No. 1-18-0294

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NOVA MADAY,	)	
Plaintiff-Appellant	)	
	)	**Appeal from the Circuit Court**
	)	**of Cook County,**
v.	)	**Chancery Division**
	)	
TOWNSHIP HIGH SCHOOL DISTRICT 211,	)	**Case No. 17 CH 15791**
Defendant-Appellee	)	**Hon. Thomas R. Allen,**
	)	**Judge Presiding**
and	)	
	)	
STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association,	)	
Intervenor-Appellee.	)	

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT NOVA MADAY

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NATURE OF THE ACTION

Plaintiff Nova Maday, a female high-school student who is transgender, filed this action against defendant District 211, seeking injunctive relief and damages because the school's locker room policy discriminates against transgender people in violation of the Illinois Human Rights Act (the Act). The trial court denied Nova's request for a preliminary injunction, concluding that the Act permits the school to treat Nova differently on the basis of her transgender identity. This appeal of right followed. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Does the Illinois Human Rights Act permit a school to treat students differently in their use of school locker room facilities because they are transgender?

2. Did the circuit court err in denying Nova Maday a preliminary injunction, when her pleadings and the evidence of record show that she has a clear, ascertainable, protectable right; would be irreparably harmed by the denial of injunctive relief; has no inadequate remedy at law, is likely to succeed on the merits of her claim; and the balance of harms favors injunctive relief?

JURISDICTION

Supreme Court Rule 307(a)(1) permits an appeal "from an interlocutory order of court: granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction."[1] On January 25, 2018, the circuit court denied Nova's preliminary injunction request. A. 3. Nova timely appealed on February 7, 2018.

[1] The circuit court has jurisdiction over Nova's lawsuit. The Act provides that when the Illinois Department of Human Rights ("IDHR") dismisses a charge for lack of substantial evidence (as it did here), the complainant may file a civil action in the appropriate circuit court. 775 ILCS 5/7A-102(D)(3).

STATUTES INVOLVED

This appeal involves the interpretation of the following provisions of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*:

> **Sec. 1-103. General Definitions**. When used in this Act, unless the context requires otherwise, the term:
>
> * * *
>
> (O) Sex. "Sex" means the status of being male or female.
>
> (O-1) Sexual orientation. "Sexual orientation" means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. "Sexual orientation" does not include a physical or sexual attraction to a minor by an adult.
>
> * * *
>
> (Q) Unlawful Discrimination. "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, *sexual orientation*, pregnancy, or unfavorable discharge from military service *as those terms are defined in this Section.* [2]
>
> **Sec. 5-101. Definitions**. The following definitions are applicable strictly in the context of this Article:
>
> (A) Place of Public Accommodation. "Place of public accommodation" includes, but is not limited to:
>
> * * *
>
> (11) a non-sectarian nursery, day care center, elementary, *secondary*, undergraduate, or postgraduate school, or other *place of education*;

[2] Although sexual orientation and gender identity are included *within* the definition *of* Section 1-103(O-1), the Act makes clear that sexual orientation and gender identity are different.

> **Sec. 5-102. Civil Rights Violations**: Public Accommodations. *It is a civil rights violation* for any person on the basis of unlawful discrimination to:
>
> (A) Enjoyment of Facilities, Goods, and Services. *Deny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation*;
>
> **Sec. 5-102.2. Jurisdiction limited.** In regard to places of public accommodation defined in paragraph (11) of Section 5-101, the jurisdiction of the Department is limited to: (1) the failure to enroll an individual; *(2) the denial of access to facilities, goods, or services;* or (3) severe or pervasive harassment of an individual when the covered entity fails to take corrective action to stop the severe or pervasive harassment.

(Emphases added.)

STATEMENT OF FACTS

Nova Is a Student at District 211 Who is Transgender

For purposes of the preliminary injunction motion, the following central facts were undisputed: (1) Nova is a girl who is also transgender; (2) she is currently a student at Palatine High School, part of defendant Township High School District 211 (the "District"); and (3) the District has denied, and continues to deny, Nova full and equal use of the girls' locker room because she is transgender.

Nova is transgender because she has known since a very young age that she is actually female even though she was assigned the male gender when she was born. A. 65; A. 70. Every human being has a deeply internalized view of their gender identity, a sense of oneself as belonging to a particular gender. A. 76. The term gender identity is a well-established concept in medicine, and the medical community has determined that gender identity is firmly established early in life. *Id*. A person's gender identity, however, is not directly linked to, nor does it have a causal relationship with, the gender a person is classified as when they are born. *Id*. Moreover, a person's innate sense of their gender identity may not always conform to their birth-assigned gender. *Id.* For transgender

individuals, the sense of one's self — one's gender *identity* — differs from their birth-assigned gender, giving rise to a sense of being "wrongly embodied." *Id.*

Nova has been formally diagnosed with gender dysphoria, the medical term used to describe this sense of being "wrongly embodied" and the resulting clinically significant distress experienced by some people whose innate sense of their gender differs from the gender they were assigned at birth. A. 77–78; A. 82. This condition predisposes Nova to increased depression and anxiety when societal expectations that she conform to her birth-assigned gender defy her innate comprehension that she is actually female. A. 77.

Many transgender people experience this condition, particularly during those (often adolescent) years when the process of externally presenting as their inherent gender (instead of the one assigned at birth) begins. A. 79. For example, before she presented as female, Nova avoided mirrors and photographs that reminded her of her assigned male gender, and she increasingly isolated herself in her room, away from family and friends whose perception of her as male further increased her depression. A. 65.

The District Has Treated Nova Unequally *Because* She Is Transgender.

Nova is prohibited from using the girls' locker room like other girls at Palatine High School. The only reason is that she is transgender. In May 2015, at the end of her freshman year of high school, Nova approached the school's administration to request that she be allowed to use the girls' locker room to change for P.E. class. A. 66–67. A month later, Nova's mother followed up with the District. A. 71. The District refused. A. 67; A. 71. And it continues to refuse. A. 66–67; A. 71.

Instead of treating Nova like all other Palatine High School girls, the District initially proposed that she change in a restroom in the school nurse's office. A. 65–66; A. 71. Several months later, before her sophomore year began, the District told Nova that she

could use a single-user locker room. A. 66. But this room was always locked, requiring Nova to find a staff member to let her in to change before and after P.E. class, often causing her to be late. A. 66. This was embarrassing; it exacerbated her gender dysphoria, increased her anxiety, and hurt her P.E. class grade. A. 66.

Nova and her mother continued to request permission for Nova to use the locker room. On July 24, 2017, following these requests, the District told Nova that she could use the girls' locker room during her senior year, provided that she "agreed to change her clothes in changing stalls within the locker room." Def.'s Resp., C. 251–52; *see also* A. 66; A. 71. Girls who are not transgender are not required to use the changing stalls. Instead, those girls can use those stalls if they want, but they have the *option* of changing in the open section of the locker room. The District told Nova that she must always use a stall separating her from the other girls or she would be barred from the girls' locker room. A. 66–67; A. 71. Rather than accept a policy that treated her differently solely because she is transgender, Nova accepted a waiver from P.E. for the 2017–2018 school year. A. 67; A. 71–72.

The District's Discriminatory Policy Has Caused Nova Significant Harm

The District's decision to prevent Nova from using the girls' locker room has caused Nova to experience increased anxiety, depression, and increased gender dysphoria stress, facts that the District has neither challenged, nor has a basis to dispute. A. 66–67. Specifically, by enforcing a policy that requires Nova to use the locker room facilities in a manner different from her female classmates, the District has declared that Nova is not a "real" girl. A. 67. Nova has been made to feel as though she is an outcast who should be ashamed of her identity. *Id*. Drawing this distinction between Nova and the other female

high school students has exacerbated Nova's gender dysphoria — the District has reinforced the division between Nova's assigned birth gender and her true identity, forcing her to constantly confront that incongruence and the significant distress that accompanies that realization. A. 67; A. 77–78.

Medical experts have determined that gender dysphoria elicits a "grief of being born into the wrong body." A. 79. Nova has stated, and the District has not denied, that its policy has unnecessarily worsened that sense of grief and despair. A. 66–67. All Nova wants is to be treated the same as the other girls in her school. A. 67. Instead, the District has disrupted Nova's transition to living consistent with her gender identity, which the medical community has found to be in conflict with "evidence-based medical practice and detrimental to the health and well-being of the individual[.]" A. 80.

Other Female High School Students Have the Option to Use Private Changing Areas

Intervenor Students and Parents for Privacy (SPP) filed its own federal lawsuit against the District in federal court in Chicago.[3] SPP claimed that the presence of a transgender student in the locker room violated their privacy. The federal court disagreed: "the students had not established any constitutional right to privacy" that would allow them to prevent a transgender student from using the same locker room. Def.'s Resp., C. 252. Instead, any student who does not want to share the locker room with someone who is transgender may ask the District to use a separate private changing area. The school provides separate changing areas in the communal locker room (the changing stalls), in a single-user locker room, and in a gender neutral bathroom in the nurse's office. Def.'s

[3] *Students and Parents for Privacy v. U.S. Dep't of Educ.*, No. 1:16-cv-04945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

Resp., Sec. C. 22–23. Just as every student has the option of requesting (by their own *choice*) to use a separate facility to change for any number of personal reasons, a female student who objects to Nova's right to use the locker room would be able to use the separate facilities available at the high school. Def.'s Resp., Sec. C. 21–23.

PROCEDURAL HISTORY

On September 3, 2016 (when Nova was beginning her junior year), Nova's mother filed, on Nova's behalf, a Charge of Discrimination (the "Charge") with the Illinois Department of Human Rights (IDHR) alleging that the District was discriminating against Nova on the basis of her gender identity in violation of the Act. A. 86–89. Just over a year later (on September 6, 2017), the IDHR mailed (to the wrong address) a Notice of Dismissal for Lack of Substantial Evidence (the "Notice"). Nova's counsel received the Notice on October 11, 2017. Nova sued the District on November 30, 2017 under 775 ILCS 5/7A-102(D)(3). Compl., C. 14.

On December 13, 2017, Nova sought a preliminary injunction to bar the District from discriminating against her solely on the basis of her transgender identity. A. 47–104. After briefing and argument, the trial court denied the motion.[4] In an oral ruling issued on January 25, 2018, the trial court held that Section 5-102.2 of the Act permits the District to treat Nova differently solely because she is transgender. A. 3–46.

[4] In the course of briefing on her preliminary injunction request, the trial court granted leave for SPP to intervene in the case on an emergency basis. It did so without affording Nova an opportunity to oppose intervention in writing, but instead provided her the opportunity to file a motion to reconsider the grant of intervention. Nova has done so and SPP's status is pending before the trial court. Notably, in its ruling denying Nova's motion for a preliminary injunction, the trial court did not rely on *any* of SPP's arguments. As noted above, SPP has separately sued the District in the Northern District of Illinois concerning its policies toward students who are transgender.

ARGUMENT

I. The Act Does not Permit the District's Discriminatory Policy.

This is a straightforward case of unlawful discrimination. There is no disputed issue of fact. Indeed, the District concedes that the only reason it treated Nova differently — requiring of her what it did not require of other girls — is because she is transgender. That is classic discrimination, the very thing the General Assembly has prohibited. To be sure, the District believes that the Act permits it to discriminate and the trial court agreed. But the only question on review is a legal one. Nova will succeed on her claim if the Act forbids the District's unwritten discriminatory policy.

Under the facts and circumstances of this case, the standard of review of the trial court's order is accordingly *de novo*. *First*, a trial court's exercise of its equitable authority is ordinarily subject to review for abuse of discretion. *Roxana Cmty. Unit Sch. Dist. No. 1 v. WRB Ref., LP*, 2012 IL App (4th) 120331, ¶ 27, ("We review a trial court's decision granting or denying a preliminary injunction for an abuse of discretion, which occurs only when its ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the court's view.") (internal citations and quotations omitted). *Second*, an error of law is an abuse of discretion. *A&R Janitorial v. Pepper Constr. Co.*, 2017 IL App (1st) 170385, ¶ 16 ("'If a trial court's decision rests on an error of law, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law,'" *quoting North Spaulding Condo. Ass'n v. Cavanaugh*, 2017 IL App (1st) 160870, ¶ 46). *Third*, review of legal questions, including issues of statutory construction, is *de novo*. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12 ("The construction of a statute is a question of law that we review de novo.").

Here, the trial court made no factual findings, but instead denied Nova's request for a preliminary injunction on a purely legal ground: it concluded that the Act permits school districts to treat transgender people differently solely on the basis of their transgender status. Review is accordingly *de novo*. *See Makindu v. Illinois High Sch. Ass'n*, 2015 IL App (2d) 141201, ¶ 32 ("[W]here the trial court does not make any factual findings and rules on a question of law, the appellate court's review is *de novo*"); *Doe v. Ill. Dep't of Prof'l Regulation*, 341 Ill. App. 3d 1053, 1060 (1st Dist. 2003) ("The court's ruling construing the statute will be reviewed *de novo*"); *People ex rel. White v. Travnick*, 346 Ill. App. 3d 1053, 1060, (2d Dist. 2004) ("to the extent that the trial court's ruling was based on its construction of a statute, a reviewing court may resolve the issue as a matter of law using a *de novo* standard of review") (internal citation omitted); *Peregrine Fins. & Sec. v. Hakakha*, 338 Ill. App. 3d 197, 202 (1st Dist. 2003) (*de novo* standard of review applies when preliminary injunction is issued "in the absence of any findings as to factual issues," "the relevant underlying facts are not in dispute," and the trial court "ruling was clearly one of law").

A party may obtain a preliminary injunction when she has "(1) a clear, ascertainable, protectable right; (2) irreparable injury; (3) inadequate remedy at law; and (4) likelihood of success on the merits." *Stanton v. City of Chicago*, 177 Ill. App. 3d 519, 522 (1st Dist. 1988); *see also In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1st Dist. 2007). "[A] party seeking injunctive relief need only raise a 'fair question' as to the existence of the right claimed." *George S. May Int'l Co. v. Int'l Profit Assocs.*, 256 Ill. App. 3d 779, 786–87 (1st Dist. 1993) (citing *Buzz Barton & Assocs. v. Giannone*, 108 Ill. 2d 373, 382 (1985)). Preliminary injunctive relief is appropriate to prevent the continuation

of an injurious act until the court can reach the merits. *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. No. 4*, 396 Ill. App. 3d 1105, 1117–18 (5th Dist. 2009) (upholding injunction permitting service animal to accompany student; relief permissible to prevent the prospective harm sought to be avoided); *see also Brooks v. LaSalle Nat'l Bank*, 11 Ill. App. 3d 791, 798–99 (1st Dist. 1973); *Kolstad v. Rankin*, 179 Ill. App. 3d 1022, 1034 (4th Dist. 1989). If a plaintiff satisfies the four-part test, the court then considers whether granting the injunction would be in the public interest. *See, e.g., Kalbfleisch*, 396 Ill. App. 3d at 1119–20 (in balancing the hardships between the parties, "the court should also consider the effect of the injunction on the public").

The trial court concluded that Nova had met the second (irreparable harm) and third (no adequate remedy) prongs of the four-part test. A. 27–28 ("I would submit that those elements are likely established by the Plaintiff, no adequate remedy at law or irreparable harm, based on the briefs, based on the arguments and based on the facts."). But it denied the injunction because it concluded that the statute permits the District to discriminate; Nova accordingly was unlikely to succeed on the merits.

Specifically, the trial court held that the Act gives members of a protected class (like Nova) a right only to "access," and not to "full and equal enjoyment," of her school's facilities, goods, and services. A. 27. Because the District did offer to allow Nova to change for P.E. class *within* the girls' locker room, the trial court held that it had given her "access." A. 28–31 ("But what they have done is they've allowed access. Access, access, access.").

The trial court declined to address the balance of harms. A. 31–32 ("The statute brought us here, I'm looking at the statute, that's the way I interpret the statute, and

therefore I don't think that there's a likelihood of success on the merits and I don't need to get to the other balancing issues.").

For three reasons, the Act does not permit the District to discriminate against Nova.

First, there is no question that the Act prohibits schools from discriminating on the basis of transgender identity. Here's why. Section 5-102 makes it a civil rights violation for any person to use a discriminatory basis to "[d]eny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation." Nova's school is a place of public accommodation. Section 5-101(A)(11). Among the prohibited discriminatory bases is gender-related identity. *See* Section 1-103(Q) (unlawful to discriminate on the basis of sexual orientation); Section 1-103(O-1) (defining sexual orientation to include "actual or perceived . . . gender-related identity, whether or not traditionally associated with the person's designated sex at birth"). Read in tandem, these provisions prohibit discrimination against someone because their gender identity does not match the gender assigned to them at birth.

In *Sommerville v. Hobby Lobby Stores*, ALS No. 13-0060C (Ill. Hum. Rts. Comm'n 2015) (May 15, 2015 Recommended Liability Determination) (adopted in relevant part by Commission, Nov. 2, 2016)) (A. 92–104), the Illinois Human Rights Commission held that Hobby Lobby Stores violated a female employee's right to be free from discrimination in her use of a public accommodation under the Act when it prohibited her use of the women's restroom used by other female employees and customers because she is transgender. *See also Michael S. and Andrea E. v. Komarek Sch. Dist. 94*, ALS No. 16-0003 (Ill. Hum. Rts. Comm'n 2018) (March 20, 2018 Recommended Liability Determination) (finding that a school policy which denies a student use of the restroom that matches their gender identity

because they are transgender is a violation of the IHRA) (A. 168–190). The Illinois Human Rights Commission's interpretation of a statutory provision of the Act is accorded substantial weight and deference; "[t]his is so because the Commission's interpretation of the Act flows directly from its expertise and experience with the statute that it administers and enforces." *Wanless v. Illinois Human Rights Comm'n*, 296 Ill. App. 3d 401, 403 (3d Dist. 1998). Accordingly, the Act on its face precludes any public accommodation (including the District) from denying a person the "full and equal enjoyment of the facilities" (here, the girls' locker room) because she (like Nova) is transgender.

Second, the District *has* discriminated against Nova *because* she is transgender. No other girls are required to use a separate stall to change for P.E. class in the girls' locker room. Only someone who is transgender faces this requirement. And they face the requirement only because they are transgender. The Act requires "full and equal enjoyment" for a reason — there is no such thing in Illinois as "a little" allowable discrimination. The General Assembly has made it clear that singling out members of identified protected classes and treating them differently because of their protected status is abhorrent and unlawful. The District does not have — and cannot offer — *a legally cognizable reason* for treating Nova differently from other girls.

Third, the Act does not carve out a discriminatory zone for schools. The trial court did not dispute that the District denied Nova full and equal use of the locker room. *See* A. 28 ("Plaintiff, Ms. Maday, and her attorneys argue that it's not full and equal access, and that may be a correct statement."). Nonetheless, the court concluded — without any support from the Illinois Human Rights Commission or the courts — that the District may deny or refuse "full and equal enjoyment" (775 ILCS 5/5-102), of its facilities, goods, and

services, provided it does not wholly deny "access" (*id.* at 5/5-102.2). On the trial court's reading, African-American and Caucasian girls could be required to use one part of the girls' locker room and Asians and Latinos another, since both would have "access" to the locker room. Students of different religions could be segregated in the cafeteria. Race and religion, after all, are also protected statuses under the Act, but a school apparently needn't give any member of every race or religion "full and equal enjoyment," just "access."

How did the trial court reach this result? By turning a section governing the Department of Human Rights' *jurisdiction* into a substantive authorization for schools to discriminate. It is clear that Section 5-102.2 is jurisdictional — it says so. "[T]he jurisdiction of the department is limited . . . ." The legislature created Section 5-102.2 in 2010 by moving language previously included in Section 5-101. *Compare* 2007 *Ill. Legis. Serv. P.A.* 95-668 (S.B. 593) (schools are public accommodations "in regard to the failure to enroll an individual or the denial of access to its facilities, goods, or services, except that the Department shall not have jurisdiction over *charges* involving curriculum content, course content, or course offerings, conduct of the class by the teacher or instructor, or any activity within the classroom or connected with a class activity such as physical education." (emphasis added)) *with* 2009 *Ill. Legis. Serv. P.A.* 96-814 (H.B. 2547) (creating Section 5-102.2, and expanding jurisdiction to include "severe or pervasive harassment of an individual when the covered entity fails to take corrective action to stop the severe or pervasive harassment.").

This history shows that the legislature's intent was to avoid requiring the Department to investigate charges *about* school curriculum and course content (areas traditionally entrusted to school discretion). For example, the Department cannot

investigate under the Act whether the content of a particular history, English, or science course is somehow discriminatory. But there is not a whisper of a suggestion that the legislature meant to limit the Act's applicability when schools deny full and equal enjoyment of the facilities, goods, and services of schools on the basis of a protected status. Had the legislature intended to redefine or limit what constitutes a "civil rights violation" in an educational setting, it clearly knew how to do so. Indeed, it *has done so* for activity protected by the First Amendment. *See id.* at 5/5-102.1 ("(a) It is not a civil rights violation . . . (b) . . . shall not be a civil rights violation.").

Courts properly give different statutory language that has "substantially the same" meaning the same effect. *See Maksym v. Bd. of Election Comm'rs of City of Chicago,* 242 Ill. 2d 303, 321–22 (2011) ("residency" in one part of an act and "resided" in another have substantially the same meaning and should be given the same effect absent a clearly expressed legislative intent to treat them differently); *see also Nuzzi v. Bd. of Trustees of Teachers' Ret. Sys. of State,* 2015 IL App (4th) 140401, ¶ 36 (the statutory phrases "benefit is not payable," "benefit shall continue until," and "such annuity shall cease" should all be given the same effect); *People v. Rodriguez,* 2014 IL App (2d) 130148, ¶ 81–82 ("at or into" and "in the direction of or into" should be given the same effect). Because the phrase "the denial of access to facilities" in Section 5-102.2 is substantially the same as the phrase "deny or refuse the full and equal enjoyment of the facilities" in Section 5-102, the two sections should be given the same effect. Section 5-102.2 gives the Department of Human Rights jurisdiction over cases involving denials of the use of a school facility or the goods or services of such accommodation, while Section 5-102 establishes the conduct by a public accommodation that is a "civil rights violation."

Accepting the District's statutory argument would undermine the purposes of the IHRA and lead to an absurd result. A court should avoid interpreting statutory language in such a way as to undermine the statute's overall purpose, *Rodriguez,* 2014 IL App (2d) 130148, ¶ 44 (In interpreting statutory language, one factor a court considers is "the apparent intent of the legislature in enacting it"), and because the IHRA is remedial legislation, it must be liberally construed to effectuate its purposes. *Arlington Park Race Track Corp. v. Human Rights Comm'n*, 199 Ill. App. 3d 698, 703 (1st Dist. 1990) (construing "housing accommodations" in the IHRA to include living facilities for backstretch workers).

The District's argument that schools are permitted to discriminate in ways that other public accommodations are not would defeat the Act's purpose and lead to absurd results. *See In re B.C.*, 176 Ill. 2d 536, 550–51 (1997) (statutes "must be interpreted in a manner that avoids absurd, unjust, unreasonable or inconvenient results which could not have been intended by the legislature"; rejecting interpretation of Illinois Hate Crime that would have required proof that the defendant's "offensive conduct was directed against a specific person" and instead requiring proof only of "improper bias which motivates certain criminal acts" because "[t]here is no indication that the legislature intended only to redress the narrower wrong caused by biased selection of victims"). *See also In re D.F.*, 208 Ill. 2d 223, 230, 232 (2003) ("A court, however, is not bound by the literal language of a statute that produces a result inconsistent with clearly expressed legislative intent, or that yields absurd or unjust consequences not contemplated by the legislature"; rejecting proposed literal reading of statute that "could only result in delaying a child's permanent placement and cannot be reconciled with the legislature's expressly stated policy to expedite juvenile

court proceedings"); *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 289–90 (2003) ("In interpreting statutory provisions, we are to afford the statute's plain language its fullest meaning to effectuate the legislative intent . . . and we may not read into a statute exceptions, limitations or conditions that conflict with the intent of the legislature"; rejecting interpretation that individuals could avoid midwife licensure requirements by labeling themselves "traditional nonnurse midwife" because it would lead to "an absurd result" and "render a certified nurse midwife's license meaningless").

If the District were correct, then it and other educational institutions would be prohibited only from completely denying "access" to facilities and their goods and services to students who are transgender or from another protected class. Indeed, a school could set up separate sections *within* a locker room (or cafeteria or classroom) for different students based on race, religion, or disability status. Students of the targeted racial or religious group, or those with disabilities, would have no recourse under the Act.

But those students' lack of "full and equal enjoyment" would be simultaneously undeniable and legally irrelevant. As the Illinois Supreme Court did in *B.C.* in interpreting the Hate Crime Statute, this Court should avoid interpreting the Act to achieve a result inconsistent with the Legislature's clearly expressed intent. The Act is designed "to secure for all individuals within Illinois the freedom from discrimination" on the basis of protected class. 775 ILCS 5/1-102.

The very purpose of the Act is to strip away labels and require public accommodations to treat all individuals equally. Nova is female. And she is transgender. Treating her differently — requiring her to do, because of who she is, what no one else must do — is the very vice the Act was meant to fix. The only reason the District treated

Nova differently is because of who she is. The Act does not permit it to do so. She is entitled to an injunction.

II. Nova Is Entitled to Preliminary Injunctive Relief.

Nova is entitled to a preliminary injunction because she has established "(1) a clear, ascertainable, protectable right; (2) irreparable injury; (3) inadequate remedy at law; and (4) likelihood of success on the merits," *Stanton*, 177 Ill. App. 3d at 522, and because the balance of harms and public interest weigh in favor of enjoining the District's discriminatory policy.

First, Nova has a clear, ascertainable, and protectable right. She has the right to full and equal enjoyment of the District's locker room facilities. There is no dispute that the District has denied her that right because of her gender identity: the District has conditioned Nova's access to the girls' locker room on her use of a stall separating her from the other girls, a requirement that is imposed solely on her and solely because she is a girl who is transgender. A. 67–67; A. 71. With the Act interpreted as the legislature intended, Nova has established a clear, ascertainable, protectable right.

Second, as the trial court agreed, she has also established irreparable injury. A. 27–28. The District's policy of unlawful discrimination reinforces the misconception that Nova is not a "real" girl. A. 67. By distinguishing Nova as an "outcast" who must be separated from other female students, the District has knowingly exacerbated Nova's gender dysphoria. *Id.* The harm experienced by individuals diagnosed with gender dysphoria when they are treated in ways that are inconsistent with their innate gender identity is understood to be "deeply traumatic, particularly for adolescents." A. 80–81. By enacting a policy that regulates Nova's use of the facility in a way that effectively segregates her from her peers, the District has consciously signaled that Nova is "different"

than other female students and implies that she should somehow be ashamed of who she is. A. 67; A. 81. Furthermore, medical research has demonstrated that the opportunity to use "the same facilities available to others is an undeniable necessity for transgender individuals." A. 81. Therefore, by limiting Nova's use of the locker room, the District has impeded Nova's ability to effectively treat and overcome her gender dysphoria, and the associated distress and depression with feeling as though the body in which one is born deeply conflicts with one's sense of self — being made to feel as though one can never live a life consistent with one's true identity is plainly a form of "irreparable harm." *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F. 3d 1034, 1045 (7th Cir. 2017) (affirming preliminary injunction; school policy preventing transgender boy from using the boy's restroom; was "significantly and negatively impact[ing] his mental health and overall well-being" and causing life-long harm).

Third, as the trial court found, Nova established that she has no adequate remedy at law. A. 27–28. Without a preliminary injunction, Nova will never again have the opportunity to enjoy a typical high school P.E. experience. *See, e.g., Doe v. Wood Cty. Bd. of Ed.*, 888 F. Supp. 2d 771, 778 (S.D. W. Va. 2012). The only remedy for the harm is to overturn the policy.

Fourth, Nova has established likelihood of success on the merits. Again, under a correct interpretation of the Act, Nova would have prevailed. The Act prevents schools from denying "full and equal access" of facilities to individuals on the basis of their gender identity. 775 ILCS 5/1-103(O-1), 1-103(Q), and 5-102. The District's policy prevents Nova from fully and equally using the girls' locker room solely because of her gender identity, an undisputed fact. A. 28–31. Because the District's policy, as a matter of law,

violates Nova's civil rights, she has a strong likelihood of success on the merits.

And because the District has clearly violated Nova's civil rights, no hardship balance is even necessary. *See, e.g., Kalbfleisch*, 396 Ill. App. 3d at 1119 (balancing against school district's potential harm not required "where the existence of a private right and the violation thereof are clear"). But if the Court decided to undertake the balancing inquiry, this is not a close case. The District has identified no valid consideration to weigh against the harm Nova has suffered, and continues to suffer. Actual or threatened litigation by SPP and other anti-transgender organizations is not a "harm" that counts in the balancing inquiry. *See Lammers v. Ill. Dep't of Human Rights*, Charge No. 1992 CN 3157, 1996 WL 651361, at *2 (Ill. Hum. Rts. Comm'n. October 28, 1996) ("[I]t is black letter law that discrimination against an individual cannot be justified by the discriminatory preferences of customers"); *Sommerville*, ALS No. 13-0060C, at 11 ("[t]he prejudices of co-workers and customers are part of what the Act was meant to prevent"); *Sprinkle v. Rivers Edge Complex, Inc.*, ALS No. 10565, 2000 WL 33309367, at *10 (Ill. Hum. Rts. Comm'n August 7, 2000) ("an employer cannot take action against a person based upon the discriminatory preferences of the employer's customers"). As for the *public's* interest, the legislature has already spoken: the Act's purpose is "[t]o secure for all individuals within Illinois the freedom from discrimination." 775 ILCS 5/1-102. Denial of injunctive relief under the facts and circumstances of this case will only frustrate that purpose.

CONCLUSION

For the foregoing reasons, the trial court's order denying the request for a preliminary injunction should be reversed and the case remanded with directions to grant the preliminary injunction.

Respectfully submitted,

Dated: March 23, 2018

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No. 1-18-0294

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NOVA MADAY,	)	
Plaintiff-Appellant	)	
	)	**Appeal from the Circuit Court**
	)	**of Cook County,**
v.	)	**Chancery Division**
	)	
	)	**Case No. 17 CH 15791**
TOWNSHIP HIGH SCHOOL	)	
DISTRICT 211,	)	**Hon. Thomas R. Allen,**
Defendant-Appellee	)	**Judge Presiding**
	)	
and	)	
	)	
STUDENTS AND PARENTS FOR	)	
PRIVACY, a voluntary	)	
unincorporated association,	)	
Intervenor-Appellee.	)	

APPENDIX TO BRIEF

TABLE OF CONTENTS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MADAY

v.

TOWNSHIP HIGH SCHOOL DIST. 211

No. 2017 CH 15791

ORDER

THIS MATTER COMING BEFORE THE COURT ON PLAINTIFF'S MOTION FOR ~~SUMMARY~~ PRELIMINARY INJUNCTION, DUE NOTICE HAVING BEEN GIVEN, AND THE COURT BEING FULLY ADVISED IN THE PREMISES, IT IS HEREBY ORDERED:

1. SAID MOTION IS DENIED FOR THE REASONS STATED ON THE RECORD;

2. THIS CASE IS SET FOR A STATUS CONFERENCE ON FEBRUARY 8, 2018, at 11:00 WITHOUT FURTHER NOTICE; and

3. DEFENDANTS' TIME TO ANSWER OR OTHERWISE PLEAD IS CONTINUED GENERALLY.

Attorney No.: _____

Name: _____

Atty. for: _____

Address: _____

City/State/Zip: _____

Telephone: _____

ENTERED:

ENTERED
JUDGE THOMAS ALLEN-2043
JAN 25 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Dated: _____, _____

_____

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Certified Shorthand Reporters
Scheff & Associates

Nova Maday v. District 211

17 CH 15791

Court Proceedings

January 25, 2018

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STATE OF ILLINOIS)
)SS.
COUNTY OF C O O K)

ORIGINAL

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

NOVA MADAY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17 CH 15791
	)	
TOWNSHIP HIGH SCHOOL DISTRICT 211,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association,	)	
	)	
Intervenor.	)	

RECORD OF PROCEEDINGS had at the hearing of the above-entitled cause before the HONORABLE THOMAS R. ALLEN, Judge of said Court, at the Richard J. Daley Center, Room 2302, on Thursday, the 25th day of January, 2018, at 11:30 a.m.

APPEARANCES:

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Appeared on behalf of the Intervenor.

(WHEREUPON, the following proceedings were had in open-court, to-wit;)

THE CLERK: Maday vs. Township High School District 211. 17 CH 15791.

THE COURT: Okay. Good morning.

MS. SCOTT: Good morning, Your Honor.

MS. SMITH: Good morning.

MS. SCOTT: Sally Scott on behalf of the Defendant, District 211.

MS. SMITH: Jennifer Smith also on behalf of 211.

MR. KNIGHT: John Knight on behalf of the Plaintiff, Your Honor.

MR. BERGMAN: Jeff Bergman also for the Plaintiff, Your Honor.

MR. OLP: Thomas Olp on behalf of the Intervenors.

THE COURT: All right. Good morning. We are here today following the hearing we had last Friday, the 19th of January, addressing the Plaintiff Ms. Maday's motion for a preliminary injunction. The

parties submitted briefs and we had argument on that matter last Friday, and I've had a chance to review the submissions and further study the cases and law on this subject matter and I'm ready to rule.

So first we'll start by just giving a short synopsis of the facts or the background which has brought the parties to this point.

So Ms. Maday is now 18 years old and she's a senior at Palatine High School. She identifies as a female but is anatomically a male. The Plaintiff alleges that the District, the School District, has denied her the use of the girls' locker room while permitting other non-transgender girls' use of the locker room to change.

The District most recently has offered Plaintiff and implemented a policy of allowing Plaintiff to use the girls' locker room but only if she agreed to change her clothes in the changing stall within the locker room. And rather than use the locker room under those conditions, Ms. Maday accepted a waiver from participating in PE class.

Subsequent to that change in policy or

evolution of policy, Plaintiff's mother because she was a minor filed a charge on her behalf against District 211 with the Illinois Department of Human Rights and the Department issued a notice of dismissal for lack of substantial evidence after reviewing the matter on September 6, 2017. After which, Ms. Maday filed this one-count complaint in the Circuit Court of Cook County alleging a violation of the Illinois Human Rights Act, and that complaint was filed on November 30th, 2017.

Plaintiff's claim rests upon the theory that the Illinois Human Rights Act intends to prevent and eliminate discriminatory practices and Plaintiff is being discriminated against because she is a transgender female.

Plaintiff believes that she should have the full and equal enjoyment of the facilities at a public place of accommodation, which is Palatine High School. Plaintiff also sought injunctive relief so that she can register for PE class this year before she graduates.

So let's talk first about the complaint

which -- and the legal theory upon which it's based I've already alluded to that in a broad sense. The complaint is a one-count complaint and it's firmly founded upon the Illinois Human Rights Act.

Now, it's Count 1 and the allegation, the heading is that District 211 denied Nova the full and equal access of its facilities because of Nova's gender-related identity, and it seeks a cease and desist order from the Court directing District 211 to allow her to use the locker room without any conditions.

Now, just generally under the law for preliminary injunctions there has to be a foundational legal premise, and that can be accomplished in several ways but more often it's couched in these terms, that the Plaintiff has a burden to raise a fair question that she has a substantive interest recognized by statute or common law. So the obvious basis and premise of this lawsuit is statutory. Clearly, simply, narrowly, exclusively, statutory. Illinois Human Rights Act.

So that's our starting point, and it's

our analysis point, and it's our conclusion point in my estimation. So it's refreshing because many times the lawyers throw multiple theories and make for an entertaining discussion, but this is straightforward Illinois Human Rights Act.

So I think I want to start by -- don't be afraid it's a book, nobody looks at books anymore, but it's all printed papers off the Internet. But I'm looking at the 775 ILCS 5/1-101, which is the reference to the Illinois Human Rights Act, and just when I did print it out it's 75 pages in length so it's very detailed and it's evolved over the years.

But I think we have to start out with the premise of legislative intent and the effective date. This law was passed in 1979, December 6, 1979, and became effective July 1, 1980. So it's been around a long time.

And I'm just going to read into the record the title of the Act. The title of the Act is as follows: "An Act to promote the public health, welfare, and safety of the people of the State of Illinois by preventing unlawful discrimination in

employment, real property transactions, access to financial credit, and public accommodations by authorizing the creation of a Department of Human Rights to enforce, and a Human Rights Commission to adjudicate allegations of unlawful discrimination and by making uniform the law with reference to unlawful discrimination through the addition, amendment, and repeal of various Acts."

So the 1980 Illinois Human Rights Act comes into existence. Now, let's talk about how it came into existence. Quite obviously and plainly the Illinois legislature. Now, the Illinois legislature like all legislatures is comprised of people who are elected by the citizens, and of course they are charged with the task of balancing society's interests, they act in response to public input and public requests. And accordingly, as we all know when we -- as you've all been lawyers for a while, things change, mostly they grow in number of pages. As I said, the Illinois Human Rights Act is now 75 pages when I printed it out on the Internet, and things change.

As an example, in my early career I was a Public Defender and I had a Chapter 38 which was a Criminal Code and that was my Bible and that's what I worked with for eight or nine years. When I first arrived there in 1977, that pamphlet book was about half inch long -- wide or deep. By the time I left, it was an inch and a half eight or nine years later.

So the point is legislation changes and I don't think it's important for the purposes of our case to analyze that further, but I think it's important to note because this law, especially a couple of sections here that deal with Ms. Maday's circumstances, has had some amendments and some changes.

So I want to look at that first. And first, I want to focus on Article 5 of the Human Rights Act which is titled Public Accommodations, and there are definitions.

In 5/5-101 is a Definition section and it reads as follows: "The following definitions are applicable strictly in the context of this Article. (A) Place of Public Accommodation. "Place of public

accommodation" includes, but is not limited to:" and there's a list of 13, and I'm just going to summarize it. Number (1) an inn, hotel, motel; (2) a restaurant, bar; (3) a motion picture house, theater, concert hall; (4) auditorium, convention center, lecture hall; (5) bakery, grocery store, clothing store, shopping center; (6) laundromat, dry-cleaner, bank, barber shop, beauty shop, accountant, lawyer, office; (7) public conveyances on air, water or land; (8) a terminal, depot, or other station used for public transportation; (9) museum, library, gallery; (10) park, zoo, amusement park; (11) a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other place of education; (12) a senior center, homeless shelter, food bank; (13) a gymnasium, health spa, bowling alley.

Okay. So there's a list and description and definition promulgated by the legislature of what they mean by public accommodation, or what falls under the umbrella of a place of public accommodation. So those definitions

are in the Act.

Now, let's move on, the timeline of, and move to October 10th of 2007. The legislators amended a portion of this Act under 5/5-102, which reads: "It is a civil rights violation for any person on the basis of unlawful discrimination to: (A)," and then there's a caption or a title that's called "Enjoyment of Facilities, Goods, and Services."

So it's unlawful discrimination to: "Deny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation." So that amendment was effective October 10th, 2007.

Next in our legislative history, the next important date is January 1st, 2010, and we have a new amendment to the Human Rights Act, Article 5, Public Accommodations, and this amendment is titled 775 ILCS 5/5-102.2, and the title is Jurisdiction Limited.

And it reads as follows: "In regard to places of public accommodation defined in

paragraph 11 of Section 5-101, the jurisdiction of the Department is limited to: (1) the failure to enroll an individual; (2) the denial of access to facilities, goods, or services; or (3) severe or pervasive harassment of an individual when the covered entity fails to take corrective action to stop the severe or pervasive harassment."

All right. So what did this amendment do? And for our purposes we're only utilizing this for the second category, "the denial of access to facilities, goods, or services." So what was the effect of this amendment and why is it there, what does it stand for now? So we're searching for, as always, legislative intent when we're dealing with a statutory cause of action which is what we have here.

So let's go back to the definitions in that laundry list that I read in abbreviated fashion. And in 2010 the legislator went back to that section of the Human Rights Act and he plucked out one and only one place of public accommodation, and they carved out some different -- a different rule or a different analysis or a different jurisdictional

authority or definition, so to say.

Now, why did they do that? Well, I don't know. So we start analyzing. If you look at all those places of public accommodation that exist in that definition section, this section, this particular section deals with schools, day care center, elementary, secondary, undergraduate, postgraduate school, or other place of education. Plain and simple. Education. Educational venue, educational facility, educational vocation. Education.

And when they did this and highlighted this one category there's also a different description of access and there's -- the words are different as we all know because we talked about it at length last Friday. And 102 before this amendment, this change in the statute, well, it still reads "full and equal enjoyment of the facilities." So it's unlawful discrimination to deny or refuse to another the full and equal enjoyment of the facilities, goods, and the services.

Now, 2-1/2 or 3 years later the

legislature speaking only to this one definition of accommodation, only to the educational category, they don't include the words "full and equal enjoyment." They describe it differently, that it would be unlawful to: "For the denial of access to facilities, goods, or services."

Now, is that an accident? Something this critical and important to our citizens of Illinois to be free from discrimination and not be discriminated against, is it an accident? I don't know. Well, I'll talk about that in a minute but we're not mind readers, but reasonable people could analyze and make a suggestion or offer possible reasoning for that.

Education. Education is not going to the movies. Public education is the most, if not the single most important mission of our government. It's certainly up there at the top of the list. It's mandatory. Our education laws require that students attend school, otherwise -- I don't think they have truant officers anymore, but you have to attend school. Parents hand off their minor children to

teachers, and teachers act in our school system as almost quasi-parental in nature. Many people argue that the teachers spend more time with the kids than the parents. I'm sure we've all heard people dwell on that. They're minors. I don't know. They're developing emotionally and physically. They're adolescents. Minors can't contract, they can't drive a car until they are 16 years old, and they can't -- so I don't know. Okay? And I'm not speculating, just for the record. So wherever this goes after me, I'm not speculating. I'm just talking about reasonable explanations. There could be reasonable ones on the other side.

So we need guidelines, "we" meaning the Courts, when we have these disputes over legislative intent and what words mean and what they don't mean. And there are guidelines and the parties, you know, discuss them in their briefs, statutory construction, and I'm just going to read a few of the more straightforward fundamental rules.

So typically when the Court interprets a statute, the fundamental rule of statutory

construction is to ascertain and give effect to the legislature's intent. Moreover, the language of the statute is the best indicator of legislative intent, and we give that language its plain and ordinary meaning.

Lastly, the Court may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that would conflict with the express legislative intent.

Now, it's clear that what's missing in the amendment, or what's different I should say in the 2002 carveout -- I'm calling it a carveout, that's not a legal term, but just for sake of our discussion. What's missing are those words "full and equal access." They are conspicuously not there in the definition, or in the statute I should say. Whereas, they are there and apply to all the other public accommodations, the 12 others that I listed and described generally. So that's a fact, those words aren't there. Now, that's the statute.

Let's move on to the request for preliminary injunctive relief. And before we get to

that legal discussion of preliminary injunctive relief, I think I'm going to start by saying the obvious, at least to the lawyers and to those who have had equitable causes of action and litigated, and that is the law describes preliminary injunctive relief as extraordinary. And I never quite understood what that meant, and I don't know that I ever still do, but I say that in jest because I sit here over the years and that's the word that's used every time, that injunctive relief is an extraordinary remedy.

And so just for laughs I went to the dictionary to look at -- the legal dictionary and it's defined as "going beyond what is usual, regular, or customary; of, relating to, or having the nature of a proceeding or action not normally required by law or not prescribed for the regular administration of law."

So I don't know that it's helped me any but I tell you what I -- I would offer this in terms of my thoughts on why it's called extraordinary. Well, in the ordinary course of litigation without

injunctive requests, here's what happens. A party files a lawsuit, the other party responds. The parties exchange information that's relevant to that lawsuit, they depose people, hire experts, and it goes on until all the facts are assembled, and those facts are presented to either a Judge or a jury and there is a decision based on evidence.

Under injunctive relief there is no decision based on evidence, so I'm thinking in my mind that's why we call it extraordinary because it's not our standard way of deciding disputes in our American jurisprudence.

In any event it's extraordinary, however parties want to define it. That's not a legal definition, that's not the Court's definition, or some Appellate Court, but I think it's a common sense look at that because what we do in a preliminary injunction and in TRO's is the Court, whether it's me or whoever it is, in essence has to have -- pretend it has a crystal ball and can look out into the crystal ball and predict the outcome, the likely outcome of the litigation.

So I just start with that premise that extraordinary is attached all the time, every time, exclusively to injunctive requests.

Now, let's look at the elements that are necessary for a Plaintiff to prevail. First, I want to just add a few more comments regarding what I glean from the briefs and the narrative here because I think some of this needs to be highlighted.

The Plaintiff's brief in support of the motion for preliminary injunction, in two places I think in the brief references -- well, let me just read it. "To date the District has either denied Nova the use of the locker rooms used by the other girls all together, or told her that she would be separated and required to dress in a private area in the girls' locker room away from the other girls."

Then later on in the brief it's mentioned again or in a little different terms: "The District's most recent offer to Nova made in 2017, July, was for her to be separated from the other girls by requiring her to dress in a private area in the girls' locker room away from the other girls."

I understand that, you know, this is a brief but my understanding from the discussion, the arguments, the submitted briefs is that the locker room is an open room like this with rows of lockers. The stalls are not bathroom stalls, they're -- I think that was described as four stalls, and they're two or maybe five feet off the end of the row of lockers from what I could see or, you know, it's -- that gives the impression that this is a separate room. I don't think that it's a separate room. There's no door, it's wide open, and it's a changing area for girls that wish to avail themselves of it, I guess, but it's part of the locker room I think, and I think that's an important fact that needs to be clarified.

So here's the elements that a Plaintiff has to establish. First, a clearly ascertained right and need of protection; second, that irreparable harm will occur without the injunction; third, there's not an adequate remedy at law; and fourth, there is a likelihood of success on the merits.

And in addition to that the Court can

balance hardships between the parties, and in balancing the equities the Court must weigh the benefits of granting the injunction against the possible injury to the opposing party from the injunction, and in balancing the equities the Court should consider the effect of the injunction on the public.

So let's address the first element, ascertainable right in need of protection. Now here Ms. Maday argues that she has a right to the full and equal enjoyment of the facilities, meaning that she has the right to unrestricted access to the girls' locker room as the other girls use the locker room at Palatine High School.

District, on the other hand, argues that the Plaintiff misapplied the relevant law and that Section 102.2, the January 2010 amendment, is the section that applies and not the section that reads "full and equal enjoyment of the facilities."

So I have already discussed how that evolved, that paragraph 11 of the Definition section was singled out in the 2010 amendment, and "full and

equal" was not attached to that amendment.

So the question is whether Ms. Maday has -- if 102.2 applies, the question is her protectable right, arguably, is access to the facilities. Defendant, the District, submits, argues and suggests that she has access to the facilities and that the access is to the locker room and the changing stalls which are part of the locker room, and that's their argument.

So the question is whether that statute as amended, carving out educational institutions, should be given the interpretation that Defendant is suggesting. And if it is then the ascertainable right is not to full and equal access to the facilities and thereby her right in need of protection should be analyzed with the amended section, namely, does she have access to the facilities.

Now, let's move to the two other elements, irreparable harm without the injunction and no adequate remedy at law. I would submit that those elements are likely established by the Plaintiff, no

adequate remedy at law or irreparable harm, based on the briefs, based on the arguments and based on the facts.

Likelihood of success on the merits, and this is where the crystal ball comes into play, and that is where this case, in my judgment, is to be decided. And the Illinois Human Rights Act addresses unlawful discrimination, not just discrimination, but 5/5-102 reads: "It is a civil rights violation for any person on the basis of unlawful discrimination," and then it goes on to recite what.

Now, if there's discrimination here as Plaintiff would argue, is it unlawful discrimination? And in analyzing that, the jurisdictional limited amendment of 102.2 is our guideline, and the guideline is that it's undeniable that Ms. Maday has access to the girls' locker room. It's also undeniable that Plaintiff, Ms. Maday, and her attorneys argue that it's not full and equal access, and that may be a correct statement. But I also cannot ignore the plain language of 102.2 which as a result of extricating the educational accommodations

that were long a part of the definition section and that had to comply in the same way as those other institutions, you can't ignore that it was carved out and it was addressed in a different manner by the Illinois legislature. And they didn't use the words "full and equal," they used "access."

Again, going back to my comments earlier, I don't see any legislative record that can dispel the plain language. They pulled it out, "full and equal enjoyment." They might have -- maybe they had their crystal ball in looking down the road and seeing that in an educational setting that they wanted a different standard based on the fact that they're legislators and they have to balance the world in their district, that they have parties on all sides of the issues talking to them all the time, I don't know. But that language is different and it can't be a mistake, it can't be that they meant to put it in there because you don't go tip-toeing around something this important, the Illinois Human Rights Act, as a legislative scribe or assistant or Court and like make a mistake like that. I don't

think so.

Well, in closing what I have to say is that this is, as I said when we got here last Friday, the balancing act of all balancing acts. But I'm not here to be the -- and it's not my role to establish social lines up or down. My role is to look at what has been presented to me. And this is not a Constitutional argument, you're not over at 219 South Dearborn in federal court. This is plain and simple a statutory cause of action and I've got to analyze this within the four corners of that statute and not according to common law. It's strictly the words that are put on paper by the legislature and signed by the Governor and amended from time to time as they always are and maybe there will be some amendment after this. But the question is likelihood of success on the merits, take out my crystal ball, look at the statute. The statute says access to the facility, and it doesn't say full and equal access, and it applies only to educational settings. There's got to be a reason and it's not for me to ignore those words.

And therefore my ruling is this, that there's not a likelihood of success on the merits because of the statutory impediment, the statutory language, and it's clear that the School District on a high-wire balancing act has done what they could, but I'm not even going to say that because it doesn't matter. But what they have done is they've allowed access. Access, access, access, and I'm not going to go into, you know, the balancing act. This is a -- as I said the other day, parties on all sides, no one, no one wants to be in this situation, everybody wants this to work out perfectly. As we all know, we don't live in a perfect world, everything is imperfect.

Accommodation, cooperation, consideration, those are the words that were buzzing in my head as I looked at this over the last few days. But I know my role, it's limited. The statute brought us here, I'm looking at the statute, that's the way I interpret the statute, and therefore I don't think that there's a likelihood of success on the merits and I don't need to get to the other

balancing issues.

So for those reasons I'm going to deny the motion for preliminary injunction. And so I guess the Defendant has to answer the complaint because we got a one-count complaint here. Although I was looking at that too.

What are we doing here, Mr. Knight? I was looking at the prayer for relief and it's basically this is the whole ball game. I mean your prayer for relief, I've been trying to figure out.

MR. KNIGHT: Your Honor, we sought -- we also sought damages for the --

THE COURT: Damages. Okay.

MR. KNIGHT: -- previous denial of the use of the facility. I agree with you that this is the issue in terms of the injunctive relief as to our client.

THE COURT: Right.

MR. KNIGHT: I think that --

THE COURT: So I don't want to engage in unnecessary measures here if you're -- obviously, if you're, you know, taking this up then I'll

accommodate you in any way, but if not you still have a complaint here that I didn't -- it's just a motion that you brought which was in furtherance of your complaint. So you still have a complaint, a live complaint here that hasn't been answered, right? I think procedurally I --

MR. BERGMAN: That's correct, Judge.

MS. SCOTT: You are correct, we have not answered.

THE COURT: Right. So what do you want to do? Do you want to give it a short status date to figure out --

MR. KNIGHT: I think that's fine, Your Honor. I think we just need to review what our options are here.

THE COURT: Yes, because I don't want people doing unnecessary --

MR. BERGMAN: Sure.

THE COURT: -- legal work if we don't have to. So whatever time you think is reasonable, two weeks, three weeks, one week, two days, whatever you want, I'm here.

MR. KNIGHT: I think, Your Honor, what we would suggest, two weeks, I guess.

THE COURT: Two weeks? All right. That would be February 8th, is that okay, at 10:30?

MR. BERGMAN: Let me see, it's like it was easier when I had a book.

MS. SCOTT: I'm available then, Your Honor.

MR. BERGMAN: February 8th at what time, Judge?

THE COURT: 10:30.

MR. BERGMAN: Yes, Judge. Thank you.

THE COURT: Okay. So if you'll just draw up the order for the reason stated on the record and we'll be back here February 8th.

MR. BERGMAN: Judge, Mr. --

MR. KNIGHT: I've got a 9:30 status on February 8th.

THE COURT: Where is that, is that in this building?

MR. KNIGHT: In federal court.

THE COURT: Well, you want to make it 11:00? Will you be back here by --

MR. KNIGHT: I should be able to be here by 11:00. 11:00 should be fine.

THE COURT: All right. Let's make it 11:00. February 8th at 11:00.

MR. BERGMAN: And Judge, then I think right now you have an order that the District's answer to the complaint is due I think on February 2nd.

THE COURT: Why don't we hold off on that. All right?

MR. BERGMAN: Yes. So just --

THE COURT: So, you know, you don't have to answer the complaint at least pending until we see what's going on February 8th. Okay?

MS. SCOTT: Thank you.

MR. OLP: Thank you.

THE COURT: All right.

MR. BERGMAN: Thank you, Your Honor.

THE COURT: All right.

(WHEREUPON, the hearing was continued to February 8, 2018 at 11:30 a.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

I, CHARLENE J. THOMAS, Certified Shorthand Reporter and Registered Professional Reporter of the State of Illinois, do hereby certify that I reported in shorthand the evidence had in the above-entitled cause and that the foregoing is a true and correct transcript of all the evidence heard.

Charlene Thomas hs

CHARLENE J. THOMAS, CSR, RPR
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February 8, 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NOVA MADAY,
Plaintiff,

vs.

TOWNSHIP HIGH SCHOOL DISTRICT 211,
Defendant.

No. 17 CH 15791

RULE 323 (b) NOTICE OF COMPLETION OF REPORT OF PROCEEDINGS

Roger, Balwin Foundation of ACLU, Inc.
John Knight
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Suite 600
Chicago, Illinois 60601

Franczek, Sullivan, Mann
Sally Scott
Jennifer Smith
300 South Wacker
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Thomas More Society
Thomas Olp
Doug Wardlow
19 South LaSalle
Suite 603
Chicago, Illinois 60603

You are hereby notified that the Report of Proceedings held on 1-19-18 and 1-25-18 have been completed, certified as accurate and is ready for filing. Pursuant to Illinois Supreme Court Rule 323 (b), the Report of Proceedings may be filed without further certification if within 14 days of the date on which this notice is sent no party had objected, citing alleged inaccuracies involving matters of substance

Dated: February 8,2018

Jeannine Miyuskovich

Jeannine Miyuskovich
Scheff & Associates, Inc.
221 North LaSalle Street
Suite 1950
Chicago, Illinois 60601

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NOVA MADAY, Plaintiff, v. TOWNSHIP HIGH SCHOOL DISTRICT 211, Defendant.	)	JUDGE THOMAS R. ALLEN CALENDAR 10 Case No.: 2017-CH-15791

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Nova Maday ("Nova"), by her attorneys John Knight and Ghirlandi Guidetti of the Roger Baldwin Foundation of ACLU, Inc., and Jeffrey H. Bergman of Mandell Menkes LLC, pursuant to 735 ILCS 5/11-102, respectfully request that this Court issue a preliminary injunction enjoining Defendant from denying Nova the use of the girls' locker rooms at school. In support of her Motion, Plaintiff submits the attached brief.

DATED: December 13, 2017

Respectfully Submitted,

NOVA MADAY

By: _____
One of Her Attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NOVA MADAY,	)	
	)	
Plaintiff,	)	JUDGE THOMAS R. ALLEN
	)	CALENDAR 10
v.	)	
	)	Case No.: 2017-CH-15791
TOWNSHIP HIGH SCHOOL DISTRICT 211,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Nova Maday ("Nova"), by and through her attorneys, submits this Brief in Support of Plaintiff's Motion for Preliminary Injunction. Nova asks this Court to enjoin Defendant, Township High School District 211 ("District 211" or "the District") from denying her use of the girls' locker room so she can change for and take physical education ("P.E.") during her last semester at Palatine High School. To date, the District has either denied Nova the use of the locker room used by the other girls altogether, or told her that she would be separated and required to dress in a private area in the girls' locker room, away from the other girls.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Nova is a young woman and student at Palatine High School who, since May 2015, has been denied use of the girls' locker rooms because she is transgender. The Illinois Human Rights Act unambiguously prohibits discrimination on the basis of one's gender identity. Nonetheless, District 211 has repeatedly denied Nova's requests to be treated the same as other girls and allowed to use the locker room. District 211's discriminatory treatment of Nova has made her feel like an outcast who doesn't belong, isn't accepted as an equal member of the school, and is somehow less of a person. The District has humiliated Nova, caused her significant anxiety, and worsened her gender dysphoria by effectively telling her that her school does not accept her as a girl.

Nova is entitled to a preliminary injunction ordering the District to allow her to use the locker room without requiring her to use a separate, private changing area because she has a protectable right to the same use of the girls' locker room as non-transgender girls; she has a likelihood of succeeding on the merits because there is no question the Illinois Human Rights Act prohibits discrimination on the basis of gender identity; and denying her the use of the locker room is causing her irreparable harm that cannot be fully remedied through damages.

BACKGROUND

I. The Parties.

Nova is a female high school senior. *See* Ex. A, Aff. of Nova Maday ("Maday Aff.") ¶¶ 1, 4. She has attended Defendant's Palatine High School since she began the ninth grade in the fall of 2014. Maday Aff. at ¶ 1. Nova is passionate about art, especially photography, and also enjoys computer programming and astronomy. *Id.* at ¶ 2. Nova has been a model student: completing her course work, participating in class, maintaining a good academic record, and forming and maintaining friendships with a close group of her classmates who accept and respect her. *Id.* at ¶ 3. Nevertheless, the District insists on humiliating Nova by separating her from her classmates because she is transgender, and effectively telling her that she isn't really a girl. All Nova wants is to be treated like any other girl, and use the girls' locker room to change clothes for P.E. *Id.* at ¶ 14.

II. Nova is Transgender and Has Been Diagnosed with Gender Dysphoria.

Nova is transgender, which means that she was assigned the male gender when she was born even though she has known since she was very young that she is female. Maday Aff. at ¶ 4; Ex. B, Aff. of Brenda Schweda ("Schweda Aff.") ¶¶ 2-3. She has been diagnosed with gender dysphoria, the medical diagnosis for individuals whose gender identity—their innate sense of their

gender—differs from the gender they were assigned at birth and causes them clinically significant distress. *See* Ex. C, Affidavit of Dr. Randi Ettner ("Ettner Aff.") ¶¶ 12-13, 28.

III. Gender Dysphoria is a Serious and Internationally Recognized Medical Condition.

The term "gender identity" is a well-established concept in medicine, referring to one's sense of oneself as belonging to a particular gender. *Id.* at ¶ 8. All human beings develop this elemental internal view: the conviction of belonging to a gender, such as male or female. *Id.* Gender identity is firmly established early in life. *Id.* Most people have a gender identity that matches their gender assigned at birth, but transgender people's gender identity fails to match the gender they were assigned when born, giving rise to a sense of being "wrongly embodied." *Id.* at ¶ 9. The medical diagnosis for this feeling of incongruence is gender dysphoria. *Id.* at ¶ 12.

Gender dysphoria is a serious medical condition codified in the DSM-V and the International Classification of Diseases-10 (World Health Organization). *Id.* The condition is manifested by symptoms such as a preoccupation with ridding oneself of primary and secondary sex characteristics. *Id. Untreated gender dysphoria can result in significant clinical distress and debilitating depression, and often suicidal thoughts and acts. Id.*; *see also De'lonta v. Johnson*, 708 F.3d 520, 525-26 (4th Cir. 2013) (recognizing treatment for gender dysphoria as a serious medical need under the Eighth Amendment). The criteria for diagnosing gender dysphoria in adolescents and adults are set forth in the DSM-V (302.85). Ettner Aff. at ¶ 13.

Additionally, the World Professional Association for Transgender Health ("WPATH") has established internationally accepted Standards of Care ("SOC") for the treatment of people with gender dysphoria. *Id.* at ¶ 14. The SOC have been endorsed as the authoritative standards of care by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, the American Psychiatric Association, and the American Psychological

Association. *Id.*; *see also De'lonta*, 708 F.3d at 522-23 (recognizing that "[t]he Standards of Care, published by the World Professional Association of Transgender Health, are the generally accepted protocols for the treatment of [gender dysphoria]"). The SOC recommend that individuals undergo a medically-supervised transition *to live in alignment with their gender identity*. Ettner Aff. at ¶ 15. Treatment of gender dysphoria can consist of social role transition, psychotherapy, hormone therapy, and surgery to alter primary and secondary sex characteristics. *Id.* at ¶ 16.

For adolescents of Nova's age, the medically recommended treatment typically consists of social role transition, and may also consist of hormone therapy. *Id.* at ¶ 15. Cross-sex hormone therapy results in an adolescent developing secondary sex characteristics consistent with their gender identity. *Id.* at ¶ 19. Social role transition allows transgender adolescents to integrate into society in a manner consistent with their gender identity. *Id.* at ¶ 18. This transition takes place at home, in the community, and at school. *Id.* However, *if any aspect of social role transition is obstructed, it can destabilize the patient and undermine the treatment goals. Id.* at ¶ 20. In other words, "*[f]or a gender dysphoric adolescent to be considered female in one situation, for example, but not in another is inconsistent with evidence-based medical practice and detrimental to the health and well-being of the individual, regardless of age.*" *Id.* at ¶ 21 (emphasis added).

IV. Nova Transitioned to Living and Presenting as a Girl More Than Three Years Ago.

Nova first told her family she was a girl on March 29, 2014, before her freshman year at Palatine High School. Maday Aff. at ¶ 5. She did so, because she could no longer go on avoiding mirrors and photographs that reflected her as a boy. Nor could she continue isolating herself in her room and staying away from friends and others who would see her as a boy. Her anxiety about trying to find a way to free her true self as a girl and to stop being seen as a boy had reached the point that she simply could not going on living that way. *Id.* In March or April of 2014, Nova

sought medical treatment for the depression and anxiety this conflict was causing her. She was diagnosed with gender dysphoria, and has been continuously treated for the condition since then. *Id.* at ¶ 6.

To help resolve the conflict that led to Nova's gender dysphoria diagnosis, she began growing out her hair and dressing and grooming consistent with the styles of other girls her age at her school. *Id.* at ¶ 7. Since September of 2014, Nova has presented fully and exclusively as a girl outside of school by also using a traditionally feminine name, and female restrooms in public places. *Id.*; Schweda Aff. at ¶ 6. In October 2016, Nova started feminizing hormone therapy. Maday Aff. at ¶ 6. She is also in the process of legally changing her name, which should be completed by January 2018. *Id.* at ¶ 8.

Nova has presented herself fully as a girl at school since October 2014. Maday Aff. at ¶ 8; Schweda Aff. at ¶ 7. At school, she uses a female name, female pronouns, and dresses and grooms like the other girls at her school. Maday Aff. at ¶¶ 7-8. Also, Nova's teachers and peers have referred to her by her female name and female pronouns since October 2014. *Id.* at ¶ 8. Nova also has used the girls' restrooms at school since May 2016. *Id.* at ¶ 7. Her school records and school I.D. card list her as female. *Id.* at ¶ 8.

V. District 211 has Repeatedly Denied Nova Use of the Girls' Locker Room.

Since at least May 2015, Nova and her mother have repeatedly requested that District officials allow her to use the girls' locker room so that she can change her clothes for P.E. Maday Aff. at ¶ 9; Schweda Aff. at ¶ 9. Their requests have been repeatedly denied. Maday Aff. at ¶ 12; Schweda Aff. at ¶ 10. Initially, the District refused Nova's request to use the girls' locker room at all. Maday Aff. at ¶ 9. Instead, she was told that she could change for P.E. in one of the restrooms in the school nurse's office and later she was told that should could use a single-user locker room

that would remain locked until Nova requested that school staff let her in to change her clothes before and after P.E. *Id.* at ¶ 10.

Changing in the nurse's office and the single-user locker room instead of the girls' locker room often caused Nova to be late for P.E., which exacerbated her gender dysphoria and caused her significant anxiety and distress. *Id.* at ¶ 11. Nevertheless, the District continued to deny Nova use of the locker room used by other girls. *Id.* at ¶ 12. As a result, in August 2016 Nova accepted a waiver of the requirement that she take P.E. for the second semester for her junior year (2016-2017). *Id.*

The District's most recent offer to Nova, made in July 2017, was for her to be separated from the other girls by requiring her to dress in a private area in the girls' locker room, away from the other girls. *Id.* at ¶ 13. Nova and her mother refused that offer because the District does not require non-transgender girls to dress in a separate area in the locker room, and because mandatory separation from other girls indicated to Nova and to other girls that Nova is different—not a "real" girl. Maday Aff. at ¶¶ 14, 16; Schweda Aff. at ¶ 11. That is an intolerable message for anyone to hear, and especially for a young transgender person. For that reason, Nova and her mother accepted another waiver from the P.E. requirement. Maday Aff. at ¶ 14; Schweda Aff. at ¶ 12.

Like many other female students who change in the locker room, Nova values her privacy, and she would take steps to discretely change her own clothes and not observe anyone else's changing habits or bodies. Maday Aff. at ¶ 15. She is modest about her body, and like many other girls she would take steps to avoid other students seeing her naked body in the locker room. *Id.* If the District is concerned that other girls will see Nova naked in the locker room, Nova—like most teenage girls—doesn't want them too, either. Thus, requiring Nova to change in a private area serves no purpose but to treat her differently than other female students because she is transgender.

PROCEDURAL POSTURE

Because the District denied Nova the use of the girls' locker room at school, Nova's mother filed a Charge of Discrimination (the "Charge") with the Illinois Department of Human Rights ("IDHR") on Nova's behalf. Ex. D, IDHR Charge. The Charge alleged that the District discriminated against Nova on the basis of her gender-related identity.

On or about September 6, 2016, IDHR mailed its Notice of Dismissal for Lack of Substantial Evidence (the "Notice of Dismissal"), which Nova's counsel did not receive until October 11, 2017.[1] The Illinois Human Rights Act ("IHRA") provides that when IDHR dismisses a charge for lack of substantial evidence, the complainant may seek review of the dismissal order before the Human Rights Commission or commence a civil action in the appropriate circuit court. 775 ILCS 5/7A-102(D)(3). Rather than seeking review of the IDHR findings, Nova elected to commence a civil action and filed her Complaint with this Court on November 30, 2017. This Court should afford no deference to IDHR's erroneous conclusions, since in these circumstances a "circuit court … hears the claim *de novo* rather than by administrative review." *Vulpitta v. Walsh Const. Co.*, 2016 IL App (1st) 152203, ¶ 16 (citing 775 ILCS 5/8–111(A) (2012)), *appeal denied*, 77 N.E.3d 86 (Ill. 2017).

LEGAL STANDARD

To obtain a preliminary injunction, Nova must establish the following four factors: "(1) a clear, ascertainable, protectable right; (2) irreparable injury; (3) inadequate remedy at law; and (4) likelihood of success on the merits." *Stanton v. City of* Chicago, 177 Ill. App. 3d 519, 522 (1st Dist. 1988); *see also In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1st Dist. 2007). "[A] party seeking injunctive relief need only raise a 'fair question' as to the existence of the right

[1] The more than a month delay was caused by IDHR's mailing the notice to the old address for Nova's attorney, even though her attorney had advised IDHR of the new address.

claimed." *George S. May Intern. Co. v. Intern. Profit Assocs.*, 256 Ill. App. 3d 779, 786-87 (1st Dist. 1993) (*citing Buzz Barton & Assocs. v. Giannone*, 108 Ill. 2d 373, 382 (1985)).

Although preliminary injunctive relief generally preserves the status quo, it can also prevent a threatened wrong or the further perpetration of an injurious act until the merits of the case can be decided. *Kalbfleisch v. Columbia Community Unit School Dist. No. 4*, 396 Ill. App. 3d 1105, 1117-18 (5th Dist. 2009) (injunctive relief that ordered school to allow service animal to accompany student to school, which altered the status quo, was permissible to prevent the prospective harm sought to be avoided by the relief sought); *see also Brooks v. LaSalle National Bank*, 11 Ill. App. 3d 791, 798-99 (1st Dist. 1973); *Kolstad v. Rankin*, 179 Ill. App. 3d 1022, 1034 (4th Dist. 1989).

ARGUMENT

I. Nova Has A Clearly Ascertainable and Protectable Right to Use the Girls' Locker Room.

The IHRA explicitly makes it unlawful for District 211 to deny Nova use of the girls' locker room because Nova is transgender. The IHRA provides that "[i]t is a civil rights violation for any person on the basis of unlawful discrimination to … [d]eny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation." 775 ILCS 5/5-102. A "secondary school," such as Palatine High School, is a place of public accommodation. *Id.* at 5/5-101 (A)(11). "'Unlawful discrimination' means discrimination against a person because of his or her … sexual orientation … as th[is] term [is] defined in this Section." *Id.* at 5/1-103(Q). "'Sexual orientation' means actual or perceived … **gender-related identity, whether or not traditionally associated with the person's designated sex at birth.**" *Id.* at 5/1-103(O-1) (emphasis added). Thus, the text of the IHRA unambiguously makes it unlawful for District 211 to deny Nova "full and equal enjoyment of the facilities," *id.* at 5/5-102, at District 211, including

use of the girls' locker room, because she is transgender, and therefore her gender-related identity does not match her gender assigned at birth.

There is no question that it is unlawful discrimination to deny someone the use of a gender-segregated restroom or locker room that matches the person's gender identity, because that person is transgender.[2] The Illinois Human Rights Commission recently found that Hobby Lobby Stores violated a female employee's rights under the IHRA by denying her use of the women's restroom used by other female employees and customers because she is transgender. *See* Ex. E, *Sommerville v. Hobby Lobby Stores*, ALS No. 13-0060C (Ill. Hum. Rts. Comm'n 2015) (May 15, 2015 Recommended Liability Determination) (adopted in relevant part by Commission, Nov. 2, 2016). The Commission found that Hobby Lobby violated Ms. Sommerville's rights to be free both from employment discrimination and discrimination in her use of a public accommodation.

II. Nova is Likely to Succeed on the Merits.

To establish a likelihood of success, Nova "need only raise a fair question regarding the existence of a claimed right and a fair question that [she] will be entitled to the relief prayed for if the proof sustains the allegations." *Kalbfleisch*, 396 Ill. App. 3d at 1114; *see also Seyller v. Cnty.*

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[2] Several courts and administrative agencies have found that denying a transgender student use of gender-segregated facilities (e.g., restrooms and locker rooms) that matches their gender identity constitutes unlawful discrimination. The Seventh Circuit recently affirmed a Wisconsin district court's preliminary injunction barring a school from violating Title IX and the Equal Protection Clause by denying a boy use of the boys' restroom, because he is transgender. *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017). Similarly, a federal court in Ohio entered a preliminary injunction ordering a school to allow a transgender girl to use the girls' restrooms in reliance on Title IX and the Equal Protection Clause. *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016). Also, the Colorado Division of Civil Rights concluded that a Colorado school violated Colorado law by refusing to allow a transgender girl to use the girls' restrooms at her school. *Coy Mathis v. Fountain-Fort Carson School District 8*, Charge No. P20130034X (Colo. Div. of Civil Rights June 17, 2013), available online at http://www.transgenderlegal.org/media/uploads/doc_529.pdf.

of Kane, 408 Ill. App. 3d 982, 991 (2d Dist. 2011) (providing the same standard); *Fischer v. Brombolich*, 207 Ill. App. 3d 1053, 1066 (5th Dist. 1991) (same). Nova easily meets that standard regarding the existence of her right to use the girls' locker room and the remedy of requiring District 211 to allow her to use the locker room.

Nova has raised a fair question regarding the existence of her right not to be denied use of the girls' locker room at school. The IHRA explicitly prohibits discrimination based on one's gender identity. *See* Argument, Section I, *supra.* There are no exceptions to this prohibition. Although the IHRA permits public accommodations to maintain separate facilities for males and females, 775 ILCS 5/5-103(B), District 211 may not deny Nova, a female, use of the facilities reserved for females because she is transgender. *See* Ex. E, *Sommerville*, ALS No. 13-0060C (Although the IHRA permits public accommodations to segregate by sex facilities like locker room and restrooms, "sex" means the "status of being male or female" and is determined based on an individual's gender identity.") On similar facts, the Maine Supreme Court held that denying a transgender girl use of the girls' restrooms and forcing her to use an individual restroom violated the Maine Human Rights Act's prohibition against gender identity discrimination. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 606 (2014). As is true here, the school district violated state law prohibiting discrimination on the basis of gender identity, by treating a female student "differently from other students solely because of her status as a transgender girl." *Id.*

Nova has also raised a fair question that she will be entitled to the relief she seeks—the right to use the girls' locker room, rather than requiring her—and only her—to change in a separate area from other girls.

Any concerns raised by the District regarding hypothetical privacy concerns on the part of non-transgender students are not a defense to its violation of the IHRA. There is no "privacy"

exception to the IHRA's prohibition against discrimination against transgender students. Moreover, the District has offered any student who has particular privacy concerns alternative areas where they could dress for gym. Report and Recommendation 4, Doc. 134, *Students and Parents for Privacy v. US Dept. of Ed.*, No. 16-cv-4945, 2016 WL 6134121, at *2 (N.D. Ill. Oct. 18, 2016) (hereafter "*Students* Recommendation") ("any cisgender [non-transgender] high school student who does not want to use a restroom or locker room with a transgender student is not required to do so."). In addition, "high school students do not have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs." *Students* Recommendation at *2; s*ee also Doe by & through Doe v. Boyertown Area Sch. Dist.*, CV 17-1249, 2017 WL 3675418, at *54 (E.D. Pa. Aug. 25, 2017) (same).[3]

III. Denying Nova The Use of The Girls' Locker Room Causes Nova Irreparable Harm That Cannot Be Remedied Though An Award Of Monetary Damages.

An injury is irreparable if it cannot be adequately compensated by damages. *Kalbfleisch*, 396 Ill. App. 3d at 1116; *Cross Wood Products, Inc. v. Suter*, 97 Ill. App. 3d 282, 286 (1981). "Irreparable harm" has also been defined as an injury that is not "beyond the possibility of repair or beyond the possibility of compensation in damages, but that species of injury that ought not be submitted to on the one hand or inflicted on the other." *Cross*, 97 Ill. App. 3d at 286.

Nova will continue to suffer irreparable harm if she is not allowed to use the girls' locker room at school. District 211 humiliates and stigmatizes Nova by separating her from her female peers. She describes how the District has made her feel like an outcast who doesn't belong, isn't accepted as an equal member of the school, and is somehow less of a person. Maday Aff. at ¶ 16. The District's message to her and the other girls in her class is that it does not consider Nova a

[3] Nor could those students allege hostile environment sexual harassment. *Students* Recommendation, 2016 WL 6134121, at *30-35.

"real" girl worthy of the same treatment as other girls, and that she should be ashamed of who she is and hidden away. *Id.* As a result, her self-confidence has suffered, she's experienced increased anxiety, and her gender dysphoria has worsened. *Id.* Nova's status as a senior who will soon be entering her last semester of high school is also significant. Unless this Court grants her the injunction she requests, she will never again have the opportunity to enjoy a typical high school P.E. experience. *See e.g. Doe v. Wood County Bd. of Ed.*, 888 F. Supp. 2d 771, 778 (S.D.W. Va. 2012), (weighing in favor of granting the student plaintiffs' preliminary injunction the fact that they "will experience their middle school years only once during their life.").

In addition to Nova's own sworn affidavit, Dr. Randi Ettner, who is unquestionably an expert on transgender issues, provides strong support for finding irreparable harm.[4] She performed a clinical assessment of Nova. Ettner Aff. at ¶ 7. She concluded that telling Nova "that she can only use the girls' locker room if she is isolated from the group" causes her anxiety and depression. *Id.* at ¶ 31. It "signals that she is not 'truly a girl'" and "[t]hat message—that she is unlike her female peers—exacerbates her gender dysphoria, undermines her medically indicated treatment, and is extremely harmful to her psychological and emotional well-being." *Id.* Thus, there is strong support for the conclusion that Nova will suffer harm if the District continues to discriminate against her by denying her use of the girls' locker room. This harm cannot adequately be compensated in damages, cannot be measured by any pecuniary standard, and ought not to be inflicted on any young person.

[4] *See* Ex. C, Ettner Aff., ¶¶ 2-6 (outlining her experience working with children and adolescents with gender dysphoria, evaluating thousands of persons with gender dysphoria, consulting with school systems in Chicago and Wisconsin on issues related to gender dysphoria, and publishing books regarding gender dysphoria and its treatment).

The Seventh Circuit reached a similar conclusion in *Whitaker* in affirming the district court's grant of a preliminary injunction because, in treating the student differently from other male students by denying him use of the boys' restroom, the school was "significantly and negatively impact[ing] his mental health and overall well-being" by preventing an "integral" part of the student's transition so as to cause him life-long harm. *Whitaker*, 858 F.3d at 1045; *see also Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 877-78 (finding irreparable harm caused by denying a transgender student the use of gender-appropriate facilities); *Doe v. Regional School Unit 26*, 86 A.3d 600, 607 (Me. 2014) ("[A] student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity[.]").

Other cases have also recognized the need for emergency relief in the school context to prevent irreparable harm to students experiencing discriminatory treatment. In *Wood County Bd. of Ed.*, 888 F. Supp. 2d at 771, for example, a court found that students seeking relief from being required to attend sex-segregated schools were entitled to injunctive relief, since those students "suffer from their involuntary placement in single-sex classrooms" and "will experience their middle school years only once during their life." *Id.* at 778. Similarly, in *Daniels v. Sch. Bd. of Brevard Cnty., Fla.*, 985 F. Supp. 1458 (M.D. Fla. 1997), the girls' softball team was entitled to injunctive relief against a school to address the disparities between the girls' athletic facilities and boys' baseball facilities, since "[e]ach day these inequalities go unredressed, the members of the girls' softball team, prospective members, students, faculty and the community at large, are sent a clear message that girls' high school varsity softball is not as worthy as boys' high school varsity baseball, i.e., that girls are not as important as boys." *Id.* at 1462.

CONCLUSION

Nova has a clearly ascertainable right to not be discriminated against on the basis of her gender identity. Moreover, she will suffer irreparable harm if this Court does not compel the District to stop treating her differently than other girls because she is transgender. Nova has raised a fair question regarding the existence of her rights and entitlement to use the girls' locker room at school. Thus, a preliminary injunction is an appropriate remedy in this case.

WHEREFORE, Nova prays that this Honorable Court grant her motion for a preliminary injunction.

DATED: December 13, 2017

Respectfully Submitted,

NOVA MADAY

By: _____
One of Her Attorneys

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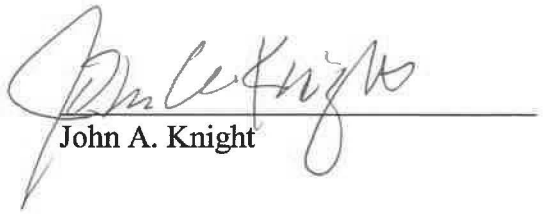
CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused to be served the attached PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION and BRIEF IN SUPPORT OF PLAINITIFF'S MOTION FOR PRELIMINARY INJUNCTION on this 13th day of December, 2017, by hand delivery and email, to the following persons:

Ms. Jennifer A. Smith
FRANCZEK RADELET, P.C.
300 S. Wacker Dr., Ste. 3400
Chicago, IL 60606



John A. Knight

Exhibit A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NOVA MADAY,	)	
	)	
Plaintiff,	)	Case No. 17 CH 15791
	)	
v.	)	Hon. Thomas R. Allen
	)	
TOWNSHIP HIGH SCHOOL DISTRICT 211	)	
	)	
Defendant.	)	

AFFIDAVIT OF NOVA MADAY IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Nova Maday, being first sworn on oath, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, swears and affirms that she is over the age of eighteen years, that she has personal knowledge of the following facts, that the statements in this Affidavit are true and correct, and that she could testify as follows if called as a witness in this matter.

1. I am the plaintiff in this matter. I have been a student at Palatine High School, which is operated by defendant Township High School District 211 (the "District"), since the ninth grade (fall 2014). My 18th birthday was on September 23, 2017, and I am currently in the twelfth grade. I expect to graduate from Palatine High School this spring.

2. Outside of my school work, I spend my time working on art projects. I love photography, and also enjoy computer programming and astronomy.

3. I do well in school. I complete my course work, participate in class, and maintain a good academic record. I also have a close group of friends who accept and respect me.

4. I am transgender, which means that my female gender identity does not match the male designation that I was given at birth. I have known since I was very young that I am female, and I have lived and presented myself as female in all aspects of my life since October 2014.

5. I first told my family that I was a girl on March 29, 2014, before my freshman year at Palatine High School. I was fourteen years old. I told them because I had been suffering from depression and anxiety, because I was expected to live as a male but I knew that I am a girl. I would stay in my room all of the time, because I did not want to see friends and other people who would see me as a boy. I even avoided mirrors and photographs, because I did not want to see images of myself as a boy. I decided that I simply could not go on living that way.

6. After that, my family and I sought medical treatment, and I was diagnosed with gender dysphoria. I have received treatment for my gender dysphoria since then, including feminizing hormones which I started taking in October of 2016.

7. Since I "came out" as a girl before I started high school, I grew out my hair, and started dressing and grooming myself like other girls my age prior to starting high school. I started using "Nova" instead of the traditionally male name I was given at birth, and using female restrooms in public places. I have also used the girls' restrooms at school since May 2016.

8. My teachers and peers at school have referred to me as "Nova" and have used female pronouns to refer to me since October of 2014. My school records and I.D. card both refer to me as "Nova", and list me as female. I am also in the process of legally changing my name to Nova Maday, which should be completed by January 2018.

9. In May of 2015, I met with, Katie Sobol, a school guidance counselor, to discuss whether I could use the girls' locker room to change for my physical education ("P.E.") class.

Ms. Sobol told me that I could not use the girls' locker room. I then spoke with Fred Rasmussen, the Director of Student Services, who confirmed that I could not use the girls' locker room.

10. In June of 2015, at the end of my freshman year, my mother told me that she had spoken with Ms. Sobol about my transition, and which locker room I would use to change for P.E. in the fall of 2015. My mother told me that Ms. Sobol had offered to allow me to use the private restroom in the nurse's office to change for P.E. class. I agreed to use this private restroom to dress separately from the other girls only because the school administration had told me I could not use the girls' locker room. Later, I was told that I could use a single-user locker room that would remain locked until I requested that school staff let me in before and after P.E.

11. Once my sophomore year started in the fall of 2015, I began to experience anxiety, depression, and worsening of my feelings of gender dysphoria because I had to dress separately from all the other girls for my P.E. class. I was frequently late for class, and my P.E. grade rapidly declined.

12. During my sophomore year, my mother and I repeatedly renewed my request to the school administration that I be allowed to use the girls' locker room. The answer was always the same – "No." So when the District offered me a waiver from P.E. class for my junior year in August 2016, I felt that I had no other choice but to accept. The alternative – not being able to change in the girls' locker room, and being treated differently from the other girls in school – just made me feel too bad to continue taking P.E.

13. In July 2017, before my senior year, the District made a new offer to me regarding locker room usage. I could use the girls' locker room to change for P.E. but I would be required to dress in a private area in the locker room, away from the other girls.

14. I refused that offer because the District does not require non-transgender girls to dress in a separate area in the locker room. Singling me out for different treatment, and requiring me to dress where other girls could not see me, would isolate me from the other girls, and would send both them and me the message that because I am transgender, I am not really a girl, and should be ashamed of who I am and of my body. I would like to take P.E. class like every other girl, but because the District would not agree to let me use the locker room like the other girls do, I agreed to accept a waiver from the P.E. requirement for my senior year.

15. Like many girls, both transgender and non-transgender, I am modest about my body, and do not like to be viewed while changing my clothes. If I were allowed to use the girls' locker room without being required to use a private changing area, I would change my clothes discretely, and avoid looking at other girls while they change. Also, I have no intention of letting other girls see me completely unclothed. As I understand that most girls at my school do, I would change into gym shorts and a t-shirt for P.E. without fully undressing, would wrap myself in a towel to protect my modesty, and would not shower after P.E. after exercising.

16. By not letting me use the locker room to change for P.E. like other girls, Palatine High School has made me feel like an outcast who doesn't belong, who isn't accepted as an equal member of the school, and who is somehow less of a person than non-transgender students. The school's message to me is that I am not a "real" girl worthy of the same treatment as other girls, and that I should be ashamed of who I am and hidden away. As a result, my self-confidence has suffered, I have experienced increased anxiety, and my gender dysphoria has gotten worse. I just want to be treated like the other girls in my school before I graduate this spring.

FURTHER AFFIANT SAYETH NOT

Dated: December 11, 2017

Nova Maday

Nova Maday

Exhibit B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NOVA MADAY,	)	
	)	
Plaintiff,	)	Case No. 17 CH 15791
	)	
v.	)	Hon. Thomas R. Allen
	)	
TOWNSHIP HIGH SCHOOL DISTRICT 211	)	
	)	
Defendant.	)	

AFFIDAVIT OF BRENDA SCHWEDA IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Brenda Schweda, being first sworn on oath, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, swears and affirms that she is over the age of eighteen years, that she has personal knowledge of the following facts, that the statements in this Affidavit are true and correct, and that she could testify as follows if called as a witness in this matter.

1. Nova Maday, the plaintiff in this matter, is my daughter.

2. She is currently eighteen years old and is a senior at Palatine High School in Township High School District 211 (the "District").

3. When Nova was born, she was assigned the male gender.

4. On or about March 29, 2014, Nova told me that she identifies as female, and I have come to understand that she is actually female even though she was assigned the male gender at birth.

5. After I learned that my child is a girl, I did everything I could to support and affirm her, including by helping her to transition to live as a girl.

6. Nova has lived exclusively as a girl outside of school since September 2014, including in the way she dresses and grooms herself.

7. Nova has presented herself fully as a girl at school since October 2014.

8. As part of my efforts to support my daughter's transition to living as a girl, I repeatedly requested that officials at her school and from the District allow her to use the girls' locker room to change for her gym class.

9. The first time I requested that Nova be allowed to use the girls' locker room was in June 2015.

10. School and District officials repeatedly told me Nova would not be allowed to change in the girls' locker room.

11. Earlier this year, the school and District modified their position. During a meeting on July 24, 2017, Mark Kovak, the District's Associate Superintendent for Student Services, said that the district would allow Nova to use the girls' locker room, but only if Nova promised to use a privacy area in the locker room while she changed that would shield her from the view of other girls in the locker room. Mr. Kovak explained that other students are also able to use the privacy areas. I pointed out that while other students may be *allowed* to use the privacy areas, none of them are *required* to use them. Mr. Kovak confirmed this was correct. I then explained that this differential treatment of Nova made the District's offer unacceptable. By making Nova change in a privacy area, whether she wanted to or not, the District was isolating my daughter from the other girls, and signaling to her that there was something wrong with her, and that she was less worthy of using the locker room than other girls. It was humiliating for Nova.

12. Because the District refused to allow Nova to use the girls' locker room unless she agreed to change in a privacy area, a precondition not expected of other girls, Nova and I

refused the District's offer, and instead accepted a waiver of the requirement that Nova take a physical education class.

FURTHER AFFIANT SAYETH NOT

Brenda Schweda

Brenda Schweda

Exhibit C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NOVA MADAY,	)	
	)	
Plaintiff,	)	Case No. 17 CH 15791
	)	
v.	)	Hon. Thomas R. Allen
	)	
TOWNSHIP HIGH SCHOOL DISTRICT 211	)	
	)	
Defendant.	)	

AFFIDAVIT OF DR. RANDI ETTNER IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Dr. Randi Ettner, being first sworn on oath, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, swears and affirms that she is over the age of eighteen years, that she has personal knowledge of the following facts, that the statements in this Affidavit are true and correct, and that she could testify as follows if called as a witness in this matter.

1. I have been retained by counsel as an expert in connection with the above-captioned litigation. I have actual knowledge of the matters stated in this declaration. The purpose of this declaration is to offer my opinions regarding (i) the scientific information about the medical condition known as gender dysphoria; (ii) to describe the psychological harm that arises when a transgender girl is treated unlike her female peers; and (iii) to offer my assessment of Nova Maday's gender dysphoria diagnosis and the negative psychological impact she experiences as a result of being told she would be segregated from the other girls within the locker room.

2. My professional background, experience, and publications are detailed in my curriculum vitae, a true and accurate copy is attached. I received my doctorate in psychology

from Northwestern University in 1979. I was the chief psychologist at the Chicago Gender Center, a position I have held since 2005, and am now the psychologist at the Weiss Memorial Hospital Gender Confirmation Center.

3. I have expertise working with children, adolescents, and adults with gender dysphoria. I have been involved in the treatment of gender dysphoric individuals since 1977, when I was an intern at Cook County Hospital in Chicago, and in the course of my career, I have evaluated and/or treated 3,000 individuals with gender dysphoria and mental health issues related to gender variance.

4. I have served as a consultant to multiple school districts in the state of Wisconsin, as well as the Chicago public school system on issues related to gender identity. I was selected as the named honoree of an externally-funded fellowship in recognition of my achievements in the field of transgender health—the University of Minnesota Randi and Fred Ettner Fellowship in Transgender Health—and have been an invited guest at the National Institute of Health to participate in developing a strategic plan to advance the health of sexual and gender minorities.

5. I have published four books, including the medical text entitled "Principles of Transgender Medicine and Surgery" (co-editors Monstrey & Eyler; Routledge, 2007) and its 2nd edition (co-editors Monstrey & Coleman, 2016), and give grand rounds at university hospitals. I have authored numerous articles in peer-reviewed journals regarding the provision of health care to this population. I have served as a member of the University of Chicago Gender Board and am a member of the editorial boards for the *International Journal of Transgenderism* and *Transgender Health.*

6. I am the Secretary of the World Professional Association for Transgender Health ("WPATH") (formerly the Harry Benjamin International Gender Dysphoria Association), and an

author of the WPATH Standards of Care (7th version), published in 2011. The WPATH-promulgated Standards of Care are the internationally recognized guidelines for the treatment of persons with gender dysphoria and serve to inform medical treatment in the United States and throughout the world.

7. In preparing this declaration, I have relied upon my years of clinical and research experience, the research that relates to my opinions cited, my assessment of Nova Maday and the psychodiagnostic testing I performed.

GENDER IDENTITY AND GENDER DYSPHORIA

8. The term "gender identity" is a well-established concept in medicine, referring to one's sense of oneself as belonging to a particular gender. All human beings develop this elemental internal view: the conviction of belonging to a particular gender, such as male or female. Gender identity is firmly established early in life.

9. At birth, infants are classified as male or female. This classification becomes the person's birth-assigned gender. Typically, persons assigned male at birth identify as males. However, for transgender individuals, this is not the case. For transgender individuals, the sense of one's self—one's gender identity—differs from the birth-assigned gender, giving rise to a sense of being "wrongly embodied."

10. Scientific research strongly suggests that gender identity has a biological component, and is not the result of social, cultural or environmental influences.

11. Attempts to change an individual's gender identity to match their birth-assigned gender are ineffective, and cause extreme psychological damage. Such efforts are considered unethical.

12. The medical diagnosis for the feeling of incongruence and accompanying distress described above is gender dysphoria, which is codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) (American Psychiatric Association) and the International Classification of Diseases-10 (World Health Organization). The condition is manifested by symptoms such as preoccupation with ridding oneself of the primary and/or secondary sex characteristics associated with one's birth-assigned gender. Untreated gender dysphoria can result in significant clinical distress, debilitating depression, and often, suicidality.

13. The criteria for establishing a diagnosis of gender dysphoria in adolescents and adults are set forth in the DSM-V (302.85):

A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).

2. A strong desire to be rid of one's primary/and or secondary sex characteristics because of a marked incongruence with one's experienced/ expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

3. A strong desire for the primary and /or secondary sex characteristics of the other gender.

4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

14. WPATH has established internationally accepted Standards of Care ("SOC") for the treatment of people with gender dysphoria. The SOC have been endorsed as the authoritative standards of care by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, the American Psychiatric Association, the American Psychological Association, the World Health Organization, the American Academy of Family Physicians, the National Commission of Correctional Health Care, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology and The American Society of Plastic Surgeons.

15. In accordance with the SOC, transgender individuals undergo medically-necessary transition in order to live in alignment with their gender identity. For an adolescent with gender dysphoria, medical treatment typically consists of social role transition, and may include cross-sex hormone therapy.

16. The SOC identify the following evidence-based protocols for the treatment of individuals with gender dysphoria:

- Changes in gender expression and role, consistent with one's gender identity (also referred to as social role transition).
- Psychotherapy for purposes such as addressing the negative impact of stigma, alleviating internalized transphobia, enhancing social and peer support, improving body image, promoting resiliency, etc.
- Hormone therapy to feminize or masculinize the body.
- Surgery to alter primary and/or secondary sex characteristics.

17. Like protocols for the treatment of other medical conditions, once a diagnosis is established, a treatment plan is developed based on an individualized assessment of the medical needs of the patient. Some combination of social role transition, hormone therapy,

psychotherapy, and surgery is used to help the individual patient with gender dysphoria live congruently and eliminate the clinically significant distress caused by the condition.

18. Changes in gender presentation and role to feminize appearance—social role transition—are an important component of treatment. This requires dressing, grooming, and otherwise outwardly presenting oneself consistently through social signifiers that correspond to one's gender identity in every aspect of life—at home, school, and in the broader community. This is an appropriate prerequisite of identity consolidation.

19. Hormone treatment will result in the acquisition of secondary sex characteristics, (eg. breast development, a softening of facial skin, and a redistribution of body fat) inducing an authentic female appearance that aligns with the gender identity.

20. Although children who are transgender feel "different" and may be confused about the suitability of their assigned gender, they often abide anxiety until they are older, and learn that there is a name for their experience—"transgender"—and a diagnosis—gender dysphoria. For some, this happens in adolescence, or even adulthood. Then, a sequential internal and external process ensues: accepting and identifying as transgender, explaining to family and others about the necessity of transition, dis-identifying with the assigned gender and seeking support for post-transition life. The final stage—identity consolidation—is attained when the transgender aspect of life becomes less important, and the individual refocuses on the normal challenges of life. With identity consolidation, the shame of having lived as a "false self" and the grief of being born into the "wrong body" can be ameliorated. If any aspect of this social transition is impeded however, it can destabilize the patient and undermine the treatment goals.

HARMFUL EFFECTS OF EXCLUSION FROM GENDER-APPROPRIATE FACILITIES

21. Social transition is a critical part of treatment for transgender individuals and it is important that the social transition occur in all aspects of the individual's life. For a gender dysphoric adolescent to be considered female in one situation, for example, but not in another is inconsistent with evidence-based medical practice and detrimental to the health and well-being of the individual, regardless of age. The integration of a consolidated identity into the daily activities of life is the aim of treatment. Thus, it is critical that the social transition be complete and unqualified—including with respect to the use of locker rooms and other spaces and activities separated by gender.

22. Use of the locker rooms and facilities available to others is an undeniable necessity for transgender individuals. Locker rooms, unlike other settings (*e.g.*, the library), categorize people according to gender. When it comes to gender-specific locker rooms, there are generally two, and only two, such categories designated: male and female. To deny a transgender individual use of a facility consistent with that person's gender identity, or to insist that a transgender individual use a separate, private area, communicates that such a person is not a "real girl"; or that the person is some undifferentiated "other." Such segregation and identification of the individual as "other" interferes with the person's ability to consolidate identity and undermines the social-transition process.

23. Separating a transgender girl from other girls in the locker room causes school to become a source of anxiety and humiliation. This division from peers, and the distress that arises from the discrimination make it difficult to concentrate at school. Transgender people go to great lengths to transition from their assigned birth gender. Segregating these individuals from spaces with peers can be deeply traumatic, particularly for adolescents, and exacerbates the depression,

anxiety and isolation that many transgender youngsters experience. Indeed, research shows that usage of the same facilities available to others is an undeniable necessity for transgender individuals.

24. Sending the message that a person is different from peers, and needs to be segregated, triggers shame. External attempts to negate a person's gender identity constitute identity threat. Developing and integrating a positive sense of self-identity formation is a developmental task for all human beings. For the transgender individual, the process is more complex, as the "self" violates society's norms and expectations. Attempts to negate a person's identity—such as closeting an adolescent girl within a locker room of her female peers—challenges the legitimacy of identity, erodes resilience and poses health risks, including anxiety, depression, and other psychological harms. In a study of transgender youth age 15 to 21, investigators found school to be the most traumatic aspect of growing up. Experiences of rejection and discrimination led to feelings of shame and unworthiness.

25. Until recently, it was not fully understood that these experiences of shame and discrimination could have serious and enduring consequences. But it is now known that stigmatization and victimization are some of the most powerful predictors of current and future mental health problems, including the development of psychiatric disorders. The social problems that transgender teens face at school actually create the blueprint for future mental health, life satisfaction, and physical health.

NOVA MADAY

26. Nova was very young when she identified with females on television and believed she should be a girl. She recalls taking her blanket and wrapping herself in it, attempting to fashion a dress for herself. As a youngster, she knew she was "different." She preferred the

company of girls, but spent most of her childhood alone. Nova had few friends, and was bullied at school and taunted for being "gay." Grade school was difficult and lonely for Nova, and her academic performance reflected her unhappiness.

27. When Nova was eleven years old, she searched Google: "how to tell my mother I want to be a girl." That search led to information about gender dysphoria and the relief of knowing that "I wasn't the only person who felt this sort of thing." Still, it was two more years before Nova worked up the courage to tell her mother about her gender incongruity. Fortunately, Nova's mother was extremely supportive and sought medical care. Nova was diagnosed with gender dysphoria and is receiving the appropriate and medically—indicated hormonal therapy. She is now in the process of obtaining a legal name change. Despite her successful transition, the mandate to remain apart from the other girls in the locker room, is a constant source of anguish for Nova, triggering anxiety and depression.

28. Nova Maday has been accurately diagnosed with early onset, severe Gender Dysphoria in adolescents and adults (302.85). She is a senior in high school but does not participate in gym class, because she is not allowed to use the girls' locker room, unless she segregates herself in a private area. The shame of being singled out, separated from the group, and stigmatized is a devastating blow to Nova, who wants nothing more than to be treated "like everyone else—like the other girls."

29. Preadolescence marks the beginning of the importance of the peer group. By adolescence, the authority of the peer group is at its apex. Personality theorists consider peer interaction to be the single most powerful driver of human behavior. "Fitting in' is the overarching motivation at this stage of life. For an adolescent to be forced by adults to buck this

natural developmental process and endure ostracism is cruel and emotionally destabilizing. Nova is experiencing anxiety, depression and sleep difficulties.

30. Nova is being directed to accentuate her "otherness" and to put herself in a humiliating position which shames her, dismantles her relationship with her peers, undermines her identity, and subverts her medical treatment.

31. Nova Maday has been accurately diagnosed with gender dysphoria, and is receiving the appropriate, medically necessary treatment. My psychodiagnostic assessment indicates that she is presently experiencing anxiety and depression as a result of being told that she can only use the girls' locker room if she is isolated from the group. This edict signals that Nova is not "truly a girl." That message—that she is unlike her female peers—exacerbates her gender dysphoria, undermines her medically indicated treatment, and is extremely harmful to her psychological and emotional well-being.

FURTHER AFFIANT SAYETH NOT

Dated: December 12, 2017

Randi Ettner PhD.

Randi Ettner, PhD

Exhibit D

STATE OF ILLINOIS
ILLINOIS DEPARTMENT OF HUMAN RIGHTS

CHICAGO OFFICE
DEPARTMENT OF HUMAN RIGHTS
100 W RANDOLPH ST., SUITE 10-100
CHICAGO, ILLINOIS 60601
(312) 814-6200
(866) 740-3953 (TTY)

SPRINGFIELD OFFICE
DEPARTMENT OF HUMAN RIGHTS
222 S. COLLEGE ST., ROOM 101
SPRINGFIELD, ILLINOIS, 62704
(217) 785-5100
(866) 740-3953 (TTY)

CHARGE NO: _____

CHARGE OF DISCRMINIATION

Dept. of Human Rights
INTAKE UNIT
SEP 08 2016
RECEIVED
By:

COMPLAINANT

Brenda Schweda, on behalf of N.S., a minor
1235 Wyndham Court, Unit 102
Palatine, IL 60074
T: 224-622-0186

I believe that I have been personally aggrieved by a civil rights violation committed on

(date/s of harm): June 2015 through present **, by:**

RESPONDENT

Daniel E. Cates, Superintendent
Township High School Dist. 211
1750 S. Roselle Road
Palatine, IL 60067
T: 847-755-6600
F: 847-755-6623

SEE ATTACHED

I, Brenda Schweda **on oath or affirmation state that I am Complainant herein, that I have read the foregoing charge and know the contents thereof, and that the same is true and correct to the best of my knowledge.**

Brenda Schweda
Complainant's Signature and Date

Subscribed and Sworn to

Before me this 3 **day**

of September, 2016

Carol A Kopp
Notary Public Signature

OFFICIAL SEAL
CAROL A KOPP
Notary Public - State of Illinois
My Commission Expires Oct 8, 2017

Notary Stamp

IDHR Form #6
Rev. 05/15

In the Matter of Brenda Schweda on behalf of N.S., a minor

ATTACHMENT

I. A. ISSUE/BASIS

June 2015 to Present – Respondent Township High School District 211 ("District 211") denied N.S. full and equal use of the girls' locker room at Palatine High School on the basis of her gender-related identity, female (designated male at birth).

B. PRIMA FACIE ALLEGATIONS

1. N.S. is a transgender girl whose gender-related identity is female.

2. Respondent District 211 is a place of public accommodation as defined by the Illinois Human Rights Act.

3. Respondent has been aware of N.S.'s gender-related identity, female, at least since January 2015.

4. N.S. is currently a junior (eleventh grade) at Palatine High School in District 211 for the 2016-2017 school year. In all aspects of her life, she lives and presents as female. District 211 uses her female name and female pronouns when referring to her. It also allows her to dress in female clothing and use the girls' restroom. However, District 211 has denied N.S. full and equal enjoyment of its facilities by requiring her to change in a restroom in the nurse's office or a separate single-user locker room instead of the girls' locker room.

5. N.S. and her mother first discussed where, now that she is presenting as female, she would change for gym class on May 1, 2015 during a meeting with Kathleen "Katie" Sobol, a student counselor at Palatine High School. Since that meeting, N.S. and her mother have had several meetings, phone calls, and email exchanges regarding locker room access with District 211 representatives. Those representatives include Frank Rasmussen, Palatine High School's Director of Student Services; Mark Kovack, District 211's Associate Superintendent for Student Services, Gary Steiger, Palatine High School's Principal and Daniel E. Cates, District 211's Superintendent-Elect.

6. District 211 treats N.S. differently than non-transgender female students at District 211, because it denies her the use of the girls' locker room since her gender-related identity, female, fails to match her sex assigned at birth.

7. District 211's refusal to allow N.S. to use the girls' locker room is damaging to her health and wellbeing, because the District denies her the ability to live her life in complete conformity with her gender, isolates and stigmatizes her by treating her differently from other girls.

II. A. ISSUE/BASIS

June 2015 to Present – Respondent Township High School District 211 ("District 211") denied N.S. full and equal use of the girls' locker room at Palatine High School because of her disability, gender dysphoria.

B. PRIMA FACIE ALLEGATIONS

1. N.S. is an individual with a disability within the meaning of Section 1-103(I) of the Human Rights Act. N.S. has been diagnosed with gender dysphoria by medical experts in that field.

2. N.S. is a qualified individual who has fulfilled all non-discriminatory requirements for full and equal use of the facilities and services at District 211, including the locker room that matches her gender identity.

3. Respondent District 211 is a place of public accommodation as defined by the Illinois Human Rights Act.

4. District 211 has been aware of N.S.'s disability at least since January 2015.

5. N.S. is a junior (eleventh grade) at Palatine High School in District 211 during the 2016-2017 school year. District 211 denies N.S. full and equal use of the locker room at school that matches her gender identity, because of N.S.'s disability. Instead, because of her disability, District 211 requires her to change in the restroom in the nurse's office or a separate single-user locker room, when girls who do not have gender dysphoria are allowed to change in the girls' locker room.

III. A. ISSUE/BASIS

June 2015 to Present – Respondent Township High School District 211 ("District 211") denied N.S. a reasonable accommodation for her disability, gender dysphoria, when it denied her full and equal use of the girls' locker room.

B. PRIMA FACIE ALLEGATIONS

1. N.S. is an individual with a disability within the meaning of Section 1-103(I) of the Human Rights Act. N.S. has been diagnosed with gender dysphoria by medical experts in that field.

2. N.S. is a qualified individual who has fulfilled all non-discriminatory requirements for full and equal access to the facilities and services at District 211, including full and equal access to the locker room that matches her gender identity.

3. Respondent District 211 is a place of public accommodation as defined by the Illinois Human Rights Act.

4. District 211 has been aware of N.S.'s disability at least since January 2015.

5. N.S. is a junior (eleventh grade) at Palatine High School in District 211 during the 2016-2017 school year.

6. N.S. and her mother requested a reasonable accommodation for N.S.'s gender dysphoria, namely that she be given the same access to the girls' locker room at school as other girls. Having the same access to the girls' locker room as other girls is a reasonable accommodation because the recommended medical treatment for many people diagnosed with gender dysphoria, including N.S., is living in complete conformity with the gender with which they identify.

6. District 211 denied N.S. and her mother's request that N.S. be allowed to use the girl' locker room like other girls. District 211 requires that N.S. change in the restroom in the nurse's office or the separate single-user locker room that no girls who do not have gender dysphoria are required to use.

Exhibit E

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MEGGAN SOMMERVILLE,	)	
	)	
Complainant,	)	**Charge Nos.: 2011CN2993**
	)	**2011CP2994**
	)	**EEOC No.: N/A**
	)	**ALS No.: 13-0060C**
HOBBY LOBBY STORES,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED LIABILITY DETERMINATION

This matter comes to be heard on the parties' cross motions for summary decision. Both parties filed responses and replies. The Illinois Department of Human Rights filed an opposition brief to Respondent's motion. The matter is ready for decision.

The Department is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following material facts were derived from uncontested sections of the record. The findings did not require, and were not the result of, credibility determinations.

1. On February 28, 2013, Complainant, Meggan Sommerville, filed two separate complaints with the Illinois Human Rights Commission against Respondent, Hobby Lobby Stores. One complaint cited Article 2 of the Illinois Human Rights Act, employment, and the second, Article 5, public accommodation. Both complaints named sexual orientation discrimination, related to gender identity, as the protected class. The cases were consolidated on May 23, 2013.

2. In July 1998, Respondent hired Complainant as an employee. In 2000, Complainant was transferred to Respondent's East Aurora store, No. 237.

3. Complainant was present on Respondent's premises both as an employee and as a customer. The general public and employees utilize the store's restrooms, which are designated by gender.

4. Since 2007, Complainant implemented a procedure toward transitioning from male to female. In 2009, Complainant had medical treatment from health care providers and other services at Howard Brown Health Center, which resulted in female secondary sex characteristics, including breasts and absence of facial hair.

5. Complainant is a transsexual who presents and identifies as female.

6. In February 2010, Complainant removed the male name from her employee nametag, without objection from Respondent, as not to confuse the customers with the noticeable physical manifestations of the transition.

7. On July 9, 2010, Complainant formally informed Respondent through Edward Slavin, store manager, of her male to female transition and her intent to use the women's restroom.

8. Respondent changed Complainant's personnel records and benefits information to identify her as female. Complainant appears at work in feminine dress and make-up. Employees and employers refer to Complainant by her chosen female name.

9. However, Respondent did not consent to Complainant's use of the store's designated women's restroom, until Complainant produced legal authority mandating its use to her.

10. On July 12, 2010, Complainant had her name legally changed to "Meggan Renee Sommerville," by order of the Circuit Court of Kendall County, Illinois.

11. On July 29, 2010, the State of Illinois issued its driver's license identifying Complainant as female.

12. In July 2010, Complainant obtained a new social security card with her female name.

13. In July 2010, Complainant produced to Anna Lee Miller, Respondent's Human Resources Specialist, a copy of the Illinois Human Rights Act, related statutes from Iowa and Colorado, a copy of her revised Illinois driver's license, her social security card, and her court ordered name change. The material submitted also included a letter dated July 21, 2015, from Kristin Koglovitz, Clinic Director of Howard Brown Health Center, who identified and verified Complainant as a female transgender individual, described the transition process, and advocated Complainant's use of the women's restroom at Respondent's store.

14. On July 30, 2010, Miller instructed Complainant to communicate with Respondent's legal office and, despite the information submitted, she was not permitted to use the women's restroom.

15. Complainant used the women's facilities at nearby businesses.

16. On February 23, 2011, Complainant was given a written warning for entering Respondent's women's restroom.

17. During the course of litigation, Respondent changed its precondition for the use of the women's facilities from producing legal authority to surgery. In 2014, Respondent modified its condition option to changing her birth certificate.

18. In December 2013 or January 2014, Respondent had built a "unisex" restroom for Complainant's use.

19. As of this Recommended Liability Determination, Complainant is still not permitted to use Respondent's women's restroom facilities as an employee or customer.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. Complainant established direct evidence of sexual related identity discrimination by Respondent preventing Complainant's access and use of the women's restroom at Respondent's store.

DISCUSSION

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Human Rights Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove her case as if at a hearing, the non-moving party must provide some factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on her pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill.App.3d at 392, 642 N.E.2d at 490. Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to her case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist.1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

Summary of Issues

Complainant is a transsexual, who presents and identifies as female, was and is denied access to Respondent's women's restroom at its store, both in her capacity as an employee and a customer. Complainant alleges such disparate treatment is contrary to the Act in terms and conditions of Complainant's employment and a denial of the full and equal enjoyment of a public accommodation.

Respondent contends the Act does not require it as an employer or as a public accommodation to permit Complainant, a transgender person, to use its store's restroom other than the one designated for her birth gender, male, or until she undergoes anatomical surgery.

Act's Interpretation

"The Illinois Human Rights Act is remedial legislation that must be construed liberally to effectuate its purpose." Nuraoka v. Illinois Human Rights Commission, 252 Ill.App.3d 1039, 625 N.E.2d 251 (1st Dist. 1993) citing, Nielsen Co. v. Public Building Commission of Chicago, 81 Ill.2d 290, 410 N.E.2d 40 (1980).

A primary rule of statutory construction is to give effect to the words selected by the General Assembly and its intent. "No word or paragraph should be interpreted so as to be rendered meaningless." Boaden v. Illinois Department of Law Enforcement, 171 Ill.2d 230, 664 N.E.2d 61 (1996); Sangamon County Sheriff's Department v. Illinois Human Rights Commission et al., 233 Ill.2d 125, 908 N.E.2d 39, (2009), citing Wade v. City of North Chicago Police Pension Board, 226 Ill.2d 485, 877 N.E2d 1011 (2008). The best indication of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. Id., citing Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill.2d 200, 886 N.E.2d 1011 (2008).

Discrimination Defined

Section 1-102(A) of the Act provides that it is the "public policy" of this State to "secure for all individuals within Illinois the freedom from discrimination against any individual because

of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, *sexual orientation*, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations." (Emphasis added.) [1]

Section 1-103 (O-1) of the Act defines "sexual orientation," in pertinent part, as "gender related identity, whether or not traditionally associated with the person's designated sex at birth."

Section 2-102(A) of the Act provides it is a "civil rights violation" for "any employer ...to segregate...discipline ...terms, privileges or conditions of employment on the basis of unlawful discrimination ..."

Section 5-102 (A) of the Act provides it is a "civil rights violation" to "deny or refuse to another the full and equal enjoyment of the facilities... and services of any public place of accommodation."

Statutory Interpretation

Article 2, Employment

Respondent's first statutory argument is that the Act does not address whether a transgender employee has the right to use a restroom other than the restroom associated with the person's sex at birth, "thus, leaving the matter to the employers' discretion." [2]

The opposite is correct; Article 2, employment, is meant to be broad with noted exceptions, which does not exclude the use of restrooms by transsexuals.

Respondent has not revealed any pertinent limitations of Section 2-102(A), Civil Rights Violations relating to Section 1-102(A), Freedom from Unlawful Discrimination or Section 1-103 (O-1), Sexual Orientation, in which sexual related identity is part. As read, sexual related

---

[1] All of the statutory classes were purposely cited, as each are equally protected and enforced under the Act.

[2] Respondent cites an Article 5, Public Accommodation, clauses, Section 5/5-102(A) and 5/5-103(B) for its Article 2, Employment, argument; this statutory authority is misplaced.

identity is protected against all statutory employment civil rights violations, "whether or not traditionally associated with the person's designated sex at birth." Id.

There is no special treatment based on sexual orientation here, only the basic treatment of any employee. Section 1-101.1 of the Act. The basic right to use a restroom, as a term and condition of employment, is discussed below.

Significantly, Respondent failed to note that if the legislature wished to limit Article 2, it would have done so under Section 2-104, *Exemptions*. (Emphasis added.) It did not.

Therefore, an employee's rights under sexual orientation, including sexual related identity, is broadly interpreted and protected against all listed civil rights violations. Id.

Article 5 – Public Accommodations

Complainant averred that she was both an employee and customer of Respondent, and that the women's restroom was available to the general public. Respondent does not counter Complainants allegations, and they are accepted as true. Rotzoll, supra.

The interpretation of Article Five is limited to the facts of this case, and the issue before me.

Article 1, General Provisions and Definitions, relate to the entire Act. Thus, Section 1-102 (A), Freedom from Unlawful Discrimination; Section 1-103 (D), Civil Rights Violations; Section 1-103 (O), Sex; and Section 1-103 (O-1) Sexual Orientation, are pertinent to Article 5, Public Accommodation.

It has been established that Respondent is a statutory public accommodation and that it cannot "deny or refuse to another (customer) the full and equal enjoyment of the facilities, goods and services of any public place of accommodation." Section 5-102 (A) Enjoyment of Facilities, Goods and Services.

However, Section 5-103 (B), Facilities Distinctly Private, sets out an exemption to an Article 5 civil rights violation. "Nothing in this Article shall apply to: Any facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower

rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemption based on bona fide consideration of public policy."

Respondent contends that being anatomically correct makes a female, as that was and is Respondent's prerequisite before Complainant could be able to use the women's restroom. However, absence of male genitalia does not make a female, as that could occur by illness or injury.

Moreover, enforcement of Respondent's approach is inherently problematic. Broad customer screening could prove difficult, whether by merely asking the customer if they were transsexual or using a version of "stop and frisk" prior to the facility's use.

Section 1-102(O) reads that "Sex means the status of being male or female." However, the definition of sex must incorporate Section 1-103 (O-1), "gender related identity, whether or not traditionally associated with the person's designated sex at birth." Thus, it is not relevant what the person's sex was at the time of birth. Sex relates to a person's sexual related identity, which is discussed below.

The same reasoning is used to dismiss the third condition of Respondent's prior to Complainant's use of its women's facility. Respondent required Complainant to change her birth certificate to reflect her current sexual identity. Complainant's birth gender is academic and is not relevant here.

Discrimination Standards – Sexual Identity

It is not necessary to discuss *prima facie* elements, as this is a rare case where there is no disagreement as to Respondent's action.

Direct Method of Proof

There are two methods for proving discrimination, direct and indirect. Sola v. Illinois Human Rights Commission, 316 Ill.App.3d 528, 736 N.E.2d 1150, (1st Dist. 2000). Under the direct approach, Complainant must present sufficient evidence, direct or circumstantial, without reliance upon inference or presumption, to allow a trier of fact to decide

that her sexual related identity was a motivating factor in Respondent's alleged adverse act. Id. A review of what an employer did and/or said regarding a particular employment decision is required. Where there is direct evidence of discrimination, it is unnecessary to use the three-part analysis. Catherine Littlejohn and Wal-Mart Stores, IHRC, ALS No. 9929, November 4, 2009.

Direct evidence is unique as "it essentially requires an admission by the decision maker that his actions were based on the prohibited animus...." Davy Cady and Northeastern Illinois University, IHRC, ALS No. 10589, February 1, 2005, quoting Haywood v. Lucent Tech, Inc., 169 F. Supp.2d 890, 907 (N.D. Illinois 2001), citing Radue v. Kimberly Clark Corp., 219 F. 3d 612, 616 (7th Cir. 2000). (A notice for a teaching position required that candidates "need to be minority."); Melvin Osborne and Robert Boudreaux and Steve's Old Time Tap, IHRC, ALS No. S-11225, April 25, 2001. (The reason as to why complainants were directed to leave the tavern was based on race as they were told, "I own this place and you get your Black asses out of here.")

Analysis

The evidence in this case establishes that Respondent's decision forbidding Complainant access and use of its women's restroom violated the Act, under the direct method of proof. Respondent's motive for its decision was and is Complainant's sexual related identity, female, a decision that should have been made irrespective of her designated sex at birth, male. Respondent substantially relied on a prohibited factor in its decision. Lalvani v. Illinois Human Rights Commission, 324 Ill.App.3d 774, 755 N.E.2d 51 (1st Dist. 2001).

"There is no surer way to find out what the parties meant, than to see what they have done." Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No. 10565, August 7, 2000, quoting Brooklyn Life Insurance Co. v. Dutcher, 95 U.S. 269, 273 (1877). In this case, the facts are straightforward.

It has been established that Complainant is a transgender woman, acknowledged as such by Respondent in both words and acts. By July 2010, Complainant had been an employee of Respondent for twelve years, and her transition from male to female was advanced and apparent, as she had physical characteristics in conformity with her gender identity.

In July 2010, after Complainant's discussion with the store's manager and as a result of it, Respondent changed Complainant's personnel records and benefits information to reflect her transition to female. Employees and employers referred to Complainant as "Meggan," her chosen female name, and she performed her assigned duties in feminine dress and makeup.

However, Complainant's request for access to Respondent's women's restroom in its store was denied. Instead, Respondent created its first precondition. It demanded from Complainant presentment of legal authority that would mandate it to allow a transgender person the use of a store's designated restroom different from that of the person's birth gender.

In response, Complainant submitted a copy of her court ordered name change, along with a driver's license and a social security card reflecting that change. Moreover, a written medical explanation and verification of her transition from Howard Brown Health Center was submitted, with its recommendation that Complainant be permitted to use Respondent's facility. Finally, a copy of the Illinois Human Rights Act was presented, along with other states' laws on the topic of sexual identity.

Respondent merely directed Complainant to its legal department. To this day, Complainant is being forced to use the restrooms available in other unrelated stores or, since January 2014, a "unisex" restroom. The prohibition is enforced by threat of employment discipline. For example, in February 2011, Complainant received a written warning because of her attempt to use the women's facility.

Other Arguments

The totality of this order addresses the legal authority that mandates Respondent to grant Complainant access to its women's restroom both as employee and customer, but other arguments of significance also were raised.

Respondent added anatomical surgery to the list of preconditions it demanded of Complainant. However, nothing in the Act makes any surgical procedure a prerequisite for its protection of sexual related identity. Therefore, Respondent's unilateral surgical requirement is untenable.

Respondent also raised a concern about a woman employee expressing "discomfort" with Complainant being present in the women's restroom. However, a co-worker's discomfort cannot justify discriminatory terms and conditions of employment. The prejudices of co-workers or customers are part of what the Act was meant to prevent. Raintree Health Care Center v. Illinois Human Rights Commission, 173 Ill.2d 469, 672 N.E.2d 1136, (1996) and Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No.10565, August 7, 2000, (HIV medical condition and loss of customers); Jack Haynes and City of Springfield, Office of Public Utilities, IHRC, ALS No. 7304 (S), April 3, 1998 (unwillingness to be supervised by a black man).

In 2014, Respondent built a "unisex" single use restroom for Complainant, which segregates only her because of her gender related identity, and perpetuates different treatment, contrary to the Act. [3]

Respondent's prohibition and/or segregation of Complainant to a "unisex" restroom is an adverse act and subjects her to different terms and conditions than similarly situated non-transgender employees. Access to restrooms, if available, is a major and basic condition of employment. DeClue v. Central Illinois Light Company, 223 F.3d 434 (7th Cir. 2000) and OSHA, Interpretation of 20 C.F.R. 1910.141 Section (c)(1)(i): Toilet Facilities (April 4, 1998)).

[3] However, the "unisex" restroom may resolve any concern by those who are allegedly uncomfortable by Complainant, by giving them the option of using it.

Therefore, I find that Respondent's decision to restrict Complainant's access to the women's restroom on account of her gender related identity violated the Act as it concerns both employment and public accommodation. I further find that the record contains direct evidence related to both counts of the complaints that the decision was based on the gender related identity of the Complainant.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Complainant is entitled to a recommended order in her favor as a matter of law.

IT IS HEREBY ORDERED:

1. Respondent's motion for summary decision is denied;

2. Complainant's motion for summary decision is granted;

3. A status hearing is set for June 25, 2015, at 10:00 a.m. when a damages hearing date will be set.

HUMAN RIGHTS COMMISSION

BY: William J. Borah

WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: May 15, 2015

ALS NO(S): 13-0060 (C)
CHARGE NO(S): N/A
EEOC NO (S): 2011CN2993,2011CP2994
CASE NAME: SOMMERVILLE VS. HOBBY LOBBY STORES

MEMORANDUM OF SERVICE

The undersigned certified that on **May 13 2015** she **re-served** a copy of the attached **RECOMMENDED LIABILITY DETERMINTAION** on each person named below by depositing the same in the U.S. mail box at **100 W. Randolph St., Suite 5-100, Chicago, Illinois,** properly posted for **FIRST CLASS MAIL**, addressed as follows:

Sonya Rosenberg
Gray I. Mateo-Harris
Neal, Gerber & Eisenberg LLP
2 North LaSalle St., Suite 1700
Chicago, IL. 60602

Jacob Meister
Katherine Eder
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INTER-OFFICE MAIL TO:

Tomas Ramirez
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Illinois Department of Human Rights
100 W. Randolph St., Suite 10-100
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Shantelle Baker
Signature

ALJ:

Certified Shorthand Reporters
Scheff & Associates

Nova Maday v. Township High School District 211

17 CH 15791

Court Proceedings

January 19, 2018

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

NOVA MADAY,
Plaintiff,
vs. No. 17 CH 15791
TOWNSHIP HIGH SCHOOL DISTRICT 211,
Defendant,
and
STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association,
Intervenor.

ORIGINAL

REPORT OF PROCEEDINGS had before the Honorable Thomas R. Allen, Judge of said Court, Richard J. Daley Center, Chicago, Illinois, 60602, courtroom 2302.

REPORT OF PROCEEDINGS commenced at the hour of approximately 11:31 a.m. on the 19th day of January 2018.

REPORTED FOR: SCHEFF & ASSOCIATES, INC.
REPORTED BY: JEANNINE SCHEFF MIYUSKOVICH, CSR

A P P E A R A N C E S:

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-AND-

MANDELL MENKES, LLC.
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appeared on behalf of the Plaintiff;

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appeared on behalf of the Defendant;

THOMAS MORE SOCIETY
BY: MR. THOMAS OLP
MR. DOUG WARDLOW
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appeared on behalf of the Intervenor.

ALSO PRESENT:
NOVA MADAY (Plaintiff)

THE COURT: Good morning.
MR. KNIGHT: Good morning, your Honor.
John Knight for the plaintiff.
MR. BERGMAN: Jeff Bergman also for the Plaintiff, your Honor. 11:31AM
MS. SCOTT: Sally Scott for the District.
MS. SMITH: Jennifer Smith for the District.
MR. OLP: Thomas Olp for the Intervenor.
MR. WARDLOW: Doug Wardlow for the Intervenor.
THE COURT: All right. So let me just get my papers in order here. 11:31AM
So it's Mr. Olp and who else? What was your name, counsel?
MR. WARDLOW: Doug Wardlow.
THE COURT: Wardlow, got it. There's a lot of names on these papers, so I just want to get everybody's name right. At least it's even. All the parties have two lawyers each, so it's a fair fight. 11:31AM
All right. So we here on Plaintiff's Motion for Preliminary Injunction, and the parties have submitted their written briefs, responses, replies, and I've had them all available to me. 11:32AM
And then the intervenor also on short notice filed or delivered to my chambers a

Intervenor's response to Plaintiff's Motion for Preliminary Injunction.

So I think I have everything that the parties have submitted. So let's get into the discussion. So, Plaintiffs, Mr. Knight or Mr. Bergman. 11:33AM

MR. KNIGHT: Sure, Judge.

So as the Court knows, Nova Maday is an 18-year-old senior. She'd like to use the gym and be treated no differently than other girls with respect to the use of the locker room. 12:45PM

The question is whether she could be granted use of the locker room for this last semester without restricting her use of it in a way that no other girl is restricted. 12:46PM

Nova's complaint and her Affidavit show that the forced separation of her from the other girls makes her feel like an outcast, like she's not accepted as a girl but is isolated and excluded just because she's transgender. 12:46PM

Nova also has a medical condition called gender dysphoria. That's a condition where a person's core understanding of their gender -- for her it's female -- fails to line up with the

individual's sex assigned at birth causing the person serious clinical distress. The treatment for that condition, the reason I mention it, involves social transition. Social transition means living full-time in every way consistent with the new gender. That's what Nova would like to do here with respect to allowing her the usage. 12:46PM

Nova, if allowed to use the locker room, intends to preserve her modesty. We pointed it out in the Complaint and in the Affidavit as well. The District has raised the question of swim, swimming in their responsive brief. The reality is Nova does not -- would like to seek an excuse from swimming, would not participate in that. 12:47PM

But, in general, the School's denial of locker room usage seems to be premised on the notion that it would be somehow harmful for the other students to allow a transgender student to be seen in a state of undress within the locker room, but the reality is that's not going to happen. Nova does not want that to happen. She's committed to making sure that does not happen. 12:47PM

As the Court knows, the preliminary injunction standard requires Plaintiffs to show a

clearly ascertainable protectable right, irreparable harm and inadequate remedy at law and a likelihood of success at the merits.

Nova has shown that. She's at the least raised a fair question as the cases require that she has a right to use the girls' locker room like other girls. The Human Rights Act make it a civil rights violation for a public accommodation, including schools, to deny someone the full and equal enjoyment of the facility's goods and services of the public accommodation because of the person's gender identity or because of other -- because they fall into another protected class, race, disability, for example. 12:48PM

This has been true since 2006 when the legislature amended the Human Rights Act to include sexual orientation which is defined to include gender identity. There's just no exception within the statute for locker rooms or restrooms. 12:48PM

There is a provision which the Intervenors have pointed to that allows public accommodations to segregate certain facilities on the basis of gender. So it is not a violation of the Human Rights Act to have restrooms for girls or women and restrooms for men or boys. That's okay. 12:49PM

But that does not determine which locker room a transgender individual gets to use, and this specific issue in this argument has been addressed by the Human Rights Commission which the Court knows is charged with interpreting the Human Rights Act. 12:49PM

That's their responsibility, and they have found that sex for purposes of gender facilities must be determined based on gender identity. That means that Nova Mayday, the girls' looker room is the right locker room for her. 12:50PM

Denying -- and, your Honor, as you know, the School has not said that they want to keep her out of the locker room entirely. They've conceded that she's a girl and should be treated as a girl, but what they wanted to do, though, is simply place 12:50PM a limitation on her that no other girl is required to abide by simply because she's transgender.

Nova has shown that denying her locker room usage causes her irreparable harm, and the damages are inadequate to compensate for that harm. 12:50PM As I pointed out, it denies her the medical treatment she needs. It challenges her identity as female. It causes her serious distress to be isolated and excluded. It's not surprising. That's the way --

that's the whole point of non-discrimination provisions is to prevent exclusion and isolation and differential treatment because of someone's membership in a protected class.

The District's arguments I'd like to address briefly. The first argument they make or at least the primary one, the first argument they make is that schools are somehow held to a lower standard than other public accommodations, and they base that argument on the language of a jurisdictional provision which is Section 5-102.2. 12:51PM 12:51PM

But to read that jurisdictional section is a limitation on the liability of a school as a public accommodation would undermine the purpose of the Human Rights Act and would create an absurd result. Your Honor's -- that argument would apply regardless of whether we're talking about a transgender individual or an individual with a disability or an individual who is of racial minority. 12:51PM

What the District seems to want is to be able to segregate students because of their protected category. And if they can do it within a locker room, then they can do it in the cafeteria or in the gym or anyplace else there's a school facility. That 12:52PM

cannot be what the General Assembly intended when they included that provision.

The reality is the legislative history shows what that provision in terms of jurisdiction was getting at was to prevent the Human Rights Act from -- or prevent issues related to the school curriculum from being reviewed for purposes of discrimination under the Human Rights Act. It did not take away or limit the nature of discrimination that's covered by the Human Rights Act. 12:52PM 12:53PM

The cases say that where there's wholly different language in different statutes; that parts of statutes that language can be read to have a different effect to indicate that the legislature intended that, but that is simply not the case here. 12:53PM

Other cases recognize where the language may be different, but it's substantially the same. It should be given the same effect.

The reality is what the District has proposed is a denial of certain use of the locker room telling her she can't dress in the locker room where other girls are allowed to dress. That is a denial of access to a facility, so it falls within the jurisdictional provision. It may not be a 12:53PM

complete denial of access to the facility, but it's still a denial.

And as a result, because it's a denial, the Courts should then look to Section 5-102 to determine whether that denial violates the Human Rights Act. Of course, a denial, if it applies across the board, if all girls were told you can't dress in certain places within the locker room, that wouldn't be a problem. But what is a problem is to discriminate. And Section 5-102 makes it clear that discrimination with respect to denying full and equal use of the locker room because of someone's protected category is a violation of the Human Rights Act. 12:54PM

The second argument the District makes is this argument about the public interest or balancing and suggests that -- concerns about community backlash. They mention the Federal Court litigation and concerns that are raised or suggestions that other students are somehow harmed by having a transgender person in the locker room. Those can't be a basis for -- or that just simply cannot be a defense to a violation of the Human Rights Act. 12:54PM 12:55PM

The commission and the courts have said that in numerous times -- and we've cited some of those cases at pages eight or nine of our brief that either a employer or a -- cannot rely on the preferences of third parties like customer preferences, for example, to justify their discrimination. That's what's that argument would ultimately mean. 12:55PM

In addition, there is no constitutional privacy interest in refusing to share a locker room with a transgender student. Magistrate Judge Gilbert and Judge Alonso address that very question in the federal litigation, the Students' and Parents' litigation that has been going on for several years there, and he framed the question as, "Do students have a constitutional right to refuse to dress in the same restroom or locker room as students whose sex assigned at birth was different than their own?" And he found that they don't have such a right. 12:55PM 12:56PM

And he found that, in particular, because the District has made available to anyone who objects to dressing in a -- or being in a restroom or dressing in a locker room with a transgender student, that there's alternative places to dress. So it's 12:56PM

not -- it is -- there's nothing compelled about the kind of privacy argument that they're raising here because they have alternatives that they can pursue.

The District also suggests that no other court has ordered this kind of relief. That's simply not true. The reality is we've cited several cases where courts have ordered school districts to make available restrooms for purposes of -- based on gender identity. And as Judge Alonso said in his recent decision affirming the Students' and Parents' case, he recognized that there is no legal difference or no -- between locker rooms and restrooms when it comes to consideration of discrimination under Federal Law, Title IX. 12:57PM

The Intervenors have made various arguments in their brief yesterday. I can address some of those now, or I can do that in rebuttal as the Court prefers. 12:57PM

THE COURT: Well, you might as well continue and address their arguments, too. That would be good. 12:58PM

MR. KNIGHT: Okay. So they made an argument based on this gender segregated facility provision which I talked about earlier. That argument, however, ignores the Hobby Lobby decision or the

Sommerville decision that I mentioned. And the reality is to accept that argument would effectively rewrite the Human Rights Act.

To suggest that transgender people are not able to use locker rooms or restrooms consistent with their gender identity would mean that schools and other public accommodations could simply deny someone the use of a locker room because they're transgender. So, in other words, what's happened here is that Nova is told I can't use -- she can't use the locker room not because she's not a girl but because she's transgender. She's a transgender girl. So they're going to place some limitations on her as a result of that. 12:58PM 12:59PM

So, basically, what they're doing is suggesting writing an extension into the Human Rights Act that is simply not there. The argument is based on this notion that sex is some kind of very narrow definition. But the Sommerville decision has rejected that notion because to set this argument -- and, first of all, sex is defined broadly in the Human Rights Act. It is not defined as sex assigned at birth or some other way of defining sex. 12:59PM 12:59PM

It is the status of being male or female,

and in no way suggests that Nova is not female and shouldn't be treated accordingly.

The Intervenors had suggested that the Court cannot rely on Affidavits or evidence to support the preliminary injunction here. The reality 01:00PM is we think that the Plaintiffs and the Defendants have chosen to waive that argument and to allow the Court to consider those. We don't believe the Intervenors should at this late date be able to object to the consideration of those -- that evidence 01:00PM that's been provided to the Court.

But, in any event even with that, just looking at the Complaint and accepting as true the allegations of the Complaint, the preliminary injunction should be granted here. Nova makes it 01:00PM clear in the Complaint she was denied full use of the locker room because she's transgender. That's in paragraphs 3, 58 and 62 of her Complaint, and she explains how harmful to that is supporting the fact that this is irreparable harm to her in paragraphs 01:01PM 9, 10, 63 and 68 of her Complaint.

I'll conclude there. There are other arguments that are made by the Intervenor, but I can address those in rebuttal. Your Honor, Nova has

raised a fair question at the very least. In fact, I think she's made a compelling case that she has the right to use the locker room and cannot be denied that right or even partially denied that right because she's transgender. 01:01PM

She's shown that denying her locker room usage is causing her irreparable harm, and that can't be remedied by damages.

Respectfully, your Honor, we'd ask that the Court grant the motion. 01:01PM

THE COURT: Okay. Thank you, Mr. Knight.

Ms. Scott?

MS. SCOTT: Yes. Thank you, your Honor.

As we hear counsel argue, they firmly believe that Ms. Maday is injured if she's not given 01:02PM unrestricted access to the locker room, and I want to be very clear that is the relief they are seeking. Although they've represented Ms. Maday would change modestly, that's not what they've asked for in the Complaint. 01:02PM

What they've asked for is that she have unrestricted access which would not require her to change modestly or any other transgender student. Frankly, had she represented to the District she

wanted to change in private, we wouldn't be before you. So the issue is unrestricted access.

I also assume we're going to hear Parents for Privacy argue that female students who are minors are harmed by having a transgender student access to the locker room and the bathroom. As we've mentioned to your Honor when we were here on the Motion to Intervene, the District is currently being sued in Federal Court by Parents for Privacy with ACLU on the other side, whether transgender students get any access at all, and here we're being sued by a transgender student as to the extent of access. The District has been in the middle on both of these litigations. 01:02PM 01:02PM

But setting aside all of that emotion for a moment, I'd like to make sure we're very clear on the facts. So Ms. Maday identifies as female, and she is anatomically male. She has access to female bathrooms because there are privacy stalls in the bathrooms. She's called by her preferred name and pronoun. Her school records reflect she's female. 01:03PM 01:03PM

She wasn't enrolled in PE last year, and she is not enrolled this year. And, instead, she's taking classes of her choosing. Specifically the

issue in this case, if Ms. Maday were to take PE, she would have access to the girls' locker room. She can enter with all of the other girls. She would have an assigned locker. She can use the sinks, the mirrors, the bathroom stalls in there. She can do her hair and makeup. The one condition is that she change in private in the private changing stalls located within the locker room. 01:03PM

And attached with our response in Mr. Kovack's Affidavit were the pictures showing the private changing stations within the locker room that are just a few steps away from the lockers. 01:04PM

I also want to be clear that the condition access that we are offering to Ms. Maday is exactly the same deal that we struck with the Federal Department of Education regarding another transgender student within the District. In 2013, that student filed a complaint with the Department of Education saying that she was denied locker room access. The Department of Education initially found in her favor, and we struck a deal with the Department of Ed. 01:04PM

We agreed in the Resolution Agreement that based on that student's representation, she would change in private. She had access to the looker

room. That is the exact same deal that we are offering to Ms. Maday in this case.

So turning then to the elements of the preliminary injunction, if Ms. Maday has a legally protected right, it's the right to access the locker room, and the statute is clear on that point. 01:05PM

Secondary school districts like District 211 need to provide access to facilities. Other places of public accommodation have a broader obligation, hotels, restaurants, stores, museums, theaters. They have a different standard that applies to them. That's where full and equal enjoyment of the facilities apply, not the school district. 01:05PM

And in the legislative history of the act, and I have a copy if your Honor would like it, there has always been a separate standard for secondary schools. It has always been simply denial of access to the facilities. (Document tendered.) 01:05PM

That section, part of Section 11, was moot to other parts of the act, but the actual language of the denial of access has always applied to schools, and the language of the full and free enjoyment never has. I have a current version of the statute if you 01:06PM

would also like it, your Honor. (Document tendered.)
THE COURT: So that's kind of a weird distinction, isn't it?
In other words, restaurants --
MS. SCOTT: It's a distinction. 01:06PM
THE COURT: -- restaurants and private entities, they have a higher standard?
MS. SCOTT: They have a higher standard, yeah.
THE COURT: Whereas our government, our educational institution, namely a government act, has 01:07PM a lower standard.
Do you know what I'm saying?
MS. SCOTT: Well, specifically only the school. It is specifically only to schools.
THE COURT: That's unusual. 01:07PM
MS. SCOTT: Yeah.
THE COURT: Do you think that's what it means?
MS. SCOTT: I think that is what it means.
And because in part one of the reasons --
THE COURT: So, in essence, the government's 01:07PM allowed to -- I'll use this word just as an analogy -- to discriminate at a certain level, a higher level of discrimination than a public place of accommodation. That's crazy, isn't it?

MS. SCOTT: Well, I wouldn't use the word discriminate.
THE COURT: Well, as I said, it's not the right word.
MS. SCOTT: But the General Assembly did apply different standards, and the Department of Human Rights recognize that there are different standards for these, and we had also included that in our brief and in our appendix. 01:07PM
The Department on their website says under public accommodation, if you're in a place of public accommodation, this is your obligation. If you're in a school district, it's to provide access. 01:07PM
THE COURT: I'm just going to pretend you're the legislature. What's the logic behind that? What kind of argument would you -- 01:08PM
MS. SCOTT: I would not --
THE COURT: -- phantom?
MS. SCOTT: -- dare to presume the wisdom of the General Assembly. 01:08PM
THE COURT: -- legislative intent as lawyers, so what would be the legislative intent of that?
MS. SCOTT: Sorry, your Honor --
THE COURT: All right. Pass. That's okay.

MS. SCOTT: -- I don't know what their intent is on it. I just know that's what they wrote.
THE COURT: In what year? What's the effective date of this?
MS. SCOTT: It was amended -- this amendment occurred effective 2007, but the original language came in about denial of access, I'm not sure of that. 01:08PM
THE COURT: So 10 years at least ago.
MS. SCOTT: Yes, at least 10 years ago.
THE COURT: The world has changed a lot in 10 years, huh? 01:08PM
MS. SCOTT: The world has changed in 10 years.
But based on the tenets of statutory construction, the General Assembly did use different language for whatever reason that they did. And as I said, I would not assume to the preliminary task. They did. And as your Honor knows, where the legislature includes language in one section but excludes it in another, the same statute, we have to assume they acted intentionally in doing so. 01:09PM 01:09PM
So based on that, Ms. Maday has been offered access to the locker room. She has full rights to go into the locker room. If she just agrees, she will change in the privacy stalls. And

as I said, the Department of Human Rights investigated this because you have to file a charge with the Department before you can file a civil act in court. They investigated the charge. They interviewed people. They reviewed all of the documents. And they did not find substantial evidence that the District discriminated against Ms. Maday with regard to locker room access. 01:10PM

And their standard is substantial evidence. That is not a high bar. That is defined as more than a mere scintilla but less than a preponderance of evidence. So even with that low standard in place, they did not find what the District offered, the locker room access, was discriminatory. And they are the entity statutorily authorized to administer the Act. 01:10PM

Now, counsel argues that the limitation in the Amendment 5-102.2 is a jurisdictional limitation. I'm not quite sure if they're saying that's jurisdictional only in the Department and not the Court. But the Human Rights Act itself is very clear that the Court's jurisdiction is the same as the Department's jurisdiction. And I could give you the statutory cite for that if you'd like. It's also 01:10PM

in our brief.

THE COURT: No. That's okay. I've got it. Thank you.

MS. SCOTT: We are also aware of no case that holds that a transgender student is entitled to unrestricted locker room access. There have been bathroom cases. There are no locker room cases. 01:11PM

In the Federal Court litigation, the issue was keeping the students out of the bathroom and locker room. And both the Magistrate Judge and the District Court Judge denied the Parents for Privacy's request for preliminary relief. They had argued that constitutional right to privacy was violated, and that a hostile environment was created under Title IX of the Federal Law. 01:11PM

Both judges relied on the privacy protections in place, and neither judge found that the restricted access was unlawful or inappropriate in any way.

Turning then to irreparable harm, and as counsel cited, they rely on the Affidavit from Dr. Ettner who concludes that Ms. Maday is experiencing anxiety and depression, and they conclude that the cause of it is being told -- is 01:12PM

from being told that she can use the locker room on the condition that she agrees to change in a private changing stall.

We had our expert, Dr. Rom Rymer, review the Affidavit, and Dr. Rom Rymer pointed out various flaws with the sufficiency of that Affidavit, and that Dr. Ettner failed to establish that if Ms. Maday enrolled in PE, having to change in private within the locker room, causes the stress or the anxiety as opposed to numerous other factors in Ms. Maday's life, including the fact that her father is resistant to her and denies her transition; that there is a relationship with her brother; she has a history of self harm, anxiety and depression. 01:12PM 01:12PM

And Dr. Ettner simply did not take those factors into account at least in her Affidavit in coming to her conclusions. As Dr. Rom Rymer also points out, Dr. Ettner relied exclusively on what Ms. Maday told her. She didn't look at her medical record, her therapist's record, consult her therapist or doctor, school records, family members, anything else. 01:13PM 01:13PM

So to the very high burden of a privy irreparable harm, that Affidavit isn't sufficient.

Counsel also relies on Ms. Maday's own Affidavit, but Ms. Maday herself admits she doesn't want to disrobe in front of other students, and that it would be distressing for her to change into her swimwear or shower in front of other students which is what we're asking as well. 01:13PM

And then, lastly, your Honor, I want to look at the balance of harms. The District is responsible for providing an educational sound environment for 12,000 students. So it's not just the interest of Ms. Maday at issue here. It's also the interest of all of these other students. And these students are minors. There are 14, 15, 16-year-old girls who may or may not be comfortable changing clothes with a girl who's biologically male. 01:14PM

If an injunction is entered allowing for unrestricted access which, again, is the relief that they've requested, then a single student is allowed to make the determination of whether to expose minor female students to the student's genitalia. School districts have to have the discretion to craft individualized approaches to these difficult issues. 01:14PM

The District has struck the appropriate balance between the needs for student privacy and

support of access to the school locker rooms. Both the Federal Department of Education and the Illinois Department of Human Rights agree with the approach the District has taken regarding locker room use. And the District's approach is consistent with the requirements of the Human Rights Act. 01:15PM

A preliminary injunction is an extraordinary remedy, and as your Honor well knows, it's only to be granted when an extreme emergency exists. It's purpose is to preserve the status quo pending a hearing on the merits of the case. Locker room access is a novel issue in Illinois and elsewhere. It's not been decided by any court in Illinois. It's a complex and nuance issue and one that must be fully developed before a decision can be entered altering the status quo. 01:15PM

Thank you.

THE COURT: Okay. Thank you, Ms. Scott.

Mr. Olp?

MR. OLP: So we have a basic disagreement with the characterization of the Human Rights Act by Mr. Knight. Mr. Knight says the exemption was based upon -- the exemption for privacy facilities in Section 5-103(B) is based upon gender. 01:15PM

But in point of fact, it's very clear that it's based upon sex, not gender and not gender identity. And this exemption, this private facility's exemption, has been in place for many years. In 2006, the category of -- sexual orientation protections for that work were into the statute, but this exemption was never removed. 01:16PM

And there are now two definitions that pertain to this case in the Human Rights Act. The first one is sex. And sex is defined to mean the status of being male or female. The status of being male or female. That's a binary classification definition. It can be either male or female. And the exemption is based upon sex. It basically says it's perfectly okay. It's not a violation of the Human Rights Act for a public accommodation to segregate privacy facilities based upon sex. 01:16PM 01:17PM

So now that's really the simple answer to whole case because that's what the District is doing. Now our Intervenor group thinks that the District has gone too far in giving too much access. We believe that the limit should be at the locker room door. 01:17PM

But, even so, the restriction that the

District has placed, you must use a privacy facility, is exempt under the private facility's exemption in the Human Rights Act. How does the Plaintiff get round that?

Well, they argue that you can ignore sex in favor of sexual orientation or gender-related identity, again, whenever you want, any time after birth. But that's not what the law itself says. 01:18PM

And the Sommerville decision, which they rely on, which is an Administrative Law Judge's decision, is simply unreasonable, and it reads that exemption out of the act. That's improper interpretation of the legislation. It's clear that the legislature did not remove the exemption in 2006 when it added protections for sexual orientation, and this Court has to read those sections together harmoniously. 01:18PM

And it can't assume. It can't presume that the legislature has erased, nullified, gotten rid of that exemption. And that exemption is fully applicable in this case and fully protects what the School District did. 01:19PM

So in that respect from the point of view of a preliminary injunction, the Plaintiff has not

articulated a clearly ascertainable right to be protected. They have no ability to show, no likelihood of success on the merits as far as that goes. No right they have under HRA.

Mr. Knight references federal privacy laws, et cetera, but this case is only about the Human Rights Act. That's all. So that's our first point. 01:19PM

The second point is -- and we've seen the problem just now -- that this Court can't rely on the Affidavit extraneous to the Complaint when there's been no answer. The issues haven't been joined in this case. And Mr. Knight says, oh, we all agree to do that, and you guys are too late. But you can see that based upon the other Affidavit -- we weren't aware of it -- another Affidavit from another expert we got was procured by the District which you can see that they're controverted. 01:19PM 01:20PM

So, therefore, it can't be relied on to establish irreparable harm. So we agree with the District in that respect. 01:20PM

And in terms of the balance of harm and balance of interest here, Judge, our clients, as the District says, their students are at the school.

They have an interest in privacy, and they're minor students, and their interest is right in the core of the protection that the Human Rights Act gives to privacy and privacy facilities. They want to be affirmed in their own gender identity, and they have a right to privacy, too. 01:21PM

How is it that the balance of harms, the balance of equities, the balance of interests tip into the Plaintiff's favor? They don't. Clearly, the District is correct in taking into account the interest of all of the students. 01:21PM

My last point I would make is that the Plaintiff needs to go to the legislature to find a solution to this problem. This Court is not going to be able to find a solution because the Human Rights Act clearly, based upon sex, says there's no claim for a segregated privacy facility. Therefore, the Plaintiff is not satisfied. 01:21PM

Thank you.

THE COURT: Okay. We're back to you, Mr. Knight. 01:21PM

MR. KNIGHT: Let me first address the Human Rights Act argument that Intervenors have made. The privacy provision does not -- it simply says that you can't argue that a gender facility is

discriminatory on the basis of sex. It says nothing about gender identity. It doesn't define how you determine the sex of a transgender individual. That's what the Sommerville decision did is understand and interpret gender identity is determining someone's sex.

And that's the only way to read the statute. That does not create an exception to the public accommodations' provision. It's just not there. What that provision was about is to prevent a boy from claiming I get to use the girls' restroom. That's the only thing we're talking about here. My client is a girl. 01:22PM

The only reason why she's being told she can't use the girls' locker room is because she's a transgender girl because of her gender-related identity, that violates the Human Rights Act. 01:23PM

The District persists in misstating the Resolution Agreement in the Department of Education case. The Department of Education made it very clear that in their findings of discrimination, as we've shown in our reply brief, that limiting transgender students and forcing them to dress in private areas was a violation of Title IX. 01:23PM

The District's argument that no court has addressed this particular issue is not quite right in the sense that, for example, in the Students' and Parents' case here that Judge Alonso was hearing, the question was whether -- one of the questions the Court had to consider was whether or not the Department's interpretation at that time that facilities such as restrooms and locker rooms, should it be available to transgender persons based on their gender identify, was consistent with Title IX, and he found that it was. 01:24PM 01:24PM

He found that he reviewed the case law nationally and found that sex for purposes of Title IX includes gender identity. The same -- the courts are finding the same is true here as the Sommerville decision did which is to find that for purposes of that sex or gender-segregated facility provision, Nova Maday's gender is female. 01:24PM

The District's argument about this difference in language they talked about earlier I would simply say, again, that that can't possibly be what the Human Rights Act intended. That would allow the District to tell disabled students they have to sit in one part of the cafeteria or students -- 01:25PM

racial-minority students, you have to sit in this part of the locker room or this part of the cafeteria. As long as we let you in there, we haven't denied you access to the facility.

What they would like to do is rewrite the jurisdictional provision to say that it's a denial of complete access, but that's not what it says. It simply says a denial of access to a facility. What the District has done here is deny Nova access to the facility in certain ways. They said it's partial denial, but it's still a denial of her use of the facility. 01:25PM 01:25PM

Another case that addresses locker room usage is similar to the one here which is an argument being made by students that -- transgender students in Pennsylvania, Boyer Town, Pennsylvania, should be denied use of locker rooms and restrooms. It is clear that that's a district that placed no limitations on transgender students. They had full and complete access to locker rooms. 01:26PM 01:26PM

The District has suggested that the -- what we're asking for here -- again, they suggested that what we're asking here is suggesting that there's some kind of nudity that's going to occur in

the locker room. First of all, that's not the way the girls dress within the locker room.

My client intends to do what she understands other girls do which is to discretely change into clothing in the locker room without being forced to dress in these private areas and to ensure that she protects her modesty. That does not -- she should have a choice. She should not be required to dress in a private area unless that's the rule for all the girls. 01:27PM

And, your Honor, it's worth pointing out that the District has not cited any cases that supports this lower standard. It's doesn't make any sense. So it's not surprising that schools have not been -- that there's no precedent for this argument that they're making to suggest that schools don't or can discriminate in certain ways as long as that they don't completely deny someone the use of a facility. 01:27PM

THE COURT: Okay. Let me start with the one factual piece of information that wasn't in anybody's brief. And as I was reading everything last night, it was obviously in my mind, and it was in the mind -- it would be on the mind of every -- likely every 01:28PM

person that would look at this scenario. And that is I understand and our society understands and our legislatures understand and the justice of the Department understands all about gender and the evolution of changing gender or gender identity, transsexual, and everybody understands that. 01:29PM

And the statutes are there. They speak to sex. And I have all of this paper, and everybody gives me the cases, and nobody talks about the only reason we're here which I've learned this morning, and I suspect it, is that Plaintiff is anatomically a male. 01:30PM

It was in nobody's brief, right? I know you don't want to talk about it, but you're asking me to decide something, and it's nowhere in the papers. Am I right? 01:30PM

MR. OLP: We thought that was known to everybody.

THE COURT: All right, so I guess I'm out of the loop but anyhow --

MR. KNIGHT: I would say we would disagree with that statement. I'm sorry that I didn't address that earlier. It's not relevant. But someone's genitalia does not determine their sex, and the science is clear about that. 01:30PM

THE COURT: I understand the science. I'm looking at the law. The law is evolutionary as we all know. And I would venture to say that -- anyhow, let me back up. You disagree with that, that statement made by Ms. Scott and I don't want to -- 01:31PM

MR. OLP: Judge, can I make a comment?

THE COURT: Let me say this.

I think that this is the balancing act of all balancing acts. Nobody in this room of all the six lawyers that are here has any ill-will or 01:32PM ill-intent toward anyone, and that goes without saying.

Now, the federal cases, the Civil Rights -- the Office of Civil Rights and their investigation which resulted in the -- I'll call it a consent 01:32PM decree or an agreement between the parties as to a student here in District 211 who is not, obviously, our Plaintiff, so there was a settlement there.

Now, the Department of Education, Office of Civil Rights in their November 2nd, 2015 letter 01:33PM said that the District was violating federal law, I guess. So the parties sat down and they arrived at an agreement in a short time, too, if I'm not mistaken. It was November, and the agreement was in

December, within 30 days or less. And that student has graduated, right, and is gone?

MS. SCOTT: Correct.

THE COURT: So -- anyway, but I would say that if it wasn't for the anatomically male component here, we wouldn't be sitting here; okay. 01:33PM

MR. KNIGHT: Your Honor --

THE COURT: I'm not making a legal statement. I'm making a commonsense statement. Anyhow, I think that that's a factor that is -- like I said, it's not in any of the papers. I don't know what it means. But here is what I will tell you, folks. 01:34PM

This is a monumental balancing act, and under law, we balance all the time especially in a courtroom, an equitable courtroom, where equity is paramount. So we balance all of the time. 01:34PM

And my mission here is to, first of all, determine whether the Plaintiff has met the four basic requirements for injunctive relief, and the parties have addressed that. And generally with injunctive relief, it's a high bar. We know the language with respect to that, and it's an extraordinary remedy, whatever extraordinary means, and it's highly-fact specific. 01:35PM

So the facts are very important here, and I've got a good grip on it. I read it. I'll have to say that I didn't have the full time that I wanted to devote to it because I had a crazy bunch of cases in front of this. But I know that when we got here earlier, a few weeks ago, three weeks ago before Christmas, the parties wanted this on an emergency basis, and that's what we did. And I commend the parties for getting all of their submissions to me, and I read it all. 01:36PM

But I don't make decisions until I have a comfort, and I will tell you right now I don't have a comfort in what I've -- on two levels, number one, on what I've read quickly, which I'm going to have to reread and, secondly, the discussion we had here today kind of reinforced what the parties put in writing. So there were no surprises except for that one. I guess I must be naive, but I should have figured that, and I don't know how that plays into the equation. 01:37PM

Let me ask you, Mr. Knight. Does it play into the equation?

MR. KNIGHT: It does not. It does not.

THE COURT: Wait a minute. Zero?

MR. KNIGHT: Zero.
THE COURT: Zero?
MR. KNIGHT: Yes.
THE COURT: And what's your basis for that?
MR. KNIGHT: Because there's no exception based on someone's sex at the time of birth, certain aspects of their body including genitalia. There's no exception for that. 01:37PM

We're talking about discrimination against someone because they're transgender, and the reality for the treatment for transgender individuals does not always include surgery. And my client has had the treatment that's appropriate for her at the time, which includes hormone therapy, and there are a number of ways in which that changes her body to make her female. But the signs are clear that someone's gender identity is -- 01:37PM 01:38PM

THE COURT: I'm talking about real people.
MR. KNIGHT: -- in terms of real people.
THE COURT: I know the science. I'm talking about real people, 14- and 15-year-old girls. 01:38PM
MR. KNIGHT: It does not make a difference.
THE COURT: I know the science. You're saying under the law it doesn't matter. I don't know the

answer to that. That's why the lawyers are here. I value their viewpoint on it.

MR. KNIGHT: I mean, it's just irrelevant because she's not going to be getting naked in the locker room. She's made that very clear. 01:38PM

THE COURT: Yes, but -- how's that fool proof? I mean, I agree with that a hundred percent from what I've read in the papers, and I totally get it, all right, and -- but I'm not -- I don't want to go there. 01:39PM

But go ahead, Ms. Scott.

MS. SCOTT: Yes. Thank you, your Honor.

For us, this is a critical factor. She identifies as female. She's anatomically male. She is a girl with male genitalia in a girls' locker room 01:39PM with minors. And so that's when I said the District has done this very careful, very thoughtful, very deliberate balancing act of the privacy interest and support of access to the locker room. That is exactly what we're talking about and because of this 01:39PM circumstance and the male genitalia to be frank about it. So that does absolutely come into play.

THE COURT: How does it come in legally? Mr. Knight says it doesn't, the law doesn't

distinguish or differentiate. It's just male or female. Or maybe the law hasn't caught up with us yet.

MS. SCOTT: And it may not. What the law talks about is access, that schools have to provide access, and we do believe we provided access. 01:40PM

Mr. Knight has previously said can schools make other decisions about like where disabled students go. The answer to that is yes. They can and they do all the time. Every student with a disability has an individual education plan and they have -- the school is responsible for their individual education. So they make these kind of individual decisions all of the time. It's very different than if you're going to a movie theater. These are kids, minors in school. 01:40PM 01:40PM

So that may answer the question. Why is there a different standard for schools? Because schools are dealing with minor students who have individual needs and individual circumstances that need to be taken into account and balanced. 01:40PM

THE COURT: Okay.

MR. OLP: May I speak?

THE COURT: Sure, you may.

MR. OLP: It is very, very critical, I think, as to what the -- there's a difference between the male sex and the anatomically male and gender identity. In this case, as you know right now, this transgender girl has a male anatomy.

Under the Human Rights Act, that makes her sex male. Her gender identity is female. And our argument is that the Human Rights Act makes an exception for same sex bathrooms in privacy facilities based upon sex, maleness/femaleness and, therefore, not on gender identity which change is malleable. And she's transitioned, but she's still a male. And, therefore, the District is within its rights to restrict access to the female locker room. That's it in a nutshell. 01:41PM

THE COURT: Okay. Well, I'm not going to rule on this this morning or this afternoon at this point.

Let me find a date in my calendar where we can come back, and I'll give you a ruling, and it will be a day next week. 01:42PM

What about the 25th -- off the record.

(WHEREUPON a discussion was held off the record, and the proceedings continued as follows.)

THE COURT: How about January 25th which is next Thursday? 01:42PM

MR. OLP: Okay with me, Judge.

THE COURT: At 11:30.

MS. SCOTT: That works for me, your Honor.

MR. KNIGHT: Your Honor, I have a noon meeting on the 25th. 01:43PM

THE COURT: Well, I can tell you this that there's not going to be any further argument. I'm just going to ask that you bring a court reporter. I'm not going to issue a written opinion. I'm just going to issue an oral opinion. I'll talk it through. 01:43PM

MR. KNIGHT: That's fine. I'll make it work.

THE COURT: Or Mr. Bergman can be here.

MR. BERGMAN: Yes, your Honor. 01:43PM

THE COURT: That's it. I've got all of your papers, and I have my homework. Wait, wait, wait.

I don't know, Mr. Knight, whether your definitive statement that the anatomy has nothing

legally to do with it or not. I don't know whether that's true or not, but I'm going to make my own judgment once I read everything, you know.

But we have a dispute on the facts there. Ms. Scott says one thing, and you said no, right? Didn't you refute that? 01:44PM

MR. KNIGHT: What I'm saying is it's irrelevant either way.

THE COURT: I have to make that decision, or I'll read the law as best I can and arrive at that decision. But I think -- I don't want to -- how do I put this? It may come into play on the balance of hardships. 01:44PM

MR. KNIGHT: Your Honor, we don't believe that a balance of hardships allows the Court to create an exception to discrimination. 01:44PM

THE COURT: You might be right on that, but you've got to give me a chance. You guys have been living this stuff for a long time. I got it here and read it yesterday. 01:45PM

MR. KNIGHT: I got it.

THE COURT: So I guess if you want to leave it open, that's not productive for anybody. Forget it. I'm just going to rule with what I've got which --

aren't we on truth-seeking mission here always in a court of law? That's our job. That's my job.

I turn over every rock I can when I do things. And in all for one single purpose is to give the litigants my best shot. And I want everything that's out there, and I never get it all because I run out of time. 01:45PM

But I did that as a lawyer. I did that all my life in other parts of life and that is -- I don't know, but here we're not going to do that. 01:46PM

MR. KNIGHT: Your Honor, what I can say is that my client --

THE COURT: If you want to -- if the privacy issue is hanging over your head, you can put it in writing or something, I don't know, or you can just leave it there. I don't know. I don't know. It may be nothing under the law. You may be right. 01:46PM

But that's why God created the Appellate Court, too, and the Supreme Court because nobody knows where it's going. It certainly -- what I like is all of the information. 01:46PM

But, anyhow, just write up an order saying that I'll take it under advisement, and we'll see you

the 25th at 11:30; all right? No further papers and no further argument.

MS. SCOTT: Thank you, your Honor.

MR. KNIGHT: Thank you.

MR. OLP: Thank you. 01:47PM

(Whereupon said court proceedings adjourned.)

STATE OF ILLINOIS)
) SS:
COUNTY OF McHENRY)

I, Jeannine Scheff Miyuskovich, CSR and Notary Public in and for the County of McHenry and the State of Illinois, do hereby certify that on the 19th day of January 2018, I reported in shorthand the court proceedings held In Re Maday vs. Township High School District 211 and Students and Parents for Privacy, to the best of my ability.

I further certify that I am in no way related to any of the parties to this suit, nor am I in any way interested in the outcome thereof.

I further certify that this certificate annexed hereto applies to the signed and certified original and typewritten copies only. I assume no responsibility for the accuracy of any reproduced copies not made under my control or direction.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this 2nd day of February 2018.

Jeannine Scheff Miyuskovich
CSR No. 084-003551

APPEAL TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NOVA MADAY, **Plaintiff-Appellant**	)	
	)	**Case No. 17 CH 15791**
v.	)	
TOWNSHIP HIGH SCHOOL DISTRICT 211, **Defendant-Appellee**	)	
and	)	
STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association, **Intervenor-Appellee.**	)	

NOTICE OF INTERLOCUTORY APPEAL
PURSUANT TO SUPREME COURT 307(a)(1)

Please take notice that Plaintiff-Appellant Nova Maday, by and through her attorneys, appeals to the Appellate Court of Illinois, First Judicial District, pursuant to Supreme Court Rule 307(a)(1), from the Order of the Honorable Thomas R. Allen of the Circuit Court of Cook County, Illinois, entered on January 25, 2018, denying Plaintiff-Appellant Nova Maday's Motion for a Preliminary Injunction filed on December 13, 2017.

Plaintiff-Appellant prays that the Illinois Appellate Court reverse the Circuit Court's aforementioned Order and grant her Motion for a Preliminary Injunction.

Dated: February 7, 2018

Respectfully submitted,

By: _____
One of her attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused to be served the attached PLAINTIFF-APPELLANT'S NOTICE OF INTERLOCUTORY APPEAL on this 7th day of February, 2018, by hand delivery and/or email, to the following persons:

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STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MICHAEL S. and ANDREA E., on behalf of P.S., a minor,	)	
	)	
Complainants,	)	
	)	**Charge No: 2015CP3418**
and	)	**EEOC No.: N/A**
	)	**ALS No.: 16-0003**
KOMAREK SCHOOL DISTRICT 94,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED LIABILITY DETERMINATION

This matter comes to be heard on Complainant's motion for summary decision. Respondent filed its response and Complainants filed their reply. The matter is ready for decision.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following material facts were derived from uncontested sections of the record. The findings did not require, and were not the result of, credibility determinations.

1. On January 8, 2016, Complainants, Michael S. and Andrea E., on behalf of P.S., a minor, filed a three count complaint with the Illinois Human Rights Commission.

2. The complaint was filed against Respondent, Komarek School District 94, and cited Article 5, Public Accommodation, of the Illinois Human Rights Act (Act). Complainants Michael S. and Andrea E. alleged on behalf of P.S., a minor, as his protected classes, sexual orientation, as related to gender identity, male, and disability, gender dysphoria. Specifically, in Count One, Complainants alleged that Respondent denied P.S. access to the school's communal boys' restrooms, because of his gender identity, male. Count Two alleged that

Respondent denied P.S. access to its communal boys' restrooms, because of his disability, gender dysphoria. Count Three alleged that Respondent failed to provide P.S. with a reasonable accommodation by denying him access to the school's communal boys' restrooms.

3. Respondent is located in North Riverside, Illinois, and has a student population of approximately 500, who are enrolled in grades Pre-Kindergarten through Eighth Grade.

4. Complainants Michael S. and Andrea E. are the parents of P.S.

5. P.S. is a transgender male.

6. P.S. was born in November 2006.

7. P.S. has been a student at Komarek since Kindergarten, and enrolled as a female.

8. During the 2013-2014 school year, P.S. was in second grade and was seven years old.

9. On or around December 2013, P.S. explained to his mother his preference to be a boy and adopted a male name, and he groomed and dressed as a male.

10. On January 14, 2014, Andrea E. emailed Jamie Kleinschmidt (Kleinschmidt), Respondent's social worker, to explain P.S.'s recent change of appearance at school. Respondent permitted P.S. to dress and groom as a boy. However, P.S. chose to retain his female name and female group affiliation.

11. A year later, on January 14, 2015, Andrea E. emailed Kleinschmidt with P.S.'s request to have Respondent's personnel and students address him by his male name and to use proper masculine pronouns while referring to him. "I just wanted to let you know what was going on gender wise with (P.S.). For over a year now, (P.S.) has been identifying as a boy." Andrea E. further asked the school for assistance and informed Respondent that P.S. will be attending the Ann & Robert H. Lurie Children's Hospital's Gender & Sex Development Program (Lurie's) for testing, treatment, and guidance, and encouraged Respondent to contact Lurie to

obtain the necessary and adequate knowledge to competently assist P.S. Respondent obtained a medical release that allowed the school to directly communicate with Lurie's about P.S.

12. On January 14, 2015, Kleinschmidt acknowledged Andrea E.'s email and recognized that P.S.'s "situation" was "very new to Komarek School..." Kleinschmidt requested "more information, as well as (time) to speak with the administration to see what our policies are for handing this situation, with as much care as possible. When we have more information we will contact you, and would love to have you in for a meeting to discuss everything."

13. In an internal January 14, 2015, school email, Kleinschmidt described P.S. as a "gender non-conforming student." In turn, Superintendent Neil Pellicci internally emailed to 12 personnel about P.S.'s status. "At the bottom of this note is an email received from a mom of a second grade student. This student has been identified by mom and our staff as transgender." On March 11, 2015, Superintendent Pellicci internally emailed to 12 personnel, for at least a second time, a confirmation of Pellicci's knowledge of P.S.'s status. "There is some new news regarding (P.S.) our second grade transgender student."

14. On January 15, 2015, Jennifer Leininger (Leininger), the Program Coordinator for Lurie Children's Hospital's Gender & Sex Development Program, emailed Klienschmidt and introduced herself, "I am reaching out at the request of a family to provide support for your school around gender (identity). When might you be available to touch base?"

15. On January 22, 2015, Kleinschmidt responded to Andrea's E.'s January 14, 2015, email. Kleinschmidt wrote that she talked to Leininger at Lurie's, and that the school has agreed to address P.S. by his male name, including the proper use masculine pronouns. Klienschmidt asked Andrea E. for a meeting.

16. On February 11, 2015, a meeting was held between Andrea E. and Kleinschmidt for the purpose of discussing the public introduction of P.S.'s male gender with students at school. At that meeting, among other topics, Andrea E. asked Kleinschmidt whether P.S. could start using the communal boys' restrooms.

17. Every Pre-Kindergarten through third grade classroom had a unisex restroom. Starting in the fourth grade, the students were limited to using the communal boys' or girls' restrooms.

18. Respondent had no formal written policy in place concerning transgender students.

19. On March 3, 2015, Andrea E. emailed Kleinschmidt, and in part inquired whether a decision had been made permitting P.S.'s access to the boys' restrooms. In response, Kleinschmidt requested a meeting.

20. On March 6, 2015, a meeting was held with Andrea E. and Respondent's superintendent, Neil Pellicci the principal, Thomas Criscione; the vice principal, Lisa Stalla; and Kleinschmidt. There, Pellicci, announced that P.S. would only be permitted to use the designated adult male faculty and staff restroom, but not the school's communal boys' restrooms. [1]

21. On March 9, 2015, Michael S., P.S.'s father, sent an email to Kleinschmidt expressing his disappointment about Respondent's decision denying P.S.'s restroom "accommodation," and encouraged it to reconsider, as well as to work with Lurie's.

22. On March 10, 2015, Pellicci emailed Michael S. In part, he reiterated his decision and explained his reason:

> As a school administrator and a parent, I'm looking at it from the perspective of what's not only good for P..., but for the other Komarek students. I hesitate having P...walk into a boy's bathroom that is occupied by an intermediate or junior high age boy, possibly using the urinal or toilet. Using your scenario, that situation is very possible. P... may feel comfortable doing so, but the young man in the bathroom may not (and neither may his parents.).
> By offering P...a bathroom with a lock on the door, he can use the bathroom without the possibility of intrusion.
> As you know, Mrs. Kleinschmidt has been in touch with Lurie's Children's hospital and has received some valuable information from them. A rep from the hospital will be here on Thursday to talk to all the teachers during our monthly teacher's meeting. ...

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[1] When the term "Banned" is use, it also incorporates P.S.'s mandated restriction to use the adult male faculty and staff restroom, when he is outside the assigned classroom restroom.

23. On March 12, 2015, Respondent held a staff training seminar presented by Leininger from Lurie's regarding "gender diversity."

24. Andrea E. requested to speak before the school board during its regularly scheduled meeting set for April 14, 2015. On April 8, 2015, Christopher Waas, the school board president, emailed Andrea E. and directed her not to address the board about reconsidering the ban: "You are welcome to bring your husband along and tell us about your son, but there will be no discussion about the decision. The School board has made its decision based on legal advice and it will not be reconsidered unless there is a change in state law." After receipt of Waas's email, Andrea E. understood Respondent's decision was "final," and she did not attend the board meeting.

25. From March 6, 2015, through October 27, 2015, no other student enrolled at Respondent was barred from using the restroom of their sexual identity other than P.S.

26. From March 6, 2015, through October 27, 2015, no other student enrolled in Respondent had been required to use the adult faculty/staff restrooms other than P.S.

27. On March 4, 2015, after numerous psychological tests and counselling sessions at Lurie's, P.S was formally diagnosed with "severe degree of early-onset gender dysphoria."

> 28. Dr. Rani Ettner,[2] averred: "The term 'gender identity' is well known concept in medicine, referring to an individual's sense of oneself as male or female. It is an innate and immutable aspect of personality that is firmly established by age four. ... For the gender dysphoric individuals, the sense of self-one's gender identity-differs from the natal, birth assigned sex. Attempts at changing an individual's gender identity have proven unsuccessful, and are now considered unethical. [T]he condition is likely neurodevelopment."

29. Both Complainant and Respondent attached "Encounter Reports" authored by Dr. Chen of Lurie's. There are a number of them dating from February 17, 2015, through

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[2] Dr. Rani Ettner is the chief clinical psychologist with the Chicago Gender Center since 2005, and has an extensive background in evaluating and treating gender dysphoria patients. He advises school districts on the subject, and is an author and speaker on the subject. Dr. Ettner earned his doctorate in psychology from Northwestern University in 1979. He avers that his "opinions ...are reliable and accurate to a reasonable degree of medical certainty." The parties agreed that his affidavit could be referenced in this matter.

October 2016, although the total number in existence was not stated. Each report identifies P.S.'s "Diagnosis" as gender dysphoria.

> 30. On July 20, 2015, Dr. Randi Ettner met with P.S. to "conduct a clinical assessment." The purpose was to determine whether P.S. met the criteria for a diagnosis of "Gender Dysphoria (302.6) in the *Diagnostic and Statistical Manual of Mental Disorders,* fifth edition; (F64.2) in the *International Classifications of Diseases* and whether, and to what extent, denying access to the restroom consistent with P.S.'s male gender identity is harmful to him."
>
> Dr. Rani Ettner concluded: "P.S. meets, and exceeds, the diagnostic criteria for Gender Dysphoria. [P.S.] has a severe degree of early-onset gender dysphoria."
>
> 31. Dr. Ettner averred about the restroom ban:
>
> The social role of transition takes place at home, in the community and in school. If any aspect of social role transition is impeded, however, it undermines the entirety of a person's transition. For a gender dysphoric child to be told that they will be considered a boy in one situation, but not in another, is inconsistent with evidence-based medical practice, and detrimental to the health and well-being of the child. The integration of a consolidated identity into the daily activities of life is the aim of treatment.
> Access to restrooms available to other boys is an undeniable necessity for the female-to-male pre-adolescent. Restrooms, unlike other settings, (e.g. the library), categorize people according to gender. There are two, and only two, such categories; males and females. To deny admission to these facilities, or to insist that one use a separate facility, is to communicate that such a child is "not male" but some undifferentiated "other," and causes undue harm. It's also puts a "target on the back" for potential victimization and stigmatization. When adults-authority figures- deny a child access to the restroom consistent with his affirmed, lived gender, they shame him-negating the legitimacy of his identity and decimating confidence. In effect, they revoke membership from the peer group. ...
>
> For transgender children, the restroom can easily become a source of anxiety. ...
>
> P.S will not be allowed access to the boys' restroom, and will be banished to a separate facility when he needs to use a restroom outside his classroom. The shame of being singled out and stigmatized is a devastating blow to a vulnerable child with documented mental health issues, and places him at risk. P.S is already experiencing considerable anxiety about the bathroom. He relates that he tries not to drinking liquids, and holds his urine. He worries that he will be in an isolated bathroom during a fire drill and will be over looked and abandoned.
>
> 32. On October 26, 2015, Respondent's successor Superintendent Ganan emailed Michael S. and Andrea E. and informed them that Respondent would no longer ban P.S. from using the boys' communal restrooms. It would wait until a final determination from the Department was issued. Later, access was extended until the Commission's final decision.

33. P.S. legally changed his name on or around March 1, 2016. Thereafter, P.S.'s Social Security card and the State of Illinois Identification Card acknowledged his sex as male.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. Complainants established by direct evidence and by indirect means, sexual related identity discrimination by Respondent, in its ban of P.S. from the boys' communal restroom at its school, a public accommodation.

3. Complainant established by direct evidence and by indirect means, discrimination based on a mental and physical disability, gender dysphoria. Respondent prevented P.S.'s access to the boys' communal restrooms at school, a public accommodation.

4. At the time of the requested accommodation, Complainant was disabled with gender dysphoria, and Respondent was aware of his disability.

5. Complainant's access to the boys' communal restrooms would have been a reasonable accommodation.

6. Respondent stopped interacting with Complainants after the ban was announced.

7. There is no genuine issue of material fact and Complainants are entitled to a recommended order in their favor as a matter of law.

8. A summary decision in Complainants' favor is appropriate in this case.

DISCUSSION

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Human Rights Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove its case as if at a hearing, the non-moving party must provide some factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to the case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist.1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240, 489 N.E.2d 867 (1986).

General Statutory Interpretation

"The Illinois Human Rights Act is remedial legislation that must be construed liberally to effectuate its purpose." Nuraoka v. Illinois Human Rights Commission, 252 Ill.App.3d 1039, 625 N.E.2d 251 (1st Dist. 1993) citing, Nielsen Co. v. Public Building Commission of Chicago, 81 Ill.2d 290, 410 N.E.2d 40 (1980).

A primary rule of statutory construction is to give effect to the words selected by the General Assembly and its intent. "No word or paragraph should be interpreted so as to be rendered meaningless." Boaden v. Illinois Department of Law Enforcement, 171 Ill.2d 230, 664 N.E.2d 61 (1996); Sangamon County Sheriff's Department v. Illinois Human Rights Commission et al., 233 Ill.2d 125, 908 N.E.2d 39 (2009), citing Wade v. City of North Chicago Police Pension

Board, 226 Ill.2d 485, 877 N.E2d 1011 (2008). The best indication of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. Id., citing Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill.2d 200, 886 N.E.2d 1011 (2008). "Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute." Michigan Avenue National Bank, As Special Administrator of the Estate of Cynthia Collins, Deceased v. The County of Cook, et al., 191 Ill.2d 493, 732 N.E. 2d 528 (2000).

The Act's General Definitions

Section 1-102(A) of the Illinois Human Rights Act provides that it is the state's "public policy" to "secure for all individuals within Illinois the freedom from discrimination against any individual, because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, *physical or mental disability*, military status, *sexual orientation*, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations." (Emphasis added.) [3]

Section 1-103 (O) of the Act defines "Sex" as "the status of being male or female."

Section 1-103 (O-1) of the Act defines "Sexual Orientation," in pertinent part, as "gender related identity, whether or not traditionally associated with the person's designated sex at birth."

Article 5, Public Accommodation Discrimination Defined

Section 5-101 (A)(11) of the Act includes an "elementary school," as a "place of public accommodation."

Section 5-102.2 of the Act, referencing Section 5-101(A)(11), forbids "the denial of access to facilities...or services."

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[3] All of the statutory classes were purposely cited, as each are equally protected and enforced under the Act.

Section 5-103 of the Act lists exemptions to Article 5's protections against public accommodation discrimination. In pertinent part: "Nothing in this Article shall apply to... (B) Facilities Distinctly Private. Any facility, as to discrimination based on *sex*, which is distinctly private in nature such as *restrooms*, shower rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemptions based on bona fide consideration of public policy." (Emphasis Added.)

Statutory Analysis

It has been established that Respondent, as an elementary school, is a statutory public accommodation. As a school, it is a civil rights violation for it to deny a student access to its facilities and services. However, Section 5-103 (B) is an exception to Article 5's protection against unlawful discrimination by allowing a public accommodation to segregate restroom designation based on "sex."

Prior to discussing Section 5-103 (B)'s implication and scope, its enclosed term "sex" is addressed, as it is significant to its overall meaning. Respondent argues that the defined terms of "sex" and "sexual identity" are "separate and distinct," and when a person's gender identity does not correspond to one's birth sex, the Act obligates that person to use the restroom of his/her birth.

Contrary to Respondent's reading, Section 1-103 (O), "Sex," is a related provision within Section 1-103 (O-1), "Sexual Orientation." The legislature could have disassociated the two terms by simply selecting the next sequential letter of the alphabet in the Act's list of general definitions, but it did not, it chose to associate the two by the letter "O." Read together they clarify the relationship between one's birth sex and sexual identity: "[G]ender-related identity, whether or not traditionally associated with the person's designated *sex ('[T]he status of being male or female.')* at birth." (Emphasis added.)

Thus, the plain and ordinary meaning of the integrated definitions confirms that one's birth sex does not diminish one's gender identity, just as it would not diminish the protected

classes of sexual orientation, (being gay or straight, the other categories in O-1), race, age, religion, national origin, citizenship, etc. [4]

Reviewing the statutory definition of Sex, the "status" of "being male or female," begs the question. How and when does a person's "status" of a sex become determinable? [5]

A case by case, common sense, interpretive approach, is most pragmatic when construing "status," despite the legislature's silence with the term. The facts reveal that P.S.'s sexual "status" was male, and it was well known by his parents, Lurie, and Respondent by the time of the ban.

P.S. is not a stranger to Respondent, unlike that of a commercial store's mostly anonymous customer base. In fact, a school has a long held special relationship with its students, described in general legal terms as *in loco parentis,* "in the place of the parents."

By January 2014, Respondent knew that P.S. wanted to be a boy. A year later, Respondent was active in P.S.'s reintroduction to the student body and faculty, even taking on the role of protector with non-cooperating students. Internal emails described P.S. as transgender. Respondent also routinely communicated with P.S., his parents, and Lurie's to assist with him and to advance its own institutional knowledge of sexual identity and transgender youth. [6]

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[4] It also should be noted that there are statutes in Article 5, Public Accommodations, aimed specifically at schools, as exemplified by Section 5-102.2, Jurisdiction Limited, and Article 5A, (Sexual Harassment in) Elementary, Secondary, and Higher Education. The legislature could have excluded or limited students from the protected class of sexual identity, but it did not, nor did it place a threshold age as a prerequisite to being protected. (i.e. The chronical age of 40 must be reached prior to being in the protected class of age. Section1-103(A) of the Act.)

[5] Respondent suggests that "status" should be determined by one's birth sex, or other ideas. However, none of those suggestions were codified by the legislature, and, in any respect, it is not the place for this tribunal to amend, invent, or insert terms that change or contradict the Act.

[6] Respondent did not have a school policy in place about restroom use by a transgender person.

Therefore, P.S.'s sexual "status" is male, and Exception (B) does not ban P.S. from the the boys' restroom, because his sex is male.

Discrimination Standards – Sexual Identity

I turn to whether Respondent discriminated against P.S. based on his sexual identity.

It is not necessary to discuss *prima facie* elements, as this is a rare case where there is no question as to Respondent's knowledge, action, decision and its basis. [7]

Direct Method of Proof

There are two methods for proving discrimination, direct and indirect. Sola v. Illinois Human Rights Commission, 316 Ill.App.3d 528, 736 N.E.2d 1150 (1st Dist. 2000). Under the direct approach, Complainant must present sufficient evidence, direct or circumstantial, without reliance upon inference or presumption, to allow a trier of fact to decide that his sexual related identity was a motivating factor in Respondent's alleged adverse act. Id. Direct evidence requires evidence that demonstrate a linkage between the adverse act and the decision-maker's alleged discriminatory animosity. Temporal proximity to the adverse act is often crucial when establishing a case of discrimination based on direct evidence. Porter and Treasure Island Foods, Inc., IHRC, ALS No. 11593, February 7, 2003.

Analysis

"There is no surer way to find out what the parties meant, than to see what they have done." Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No. 10565, August 7, 2000, quoting Brooklyn Life Insurance Co. v. Dutcher, 95 U.S. 269, 273 (1877). In this case, the facts are straightforward.

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[7] A *prima facie* case of discriminating concerning a public accommodation may be proven by showing that 1) a complainant is within a protected category (he was); 2) he or she was denied "access" of the respondent's facilities (he was); and 3) that others not within his or her protected class were given "access" of those facilities (yes). Henderson and Steak N Shake, IHRC, ALS No. S-9735, March 24, 1999; and Section 5-102.2 of the Act.

P.S. first discussed being a boy with Andrea E., his mother, in late 2013, when he was seven years old, and in January 2014, Andrea E. contacted the school's social worker. At that time, P.S. began to outwardly manifest his sexual identity at school by dressing and grooming as a boy, while still preserving his female name and birth sex affiliation.

A year later, on January 14, 2015, Andrea E. requested that Respondent use P.S.'s male name along with its corresponding masculine pronouns. Respondent soon agreed, knowing that the issue before it was P.S.'s sexual identity, and not a dress code matter or a student being delusional, as exemplified by the social worker describing P.S. as "gender non-conforming student," and on at least two known occasions the superintendent emailing to numerous personnel about "our second grade transgender student."

P.S. began counselling at Lurie and it contacted Respondent to coordinate their school/hospital assistance. Respondent was permitted by the parents to contact Lurie about P.S.

On February 11, 2015, the desire of P.S. to use the boys' communal restrooms was communicated to the social worker. After some delay, a meeting was called by Respondent for March 6, 2015. Andrea E. and a multitude of administrators attended the meeting, where she was told by the superintendent that P.S. would not be allowed access into the boys' communal restrooms. P.S. was limited to the use adult male faculty and staff restrooms, unless assigned to a classroom with its own unisex restroom. When the parents asked Respondent to reconsider P.S.'s ban, both the superintendent and the school board president, independent of each other, denied their requests. The decision was understood to be "final."

On March 4, 2015, P.S. was formally diagnosed by Lurie with gender dysphoria. The diagnosis did not modify Respondent's ban. No other student, whose sexual identity was male, was banned from the boys' restroom.

The ban began on March 6, 2016, and continued until it was conditionally lifted on October 27, 2016.

Therefore, Complainant has established a *prima facie case* of sexual identity discrimination by direct means (and indirect means.)[8] The facts showed that P.S. is a transgender student, with the sexual identity, male. Respondent knew P.S.'s sexual identity, and decided to ban him from using the boys' restroom. No other student, whose sexual identity was male, was banned from the boys' restroom.

Legitimate Nondiscriminatory Reason

The respondent must articulate a legitimate nondiscriminatory reason for the action taken against the complainant. To succeed in his or her claim, a complainant must then show the articulated reason to be a pretext for discrimination. Henderson and Steak N Shake, Inc., IHRC, ALS No. S-9735, March 24, 1999, citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

It is noted that Respondent failed to plead any Affirmative Defenses in its answer, as required by Section 5300.640 (c)(2): "Contents – The answer shall be in writing and signed under oath or affirmation, and shall contain: A statement of any matter constituting a defense against any allegation of the Complaint…" In any respect, what was submitted is addressed:

"Ambiguity" – Respondent knew P.S. was transgender, that he wished access to the boys' restroom, that "male" not was not his birth and school enrollment sex, and on that basis the request was denied. There is no factual ambiguity of P.S.'s status, actions taken, motivating factor, or Respondent's ban.

"Assisted P.S." - Respondent contends it supported P.S. during his transition, but for the ban. However, a "good faith attempt" at compliance with the Act, but for the ban and restriction, must fail. The Illinois Supreme Court held that the Act does not contain a "good faith exemption." Raintree Health Care Center v. The Illinois Human Rights Commission, et al., 173 Ill.2d 469, 672 N.E.2d 1136 (1996).

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[8] The Commission applies the burden shifting method of providing discrimination in public accommodation cases as well as in employment cases. Charisse Davis and Ben Schwartz Food Mart, IHRC, ALS No. 1361(B), January 31, 1986.

"Administrative Judgment" – Respondent also defends its ban and restriction by contending it had "exercised its administrative judgment." Again, Respondent does not cite any authority that incorporates such a doctrinal defense, or any formal position articulated.

Pellicci, as the superintendent and the primary decision maker at the time of the ban, merely speculated about a "comfort" level of a hypothetical intermediate or junior high age boy or his parents, if he met P.S. in the boys' restroom.

However, the prejudices of others are part of what the Act was meant to prevent. Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No.10565, August 7, 2000, (HIV medical condition and loss of customers); Jack Haynes and City of Springfield, Office of Public Utilities, IHRC, ALS No. 7304 (S), April 3, 1998 (unwillingness to be supervised by a black man). Also, there is no right that insulates a student from coming in contact with others who are different than them or a Bathroom Privacy Act, unless the behavior violates a school policy or is criminal.

Waas, the school board president, emailed about "legal advice" to support the ban, in hopes to silence P.S.'s parents, but no law was cited. "Nowhere does the Human Rights Act state that a good-faith belief that one's discriminatory actions are required by state law is a defense to liability. The statute must be enforced as enacted by the legislature." Raintree, supra.

Brian Ganan, Pellicci's successor, avers that the ban was entered to "avoid disruption to the educational environment," prevent an "intimidating and uncomfortable (environment)," and preserve "safety and privacy interests." However, Ganan's affidavit is little help, as he was not a decision maker at the time of the ban. In any respect, more facts are needed to develop the "disruption" reason, and without more, those phrases are mere conclusionary and speculative positions. "[U]nsupported assertions, opinions, and self-serving or conclusionary statements do

not comply with S.Ct. Rule 191." McBaldwin Financial Comp., et al. v. DeMaggio, Rosario & Varaja, LLC, 364 Ill.App.3d 6, 845 N.E.2d 22, (1st Dist. 2006). [9]

Therefore, the evidence in this case establishes that Respondent's decision forbidding Complainant access to its boys' restroom violated the Act, under both methods of proof. Respondent's motive for its decision was P.S.'s sexual identity, male. Respondent substantially relied on a prohibited factor in its decision to ban P.S. Lalvani v. Illinois Human Rights Commission, 324 Ill.App.3d 774, 755 N.E.2d 51 (1st Dist. 2001).

Disability Discrimination Standard

"Unlawful discrimination" is "discrimination against a person because of his [or her] ...disability... as ...defined in this Section." Section 1-103(Q) of the Act.

The prima face elements of discrimination are the same as for discrimination based on sexual identity, but for the requirement of a disability.

"Disability" is defined under the Act as "a determinable physical or mental characteristic of a person ...which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic... is unrelated to the person's ability to utilize and benefit from a place of public accommodation." Section 1-103(I)(4) of the Act.

Compared to the federal Americans with Disabilities Act [ADA], the Illinois Human Rights Act's definition of "disability" has a "lower standard." Courtney v. Oak Forest Hospital, IHRC, ALS No. 4627, August 12, 1996.

In fact, many disabilities are defined by "common sense." "With many claims of physical handicap, it is relatively easy to identify the cause of the handicapping condition. If someone is deaf, blind, cannot walk or speak, or suffers from a well-known disease such as cancer, asthma, or renal failure, it is apparent that the person so afflicted has a condition which rises to the level

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[9] A number of supposed emails or portions of them, were typed and submitted as true, but none were copies of the original emails. Respondent has failed to adequately lay the proper foundation for a document or properly authenticate it.

of a physical handicap and thus is entitled to protection under the act." Lake Point Tower, Ltd. v. Illinois Human Rights Commission, 291 Ill.App.3d 897, 684 N.E.2d 948 (1st Dist. 1997).

Timing of Diagnosis

Respondent submits that P.S. did not have a disability, until the time it was formally diagnosed.

No formal diagnosis is required prior to being recognized as a statutory disability. "Disability is measured at the time of discrimination." "The respondent can call complainant's illness by whatever name it wants, because it need not be aware of the precise diagnosis in order to violate the Act." White-Day and Peoria Housing Authority, IHRC, ALS No. 2968, June 10, 1991.

As discussed above, whether the academic medical term "gender dysphoria" was used or not, by the date of the ban, Respondent was intimately aware and understood the character of the disability. [10]

Gender Dysphoria as a Disability

The question is whether the physical and mental condition of gender dysphoria qualifies as a protected "disability" under the Act.

It is understood, the term "disability" may have an overly harsh and derisive connotation. There are many people who are in the protected class who do not want to think of themselves as "disabled." Nevertheless, the legal term which is used to define those individuals qualified for protection is "disability." [11]

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[10] Although Lurie's formal diagnosis of P.S. was revealed on March 4, 2015, and the ban began on March 6, 2015, no modification of the ban occurred by Respondent until October 2015.

[11] For example, in the "Encounter Reports," Dr. Chen describes P.S. as "normal." Under the category Strengths, it was consistently written that P.S. is "curious, self-motivated, and physically healthy, ..." Further, "P.S was utilizing and benefiting from school, as he is performing at grade level across classes, no concerns about learning problems, no behavioral/emotional problems noted by teachers."

Dr. Rani Ettner averred that gender dysphoria is a disability and cited a number of medical and psychological reference texts.

Both Complainant and Respondent attached a number of "Encounter Reports," dated February 2015 through October 2015, authored by Dr. Chen of Lurie's, which identifies P.S.'s medical "Diagnosis" as gender dysphoria.

Complainants cite Jess Evans and Illinois Department of Human Rights, et al., IHRC, ALS No. 9937, November 18, 1999. The Commission concluded in that case "transsexualism (the former term for gender dysphoria) does qualify for the protection of the Act as a handicap (the former term for disability)."

Therefore, gender dysphoria is currently considered a disability.

P.S. was diagnosed with Gender Dysphoria

Beginning in February 2015, in its "Encounter Reports," Lurie's Dr. Chen "diagnosed" Complainant with gender dysphoria and later characterized it as "serious." Dr. Rani Ettner concluded: "P.S. meets, and exceeds, the diagnostic criteria for Gender Dysphoria. [P.S.] has a severe degree of early-onset gender dysphoria." Respondent was aware of P.S.'s medical condition.

Therefore, based on Evans, Dr. Chen, and Dr. Ettner, P.S. has shown to have the medical condition of gender dysphoria, as a result from a "condition [that] is congenital and is a combination of determinable physical and mental characteristics," and unrelated to the person's ability to utilize and benefit from his school. Id.

Disability Discrimination

The factual analysis is comparable to the discussion related to sexual identity discussed above and is incorporated here.

Therefore, Respondent knew that P.S. had a disability, gender dysphoria, and denied him access to the boys' restrooms because of it, as it did not conform to his birth sex.

Respondent contends that it did not know the formal diagnosis until March 4, 2015. However, as discussed above, Respondent had enough information through P.S., his parents, and Lurie to identify it. Respondent also contends "Ambiguity," "Administrative Judgment," and "potential for a disruption or safety threat," all addressed above.[12]

Therefore, I find that Respondent's decision to deny Complainant's access to the boys' communal restroom on account of his disability, gender dysphoria, violated the Act as it concerns public accommodation. I further find that the record contains both direct and indirect evidence related to disability discrimination.

Reasonable Accommodation

Is there a duty to grant P.S. a reasonable accommodation? In Ivanka Kojic and Gerald Hagman, et al. IHRC, ALS No. 5999 (A), December 18, 1995, citing R. Kent Jones, et al. and Chicago and North Western Transportation Company, IHRC, ALS No. 3611 & 3970, August 12, 1992, the Commission held that "the same implied duty of reasonable accommodation of a handicap that exist in the Illinois Human Rights Act in the context of employment exists in the context of public accommodation." The Commission continued, "the term 'discrimination' includes the refusal to eliminate barriers to accessibility when the elimination of such barriers will not impose undue financial and administrative burdens. Thus 1-103(I)(4) of the Act presupposes a duty of reasonable accommodations."

Here, Respondent does not contend that the cost of the requested accommodation would be "prohibitively expensive" or that it would "unduly disrupt the school." Owens v. Department of Human Rights, 356 Ill.App.3d 46, 826 N.E.2d 539 (1st Dist. 2005). However, if Respondent would have pled that affirmative defense, then the issue would become whether that disrupted policy complies with the Act. Green v. State of Illinois Department of Corrections, IHRC, ALS No. 7800, November 17, 1997.

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[12] It is unnecessary to reference my February 9, 2017, order, as part of the case's analysis, as the record has enough facts to reach underlying basis of Respondent's ban. However, my order of February 9, 2017, stands and is incorporated by reference.

No policy was submitted as an attempted defense, only two contemporary emails. Pellicci expresses his personal concern about a restroom "scenario," and Wass' email, that cut off all further interaction with the parents, because of some unknown "legal advice." [13]

An individualized determination is required in Illinois. Van Campen v. International Business Machines Corporation, 326 Ill.App.3d 963, 762 N.E.2d 545 (1st Dist. 2001); Raintree, supra; Melvin v. City of West Frankfort, 93 Ill.App.3d 425, 417 N.E. 2d 260 (1981). Respondent's group meeting and subsequent emails from Pellicci and Waas were meant to silence the parents, not to interact, obtain information, or negotiate with them. There is no evidence that Respondent even considered the medical consequences of its decision, despite the vast amount of information available to it.

Dr. Ettner averred in his uncontroverted affidavit, P.S being told he is a boy in name and appearance, but not permitted in the boys' restroom is "detrimental to the health and well-being of the child. It communicates to P. S. that he is neither male nor female, but some sort of other."

The ban and use the adult male restroom further brands and segregates P.S. It publicly invites unnecessary scrutiny and questioning from inquisitive or mean spirited students, further isolating P.S. "The shame of being singled out and stigmatized is a devastating blow to a vulnerable child with documented mental health issues, and places him at risk." Id.

As with the other counts of discrimination discussed above, Respondent only submitted an informal hypothetical "comfort" concern, and its alleged "legal advice."

Therefore, Respondent failed to interact and discuss a reasonable accommodation to P.S. when it banned him from the boys' restroom and restricted him to the adult male restrooms.

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[13] As discussed above, Ganan avers that the ban was decided to "avoid disruption to the educational environment," but he was not a decision maker at the time of the ban, and gives no evidentiary facts to support his conclusion. Without more, his statement is merely conclusionary and speculative.

Damages

Respondent raises the issue of the Tort Immunity Act, and contends that it bars any monetary damages for any discriminatory injury caused by one of its employees. 745 ILCS 10/2-201 and 109.

However, "the Tort Immunity Act is an affirmative defense that will be forfeited if it is not pleaded," Decatur Park District v. City of Decatur, 2016 IL App (4th) 150699, 57 N.E.2d 631, and Respondent did not raise this defense in its answer.

In any respect, for decades statutory monetary damages and other remedies were available to a victim of a civil rights violation, whether performed by private or governmental entities. The legislature made monetary damages statutory, as per Section 8A-104 of the Act: Relief; Penalties (Upon Finding a Civil Rights Violation).

To eliminate the statutory remedies under the Act, will undercut the Legislature, Commission and the Circuit Court, and make discrimination, harassment, and retaliation cases merely a nuance to the violator and fail to make the Complainant whole.

The Tort Immunity Act is inapplicable to the statutory based claims and remedies under the Illinois Human Rights Act. Governmental units remain liable for damages caused by discriminatory acts that violate the Act. Smith v. Cook County Sheriff's Office, IHRC, ALS No. 1077, October 31, 2005.

Respondent submitted Rozavolgyi et al. v. The City of Aurora, 2016 IL App (2d) 150493 (2016), 58 N.E.3d 65 (2nd Dist. 2016). However, that judgment was vacated by the Supreme Court in Rozavolgyi et al. v. The City of Aurora, 2017 IL 121048, --N.E.3d—(2017), and does not need to be discussed here.

Therefore, Respondent school is responsible for the statutory damages P.S. suffered as a result of its discriminatory actions.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Complainant is entitled to a recommended order in his favor as a matter of law.

IT IS HEREBY ORDERED:

1. Complainant's motion for summary decision is granted;

2. A status hearing is set for April 10, 2018, at 2:00 p.m. when a damages hearing date will be set.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: March 15, 2018

ALS NO(S): 16-0003
CHARGE NO(S): 2015CP3418
EEOC NO (S): N/A
CASE NAME: MICHAEL S. & ANDREA E. et. al. VS. KOMAREK SCHOOL DISTRICT 94

MEMORANDUM OF SERVICE

The undersigned certified that on **March 15, 2018** she served a copy of the attached **RECOMMENDED LIABILITY DETERMINATION** on each person named below by depositing the same in the U.S. mail box at **100 W. Randolph St., Suite 5-100, Chicago, Illinois,** properly posted for **FIRST CLASS MAIL**, addressed as follows:

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HAND DELIVERED TO:

Donyelle Gray
General Counsel
Illinois Human Rights Commission
100 W. Randolph St., Suite 5-100
Chicago, IL. 60601

ALJ: _____

Shantelle Baker
Signature

No. 1-18-0294

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NOVA MADAY,	**)**	
Plaintiff-Appellant	**)**	
	)	**Appeal from the Circuit Court**
	)	**of Cook County,**
v.	**)**	**Chancery Division**
	)	
	)	**Case No. 17 CH 15791**
TOWNSHIP HIGH SCHOOL	**)**	
DISTRICT 211,	**)**	**Hon. Thomas R. Allen,**
Defendant-Appellee	**)**	**Judge Presiding**
	)	
and	**)**	
	)	
STUDENTS AND PARENTS FOR	**)**	
PRIVACY, a voluntary	**)**	
unincorporated association,	**)**	
Intervenor-Appellee.	**)**	

COMMON LAW RECORD – TABLE OF CONTENTS

Notice of Filing and Plaintiff's Filing of Expert Curriculum Vitae in Support of Plaintiff's Motion for Preliminary Injunction	December 19, 2017	December 19, 2017	C 94-103
Agreed Authorization to Disclose Student Records and Protective Order	N/A	December 26, 2017	C 104-117
Emergency Petition of Students and Parents for Privacy for Leave to Intervene as a Defendant as of Right or Alternatively by Permission, and Memorandum of Law in Support of Petition	January 11, 2018	January 11, 2018	C 118-150
Plaintiff's Reply Brief in support of Plaintiff's Motion for Preliminary Injunction	January 12, 2018	January 12, 2018	C 151-218
Order Granting Students and Parents for Privacy Leave to Intervene as a Defendant	N/A	January 17, 2018	C 219
Intervenor's Response to Plaintiff's Motion for Preliminary Injunction	January 18, 2018	January 18, 2018	C 220-229
Order Scheduling Ruling on Plaintiff's Motion for Preliminary Injunction	N/A	January 19, 2018	C 230
Order on Plaintiff's Motion for Preliminary Injunction	N/A	January 25, 2018	C 231
Notice of Plaintiff's Interlocutory Appeal Pursuant to Rule 307(a)(1) of Circuit Court's Denial of Plaintiff's Preliminary Injunction	February 7, 2018	February 7, 2018	C 232-234

Notice of Filing and Plaintiff's Emergency Motion to File Slightly Redacted Copy of District's Brief in Response to Plaintiff's Motion for Preliminary Injunction	February 27, 2018	February 27, 2018	C 235-240
Order Granting Plaintiff's Emergency Motion to File Slightly Redacted Copy of District's Brief in Response to Plaintiff's Motion for Preliminary Injunction	N/A	March 1, 2018	C 241-242
Defendant's Response to Plaintiff's Motion for Preliminary Injunction (redacted version). Unredacted version (showing redactions in brief as shaded text and unredacted versions of supporting exhibits) filed under seal as Secured Common Law Record.	January 8, 2018	March 1, 2018	C 243-264

No. 1-18-0294

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NOVA MADAY,	**)**	
Plaintiff-Appellant	**)**	
	)	**Appeal from the Circuit Court**
	)	**of Cook County,**
v.	**)**	**Chancery Division**
	)	
	)	**Case No. 17 CH 15791**
TOWNSHIP HIGH SCHOOL	**)**	
DISTRICT 211,	**)**	**Hon. Thomas R. Allen,**
Defendant-Appellee	**)**	**Judge Presiding**
	)	
and	**)**	
	)	
STUDENTS AND PARENTS FOR	**)**	
PRIVACY, a voluntary	**)**	
unincorporated association,	**)**	
Intervenor-Appellee.	**)**	

SECURED COMMON LAW RECORD – TABLE OF CONTENTS

No. 1-18-0294

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NOVA MADAY,	)	
Plaintiff-Appellant	)	
	)	**Appeal from the Circuit Court**
	)	**of Cook County,**
v.	)	**Chancery Division**
	)	
	)	**Case No. 17 CH 15791**
TOWNSHIP HIGH SCHOOL	)	
DISTRICT 211,	)	**Hon. Thomas R. Allen,**
Defendant-Appellee	)	**Judge Presiding**
	)	
and	)	
	)	
STUDENTS AND PARENTS FOR	)	
PRIVACY, a voluntary	)	
unincorporated association,	)	
Intervenor-Appellee.	)	

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No. 1-18-0294

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NOVA MADAY,	)	
Plaintiff-Appellant	)	
	)	**Appeal from the Circuit Court**
	)	**of Cook County,**
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	)	
TOWNSHIP HIGH SCHOOL	)	**Case No. 17 CH 15791**
DISTRICT 211,	)	
Defendant-Appellee	)	**Hon. Thomas R. Allen,**
	)	**Judge Presiding**
and	)	
	)	
STUDENTS AND PARENTS FOR	)	
PRIVACY, a voluntary	)	
unincorporated association,	)	
Intervenor-Appellee.	)	

CERTIFICATE OF COMPLIANCE

Under Ill. S. Ct. R. 341 Neil Lloyd states the following:

1. I am one of the plaintiff-appellant's attorneys and have personal knowledge of the documentation included in this assembled record.

2. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages or 6,028 words.

Dated: March 23, 2018

/s/ Neil Lloyd
Neil Lloyd
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused to be served the attached BREIF AND APPENDIX OF PLAINTIFF-APPELLANT NOVA MADAY on this 23rd day of March, 2018, by hand delivery and/or email, to the following persons:

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