

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**PRIVACY MATTERS**, a voluntary  
unincorporated association; and  
**PARENT A**, president of Privacy  
Matters,

Plaintiffs,

vs.

**UNITED STATES DEPARTMENT  
OF EDUCATION; JOHN B. KING,  
JR.**, in his official capacity as United  
States Secretary of Education;  
**UNITED STATES DEPARTMENT  
OF JUSTICE; LORETTA E.  
LYNCH**, in her official capacity as  
United States Attorney General, and  
**INDEPENDENT SCHOOL  
DISTRICT NUMBER 706, STATE  
OF MINNESOTA.**

Defendants.

Case No. \_\_\_\_\_

**VERIFIED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**JURY TRIAL REQUESTED**

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**VERIFIED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Privacy Matters and its members (collectively referred to as the  
“Plaintiffs”), state as follows:

1. This case is about protecting the privacy of every student within  
Independent School District 706 (“Virginia School District” or “District” or  
“District Defendant”)—privacy that the Defendants violate each school day  
through their new rules and policies that radically changed the meaning of

“sex” in Title IX. Defendants have unilaterally rejected the Title IX meaning of sex, which for 40 years has meant male and female: two objective, fixed, binary classes which are rooted in our human reproductive nature. In lieu of this unambiguous meaning of sex, Defendants inject a distinct and altogether different concept of gender identity which is subjectively discerned, fluid, and nonbinary. The Department of Education and Department of Justice (“Federal Defendants”) acted without regard for statutory authority or required rule-making procedures, and created and promulgated a new *ultra vires* rule (“Federal Rule” or “Rule”) through the artifice of issuing “guidelines” (“Federal Guidelines” or “Guidelines”) and then enforcing those guidelines against several schools. And those enforcement actions notified all school districts nationwide that they must treat a student’s gender identity as their sex for the purpose of Title IX if they wish to retain federal funding. The Federal Rule redefines “sex” in Title IX and requires school districts to regulate access to sex-specific private facilities such as locker rooms, restrooms, shower rooms, and hotel rooms on overnight school-sponsored trips by gender identity rather than by sex. Virginia School District fully adopted and implemented the Federal Defendant’s Rule as their own policy (“District Policy” or “Policy”). The consequence of the Federal Rule and District Policy was ineluctable: adolescent girls, in the midst of disrobing within their private locker room, found an adolescent male in their midst.

The risk of such encounters, and the encounters themselves, merit prompt judicial intervention to strike the Defendants' rules and policies and protect Plaintiffs' bodily privacy.

### **JURISDICTION AND VENUE**

2. This action arises under 42 U.S.C. §§ 1983 et seq. (the "Civil Rights Act"), 5 U.S.C. §§ 500 et seq. (the "Administrative Procedure Act" or the "APA"), 20 U.S.C. §§ 1681 et seq. ("Title IX"), the First, Fifth, and Fourteenth Amendments to the United States Constitution, Section 16 of the Minnesota State Constitution, and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq.

3. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1361, and 1367.

4. The Court has jurisdiction to issue the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57.

5. The Court has jurisdiction to award the requested injunctive relief under 5 U.S.C. §§ 702 and 703, 20 U.S.C. § 1683, 42 U.S.C. § 2000bb-1(c), 28 U.S.C. § 1343(a)(3), and Federal Rule of Civil Procedure 65.

6. The Court has jurisdiction to award nominal and compensatory damages under 28 U.S.C. § 1343(a)(4).

7. The Court has jurisdiction to award reasonable attorneys' fees and costs. 28 U.S.C. § 2412, 42 U.S.C. § 1988.

8. Venue lies in this district pursuant to 28 U.S.C. § 1391(b) and (e), because a substantial part of the events or omissions giving rise to all claims occurred in this district where the District Defendant is located.

## **PARTIES**

### ***Plaintiff Privacy Matters***

9. All Plaintiffs are citizens of the United States and residents of St. Louis County, Minnesota.

10. Privacy Matters is a voluntary unincorporated association. Minn. Stat. Ann. § 540.151; *Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Avera Marshall*, 857 N.W.2d 695, 700 (Minn. 2014).

11. Privacy Matters is composed of 10 families of Virginia School District students and parents who are directly impacted by the Federal Defendants' Rule and the District Policy.

12. Parent A is the president of Privacy Matters.

13. Girl Plaintiffs A, B, D, E and F, all minors, are members of Privacy Matters, and are represented in this lawsuit by their parents, and next friends, Parents A, B, D, E and F.<sup>1</sup>

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<sup>1</sup> Girl Plaintiff C decided to excuse herself from this case due to perceived risks associated with being a plaintiff in this lawsuit.

14. Parents A, B, D, E and F are also members of Privacy Matters and as parents of Girl Plaintiffs A, B, D, E and F, respectively, are Plaintiffs in their own rights.

15. Girl Plaintiffs A, B, D, E and F all attended VHS in 2015-2016. Because of the Policy, Girl Plaintiff A will not return to VHS for fall 2016. Girl Plaintiff A will likely return to Virginia High School if the Policy is set aside. Girl Plaintiffs B, D, and E will continue at VHS.

16. Girl Plaintiffs A, B, D, E and F and their parents file this lawsuit and seek to proceed under pseudonyms to protect their identities. These Girl Plaintiffs are minors and, while Plaintiffs recognize it is common to use initials to protect a minor's identity, VHS is a small school – 1580 students in the entire District, pre-school to 12th grade – located in a small town – around 8,660 people – so the Girl Plaintiffs' initials or their parents' initials will likely identify the girls. Because the issues raised by this case are hotly contested in Virginia, MN and throughout the country, Girl Plaintiffs fear retaliation from their peers, faculty and administrators within their school, and the greater community, if their true identities are known. Plaintiffs consent to the use of a pseudonym to protect Student X's identity. *See infra* fn. 3.

17. The factual statements and allegations of law in this Verified Complaint may apply to a number of individual members of Privacy Matters.

For clarity, when used in this complaint: **“Plaintiffs”** refers to all members of Privacy Matters; **“Student Plaintiffs”** refers to all students, girls and boys, who are part of Privacy Matters; **“Parent Plaintiffs”** refers to all parents who are part of Privacy Matters; **“Girl Plaintiffs”** refers to all girl students who are part of Privacy Matters; and **“Boy Plaintiffs”** refers to all boy students who are part of Privacy Matters.

***Defendant Department of Education***

18. Defendant Department of Education (“DOE”) is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulations at 34 C.F.R. Part 106.

***Defendant Secretary John B. King, Jr.***

19. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of the DOE. King is sued in his official capacity only.

***Defendant Department of Justice***

20. Defendant Department of Justice (“DOJ”) is an executive agency of the United States government and is responsible for the enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106. Pursuant to Executive Order 12250, the DOJ has authority to bring actions to enforce Title IX, and it has brought such actions.

***Defendant Attorney General Loretta E. Lynch***

21. Defendant Loretta E. Lynch is the United States Attorney General. In this capacity she is responsible for the operation and management of the DOJ. Lynch is sued in her official capacity only.

***Defendant Independent School District Number 706,  
State of Minnesota***

22. Independent School District Number 706, State of Minnesota (“Virginia School District” or “District”) is organized under the laws of the State of Minnesota and pursuant to those laws it may be sued in all courts including this one. Minn. Stat. Ann. § 123B.25 (2016).

23. The District comprises public educational institutions that provide male and female students a pre-school through 12th-grade education.

24. The District and its schools receive federal funds and so are subject to the requirements of Title IX.

25. District schools include VHS (7th to 12th grade), Roosevelt Elementary School (3rd to 6th grade), which is housed in the same building as VHS, and Parkview Learning Center (pre-school to 2nd grade).

26. District Defendant is responsible for the enforcement of policies through its Superintendent, administrators, teachers, and other employees.

**INTRODUCTION**

27. No student should be forced to use private facilities at school, like locker rooms and restrooms, with students of the opposite sex. No government agency should hold hostage important education funding to advance an unlawful agenda. And no school district should trade its students' constitutional and statutory rights for dollars and cents, especially when it means abandoning a common sense practice that long protected every student's privacy and access to education. Yet the Defendants have taken precisely these actions in this case.

28. Bypassing congressional intent, judicial rulings, and more than 40 years of Title IX history, the Federal Defendants decreed by unlawful agency fiat a new legislative rule that a school must treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations.<sup>2</sup>

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<sup>2</sup> The term "sex," as used in both Title IX and this Complaint, is a binary concept that refers to one's biological status as either male or female determined at birth and manifest by biological indicators such as chromosomes, gonads, hormones, and genitalia. *See, e.g.,* Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 1, <http://www.apa.org/topics/lgbt/transgender.pdf> ("Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy."); Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM-5") (noting that sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia."). When "male" and



29. The Federal Defendants created and promulgated this new legislative rule through a series of Federal Guidelines that were sent to school districts between April 2014 and May 2016.

30. Contemporaneously, the Federal Defendants aggressively enforced the policies announced in these Guidelines, publically threatening to remove all federal funding from school districts that did not submit to their Guidelines.

31. This Rule made two radical changes to the law that are directly at issue in this case: It (1) redefined the term “sex” in Title IX to include gender identity, and (2) prohibited school districts from providing sex-specific facilities including locker rooms, shower rooms, restrooms, and hotel rooms on school sponsored trips.

32. Under the Rule, school districts must provide any male student who professes a female gender identity unrestricted use of girls’ private

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“female” are used in this Complaint, they are used consistently with this definition. “**Gender identity**” as defined by the Department of Education “refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.” U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter: Transgender Students* 1 (May 13, 2016). **Exhibit A**. It is also subjective, fluid, and not rooted in human reproduction or tied to birth sex. Lawrence S. Mayer & Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, New Atlantis, at 87-93 (2016). When “gender identity” is used in this Complaint, it is used consistently with this definition.

facilities<sup>3</sup> and any female student who professes a male gender identity unrestricted use of boys' private facilities.

33. The Rule is *ultra vires* because it violates both substantive and procedural requirements of the Administrative Procedure Act ("APA").

34. The Rule is unlawful because it mandates a school policy that creates a sexually harassing hostile environment and violates privacy.

35. Responding to the extensive Federal Guidelines and enforcement, in February 2016, the District Defendant stopped its historic and lawful practice of sex-separating locker rooms and restrooms and adopted and implemented the Federal Defendants' Rule as District Policy.

36. The District Policy regulates all District schools, programs, and students pre-school through 12th grade.

37. The Policy was immediately effective and authorized a male high school student who professes a female gender identity, Student X,<sup>4</sup> unrestricted access to enter and use girls' private facilities, which he

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<sup>3</sup> The term "private facilities" in this Complaint includes locker rooms, shower rooms, restrooms, and housing on school-sponsored overnight trips.

<sup>4</sup> Plaintiffs wish to respect the anonymity of this student and so shall refer to him as Student X. Both Title IX and legal precedent regarding bodily privacy recognize that distinctions based on sex are necessary to protect privacy and prevent sex discrimination. Therefore, although Plaintiffs are aware that Student X professes a female gender identity, it is his male sex that is relevant to determining whether Plaintiffs' rights have been violated by Defendants' actions. Therefore, to respect the facts that are necessary knowledge for this Court's adjudication of Plaintiffs' claims, Plaintiffs use masculine pronouns to identify this male student throughout this Complaint.

promptly began doing while Girl Plaintiffs were present and using the same private facilities.

38. The Policy has had a severe and negative impact on students, including Girl Plaintiffs.

39. Girl Plaintiffs experience anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension and distress throughout their day knowing that to obtain an education they must attend to their most personal needs in private facilities unprotected from the entrance, presence, or exposure of a male.

40. Because of the Policy, Girl Plaintiffs do not feel secure in their own locker rooms, restrooms, or school.

41. Accordingly, some of the direct and natural consequences of the Policy have occurred and include:

- After attending Virginia High School ("VHS") last year, Girl Plaintiff A and F will not return to VHS in fall 2016 rather than continue using private facilities with a male student.
- Girl Plaintiffs A, B, and E, missed instructional class time or athletic practice time while trying to find a locker room or restroom where only girls' were likely to be present.

- Girl Plaintiffs A and E stopped using school restrooms for periods of time, holding their urine all day rather than use a restroom that is accessible to a male.
- Parent Plaintiffs A, B, D, E, F, and others observed their daughters' visible distress, including tearfulness, isolating behavior, and anger, over the Policy that forces them to use locker rooms and restrooms accessible to a male and used by him.

42. The anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension, and distress the Girl Plaintiffs' feel from the Policy is exacerbated by Student X's behavior in girls' private facilities, which includes:

- Student X commented on girls' bodies while in the girls' locker room, including asking Girl Plaintiff F her bra size and asking her to "trade body parts" with him both while he and Girl Plaintiff F were in the girls' locker room and outside the locker room in the gym.
- Student X dances to loud music with sexually explicit lyrics in the locker room while "twerking," "grinding," and lifting up his skirt to reveal his underwear.
- Student X changes his clothing by girls who try to seek additional privacy – both Girl Plaintiff A and Girl Plaintiff D started using a

secondary girls' locker room to seek additional privacy but both Girl Plaintiffs report that Student X came in and used the secondary locker room while they were in their underwear. Girl Plaintiff A also reports that Student X removed his pants near her, while she was changing and in her underwear.

43. The Policy violates Title IX, Girl Plaintiffs' constitutional privacy rights, as well as Plaintiffs' other constitutional and statutory rights.

44. Plaintiffs ask this Court to declare the Federal Rule and District Policy unlawful, set them aside, and order the other relief requested herein.

## **FACTUAL BACKGROUND**

### ***The Federal Defendants' Ultra Vires Rule.***

#### **Title IX.**

45. Congress passed Title IX of the Education Amendments of the Civil Rights Act in 1972 pursuant to its Spending Clause power.

46. Title IX prohibited invidious sex discrimination.

47. Title IX was designed to "expand basic civil rights and labor laws to prohibit the discrimination against women which has been so thoroughly documented." 118 Cong. Rec. 3806 (1972) (statement of Senator Birch Bayh of Indiana).

48. Title IX states that "[n]o person in the United States 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.

49. Congress delegated authority to federal agencies to “effectuate the provisions of section 1681 of this title...by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute...” but specified that “no such rule, regulation, or order shall become effective unless and until approved by the President.” 20 U.S.C. § 1682.

50. Regulations implementing Title IX in relevant part provide 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 academic, extracurricular...or other education program or activity operated by a recipient which receives Federal financial assistance,” and that no funding recipient shall on the basis of sex “treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; ... Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; ... Deny any person any such aid, benefit, or service; ... Subject any person to separate or different rules of behavior, sanctions, or other treatment; ...[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.” 34 C.F.R. § 106.31.

51. Title IX does not authorize the Federal Defendants to regulate the content of speech.

52. Regulation of the content of viewpoint of speech is presumptively unconstitutional under the First Amendment to the United States Constitution.

*“Sex” in Title IX does not include gender identity.*

53. Title IX and its implementing regulations use the term “sex” to categorize the persons protected from invidious discrimination by the law.

54. The term “sex” in Title IX and its implementing regulations means the immutable, genetic, reproductively-based binary male-female taxonomy. *See supra* fn. 1.

55. The text of Title IX demonstrates this male-female taxonomy by using terminology such as “both sexes,” “one sex,” and “the other sex.”

56. Title IX and its implementing regulations do not use the term “gender identity,” or alternate terms referring to the same concept, such as “transgender,” or “transsexual.”

57. Nothing in the text, structure, or legislative history of Title IX suggests or supports that the term “sex” in Title IX includes “gender identity.”