M.A.B. v. Bd. of Educ.

United States District Court for the District of Maryland

March 12, 2018, Decided; March 12, 2018, Filed

Civil Action No. GLR-16-2622

Reporter
2018 U.S. Dist. LEXIS 40346 *

M.A.B., Plaintiff, v. BOARD OF EDUCATION OF TALBOT COUNTY, et al., Defendants.

Core Terms

transgender, gender, restrooms, boys', locker room, stereotyping, sex, classification, heightened scrutiny, Defendants', clothes, birth, stall, high school, designated, concludes, sex-based, Rights, male, individuals, preliminary injunction, right to privacy, sex discrimination, requires, quasi-suspect, allegations, transition, school district, intermediate scrutiny, applies

Counsel: **[*1]** For M. A. B., a minor, by and through his parents and next friends L.A.B. and L.F.B., Plaintiff: Jennifer Lauren Kent, LEAD ATTORNEY, FreeState Justice, Baltimore, MD; Joshua Block, PRO HAC VICE, American Civil Liberties Union, New York, NY; Laura McMahon DePalma, FreeState Legal Project, Inc., Baltimore, MD.

For Board of Education of Talbot County, Kelly L. Griffith, in her official capacity as Superintendent of Talbot County Public Schools, Tracy Elzey, in her official capacity as Principal of St. Michaels Middle-High School, Defendants: Edmund J O Meally, LEAD ATTORNEY, Andrew G Scott, Pessin Katz Law PA, Towson, MD; Rochelle S. Eisenberg, PESSIN KATZ LAW, P.A., Columbia, MD.

Judges: George L. Russell, III, United States District Judge.

Opinion by: George L. Russell, III

Opinion

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants Board of Education of Talbot County (the "Board"), Kelly L. Griffith, and Tracy Elzey's Motion to Dismiss for Failure to State a Claim (ECF No. 36) and Plaintiff M.A.B.'s Motion for Preliminary Injunction (ECF No. 41). This action arises from Defendants' decision to require M.A.B., a transgender boy, to use restrooms and locker rooms for girls. The Motions are ripe for disposition, **[*2]** and no hearing is necessary. See *Local Rule 105.6* (D.Md. 2016). For the reasons outlined below, the Court will deny the Motion to Dismiss. In addition, the Court will deny without prejudice the Motion for Preliminary Injunction.

I. BACKGROUND[1]

M.A.B. is a fifteen-year-old boy[2] who attends high school at St. Michaels Middle High School (the "High School"), which is located in Talbot County, Maryland. (Compl. ¶ 2, ECF No. 1). His birth sex,[3] which is usually based on "the appearance of the person's external genitalia," is "female." (Id. ¶¶ 20, 21). Yet M.A.B.'s "deeply-held internal sense of his own gender," known as his gender identity, is male. (Id ¶¶ 2, 20). "[Determinations of gender," unlike determinations of birth sex, are based on "multiple factors." (Id. ¶ 21). These factors include "chromosomes, hormone levels, internal and external reproductive organs, and gender identity," with gender identity being the "primary determinant" among them. (Id. ¶¶ 21, 22).

Because M.A.B. was designated female at birth but has a male gender identity, that designation does not accurately reflect his gender identity—giving him the status of a transgender boy. (Id. ¶ 20). As a result, he also has had feelings of gender **[*3]** dysphoria since early childhood. (Id.

[1] Unless otherwise noted, the Court takes the following facts from M.A.B.'s Amended Complaint and accepts them as true. See *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (citations omitted).

[2] Throughout the Complaint and the parties' briefing of the instant Motions, the parties have used masculine pronouns to refer to M.A.B. Accordingly, the Court will also use masculine pronouns.

[3] The Court uses terms such as "birth sex" to refer to gender designations made at birth.

¶¶ 2, 26). Gender dysphoria and "the status of being transgender" are "not synonymous," though "they are correlated." (Id. ¶ 24). Gender dysphoria is the "clinically significant distress" experienced by transgender individuals. (Id. ¶ 23). Treatment for gender dysphoria includes "social transitioning," which consists of "living consistent with one's gender identity . . . in all aspects of one's life, including when accessing single-sex spaces like restrooms and locker rooms." (Id. ¶ 25).

When M.A.B. was in the sixth grade, he "arrived at the clear realization" that he was a boy. (Id. ¶¶ 2, 26). M.A.B. received a clinical diagnosis of gender dysphoria in 2014, and has been seeing a medical professional regularly for his gender dysphoria and process of gender transition. (Id. ¶ 26). When M.A.B. turned thirteen, therefore, he began to socially transition to life as male, including going by "a more traditionally masculine chosen first name." (Id. ¶ 28). The Board and the High School "took several steps" to assist M.A.B.'s social transition. (Id. ¶ 30). They addressed him by his new name, addressed him with male pronouns, and conducted a professional **[*4]** development workshop for its staff in 2015 on the topic of transgender students. (Id.). M.A.B. later legally changed his name. (Id. ¶ 28). Since his transition began, M.A.B. "has been generally accepted and recognized as male" by his peers at the High School. (Id. ¶ 29).

While aiding M.A.B.'s social transition in some ways, Defendants prohibited M.A.B. from using the High School's boys' locker rooms, and initially, its boys' restrooms. (Id. ¶ 31). Instead, the Board "designated" three of the High School's single-use restrooms as "gender neutral" and required M.A.B. to use them when he needed to use the restroom or change his clothes. (Id. ¶ 32). After the United States Court of Appeals for the Fourth Circuit issued its opinion in *G.G. ex rel. Grimm v. Gloucester County School Board., 822 F.3d 709 (4th Cir. 2016)*, Defendants permitted M.A.B. to use the boys' restrooms. (Id. ¶¶ 31, 45). Since M.A.B. began using the boys' restrooms, no male students at the High School have voiced "any discomfort" about M.A.B.'s access. (Id. ¶ 49). In fact, many of M.A.B.'s peers "congratulated him" on the Board's decision to allow M.A.B. access. (Id.).

The Board, however, continued to prohibit M.A.B. from using the boys' locker rooms. (Id. ¶¶ 31, 45). It maintained its decision to require **[*5]** M.A.B. to use the restrooms it designated as gender neutral whenever M.A.B. had to change his clothes (the "Policy").[4] (Id. ¶¶ 32, 45). Unlike the locker rooms, the designated restrooms the Board requires M.A.B. to use do not have benches or showers. (Id. ¶ 36). Meanwhile, the boys' locker rooms have partitioned stalls for changing clothes and partitioned stalls that have toilets and stall doors. (Id. ¶ 48).

The Board requires only M.A.B., and no other student, to change clothes in the designated restrooms. (Id. ¶ 37). This has resulted M.A.B. experiencing humiliation and embarrassment, as well as alienation from his peers. (Id. ¶ 38). He has received "weird looks" from other students when using the designated restrooms to change. (Id.). M.A.B., then, "has tried to use them as infrequently and inconspicuously as possible." (Id.).

The designated restrooms are "remotely located" from the boys' and girls' locker rooms and the gymnasium. (Id. ¶ 35). The designated restrooms also do not have lockers. (Id. ¶ 36). So, M.A.B. has to go to his student locker, which is far away from the designated restrooms, before changing his clothes, and his physical education teacher gives him extra time **[*6]** to change. (Id. ¶¶ 40, 41). Thus, when M.A.B. took physical education class in 2015, substitute teachers unaware of the Policy forced him to explain why he was tardy to class. (Id. ¶ 41). This required M.A.B. to disclose his transgender status to avoid disciplinary action. (Id.). The "stigma and impracticality" of changing his clothes in the designated restrooms led M.A.B. to attend physical education class without changing when he thought he would not sweat very much. (Id. ¶ 42). At times, his physical education teacher penalized M.A.B.'s grade for not changing his clothes. (Id.).

M.A.B., by and through his parents and next friends L.A.B. and L.F.B., filed the present action on July 19, 2016 against the Board, Kelly L. Griffith in her official capacity as Superintendent of Talbot County Public Schools, and Tracy Elzey in her official capacity as Principal of the High School. (ECF No. 1). In his four-count Complaint, he alleges claims under: *Title IX of the Education of Amendments of 1972, 20 U.S.C. § 1681 et seq. (2018)* ("*Title IX*") (Count I); the *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution* (Count II); *Article 24 of the Maryland Declaration of Rights* (Count III); and *Article 46 of the Maryland Declaration of Rights* (Count IV). (Id. ¶¶ 51-75). M.A.B. seeks judgment declaring that the Policy **[*7]** violates his rights under Title IX, the *Fourteenth Amendment*, and *Articles 24* and *26*. (Id. at 17). M.A.B. also seeks a preliminary injunction requiring Defendants to allow him to use the High School boys' locker room on the same terms as

[4] The Court will refer to the Board's decision to prohibit M.A.B. from using the boys' locker rooms as a "policy," even though the Board simply made a decision and communicated it to M.A.B.'s counsel. (Id. ¶ 45). The High School's principal at the time later advised M.A.B. and his parents of this decision. (Id.).

other male students. (Id.). Finally, M.A.B. seeks nominal and compensatory damages, costs, and attorneys' fees. (Id.).

Defendants now move to dismiss all counts against them for failure to state a claim upon which relief may be granted under *Federal Rule of Civil Procedure 12(b)(6)*, filing their Motion on April 18, 2017. (ECF No. 36). M.A.B. filed an Opposition on May 22, 2017. (ECF No. 40). Defendants filed a Reply on June 5, 2017. (ECF No. 42). M.A.B. also moves for a preliminary injunction under *Rule 65*, filing his Motion on May 22, 2017. (ECF No. 41). Defendants filed an Opposition on June 5, 2017. (ECF No. 43). M.A.B. filed a Reply on June 19, 2017. (ECF No. 44).

II. DISCUSSION

A. *Rule 12(b)(6)* Standard of Review

"The purpose of a *Rule 12(b)(6)* motion is to test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016)* (quoting *Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999)*). A complaint fails to state a claim if it does not contain "a short and plain statement of the claim showing that the pleader is entitled to **[*8]** relief," *Fed.R.Civ.P. 8(a)(2)*, or does not "state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing *Twombly, 550 U.S. at 556*). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing *Twombly, 550 U.S. at 555*). Though the plaintiff is not required to forecast evidence to prove the elements of the claim, the complaint must allege sufficient facts to establish each element. *Goss v. Bank of Am., N.A., 917 F.Supp.2d 445, 449 (D.Md. 2013)* (quoting *Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012)*), aff'd sub nom., *Goss v. Bank of Am., NA, 546 F.App'x 165 (4th Cir. 2013)*.

In considering a *Rule 12(b)(6)* motion, a court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff. *Albright v. Oliver, 510 U.S. 266, 268, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)*; *Lambeth v. Bd. of Comm'rs of Davidson Cty., 407 F.3d 266, 268 (4th Cir. 2005)* (citing *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*). But, the court need not accept unsupported or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979)*, or legal conclusions couched as factual allegations, *Iqbal, 556 U.S. at 678*.

B. *Rule 12(b)(6)* Analysis

As a threshold matter, Defendants argue that the Court must dismiss all of M.A.B.'s claims against the Board because the Board enjoys sovereign immunity under the *Eleventh Amendment to the United States Constitution*. The **[*9]** Court disagrees.

The *Eleventh Amendment* provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." *U.S. Const. amend. XI*. The Supreme Court of the United States has construed the *Eleventh Amendment* as also protecting states from federal court suits brought by the state's own citizens. *Lee-Thomas v. Prince George's Cty. Pub. Schs., 666 F.3d 244, 248 (4th Cir. 2012)* (quoting *Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990)*). *Eleventh Amendment* immunity extends to "state agents and instrumentalities." Id. (quoting *Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)*). As a matter of Maryland law, county school boards of education are state instrumentalities, and therefore are generally entitled to immunity under the *Eleventh Amendment*. See, e.g., *Farrell v. Bd. of Educ., No. GLR-16-2262, 2017 U.S. Dist. LEXIS 41011, 2017 WL 1078014, at *3 (D.Md. Mar. 21, 2017)* (citing *Lewis v. Bd. of Educ., 262 F.Supp.2d 608, 612 (D.Md. 2003)*).

Nevertheless, there are exceptions. One exception is when a state waives its *Eleventh Amendment* immunity from suit in a federal court. *Lee-Thomas, 666 F.3d at 249*. The Maryland legislature enacted a statute that waived a county board of education's *Eleventh Amendment* immunity "for all claims in the amount of $100,000 or less." *Md.Code Ann., Cts. & Jud. Proc. § 5-518(c)* (West 2018). As interpreted by the Court of Appeals of Maryland, *§ 5-518(c)* waives a county board of education's *Eleventh Amendment* immunity to suit from a plaintiff's discrimination claim under a federal law. *Bd. of Educ. v. Zimmer-Rubert, 409 Md. 200, 973 A.2d 233, 243 (Md. 2009)*. The Court of Appeals later clarified that its interpretation **[*10]** of *§ 5-518(c)* in Zimmer—Rubert applies to all "tort or insurable" claims. *Beka Indus., Inc. v. Worcester Cty. Bd. of Educ., 419 Md. 194, 18 A.3d 890, 896 (Md. 2011)*. Under Maryland law, the definition of "tortious act or

omission" encompasses constitutional torts. See *Espina v. Jackson, 442 Md. 311, 112 A.3d 442, 450 (Md. 2015)* (holding that under *Maryland's Local Government Tort Claims Act*, "tortious acts or omissions" includes constitutional torts); see also, e.g., *Green v. N.B.S., Inc., 409 Md. 528, 976 A.2d 279, 287 (Md. 2009)* ("[T]he term 'tort' as defined by Blacks encompasses all 'civil wrong.'" (citation omitted)).

Here, M.A.B. brings two sets of causes of action against the Board and the other Defendants: (1) a discrimination claim under Title IX (Count I); and (2) claims under the *Fourteenth Amendment to the United States Constitution* and associated Maryland Declaration of Rights provisions (Counts II—IV). Because *§ 5-518(c)* waives a county board of education's *Eleventh Amendment* immunity from discrimination claims under federal law and the constitution, the Court concludes that such immunity does not apply to M.A.B.'s claims against the Board. Accordingly, the Court will not dismiss M.A.B.'s claims against the Board on *Eleventh Amendment* immunity grounds.

Defendants move to dismiss all of M.A.B.'s remaining claims for failure to state a claim under Title IX and the *Fourteenth Amendment* and associated state constitutional provisions. At bottom, the Court concludes that M.A.B. sufficiently states a claim under both **[*11]** sets of causes of action. The Court addresses each set in turn.

1. Title IX

Defendants contend that the Court should interpret Title IX narrowly to only prohibit discrimination on the basis of birth sex. M.A.B. replies that the Court should interpret Title IX more broadly to include discrimination on the basis of transgender status. In short, the Court agrees with M.A.B.'s interpretation of Title IX and concludes that M.A.B. has sufficiently stated a claim of sex discrimination.

i. *34 C.F.R. § 106.33 (2017)* and Transgender Status

Title IX provides, in relevant part: "[n]o 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) (2018)*. To allege a violation of Title IX, M.A.B. must show: "(1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused [M.A.B.] harm." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd. (Grimm I), 822 F.3d 709, 718 (4th Cir. 2016)*, vacated, *137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017)*.[5]

Title IX does not prohibit all distinctions **[*12]** on the basis of sex. Id. Under one of Title IX's implementing regulations, *34 C.F.R. § 106.33 (2017)*, Title IX permits separating toilets, locker rooms, and shower facilities on the basis of sex as long as they are "comparable." Grimm I observed that "[b]y implication," then, *§ 106.33* permits schools to exclude those with a birth sex of female from male facilities and vice-versa. *822 F.3d at 720*.

Defendants maintain that because *§ 106.33* refers to males and females unambiguously, the Court must interpret Title IX to apply only to discrimination on the basis of birth sex, and does not prohibit discrimination on the basis of transgender status. The Court disagrees.

As Grimm I observed, the Court's "inquiry is not ended" by *§ 106.33*'s reference to males and females. Id. "Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." Id.; see also *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017)* ("Neither [Title IX] nor [its] regulations define the term 'sex.' Also absent from the statute is the term 'biological,' which [the defendant school district] maintains is a necessary modifier."). **[*13]**

The Fourth Circuit went on to hold that a January 7, 2015 opinion letter by the Department of Education's Office for Civil Rights, which interpreted the regulation to require access to sex-segregated facilities be based on gender identity (the "2015 Opinion Letter"), is entitled to deference under

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[5] The Supreme Court vacated the Fourth Circuit's judgment in *Grimm I* in light of the United States Department of Education and United States Department of Justice issuing a letter withdrawing the guidance documents that the judgment examined. See *137 S.Ct. at 1239*; see also U.S. Dep't of Just. Civil Rights Div. & U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf . Grimm I remains binding law of the Fourth Circuit, however, "unless it is overruled by a subsequent en banc opinion of [the Fourth Circuit] or a superseding contrary decision of the Supreme Court." *United States v. Giddins, 858 F.3d 870, 886 n.12 (4th Cir. 2017)* (quoting *United States v. Collins, 415 F.3d 304, 311 (4th Cir. 2005)*). There has been neither an en banc Fourth Circuit opinion nor a superseding contrary Supreme Court decision overruling Grimm I. Thus, the Court will rely on Grimm I to the extent it offers guidance for deciding issues the Motions present.

Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). Id. But on February 22, 2017, after the Fourth Circuit decided Grimm I, the Department of Education and the Department of Justice issued a guidance document withdrawing the 2015 Opinion Letter. U.S. Dep't of Just. Civil Rights Div. & U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf . Thus, with the 2015 Opinion Letter no longer in effect, Grimm I no longer resolves how *§ 106.33* applies to a transgender student.

The Fourth Circuit has not spoken on how *§ 106.33* applies to a transgender person since Grimm I. And the Supreme Court has never addressed the issue. It is well-settled within the Fourth Circuit, however, that case law interpreting *Title VII of the Civil Rights Act of 1964 ("Title VII")*, as amended, *42 U.S.C. §§ 2000e et seq. (2018)*, guides courts in evaluating a Title IX claim. *Grimm I, 822 F.3d at 718* (citing *Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007)*).[6] Accordingly, the **[*14]** Court turns to *Title VII* precedent for guidance.

ii. Title VII and Transgender Status

The Supreme Court has never addressed how Title VII applies to transgender individuals. Nevertheless, other Supreme Court cases interpreting Title VII provide helpful guidance. In Price Waterhouse v. Hopkins, the Supreme Court held that plaintiff Hopkins, a woman who was denied partnership in an accounting firm, had an actionable claim against that firm because the firm denied her a promotion for failing to conform to gender stereotypes. *490 U.S. 228, 250-53, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)*. Various firm partners described Hopkins as "macho," in need of "a course in charm school," "a lady using foul language," and someone who had been "a tough-talking somewhat masculine hard-nosed manager." *Id. at 235*. Partners advised her that she could improve her chances for partnership if she were to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. (internal quotation marks omitted).

Writing for a plurality, Justice Brennan held that "[i]n the specific context of sex stereotyping," these comments were sufficient to show that the accounting firm "acted on the basis of gender" when it denied Hopkins **[*15]** a promotion. *Id. at 250*. In doing so, six members of the Court agreed that Title VII barred not only discrimination because Hopkins was a woman, but also for "sex stereotyping" because she failed to act according to the gender stereotype of a woman. *Id. at 250-51*; *id. at 258-61* (White, J., concurring); *id. at 272-73* (O'Connor, J., concurring). Thus, Price Waterhouse establishes that Title VII's prohibition on discrimination because of sex includes—more broadly—gender stereotyping. See *id. at 251* ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

After Price Waterhouse, the Supreme Court confirmed this broader interpretation of Title VII in *Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)*. There, the Court held that Title VII's prohibition of sex discrimination is broad enough to include same-sex harassment claims. *Id. at 79*. Justice Scalia, writing for a unanimous Court, observed that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Id.

The Fourth Circuit has not applied Price Waterhouse in the context of claims brought **[*16]** by transgender persons, or gender stereotyping claims more generally, under Title VII. But see *G.G. v. Gloucester Cty. Sch. Bd. (Grimm II), 654 F.App'x 606, 606-07 (4th Cir. 2016)* (Davis, J., concurring) (observing that the Supreme Court "has expressly recognized" that "failure to conform" to gender stereotypes constitutes sex discrimination under Title VII (citing *Price Waterhouse, 490 U.S. at 250-51*)). Still, this Court has concluded that discrimination on the basis of transgender status constitutes gender stereotyping because "by definition, transgender persons do not conform to gender stereotypes." *Finkle v. Howard Cty., 12 F.Supp.3d 780, 787-88 (D.Md. 2014)*. As a result, transgender discrimination is per se actionable sex discrimination under Title VII based on Price Waterhouse. Id.

This Court's conclusion is in accord with the First, Sixth, Ninth, and Eleventh Circuits, which have all recognized that claims of discrimination on the basis of transgender status is per se sex discrimination under Title VII or other federal civil rights laws based on Price Waterhouse. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., F.3d , 2018 U.S. App. LEXIS 5720, 2018 WL 1177669, at *5-12 (6th Cir. Mar. 7, 2018)* (Title VII); *Glenn v. Brumby, 663 F.3d 1312, 1316-19 (11th Cir. 2011)* (Title VII); *Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215-16 (1st Cir. 2000)* (*Equal Credit Opportunity Act*); *Schwenk v. Hartford, 204 F.3d 1187, 1201-03 (9th Cir. 2000)* (*Gender Motivated Violence Act*); see also *Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004)* (holding that "sex stereotyping based on a person's gender

[6] For this reason, Defendants' various arguments about why the "very different natures" of Title VII and Title IX precludes reliance on Title VII precedent have no merit. (Defs.' Reply at 3, ECF No. 42).

non-conforming behavior" is unlawful under Title VII); *Grimm II, 654 F.App'x at 607* (Davis, J., concurring) (noting that Glenn, Rosa, Schwenk, and Smith "have **[*17]** all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes").[7]

In addition, more generally, the First, Second, Third, Seventh, and Ninth Circuits have all recognized that an allegation of gender stereotyping is actionable sex discrimination under Title VII based on Price Waterhouse. See *Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 351-52 (7th Cir. 2017)* (en banc); *Anonymous v. Omnicom Grp., Inc., 852 F.3d 195, 200-01 (2d Cir. 2017)* (per curiam); *Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290 (3d Cir. 2009)*; *Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001)*; *Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999)*.[8] What is more, no Court of Appeals has held otherwise.

Thus, on the basis of the Supreme Court's holding in Price Waterhouse, subsequent opinions of several Courts of Appeals, and this Court's opinion in Finkle, the Court concludes that allegations of gender stereotyping are cognizable as sex-discrimination claims under Title VII, and consequently, Title IX. The Court further concludes, on the basis of Finkle and several Courts of Appeals decisions, that claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory.

iii. The Policy under a Gender-Stereotyping Theory

Having determined that M.A.B. may bring a claim of discrimination **[*18]** under Title IX on the basis of his transgender status, the Court turns to whether M.A.B. has sufficiently alleged his claim under a gender-stereotyping theory. In brief, the Court concludes that M.A.B. has done so.

M.A.B. asserts that under a gender-stereotyping theory, the alleged Policy subjects him to sex discrimination. Defendants submit that even under a gender-stereotyping theory, M.A.B. fails to state a claim. M.A.B. has not alleged that Defendants denied M.A.B. access to the boys' locker rooms "because of the way he dresses, talks, acts, or any other outward expression," as in *Price Waterhouse*. (Defs.' Reply at 7). Defendants highlight that unlike Price Waterhouse, the Policy is "based on biology alone." (Id. at 8).[9] The Court agrees with M.A.B.

Defendants' argument is unavailing because they define gender stereotyping too narrowly. Granted, the employer in Price Waterhouse did deny the plaintiff a promotion because her appearance and behavior did not conform to the employer's gender stereotype of a woman. Yet the Supreme Court did not require gender stereotyping to take the specific form of discrimination on the basis of appearance or behavior. In fact, Price Waterhouse forecloses **[*19]** Defendants' argument because it explicitly left open the possibility of other forms of gender stereotyping: "By focusing on [appearance and behavior], however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision . . ." *490 U.S. at 251-52*; see also *id. at 251* (observing that Congress intended "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" when it enacted Title VII (quoting *L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707, n.13, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978)*) (emphasis added)). Thus, the Court will not limit its analysis to whether M.A.B. alleges that Defendants discriminated against him based on his appearance or behavior.

The Court concludes that the alleged Policy subjects M.A.B.

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[7] The only Courts of Appeals that arguably have held to the contrary are the Seventh, Eighth, and Tenth Circuits' rulings that transgender status, taken alone, is not entitled to Title VII protection. See *Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221-22 (10th Cir. 2007)*; *Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749-50 (8th Cir. 1982)*; *Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984)*.

As this Court has noted, however, "it is unclear what, if any, significance to ascribe" to these holdings because "[i]n light of Price Waterhouse," transgender individuals may bring sex-discrimination claims under a gender-stereotyping theory. *Finkle, 12 F.Supp.3d at 788*. Indeed, the Seventh Circuit recently explained that its prior decision in Ulane "cannot and does not foreclose" transgender students from bringing sex-discrimination claims based on Price Waterhouse's gender-stereotyping theory. *Whitaker, 858 F.3d at 1047*.

[8] As a matter of fact, Defendants appear to agree that under Title VII, sex-discrimination claims under a gender-stereotyping theory are cognizable based on Price Waterhouse. (See Defs.' Reply at 7) (". . . [T]he Supreme Court has recognized since [Price Waterhouse] that gender[-]stereotype discrimination may be evidence of sex discrimination.").

[9] Defendants also advance this argument in an attempt to distinguish this Court's opinion in Finkle. For the reasons stated below, this argument is unavailing. See *Finkle, 12 F.Supp.3d at 788* (concluding that the plaintiff stated a Title VII claim because she alleged that defendants discriminated against her because of her transgender status without relying on the particular form of the discrimination).