RECORD NO. 15-2056

In The
United States Court of Appeals
For The Fourth Circuit

G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff – Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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INTRODUCTION

The fundamental issue in this appeal is whether the Fourteenth Amendment and/or Title IX require the Gloucester County School Board to permit a student, who was born and remains anatomically a female, to use the boys' restroom, because the student now identifies as a boy. Appellant ("G.G.") was born a girl and is biologically a female. G.G. has female anatomy. JA28; Appellant Br., p. 3-4. G.G. enrolled in Gloucester High School as a girl and started ninth grade as a girl. JA29; JA12, ¶20; JA57. At the beginning of G.G.'s sophomore year, school officials were informed that G.G. was transgender and now identified as a boy. G.G., however, is still biologically and anatomically a female. JA33; JA38-39. There is no allegation, medical evidence or medical testimony that G.G. is a boy or has male chromosomes.

The restrooms and locker rooms in Gloucester County schools are separated based on the students' biological sex. The school has boys' restroom and locker room facilities and girls' restroom and locker room facilities. JA57. After informing the school that G.G. identified as a boy, G.G. voluntarily chose not to use the boys' restroom. G.G. instead used a separate restroom in the nurse's office. JA9-10, ¶3; JA15, ¶30. In late October of 2014, G.G. asked to use the boys' restroom. On October 20, 2014, school personnel at the high school allowed G.G. to use the boys' restroom. JA15, ¶32.

On November 11, 2014, after receiving numerous complaints from parents and students, the Gloucester County School Board ("School Board") considered the difficult issues associated with a transgender student seeking to use the restroom that does not correspond with the student's anatomical sex. JA57-58. During the discussion, several citizens expressed concerns to the School Board. JA15-17, ¶¶34-38. The School Board also considered G.G.'s concerns after G.G. voluntarily agreed to speak at the meeting. JA16-17, ¶38.

Taking the safety and privacy of all students into consideration, the School Board on December 9, 2014, adopted a restroom and locker room resolution. In implementing this resolution ("policy"), the School Board maintained the practice of providing separate restrooms and locker rooms based on students' biological and anatomical sex. The School Board also provided three unisex, single-stall restrooms for any student, including G.G., to use for greater privacy. JA17, ¶41; JA57-58. G.G., however, refuses to use either the girls' restrooms or the single-stall restrooms. JA19, ¶48.

School officials have supported G.G. after being informed that G.G. is transgender. G.G. has not alleged that school officials have in any way harassed or discriminated against G.G. in educational opportunities or engaged in any form of

discriminatory treatment with respect to G.G.'s transgender identification. G.G.'s only complaint is that the School will not permit G.G. to use the boys' restroom.[1]

G.G. alleges that the School Board's policy violates the Equal Protection Clause of the Fourteenth Amendment and Title IX. G.G. filed a Complaint against the School Board and sought a preliminary injunction requiring the School Board to allow G.G. to use the boy's restroom during school.

The District Court properly denied G.G.'s Motion for a Preliminary Injunction. The policy does not violate Equal Protection Clause or Title IX. Instead, the School Board treats G.G. the same as all students enrolled in Gloucester County schools. This Court should affirm the Order of the District Court.

STATEMENT OF ISSUES

1. Whether the Fourteenth Amendment or Title IX requires the School Board to permit G.G., who was born and remains anatomically a female, to use the boys' restroom because G.G. identifies as a boy.

2. Should this Court affirm the District Court's denial of G.G.'s Motion for Preliminary Injunction?

[1] G.G. has voluntarily agreed not to use the boys' locker room. JA30.

3. Should this Court affirm the District Court's Order dismissing the Title IX claim and direct the District Court to grant the School Board's Motion to Dismiss the Equal Protection claim?

STATEMENT OF THE CASE

G.G. is a 16 year old high school student in Gloucester County, Virginia. JA9, ¶1, JA11, ¶9. G.G. is biologically a female. G.G. was born a girl and has female genitalia. JA28, JA33, ¶31. G.G. enrolled in high school as a girl. JA29; JA12, ¶20; JA57. At the beginning of G.G.'s sophomore year, school officials were informed that G.G. was transgender and identified as a boy. G.G., however, is still biologically and anatomically a female. JA33; JA38-39.

When school officials were informed that G.G. was transgender, school officials immediately expressed support. JA9, ¶2; JA14, ¶28. School officials agreed to refer to G.G. using his new name and by using male pronouns. JA14, ¶28. School official changed G.G.'s name in the school records. At G.G.'s request, school officials have permitted G.G. to continue with the home-bound program for the school's physical education requirements. JA14, ¶29.

After informing the school that G.G. identified as a boy, G.G. voluntarily chose not to use the boys' restroom and instead used a separate restroom in the nurse's office. JA9-10, ¶3; JA15, ¶30. In October of 2014, G.G. asked to use the

boys' restroom. School personnel at the high school complied with that request on October 20, 2014.

After receiving numerous complaints from parents and students, the School Board on November 11, 2014, considered the difficult issues associated with a transgender student seeking to use the restroom that does not correspond with the student's anatomical sex. JA57-58. During the discussion, several citizens expressed concerns to the School Board. JA15-17, ¶¶34-38. The School Board also considered G.G.'s concerns. JA16-17, ¶38; JA31, ¶21.

Taking the safety and privacy of all students into consideration, on December 9, 2014, the School Board adopted a restroom and locker room resolution that provided:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility. JA18, ¶43.

In adopting this resolution, the School Board issued a news release that stated:

> One positive outcome of all the discussion is that the District is planning to increase the privacy options for all students using school restrooms … Plans include adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms. The District also plans to designate single-stall, unisex restrooms, similar to what's in many other public spaces**, to give all students the option for even greater privacy.** JA17, ¶41. (emphasis added).

In implementing the resolution, the School Board maintained its existing practice of providing separate restrooms and locker rooms based on a student's biological sex. The School Board also provided three unisex, single-stall restrooms for any student to use. JA17, ¶41; JA19, ¶47; JA57-58. Under the policy, G.G. is not permitted to use the boys' restrooms. JA18, ¶45. Based on G.G.'s biological sex, G.G. is permitted to use the girls' restroom. G.G. chooses not to do so. JA18-19, ¶46; JA57-58. G.G. is permitted to use the unisex, single-stall restrooms, but also refuses to use those restrooms. JA19, ¶48; JA58.

G.G. filed a Complaint and Motion for Preliminary Injunction against the School Board on June 11, 2015, alleging that the School Board's policy violates the Equal Protection Clause of the Fourteenth Amendment and Title IX. The School Board filed a brief in opposition to the Motion for Preliminary Injunction and a Motion to Dismiss G.G.'s Complaint. The District Court held oral argument on the Motion to Dismiss and Motion for Preliminary Injunction on July 27, 2015. (ECF Doc. 45). G.G was present at the hearing, and the District Court allowed

G.G. to present evidence on the Motion for Preliminary Injunction during the hearing. JA100-101.

From the bench, the Court granted the School Board's Motion to Dismiss G.G.'s Title IX claim in Count II of the Complaint. JA116. On September 4, 2015, the District Court entered an Order denying G.G.'s Motion for Preliminary Injunction. JA137. On September 8, 2015, G.G. filed a Notice of Appeal of the September 4, 2015 Order. ECF Doc. 54. On September 17, 2015, the District Court issued a Memorandum Opinion detailing the reasons that the Court denied the Motion for Injunction and granted the Motion to Dismiss G.G.'s Title IX claim, and entered an Order dismissing the Title IX claim. JA139-164. The District Court has not ruled on the School Board's Motion to Dismiss G.G.'s Equal Protection claim in Count I of the Complaint.

G.G. is asking this Court to reverse the District Court's Order denying the Motion for Preliminary Injunction. G.G. is seeking an injunction requiring the School Board to permit G.G. to use the boys' restroom, even though G.G. is biologically and anatomically a female, and has equal access to the girls' restroom, three unisex single-stall bathrooms, and a bathroom in the nurse's office. JA57-58. G.G. is also requesting that this Court reverse the Court's Order granting the Motion to Dismiss the Title IX claim. Finally, G.G. is asking this Court to assign this case to a different judge on remand.

The School Board requests that this Court affirm the District Court's September 4, 2015 Order denying the Motion for Preliminary Injunction, affirm the District Court's September 17, 2015 Order granting the Motion to Dismiss the Title IX claim, and direct the District Court to grant the School Board's Motion to Dismiss G.G.'s Equal Protection claim in Count I of the Complaint on remand.

SUMMARY OF ARGUMENT

The School Board's policy of separating students in restroom and locker room use based on the students' biological and anatomical sex does not violate the Equal Protection Clause or Title IX. Moreover, by providing three single-stall restrooms for any student to use, G.G. is being treated the same as all students at Gloucester High School. Transgender status is not a suspect classification under the Equal Protection Clause, and G.G. does not ask this Court to recognize it as a suspect classification. In fact, G.G. is not asking that transgender status alone be treated as a separate classification. Transgender status is also not a class protected by Title IX.

G.G.'s attempt to state a cause of action under the Equal Protection Clause and Title IX by construing the phrase "based on sex" to include gender identity is not persuasive. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) does not support G.G.'s assertion that by virtue of transgender status alone, the School Board's policy violates the Equal Protection Clause and Title IX. The School

Board's policy is not grounded in the false assertion that G.G. does not conform to the stereotypes, behaviors or mannerisms expected of G.G.'s biological sex or gender identity. Instead, it is grounded in the biological and anatomical differences between boys and girls.

Under Title IX, the School Board is specifically permitted to provide separate restrooms and locker room facilities based on a student's sex. 34 C.F.R. § 106.33. Moreover, the School Board's interest in protecting students' safety and privacy interests is not only a rational basis for implementing the policy, but it is also a substantial interest for implementing the policy.

No court has held that a transgender student has the constitutional right, or the right under Title IX, to use a restroom that is inconsistent with that student's biological sex in a school setting. In fact, the only United States District Court to have considered the issue held that a University did not violate the Equal Protection Clause or Title IX by maintaining a policy of sex segregated bathrooms and locker rooms or by requiring the transgender plaintiff to use the bathroom and locker room that correlated with his biological sex. *Johnston v. University of Pittsburgh of Com. System of Higher Educ.*, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015). The same result is dictated here.

Accordingly, not only should this Court affirm the Order denying the Motion for Injunction, but this Court should remand this case and direct that the

District Court grant the School Board's Motion to Dismiss G.G.'s Complaint in its entirety. Alternatively, the District Court's September 4, 2015 Order should be affirmed, because the evidence did not establish that G.G. would suffer irreparable harm under the policy, the balance of hardships weighs in favor of the School Board, and enjoining the implementation of the policy would not be in the public interest. This Court also should deny the request to assign a new judge to this case on remand.

ARGUMENT

I. Standard of Review on Appeal.

The denial of a preliminary injunction is an immediately appealable interlocutory order. 28 U.S.C. § 1292(a)(1). This Court evaluates a district court's decision to deny a preliminary injunction under an abuse of discretion standard. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). Pursuant to this standard, the Court reviews the District Court's factual findings for clear error and reviews its legal conclusions de novo. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011); *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013); *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 1735, 191 L. Ed. 2d 702 (2015). Because preliminary injunctions are "extraordinary remed[ies] involving the exercise of very far-reaching power," this Court should be particularly "exacting" in its use of

the abuse of discretion standard when it reviews an order granting or denying a preliminary injunction. *Pashby*, 709 F.3d at 319.

A preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1992) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989)). It is "never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365 (2008). Instead, a preliminary injunction is a "drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *American Civil Liberties Union of Florida, Inc. v. Miami–Dade County School Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) (citations omitted).

In deciding whether to grant a preliminary injunction, G.G. must demonstrate that (1) G.G. is likely to succeed on the merits, (2) G.G. is likely to suffer irreparable harm, (3) the balance of hardships tips in G.G.'s favor, and (4) the injunction is in the public interest. *Winter*, 555 U.S. at 20. A preliminary injunction must be denied if G.G. does not satisfy each and every factor of this test. *The Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds, Citizens United v. Federal Election Com'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), *aff'd, The Real*

Truth About Obama, Inc. v. F.E.C., 607 F.3d 355 (4th Cir. 2010) (per curiam); *Pashby*, 709 F.3d at 320-21.

II. G.G. is not likely to succeed on the merits, because the School Board has not violated the Equal Protection Clause.

The District Court did not abuse its discretion in denying G.G. a preliminary injunction, because G.G. is not likely to succeed on the merits of the Complaint. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. Amend. XIV, § 1.* The equal protection requirement "does not take from the States all power of classification," *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271, 99 S. Ct. 2282 (1979), but "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326 (1992).

Thus, "[t]he [Equal Protection] Clause requires that similarly-situated individuals be treated alike." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). In order to make out a claim under the Equal Protection Clause, a plaintiff must demonstrate (1) that he has been treated differently from others similarly situated and (2) that the unequal treatment was the result of intentional discrimination. *Morrison v. Garraghty*, 239 F.3d 648, 652 (4th Cir. 2001); *Brown v. Wilson*, No. 3:13CV599, 2015 WL 3885984, at *6 (E.D. Va. 2015); *Veney v.*

Wyche, 293 F.3d 726, 730 (4th Cir. 2002). G.G. was not denied equal protection of the law on the basis of sex.

A. All students are treated the same.

The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex[2] of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all

[2] The School Board uses the terms "biological sex" and anatomical sex interchangeably. G.G. quibbles with the use of the term "biological sex" and, instead, uses the phrase "sex assigned at birth." (Appellant Br., p. 4 n. 3). G.G. also complains about the District Court's use of the term "biological sex." For purposes of this appeal and brief, however, the two phrases mean the same thing – G.G. was born with female reproductive organs. G.G. does not dispute this. *See*, e.g., Merriam-Webster's Collegiate Dictionary, p. 1070 (10th ed. 2000) (defining sex as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.")

students, including female to male transgender and male to female transgender students, are treated the same.[3]

Ignoring the neutral application of the School Board's policy, G.G. attempts to recast the policy as one that relegates only transgender students to single-stall restrooms.[4] That argument, however, falters when G.G. points out on brief that students uncomfortable with G.G.'s presence in the boys' restroom "have the option – like any other student – to use one of the new single-stall unisex facilities the Board has installed." (Appellant Br., p. 42). This passage explicitly recognizes that the use of alternative single-stall restrooms is a valid option for all students.

Accordingly, G.G. is not able to demonstrate an Equal Protection violation, and the District Court's decision to deny the Motion for Preliminary Injunction should be affirmed as G.G. is not likely to succeed on the merits. *Workman v. Mingo County Bd. of Educ*., 419 F. App'x 348, 354 (4th Cir. 2011) (no evidence of unequal treatment in application of state mandatory vaccination laws before

[3] The policy that G.G. claims is unconstitutional and violates Title IX also provides that students are to use a locker room associated with their biological sex. G.G. is not using the boys' locker room voluntarily, and is not asserting that this part of the policy is unconstitutional or in violation of Title IX.

[4] G.G. asserts that "using the girls' room would be no more appropriate for G.G. than for any other boy." (Appellant Br., p. 13). Yet, under G.G.'s interpretation of "on the basis of sex", a boy would be permitted to use the girls' restroom if that boy identified as a girl.

admission to school); *Hanton v. Gilbert*, 36 F.3d 4, 8 (4th Cir. 1994) (no evidence that similarly situated males were afforded different treatment).

B. There is no evidence of intentional discrimination.

G.G. cannot demonstrate, under the allegations in the Complaint or in the evidence presented on the Motion for Preliminary Injunction, that there was intentional discrimination. The School Board did not develop the restroom and locker room policy in an attempt to stigmatize, embarrass or otherwise reject G.G. Indeed, when school officials were informed that G.G. was transgender, school officials immediately expressed support. JA9, ¶2, JA14, ¶28. School officials changed G.G.'s name in the official school records, refer to G.G. using his new name, and refer to G.G. using male pronouns. JA14, ¶27. G.G. has not alleged that school officials have in any way harassed or discriminated against G.G. in his educational opportunities or engaged in any form of discriminatory treatment with respect to G.G.'s transgender identification. *Nofsinger v. Virginia Commonwealth Univ.*, 523 F. App'x 204, 206 (4th Cir.) *cert. denied sub nom., Nofsinger v. Virginia Com. Univ.*, 134 S. Ct. 236, 187 L. Ed. 2d 175 (2013) (failed to establish that any differential treatment was the result of discrimination.)

C. G.G.'s transgender status does not create a suspect class or evidence of discrimination under the Equal Protection Clause.

The United States Supreme Court and this Court have not recognized transgender status as a suspect classification under the Equal Protection Clause. In

fact, no Circuit Court has recognized transgender status, alone, as a suspect classification under the Equal Protection Clause. To the contrary, Courts have rejected the notion that transgender status, or other classifications of sex, is a suspect classification. *See, e.g.*, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that transsexuals are not a protected class under Title VII); *Wrightson v. Pizza Hut of Am., Inc*., 99 F.3d 138, 143 (4th Cir. 1996) (Title VII does not afford a cause of action for discrimination based upon sexual orientation); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals"), *cert. denied*, 493 U.S. 1089, 110 S. Ct. 1158 (1990).

As a result, G.G. conceded in the District Court that he was not asking the Court to recognize transgender status as a suspect classification entitled to heightened scrutiny and protection under the Equal Protection clause. ECF Doc. 41, p. 6. In fact, G.G. is not arguing that transgender status is a separate classification at all. Instead, G.G. attempts to bootstrap arguments under Title IX and fashion an argument that heightened scrutiny must apply, because the restroom policy creates gender based classifications. (Appellant Br., p. 38). Yet, G.G. concedes on brief that the School Board can provide separate restrooms to male and female students. In fact, G.G. argues that this case is not about "whether schools may provide separate restrooms for male and female students." (Appellant

Br., p. 16). By proceeding in this manner, G.G. cannot show that the School Board treated G.G. differently than similarly situated students.

G.G. asserts on brief that G.G. is a boy. (Appellant Br., p. 20). The Complaint and evidence on the preliminary injunction, however, establish that G.G. was born a girl and remains anatomically and biologically a girl. G.G. has female genitalia. G.G. enrolled in high school as a girl. G.G. has been diagnosed with Gender Dysphoria by a psychologist, and now identifies as a boy. The Complaint does not allege, however, that G.G. is a boy anatomically. Medical evidence was not introduced at the preliminary injunction hearing to establish that G.G. is a boy. Accordingly, the Complaint and evidence show that G.G. is biologically and anatomically a girl.[5]

This point is not made to be insensitive to G.G.'s diagnosis of Gender Dysphoria. Instead, it is made to show that G.G. is not being treated differently from any other similarly situated students. The School Board's policy provides at its most basic level that if a student is anatomically a female, the student can use the girls' restrooms or a single-stall restroom, but the student cannot use a restroom designated for anatomical males. The reverse is true with anatomical males.

[5] G.G.'s suggestion that from a "medical perspective" there "is no distinction between an individual's gender identity and his or her 'biological' sex or gender" is unsupported by any proffered medical evidence or testimony. G.G.'s argument is even more dubious considering that G.G. recognizes that separate facilities for men and women are permissible. Appellant Br., p. 37, citing *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Accordingly, because G.G. does not seek to create a new classification for transgender status, the Equal Protection claim cannot survive under the facts of this Complaint.

Ignoring this underlying flaw in the case, G.G. attempts to redefine the meaning of sex. G.G. contends that "sex" does not mean biologically male or female. Instead, G.G. tries to obtain protected status under the Equal Protection Clause by arguing that sex encompasses gender "nonconformity." (Appellant Br., p. 38).[6] This argument implicitly attempts to create a classification based on transgender status, despite G.G.'s steadfast refusal to assert this very claim. This position is evident in G.G.'s assertion that "discrimination based on a person's transgender status also inherently involves impermissible discrimination based on the person's gender nonconformity." (Appellant Br., pp. 22-23). That assertion misinterprets *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is not supported by the cases cited by G.G., and would create a new sex classification not currently protected under the Constitution.

Price Waterhouse says that discrimination based on behavior that is inconsistent with a sex stereotype is prohibited. A policy based on anatomy, however, is not "sex stereotyping" under *Price Waterhouse*. In *Price Waterhouse*,

[6] Under the Title IX claim, G.G. argues that discrimination based on transgender status is discrimination based on sex. G.G. also adopts that argument for purposes of the Equal Protection clause.

the Supreme Court considered a Title VII claim based on allegations that a female employee at Price Waterhouse was denied partnership, because she was considered "macho" and "overcompensated for being a woman." 490 U.S. at 235. The female employee had been advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Court found that such comments were indicative of gender stereotyping, which Title VII prohibited as sex discrimination. The Court explained:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

Id. at 251 (quoting *County of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n. l3 (1978)). Accordingly, the Court found that "an employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be" has acted on the basis of sex. *Id*. at 251.

The use of *Price Waterhouse* and subsequent employment cases to support a transgender stereotype theory in the school restroom context is not analogous. In the employment context, as in *Price Waterhouse*, employees allege that they are discriminated against, because the employer believes the employee is not behaving

in accordance with the employee's biological sex. Nevertheless, G.G. suggests that the federal cases he cites stand for the proposition that transgender status alone can support a discrimination claim based on gender non-conformity.[7] *See, e.g.*, Appellant Br., pp. 22-23. Contrary to that suggestion, those cases do not stand for the proposition that transgender status supports an Equal Protection Claim.[8]

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[7] G.G. also implies that district courts in this Circuit have made this holding using post-*Price Waterhouse* sex stereotyping precedent. That is inaccurate. In *Muir v. Applied Integrated Technologies, Inc.*, 2013 WL 6200178, at *1 (D. Md. 2013), the issue of whether discrimination on the basis of sex can encompass transgender individuals was not specifically before the court and was not specifically addressed by the court. In *Hart v. Lew*, 973 F. Supp. 2d 561, 579 (D. Md. 2013), the court noted that the defendant did not seriously contest that the plaintiff had stated a claim for sex discrimination at the pleading stage. As such, the court did not analyze or articulate a basis for transgender based discrimination. Similarly, *Lewis v. High Point Regional Health System*, 2015 WL 221615, at *2 n. 2 (E.D.N.C. 2015) did not analyze whether the plaintiff's complaint fit within a gender-stereotyping framework, because the issue was not raised in the defendant's motion to dismiss.

[8] G.G. cites *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000), where a prison guard attempted to rape the plaintiff, "a pre-operative male-to-female transsexual." The plaintiff filed suit alleging violations of the Eighth Amendment and the Gender Motivated Violence Act ("GMVA"). Detailing the prison guard's pattern of outrageous conduct, the Ninth Circuit denied qualified immunity on the Eighth Amendment claim, because it was clearly established "when prison officials maliciously and sadistically use force to cause harm contemporary standards of decency always are violated." On the GMVA claim, the Court concluded that the legislative history made clear that Congress specifically intended to include men within the statute's protection, and that the attack was motivated by the inmate's appearance and demeanor. The Court emphasized that in the mind of the perpetrator the discrimination is "related to the sex of the victim" in that the "perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one." 204 F.3d at 1202. This case does not support the proposition for which it is cited.

For example, in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the plaintiff was a male and intended to take steps to transition to a female, including wearing women's clothing to work. The plaintiff's supervisor told the plaintiff that his appearance was not "appropriate." The supervisor found the plaintiff's appearance "unnatural" and "unsettling." *Id.* The court in *Glenn* concluded that the transgender plaintiff's discrimination claim arose from the failure to act according to socially prescribed gender roles. That is, the plaintiff's claim could proceed because of evidence of sex stereotyping – acts "which presume that men and women's appearance and behavior will be determined by **their sex** ..." *Id.* at 1317, 1320 (emphasis added) ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype."). Thus, the plaintiff was seeking protection on the basis of his biological sex – male.

Similarly, *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), is a classic sex stereotyping case where the Sixth Circuit concluded that the plaintiff had stated a cause of action by alleging that the defendant's discrimination was motivated by his appearance and mannerisms, and the defendant's belief that this behavior was "inappropriate for his perceived sex." The same is true with *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005), where the plaintiff was a male to female transsexual. The plaintiff alleged discrimination based upon his mannerisms and the way he behaved. There, supervisors told the plaintiff he was

not sufficiently masculine, and numerous supervisors and peers criticized him for lacking a quality known as "command presence." Thus, the sexual stereotyping claim was again grounded in plaintiff's biological sex. *Id.* *See also Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (reasonable to infer from the Complaint that the plaintiff was told to go home and change because the supervisor thought that the plaintiff's attire did not accord with his male gender.) In sum, sex stereotyping cases are all grounded in allegations that the transgender plaintiffs were discriminated against because their behaviors, mannerisms or appearance did not correspond to notions attributable to their biological sex.[9]

Here, G.G.'s behavior, mannerisms and appearance are not at issue. In fact, G.G. does not seek constitutional protection based on biological and anatomical sex. Instead, G.G. asks the Court to provide protection based on gender identity.[10]

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[9] In *Finkle v. Howard County, Md.*, 12 F. Supp. 3d 780 (D. Md. 2014), the plaintiff alleged that she was denied a position with the Howard County Police Department due to her "obvious transgendered status." The Court, in holding that the plaintiff could pursue a Title VII claim, simply recognized that "sex stereotyping based on a person's gender nonconforming **behavior** is impermissible discrimination." *Id.*, at 787 (emphasis added) citing *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574–75 (6th Cir. 2004).

[10] G.G. takes this position because if G.G. asserted that he is entitled to protection because using the boys' restroom is "nonconforming" behavior with G.G.'s biological sex, female, that theory would entitle any girl who chooses to use the boys' restroom, or any boy who chooses to use the girls' restroom, to bring a viable cause of action under the Equal Protection Clause or Title IX because of their "nonconforming" behavior. Certainly, this was not the intent of *Price Waterhouse*.

Yet, the Complaint and evidence show that while G.G. now identifies as a boy, G.G. was born biologically and anatomically female, enrolled in school as a female, and remains biologically and anatomically female. The Complaint and evidence submitted during the hearing on the motion for a preliminary injunction do not show that the School Board acted on an impermissible stereotype associated with G.G. being a girl or, for that matter, a boy.

The School Board acted based on the admitted and legitimate biological and anatomical differences between boys and girls. Accordingly, it is apparent that G.G. is seeking protection based on transgender status alone, not stereotypes about biological sex, and there has been no unlawful discrimination under the Equal Protection Clause based on G.G.'s sex. The District Court's Order denying the Motion for Preliminary Injunction should be affirmed.

D. There is a substantial interest for the restroom policy.

Even if G.G. could assert an Equal Protection claim, the School Board's policy does not violate the Equal Protection Clause. Only one United States District Court has considered whether a public school can prohibit a transgender student from using a bathroom or locker room that is not associated with that student's biological sex. Yet, G.G. does not address this case in the opening brief.

In *Johnston v. University of Pittsburgh of Com. System of Higher Educ.*, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015), the plaintiff was born a biological

female. The plaintiff entered college as a female, but later identified as a male. The plaintiff was diagnosed with Gender Identity Disorder, legally changed his name, and began living as a male. The plaintiff used the men's restrooms and locker rooms on campus. The plaintiff, however, remained anatomically a female.

Thereafter, the plaintiff was told that he could not use the men's restrooms or locker rooms. When the plaintiff refused to comply with this policy, he was expelled from the University. The plaintiff filed suit against the University alleging that the school's policy violated the Equal Protection Clause of the Fourteenth Amendment and Title IX. In short, *Johnston* is nearly "on all fours" with this case, except that it arose in a university instead of a high school setting, and the plaintiff in *Johnston* was expelled whereas G.G. is simply offered an alternative restroom. The District Court, in a detailed analysis and opinion, rejected these claims.

Johnston held that transgender status is not a suspect classification, and that providing separate restroom and locker room facilities for college students based on their biological sex did not violate the Equal Protection Clause. *Johnston*, 2015 WL 1497753, at *8-10. As the Court noted, this holding is consistent with the holdings of numerous other courts that have considered allegations of discrimination by transgender individuals, whether under the Fourteenth Amendment or Title VII. *See*, *e.g.*, *Johnston*, 2015 WL 1497753, at *8; *Frontiero*

v. Richardson, 411 U.S. 677, 686, 93 S. Ct. 1764 (1973); *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1221-22; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

The same result should be reached here. Not only is the School Board's policy rationally related to protecting students' safety and privacy rights, but it is substantially related to this important governmental interest. G.G. frames the question as "whether an important interest in privacy is substantially furthered by the new policy regulating the restroom use of transgender students." (Appellant Br., p. 39). That ignores, however, the underlying basis for the policy's existence.

The policy was implemented to ensure that the safety and privacy rights of all students, both boys and girls, are respected and protected. In doing so, the School Board focused on those privacy rights by providing three single-stall restrooms that any student can use for increased privacy. Thus, contrary to G.G.'s suggestion, the question is whether the School Board's policy of providing separate bathrooms based on anatomical sex, along with providing single-stall

restrooms for all students, serves the governmental interest in protecting all students' safety and privacy.[11]

The answer is yes. This case is not an employment case involving adults. It is a case that involves the public education of children, kindergarten through twelfth grade. In fact, the School Board's interests here are much more compelling than in *Johnston*, because the School Board is responsible for the care and education of minor children, from kindergarten through twelfth grade, not adults in college as in *Johnston*. There is no question that the School Board has a substantial interest in protecting the safety and privacy of minor children while they are in school. *See, e.g.*, *Davis v. Monroe County Board of Education*, 526 U.S. 629, 646-47, 119 S. Ct. 1661 (1999) (recognizing that schools have an obligation to protect students in the school setting).

As *Johnston* noted, the issue presents "two important but competing interests." G.G.'s interest is performing "life's most basic and routine functions" in the school restroom in an environment consistent with G.G.'s gender identity. On the other hand, the School Board has an interest in "providing its students with

[11] G.G.'s attempt to re-frame the question is an acknowledgement that the School Board does have a legitimate interest in protecting student privacy by providing separate bathrooms based on sex. Tellingly, G.G. does not argue that the School Board's policy of providing separate restrooms and locker rooms based on biological sex is unconstitutional for all purposes. That is, G.G. is not asking this Court to invalidate the policy and order the School Board to provide only unisex restrooms and locker rooms for all students. G.G. implicitly recognizes the legitimate privacy interests associated with using the restroom and locker room.

a safe and comfortable environment for performing these same life functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex." *Johnston*, 2015 WL 1497753 at *7. In analyzing these issues, *Johnston* held that segregating "bathroom and locker room facilities on the basis of birth sex is substantially related to a sufficiently important governmental interest." *Id.* *8. That conclusion is a correct statement of the law and should be followed in this case.

This Circuit has recognized a right to bodily privacy. *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) ("Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.") Parents have an interest in the safety of their children, and children have a strong privacy interest of their own. *United States v. Virginia*, 518 U.S. 515, 551, 116 S. Ct. 2264, 2284 (1996) (recognizing that admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex); *Doe v. Luzerne Cty.*, 660 F.3d 169, 177 (3d Cir. 2011) (recognizing right of privacy from involuntary exposure of body particularly while in the presence of members of the opposite sex); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 498 (6th

Cir. 2008) (holding that "given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy," students had constitutionally protected right not to be videotaped in while dressing and undressing in locker room.) G.G.'s Equal Protection arguments improperly discount the legitimate privacy interests of other students.

The School Board has a responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. This is particularly true in an environment where children are still developing, both emotionally and physically. *See, e.g.*, *Burns v. Gagnon*, 283 Va. 657, 671, 727 S.E.2d 634, 643 (2012) (school administrators have a responsibility "to supervise and ensure that students could have an education in an atmosphere conducive to learning, free of disruption, and threat to person."); Va. Code § 22.1-254 (compulsory attendance).

As *Johnston* recognized, the context of this dispute is important. Here, the School Board is balancing the needs, interests and rights of children in kindergarten through twelfth grade. The right to privacy for students strongly supports maintaining sex-segregated bathrooms and locker rooms. *See Johnston*, 2015 WL 1497753, at *7 (finding "controlling the unique contours under which

this case arises," namely a public school which is "tasked with providing safe and appropriate facilities for all of its students.")[12]

Furthermore, the School Board's interest in protecting students' safety and privacy rights based on their biological sex has been recognized by the Department of Education. The regulations implementing Title IX specifically allow schools to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. G.G's suggestion that the School Board does not have a substantial interest in providing separate restroom and locker room facilities based on biological sex is unfounded.

The School Board is not unsympathetic to G.G.'s recent identification as a boy, but G.G.'s identification does not alter the biological and anatomical differences between G.G. and other male students, nor does it erase the biological and anatomical differences between a male student who identifies as a female and other female students. G.G. cannot reconcile these facts with the position that the

[12] In the District Court, G.G. attempted to distinguish *Johnston* by incorrectly interpreting the court's reasoning, which is directly on point. G.G. contended that "*Johnston* assumed that separate restrooms for men and women based on privacy concerns had been upheld under heightened scrutiny, but none of the cases cited by Johnston court actually supports that proposition." This is not *Johnston's* holding. Instead, *Johnston* cited to those cases to show that the need to ensure the privacy of students outside the presence of members of the opposite sex is a justification that has been upheld by courts. *Id*., *8.

School Board does not have a legitimate interest in protecting other students' privacy.[13]

The School Board has taken both G.G.'s interests and the interests of its other students into consideration and developed a policy that attempts to accommodate the best interests of all of its students. In doing so, the School Board bolstered these privacy rights by providing single-stall restrooms for any student to use. Accordingly, there is not only a rational basis, but a substantially related basis for the School Board's policy requiring students to use the restroom and locker room associated with their biological sex, or to use a single-stall restroom of their choice. *Johnston*, 2015 WL 1497753, at *8; *United States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991) (recognizing anatomical differences between men and women for purposes of equal protection analysis.)

III. G.G. is not likely to succeed on the merits, because the School Board's policy does not violate Title IX.

The School Board's policy does not violate Title IX. Title IX prohibits discrimination "on the basis of sex" in educational programs. 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.1. G.G. asserts that by "expelling G. from the restrooms used by other students," the School Board has deprived G.G. of equal educational opportunities. The federal regulations, however, specifically permit the School

[13] G.G.'s citation to the Virginia Department of Education guidelines for the construction of school locker room facilities only confirms that there are legitimate privacy interests for students when using restrooms and locker rooms.

Board to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. G.G. agrees that the plain text of this regulation allows schools to assign restrooms based on sex. (Appellant Br., p. 35).[14]

Yet, G.G. contends this regulation does not apply to transgender students. Instead, as set out above, G.G. contends that "based on sex" encompasses gender identity, so that schools are required to permit transgender students to use the restroom of their choice. The United States Supreme Court and this Court, however, have never held that 34 C.F.R. § 106.33 does not apply to transgender students.[15]

Seeking to overcome the regulation's obvious meaning, G.G. argues that the interpretation of 34 C.F.R. § 106.33 by the United States Department of Education's Office of Civil Rights ("OCR") is entitled to deference pursuant to *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905 (1997). According to OCR, section 106.33 means that transgender students must be allowed to use the restroom that they identify with. That is simply not so.

[14] The regulations further provide that educational institutions can provide separate housing and consider sex in employment for a locker room or toilet facility used only by members of one sex. 34 C.F.R. § 106.32; 34 C.F.R. § 106.61.

[15] This Circuit recently declined an opportunity to expressly rule on whether a "failure to conform to gender stereotypes" could constitute a Title IX violation. *M.D. v. School Bd. of City of Richmond*, 560 F. App'x 199, 202 (4th Cir. 2014).

Deference to an agency's interpretation of its regulation "is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 1657 (2000). As this Court recently observed, "When the regulation in question is unambiguous ... adopting the agency's contrary interpretation would permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Dickenson-Russell Coal Co., LLC v. Secretary of Labor*, 747 F.3d 251, 256-57 (4th Cir. 2014) (internal quotations and citations omitted). Here, 34 C.F.R. § 106.33 is not ambiguous, and deference should not be given to OCR's attempt to create a completely new regulation concerning the rights of transgender students under Title IX.[16]

The plain meaning of the regulation is that schools are permitted to segregate boys from girls based on their biological sex for purposes of restroom use, as long as the girls' facilities are comparable to the boys' facilities.[17] *See Johnston*, 2015 WL 1497753, at *13 (finding that the term "on the basis of sex" under Title IX plainly means "nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex.").

[16] The Senate just recently rejected an amendment to the Every Child Achieves Act of 2015 that would have expressly prohibited schools or school boards from discriminating against students based on their gender identity. *See* S.Amdt.2093 to S.Amdt.2089, 114th Congress (2015-2016), *available at* https://www.congress.gov/amendment/114th-congress/senate-amendment/2093 (visited Nov. 23, 2015).

[17] Indeed, the title of 34 C.F.R. 106.33 is "Comparable facilities."

No deference should be given to OCR's attempts to "construe" a very straightforward regulation concerning comparable facilities for sex segregated restrooms into one permitting an individual to choose a restroom on the basis of his or her gender identity.

Far from merely interpreting a regulation, OCR improperly attempts to legislate and create a new regulation through the guise of litigation. The District Court recognized the flaw in the interpretation of Title IX offered by the OCR and G.G.

> [T]he only way to square G.G.'s allegations with Section 106.33 is to interpret the use of the term "sex" in Section 106.33 to mean *only* "gender identity." Under this interpretation, Section 106.33 would permit the use of separate bathrooms on the basis of gender identity and *not* on the basis of birth or biological sex. However, under any fair reading, "sex" in Section 106.33 clearly includes biological sex ...
>
> Section 106.33 states that sex-segregated bathrooms are permissible unless such facilities are not comparable. G.G. fails to allege that the bathrooms to which he is allowed access by the School Board - the girls' restrooms and the single-stall restrooms – are incomparable to those provided for individuals who are biologically male … To defer to the Department of Education's newfound interpretation would be nothing less than to allow the Department of Education to "create *de facto* a new regulation" through the use of a mere letter and guidance document. *See Christensen*, 529 U.S. at 588. If the Department of Education wishes to amend its regulations, it is of course entitled to do so. However, it must go through notice and comment rulemaking, as required by the Administrative Procedure Act. See 5 U.S.C. § 553.

JA150-151.

OCR's "interpretation" of 34 C.F.R. § 106.33 is in the form of an unpublished opinion letter from OCR written in response to a letter of inquiry concerning this very case. JA54-56. A close examination of the opinion letter reveals that OCR "refrain[ed] from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation" and merely referenced settlements reached in other cases as "examples of how OCR enforces Title IX." Such voluntary resolutions are in no way binding on the School Board or the Court in this case.

Moreover, G.G.'s assertion that OCR has authoritatively construed this regulation and that the School Board "must … treat transgender students consistent with their gender identity" is not accurate. The actual letter that G.G. and the United States rely upon states that a "school **generally** must" treat students consistent with their gender identities. JA55. The "authority" OCR cites for this proposition is a reference to a Question and Answers document prepared by OCR. JA55, n. 4. In that document, OCR merely states that schools "must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of **single-sex classes**" – not restrooms. (Emphasis added.)

The School Board, as G.G. acknowledges, has complied with this "guidance" inasmuch as school officials have agreed to refer to Plaintiff using his

new name and by using male pronouns, and they are treating G.G. as a boy in his education classes. JA14, ¶28. Moreover, as *Johnston* noted, it is a "stretch to conclude that a restroom, in and of itself, is educational in nature and thus an educational program." *Johnston*, 2015 WL 1497753, at *18. Regardless, conspicuously absent from this OCR "authority" is any reference to restroom policies.

Ultimately, OCR's interpretation of 34 C.F.R. § 106.33 is not entitled to *Auer* deference as OCR's interpretation far exceeds the purpose of the regulations and is plainly an attempt to legislate in a new area.[18] Thus, OCR's position in this case should be given little to no consideration.[19]

[18] Even if 34 C.F.R. § 106.33 were ambiguous such that *Auer* deference would apply, deference to OCR's interpretation should not be given here since its "interpretation is plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Indeed, an agency's interpretation of a regulation controls only if it "sensibly conforms to the purpose and wording of the regulations." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151, 111 S. Ct. 1171, 1176 (1991); *Dickenson-Russell Coal Co.*, 747 F.3d at 256-57. On its face, the wording of 34 C.F.R. § 106.33 makes clear that its purpose is to permit schools to create sex segregated restroom facilities as long as the facilities are comparable to one another. Despite OCR's best efforts, 34 C.F.R. § 106.33 cannot be twisted to achieve the result Plaintiff and OCR seek, because transgender restroom use has nothing to do with the purpose and wording of the regulation.

[19] In fact, the OCR letter "encourages schools to offer the use of gender-neutral, individual-user facilities to any student." JA55. The School Board has done that. Similarly, the Government's citation to other state legislation or regulations involving adults in the work force do not support G.G.'s Title IX claim. This case does not involve adults or the workplace. Further, federal regulations make clear

Furthermore, both the government and G.G. improperly conflate sex-stereotyping discrimination claims with a claim for transgender status alone under the *Price Waterhouse* analysis. The attempts by G.G. and the Government to read transgender identification into "sex" is not supported by case law. As discussed in detail under the Equal Protection argument, courts have not permitted discrimination claims to proceed based upon transgender status alone. Instead, all of the cases have been premised on some form of discrimination based on the plaintiff's behaviors, mannerisms or appearance, and those plaintiffs have sought protection on the basis of their biological sex. *Johnston* addressed this precise issue as well, and held that being transgender itself is not a protected characteristic under Title IX. *Johnston*, 2015 WL 1497753, at *12-13. As the Court noted, the exclusion of gender identity from the language of Title IX is not an issue for the court to remedy, but one within the province of Congress to identify the classifications which are statutorily prohibited. *Id*, at *15.

This is consistent with the plain language of the statute and the legislative history of Title IX. Title IX was enacted in order to open up educational opportunities for girls and women in education and to address discrimination toward women. *See, e.g.*, 117 Cong. Rec. 30,155- 30,158 (August 5, 1971); 117 Cong. Rec. 39,248 – 39,261 (November 4, 1971); *Johnston*, 2015 WL 1497753, at

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that guidance offered by executive agencies is "non-binding" on this Court. 72 Fed. Reg. 2432 (2007).

*12-13. The legislative history, statutory language and implementing regulations do not refer to gender identity or transgender individuals in the enforcement scheme.

Johnston's analysis of the Title IX claim is particularly compelling here:

> The gravamen of plaintiff's case is [his] desire to [use] a specific [restroom or locker room] based on its particular appeal to [him]. [He] believes that the choice should not be denied [him] because of an educational policy with which [he] does not agree.
>
> We are not unsympathetic with [his] desire to have an expanded freedom of choice, but its cost should not be overlooked. If [he] were to prevail, then all [sex-segregated restrooms and locker rooms] would have to be abolished. The absence of [sex-segregated spaces] would stifle the ability of the [University] to continue with a respected educational methodology. It follows too that those students and parents who prefer an education [with sex segregated restrooms and locker rooms] would be denied their freedom of choice....
>
> It is not for us to pass upon the wisdom of segregating boys and girls in [their use of restrooms and locker rooms]. We are concerned not with the desirability of the practice but only its constitutionality. Once that threshold has been passed, it is the [University's] responsibility to determine the best methods of accomplishing its mission.

Johnston, 2015 WL 1497753, at *15, quoting *Vorchheimer v. Sch. Dist. Of Philadelphia*, 532 F.2d 880, 888 (3d Cir. 1976) (alterations in *Johnston*). G.G. cannot state a cause of action under Title IX as a result of transgender status. The School Board's policy of providing separate bathrooms and locker rooms on the basis of birth sex is permissible under Title IX. Simply stated, G.G. has not alleged facts showing that the School Board unlawfully discriminated against him

on the basis of sex in violation of Title IX. *Johnston*, 2015 WL 1497753, at *17. As a result, the District Court did not abuse its discretion in denying the Motion for Preliminary Injunction, nor did it err in dismissing the Title IX claim.

IV. The Court should exercise its pendent appellate jurisdiction and dismiss G.G.'s Complaint in its entirety.

G.G. has invoked this Court's jurisdiction under 28 U.S.C. § 1292(a)(1) to review the District Court's interlocutory order refusing to grant a preliminary injunction. G.G. has also asked this Court to involve pendent appellate jurisdiction to review the District Court's dismissal of G.G.'s Title IX claim. While appellate jurisdiction ordinarily focuses on the injunction decision, matters that are "intimately bound up" with the decision may be considered by the appellate court. *See Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co.*, 809 F.2d 1030, 1032 (4th Cir. 1987); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013).

The merits of G.G.'s claims that his rights under the Equal Protection Clause and Title IX were violated are "intimately bound up" with the Court's consideration of whether the preliminary injunction was correctly denied. As such, this Court should exercise its pendent appellate jurisdiction and affirm the District Court's dismissal of the Title IX claim, and it should direct the District Court to dismiss the Equal Protection Claim on remand.

The Supreme Court has held that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 757, 106 S. Ct. 2169, 2177 (1986) *overruled on other grounds by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (affirming the appellate court's final determination that several provisions of a state abortion statute were invalid even though only the preliminary injunction decision was on appeal); *see also Munaf v. Geren*, 553 U.S. 674, 691, 128 S. Ct. 2207, 2220 (2008) (finding that "[t]he question whether an action should be dismissed for failure to state a claim is one of the most common issues that may be reviewed on appeal from an interlocutory injunction order.").

This Court has specifically recognized that "[a]ppellate adjudication of the underlying legal merits, on an appeal from the issuance of a preliminary injunction, is most clearly justified where not only does the injunction rest entirely upon a pure question of law, but it is plain that the plaintiff cannot prevail as a matter of the governing law." *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 360 (4th Cir. 1998) (holding that it was proper on appeal from a preliminary injunction to find as valid a state law requiring notification of the parents of an

unemancipated minor before the minor could have an abortion); *see also Fran Welch*, 809 F.2d at 1032 (affirming the grant of summary judgment on the appeal of a denial of an injunction and finding that "the denial of the injunction was intimately bound up with other unappealable partial dispositions of some of the claims on the merits.").

The reasons for reviewing the merits during an interlocutory appeal such as this are obvious. As the Supreme Court has recognized, one of the purposes of interlocutory appeals is "to save the parties the expense of further litigation." *Thornburgh*, 476 U.S. at 756. When it is apparent to a court of appeals that a plaintiff cannot prevail as a matter of law during the appeal of a preliminary injunction, defendants are entitled to relief from the expense of further litigation. *Camblos*, 155 F.3d at 360.

The same considerations apply here. For the reasons previously stated, G.G. cannot prevail on the merits, and the School Board is entitled to relief from the expense of further litigation. Accordingly, this Court should affirm the dismissal of the Title IX claim and direct the District Court to dismiss the Equal Protection claim.

V. G.G. cannot satisfy the remaining factors justifying the imposition of a preliminary injunction.

A. The balance of hardships does not tip in G.G.'s favor, and G.G. is not likely to suffer irreparable harm.

The District Court did not abuse its discretion in finding that G.G. did not submit sufficient evidence to establish that the balance of hardships weigh in his favor. JA154. As discussed under the Equal Protection claim, the School Board is charged with the responsibility to care and protect minor children while they are in school. *Linnon v. Commonwealth*, 287 Va. 92, 752 S.E.2d 822, 826 (2014). Those children have a right to privacy protected by the Constitution. *Lee*, 641 F.2d at 1119. That right, as explained above, is of paramount concern for the School Board, and outweighs the interests of G.G.[20] This is particularly true where G.G. seeks to impose an injunction on the School Board before the difficult issues associated with G.G.'s claims are litigated, before the Court has considered whether G.G. even has a viable legal claim, and in direct contradiction to the holding of the only Federal Court to have actually considered the issues raised in G.G.'s Complaint.

As the District Court correctly recognized, the School Board's strong interest in protecting student privacy outweighs the claims of hardship by G.G.

[20] See Section II D. The School Board adopts the arguments in that section in support of the assertion that the balance of hardships does not weigh in G.G.'s favor.

Moreover, the School Board, and school officials, have recognized and accepted G.G. as a transgender individual. They are supporting G.G., have changed his official school records, refer to G.G. with male pronouns, and are allowing him to participate in his school educational opportunities as a transgender male. The School Board has also provided three single-stall bathrooms for G.G. and any other student to use. G.G. can also use the bathroom in the nurse's office. G.G. has voluntarily chosen not to use the locker room at the high school. This evidence discounts the notion that G.G. will suffer irreparable harm if a preliminary injunction is not granted. The competing hardship is to the remaining students in the school system. Their safety and privacy interests will go unprotected if an injunction is entered until the issue is resolved on the merits.

G.G.'s assertions concerning the Court's consideration of Dr. Ettner's declaration and G.G.'s declaration miss the point. Dr. Ettner saw G.G. on one occasion. In the declaration, Dr. Ettner devotes only three paragraphs to G.G. specifically. JA41-42. Those three paragraphs do not divulge any particular facts related to G.G. While Dr. Ettner opines that G.G. is suffering emotional distress, Dr. Ettner does not offer an opinion differentiating between the distress that G.G. may suffer by not using the boy's bathroom during the course of this ligation and the distress that he has apparently been living with since age 12. JA29. Similarly, while G.G. asserts that his feelings of dysphoria, anxiety and distress increase

when he uses the restroom at school, because he is reminded that everyone knows he is transgender, G.G. did not present evidence that those feelings would be lessened by using the boy's restroom. As the District Court rightly pointed out, there was no evidence presented from G.G.'s treating psychologist, nor was there any medical evidence presented in support of the preliminary injunction.[21]

While G.G. disagrees with aspects of the District Court's opinion, a close review of that opinion shows that the District Court did consider in detail the evidence presented on the motion for a preliminary injunction. That opinion discredits the assertion that there was "clear error" in the Court's factual findings. In sum, G.G. did not present sufficient evidence to carry the burden required to impose a preliminary injunction on the School Board under the circumstances of this case.

B. An injunction is not in the public interest.

An injunction is not in the public interest, because the School Board's policy does not violate the Equal Protection Clause or Title IX, and the School Board is not discriminating against G.G. by maintaining separate sex-segregated bathrooms.

[21] G.G.'s complaint that he was "sandbagged", because the Court did not request oral testimony is unfounded. G.G. acknowledges on brief that he was present at the hearing and available to testify. Appellant Br., p. 44. The Court announced that it would "be hearing evidence" on the Motion for an Injunction. The Court further stated that counsel could "present what you have to present." JA100-101. Counsel did not call G.G. to testify nor ask if the Court wanted to hear testimony from G.G. in response to the Court's questions on the motion for a preliminary injunction.

As the District Court candidly pointed out, there are significant concerns with the precedent that would be set if the Court granted the Motion for Preliminary Injunction without full consideration of the case on the merits.

Moreover, this is an issue that should be resolved by Congress. In fact, there is legislation in Congress that addresses this specific issue. *See*, H.R.846, 114th Cong., 1st Sess. (2015); S.439 114th Cong., 1st Sess. (2015). It is in the public interest for this debate to play out in Congress and with the citizens, and not decided through a motion for preliminary injunction in a single district court.

VI. This case should not be reassigned to a new Judge if it is remanded to the District Court.

G.G. seeks to have this case reassigned to a new judge if this case is remanded to the District Court. In support of this request, G.G. takes issue with rhetorical statements and criticisms of the District Court judge during oral argument. G.G.'s concerns are insufficient to meet the test outlined in *United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir. 1991).

Nothing in the record indicates that the judge would not adhere to any ruling made by this Court. Harsh criticism or expressions of doubt from the district court during oral argument are insufficient to remove a judge. *See, e.g.*, *United States v. N. Carolina*, 180 F.3d 574, 583 (4th Cir. 1999). That is particularly true where the judge does not rely on such criticisms in making a ruling. *Id.* In that regard, no part of the District Court's well-reasoned memorandum opinion indicates that the

judge did anything other than carefully analyze and follow the law. Moreover, the District Court judge still has not ruled on the Equal Protection Clause claim, which shows that he has given G.G.'s claims due consideration.

In effect, G.G.'s only complaint is that the District Court judge has already ruled against him. Prior rulings against G.G. are not a sufficient basis for removing a judge from further proceedings. *See, e.g.*, *Glocker v. W.R. Grace & Co.*, 68 F.3d 460 (4th Cir. 1995). The removal of a judge is both unusual and rare, and the record does not warrant such an extreme measure in this case.

CONCLUSION

For the reasons stated above, this Court should affirm the District Court's Order denying G.G.'s Motion for Preliminary Injunction. This Court should further affirm the District Court's Order granting the School Board's Motion to Dismiss the Title IX claim. Finally, this Court should direct the District Court to enter an Order granting the School Board's Motion to Dismiss the Equal Protection claim on remand.

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Dated: November 23, 2015

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I hereby certify that on this 23rd day of November, 2015, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel that are registered CM/ECF users.

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