Evancho v. Pine-Richland Sch. Dist.

United States District Court for the Western District of Pennsylvania

February 27, 2017, Decided; February 27, 2017, Filed

Civil No. 2:16-01537

Reporter
2017 U.S. Dist. LEXIS 26767 *

JULIET EVANCHO, ET AL., Plaintiffs, v. PINE-RICHLAND SCHOOL DISTRICT, ET AL., Defendants.

Core Terms

restrooms, gender, transgender, sex, identities, high school, bathrooms, Regulation, declarations, assigned, purposes, privacy, merits, appears, privacy interest, no record, classification, biological, matters, parties, girls, lives, interpretations, deference, courts, issues, cases, preliminary injunction, reasonable likelihood, court concludes

Counsel: [*1] For JULIET EVANCHO, ELISSA RIDENOUR, A. S., a minor, by and through his parent and next friend, DANIEL SMILEY, Plaintiffs: David C. Williams, LEAD ATTORNEY, PRO HAC VICE, Kline & Specter, P.C., Philadelphia, PA; Omar Gonzalez-Pagan, LEAD ATTORNEY, PRO HAC VICE, Lambda Legal Defense and Education Fund, Inc., New York, NY; Tracie L. Palmer, LEAD ATTORNEY, Kline & Specter, PC, Philadelphia, PA; Christopher R. Clark, PRO HAC VICE, Lambda Legal Defense and Education Fund, Inc., Chicago, IL; Kara N. Ingelhart, PRO HAC VICE, Lambda Legal Defense and Education Fund, Inc., Chicago, il.

For PINE-RICHLAND SCHOOL DISTRICT, DR. BRIAN R. MILLER, in his official capacity as Superintendent of the Pine-Richland School District, NANCY BOWMAN, in her official capacity as Principal of Pine-Richland High School, Defendants: Alfred C. Maiello, Maiello, Brungo & Maiello, Pittsburgh, PA; Christina L. Lane, Maiello Brungo & Maiello, Pittsburgh, PA; Gary H. Dadamo, Peter J. Halesey, Roger W. Foley, Jr., Maiello, Brungo & Maiello, LLP, Pittsburgh, PA; Michael L. Brungo, Maiello, Brungo & Maiello, P.C., Pittsburgh, PA.

For SCHOOL ADMINISTRATORS FROM CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, FLORIDA, ILLINOIS, [*2] KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NO, Amicus: Matthew D. Stockwell, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, New York, NY.

For THE PENNSYLVANIA YOUTH CONGRESS, THRIVE OF SOUTHWEST PENNSYLVANIA, Amici: Jesse R. Loffler, Mark Siegmund, PRO HAC VICE, Fried, Frank, Harris, Shriver & Jacobson LLP, New York, NY.

Judges: Mark R. Hornak, United States District Judge.

Opinion by: Mark R. Hornak

Opinion

Mark R. Hornak, United States District Judge

The three high school student Plaintiffs are each transgender, and all are in their senior year at Pine-Richland (Pa.) High School ("High School"). ECF 43 at ¶ 15. Two of them, Juliet Evancho and Elissa Ridenour, each over eighteen years old, had "male" listed on their birth certificates when they were born.[1] That of the third Plaintiff, A.S. (also a high school senior, but not yet eighteen years old), said "female." For some time, Juliet Evancho and Elissa Ridenour have lived all facets of their lives as girls, and A.S. has done so as a boy.*

[1] The Commonwealth of Pennsylvania has re-issued a birth certificate for Plaintiff Evancho that lists her sex as "female."

* In the evening hours of February 22, 2017, the United States Departments of Education and of Justice jointly issued a guidance letter ("2017 Guidance") that withdrew or revoked the Departmental interpretation of *Title IX* and a regulation relating specifically to school bathroom use by transgender students that was contained in two previous Departmental guidance letters, one of January 7, 2015 ("2015 Guidance") and the other of May 13, 2016 ("2016 Guidance"). *See* February 22, 2017 "Dear Colleague" Letter, *available at* https://www2.ed.gov/about/offices/list/ocr/lgbt.html . As discussed at length in Section IV of this Opinion, the Court has

The Defendant School District ("District")[2] does not dispute that Plaintiffs identify as transgender, which means, among other things, that their [*3] gender identities are at odds with the sexes listed on their original birth certificates and with their external sex organs. ECF 38 at ¶ 2. It is undisputed that in all respects, the Plaintiffs have—at least for their high school years—lived every facet of their in-school and out-of-school lives consistently with their respective gender identities rather than their "assigned sexes."[3] Their teachers, school administrators, fellow students and others have treated the Plaintiffs consistently with their gender identities as they have lived and expressed them rather than according to their assigned sexes. ECF 36-4 at ¶¶ 25-26. According to the District, the Plaintiffs, except for purposes of excretory functions, are of the gender with which they identify, and the District treats the Plaintiffs' gender identities as their "sex" in all other interactions with the District. ECF 38 at ¶¶ 3, 4, 5, 9; ECF 36-5 at ¶¶ 12-14; ECF 73 at 73.

The central issue now before the Court is whether the District acted in accord with federal law when it limited, by formal School Board ("Board") Resolution 2,[4] the common school bathrooms that these Plaintiffs may use to either (a) single-user [*4] bathrooms or (b) the bathrooms labeled as matching their assigned sexes. The Plaintiffs argue that the District's application of Resolution 2 to prevent them from continuing to use common student restrooms that conform to their gender identities violates both *Title IX of the Education Amendments of 1972*, and the *Equal Protection Clause of the Fourteenth Amendment*, in the former case by unlawfully discriminating against them based on their sexes, and in the latter case by impermissibly treating them differently than other District students based on their gender identities, and therefore their sexes. The relief Plaintiffs seek in their motion for preliminary injunctive relief is relatively narrow. They seek an order of this Court enjoining the District from enforcing Resolution 2 as to them and restoring the *status quo ante* as to how the District interacted with the Plaintiffs prior to the enactment of Resolution 2.

The Court concludes that the Plaintiffs have a reasonable likelihood of success on the merits of their Equal Protection claim but not on the merits of their Title IX claim. The Court will therefore grant in part the Plaintiffs' Motion for a Preliminary Injunction, ECF 22; ECF 24. The Court will deny without prejudice the District's Motion to Dismiss both of the Plaintiffs' claims, ECF 34.

I.

Court cases involve real people and real events. Facts matter,[5]

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carefully reviewed and considered the 2017 Guidance. The Court has also conferred with counsel for all parties regarding the impact of that latest Guidance. Counsel provided the Court with their respective positions as to the effect of such Guidance on the claims and defenses asserted by the parties in this case and on the disposition of the Motions now pending before this Court, and each advised the Court that they did not find it necessary to file further supplemental papers.

[2] The District, located in the northwestern segment of Allegheny County, Pennsylvania, is a public school district organized and existing under the Public School Code of 1949, as amended. ECF 43 at 20. It is governed by a nine-member elected Board of School Directors. ECF 43 at ¶ 21. Its chief educational officer is its Superintendent, who is a Commissioned Officer of the Commonwealth, and is by statute an *ex officio*, non-voting member of the School Board. *24 Pa. Stat. Ann. §§ 10-1078, 1081*; ECF 43 at ¶ 23. The District has about 4,500 students in kindergarten through the 12th grade, which would mean that it has about 1,600 students in grades 9-12 at the High School. It is uncontested that the District is the direct and indirect recipient of federal educational funding. *Title IX* therefore covers the District's educational programs. ECF 38 at ¶¶ 40, 42, 43, 44; ECF 43 at ¶ 22. The named Defendants are the District and its Superintendent and High School Principal (both in their official capacities).

[3] Solely for simplicity of reference, and because it is the focus of all of the arguments advanced by the Defendants, the Court will use the term "assigned sex" to refer to the physical characteristics of the external sex organs of a person being referenced. As was Judge Nelson in the *Rumble* case, this Court is reluctant to use any descriptive term that can have the unintended effect of reducing any person on any side of any case to a label, but it nonetheless uses this terminology because the District's asserted rationale for Resolution 2 turns on that single human characteristic. *See Rumble v. Fairview Health Svcs., No. 14-2037, 2015 U.S. Dist. LEXIS 31591, 2015 WL 1197415, at *2, n.1 (D. Minn. Mar. 16, 2015)*. The Court will use the term "transgender" to refer to individuals who have expressed and live a gender identity that is different from their assigned sex at birth. The Court recognizes that each of the parties contends that such terms may have other meanings in a variety of contexts beyond the discrete issues now before the Court.

[4] Resolution 2 provides:

> This resolution agreed to by a majority of the Board of Directors of the Pine-Richland School District indicates our support to return to the long-standing practice of providing sex specific facility usage. All students will have the choice of using either the facilities that correspond to their biological sex or unisex facilities. This practice will remain in place until such [*5] time that a policy may be developed and approved.

ECF 39 at ¶ 31.

[5] That we know for sure. Our Court of Appeals has squarely recognized that there may be a *Fourteenth Amendment* right to privacy in a partially clothed body where as a result of "fact-intensive and context-specific analyses" a court concludes that

so it is both worthwhile and important to note what the record now before the Court does and does not demonstrate.[6]

Plaintiff Juliet Evancho began to change her appearance and dress to that typically associated with a girl at around age 12 or 13. She began medically supervised hormone treatment at around age 16, and in 2015, at age 17, she publicly began living as a girl. During the 2015-16 school year, Ms. Evancho and her parents met with school officials regarding her gender identity as a girl, and those school officials were fully on board with treating her consistently with that identity. She says that the passage of Resolution 2 and its implementation as **[*6]** to her have caused her serious emotional and other distress, making her feel unsafe, depressed, marginalized and stigmatized by, among other things, the School's requirement that she use only either the boys restrooms or the single-user restrooms at the High School.[7] ECF 24-2 at 46-52, 55, 62. Ms. Evancho's photo, which shows that her appearance is completely consistent only with the gender identity that she lives every day, is in the record at ECF 24-2 at ¶ 7.

Plaintiff Elissa Ridenour began to live her life as a girl at age 14, and she likewise began medically supervised hormonal therapy thereafter. In 2012, while in 8th grade, she and her parents met with school officials to advise them that she was living her life in all respects as a girl. The District officials stated that they would engage with her in that fashion. ECF 71-2. Ms. Ridenour is treated by the High School community as a girl, and—at least prior to the passage of Resolution 2—was fully accepted as a girl. She reports that Resolution 2 had essentially the same impact on her as does Ms. Evancho. ECF 24-3 at ¶¶ 28, 31, 34, 40. Plaintiff Ridenour's photo, which shows that her appearance is consistent only with the gender **[*7]** identity that she lives every day, is in the record at ECF 24-3 at ¶ 8.

Plaintiff A.S. and his parents met with school counselors in 2015 and advised them that he lived as a boy. The school counselors advised him that he would be treated as a boy within the school community, and he was. Beginning in his junior year at the High School, A.S. started using the "boys" restroom with no issues, and he was widely accepted as a boy by the school community. In 2016, he too began receiving medically-directed hormonal treatment, and he has now legally changed his given name to one traditionally used by boys. A.S. also asserts the same sorts of actual harm from the implementation of Resolution 2 as do the other Plaintiffs. ECF 24-4 at ¶¶ 24, 33-35.

The Plaintiffs have submitted the declaration of Dr. Diane Ehrensaft, a developmental and clinical psychologist who has declared that she has considerable educational and professional experience in the area of gender identity matters. ECF 24-5. Dr. Ehrensaft stated that what is reported by the Plaintiffs as to their gender identities, their life experiences, and the scope of the impact of that identity on their daily living is fully consistent with their **[*8]** having exactly the gender identities they say that they have and the way they live in all facets of their lives. The Plaintiffs' own unopposed

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governmental action has resulted in the "public disclosure of highly personal matters representing the most intimate aspects of human affairs," and where what is publicly disclosed "involves deeply rooted notions of fundamental personal interests derived from the Constitution." *See Doe v. Luzerne Cty., 660 F. 3d 169, 176 (3d Cir. 2011)*. Thus, *Doe* stands at least for the proposition that this Court is obligated to consider the *Fourteenth Amendment* and *Title IX* interests advanced by the Plaintiffs, and the privacy interests advanced by the Defendants, in the context of the actual facts.

[6] Each party has submitted detailed declarations, proposed findings of fact and conclusions of law, principal and responsive briefs, and various supporting reports and documents, all of which form the basis for the recitations contained in this Opinion. Although the parties vigorously dispute the legal consequences of the factual record before the Court, the parties agree as to the overall content of that factual record, each having advised the Court that an evidentiary hearing was unnecessary. The parties agree that the Court may and should proceed on the record developed by the declarations and other record material advanced by the parties. Having reviewed that record, and having considered the matters advanced by able and thoroughly prepared counsel for all parties in more than five (5) hours of oral argument before the Court, along with detailed supplemental filings of the parties, the Court concurs that the record is sufficiently complete and detailed to proceed with the disposition of the pending Motions. To the extent such denomination is required, the facts and conclusions set forth at length in this Opinion constitute the Court's findings of fact and conclusions of law for purposes of *Fed. R. Civ. P. 52*.

In addition, the Court granted leave to several *amici curiae* authorizing them to file briefs in this case. All were in support of the position of the Plaintiffs. ECF 48; ECF 51; ECF 55. *Amici* included a group of medical professionals who focus on healthcare for transgender youths, ECF 48, a group of senior school administrators from school districts and state-wide educational agencies in 21 states and the District of Columbia, ECF 51, and two Pennsylvania organizations whose energies focus on advocating for the interests of LGBTQ youth. ECF 55. The Court is appreciative of the efforts undertaken by *amici* and their counsel, who have made helpful contributions to the record in this case.

[7] The District does not dispute the historical factual assertions in Plaintiffs' declarations, but does take issue with certain other assertions in them. These include those in which the declarant asserts either motives of the Board or certain statements which might imply a causal link between the passage of Resolution 2 and what the declarant says is its effect on him or her, or between the Resolution and a perceived negative change in the High School environment.

declarations, and those of their parents, state the depth and consistency with which they live the gender identities they have expressed on the record here. Indeed, there is no record evidence that these Plaintiffs do not actually have the specific gender identities they relate to this Court (and as they related to, and were known by, the District Administration while Resolution 2 was under consideration), nor has the District advanced any arguments to that effect.[8]

The parties seem to agree that besides Plaintiffs, there are no other openly-known transgender students at the High School at this time. The District does not advance as a factual matter that there are any other students at any level in the District that have advised the District that they are transgender. ECF 73 at 83, 88. Thus, in terms of the real world, the passage of Resolution 2 and its current application would fairly be understood by the Plaintiffs, the District and everyone else paying attention to these matters as relating to these Plaintiffs and their use of common bathrooms. **[*9]** Such would have well been known to the Board and the District Administration as being the case. ECF 23-3 at 4.

As to the High School restroom facilities themselves, the parties agree that the student restrooms at the High School are well-maintained, well-lit, and provide locking doors for the toilets in both the girls and boys restrooms. There are partitions on the urinals in the boys rooms. ECF 23-4 at 40. The photos of the restrooms placed into the record demonstrate all of that to be the case. ECF 41-3. The parties agree that the nearly one dozen single-user restrooms arrayed around the High School are now open to any student at any time, including to any student that has a particularized privacy concern. ECF 38 at 35-39.

Until early 2016, there were no institutional issues with the participation of the Plaintiffs in any facet of daily life at the High School. The District, its educational staff, and apparently their fellow students, treated each of them in the very same way that their own families did—that is, consistently with their gender identities. The record reveals that the Plaintiffs appear to have as their principal goal living and attending school in about as unexceptional **[*10]** a way as is possible. It is not an overstatement to observe that on the record before the Court, there simply were no issues or concerns from the District's perspective as to the Plaintiffs' unlimited participation in all daily activities at school, and the District's faculty, staff and Administration were fully supportive of them. ECF 38 at ¶ 13. The most distinctive and illustrative evidence of this is that Juliet Evancho ran for Homecoming Queen in 2016, and she was elected by her peers to the "Homecoming Court" of finalists for that honor.[9] ECF 38 at ¶117; ECF 36-5 at ¶ 14.

In early 2016, apparently fueled by an inquiry from a parent of a student at the High School, ECF 38 at II 20, the District's Superintendent addressed the restroom issue with the entire school community for the first time.[10] His message was pretty much one of "steady as it goes," ECF 43 at ¶¶ 28, 29; ECF 73 at 9, 78; ECF 23-23, in that the Plaintiffs had been participating, engaged members of the student body, and the District Administration had become aware that the Plaintiffs had been using the school restrooms that conformed with their gender identities for some time. ECF 23-5 at 57; ECF 43 at ¶¶ 17, 18, 19. **[*11]** This was consistent with how the Plaintiffs lived their lives day in and day out and with how the District treated them in every other respect.[11]

Throughout the summer of 2016, there were a number of discussions about the restroom topic at the District's regular public Board meetings and at publicly-held Board Committee meetings convened specifically as to these matters. One session included a presentation on gender identity by the professional staff at Pittsburgh's Children's Hospital.[12] ECF

[8] From the perspective of the actual record before the Court, that would be a very, very hard case to make. The record reveals no basis to call into question the sincerity and actuality of the gender identities of the Plaintiffs or the reality that the greater school community has for some time recognized those gender identities.

[9] At graduation, the Plaintiffs will wear the academic garb that matches their gender identities, and the name and descriptive pronouns that Plaintiffs and faculty use daily in reference to them—which match those gender identities—will appear on their diplomas. ECF 38 at ¶¶ 6, 8.

[10] The record reflects that the Board President received a petition signed by twelve resident taxpayers of the District dated March 1, 2016. The petition requested the District's response to fourteen (14) questions related to the use of District restrooms, showers and locker rooms by students relative to their "biological sex." ECF 36-14. The record also reflects that the Superintendent first briefed the Board on these matters in October 2015. ECF 36-8. The Superintendent says that he first learned of a transgender student using a bathroom consistent with his or her gender identity in the Fall of 2015, though such use had been occurring since the 2013-14 school year. ECF 23-5 at 57; ECF 36-4.

[11] The District Administration's decision to interact with these students as it did was fully consistent with what appears to have been the core message of the advice provided to the the School Board and the Administration by professionals at Children's Hospital of Pittsburgh. It also happens to be fully consistent with what is set out in the Plaintiffs' expert's declaration based on her professional education and experience.

[12] The PowerPoint slide deck of that presentation, ECF 23-7, explains that the professionals from Children's Hospital stated many of the same professional conclusions as did the psychological

expert's declaration proffered by the Plaintiffs: transgender status is not a "disorder," nor is it a "choice" or changeable; those who are transgender can experience "gender dysphoria," which is a recognized medical diagnosis reflective of severe and unremitting emotional pain connected to unresolved tension between gender assigned at birth and gender identity; and transgender people pose no different or heightened risk of harm or danger to anyone else. ECF 43 at ¶ 7.

In support of their position, the Plaintiffs filed the declaration of Dr. Diane Ehrensaft, ECF 24-5, a clinical and developmental psychologist of some 35+ years professional experience and engagement. She declared, seemingly in line with the Children's Hospital presentation, that external sex organs are one (but by no means the only or most accurate) indicia of a person's sex and gender, that being transgender is not a "preference," that being transgender has a medically-recognized biological basis, and that it is an innate and non-alterable status.

The Defendants did not counter Dr. Ehrensaft's declaration with any testimonial offering. ECF 36 at 20, n.5. They did refer generally in their papers to an article which in summary reports that (1) the idea that sexual orientation is an innate, biologically-fixed property of humans is not supported by scientific evidence, (2) there are no compelling causal biological explanations for human sexual orientation, (3) sexual orientation in adolescents is fluid, (4) the concept that gender identity as an innate, fixed property of humans independent of biological sex is not supported by scientific evidence, (5) 6/10ths of 1% of U.S. adults identify as a gender that does not correspond to their biological sex, (6) there is weak correlation between brain structure and "cross-gender identification," (7) only a minority of children who experience "cross-gender identification" will do so into adolescence or adulthood, (8) there is no evidence that all children "who express gender-atypical thoughts or behavior should be encouraged to become transgender." *See* ECF 43 at ¶¶ 1-6, 13; L.S. Mayer, Ph.D. & P.R. McHugh, M.D. *Sexuality and Gender: Findings from the Biological, Psychological, and Social Studies*, THE NEW ATLANTIS: A JOURNAL OF TECHNOLOGY & SOCIETY, Fall 2016, at 7-9 ("Article").

The Court has reviewed the Article, even though it carries with it no indicia of admissibility into the evidentiary record under any provision of the Federal Rules of Evidence, nor alternatively, any other indicia of reliability. The Defendants were given the opportunity to make such showings and have not. ECF 44, 63. There is no record evidence of the degree of acceptance in the scientific literature of the Article, its methodology, findings, or the degree to which it was subjected to peer review. It also appears from the Article's Preface that it was not the result of specific empirical research under the direction of its authors, but was instead a "synthesis of research" by Dr. Mayer. Article at 4. There is also no record evidence that the Article was consulted or relied upon by the District in enacting Resolution 2, or that its authors were in any way consulted by the Board or District Administrators in those regards.

The District does not advance any reason as to why the summary conclusions in that Article, which appear to be at odds with not only what Dr. Ehrensaft opines, but also with what the medical professionals from Children's Hospital reported to the Board at a public meeting, should be given precedence in this case. What that Article appears to say at its core is that particularly as to younger people, the surveyed literature indicates that gender identity may well remain unsettled for a longer period of time than is posited by the Plaintiffs.

The record in this case is both robust and unequivocal—the Plaintiffs, who are in late adolescence/early adulthood, have gender identities that appear to be settled. They live consistently with those identities and only those identities, and the entire School community treats them accordingly. They have for some time been engaged in medical consultations and interventions that are consistent with those identities. There is no record evidence that the Plaintiffs were "encouraged" to "become" transgender. The record reveals, and the District does not contest, that they are transgender.

Finally, the Article's references to sexual orientation do not appear to have anything to do with this case. *Rumble, 2015 U.S. Dist. LEXIS 31591, 2015 WL 1197415, at *2*.

38 at ¶ 30; ECF 23-15. The debate was highly engaged. The Board sought the advice of its experienced school solicitor as to legal issues related to these matters. Members of the public spoke at the meetings on these topics. Many, but not all, spoke in favor of the position ultimately enacted in what has been denominated School Board Resolution 2. ECF 38 at 24; ECF 36-4 at ¶ 10-11. According to the declarations submitted by the individual Board Members, a (if not *the*) prevailing concern raised by both those who spoke in favor of Resolution 2 and Board proponents alike was that a student would in essence masquerade as being transgender, and would then use a designated student restroom inconsistent with **[*12]** their assigned sex. This would all occur in an effort to visually examine the sex organs of other restroom users or to engage in some other blatant and malicious invasion of bodily privacy of those simply using the restrooms for their intended purposes. Board members also expressed concern that the partially clothed body of a student of a given assigned sex would be observed in a restroom by a student of the opposite assigned sex. No explanations were provided as to the circumstances of how or when that has, or would, actually happen. ECF 36-4 at ¶ 12; ECF 36-7 at ¶ 16; ECF 36-8 at ¶ 15; ECF 36-9 at ¶ 12; ECF 36-10 at ¶ 14; ECF 36-11 at ¶ 12. And the record of these discussions (including the declarations of Board Members and the parents of other students, as well as the transcripts of portions of the meetings, ECF 23-2 through 23-6), does not reveal that any such episode involving an imposter has ever occurred at the High School or in the District, nor was any reported episode in another school advanced to the Board.[13] ECF 23-3 at 4-7; 73

[13] One Board Member stated that she had been made aware that in early 2016 several students at the High School were uncomfortable because a transgender student had used the student restroom that was

at 81.

[*13] At the end of its process,[14] the Board in a 5-4 vote passed Resolution 2, reversed how things had been happening for the past several years, and directed, among other things, that students must use either unisex bathrooms or the school bathrooms of their "biological sex." ECF 38 at ¶¶ 16, 17; ECF 39 at 1131; ECF 43 at ¶¶ 30-31. The Board did not then, and to the Court's knowledge has not to date, defined the term "biological sex" by resolution, policy statement or other Board pronouncement (although the principal proponent of Resolution 2 stated he meant "sex assigned at birth"). ECF 23-4 at 6. Resolution 2 by its terms did commit the District to engaging in further study and some sort of undefined policy development and adoption going forward. District counsel advised the Court that to date no Board or District policy exploration, development or adoption activity in such regards has occurred or begun. ECF 73 at 116-120.

At oral argument, the District's counsel advised the Court that "biological sex" for purposes of Resolution 2 means the then-existing presence of a penis (boys) or a vagina (girls). District counsel was not in a position to authoritatively respond when asked [*14] by the Court what the biological sex would be, for Resolution 2 purposes, of someone born with indeterminate primary external sex organs. District counsel did note that if, for instance, a boy had lost his penis due to trauma or surgery, he would no longer "be a boy"—even if as a result, he had not acquired a vagina. ECF 73 at 116-118.

As of the passage of Resolution 2,[15] the Plaintiffs were required to stop using the common restrooms they had been using, and instead were required to begin using either the single-user facilities that had been opened to all students or the common restrooms matching their assigned sex but not their gender identities. Thus, in sum and substance, in the Pine-Richland School District, the Board has adopted a student bathroom policy that turns exclusively on the then-existing presence of a determinate external sex organ, no matter what other biological sex or gender markers may exist, irrespective of gender identity (even if as in the case of the Plaintiffs, that gender identity is uncontested, and apparently persistent, consistent and medically and psychologically comprehensive), unrelated to how a student leads his or her life in all other respects, and irrespective [*15] of the manner in which the District treats that student for all other purposes. ECF 73 at 175-77.

The record does not reveal (1) the analysis by which the Board chose its specific line of demarcation (or even if the Board, acting as a board,[16] adopted this specific line of demarcation, or whether that was a position taken by District counsel during oral argument, ECF 73 at 176-77), (2) whether that line of physiological definition was based on medical, psychological, psychiatric, or other similar assessments,[17] or (3) how the District would as a practical matter assess the presence of such external anatomy in a disputed case essentially "on the spot," or how it would day to day assess the compliance by the hundreds of students at the High School with that directive. What District counsel did advise the Court was that drawing the line, then and there, was both necessary to enforce, and for the District to act consistently with, longstanding societal definitions of "biological sex," and to protect the privacy interests of students.[18] District counsel

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inconsistent with that student's assigned sex. ECF 36-7. Another Board Member reported that he was first aware of the presence of a transgender student earlier than that based on a report from his child. ECF 36-8.

[14] It also does not appear from the record that the Board received a formal educational recommendation from either the District's Superintendent or the High School Principal as to the necessity or appropriateness of the passage or implementation of Resolution 2 as to restroom use by these Plaintiffs. The Superintendent expressed his concern that what he identified to be an uncertain legal landscape could put the District's federal funding at risk if the District changed the *status quo* as to restroom use via Resolution 2. ECF 36-4 at ¶¶ 15-23.

[15] A "Resolution I" was also proposed, which would have maintained the *status quo* as to bathroom use by Plaintiffs. It failed on a 4-4 vote. ECF 23-4 at 22-23.

[16] One Board member stated in his declaration that "anatomical" sex was the dividing line for him, which he indicated was "sex assigned at birth." According to District counsel, that Board Member was the author of Resolution 2. ECF 73 at 177. But "anatomy" is more than that. For instance, Dr. Ehrensaft opined that there are an array of "anatomical" markers that must be considered in assessing both "sex" and "gender," including internal reproductive organs, internal and external morphological features, chromosomes, hormones and body chemistry.

[17] Based on the Court's review of the meeting transcripts in the record, no Board member offered any such bases. Those advocating for differentiation based on "biological sex" instead referred to what they articulated to be general societal history and what they described as common understandings as to bathroom use.

[18] District counsel even more precisely tied the line of demarcation to excretory functions and the presence of external sexual organs. ECF 73 at 73, 113-118. District counsel also confirmed that there were no findings by the Board that for the purposes of Resolution 2, "biological sex" meant anything more or less than "the primary sexual organs of the student involved." ECF 73 at 176. The record is silent as to any situation in which the excretory functions of any person in any High School restroom are or had been visually accessible to anyone else. *See* ECF 23-4 at 40 (Board member recounting that all bathroom usage by students is shielded from