



Positive

As of: May 1, 2017 5:45 PM Z

## *Bd. of Educ. v. U.S. Dep't of Educ.*

United States District Court for the Southern District of Ohio, Eastern Division

September 26, 2016, Decided; September 26, 2016, Filed

Case No. 2:16-CV-524

### Reporter

2016 U.S. Dist. LEXIS 131474 \*; 208 F. Supp. 3d 850; 2016 WL 5372349

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION, et al., Defendants. JANE DOE, a minor, by and through her legal guardians JOYCE and JOHN DOE Intervenor Third-Party Plaintiff, v. BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, et al., Third-Party Defendants.

**Subsequent History:** Motion granted by, Motion granted by, in part, Stay denied by *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 2016 U.S. App. LEXIS 22318 (6th Cir.) (6th Cir. Ohio, 2016)

**Prior History:** *Bd. of Educ. v. United States Dep't of Educ.*, 2016 U.S. Dist. LEXIS 107614 (S.D. Ohio, Aug. 15, 2016)

### Core Terms

sex, restroom, transgender, school district, gender, girls', Third-Party, district court, female, regulations, bathroom, privacy, male, preliminary injunction, judicial review, facilities, cases, classification, birth, heightened scrutiny, court of appeals, injunction, agencies', issues, locker room, individuals, basis of sex, equal-protection, proceedings, Dictionary

### Case Summary

#### Overview

**HOLDINGS:** [1]-Where the Department of Education (DOE) found that a school district's policy prohibiting a transgender elementary school girl from using the girls' restroom impermissibly discriminated on the basis of sex in violation of Title IX, a court lacked jurisdiction over the district's suit to enjoin the DOE and others on the basis that they violated the APA and the constitution because Congress established a specific enforcement scheme for Title IX, which prohibited the district from seeking judicial review before enforcement

any action occurred; [2]-The intervening girl was entitled to a *Fed. R. Civ. P. 65* preliminary injunction because her testimony that she felt stigmatized and isolated when she was forced to use a separate bathroom and otherwise not treated as a girl showed irreparable injury, and she was likely to succeed on her Title IX and Equal Protection claims.

### Outcome

Motion granted.

### LexisNexis® Headnotes

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Protected Individuals

**HNI** [↓] Title IX of the Education Amendments of 1972 (Title IX) provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C.S. § 1681(a). Title IX also specifies that nothing in the statute shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes. 20 U.S.C.S. § 1686. The U.S. Department of Education has promulgated regulations clarifying that a recipient of federal funds may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex. 34 C.F.R. § 106.33.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Amicus Curiae

**HN2** [v] Leave to participate as amicus curiae is a privilege within the sound discretion of the courts.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

**HN3** [v] The test to determine whether injunctive relief is appropriate under *Fed. R. Civ. P. 65* requires a court to weigh the following factors: (1) whether the movant has a substantial likelihood of success on the merits; (2) whether there is a threat of irreparable injury to the movant without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief. These four factors guide the discretion of the district court, but they do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief. Whether the combination of the factors weighs in favor of issuing injunctive relief in a particular case is left to the discretion of the district court.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > Burdens of Proof > Allocation

**HN4** [v] While the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion, a party is not required to prove his case in full at a preliminary injunction hearing and the findings of fact and conclusions of law made by a court granting the preliminary injunction are not binding at trial on the merits. A plaintiff has the burden of establishing a clear case of irreparable injury and of convincing the court that the balance of injury favors the granting of the injunction.

Education Law > ... > Gender & Sex Discrimination > Title IX > Enforcement of Title IX

**HN5** [v] After an investigation, if the Office of Civil Rights (OCR) of the Department of Education finds a school district in violation of Title IX of the Education Amendments of 1972, *20 U.S.C.S. § 1681 et seq.*, and cannot obtain voluntary compliance from the district, OCR may seek compliance in one of two ways. First, it may initiate administrative proceedings to withhold federal funds from the school district. *20 U.S.C.S. § 1682; 34 C.F.R. § 100.8(c)*. A district is entitled to a hearing before an administrative law judge followed by an administrative appeal and discretionary review by the Secretary of Education. *34 C.F.R. § 100.10(a), (e)*. A district may then seek review of an adverse decision in the appropriate court of appeals. *20 U.S.C.S. § 1683; 20 U.S.C.S. § 1234g(a)-(b)*. Alternatively, instead of initiating administrative proceedings, OCR may refer the matter to the U.S. Department of Justice to commence a civil action in the appropriate federal district court to enjoin further violations. *34 C.F.R. § 100.8(a); 20 U.S.C.S. § 1682*.

Governments > Legislation > Statutory Remedies & Rights

Governments > Legislation > Interpretation

**HN6** [v] Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, purpose, legislative history, and the opportunity provided for meaningful review of the claims.

Education Law > ... > Gender & Sex Discrimination > Title IX > Enforcement of Title IX

**HN7** [v] When an action is "otherwise subject to judicial review," no additional judicial review is available under *20 U.S.C.S. § 1683*.

Administrative Law > Judicial Review > Reviewability > Preclusion

**HN8** [v] If specific statutes relating to programs receiving federal assistance afford review of agency action, then review under the Administrative Procedure Act, *5 U.S.C.S. §§ 551 et seq., 701 et seq.*, is not available.

Education Law > ... > Gender & Sex Discrimination > Title IX > Proof of Discrimination

Education Law > ... > Gender & Sex Discrimination > Title IX > Enforcement of Title IX

**HN9** [↓] In *Cannon v. University of Chicago*, the U.S. Supreme Court held that Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.S. § 1681 et seq., affords an implied private right of action to victims of discrimination. To succeed on a Title-IX discrimination claim, a plaintiff must show: (1) that she was excluded from participation in an education program because of her sex; (2) that the educational institution received federal financial assistance at the time of the exclusion; and (3) that the discrimination harmed her.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

**HN10** [↓] The regulation pertaining to "education programs or activities" provides that in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; or (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.31(b). Access to a communal school bathroom constitutes an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity." Access to the bathroom is thus an education program or activity under Title IX of the Education Amendments of 1972, 20 U.S.C.S. § 1681 et seq.

Education Law > ... > Gender & Sex Discrimination > Title IX > Enforcement of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

**HN11** [↓] Title IX of the Education Amendments of 1972 (Title IX) authorizes implementing agencies to issue rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute. 20 U.S.C.S. § 1682. Title IX's implementing regulations permit schools to provide separate toilet, locker room, and shower facilities on the basis of sex so long as the facilities provided for students of one sex are comparable to facilities provided for students of the other sex. 34 C.F.R. § 106.33; 28 C.F.R. § 54.410. Title IX does not define "sex" in either the statute or the regulations, and the regulations are silent as to how to determine a transgender student's sex for purposes of

access to bathrooms, locker rooms, and shower facilities.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

**HN12** [↓] Auer requires courts to give controlling weight to an agency's interpretation of its own regulation provided that the regulation is ambiguous and the agency's interpretation is not plainly erroneous or inconsistent with the regulation. Auer deference is not appropriate, however, when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question, for instance, when the agency's interpretation conflicts with a prior interpretation or appears to be nothing more than a convenient litigation position or post hoc rationalization advanced to defend past agency action against attack.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

**HN13** [↓] In deciding whether Auer deference is warranted, a court must first determine whether the statute and its implementing regulations are ambiguous, that is, whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Whether the language is ambiguous depends on the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Civil Procedure > US Supreme Court Review > Jurisdiction on Certiorari

Governments > Courts > Judicial Precedent

**HN14** [↓] A grant of certiorari, much less a stay of a mandate pending a decision on certiorari, does not itself change the law. Unless the U.S. Supreme Court rules otherwise, circuit court precedent binds district courts in the circuit on questions of law.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

[HN15](#) [↕] An agency's view need not be the best or most natural one by grammatical or other standards. Rather, the agency's view need be only reasonable to warrant deference.

Constitutional Law > Equal Protection > Gender & Sex

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

[HN16](#) [↕] Under the familiar tiers-of-scrutiny framework in cases arising under the *Equal Protection Clause of the Fourteenth Amendment*, the actions of a governmental entity that discriminates on the basis of sex are subject to heightened scrutiny. State entities may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females. Therefore, generalizations about the way women are, estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Accordingly, the U.S. Supreme Court has consistently held that a party who seeks to defend discriminatory classifications on the basis of sex must offer an exceedingly persuasive justification for that classification. The government must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The governmental interests enumerated must be real, as opposed to merely speculative. If the governmental action at issue does not concern a suspect or quasi-suspect classification, such as sex, however, a court will uphold it so long as it bears a rational relation to some legitimate end.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Gender & Sex

[HN17](#) [↕] Smith supports a conclusion that transgender individuals are a quasi-suspect class because discrimination against them is discrimination on the basis of sex.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

[HN18](#) [↕] The U.S. Supreme Court employs the following four factors to determine whether a new classification requires heightened scrutiny: (1) whether the class has been historically subjected to discrimination; (2) whether the class has a defining characteristic that frequently bears no relation to ability to perform or contribute to society; (3) whether the class exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (4) whether the class is a minority or politically powerless.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

[HN19](#) [↕] Irreparable harm for injunctive relief is presumed as a matter of law when a moving party shows that a constitutional right is being threatened or impaired. Loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. And there is likewise a presumption of an irreparable injury when a plaintiff has shown a violation of a civil rights statute.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

[HN20](#) [↕] For purposes of injunctive relief, it is always in the public interest to prevent the violation of a party's constitutional rights.

**Counsel:** [\*1] For Board of Education of the Highland Local School District, Plaintiff: David R Langdon, LEAD ATTORNEY, Langdon Law LLC, West Chester, OH; Andrew J Burton, Renwick, Welsh & Burton LLC, Mansfield, OH; Douglas G. Wardlow, Gary S. McCaleb, Jeana Hallock, Kenneth J. Connelly, PRO HAC VICE, Alliance Defending Freedom, Scottsdale, AZ; J. Matthew Sharp, PRO HAC VICE, Alliance Defending Freedom, Lawrenceville, GA.

For U.S. Department of Education, John B King, Jr., U.S. Department of Justice, Hon. Loretta E. Lynch, NA, Vanita Gupta, Defendants: Benjamin L. Berwick, LEAD ATTORNEY, U.S. Department of Justice, Boston, MA; Spencer E. Amdur, U.S. Department of Justice, Washington, DC.

For Jane Doe, Joyce Doe, John Doe, ThirdParty Plaintiffs: John Richard Harrison, LEAD ATTORNEY, Hickman & Lowder, Cleveland, OH; Asaf Orr, Christopher Stoll, PRO

HAC VICE, San Francisco, CA; Derek Wikstrom, Jennifer Mintz, Joseph Weissman, Jyotin Hamid, PRO HAC VICE, Debevoise & Plimpton LLP, New York, NY; Linda M. Italiano Gorczynski, PRO HAC VICE, HICKMAN & LOWDER, L.P.A., Cleveland, OH.

For Board of Education of the Highland Local School District, ThirdParty Defendant: David R Langdon, LEAD ATTORNEY, Langdon Law LLC, [\*2] West Chester, OH; Matthew John Markling, LEAD ATTORNEY, McGown & Markling Co, L.P.A., Akron, OH; Andrew J Burton, Renwick, Welsh & Burton LLC, Mansfield, OH; Douglas G. Wardlow, Jeana Hallock, Kenneth J. Connelly, PRO HAC VICE, Alliance Defending Freedom, Scottsdale, AZ; J. Matthew Sharp, PRO HAC VICE, Alliance Defending Freedom, Lawrenceville, GA; Patrick Vrobel, Sean Thomas Koran, Akron, OH.

For Highland Local School District, William Dodds, Shawn Winkelfoos, ThirdParty Defendants: Matthew John Markling, LEAD ATTORNEY, McGown & Markling Co, L.P.A., Akron, OH; Patrick Vrobel, Sean Thomas Koran, Akron, OH.

For State of Ohio, State of Ohio, Amicus: Frederick D Nelson, LEAD ATTORNEY, Ohio Attorney General's Office, Administration, Columbus, OH; Eric Earl Murphy, Ohio Attorney General, Columbus, OH.

For State Of Texas, Amicus: Peter Andrew Patterson, LEAD ATTORNEY, Cooper & Kirk PLLC, Washington, DC; Austin R. Nimocks, PRO HAC VICE, Texas Attorney Generals Office, Office of Special Litigation, Austin, TX.

For State of Arkansas, State of Arizona, State of West Virginia, State of Alabama, State of Wisconsin, State of Georgia, State of Nebraska, State of Louisiana, State of South Carolina, Commonwealth [\*3] of Kentucky, State of Utah, Amicus: Austin R. Nimocks, PRO HAC VICE, Texas Attorney Generals Office, Office of Special Litigation, Austin, TX; Peter Andrew Patterson, Cooper & Kirk PLLC, Washington, DC.

For Governor Phil Bryant, State of Mississippi, Amicus: Peter Andrew Patterson, Cooper & Kirk PLLC, Washington, DC.

For SCHOOL ADMINISTRATORS FROM CALIFORNIA, DISTRICT OF COLUMBIA, FLORIDA, ILLINOIS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, Amicus: Cynthia Cook Robertson, PRO HAC VICE, Pillsbury Winthrop Shaw Pittman LLP, Washington, DC; Edward Reilley Forman, Marshall and Morrow LLC,

Columbus, OH.

**Judges:** ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE. Magistrate Judge Jolson.

**Opinion by:** ALGENON L. MARBLEY

## Opinion

### OPINION & ORDER

Jane Doe, an eleven-year-old transgender girl, seeks to use the girls' restroom at Highland Elementary School. Highland will not permit her to do so. After an investigation, the Office of Civil Rights ("OCR") of the Department of Education ("DOE") found that Highland's policy impermissibly discriminated against Jane on the basis of her sex in violation of *Title IX of the Education Amendments of 1972*. Highland now asks this Court to enjoin DOE and the Department [\*4] of Justice ("DOJ") from enforcing the antidiscrimination provisions of Title IX against Highland. Jane Doe, in turn, asks the Court to enjoin Highland's policy and order Highland to permit her to use the girls' restroom and otherwise treat her as a girl. For the reasons that follow, the Court **DENIES** Highland's Motion for Preliminary Injunction and **GRANTS** Jane Doe's Motion for Preliminary Injunction.

### I. BACKGROUND

#### A. Statutory and Regulatory Background

HNI [↑] Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681(a)*. Title IX also specifies that nothing in the statute "shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *Id. § 1686*. The DOE has promulgated regulations clarifying that a recipient of federal funds "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." [\*5] *34 C.F.R. § 106.33*.

Over the past several years, DOE has issued several guidance documents explaining the agency's interpretation of Title IX and its implementing regulations with respect to transgender students. In a 2010 Dear Colleague Letter, a guidance document explaining DOE's interpretation of Title IX, OCR wrote that Title IX "protect[s] all students, including . . . transgender . . . students, from sex discrimination." (10/26/10

Dear Colleague Letter, Doc. 33-1 at 8.) In April 2014, OCR issued a "significant guidance document" stating that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." (Questions and Answers on Title IX and Sexual Violence, Doc. 33-2 at B-2.) In December 2014, OCR published further guidance clarifying that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." (Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, Doc. 33-3 at 25.) In April [\*6] 2015, OCR issued a Title IX Resource Guide, which stated that schools should "help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes." (Resource Guide, Doc. 33-4 at 21-22.) Most recently, on May 13, 2016, DOJ and DOE issued joint guidance that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." (Dear Colleague Letter on Transgender Students, Doc. 33-5 at 3.) The letter also clarified that "[h]arassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly." (*Id.* at 2.)

## B. Factual Background

Jane Doe is an eleven-year-old transgender girl who is enrolled in the fifth grade at Highland Elementary School. Jane, who was assigned male at birth, has communicated to her family that she is female since she was four years old. (Declaration of Joyce Doe, Doc. 35-2 at ¶ 2.) After her parents sought out the advice of medical and mental health professionals, Jane was diagnosed with gender dysphoria. [\*7] (*Id.* at ¶ 4; Declaration of Lourdes Hill, Doc. 36-2 at ¶ 5.) According to Diane Ehrensaft, a developmental and clinical psychologist who specializes in working with children and adolescents with gender dysphoria, gender dysphoria is "the medical diagnosis for the severe and unremitting emotional pain resulting from th[e] incongruity" between one's gender identity and the sex he or she was assigned at birth. (Declaration of Diane Ehrensaft, Ph.D, Doc. 35-4 at ¶¶ 23-24.) Jane's health care providers recommended that she socially transition to treat her gender dysphoria. (Hill Decl., Doc. 36-2 at ¶ 7.) "Social transition" involves "changes that bring the child's outer appearance and lived experience into alignment with the child's core gender," including "changes in clothing, name, pronouns, and hairstyle." (Ehrensaft Decl., Doc. 35-4 at ¶ 27.)

When Jane began kindergarten at Highland Elementary, she used a traditionally male name and was listed as male in school records. (Compl., Doc. 1 at ¶¶ 61-63.) In 2012, however, Jane's parents, Joyce and John Doe, helped her socially transition by obtaining appropriate clothing and a legal name change, treating her as their daughter, and asking others [\*8] to treat her likewise. (Joyce Doe Decl., Doc. 35-2 at ¶ 5.) According to Joyce, Jane immediately began to feel more joyful, at ease with herself, and less angry. (*Id.* at ¶ 6.) That summer, before she started first grade, Joyce informed Defendant Shawn Winkelfoos, the principal of Highland Elementary, that Jane had socially transitioned and asked that the School District treat her as female, permit her to use the girls' restroom, and ensure that her school records reflected her chosen name and correct gender marker. (*Id.* at ¶¶ 7-8; Compl., Doc. 1 at ¶ 66.) Winkelfoos denied her request to permit Jane to use the girls' restroom and to change the records to reflect her female name, although the School District has stated that it agreed to "address [Jane] as a female." (*Id.* at ¶ 67; Joyce Doe Decl., Doc. 35-2 at ¶¶ 9-10.) Highland has a policy that "students using sex-specific locker rooms and restrooms, or overnight accommodations during school trips or events, must use the facilities that correspond to their biological sex." (Compl., Doc. 1 at ¶ 74.) Jane, therefore, was required to use the office restroom, which was generally used by school personnel and other adults. (Joyce Doe Decl., [\*9] Doc. 35-2 at ¶ 9.) Joyce and John Doe observed that this arrangement was "taking a toll on Jane's mental health." (*Id.* at ¶ 11.)

Joyce renewed her request the following year, in the summer of 2013, before Jane started second grade. (*Id.* at ¶ 12.) Winkelfoos again denied the request and Jane was required to use the unisex restroom in the teachers' lounge. (*Id.* at ¶ 15.) Jane reported to Joyce that when she would pass through the lounge to access the restroom, "teachers would glare at her and make her feel uncomfortable." (*Id.*) Jane began to suffer from extreme anxiety and depression. (*Id.* at ¶ 16.) In May 2014, she was hospitalized for suicidal ideation and depressed mood. (*Id.*)

In December 2013, Joyce filed a complaint with OCR, which proceeded to investigate the complaint. (*Id.*; Compl., Doc. 1 at ¶ 97.) The complaint alleged that Highland discriminated against Jane on the basis of her sex by requiring her to use a separate individual-user bathroom and denying her access to the same bathrooms used by other female students. (*Id.* at ¶ 98; Complaint-in-Intervention, Doc. 32 at ¶ 72.) On August 29, 2014, OCR amended the complaint to include an additional allegation, namely, that school staff [\*10] members subjected Jane to harassment, including by referring to her as a boy and failing to use female pronouns when referring to her, and that the School District failed to respond

appropriately when staff members were informed of student harassment toward Jane. (*Id.* at ¶ 73; Compl., Doc. 1 at ¶ 100.)

In September 2014, at the beginning of Jane's third-grade year, Joyce also filed a complaint with Superintendent William Dodds against Principal Winkelfoos, alleging that Highland had created a hostile environment for Jane. Dodds investigated the complaint and found it to be without merit. (Joyce Doe Decl., Doc. 35-2 at ¶ 17.) That same month, Joyce put in a request to Superintendent Dodds to ask the Board of Education to permit Jane to use the girls' restroom. (*Id.* ¶ 18.) Dodds later told Joyce that the Board had considered her request and voted not to grant it. (*Id.*)

As the beginning of fourth grade approached, Jane became anxious about returning to school because she would not be permitted to use the girls' restroom and she feared that teachers and other students would harass and bully her, including by using her birth name and male pronouns when referring to her. (*Id.* at ¶ 19.) In [\*11] August 2015, she attempted suicide. (*Id.*)

After Jane began fourth grade, the School District required her to use a restroom in the staff room. (*Id.* at ¶ 20.) The restroom was kept locked so that for Jane to gain access to it, a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class. (*Id.*) As a result, Jane began to refuse to use the restroom at school and to limit her fluid intake during the day. (*Id.* at ¶ 21.) Joyce characterized her as more agitated and combative when she returned home each day. (*Id.*) Jane herself stated that when she has to use a different restroom from everyone else, she feels alone and not part of the school. (Declaration of Jane Doe, Doc. 35-1 at ¶ 5.) She said that when other students line up to go to the restroom, she "leave[s] the line to go to a different restroom, [and] other kids say, 'Why are you going that way? You're supposed to be over here.'" (*Id.* at ¶ 6.) One friend asked her: "Why are you going to another restroom? You're a girl. Girls go to the girls' restroom." (*Id.* at ¶ 7.) She also stated that other students sometimes bully her, call her a boy, or tell her to act like a boy, and that some teachers have [\*12] told her she was a boy and called her by her birth name. (*Id.* at ¶¶ 9, 11.)

Based on her experience working with transgender children, Dr. Ehrensaft believes that "it would be psychologically damaging for a transgender child to be forced to use a separate restroom and repeatedly referred to by her birth name and male pronouns," and that circumstances such as a history of serious health conditions and prior suicide attempts "would amplify risk of harm to the child." (Ehrensaft Decl., Doc. 35-4 at ¶ 42.)

Notwithstanding the prohibition on Jane's use of the girls' restroom, Jane has used the girls' restroom on several occasions, and Joyce asserts that none of these occasions caused any harm to other students. (Joyce Doe Decl., Doc. 35-2 at ¶ 22.) While Jane participated in an after-school running club in April and May 2014, her coach allowed her to use a girls' restroom at the school. (*Id.* at ¶ 23.) In October 2014, Jane attended an after-school program called God's Kids, during which the office and teachers' lounge were locked and Jane was permitted to use the girls' restroom. (*Id.* at ¶ 24.) In April 2015, Jane used the girls' restroom at the local zoo during a school field trip there. [\*13] (*Id.* at ¶ 25.) Finally, she used a girls' restroom at the elementary school during after-school choir practice and at Highland High School during a summer volleyball camp. (*Id.* at ¶¶ 26-27.)

Defendants Dodds and Winkelfoos have submitted affidavits attesting that they and other School District officials have taken prompt action to revise school records to reflect Jane's current legal name and insisting that Highland staff have made a concerted effort to address her with the name and pronouns of her choice. (Declaration of William Dodds, Doc. 64 at ¶ 9; Declaration of Shawn Winkelfoos, Doc. 65 at ¶ 20.) Dodds and Winkelfoos also stated that they perceive Jane to be consistently happy while at school and that at the beginning of the school year Jane "high-fived" Dodds and told him she was having fun at school. (Dodds Decl., Doc. 64 at ¶¶ 5, 11; Winkelfoos Decl., Doc. 65 at ¶ 3.) They also submitted copies of emails between Joyce Doe and school officials documenting steps Highland took to help Jane deal with her eating disorder and other health issues. (Emails, Docs. 65-1, 65-2.) Finally, they assert that Jane has never attempted self-harm or exhibited anger issues at school. (Winkelfoos [\*14] Decl., Doc. 65 at ¶¶ 4-5; Dodds Decl., Doc. 64 at ¶ 6.) She has regularly met with the school's social workers and psychologist, with Joyce Doe's consent. (Winkelfoos Decl., Doc. 65 at ¶ 9.) Finally, they point to the school safety plan Highland created for Jane and note that Joyce recently informed them that Jane's suicide risk had been downgraded from high to moderate. (*Id.* at ¶ 22; Doc. 65-9.)

Three parents of other Highland students submitted affidavits in support of the School District's policies. One parent testified that her seventh-grade son who attends Highland Middle School "would be uncomfortable if a girl came into the restroom while he was in there" and that she did not approve of her son sharing a restroom, locker room, or overnight accommodations with girls. (Declaration of Parent H., Doc. 68 at ¶¶ 2, 5.) Another Highland parent, whose two foster daughters have suffered horrific sexual abuse and, as a result, suffer from psychological trauma, submitted an affidavit explaining that for her daughters, "the male anatomy is a weapon by which they were assaulted" and they would