

**Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.**

United States District Court for the Western District of Pennsylvania

March 31, 2015, Decided; March 31, 2015, Filed

CIVIL ACTION NO. 3:13-213

**Reporter**

97 F. Supp. 3d 657 \*; 2015 U.S. Dist. LEXIS 41823 \*\*

SEAMUS JOHNSTON, Plaintiff, v. UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION d/b/a UNIVERSITY OF PITTSBURGH, ERIC KINSEY, MARK A. NORDENBERG, JEM SPECTAR, MATTHEW UPDYKE, NANCY TURNER, DANIEL W. DUNN, PAUL J. EASH, DOES 1 THROUGH 10, Defendants.

Pittsburgh, PA.

For DOES 1 THROUGH 10, INCLUSIVE, Defendant: Martha Hartle Munsch, LEAD ATTORNEY, Reed Smith, Pittsburgh, PA.

**Judges:** KIM R. GIBSON, UNITED STATES DISTRICT JUDGE.

**Core Terms**

sex, gender, male, transgender, locker room, stereotyping, female, individual's, birth, alleges, cases, restrooms, biological, basis of sex, retaliation, harassment, discriminated, conform, classification, sex-segregated, bathrooms, asserts, sex discrimination, transsexual, facilities, courts, sexual, second amended complaint, disorder, prohibiting discrimination

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For UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, doing business as UNIVERSITY OF PITTSBURGH, doing business as UNIVERSITY OF PITTSBURGH, Defendant: Martha Hartle Munsch, LEAD ATTORNEY, Reed Smith, Pittsburgh, PA; Patrick T. Noonan, LEAD ATTORNEY, Pittsburgh, PA; Kim M. Watterson, Reed Smith LLP, Pittsburgh, PA.

For ERIC KINSEY, MARK A. NORDENBERG, MATTHEW UPDYKE, NANCY TURNER, DANIEL W. DUNN, PAUL J. EASH, JEM SPECTAR, Defendants: Martha Hartle Munsch, LEAD ATTORNEY, Reed Smith, Pittsburgh, PA; Kim M. Watterson, Reed Smith LLP,

**Opinion by:** KIM R. GIBSON

**Opinion**

**[\*661] MEMORANDUM OPINION**

**I. Introduction**

This case arises from Plaintiff Seamus Johnston's allegations that Defendants discriminated against him **[\*\*2]** based on his sex and his transgender status<sup>1</sup> by prohibiting him from using sex-segregated locker rooms and restrooms that were designated for men. Although the parties have submitted lengthy briefs and have advanced numerous arguments, this case presents one central question: whether a university, receiving federal funds, engages in unlawful discrimination, in violation of the United States Constitution and federal and state statutes, when it prohibits a transgender male student from using sex-segregated restrooms and locker rooms designated for men on a university campus. The simple answer is no.

Pending before the Court in this matter is Defendants' motion to dismiss (ECF No. 9) the second amended complaint (ECF No. 7) pursuant to Federal Rule of Civil Procedure 12(b)(6). Thus, the issue this Court must decide is whether Plaintiff has stated a cognizable claim of discrimination on the basis of sex under the Fourteenth Amendment to the United States

<sup>1</sup>As will be explained below, Plaintiff was born a female but identifies as a transgender male.

Constitution and Title IX of the Education Amendments.<sup>2</sup> The Court finds that Plaintiff has failed to allege a plausible claim for relief as a matter of law. Accordingly, and for the reasons explained below, the Court will **GRANT** Defendants' motion to dismiss.

## II. Jurisdiction

The Court has jurisdiction over the federal constitutional and statutory claims pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983. The Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Venue is proper under 28 U.S.C. § 1391(b) because a substantial portion of the events giving rise to the claims occurred in the Western District of Pennsylvania.

## III. Background

Plaintiff alleges the following facts in his second amended complaint, which the [\*662] Court will accept as true for the purpose of deciding the pending motion to dismiss. Plaintiff identifies as a transgender male. (ECF No. 7 ¶¶ 1, 18). According to Plaintiff, "although he was assigned the sex of female at birth, he is legally, socially, and medically recognized as a man." (*Id.* ¶¶ 1, 18). Plaintiff understood his male gender identity<sup>3</sup> at a very early age, informing his parents that he was a boy at age 9. (*Id.* ¶ 20). In May 2009, Plaintiff transitioned to living in accordance with his male gender identity and began holding himself out as a male in all [\*4] aspects of life. (*Id.* ¶ 21).

Beginning in August 2010, Plaintiff underwent counseling related to his gender identity and was diagnosed by his psychotherapist with Gender Identity Disorder ("GID").<sup>4</sup> (*Id.*

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<sup>2</sup>Because the Court dismisses [\*3] both of Plaintiff's federal question claims, the Court will decline to exercise jurisdiction over Plaintiff's state law claims and thus will not discuss those claims in this memorandum opinion.

<sup>3</sup>Plaintiff avers, "Gender identity is a person's deeply rooted understanding of oneself as male or female. Gender identity is typically established at a very early age and cannot be changed." (ECF No. 7 ¶ 19).

<sup>4</sup>"Gender identity disorder is most simply described as an individual's confusion or discomfort about his or her sexual status as a biological male or female." *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 122 (D. D.C. 1999) (discussing clinical definition and diagnosis criteria for GID). In the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) (2013), which was released in May 2013, the American Psychiatric Association replaced the diagnostic name "gender identity disorder" with "gender dysphoria," defining gender dysphoria as a diagnosis for "people

¶ 22). In August 2011, Plaintiff began hormone treatment for his GID in the form of testosterone injections.<sup>5</sup> (*Id.* ¶ 26).

Beginning in 2009, as part of Plaintiff's transition to living as a male, he "amended his identity documents and records to reflect his male gender identity." (*Id.* ¶ 27). In 2010, Plaintiff obtained a common law name change to "Seamus Samuel Padraig Johnston." (*Id.* ¶ 28). In October 2011, Plaintiff amended the gender marker to male on his Pennsylvania driver's license. (*Id.* ¶ 29). In July 2011, Plaintiff registered with the Selective Service. (*Id.* ¶ 30). In February 2012, Plaintiff amended the gender marker to male on his United States passport. (*Id.* ¶ 31). In November 2013, Plaintiff amended the gender marker to male in his Social Security record. (*Id.* ¶ 32).

Plaintiff attended the University of Pittsburgh at Johnstown ("UPJ" or "University") as an undergraduate Computer Science major for five semesters from 2009 to 2011. (*Id.* ¶ 7). Plaintiff received an REB Commuter Scholarship, a four-year scholarship covering full tuition, fees, and books, which he [\*6] maintained for the entire time he was enrolled at UPJ. (*Id.* ¶¶ 35-36).

When Plaintiff applied for admission to UPJ in March 2009, he listed his sex as "female" on his application form. (*Id.* ¶¶ 33-34). However, when Plaintiff began attending classes at UPJ in August 2009, and at all times thereafter, Plaintiff "consistently lived as male." (*Id.* ¶¶ 37-38). In August 2011, Plaintiff requested that UPJ change the gender marker to male in his school records.<sup>6</sup> (*Id.* ¶ 39). In the fall of 2011, Plaintiff presented UPJ with a [\*663] notarized affidavit regarding his name change, and UPJ changed the name on his student records to "Seamus Samuel Padraig Johnston." (*Id.* ¶¶ 40-41).

While enrolled as a student at UPJ, Plaintiff consistently used the men's restrooms on campus. (*Id.* ¶ 42). During the

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whose gender at birth is contrary to the one they identify with." See Gender Dysphoria Fact Sheet, American Psychiatric Association, available at [\*5] <http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf>.

<sup>5</sup>As Plaintiff explains in his second amended complaint, "Testosterone causes development of male secondary sex characteristics, including increased muscle mass, deepening of the voice, and facial and body hair growth." (ECF No. 7 ¶ 26).

<sup>6</sup>Plaintiff alleges that he "submitted the first of multiple unsuccessful inquiries to . . . amend the gender marker on his school records." (ECF No. 7 ¶ 39). It is unclear from the complaint whether UPJ ever changed the gender marker to male in his school records. However, because Plaintiff alleges that his "inquiry" was "unsuccessful," it appears that UPJ did not change the gender marker in his school records.

spring [\*\*7] 2011 semester, Plaintiff enrolled in a men's weight training class, which was attended only by men. (*Id.* ¶ 43). Plaintiff used the men's locker room for the men's weight training class throughout the spring 2011 semester. (*Id.* ¶ 44). Plaintiff again enrolled in a men's weight training class for the fall 2011 semester, and again began using the men's locker room. (*Id.* ¶ 45). Plaintiff used the locker room approximately five times between the end of August and mid-September without incident. (*Id.*).

However, on September 19, 2011, Plaintiff met with Teresa Horner, Executive Director of Health and Wellness Services at UPJ, who informed Plaintiff that he could no longer use the men's locker room. (*Id.* ¶¶ 46-47). Instead, Plaintiff agreed to use a unisex locker room at the Sports Center normally reserved for referees. (*Id.* ¶ 47). On September 26, 2011, Jonathan Wescott, UPJ Vice President of Student Affairs, informed Plaintiff that "he would be allowed to use the men's locker room if his student records were updated from female to male." (*Id.* ¶ 50). On September 29, 2011, Marylin Alberter, UPJ Registrar, informed Plaintiff that, in order to change the sex designation on his student records, [\*\*8] Plaintiff must provide either a court order or a new birth certificate reflecting Plaintiff's current gender. (*Id.* ¶¶ 51-52). On October 19, 2011, Plaintiff registered a complaint with Jem Spectar, UPJ President, to protest his exclusion from the men's locker room. (*Id.* ¶ 57). Spectar responded by a letter dated October 21, 2011, confirming that, in order for Plaintiff to have access to the men's locker room, he must officially change his gender in UPJ's records by presenting a court order or birth certificate. (*Id.* ¶ 58).

In October 2011, Plaintiff began reusing the men's locker room, using the locker room six times between October 24, 2011, and November 14, 2011, without incident. (*Id.* ¶ 59). On November 16, 2011, the campus police issued a citation to Plaintiff for disorderly conduct because he used the men's locker room. (*Id.* ¶ 60). Despite receiving this citation, Plaintiff continued to use the men's locker room. (*Id.* ¶ 61). On November 21, 2011, Plaintiff received a second citation for disorderly conduct for using the men's locker room. (*Id.* ¶ 62). During this confrontation, Campus Police Chief Kevin Grady informed Plaintiff that, if he continued to use the men's locker room, [\*\*9] he would be arrested and taken into custody. (*Id.* ¶ 62). On November 28, 2011, Jacob W. Harper, Coordinator for the UPJ Office of Student Conduct and Conflict Resolution, issued an interim persona non grata against Plaintiff, barring him from the Sports Center due to his continued use of the men's locker room. (*Id.* ¶¶ 63, 65). Additionally, on November 21, 2011, Harper notified Plaintiff that disciplinary charges had been filed against him and that he was required to attend a disciplinary hearing on November 23, 2011, which was subsequently rescheduled for December

2, 2011. (*Id.* ¶ 64).

On November 28, 2011, Plaintiff again used the men's locker room, and Campus Police took Plaintiff into custody and issued another disorderly conduct citation. (*Id.* ¶ 66). On December 2, 2011, at a disciplinary hearing, Plaintiff was found guilty of three charges resulting from alleged violations of the Student Code of Conduct, and was instructed that he was [\*664] not to use any male locker rooms or restroom facilities on campus. (*Id.* ¶ 68). As a result of the findings at the disciplinary hearing, several sanctions were imposed against Plaintiff, including a required counseling assessment, disciplinary probation [\*\*10] for approximately one year, and exclusion from all male-designated campus facilities until Plaintiff graduated from UPJ. (*Id.* ¶ 69).

Nevertheless, on December 7, 2011, Plaintiff used a men's restroom in the Wellness Center to change his clothes, and Campus Police confronted Plaintiff, informing him that he was not to use any men's restrooms on campus. (*Id.* ¶ 67). Then, on December 15, 2011, Plaintiff used a men's restroom in Biddle Hall, an academic building on the UPJ campus. (*Id.* ¶ 70). Officer Matthew Updyke confronted Plaintiff, reminded Plaintiff that he was not permitted to enter any men's restrooms on campus, and informed Plaintiff that he intended to file a complaint with the University Hearing Board. (*Id.* ¶ 70). On December 20, 2011, Harper informed Plaintiff that, due to his use of the men's restrooms on December 7 and December 15, Plaintiff would be placed on interim disciplinary suspension and barred under an interim persona non grata from all UPJ property pending an adjudicatory hearing. (*Id.* ¶ 71). A disciplinary hearing was held on January 24, 2012, before a panel of students, who found Plaintiff guilty of exhibiting disorderly, lewd, or indecent behavior; failing to [\*\*11] comply with lawful directions of a University official; and entering University facilities without authorization. (*Id.* ¶ 72). As a result, Plaintiff was expelled from UPJ and prohibited from accessing all UPJ property. (*Id.* ¶ 72). Following a "sanction justification review," Dr. Gyure upheld Plaintiff's expulsion. (*Id.* ¶ 73). Similarly, the University Appeals Board reviewed the case and upheld the disciplinary sanctions against Plaintiff. (*Id.* ¶¶ 74-75).

Due to his expulsion from UPJ, Plaintiff lost his scholarship. (*Id.* ¶ 76). Additionally, on December 2, 2011, the UPJ Campus Police filed a criminal complaint with the District Attorney's office, which charged Plaintiff with indecent exposure, criminal trespass, and disorderly conduct. (*Id.* ¶ 77). On May 30, 2013, Plaintiff pled guilty to the reduced charges of trespass and disorderly conduct and was sentenced to six months' probation and a fine of approximately \$600. (*Id.* ¶ 78).

Following Plaintiff's expulsion, the FBI investigated Plaintiff related to a series of bomb threats made against the University of Pittsburgh. (*Id.* ¶ 83). Plaintiff alleges that "the University gave [Plaintiff]'s name to the FBI in retaliation for exercising [\*\*12] his right to complain about the University's discriminatory conduct." (*Id.* ¶ 84). Plaintiff also alleges that he suffers significant emotional distress as a result of Defendants' discriminatory conduct, including humiliation, stress, depression, and anxiety. (*Id.* ¶ 85). Further, and among other things, Plaintiff alleges that he suffers from Post-Traumatic Stress Disorder, requiring counseling treatment, as a result of Defendants' conduct. (*Id.* ¶ 86).

Plaintiff filed a four-count *pro se* complaint in this Court on October 29, 2013. (ECF No. 2). The matter was referred to United States Magistrate Judge Pesto, who screened the complaint pursuant to 28 U.S.C. § 1915A, Magistrate Judge Pesto filed a report and recommendation (ECF No. 3), recommending that the federal count of Plaintiff's complaint<sup>7</sup> be dismissed [\*665] for failure to state a claim upon which relief can be granted and that the Court should decline to exercise jurisdiction over the remaining state law claims. On November 26, 2013, this Court entered an order adopting the report and recommendation and dismissing the case without prejudice to Plaintiff filing an amended complaint. (ECF No. 5).

Plaintiff then filed an amended complaint (ECF No. 6) on January 8, 2014, and a second amended complaint (ECF No. 7) on January 14, 2014.<sup>8</sup> Thereafter, Defendants filed the instant motion to dismiss (ECF No. 9) along with a brief in support. Plaintiff filed a brief in opposition (ECF No. 19), and the parties filed responsive briefs (ECF Nos. 20, 23) and supplemental authority (ECF Nos. 35, 40, 41, 42). On August 18, 2014, Magistrate Judge Pesto recused himself from the case (ECF No. 24), after which this Court held a status conference (*see* ECF Nos. 30, 34). On October 28, 2014, the Court held oral argument on the motion to dismiss. (ECF Nos. 33, 38). The parties having completed extensive briefing and argument, this matter is now ripe for disposition by this Court.

#### IV. Standard of Review

<sup>7</sup>Plaintiff's original complaint (ECF No. 1-1) alleged four counts: [\*\*13] discrimination and retaliation under Title IX; discrimination under the Pennsylvania Human Relations Act; discrimination under Pennsylvania Fair Educational Opportunities Act; and common law breach of contract. Magistrate Judge Pesto's report and recommendation addressed only Plaintiff's Title IX claim.

<sup>8</sup>In addition to the other claims alleged in the original complaint, the second amended complaint includes an Equal Protection [\*\*14] claim under the Fourteenth Amendment.

Defendants have moved to dismiss Plaintiff's second amended complaint pursuant to Rule 12(b)(6). The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2), Rule 12(b)(6) allows a party to seek dismissal of a complaint or any portion of a complaint for failure to state a claim upon which relief can be granted. Although the federal pleading standard has been "in the forefront of jurisprudence in recent years," the standard of review for a Rule 12(b)(6) challenge is now well established. Fowler v. UPMC Shadyside, 578 F. 3d 203, 209 (3d Cir. 2009).

In determining the sufficiency of a complaint, a district court must conduct a two-part analysis. First, the court must separate the factual matters averred from the legal conclusions asserted. *See Fowler*, 578 F. 3d at 210. Second, the court must determine whether the factual matters averred are sufficient to show that plaintiff has a "plausible claim for relief." *Id.* at 211 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). The complaint need not include "detailed factual allegations." Phillips v. County of Allegheny, 515 F. 3d 224, 231 (3d Cir. 2008) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Moreover, the court must construe the alleged facts, and draw all inferences gleaned therefrom, in the light most favorable to the non-moving party. *See id.* at 228 (citing Worldcom, Inc. v. Graphnet, Inc., 343 F. 3d 651, 653 (3d Cir. 2003)). However, [\*\*15] "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action . . . do not suffice." Iqbal, 556 U.S. at 678. Rather, the complaint must present sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Sheridan v. NGK Metals Corp., 609 F. 3d 239, 263 n.27 (3d Cir. 2010) (quoting Iqbal, 556 U.S. at 678).

Ultimately, whether a plaintiff has shown a "plausible claim for relief" is a "context specific" inquiry that requires the [\*\*666] district court to "draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. The relevant record under consideration includes the complaint and any "document integral or explicitly relied on in the complaint." U.S. Express Lines, Ltd. v. Higgins, 281 F. 3d 383, 388 (3d Cir. 2002) (citing In re Burlington Coat Factory Sec. Litig., 114 F. 3d 1410, 1426 (3d Cir. 1997)). If a complaint is vulnerable to dismissal pursuant to Rule 12(b)(6), the district court must permit a curative amendment, irrespective of whether a plaintiff seeks leave to amend, unless such amendment would be inequitable or futile. Phillips, 515 F. 3d at 236; *see also* Shane v. Fauver, 213 F. 3d 113, 115 (3d Cir.

2000).

## V. Discussion

Plaintiff has asserted five claims for relief in his second amended complaint. Count One asserts a claim against all Defendants pursuant to 42 U.S.C. § 1983, alleging discrimination and retaliation in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (ECF No. 7 ¶¶ 92-98). Specifically, Plaintiff alleges that "Defendants, without justification, treated Plaintiff differently from [\*\*16] other similarly situated students on the basis of sex, including his transgender status and perceived failure to conform to gender stereotypes," and that Defendants retaliated against Plaintiff for asserting his constitutional right to be free from discrimination based on sex. (*Id.* ¶¶ 93, 96). Count Two asserts a claim against all Defendants pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., alleging discrimination and retaliation on the basis of sex in an education program or activity receiving federal funds. (*Id.* at 16-17, ¶¶ 1-10).<sup>9</sup> Count Three asserts a state law claim against all Defendants for discrimination and retaliation on the basis of sex under the Pennsylvania Human Relations Act, 43 P.S. § 955. (*Id.* at 17-18, ¶¶ 11-19). Count Four asserts a state law claim against all Defendants for discrimination and retaliation on the basis of sex under the Pennsylvania Fair Educational Opportunities Act, 24 P.S. § 5001, et seq. (*Id.* at 18-19, ¶¶ 20-27). Count Five asserts a state law claim against the Defendant University for a common law breach of contract, alleging that UPJ breached its nondiscrimination policy. (*Id.* at 19-20, ¶¶ 28-33). The Court will separately evaluate Plaintiff's claims for relief according to the Rule 12(b)(6) standard of review as set forth above.<sup>10</sup>

### A. Equal Protection Claim

Plaintiff asserts his first claim for relief, a Fourteenth Amendment Equal Protection claim, under 42 U.S.C. § 1983, which provides a remedy for the deprivation of a person's constitutional rights. See Dipippa v. Union Sch. Dist., 819 F. Supp. 2d 435, 439-40 (W.D. Pa. 2011). To state a claim for

relief under § 1983, a plaintiff must allege both the violation of a right secured by the Constitution or laws of the United States and that the alleged violation was committed by a person acting under color of state law. See Davis v. [\*\*667] Holder, 994 F. Supp. 2d 719, 726 (W.D. Pa. 2014); West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). Here, the inquiry in dispute is whether Plaintiff has plausibly alleged that Defendants' conduct violated a constitutional or federal right. In his second amended complaint, Plaintiff alleges that Defendants deprived him of his constitutional right to be free [\*\*18] from discrimination on the basis of sex under the Equal Protection Clause of the Fourteenth Amendment to the Constitution when they prohibited him from using men's restrooms and locker rooms on the University's campus.

The Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To state a claim for sex discrimination under the Equal Protection Clause pursuant to § 1983, a plaintiff must allege the existence of purposeful discrimination because of his sex. See Epps v. City of Pittsburgh, 33 F. Supp. 2d 409, 414 (W.D. Pa. 1998) (citing Robinson v. City of Pittsburgh, 120 F. 3d 1286, 1293 (3d Cir. 1997)). Thus, to establish a gender discrimination claim under the Equal Protection Clause, a plaintiff must allege: (1) disparate treatment in relation to other similarly situated individuals, and (2) that the discriminatory treatment was based on sex. See Andrews v. City of Philadelphia, 895 F. 2d 1469, 1478 (3d Cir. 1990); Wolfe v. Horn, 130 F. Supp. 2d 648, 654 (E.D. Pa. 2001); Hiestler v. Fischer, 113 F. Supp. 2d 742, 746 (E.D. Pa. 2000). "Persons are similarly situated under the Equal Protection Clause when they are alike in all relevant aspects." Startzell v. City of Philadelphia, 533 F. 3d 183, 203 (3d Cir. 2008) (internal citations and quotation marks omitted); Etheredge v. Henry, No. 3:11-CV-2330, 2014 U.S. Dist. LEXIS 1036, 2014 WL 59996, at \*4 (M.D. Pa. Jan. 6, 2014). Nevertheless, "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

<sup>9</sup>In his second amended complaint, [\*\*17] Plaintiff begins to renumber the allegations in his second claim for relief. The Court will attempt to clearly distinguish the paragraphs of the complaint that are redundantly numbered by referring to both the page number and the paragraph number of the relevant allegation in the complaint.

<sup>10</sup>Because Plaintiff has failed to allege a plausible federal claim for relief under either the Equal Protection Clause or Title IX, the Court will decline jurisdiction over Plaintiff's state law claims and will not evaluate those claims.

"When reviewing a claim that [state] action violates the Equal Protection Clause, the Court must first determine the correct standard of review." Hunters United for Sunday Hunting v. Pennsylvania Game Comm'n, 28 F. Supp. 3d 340, 2014 WL 2770228, at \*4 (M.D. Pa. 2014) (citing [\*\*19] Donatelli v. Mitchell, 2 F.3d 508, 513 (3d Cir. 1993)). State action that does not burden a fundamental right or target a suspect class will be upheld if it bears a rational relation to some legitimate end. Ramsgate Court Townhome Ass'n v. W. Chester

*Borough*, 313 F. 3d 157, 160 (3d Cir. 2002); *Doe v. Pennsylvania Bd. of Prob. & Parole*, 513 F. 3d 95, 107 (3d Cir. 2008) ("If state action does not burden a fundamental Constitutional right or target a suspect class, the challenged classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). On the other hand, "gender-based discriminations must serve important governmental objectives and . . . the discriminatory means employed must be substantially related to the achievement of those objectives." *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980). In short, gender classifications are subject to intermediate scrutiny. See *United States v. Virginia*, 518 U.S. 515, 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

Plaintiff alleges that Defendants violated the Equal Protection Clause by "treat[ing] Plaintiff differently from other similarly situated students on the basis of his sex, [\*668] including his transgender status and perceived failure to conform to gender stereotypes." (ECF No. 7 ¶ 93). Specifically, the complaint avers that "non-transgender male students . . . were permitted to use the men's locker [\*20] room and restroom facilities on campus" while Plaintiff "was denied access to the men's locker rooms and restrooms." (*Id.* ¶¶ 94, 95). Additionally, the complaint alleges that Defendants retaliated against Plaintiff for asserting his constitutional right to be free from discrimination based on sex. (*Id.* ¶ 96).

Defendants argue that Plaintiff's complaint fails to state a cognizable Equal Protection Claim as a matter of law. (ECF No. 10 at 7). First, Defendants contend that "transgender" is not a suspect classification under the Equal Protection Clause and that rational basis review therefore applies. (*Id.*). According to Defendants, UPJ had a rational basis in refusing to permit Plaintiff to use male locker rooms, showers, and bathrooms—namely, to protect the privacy rights of students at UPJ. (*Id.*). Defendants assert that students have a constitutional right to privacy, which includes "the right to disrobe and perform personal bodily functions out of the presence of members of the opposite biological sex." (*Id.* at 7-8). Defendants also argue that, even if an intermediate standard of review applies to the alleged sex-based discrimination in this case, UPJ's conduct would still pass constitutional muster. (*Id.* at 8). Specifically, [\*21] Defendants assert that UPJ's conduct in refusing to permit Plaintiff, "a biological female, to disrobe and shower with male students advance[s] an important purpose." (*Id.*).

At the outset, the Court notes that society's views of gender, gender identity, sex, and sexual orientation have significantly

evolved in recent years. Likewise, the Court is mindful that the legal landscape is transforming as it relates to gender identify, sexual orientation, and similar issues, especially in the context of providing expanded legal rights. Within the context of these expanding rights and protections arises the profound question of self-identify, as exemplified by this case. But, while this case arises out of a climate of changing legal and social perceptions related to sex and gender, the question presented is relatively narrow and the applicable legal principles are well-settled. At the heart of this case are two important but competing interests. On the one hand is Plaintiff's interest in performing some of life's most basic and routine functions, which take place in restrooms and locker rooms, in an environment consistent with his male gender identity. On the other hand is the University's related interest [\*22] in providing its students with a safe and comfortable environment for performing these same life functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex. Additionally, the Court finds controlling the unique contours under which this case arises. Namely, the context is a public university, whose mission is primarily pedagogical, but which is also tasked with providing safe and appropriate facilities for all of its students. With these considerations in mind, the Court will apply the appropriate legal principles to the alleged facts of this case.

First, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiff's discrimination claim is reviewed under the rational basis standard. This finding is consistent with numerous other courts that have considered allegations of discrimination by transgender individuals. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F. 3d 1215, 1228 (10th Cir. 2007); *Brown v. Zavaras*, 63 F. 3d 967, 971 (10th [\*669] Cir. 1995) (but cautioning that recent research concluding that sexual identity may be biological suggests reevaluating the rule); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, 2012 WL 3911910, at \*8 (E.D. Cal. Sept. 7, 2012) [\*23] ("it is not apparent that transgender individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S-11-cv-2056 WBS, 2012 U.S. Dist. LEXIS 40266, 2012 WL 996383, at \*3 (E.D. Cal. Mar. 23, 2012) ("transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Kaao-Tomaselli v. Butts*, No. 11-cv-00670 LEK, 2013 U.S. Dist. LEXIS 13280, 2013 WL 399184, at \*5 (D. Haw. Jan. 31, 2013) (noting the plaintiff's status as a transgender female did not qualify her as a member of a protected class and explaining the court could find no "cases in which transgendered individuals constitute a 'suspect'