejected the notion that "sex" is limited to the "traditional" concept of being male or female. 858 F.3d at 1050, 1053-54. The court explained that the term "biological" appears nowhere in Title IX. *Id.* at 1047. Instead, *Price Waterhouse* and a long line of federal precedent make clear that "sex" includes characteristics such as gender identity and an individual's conformity (or lack of conformity) with societal expectations regarding gender roles. *See id.* at 1048-49 (collecting cases).

Every other federal appellate court that has considered sex discrimination claims brought by transgender people post-*Price Waterhouse*—including the First, Sixth, Ninth, and Eleventh Circuits—has reached the same conclusion as the *Whitaker* court. *See EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567-74 (6th Cir. 2018) (Title VII); *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (Title VII); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000) (Gender Motivated Violence Act); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). Courts considering Equal Protection claims take the same approach. *See Whitaker*, 858 F.3d at 1050, 1053-54; *Evancho*, 237 F. Supp. 3d at 294-95; *Highland*, 208 F. Supp. 3d at 874-77.

Far from violating Title IX, the District has done what is necessary to comply with Title IX and Equal Protection. Plaintiffs have not stated a claim for which relief may be granted.

II. The District's Policies Do Not Violate The Fundamental Right To Bodily Privacy

Plaintiffs fail to state a claim that the District's policies violate their constitutional right to bodily privacy. The Fourteenth Amendment extends substantive due process protection to bodily privacy interests in certain limited circumstances. *See, e.g.*, *Lawrence v. Tex.*, 539 U.S. 558, 577-

78 (2003); *Roe v. Wade*, 410 U.S. 113, 153 (1973). While that right may, in some instances, extend to "forced observations or inspections of the naked body . . . by a member of the opposite sex" (*Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994)), no such compelled exposure is implicated here. Rather, the District makes private accommodations for *all* students in the form of privacy curtains and single-use facilities. Thus, as this Court has recognized, the true issue raised by this claim is "whether high school students have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different from theirs." Memo. Op. 11-12. No such right is recognized by any court, and to create one would "fl[y] in the face of *Whitaker*." *See id.* at 12.

The Seventh Circuit in *Whitaker* rejected the contention that the mere "risk" a student may suffer harm is sufficient to establish a violation of the right to bodily privacy, absent evidence that the presence of a transgender student "has actually caused an invasion of any other student's privacy." 858 F.3d at 1054. The court explained (*id.* at 1052):

> 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 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.

Accordingly, an actual invasion of bodily privacy far beyond the common sense norms of bathroom and locker room use must be alleged before a bodily privacy claim can survive a motion to dismiss. Here, Plaintiffs come no closer to alleging an actual invasion of bodily privacy than the school district in *Whitaker*. Although they allege that some Plaintiff Students "encountered Student A" in the girls' restrooms, they do not allege that Student A or the Plaintiff Students were unclothed during these encounters. Compl. ¶ 214(jj). There is no allegation that Plaintiff Students actually encountered Student A in the swim locker room. *Id.* ¶¶ 214(y)-(z). Nor

are Plaintiffs' allegations regarding the inadequacy of privacy stalls persuasive. *See id.* ¶¶ 178-182, 214(n)-(q). The possibility of brief, easily avoided glimpses of someone through a gap in a partition does not rise to the level of a constitutional violation. In any event, students "who have true privacy concerns" may access single-occupancy facilities. *Id.* ¶¶ 99, 115. Accordingly, the District does *not* mandate "forced observations or inspections of the naked body" by anyone, let alone by "a member of the opposite sex." *Canedy*, 16 F.3d at 185.[4]

Plaintiffs see "risk" in being in the presence of transgender students in restrooms or locker rooms. But courts have consistently refused to hold that these perceived risks are enough to banish students who are transgender from common school facilities. *See Doe*, 276 F. Supp. 3d at 387("high school students … have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs"); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *2 (N.D. Ill. Oct. 18, 2016) (same); *Evancho*, 237 F. Supp. 3d at 290 (transgender girl's presence in girl's bathroom did not demonstrate "any threatened or actually occurring violations of personal privacy"); *M.A.B.*, 2018 WL 1257097, at *16-*17 (same); *Highland*, 208 F. Supp. 3d at 876 (policy preventing transgender girl from using girl's bathroom was not substantially related to the district's interest in students' bodily privacy); *see also Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting cisgender female prisoner's claim that housing transgender female prisoner with her violated her right to bodily privacy).

Although Plaintiffs try to shoehorn their claimed right into the constitutional right to bodily privacy, what they are really doing is asking this Court to establish a new fundamental

[4] The vague, sensationalist allegations at Compl. ¶¶ 77, 79 are irrelevant. That student is not alleged to have been affiliated with Plaintiffs. Even assuming she had a constitutional privacy claim, the Plaintiffs would lack standing to raise it.

right that has never been recognized by any court and should not be recognized now: the right to exclude people from common spaces based solely on their gender assigned at birth.

III. The District's Policies Do Not Violate The Right To Parent Children

Plaintiffs allege that their Fourteenth Amendment right to "direct the education and upbringing of one's children" (Compl. ¶ 271), is infringed by the District's policies. Specifically, they assert a right to "instill moral standards and values" into their children by sending them to school absent the presence of transgender students in restrooms and locker rooms. *Id.* ¶¶ 272-274. The Fourteenth Amendment encompasses no such right.

To be sure, the Due Process Clause of the Fourteenth Amendment encompasses a right to make choices in connection with the education of one's children. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down Nebraska law prohibiting teaching of foreign language); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down Oregon compulsory attendance law). But at most this right allows parents to "to seek a reasonable alternative to public education for their children." *Scoma v. Chi. Bd. of Educ.*, 391 F. Supp. 452, 460 (N.D. Ill. 1974). It does "'not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense.'" *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005); *see also Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring) (*Pierce* does not permit parents to "replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."). Parents may have the right to remove their students from public schools, but they have no constitutional right to force the state to run its public schools in accordance with their particular moral or religious beliefs. *See Fields*, 427 F.3d at 1207. In other words, the right to make choices in connection with the education of one's own children does not include the right to alter the education of other people's children, let alone exclude those children from common spaces on

school grounds. Plaintiffs thus have no fundamental right to prohibit the District from allowing students to use facilities consistent with their gender identity.

IV. The District's Policies Do Not Infringe On The Free Exercise Of Religion

Plaintiffs allege that the District has violated "the right to the free exercise of religion of some Christian SPP Students and Parents." Compl. ¶ 30. However, they have failed to explain how their free exercise rights are infringed by the District's policy. Had Plaintiffs explained their claims, the District's policies would still only be subject to rational basis review, because they are neutral and generally applicable. Even if strict scrutiny applied, the policies are narrowly tailored to serve the compelling government interests of student safety and non-discrimination.

A. Plaintiffs have not clearly articulated their claim or explained how they are burdened by the District's policies

Plaintiffs do not clearly explain how the District has interfered with their freedom to practice their religion. The Complaint alleges that "some Christian SPP Students and Parents" (Compl. ¶¶ 30, 306) hold sincerely held religious beliefs that modesty requires students to refrain from undressing or using the restroom in the presence of students of the opposite sex, or be present when opposite-sex students are undressing or using the restroom. *Id.* ¶¶ 294-296. But this case "does not merely involve members of the opposite sex." *Doe*, 276 F. Supp. 3d at 386. "[A]lthough the plaintiffs refuse to refer to them as such, this case involves transgender students." *Id.*

Moreover, regardless of how the Plaintiffs characterize the sex of students who are transgender, they never allege that the subset of students claiming free exercise violations actually had to undress or use the restroom in the presence of a student who is transgender. For example, Plaintiffs allege that "[s]ome SPP Girls . . . encountered Student A" in the restroom, but do not allege that the encounter violated those students' religious beliefs. Compl. ¶¶ 70-71.

They allege that Student A "failed to use a private changing station" while utilizing the girls' locker rooms, but do not allege that SPP Students, let alone religious students, were present. *Id.* ¶ 104; *see also id.* ¶ 113 (parent requested access to a private room to protect her daughter's "privacy"); *id.* ¶ 214 (listing "impacts on SPP Students" that do not include religious impacts). Nor are there allegations that these students will attend school with a transgender student in the future. *See id.* ¶¶ 150-151. Even if there were, those students have the option of using a privacy stall or single-occupancy facility if their religion required them to have complete privacy. *Id.* ¶¶ 99, 115. Especially given the availability of single-occupancy facilities, it is unclear what precisely the Plaintiffs allege to have compromised their modesty beliefs.

Furthermore, to the extent Plaintiffs object that SPP Students have been (or will be) informed of the District's policies, they do not state a cognizable claim. "[T]he 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, 105 (1st Cir. 2008); *see also Mozert v Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (requiring study of evolution does not burden objecting family's free exercise rights); *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 394 (M.D. Pa. 2014) (female student could not be excluded from wrestling team to protect students against "the perceived psychological and moral degradation accompanying coeducational wrestling"); *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (female student could not be excluded from wrestling team based on "student and parent objections based on moral beliefs").

B. The polices are neutral and generally applicable

"[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Division v. Smith*,

494 U.S. 872, 879 (1990) (internal quotation marks omitted). A law that is neutral and generally applicable is constitutionally permissible if it is rationally related to a legitimate government interest. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Plaintiffs claim that the Policy is not generally applicable because it "does not allow all students to use the opposite-sex restrooms, but only [transgender] students," or, in the case of the Locker Room Agreement, one particular transgender student. Compl. ¶¶ 308-313. This assertion reflects a misunderstanding of the term "generally applicable." "Generally applicable" means that the government action is not "specifically directed at" a religious practice. *Employment Div.*, 494 U.S. at 878. To make that determination, courts look at whether the government enforces a law "in a selective manner" to "impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543.

Plaintiffs allege no facts to support a claim that the policies at issue target any religious group or practice, that they have been enforced selectively against people engaging in religiously-motivated conduct, or that they have as their "object" the "suppression" of anyone's free exercise of religion. *Employment Division*, 494 U.S. at 878. The policies allow students to use gender-appropriate facilities and make privacy accommodations available to "any student." Compl. ¶ 99. Those protections affect all students, regardless of their religious beliefs. Indeed, Plaintiffs' claim that non-religious SPP members are harmed by the policies belie any contention that the Policy singles out a particular religion.[5]

The District's policies are generally applicable, and any burden on religious practice is incidental. As such, strict scrutiny does not apply. Plaintiffs attempt to skirt that result by invoking the so-called "hybrid rights" exception (Compl. ¶ 314), but, even assuming that

[5] While only "some" SPP members hold religious objections to the Policy (Compl. ¶¶ 30, 306), "all" SPP members object to the Policy on "moral" grounds. *Id.* ¶ 276.

doctrine were viable,[6] it would not apply here as the companion constitutional claims Plaintiffs assert are not colorable. *See, e.g.*, *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 641 (7th Cir. 2017) ("A plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right."), *cert. denied sub nom. Ill. Bible Colls. Ass'n v. Cross*, 138 S. Ct. 1021 (2018). Therefore, rational basis scrutiny applies, and the Policy easily meets that threshold.

C. The policies also satisfy strict scrutiny

Even if strict scrutiny applied, the policies would survive that test because they are narrowly tailored to the compelling government interests of promoting student safety and eliminating discrimination.

Protecting student safety and well-being is a compelling government interest. *E.g.*, *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 797–98 (7th Cir. 1987); *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996). Likewise, government has a compelling interest "of the highest order" in "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, (1984); *see id.* at 628 (discrimination "cause[s] unique evils that government has a compelling interest to prevent"); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 n.5 (1988) (recognizing the "State's

[6] In *Employment Division*, the U.S. Supreme Court suggested that a neutral law of general applicability could be unconstitutional if the law violated both free exercise and an additional constitutional right. 494 U.S. at 882. Though it has had several opportunities to do so, the Court has never subsequently employed the hybrid rights doctrine. *See, e.g.*, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697 (2010); *Lukumi*, 508 U.S. at 566-71 (Souter, J., concurring in part and concurring in the judgment) (rejecting the concept of a hybrid rights claim as "ultimately untenable"). Most circuit courts similarly refuse to apply the doctrine. *See, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 647 n.5 (3d Cir. 2009); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Workman v. Mingo County Bd. Of Educ.*, 419 Fed. App'x. 348 (4th Cir. 2011); *Kissinger v. Board of Trustees of the Ohio State University*, 5 F.3d 177, 180 (6th Cir. 1993).

'compelling interest' in combating invidious discrimination"). That includes a school district's "compelling state interest not to discriminate against transgender students." *Doe*, 276 F. Supp. 3d at 390. Anti-discrimination laws and policies ensure "society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625.

The District's policies are narrowly tailored to serve both of these interests. The only alternative—denying transgender students the use of gender-appropriate facilities solely because they are transgender—would perpetrate the very harms the District sought to avoid. It would compromise transgender students' safety and well-being and discriminate against them on the basis of sex and transgender status. In *Equal Employment Opportunity Commission*, for example, the Sixth Circuit rejected a funeral home's argument that it was entitled to a religious exemption from Title VII enforcement when it terminated a funeral director who was transgender. 884 F.3d at 591. The court explained that *even if* enforcing Title VII would substantially burden the employer's religious beliefs, "[f]ailing to enforce" it would mean "allowing a particular person—[the funeral director]—to suffer discrimination." *Id.* Such an outcome would have been "directly contrary" to the government's "compelling interest in combating discrimination in the workforce." *Id.* Avoiding discrimination against transgender students furthers the government's compelling interest in ending the "stigmatizing injury" of discrimination as well as "the denial of equal opportunities that accompanies it." *Roberts*, 468 U.S. at 625.

The District accommodated other students by continuing to permit them to use multi-occupancy restrooms and locker rooms precisely as they had always done, or to choose to use single-occupancy facilities if they preferred. Compl. ¶¶ 99, 115. Religious objections can be accommodated by providing additional privacy options to those who seek them, but when "sincere, personal opposition" to sharing common areas with transgender people becomes

official school policy, "the necessary consequence is to put the imprimatur of the [school] itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). While Plaintiffs may choose to use single-user facilities, they are not required to do so. There is a significant difference between making the choice to use single-user facilities to protect one's own sense of privacy and being required to use separate facilities because your existence is deemed unacceptable. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.), cert. granted in part, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), *and vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) (Davis, J., concurring) ("For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students.").

The School District had no other way to serve its paramount interest in the safety and dignity of all students than to permit all students, including those who are transgender, to use gender-appropriate restrooms and locker rooms.

V. The District's Policies Do Not Violate the Illinois Religious Freedom Restoration Act

Plaintiffs allege that the District policies "violate[d] the SPP Parents' and Students' rights under the Illinois Religious Freedom Restoration Act" ("IRFRA") (Compl. ¶ 303) because they "preven[t] the SPP Students from practicing the modesty that their faith requires of them" and "contradict[] the SPP Parents' sincerely-held religious beliefs relative to teaching their children sexual modesty consistent with their religious beliefs." *Id.* ¶¶ 296-97. But Plaintiffs' allegations do not meet the standards for an IRFRA claim.

Under IRFRA, "[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 ILCS 35/15 (emphasis added). We have already demonstrated that, on the face of the Complaint, the challenged policies further compelling government interests in the least restrictive manner possible. Part D.3, *supra*. But in addition, Plaintiffs IRFRA claim should be dismissed because Plaintiffs fail to "make a threshold showing" that District policies "impose a 'substantial burden' on the free exercise of [their] religion." *Diggs v. Snyder*, 333 Ill. App. 3d 189, 195 (5th Dist. 2002).

"[T]he hallmark of a substantial burden . . . is the presentation of a coercive choice of either abandoning one's religious convictions or complying with the governmental regulation." *Diggs*, 333 Ill. App. 3d at 195 (citing *Yoder*, 406 U.S. at 217-18). Accordingly, "a plaintiff must demonstrate that the governmental action prevents him from engaging in conduct or having a religious experience that his faith mandates." *Id.* (internal citations omitted). Finding a substantial burden anytime a law "constrain[s] *any* religious exercise" would "render meaningless the word 'substantial.'" *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (construing Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*).[7] As the Seventh Circuit has explained, this standard requires a plaintiff to show that challenged government action "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Id.*

An example of a coercive choice that rises to the level of a substantial burden is the state law held invalid in *Sherbert v. Verner*, 374 U.S. 398 (1963), requiring acceptance of Saturday work to be eligible for unemployment benefits, thereby requiring those who recognize Saturday

[7] Cases interpreting RLUIPA provide guidance for interpreting IRFRA. *See Diggs*, 775 N.E.2d 40, 44–45 (Ill. 2002); *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531, 533 (7th Cir. 2009).

as the Sabbath to decide between their beliefs and unemployment benefits. *Cf. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston,* 250 F. Supp. 2d 961, 993 (N.D. Ill. 2003) (no RFRA violation where local zoning ordinance prevented a church from conducting services in building it purchased; plaintiff's "inconveniences" did not "rise to the level of a significant burden" because the church was able to conduct services elsewhere in the vicinity); *Diggs,* 333 Ill. App. 3d at 195 (confiscation of religious pamphlet not a substantial burden).

Here, Plaintiffs have not alleged sufficient facts to support the claim that the District's policies "substantially burden" their religious exercise. They make sweeping but vague allegations that the District's policies contract Plaintiffs' beliefs regarding sexual modesty. Compl. ¶¶ 296-98. Plaintiffs assert that they hold religious beliefs that SPP Students must not undress or use the restroom in the presence of students that Plaintiffs regard as being of the "opposite sex," or be present when students of the "opposite sex" are undressing or using the restroom. *Id.* ¶¶ 294-296. But Plaintiffs have not alleged sufficient facts demonstrating that the District's policies prevent them "from engaging in conduct or having a religious experience that [their] faith mandates." *Diggs,* 333 Ill. App. 3d at 195. As already explained in Part D.1, *supra,* Plaintiffs have not alleged sufficient facts to support the claim that the District has interfered with their religious exercise of religious mandates in any way—let alone a claim that the District's policies are a "substantial burden" on their religious exercise. Plaintiffs have not alleged that any SPP Student has had to undress or use the restroom in a transgender student's presence. In addition, there are private changing stations within the locker rooms, which any student may use during changing periods, and a separate locker room for students who are participating in a swimming activity or class. *See* Compl. ¶¶ 99, 214(bb). Plaintiffs' allegations do not satisfy pleading requirements for an IRFRA claim. *See Diggs,* 333 Ill. App. 3d at 195

(plaintiff failed to state a claim under the Illinois RFRA where he failed to plead that "the confiscation of the unauthorized pamphlet prevented him from fulfilling any religious obligation mandated by Islamic law or practice"); *Civil Liberties for Urban Believers*, 342 F.3d at 766 ("Whatever the obstacles that the CZO might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs.").

Even if Plaintiffs have alleged sufficient facts to show that the District's policies impose a substantial burden on the free exercise of their religion, their IFRA claim fails because the District's policies are narrowly tailored to further a compelling government interest. *See* Part D.3, *supra*. In any event, Plaintiffs' IFRA claim is preempted by federal law. Under the Supremacy Clause, no interpretation of IRFRA that required Illinois School Districts to discriminate against transgender students in violation of Title IX and Equal Protection can stand. This Court's prior recognition that barring transgender students from gender appropriate facilities violates Title IX under controlling law forecloses Plaintiffs' IRFRA claim as a matter of law. *See* Memo. Op. 9. Accordingly, Plaintiffs have not asserted sufficient facts to state a claim for which relief may be granted.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully ask that the Plaintiffs' claims in the First Amended Complaint be dismissed with prejudice.

Respectfully submitted,

Dated: April 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the CM/ECF system. I certify that all participants in the case are registered MC/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ *Britt M. Miller*