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,	)	
v.	)	Case No. 1:16-cv-4945
SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS,	)	The Honorable Jorge L. Alonso 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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiffs incorrectly accuse Defendants of re-defining the terms "sex" and "gender." Under the Seventh Circuit's decisions in both *Whitaker* and *Hively*, excluding a transgender person from access to a facility that conforms to their gender identity is "sex discrimination" prohibited by Title IX and violates the Equal Protection and Due Process clauses of the Constitution, regardless of how one defines "sex" or "gender." This court is bound to follow the Seventh Circuit's directives, and most of Plaintiffs' arguments constitute a direct challenge to the reasoning of those decisions. As such, any contention that the statutory or Constitutional rights of the students whom Plaintiffs purport to represent are being violated by the District acting in conformity with what *Whitaker* and *Hively* compel are insufficient as a matter of law to avoid dismissal of the Amended Complaint.

ARGUMENT

I. This Case Should Be Dismissed Because Plaintiffs Lack Standing

A. SPP Lacks Standing to Bring this Action on Behalf of SPP Students

Plaintiff Students and Parents for Privacy (SPP) does not argue that the organization itself has suffered an injury that gives it standing to sue in its own right. Also, none of the arguments raised in plaintiffs' response give SPP associational standing to sue on behalf of its members.

Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors, 522 F.3d 796 (7th Cir. 2008), cited by Plaintiffs (Pl. Brief p. 25), confirms that SPP lacks standing in this case. There, the court held that an organization lacked standing to sue because the allegations in the complaint did not establish standing for any of its individual members even though all parties conceded the organization was an advocacy group able to sue on behalf of its members in theory.

The District does not dispute SPP's status as an advocacy organization, but as in *Disability Rights*, this status alone is not sufficient to confer standing. Although an advocacy group need not identify the specific members on whose behalf the group is suing, *Disability Rights* unambiguously holds that this does not relieve an organizational plaintiff of the burden of making allegations, which if true, would confer standing on behalf of an individual member. *Id.* at 802-3. Just as in *Disability Rights,* SPP lacks standing because the allegations in the Amended Complaint fail to confer standing on *any* individual SPP student regardless of whether any SPP Student is named or identified in the Amended Complaint.

Plaintiffs' reliance on *Ezell v. City of Chicago,* 651 F.3d 684, 696 (7th Cir. 2011) is also misplaced. In that case the court held that an organization had standing to sue on behalf of firearm owners to challenge the City of Chicago's ban on firing ranges within the City. The district court had originally denied standing because there was no evidence that any City resident had been unable to travel to a range outside of the City for the training necessary to obtain a permit. The appellate court reversed this decision because the question presented by the case was whether the firing range ban itself violated the Second Amendment, not whether the residents had been denied the opportunity to get the training necessary to obtain a permit due to the ban. *Id.* Viewed in this manner, the alleged injury to the organization's members was apparent and was sufficient to confer standing. *Id.*

In contrast, Plaintiffs make no allegations which permit an inference that any SPP members have suffered a cognizable injury that would allow any SPP Member to sue in his or her own right. Here, the question of whether the SPP students' or parents' Title IX or Constitutional rights have been violated inextricably depends on whether any SPP student has ever been or is likely to be in a locker room at the same time as a transgender student whose (in

Plaintiffs' words) "biological sex" does not conform to his or her gender identity. As described in the District's initial brief (Dist. Brief pp. 5-6), Plaintiffs do not allege that any SPP student has been or will be physically present in a locker room or restroom with a transgender student whose "biological sex" is different than the sex of the SPP student, or that any SPP students have been harmed or threatened to be harmed in any way by the presence of a transgender student in a locker room under such a scenario. They do not even allege that any SPP student is in the same grade, attends the same PE class, or has the same class schedule as a transgender individual who wishes to use a restroom or locker room that conforms to the student's gender identity but not "biological sex."[1]

Just as the Supreme Court held in *O'Shea v. Littleton* that the risk of an African American resident being subjected to racist and unconstitutional police and prosecutorial conduct did not give standing to African American residents who had never been arrested or subjected to the alleged conduct, Plaintiffs' allegations of a generalized "risk" to SPP students is insufficient to confer standing in this case. 414 U.S. 488, 495 (1974). Plaintiffs do not distinguish *O'Shea* or explain how the reasoning of that case does not apply with full force in this case.

SPP also lacks standing to sue on behalf of its members because it cannot establish that "neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit." *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiffs attempt to rely on *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 601 (7th Cir. 1993), where the Seventh Circuit opined that this element "is more plausibly read as dealing with situations in which it is necessary to establish 'individualized proof' for litigants not

[1] Plaintiffs also make no allegation as to the number of "SPP Students" who share the viewpoint of SPP, which makes their allegations even more deficient for standing purposes. There is nothing to suggest that SPP speaks for anyone other than a small minority of District students and parents, thus decreasing the likelihood that any SPP student would actually be harmed or impacted by the practices that SPP challenges given the overall size of the District and total number of students.

before the court in order to support the cause of action." *Id.* This distinction, however, does not help SPP because, as previously explained by the District Plaintiffs' Title IX and Constitutional claims all require fact-intensive, case by case, individualized proof, and are exactly the sort of claims for which this standing element applies under binding Supreme Court precedent. (Dist. Brief, pp. 5-6); *Hunt*, 432 U.S. at 343.

Plaintiffs' assertion that they only seek "prospective injunctive" relief does not eliminate this individualized proof element because this requirement applies both to proof of the underlying claims necessary to obtain injunctive relief as well as the proof of damages or entitlement to other relief. *Id.* Accordingly, Plaintiffs' limiting of the remedy sought does not remedy this fatal flaw in the Amended Complaint.

B. Victoria Wilson's Status as a Parent Does Not Give Her Standing Because There is No Allegation that Gives Her Children Standing

Plaintiffs summarily assert that Victoria Wilson has status to sue "as a parent," but do not respond the District's argument as to why she lacks standing. Wilson lacks standing because -- just as SPP alleges no injury to a SPP Student that would give SPP standing -- Wilson alleges no injury to her children that gives her standing to sue on their behalf. As *O'Shea* confirms, the generalized risk or fear that at some point in the future her children could be in a restroom or locker room with a student whose gender identity is the same sex as her children but has a different "biological sex" does not give her standing. *See e.g.*, *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).

II. *Whitaker* is Controlling Precedent

Plaintiffs argue the Seventh Circuit's decision in *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) should not be given controlling weight because it is a preliminary injunction determination. Plaintiffs mistake the weight owed to the decision. Although the general rule is that preliminary injunction decisions do not constitute the law of the case; there is an important exception.to that general rule. "Any of our conclusions on pure issues of law […] are binding." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture*, 499 F.3d 1108, 1114 (9th Cir. 2007), *citing See This That and The Other Gift and Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1284-1285 (11th Cir. 2006); *see also Highway J. Citizens Group, U.A. v. U.S. Dept. of Transp.*, 656 F.Supp. 2d 868 (E.D. Wis 2009); *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979) (finding a decision final for collateral estoppel purposes when, as a practical matter, the decision is immune from reversal or amendment). "A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal. . . become[s] the law of the case for further proceedings in the trial court on remand and in any subsequent appeal." 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2002).

The Seventh Circuit's in *Whitaker* made a binding interpretation of Title IX: "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." 858 F.3d at 1049. This legal determination is binding even though issued on review of preliminary relief.

Plaintiffs other arguments regarding *Whitaker* assert that the decision was wrongly decided. This Court cannot overturn precedent set by the Seventh Circuit. *See Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc). In *Hively* the court held that Title VII of the Civil Rights Act prohibited discrimination based on sexual orientation. The *Hively* court's reasoning applies equally to discrimination claims under Title IX and discrimination based on gender identity. Accordingly, Plaintiffs' attempts to distinguish or disregard binding Seventh Circuit precedent must be disregarded.

III. Plaintiffs Do Not Allege a Violation of Title IX

A. Plaintiff Students were not Subject to Discrimination Based on their Sex

Plaintiffs contend that it is "slightly nonsensical" for the District to contend that cisgender students whom Plaintiffs purport to represent were not subjected to discrimination based on their own sex because the District relies on *Whitaker*. (Pl. Resp. at 5). Actually, it is Plaintiff's assertion that *Whitaker* can somehow be interpreted to support the exclusion of transgender individuals from restrooms and locker rooms that conform to their gender identity that is nonsensical. What Plaintiffs ignore is that the touchstone of a sex discrimination claim is that a plaintiff must allege and prove that the plaintiff is being intentionally discriminated against because of the sex of the plaintiff.

In *Whitaker*, the Seventh Circuit held that denying an individual access to the restroom that conforms to the student's gender identity constitutes discriminatory "sex stereotyping" that is directed at that student because of the student's "sex" in violation of Title IX. The touchstone of the decision was that the plaintiff was being singled out because of his "sex" as defined by the court. *See* 858 F.3d at 1049.

Here, there is no allegations that SPP students are being discriminated against because of their *own* sex (i.e. because the SPP students are female or male). Rather, the only "injury" that Plaintiffs allege is the result of alleged beliefs of the parents and who Plaintiffs purport to represent about the "sex" of the transgender student and belief that restrooms and locker rooms should be segregated by "biological sex" without exception for both boys and girls. As a matter of law, this is not discrimination against the students who Plaintiffs purport to represent because of the "sex" of those students.

B. As a Matter of Law the Presence of a Transgender Student in a Locker Room Does Not Create a Severe and Pervasive Environment Based on Sex

The cases relied upon by the Plaintiffs to support their hostile environment claim are so far removed from the situation presented here that, at best, they confirm the lack of any potential Title IX violation and, at worst, offensively equate transgender students to sexual predators. For example, Plaintiffs rely on *People v. Grunau*, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009), a criminal case where a man with two previous convictions for sexually molesting a 5-year-old girl and a 10-year-old girl was caught staring at a teenager showering in a locker room.

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

Lewis v. Triborough Bridge and Tunnel Authority, 77 F. Supp. 2d 376, 378 (S.D.N.Y. 1999). They similarly omit from the description of facts in *Schonauer v. DCR Entertainment Inc*., 905 P.2d 392, 400-401 (Wash. Ct. App. 1995) that the defendant "pressured [plaintiff], repeatedly and intentionally, to provide fantasized sexual information and to dance on stage in sexually provocative ways" and that she was fired for refusing to dance nude on stage. Similarly, Plaintiffs' reliance on *Norwood v. Dale Maintenance System*, 590 F. Supp. 1410 (N.D. Ill. 1984), is misplaced, as it addresses a BFOQ defense under Title VII for a restroom janitor; not whether a hostile work environment exists.

Plaintiffs' implication – that a transgender student's use of restrooms and locker rooms that conform with his or her gender identity is similar to a "Peeping Tom," convicted sex offender, or serial sexual harasser – is both legally unsupported and patently offensive and demonstrates the total lack of merit in their Title IX claim.

An action under Title IX lies only where the behavior denies a victim equal access to education. *Gabrielle M. v. IL. School Dist*. 163, 315 F.3d 817, 823 (7th Cir. 2003). The harassment must have a "concrete, negative effect" on the victim's education such as dropping grades, becoming homebound or hospitalized due to harassment, or physical violence. *Id.* (citations omitted). Plaintiffs point to no "SPP Student" who allegedly has suffered any adverse impact whatsoever from a transgender student being present in a locker room or restroom.

Plaintiffs argue that the mere possible presence of a transgender student is itself a "concrete negative effect," but that is not what the case law holds, and this assertion once again directly contradicts *Whitaker*. Plaintiffs don't even allege a single "SPP Student" who has been present in the locker room at the same time as a transgender student, let alone any student whose educational experience has suffered to the extent required to state an actionable Title IX claim.

This is yet another reason why Plaintiffs lack standing to sue on behalf of unidentified cisgender students and is also a reason why they have failed to plead an actionable claim on behalf of these unidentified students under Title IX.

IV. Plaintiffs Have Not Plead a Constitutional Right to Privacy that was Violated

In their Response, Plaintiffs assert that "everyone" has a "constitutionally protected privacy interest in his or her partially clothed body," relying on *Doe v. Luzerne County*, 660 F.3d 169, 176 (3rd Cir. 2011) and *Poe v. Leonard*, 282 F.3d 123 (2nd Cir. 2002). Plaintiffs significantly overstate the holding of these cases and the scope of constitutionally protected privacy rights.

In *Doe*, a female deputy sheriff was filmed by her male co-workers after she stepped out of a decontamination shower; her colleagues showed the photos and video to others and loaded them onto a computer server. *Id*. at 173. On appeal, the Second Circuit did not find the plaintiff's constitutional rights were violated. Instead, it recognized that there is no "rule that a nonconsensual exposure of certain anatomical areas constitutes a per se violation," and remanded to the district court to analyze "whether Doe's exposure meets the lofty constitutional standard of the 'most intimate aspects of human affairs' that involve 'deeply rooted notions of fundamental personal interests.'" *Id*. at 176-7, citing *Nunez v. Pachman*, 578 F.3d 228, 232 (3rd Cir. 2009).

Likewise, *Poe v. Leonard*, 282 F.3d 123, 138 (2nd Cir. 2002), does not establish a generalized constitutional right to privacy in a partially clothed body. Rather, as the Second Circuit held: "a police officer violates a person's constitutional right to bodily privacy when that officer manipulates the circumstances to view, to photograph, to videotape or otherwise to record that person's unclothed or partially unclothed body without his or her consent where, as here,

there is no conceivable investigative or otherwise proper law-enforcement interest advanced by such a viewing." *Id*. at 139. That holding has nothing to do with this case.

The other cases cited by Plaintiffs involve strip searches in schools and prisons, with actual touching or photographing of unclothed body parts by the opposite sex, not the mere "risk" that a person could be in the presence of a transgender person when undressing or using the restroom. Transgender students' appropriate use of a restroom or locker room does not involve the sort of intrusion at issue in *Safford Unified Sch. District #1 v. Redding*, 557 U.S. 364 (2009) (13 year old girl subjected to a search of her bra and underpants and exposure of breast and pelvic area over suspicion she brought ibuprofen and naproxen to school) or *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (forceful removal of plaintiff's underwear in presence of male guards held unreasonable), or *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (male police officer deceived the plaintiff into allowing him to photograph her genitals and breasts under the pretext of an investigation, and then later distributed those photos); or *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (a strip search in which two teachers inspected the student's naked groin was constitutional).

The very broad constitutional right to privacy that Plaintiffs urge this court to recognize has never been recognized by another court. Indeed, if such a broad right existed, the Third Circuit in *Doe* would not have remanded the case to the district court to determine whether defendants actually violated the plaintiff's right to privacy. 660 F.3d 169, 176. If Plaintiffs' position were correct, the defendants in *Doe* would have violated the right to privacy simply by entering the decontamination room. Under Plaintiffs' expansive theory, a female student who accidentally enters the wrong locker room or glances into an open restroom door would violate a constitutional right to privacy. There is no legal support for such a broad right of privacy.

Further, this case does not involve cisgender students being exposed to opposite-sex cisgender students, but, instead, involves transgender students and whether it violates the constitutional rights of a cisgender student for transgender students to be in the locker room or restroom.

In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court made clear that 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). Nothing in Plaintiffs' amended complaint or brief supports expanding a constitutional right to privacy to a right not to share restrooms or locker rooms with transgender students whose gender identity is different than their sex at birth. Given the caution about expanding constitutionally based privacy claims as noted above, Plaintiffs cannot state a claim. *See also Whitaker*, 858 F.3d 1034, 1052 (7th Cir. 2017).

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

Nothing in Plaintiffs' response brief supports their claim that a fundamental right is violated by allowing transgender students to access restrooms and locker rooms of their identified gender. As set forth in the District's initial brief, the fundamental right to direct the upbringing and education of one's child is subject to important limitations in the public school setting. Plaintiffs try to distinguish this case from those cited in the District's opening Memorandum by describing those cases as being limited to curriculum content, and arguing that they are not trying to control curriculum, but to restrain government conduct that allows their children to be exposed to transgender students while changing clothes or attending to personal hygiene.

First, the cases cited in the District's initial brief are not limited only to curriculum. For example, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) recognized the state may require school attendance and regulate child labor; *Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260 (3d Cir.1998) addressed a school district's consensual condom distribution program; and *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir.1995) addressed a compulsory assembly program that included sexually explicit monologues, simulated masturbation and sexually explicit skits with minors chosen from the audience. On appeal, the Court of Appeals affirmed the dismissal of the claim pursuant to FRCP 12(b)(6), finding 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." *Id* at 534.

Second, it would not matter if the cases were limited to curriculum because the reasoning still applies here. Plaintiffs present no argument that refutes the conclusion of the Ninth Circuit Court of Appeals: "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. . . Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent." *Fields v. Palmdale Sch. Dist*., 427 F.3d 1197, 1206 (9th Cir. 2005). 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.

Notably, Plaintiffs did not respond to the District's argument that strict scrutiny does not apply because a fundamental right was not involved, implicitly agreeing that rationale basis review applies. The District easily establishes that basis of review. It 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*. Accordingly, this Court should dismiss Count III.

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

In its initial brief, the District noted that Plaintiffs cannot state a claim under the ILRFRA because the District's practices of allowing transgender students access conform to federal law, 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. The District also noted that any assertion by Plaintiffs that the IRFRA bars the District from taking action mandated by Title IX is preempted by federal law. In response, Plaintiffs assert that *Whitaker* is not binding on this case. As explained above in Section II, *Whitaker* is binding, as is *Hively* which compels the same result as *Whitaker* even if *Whitaker* itself is not binding. 853 F.3d 339

The District also noted in its initial brief that Plaintiffs failed to state a claim because they did not identify their religion; did 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; nor did they allege with any specificity how the privacy arrangements in restrooms and locker rooms are insufficient to accommodate any legitimate religious principle. Plaintiffs did not respond to these arguments other than to declare that using the offered privacy measures does not resolve their issue. As is well established, Plaintiffs must provide more than "labels and conclusions" to survive a motion to dismiss, which is all that Plaintiffs offer. *Bell Atl. V. Twombley*, 550 U.S.

544, 555 (2007). This Court should dismiss Count V based on the failure of Plaintiffs to plead allegations showing a substantial burden on religious exercise by the District.

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. This provision of educational opportunities for transgender students is a compelling interest and the basis for the practices complained of in Count IV.

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

In their response brief, Plaintiffs argue that the District "has a duty to protect" . . . "religious believers from the opposite sex when they are disrobing." Plaintiffs Brief p. 16; Doc. #211, p. 26. This argument fails for several reasons.

First, Plaintiffs do not argue that the District violated First Amendment rights of the SPP Parents, so any such claim must be dismissed. Second, there is no such duty that falls under the First Amendment free exercise clause. Plaintiffs refer generally to the District's "*in loco parentis* capacity" as the source of this "duty," but provide no legal support for any such assertion. Plaintiffs also claim this purported obligation is directed by *United States v. Virginia*, 518 U.S. 515 (1996), in which the Supreme Court held that the Virginia Military Institute could not categorically exclude female applicants. Plaintiffs rely on a footnote in the decision in which the Court noted that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Id*. at 550 n. 19. That footnote has no bearing whatsoever on this case. Third, given the admitted privacy options in place, their assertion is contradicted by the facts they plead. Students who want to change in private have the option to do so.

Plaintiffs also argue that the practice of allowing transgender students locker room and bathroom access is not generally applicable because it applies only to transgender students. To the contrary, the practice applies to all students. Students who consistently identify as female may access female facilities, and students who consistently identify as male may access male facilities, regardless of their anatomy. Nor have Plaintiffs plead any facts to support an assertion that the practice of access was done to affect the SPP Students' religious beliefs. As such, rational basis review applies. 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.

CONCLUSION

For all the reasons set forth in this brief and in the District's initial brief, this Court should dismiss the Amended Complaint with prejudice.

Dated: May 21, 2018

Respectfully submitted,

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211

By: /s/ Jennifer A. Smith
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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 REPLY 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 21st day of May, 2018:

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