

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor, by and through his
guardians, JOHN DOE and JANE DOE;
MARY SMITH; JACK JONES, a Minor,
by and through his parents, JOHN JONES
and JANE JONES; and MACY ROE,

Plaintiffs,

v.

BOYERTOWN AREA SCHOOL
DISTRICT; DR. RICHARD FAIDLEY, in
his official capacity as superintendent of the
Boyertown Area School District; DR.
BRETT COOPER, in his official capacity as
principal; and DR. E. WAYNE FOLEY, in
his official capacity as assistant principal,

Defendants,

and

PENNSYLVANIA YOUTH CONGRESS
FOUNDATION,

Intervenor-Defendant.

CIVIL ACTION NO. 17-1249

MEMORANDUM OPINION

Smith, J.

August 25, 2017

The current issue before the court – whether the court should issue a preliminary injunction prohibiting a school district from maintaining its practice that started in the 2016-17 school year of allowing transgender students to use the bathrooms and locker rooms of the sex to which they identify – involves intricate and genuine issues relating to, *inter alia*, the personal privacy of high school students, a school district’s discretion and judgment relating to the conduct of students in its schools, the meaning of the word “sex” in Title IX, and the rights of all

students to complete access to educational opportunities, programs, and activities available at school. The general issue of transgender persons' access to privacy facilities such as bathrooms has recently received nationwide attention, and the issue of transgender students' access to educational institutions' bathrooms and locker rooms aligning to their gender identity has spurred litigation with unsurprisingly inconsistent results. With regard to cases involving transgender students, they have generally centered on whether precluding transgender students from using facilities consistent with their gender identity violates those students' rights under the Equal Protection Clause of the Fourteenth Amendment or Title IX. And as to Title IX, which generally precludes public schools receiving federal financial assistance from discriminating "on the basis of sex," this has resulted in a debate as to whether "sex" refers to biological sex (which the plaintiffs in this case define as a person's classification as male or female at birth based on the presence of external and internal reproductive organs) or a broader and arguably more contemporary definition of sex that could include sex stereotyping or gender identity.

Here, the court is presented with four students, three who will be seniors for the upcoming 2017-18 school year and one student who recently graduated, claiming that the defendant school district's practice of allowing transgender students (who the plaintiffs choose to identify as "members of the opposite sex" rather than as transgender students) to access bathrooms and locker rooms consistent with their gender identity violates (1) their constitutional right to privacy under the Fourteenth Amendment, (2) their right of access to educational opportunities, programs, benefits, and activities under Title IX because they are subject to a hostile environment, and (3) their Pennsylvania common law right of privacy preventing intrusion upon their seclusion while using bathrooms and locker rooms. The plaintiffs not only raise concerns with being in privacy facilities with transgender students regardless of whether the

transgender students actually view them in a state of partial undress, but they raise concerns with the possibility of viewing a transgender person in a state of undress or having a transgender person present to hear them while they are attending to their personal needs while in the bathroom. At bottom, the plaintiffs are opposed to the mere presence of transgender students in locker rooms or bathrooms with them because they designate them as members of the opposite sex and note that, *inter alia*, society has historically separated bathrooms and locker rooms on the basis of biological sex to preserve the privacy of individuals from members of the opposite biological sex.

The plaintiffs now seek a preliminary injunction which would require the school district to cease its practice and return to the prior practice of requiring all students to only use the privacy facilities corresponding to their biological sex. The plaintiffs have a heavy burden here because they are not seeking to preserve the status quo that has existed since the start of the 2016-17 school year and instead are seeking to have the school district cease its current practice.

The court has thoroughly reviewed all evidence in the record and has considered the parties' well-articulated arguments in support of their respective positions. After reviewing the entire record, the court finds that the plaintiffs are not entitled to preliminary injunctive relief because they have not shown that they are likely to succeed on the merits on any of their causes of action and they have failed to show irreparable harm. Accordingly, the court will deny the plaintiffs' motion for a preliminary injunction.

I. SUBJECT-MATTER JURISDICTION

The court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, and 1367.¹

¹ In the amended complaint, the plaintiffs reference 28 U.S.C. § 1361, the federal Mandamus Act, as a possible basis for subject-matter jurisdiction over this action against a school district and three school district administrators. It

II. VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b)(2).²

III. PROCEDURAL HISTORY

The initial plaintiff in this matter, Joel Doe, a minor, by and through his guardians, John Doe and Jane Doe, commenced this action on March 21, 2017, by filing (1) a complaint against the defendants, Boyertown Area School District (the “School District”), Dr. Richard Faidley, in his official capacity, Dr. Brett Cooper, in his official capacity, and Dr. E. Wayne Foley, in his official capacity, and (2) a motion to proceed pseudonymously. Doc. Nos. 1-4. On April 3, 2017, Aidan DeStefano, who was then a senior at the Boyertown Area Senior High School, and the Pennsylvania Youth Congress Foundation (“PYC”), a youth-led, statewide LGBTQ advocacy organization, filed a motion to intervene in this litigation. Doc. No. 7.

On April 18, 2017, the plaintiff filed an amended complaint in which three new plaintiffs were added to this litigation: (1) Mary Smith, (2) Jack Jones, a minor, by and through his parents, John Jones and Jane Jones, and (3) Macy Roe. Doc. No. 8. In the amended complaint, the plaintiffs generally complain that the defendants’ policy and practice of permitting transgender individuals (who are identified as members of the “opposite sex” instead of being identified as “transgender”) to use restrooms, locker rooms, and shower facilities designated for the biological sex to which they identify violates the plaintiffs’ “fundamental right to bodily privacy contrary to constitutional and statutory principles, including the Fourteenth Amendment, Title IX, invasion of seclusion [under Pennsylvania state law], and Pennsylvania’s Public School

does not appear that the court has jurisdiction under section 1361 because “by its terms, [section 1361] applies only to writs issued against an ‘officer or employee of the United States.’” *Weaver v. Wilcox*, 650 F.2d 22, 25 (3d Cir. 1981) (quoting 28 U.S.C. § 1361). It does not appear that any defendant is an officer or employee of the United States.

² Again, the plaintiffs reference 28 U.S.C. § 1391(e) as a basis for venue, but that subsection only pertains to “[a]ctions where [a] defendant is officer or employee of the United States[.]” 28 U.S.C. § 1391(e). As previously indicated, it does not appear that the plaintiffs include a claim against an officer or employee of the United States.

Code of 1949, which requires separate facilities on the basis of sex.”³ Amended Compl. at ¶¶ 1, 2, 20, 41. For relief, the plaintiffs seek, *inter alia*, (1) declarations that the defendants’ policy and actions (a) violate their constitutional right to privacy, (b) violate the Pennsylvania School Code of 1949, (c) constitute an unlawful intrusion upon Joel Doe and Jack Jones’s seclusion and bodily privacy rights, and (d) impermissibly burden their rights under Title IX to be free from discrimination on the basis of sex by creating a sexually harassing hostile environment, (2) an injunction “enjoining the District’s policy and ordering the District to permit only females to enter and use the multi-user girls’ private facilities, including locker rooms and restrooms, and only males to enter and use the multi-user boys’ private facilities, including locker rooms and restrooms,” (3) compensatory damages, and (4) costs and attorney’s fees. *Id.* at 38-39.

With regard to the specific factual allegations pertaining to each plaintiff, Joel Doe alleges that he was a junior at the Boyertown Area Senior High School on or about October 31, 2016, and was changing in the boys’ locker room for his mandatory physical education course. *Id.* at ¶¶ 10, 43, 50. While standing in his underwear and about to put on his gym clothes, he observed a “member of the opposite sex changing with him in the locker room.” *Id.* at ¶ 50. This “member of the opposite sex” was “wearing nothing but shorts and a bra.” *Id.*

Due to Joel Doe’s “immediate confusion, embarrassment, humiliation, and loss of dignity,” he “quickly put his clothes on and left the locker room.” *Id.* at ¶ 51. Joel Doe, along with other classmates, then went to Dr. Foley, the assistant principal of the Boyertown Area

³ The plaintiffs bring their Fourteenth Amendment claim under 42 U.S.C. § 1983. Amended Compl. at ¶ 2. Additionally, although the plaintiffs claim that the defendants’ actions violate the Pennsylvania Public School Code of 1949, there is no specific cause of action for this violation in the amended complaint and it is unclear whether the Public School Code provides for a private right of action. *See Issa v. School Dist. of Lancaster*, 847 F.3d 121, 141 (3d Cir. 2017) (indicating that there is no express cause of action under the Public School Code, but leaving issue unresolved as to whether there is an implied right of action). Instead, the amended complaint asserts only causes of action for violations of the Fourteenth Amendment, Title IX, and Pennsylvania’s common law tort of intrusion upon seclusion. *See generally* Amended Compl. at 21-39. The court notes that the plaintiffs sought declaratory relief that the defendants’ actions violated the School Code. *See id.* at 38.

Senior High School, to let him know what happened. *Id.* at ¶¶ 22, 52. When Joel Doe informed Dr. Foley that there had been a girl in the locker room, Dr. Foley indicated that although the legality of this was up in the air, students who mentally identified themselves with the opposite sex could choose the locker room and bathroom to use because their physical sex did not matter. *Id.* at ¶ 53. Dr. Foley also told Joel Doe that there was nothing he could do to protect him from this situation and that he needed to “‘tolerate’ it and make it as ‘natural’ as he possibly [could].” *Id.* at ¶¶ 54-56.

The plaintiffs assert that this action “marginalized and shamed Joel Doe, and unlawfully attempted to coerce and intimidate [him] into accepting continuing violations of his bodily privacy.” *Id.* at ¶ 62. They further assert that the School District’s “directive to Joel Doe was that he must change with students of the opposite sex and make it as natural as possible and that anything less would be intolerant and bullying against students who profess a gender identity with the opposite sex.” *Id.* at ¶ 61.

Because the School District’s policy of allowing persons of the opposite sex to use the boys’ facilities causes him anxiety, embarrassment, and stress, Joel Doe has opted to hold his bladder and refrain from using restrooms as much about possible and, to the extent that he needs to use the restroom, he stresses about whether he could use a restroom without running into persons of the opposite sex. *Id.* at ¶ 63. Thus, the defendants’ policy inhibits him from timely voiding, which has “direct and adverse physiological effects.” *Id.* at ¶ 64.

Joel Doe’s parents, John and Jane Doe, separately met with Dr. Foley, Dr. Cooper, and Dr. Faidley to discuss this issue.⁴ *See id.* at ¶¶ 65-72. They met with Dr. Foley on or about

⁴ The plaintiffs also allege that Joel Doe was a student for half of the day at the Berks Career and Technology School – Oley Campus (“BCTS”). Amended Compl. at ¶ 69. The plaintiffs allege that the School District “marginalized, intimidated, and shamed Joel Doe” by contacting the principal at BCTS to disclose Joel Doe’s meeting with Dr. Foley over the locker room incident. *Id.* The BCTS principal then pulled Joel Doe out of class to

November 2, 2016, and, during this meeting, Dr. Foley informed them that the School District was “all-inclusive” and that if Joel Doe had an issue with the policy, Dr. Foley would get him permission to use the nurse’s office to change. *Id.* at ¶ 66. Mr. and Mrs. Doe then met with Dr. Cooper, the principal of Boyertown Area Senior High School, and Dr. Cooper told them that he would not do anything since Joel Doe could change in the nurse’s office if he did not want to change around people of the opposite sex. *Id.* at ¶ 67. Ultimately, they met with Dr. Faidley, who informed them that if Joel Doe was uncomfortable changing under the new policy or with using the nurse’s office, he could withdraw from school to be home schooled while still attending BCTS if he wanted. *Id.* at ¶ 72.

As for Jack Jones, he was also a junior at the Boyertown Area Senior High School for the 2016-17 school year. *Id.* at ¶ 12. During the first week of November 2016, he was changing in the locker room for his physical education class and was in his underwear when he saw classmates gesturing and looking at something behind them. *Id.* at ¶ 86. Upon turning, he saw a member of the opposite sex in the locker room with him. *Id.* He then “experienced immediate confusion, embarrassment, humiliation, and loss of dignity,” and put on his clothes and exited the locker room. *Id.* at ¶ 87.

Jack Jones informed his parents about the incident and his mother, Jane Jones, contacted and spoke to Dr. Cooper. *Id.* at ¶ 89. Jane Jones informed Dr. Cooper about the privacy violation and asked “for such infractions to stop.” *Id.* Dr. Cooper informed her that the law required him to permit girls identifying as boys to use the private facilities with her son. *Id.* at ¶ 90. He did not offer any single-user facility for Jack Jones to use as an alternative. *Id.*

have a conversation with him. *Id.* at ¶ 70. During this conversation, the BCTS principal told Joel Doe that “he wanted to make sure none of that negativity was going to happen at his school.” *Id.*

Similar to Joel Doe, Jack Jones feels violated, humiliated, and embarrassed by the invasion of privacy. *Id.* at ¶ 91. He also opts to hold his bladder, refrains from using the restrooms as much as possible, and stresses about whether he can use a restroom without running into members of the opposite sex. *Id.* at ¶ 93. This causes him an “ever-present distraction throughout the day, including during class instructional time.” *Id.* at ¶ 94.

Concerning Mary Smith, she was a junior at the Boyertown Area Senior High School for the 2016-17 school year. *Id.* at ¶ 11. In March 2017, she entered a girls’ bathroom at the high school and saw a male student washing his hands in the sink. *Id.* at ¶ 99. After immediately experiencing shock, confusion, and embarrassment, she went to report the incident to the school office. *Id.* at ¶ 104. She eventually was able to report the incident to Dr. Foley, and during her conversation with him she learned for the first time that the school was permitting members of the opposite sex to use the girls’ bathrooms. *Id.* at ¶¶ 105-07. Dr. Foley stated that even though the student’s sex is male, the student could use the girls’ restrooms and locker rooms because the student identified as a girl. *Id.* at ¶ 108. Dr. Foley also indicated that they had not told parents about this policy, but he noted that they might be working on that. *Id.* at ¶ 109. Dr. Foley did not offer Mary Smith the option to use restrooms or locker rooms outside the presence of male students, such as the nurse’s office. *Id.* at ¶ 110.

As with the Joel Doe and Jack Jones, Mary Smith “feels violated, humiliated, and embarrassed by the invasion of her privacy.” *Id.* at ¶ 112. She also opts to hold her bladder, refrains from using the restrooms as much as possible, and stresses about whether she can use a restroom without running into members of the opposite sex. *Id.* at ¶ 113. This causes her an “ever-present distraction throughout the day, including during class instructional time.” *Id.* She has also alleged that due to the stress and anxiety caused by the new policy and the defendants’

actions, she is not returning to the School District for her senior year. *Id.* at ¶ 117. She would have returned for her senior year if the School District's policy was not in place. *Id.* at ¶ 118.

Regarding the final plaintiff, Macy Roe, she is an 18-year-old girl who was a senior at the Boyertown Area Senior High School for the 2016-17 school year. *Id.* at ¶ 13. It does not appear from the amended complaint that Macy Roe had any direct interaction with a member of the opposite biological sex in a locker room or restroom; yet, due to the defendants' policy and practice, she opts to hold her bladder, refrains from using the restrooms as much as possible, and stresses about whether she can use a restroom without running into members of the opposite sex. *Id.* at ¶ 126. She is also constantly distracted during the school day due to the aforementioned concerns, and asserts that the policy inhibits her from timely voiding. *Id.* at ¶ 127.

The plaintiffs filed an amended motion to proceed pseudonymously along with the amended complaint on April 18, 2017. Doc. No. 9. The plaintiffs then filed the instant motion for a preliminary injunction on May 17, 2017. Doc. No. 16. The court had a telephone conference to discuss the amended motion to proceed pseudonymously, the motion to intervene, and scheduling for the motion for a preliminary injunction on May 19, 2017. On May 24, 2017, the court entered an order which, *inter alia*, (1) granted the motion to intervene without objection insofar as PYC sought to intervene, (2) provided the parties with additional time to submit briefs on the motion to intervene by Aidan DeStefano insofar as the plaintiffs opposed his motion to intervene, (3) granted the amended motion to proceed pseudonymously without objection, (4) provided the parties with deadlines for filing submissions relating to the motion for a preliminary injunction, and (5) directed the parties to immediately commence with discovery related to the motion for a preliminary injunction. Order, Doc. No. 29.

PYC filed an answer to the amended complaint on May 26, 2016. Doc. No. 30. On the same date, PYC and Aidan DeStefano filed a supplemental memorandum in support of Aidan DeStefano's motion to intervene. Doc. No. 31. The plaintiffs then filed a brief in opposition to Aidan DeStefano's motion to intervene on June 2, 2017. Doc. No. 32.

The defendants and PYC separately filed memoranda of law in opposition to the motion for a preliminary injunction on June 9, 2017. Doc. Nos. 33, 34. The plaintiffs then filed a reply brief in support of the motion for a preliminary injunction on June 16, 2017. Doc. No. 36.

On July 13, 2017, the plaintiffs filed a motion to present the testimony of Joel Doe and Mary Smith *in camera* during the evidentiary hearing on July 17, 2017.⁵ Doc. No. 45. The parties then separately filed proposed findings of fact and conclusions of law on July 14, 2017. Doc. Nos. 46-48. PYC filed a response to the plaintiffs' motion to present testimony *in camera* on July 15, 2017.⁶ Doc. No. 49.

The court held evidentiary hearings in this matter on July 17, 2017, and July 31, 2017. On July 17, 2017, the plaintiffs presented the live testimony of Joel Doe and Mary Smith, and PYC presented the live testimony of its expert, Dr. Scott Leibowitz, and Aidan DeStefano. On July 31, 2017, the court heard the continued testimony of Dr. Leibowitz (via videoconferencing) and also heard live testimony from Dr. Cooper. Throughout the proceedings, the parties additionally provided the court with, *inter alia*, numerous exhibits, deposition transcripts of all four plaintiffs (including trial depositions of Macy Roe and Jack Jones) and other witnesses including Dr. Foley, Dr. Cooper, Dr. Faidley, and Dr. Leibowitz.

⁵ Although omitted from the main text of the procedural history in this matter, the defendants filed a motion to dismiss the amended complaint and supporting memorandum of law on June 16, 2017. Doc. Nos. 38, 39. The plaintiffs filed a memorandum in opposition to the motion on June 30, 2017, and the defendants filed a reply brief in support of their motion on July 7, 2017. Doc. No. 41, 43.

⁶ The court resolved this motion by clearing the courtroom and providing members of the public, including members of the press, with the opportunity to hear the testimony (except where necessary to protect the plaintiffs' anonymity) in the undersigned's chambers as the court's audio system allows for court proceedings to be heard in chambers.

The parties separately filed supplemental findings of fact and conclusions of law on August 10, 2017. Doc. Nos. 57-59. The court then heard oral argument on the motion for a preliminary injunction on August 11, 2017.⁷

During the oral argument, the plaintiffs' objected to exhibit 1 to the School District defendants' supplemental proposed findings of fact and conclusions of law insofar as they had attached purported public school district policies referencing transgender students. At the plaintiffs' request, the court provided them with an opportunity to submit a memorandum of law in support of their objection, and the plaintiffs filed a motion to strike this exhibit on August 16, 2017. Doc. No. 63. On the same date, the School District defendants filed a response in opposition to the motion to strike. Doc. No. 64.

On August 17, 2017, PYC submitted a supplement to its proposed findings of fact and conclusions of law in which it seeks to have the court consider the *Amici Curiae* brief submitted by school administrators from 33 states and the District of Columbia in support of the plaintiff/appellant in *G.G. ex rel. Grimm v. Gloucester County School Board*, No. 15-2056 (4th Cir. 2015). Doc. No. 65. On the same date, the plaintiffs filed a response to PYC's supplemental submission. Doc. No. 66.

IV. FINDINGS OF FACT

After carefully considering all of the evidence presented during the evidentiary hearings on July 17, 2017, and July 31, 2017, and the evidence introduced and admitted before the court closed the evidentiary record on August 11, 2017, after assigning such weight to the evidence as

⁷ During oral argument, the parties indicated that they were submitting the various depositions as evidence without designations, and they also submitted (1) unredacted and redacted transcripts of the evidentiary hearings, (2) unredacted and redacted transcripts of the plaintiffs' depositions and trial depositions, (3) Dr. Faidley's deposition transcript, (4) the plaintiffs' redacted interrogatory responses, (5) a redacted November 16, 2016 email from Jane Doe, and (6) a redacted report relating to Mary Smith. The parties also provided the court with a stipulation of facts.

the court deemed proper and disregarding the testimony that the court found to lack credibility, the pertinent facts are as follows:

A. The School District Defendants, the School District's Practice, and the Facilities at the Boyertown Area Senior High School

1. The defendant, the Boyertown Area School District (the "School District"), is organized under the laws of the Commonwealth of Pennsylvania, and includes public educational institutions that provide students a kindergarten through twelfth grade education. Amended Compl. at ¶¶ 14, 15, Doc. No. 8.

2. The School District receives "Federal financial assistance" potentially subjecting it to the requirements of Title IX. Plaintiffs' Ex. P-42, Resp. to Pls.' First Set of Reqs. for Admis. to Defs. ("School Dist. Resp. to Requests for Admis.") at ¶ 1.

3. The School District is an "educational institution" as defined under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681. School Dist. Resp. to Requests for Admis. at ¶ 2.

4. The School District's Board of Directors (the "School Board") establishes official policies for the School District. Transcript of Evidentiary Hr'g on July 31, 2017 ("7-31-17 Tr.") at 108.

5. The defendant, Dr. Richard H. Faidley, who has been working in the education field since 1990, served as the Superintendent of Schools for the School District from August 2013 until resigning as Superintendent no later than July 25, 2017. June 21, 2017 Dep. of Dr. Richard H. Faidley ("Faidley Dep.") at 12; 7-31-17 Tr. at 107.⁸

⁸ Although the School District defendants indicate in their second set of proposed findings of fact and conclusions of law that Dr. Faidley resigned as Superintendent on July 17, 2017, effective July 18, 2017, *see* Defendants' Second Set of Proposed Findings of Fact and Conclusions of Law Regarding Pls.' Mot. for Prelim. Inj. ("Defs.' Findings and Conclusions") at 2, ¶ 2, the court could not locate this fact in the record. Instead, the only fact relating to the

6. The defendant, Dr. Brett A. Cooper, is the Principal of the Boyertown Area Senior High School (“BASH”), and has worked in this role for the past eight-and-a-half years. 7-31-17 Tr. at 106, 130. Prior to becoming Principal at BASH, Dr. Cooper was an Assistant Principal at BASH for three-and-a-half years. July 7, 2017 Dep. of Dr. Brett A. Cooper (“Cooper Dep.”) at 18.

7. There were 1659 students at BASH during the 2016-17 school year. June 21, 2017 Dep. of Dr. E. Wayne Foley (“Foley Dep.”) at 15.

8. As Principal of BASH, Dr. Cooper is responsible for all of BASH’s operations, including, *inter alia*, responding to inquiries by parents, guardians, and community members, having final decision over disciplinary matters, supervising staff and faculty, implementing the curriculum approved by the School Board, and establishing, in conjunction with the School District office lead by the Superintendent, practices and procedures affecting BASH students. Cooper Dep. at 20, 21.

9. Dr. Cooper reports directly to School District Assistant Superintendent of Operations Rob Scoboria (“Assistant Superintendent Scoboria”). Cooper Dep. at 21; 7-31-17 Tr. at 106. Dr. Cooper often communicates with Assistant Superintendent Scoboria about operations, policies, and special education issues involving BASH. Cooper Dep. at 22, 23.

10. Assistant Superintendent Scoboria reports directly to Dr. Faidley. Cooper Dep. at 21.

11. BASH has grade-level Assistant Principals who report directly to Dr. Cooper. Cooper Dep. at 23; 7-31-17 Tr. at 110-11.

date of resignation is that it appears that the School Board named an Interim Superintendent, David Krem, to replace Dr. Faidley on July 25, 2017. *See* 7-31-17 Tr. at 107.

12. One of the BASH Assistant Principals is Dr. E. Wayne Foley, who is assigned to the graduating class of 2018. Cooper Dep. at 24; Foley Dep. at 11, 12. Dr. Foley has served in this role since April 30, 2012. Foley Dep. at 11.

13. Dr. Cooper meets regularly with the BASH Assistant Principals. Cooper Dep. at 24.

14. Prior to the 2016-17 school year, BASH students were to use the locker room or bathroom aligning with their biological sex. 7-31-17 Tr. at 131; Faidley Dep. at 34, 40.

15. BASH students were previously separated on the basis of their biological sex in part to protect their personal privacy and safety from members of the opposite sex while using bathrooms and locker rooms. 7-31-17 Tr. at 131, 132; Cooper Dep. at 35; Foley Dep. at 23, 24, 26, 53-54.

16. Under this practice, BASH administration would have disciplined and, in fact, disciplined, any students if they entered the opposite biological sex's bathroom or locker room. Foley Dep. at 24, 25; 7-31-17 Tr. at 112; Cooper Dep. at 31.

17. In the 2014-15 school year, a school counselor communicated to Dr. Cooper that Aidan DeStefano ("DeStefano"), a tenth grade student and biological female who was identifying as a male, *i.e.* a transgender male, was uncomfortable using the girls' bathrooms at BASH. Cooper Dep. at 75-78; *see also* Faidley Dep. at 25, 26, 27.

18. Dr. Cooper discussed this request, and the possibility of DeStefano using the single-user facility in the nurse's office, with Assistant Superintendent Scoboria. 7-31-17 Tr. at 109.