UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; and **VICTORIA WILSON**,	)	
Plaintiffs,	)	
vs.	)	
SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS,	)	Case No. 1:16-cv-04945 The Honorable Jorge L. Alonso
Defendants,	)	
and	)	
STUDENTS A, B, AND C, by and through their parents and legal guardians **Parents A, B, and C**, and the **ILLINOIS SAFE SCHOOLS ALLIANCE**,	)	
Intervenor-Defendants.	)	

INTERVENOR-DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs' opposition boils down to their contention that "sex" is narrowly defined as "male or female," "binary, fixed at conception," and "grounded in reproductive biology." Pls. Br. (Dkt. 211) at 1. But that contention ignores the broad scope of sex discrimination protections established by binding Supreme Court and Seventh Circuit precedent which requires dismissal of Plaintiffs' claims. To exclude students from gender-appropriate locker rooms or restrooms because they are transgender—the very relief Plaintiffs seek in this case—would discriminate against them on the basis of sex.

Plaintiffs ignore the fact that this Court has already determined, in denying Plaintiffs a preliminary injunction, that they have not shown a likelihood of success on the merits. In doing so, this Court correctly observed that the Supreme Court and the Seventh Circuit have "conclusively held" that "federal protections against sex discrimination" are not limited by Plaintiffs' narrow conception of sex as determined by "genitalia or chromosome." Memo. Op. (Dkt. 191) at 7. Instead, this modern case law establishes that "[d]iscrimination against transgender individuals is sex discrimination." *Id.* at 9. This Court also pointed to "clear, and binding" precedent that Plaintiffs' constitutional privacy rights are not violated when transgender students use gender-appropriate facilities, in which "'those who have true privacy concerns'" may take measures to maintain their modesty without imposing their views on other students. *Id.* at 12-13.

Plaintiffs also assert that the Seventh Circuit case *Whitaker v. Kenosha Unified School Dist.*, 858 F.3d 1034 (7th Cir. 2017) does not control this case and is factually distinguishable. Pls. Br. at 17-23. Plaintiffs' attempt to cast doubt on or circumvent binding law in this circuit fails. The *Whitaker* decision was correct and controls the outcome of this case.

ARGUMENT

I. Plaintiffs' Title IX Claims Should Be Dismissed

The Intervenors have shown that Plaintiffs' Title IX claims should be dismissed for two reasons. First, Plaintiffs have not alleged facts that, if true, would support a finding of discrimination on the basis of sex. Second, granting Plaintiffs the injunctive relief they seek would itself violate Title IX. Opening Br. (Dkt. 205) at 5-8.

A. Plaintiffs have not adequately alleged a violation of Title IX.

Intervenors have shown that, to sustain a sexual harassment claim under Title IX, Plaintiffs must establish that they experienced harassment based on sex that was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 821 (7th Cir. 2003) (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)). That is a tall order. As a matter of law, Plaintiffs come nowhere near to alleging such harassment.

The Student Plaintiffs say that permitting transgender students to use gender-appropriate facilities discriminates against Plaintiffs on the basis of sex because the District's policy "necessarily 'references sex'" when "it authorizes access for a transgender student by referencing the sex of users in the chosen opposite sex facility." Pls. Br. at 4; *see also id.* ("the Locker Room Agreement . . . specifically targeted females because they were females"). That contention is legally erroneous because it rests on Plaintiffs' view that "sex" for purposes of Title IX is genetically determined forever at birth and that a transgender girl who uses a female locker room is using an "opposite sex facility"—a view of Title IX that the Seventh Circuit has flatly rejected because it rests on stereotypical norms that under *Price Waterhouse* are an illegitimate basis of decision. *Infra*, pp. 11-13. Once that legal error is cleared up, Plaintiffs' Title IX claim

disappears. The District's policy says girl students, including girls who are transgender, can use female restrooms and locker rooms, and that obviously does not discriminate against girls.

Plaintiffs see harassment and discrimination against them where there is none. They compare transgender students who are denied use of multi-occupancy facilities to Student Plaintiffs who have access to those facilities but *opt not to use them* because of their own privacy concerns. Those are not comparable situations. No school policy bans Student Plaintiffs from accessing the multi-occupancy restrooms and locker rooms used by other students. And *choosing* to use single-user facilities, as opposed to being forced to by school policy to use those facilities, carries no stigma. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), and *vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) (Davis. J., concurring) ("For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students.").

Plaintiffs allege no misconduct by any student of any gender. And they cite no case law to support their contention that the mere presence of a transgender student in a restroom or locker room constitutes harassment based on sex. To the contrary, courts that have addressed arguments like Plaintiffs' have squarely rejected them. *See Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 392 (E.D. Pa. 2017) ("the mere presence of transgender students in a locker room or bathroom corresponding to their gender identity does not rise to the level of conduct that has been found to be objectively offensive, and therefore hostile") (internal quotations omitted); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (rejecting

female employee's claim that a transgender female co-worker's use of the women's restrooms constituted sexual harassment).

Plaintiffs ignore these cases. They cite instead cases involving "Peeping Toms," a supervisor demanding that his employee dance nude in public, and other conduct that would be outrageous regardless of the sex of the people involved. Pls. Br. at 6-9. None of those cases involves anything remotely like the presence of transgender students making ordinary use of school restroom and locker room facilities. And the comparisons Plaintiffs would draw all rest on the mistaken premise that a transgender boy is a girl and vice versa.

Plaintiffs attempt to shore up their sexual harassment claim with cases that have nothing to do with sexual harassment. For example, Plaintiffs cite *People v. Grunau*, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009), which affirmed criminal convictions of an adult man who went to a local high school to leer at girls in the girls' locker room. Pls. Br. at 7. Plaintiffs also cite *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984), a case in which both parties conceded that entry of a female janitor into a men's restroom would violate the privacy rights of any man who happened to be inside. The only question before the court was whether the bona fide occupational qualification exception to Title VII applied and whether the defendant provided reasonable alternatives for the plaintiff. *Id.* at 1417-23. Neither case is the least bit relevant to a transgender girl using the girl's locker room.

These cases are irrelevant for an additional reason: there are private areas available in District restroom and locker room facilities, should any student wish to use them. *See* First Am. Compl. (Dkt. 197) ¶ 74 (private stalls are available in the restrooms for anyone who wishes to use them); *id.* ¶ 99 (the District installed and maintained private changing stations within the locker rooms, which any student could use during changing periods).

Furthermore, Plaintiffs' assertion that they "face imminent harm to their privacy and other legal interests" (Pls. Br. at 11) is unsupported even by their own allegations. Plaintiffs have not alleged that any SPP Student has had to undress or use the restroom in a transgender student's presence. At District schools, there are private stalls available in the restrooms, private changing stations in the locker rooms, and a separate locker room for students who are participating in a swimming activity or class—all of which are available to all students. First Am. Compl. ¶¶ 74, 99. Plaintiffs do not allege that Student A or any transgender student has ever done anything harmful to anyone, inside restrooms and locker rooms or outside of them. Their vague allegations (see Pls. Br. at 9-10) that they suffer "'embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity' due to the impacts of [the District's] policy" fare no better with repetition. With no particularized fact allegations behind them, these assertions of harm are insufficient to plead the sort of severe and pervasive harassment necessary to ground a Title IX claim under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011) (conclusory allegations are insufficient to state a claim); Opening Br. at 4-5.

B. Plaintiffs fail to respond to the argument that the injunctive relief they seek would discriminate on the basis of sex.

Intervenors have explained that the injunctive relief Plaintiffs seek would violate Title IX and the Equal Protection Clause. Opening Br. at 7-8. The Seventh Circuit, as well as the First, Sixth, Ninth, and Eleventh Circuits, and numerous district courts across the country have held that discrimination against a transgender individual is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution. *Id.* Plaintiffs fail to distinguish these cases, including *Whitaker*, or explain how all these courts misunderstood

Price Waterhouse. *Infra*, pp. 11-13. The injunctive relief Plaintiffs seek cannot be granted because it would discriminate on the basis of sex.

II. Plaintiffs' Constitutional Right to Bodily Privacy Claims Should Be Dismissed

Plaintiffs assert that there is a constitutional right to bodily privacy that includes the right to refuse sharing communal facilities with transgender students whose sex assigned at birth is different from theirs. Pls. Br. at 13. That articulation of the fundamental right to privacy finds no basis in the case law.

As Intervenors explained (Opening Br. at 8-11), although substantive due process protection for bodily privacy interests exists to protect against "forced observations or inspections of the naked body" by any person of any gender (*Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994)), it does not include the "right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different from [one's own]"—as this Court correctly articulated the right Plaintiffs claim. Memo. Op. at 11-12. The Seventh Circuit in *Whitaker* rejected the contention that the mere "risk" a student may suffer harm is sufficient to establish a violation of the right to bodily privacy, absent evidence that the presence of a transgender student "has actually caused an invasion of any other student's privacy." 858 F.3d at 1054. And other courts to have considered the issue have consistently reached the same result, holding perceived risks insufficient to banish students who are transgender from common school facilities. *See* Opening Br. at 10 (collecting cases).

The cases Plaintiffs rely on each involve egregious scenarios such as unnecessary strip searches and the surreptitious filming of another person's naked body—and thus illustrate the high bar required to state a bodily privacy claim. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 376 (2009) (strip search of student to locate "nondangerous school contraband"); *Doe v. Luzerne Cty.*, 660 F.3d 169, 178 (3d Cir. 2011) (male deputy sheriff filmed breasts and

buttocks of female deputy sheriff without her consent); *Poe v. Leonard*, 282 F.3d 123, 136–39 (2d Cir. 2002) (male police officer surreptitiously filmed female civilian in dressing room while topless and without a bra); *Canedy v. Boardman*, 16 F.3d 183, 185, 188 (7th Cir. 1994) (male inmate subjected to "strip searches by female prison guards" in non-emergency situations with "no effort . . . to accommodate his privacy interests"); *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1319 (7th Cir. 1993) (strip search of student suspected of having "crotched" drugs); *Fortner v. Thomas*, 983 F.2d 1024, 1027 (11th Cir. 1993) (female prison guards spied on male prisoners through cracks in cell and shower doors and would "flirt, seduce, solicit, and aroused them to masturbate and otherwise exhibit their genitals"); *York v. Story*, 324 F.2d 450, 454–56 (9th Cir.1963) (male police officer deceived female sexual-assault victim into permitting him to photograph her genitals and exposed breasts under the pretext of an investigation).

Moreover, even if there were a fundamental right not to be seen by others with whom one is uncomfortable—a right no court has ever identified—Plaintiffs allege no such thing here. This case does not involve a lack of consent, as the District provides privacy curtains and single-use facilities that the Plaintiff Students can avail themselves of at their preference. *See* First Am. Compl. ¶¶ 99, 115, 178-182, 214(n)-(q). This case does not involve members of a different sex, but rather transgender students of the same gender as the Student Plaintiffs. *See Doe*, 276 F. Supp. 3d at 386. And the Student Plaintiffs do not allege that they experienced any violative conduct by Student A or any other transgender student while availing themselves (voluntarily) of the communal facilities. Plaintiffs' claim for violation of their constitutional right to bodily privacy should be dismissed.[1]

[1] Plaintiffs contend that Intervenors have no privacy interests and are only interested in "self affirmation." Pls. Br. at 12-13 & n.12. But the District's policy provides choices to use privacy curtains and single-use

III. Plaintiffs 14th Amendment Parental Rights Claims Should Be Dismissed

Plaintiff Parents argue that they are entitled to impose their views on the school district because, they say, their way of doing things is not "idiosyncratic." Pls. Br. at 14. The question of whether a view is mainstream or not is irrelevant to the Due Process analysis. The point is that parents cannot compel schools to replace state educational requirements with *any* personal views—whatever they might be. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005); *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring). At most, Plaintiffs have a right "to seek a reasonable alternative to public education for their children." *Scoma v. Chi. Bd. of Educ.*, 391 F. Supp. 452, 460 (N.D. Ill. 1974).

Plaintiffs attempt to distinguish parental control of "curriculum content" from the parental right to teach "modesty" or "religious tenets." Pls. Br. at 14. But modesty and religious tenets receive no special preference under the due process analysis as compared to parental views based on other concerns. *Compare Fields*, 427 F.3d at 1206 ("Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent."), *with Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding state mandatory vaccination laws against a parental challenge). And Plaintiffs' suggestion that parents have the right to "restrain unlawful . . . conduct" by the school system (Pls. Br. at 14), adds nothing to this argument. The right to restrain unlawful conduct depends on the underlying illegality, not on the parental right to "direct the upbringing and education" of their children. To the extent that Plaintiffs object on the basis of privacy or religious liberty, therefore, they must make those arguments under the proper legal rubric.

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facilities in addition to gender-appropriate communal facilities, and having those options is just as important to transgender students as to Plaintiffs. There is no basis to think that Intervenors' privacy interests are any different than Plaintiffs'

IV. Plaintiffs' First Amendment Claims Should Be Dismissed

Plaintiffs want their First Amendment Free Exercise claims assessed by applying strict scrutiny to the District's policy. But, as Intervenors explained (Opening Br. at 13-15), rational basis scrutiny applies because the District's policy is neutral and generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability"). Plaintiffs make no effort to explain how the District's policy fails rational basis analysis, thus conceding that their Free Exercise claims should be dismissed if this Court agrees that rational basis applies. *See Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (failure to oppose an argument permits an inference of acquiescence and "acquiescence operates as a waiver").

Nor do Plaintiffs make much effort to explain why strict scrutiny should apply under the First Amendment. Plaintiffs assert that the District's policy is not generally applicable because it "serves" only those students whose gender is different than the sex they were assigned at birth. Pls. Br. at 16. But Plaintiffs' focus on who the policy "serves" is misplaced. "Generally applicable" is not about who a government action *benefits*, but rather means that the government action is not "specifically directed" against a religious practice. *Employment Div.*, 494 U.S. at 878. To make that determination, courts look at whether the government enforces a law "in a selective manner" to "impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). The District's policy is not targeted at religion and affects all students, regardless of their religious beliefs—and the Plaintiffs make no attempt to refute that fact.

Instead, Plaintiffs (at 16) invoke the so-called "hybrid rights" doctrine. But Intervenors showed, and Plaintiffs do not refute, that this doctrine is no longer viable in this Circuit. Opening

Br. at 14-15 & n.6. And as explained in Parts II and III, *supra*, the bodily privacy and parental rights claims Plaintiffs rely on in support of applying the hybrid rights doctrine are not colorable claims. Rather, they should be dismissed. *See Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 641 (7th Cir. 2017), *cert. denied sub nom. Ill. Bible Colls. Ass'n v. Cross*, 138 S. Ct. 1021 (2018). In any event, as we show next in Part V, Plaintiffs' religious freedom claims also fail a strict scrutiny test.

V. Plaintiffs' Illinois Religious Freedom Restoration Act Claims Should Be Dismissed

Under IRFRA "[g]overnment may not *substantially burden* a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." 775 ILCS 35/15 (emphasis added). Plaintiffs have not alleged sufficient facts to support the claim that the District's policies "substantially burden" their religious exercise. *See* Opening Br. at 19-20. Plaintiffs assert that "the religious Plaintiffs hav[e] to choose between faith, privacy, or their right to access privacy facilities designated for the use of their sex." Pls. Br. at 15. But Plaintiffs have not alleged that any SPP Student has been forced to undress or use the restroom in a transgender student's presence. Plaintiffs say that religious SPP Students face a coercive choice between the District's policy and their own beliefs. *Id.* But as Plaintiffs acknowledge, there are private stalls in the restrooms, private changing stations within the locker rooms, which any student may use during changing periods, and a separate locker room for students who are participating in a swimming activity or class. *See* First Am. Compl. ¶¶ 74, 99. No Plaintiff, therefore, is forced to make that choice.

In any event, the District's policy would survive strict scrutiny because it is narrowly tailored to further a compelling government interest. Plaintiffs rightly concede that the District's

interest in eliminating discrimination against transgender students is a compelling government interest. Pls. Br. at 15. But they contend that the District's policy is not the "least restrictive means" of furthering that interest. In particular, Plaintiffs argue that allowing transgender students to use their preferred names and pronouns and dress in accordance with their gender is sufficient to eliminate discrimination. *Id.* (citing First Am. Compl. ¶ 130a-f). But lack of discrimination in one context cannot excuse discrimination in another. And those measures, although necessary, do not resolve the "stigma," "humiliation," and "continuing mark of difference" that transgender students experience when required to use separate facilities. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d at 729 (Davis, J., concurring); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Nothing short of being able to use all gender appropriate facilities is sufficient to end discrimination against transgender students.

Because any alternative that keeps transgender students out of gender-appropriate facilities would perpetuate discrimination, and because the District accommodates all students by permitting them to choose between multi-occupancy and single-occupancy facilities and providing privacy curtains and stalls (First Am. Compl. ¶¶ 99, 115), the District's policies are narrowly tailored to further a compelling government interest.

Finally, Plaintiffs offer no response to our argument that applying IRFRA to bar students from gender-appropriate facilities because they are transgender is preempted by Title IX, which bars exactly that discrimination as this Court has already observed. *See* Opening Br. at 20.

VI. ***Whitaker* Is Binding on this Court and Controls the Outcome in This Case**

Plaintiffs' principal tactic in opposing dismissal (at Part II.G) is to say that the law this Court relied on is wrong. But *Whitaker* is legally controlling of the outcome here and binding upon this Court. It held that "a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth" and that basing school policies on that

stereotype is sex discrimination under *Price Waterhouse* and *Oncale*. 858 F.3d at 1048-50. Plaintiffs protest (at 17) that "the *Whitaker* panel failed to consider several key Supreme Court decisions bearing directly on the issues." But Plaintiffs are making that argument to the wrong court—it is irrelevant to the binding force of *Whitaker* on this Court. In any event, it is wrong.

Frontiero v. Richardson, 411 U.S. 677 (1973) (which the *Whitaker* court acknowledged, 858 F.3d at 1050) (Pls. Br. at 21), predated *Price Waterhouse* and *Oncale* by decades and was resolved without the need to address the stereotyping at issue in *Price Waterhouse* and here. Plaintiffs' convoluted effort (at 17-18) to explain away *Price Waterhouse* rests on quoting the *dissent* in that case, and on an Age Discrimination in Employment Act decision, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (1989), which does not even touch on the issues here. *Gross* addressed the type of proof required in an ADEA case, held that *Price Waterhouse* does not govern the allocation of the burden of persuasion under the ADEA, and not once mentions sex stereotyping.

Equally remote is *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001) (Pls. Br. at 19), which involved the different burdens of proof established by federal immigration statutes for mothers and fathers to establish blood relationship to a child. Rejecting an equal protection argument that the statute's evidentiary rule was based on stereotypes, the Court held it was based on "an undeniable difference in circumstances of the parents at the time the child is born"—that "the moment of birth" establishes the "fact of parenthood" for the mother but not for the father. *Id.* at 68. The evidentiary value of giving birth in establishing motherhood bears not the slightest similarity to the issue of what "sex" means under federal antidiscrimination statutes. And Plaintiffs' reliance (at 20) on *United States v. Virginia Military Inst. ("VMI")*, 518 U.S. 515 (1996), turns on Plaintiffs' obsolete view that sex is determined at birth and schools must

separate facilities by sex so defined. *VMI* says nothing about how the law treats gender non-conforming students. In short, none of these decisions throw any doubt on *Whitaker*—or on many decisions of other appellate and trial courts reaching the same conclusion. *See* Opening Br. at 7-8.

Plaintiffs' second tactic (at 17) is to argue that *Whitaker* carries no weight because it involved a preliminary injunction rather than permanent relief. To be sure, the grant of a preliminary injunction is "preliminary" as to the parties in the particular case. But the unanimous Seventh Circuit panel's explication of the governing law in *Whitaker* was anything but preliminary. Indeed, the court analyzed the law with particular care because it was called on to reconsider its own prior decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), which this and other circuits had relied on to hold that transgender individuals are not protected by federal antidiscrimination laws. The *Whitaker* court carefully explained that *Price Waterhouse*'s understanding of sex-stereotyping superseded *Ulane*, that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth," and that Titles VII and IX prohibit "'discrimination based on a failure to conform to stereotypical gender norms.'" 858 F.3d at 1048, 1049 (*quoting Price Waterhouse*, 490 U.S. at 251). As this Court correctly held, *Whitaker* firmly establishes that punishing students for gender non-conformance by prohibiting them from using gender appropriate facilities violates Title IX and Equal Protection. Memo Op. at 9.

* * * * *

As this Court correctly determined when it rejected Plaintiffs' motion for a preliminary injunction, the law in this Circuit applying *Price Waterhouse* is clear and binding and compels dismissal of Plaintiffs' Title IX claims. Plaintiffs misstate the constitutional right to bodily

privacy, and any individual student's privacy concerns can be allayed by using options provided by the District's policy—as this Court recognized in its prior opinion. Plaintiffs' other claims are based either on misstating the scope of the right, misstating the level of scrutiny to be applied to the District's policy, or ignoring the option the policy creates for students who wish to maintain their privacy. Underlying all these errors is Plaintiffs' denial of the fundamental fact, enshrined in this Circuit's law, that transgender girls are girls, and transgender boys are boys.

CONCLUSION

For the reasons stated above and in Intervenors' opening memorandum, the First Amended Complaint should be dismissed with prejudice.

Dated: May 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the CM/ECF system. I certify that all participants in the case are registered MC/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ *Britt M. Miller*