IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JULIET EVANCHO; ELISSA RIDENOUR; and A.S., a minor, by and through his parent and next friend,	:	Civil Action No. 2:16-cv-01537
	:	Judge Mark R. Hornak
Plaintiffs,	:	
vs.	:	*Electronically Filed*
PINE-RICHLAND SCHOOL DISTRICT; DR. BRIAN R. MILLER, in his official capacity as Superintendent of the Pine-Richland School District; and NANCY BOWMAN, in her official capacity as Principal of Pine-Richland High School,	:	JURY TRIAL DEMANDED
Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Pine-Richland School District (the "District"), Dr. Brian R. Miller ("Dr. Miller") and Nancy Bowman ("Principal Bowman") (collectively "Defendants"), by and through their attorneys, the law firm of Maiello, Brungo & Maiello LLP, file this Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief.

I. FACTUAL BACKGROUND

A. The Deliberation and Passage of Resolution #2.

On September 12, 2016, after much reasoned debate and discussion, and in response to requests by District parents to implement a policy, the District Board of Education ("School Board") passed Resolution #2. (Banyas Decl. ¶ 18; Goebel Decl. ¶ 15). Resolution #2 requires all District students to utilize sex-specific facilities that correspond to their biological sex or any

unisex facilities. In addition, all students are permitted to use any of ten (10) unisex restrooms that are located throughout Pine-Richland High School. (Banyas Decl. ¶ 19; Goebel Decl. ¶ 16; Miller Decl. ¶ 4; Bowman Decl. ¶ 4). Prior to the passage of Resolution #2, the School Board had taken no action on directing the use of the School District's restrooms inconsistent with the student's biological sex. (Banyas, Decl. ¶¶ 7, 10; Goebel Decl. ¶¶ 5, 8). "The elimination of biologically distinct restrooms was not a process by the Board." (Pagan Decl. Ex. C, p. 25, lines 14 – 15).

On January 30, 2016, it became known to a parent of a student attending the District's High School (the "Parent") that transgender girls, i.e. individuals with male genitalia who believe themselves to be girls, were using the girls' restroom facilities in the High School without restriction. (Wiethorn Decl. ¶ 1). The following day, the Parent was able to confirm through his daughter that she had personally encountered transgender girls in the girls' restroom at the High School. (Wiethorn Decl. ¶ 2). In response to this information, the Parent sought information from the District. (Wiethorn Decl. ¶¶ 3, 4). Dr. Miller, the District's Superintendent, and Dr. Jeffrey Banyas, President of the School Board, met with the Parent to follow-up on his request for information. (Wiethorn Decl. ¶ 6). At the meeting, the Parent expressed his concerns with respect to his daughter's fundamental right to privacy – the shielding of her unclothed figure from the view of strangers, particularly strangers of the opposite sex – as not being respected by the current restroom situation at the High School. The Parent expressed his belief that restroom usage at the District needed to be done in a manner that protected the dignity of all students. (Wiethorn Decl. ¶¶ 7, 8).

Community members voiced concern at School Board meetings that permitting students to utilize restrooms corresponding with their stated gender identity, rather than biological sex, resulted in an unacceptable invasion of privacy. (Avallone Decl. ¶ 8, 10, 14; Wiethorn Decl. ¶¶ 7,

8). The majority of community members (parents) expressed deep concerns related to their children's bodily integrity and bodily privacy. (Wiethorn Decl. ¶¶ 9, 11; Avallone Decl. ¶¶ 7, 8, 10, 12, 14; Banyas Decl. ¶¶ 11, 12, 13, 14, 16, 17; Goebel Decl.¶¶ 9, 10, 11, 13; Miller Decl. ¶¶ 10, 11).

From the outset of its deliberative process, the School Board set forth its goals to maintain civil discourse and to encourage diverse points of view. (Ex. A, President's Statement). The School Board acknowledged that the District, as well as other school districts around the country, were continuing to struggle with the issue of use of restrooms by gender identity, rather than restricted to biological sex. *Id*. The School Board further recognized that the legal environment on the issue was unsettled and offered that it now found itself at the consensus-building phase. *Id*. (See also Pagan Decl. Ex. F – partial transcript of September 12 2016 meeting, p. 24, lines 17 – 20) ("School Districts everywhere are in limbo because of the disagreement or incoherence between OCR's significant guidance and the courts, and the different perspectives"); see also, (Miller Decl. ¶¶ 20 – 21) ("…shift from the commonly understood and long-standing practice of segregating restrooms based upon biological sex. Segregation of restrooms by biological sex had been the status quo of public schools and other facilities for decades even before the implementation of Title IX.") In an effort to promote awareness and informed discussion, the School Board held a public Student Services Committee information session on transgender youth. (Ex. "B", PR Notice of Meeting). Physicians from Children's Hospital of Pittsburgh of UPMC were invited by the School Board to provide the public with background knowledge from a medical, social and psychological perspective. *Id*.[1]

[1] Biographies of each physician are provided in Pagan Decl. Ex. O.

During its deliberative process, the School Board was routinely updated regarding the evolving legal landscape addressing transgender students' use of single-sex designated restrooms. Prior to the September 12, 2016 vote on Resolution #2, the School Board was informed that on August 3, 2016, the United States Supreme Court stayed the Fourth Circuit's mandate and the District Court's preliminary injunction in *G.G. v. Gloucester County School Board* during the time period taken by Supreme Court to make a final decision . *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016).[2] The Supreme Court's grant of the stay was a significant change in the legal landscape. This type of intervention is only granted where a lower court "tenders a ruling out of harmony with [the Supreme Court's] prior decisions, or [raises] questions of transcending public importance, or [presents] issues which would likely induce [the] Court to grant certiorari." See *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) (Douglas, J.).

The effect of the Supreme Court's stay was to require G.G. to use the restroom consistent with biological sex or use an alternative unisex restroom. As a result of the stay issued in *G.G.*, some School Board members believed the Supreme Court's action in issuing a stay mirrored the proposed effects of Resolution #2 – to issue a stay that restrooms in the District were to be used according to biological sex. (Pagan Decl. Ex. F – partial transcript of September 12, 2016 meeting, p. 8, lines 5 – 19) (". . . to put a stay, which is exactly what this would do . . . It would just put a stay…"). Resolution #2 represents a reasonable balance between the rights of transgender individuals and the privacy interests of students attending the Pine-Richland School District. (Banyas Decl. ¶ 24; Goebel Decl.¶ 18)

[2] The Petition for Certiorari was granted on October 28, 2016. *Gloucester Cnty. Bd. v. G.G.*, 2016 U.S. LEXIS 6408, 2016 WL 4565643.

B. Plaintiffs' Complaint and Motion for Preliminary Injunctive Relief.

Plaintiffs, Juliet Evancho ("Ms. Evancho"), Elissa Ridneour ("Ms. Ridenour") and A.S. (collectively, "Plaintiffs") instituted this action by filing a Complaint on October 6, 2016. (See Doc. No. 1). Plaintiffs are transgender individuals who seek to use restroom facilities at the District congruent with their gender identity. In other words, Plaintiffs were assigned a biological sex at birth based on their respective anatomies ("biological sex"), but identify as the opposite gender ("gender identity") and seek to utilize restroom facilities congruent with their gender identity. (See Doc. No. 1).

Plaintiffs' Complaint was filed three weeks after the School Board passed Resolution #2, which requires all students attending the District to utilize sex-specific facilities that correspond to their biological sex or any unisex facility. Plaintiffs seek monetary, declaratory and injunctive relief in the nature of an injunction preventing the District from enforcing Resolution #2. (See Doc. No. 1). Two weeks after filing their Complaint, on October 20, 2016, Plaintiffs filed a Motion for Preliminary Injunction seeking to enjoin Defendants from: 1) enforcing Resolution #2 or any other such policy denying Plaintiffs the access and use of restrooms and other sex-designated facilities matching their gender identity; 2) taking any formal or informal disciplinary action against Plaintiffs for using the restrooms and other sex-designated facilities consistent with their gender identity; and 3) refusing to treat Plaintiffs consistent with their gender identity in any respect. (See Doc. No. 22 at ¶ 4).

C. The Availability of Unisex Restrooms in the High School.

Prior to March 2016, at least six (6) of the ten (10) unisex restrooms located throughout the District High School were available for use at any time by any student. The remaining unisex restroom were reserved for staff use only. (Bowman Decl. ¶ 5). As of March 2016, all ten (10)

unisex restrooms were made available for student use throughout the High School and consistent signage outside each unisex restroom informed students of the restrooms unisex usage. (Miller Decl. ¶ 8, Ex. A; Bowman Decl.¶ 6). The unisex restrooms are spread throughout the High School, and are not clustered in a single location. Most are located near the communal, sex-segregated restrooms. (Bowman Decl. ¶ 7). District students use the unisex restrooms due to their proximity to the students' scheduled classrooms on a regular basis. (Bowman Decl. ¶ 10). The level of student usage of the unisex restrooms has remained constant before and after the passage of Resolution #2. (Bowman Decl. ¶12). The educational environment is not impacted by students' use of the unisex restrooms. (Bowman Decl.¶¶ 10 – 12).

The Human Rights Watch, in interviewing transgender students, found that "all-gender facilities, introduced as an option available to all students, would be their preferred solution and lessen the stress of gender policing by peers and teachers." (Pagan Decl. Ex. J – Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools (Sept. 2016), p. 18)). The District's ten unisex restrooms offer a reasoned and preferred approach. The unisex option, and availability of these restrooms throughout the High School, greatly diminish any harm alleged by Plaintiffs. Based on the Plaintiffs' current class schedules, they would not have to travel any greater distance to use a unisex restroom than they would to use a communal restroom. (Bowman Decl. ¶ 8). Based upon their class schedules, the Plaintiffs are never more than a forty-five (45) second walk to any unisex restroom. (Bowman, Decl. ¶ 9).

D. The Plaintiffs' Treatment in the District's Educational Programs.

As part of the District's efforts to ensure that the Plaintiffs are treated respectfully and pursuant to their gender identities, with the exception of requiring Plaintiffs to utilize restrooms corresponding to their biological sex, each Plaintiff is supported based on their expressed gender

identity. (Miller Decl. ¶ 25). By way of example, each Plaintiff is addressed at the District by their preferred name and pronoun. (Miller Decl. ¶ 26). The District has worked with its faculty members to make them aware that the Plaintiffs are to be treated in accordance with their stated gender identity. *Id*. In recognition of the importance of traditional senior year events and District traditions, the Plaintiffs are treated with respect to their stated gender identity. *Id*. Ms. Evancho was a candidate for homecoming queen during her senior year. *Id.* (See also Bowman Decl. ¶ 23). At the time of graduation, each Plaintiff will wear the color of graduation attire in accordance with their gender identity, and their preferred names will be on their diplomas. (Miller Decl. ¶¶ 24, 25).

The District has also made a point of working collaboratively with the Plaintiffs and their families in supporting the Plaintiffs. (Bowman Decl. ¶ 25). Principal Bowman and guidance counselors serve as points of contact for the Plaintiffs at the District to report any instances where they feel threatened, harassed or bullied. (Bowman Decl. ¶ 20). The atmosphere of the High School is a supportive environment for the Plaintiffs. (Bowman Decl. ¶ 22). Plaintiffs themselves have expressed their appreciation for this supportive environment. (Bowman Decl. ¶ 27). Their grades have not suffered, and their attendance has remained largely consistent prior to the passage of Resolution #2. (Miller Decl. ¶ 28, 29; Bowman Decl.¶ 24, Ex. B).

II. LEGAL STANDARD

In determining whether a preliminary injunction is warranted, a court must consider: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d

Cir. 1999) (citing *ACLU v. Black Horse Pike Regional Bd. of Educ*., 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996) (en banc)). It is the movant's burden to demonstrate that he or she merits the grant of the preliminary injunctive relief. *Campbell Soup Co. v. ConAgra, Inc*., 977 F.2d 86, 90 – 91 (3d Cir. 1992) ("In order to support a preliminary injunction, plaintiff must show both a likelihood of success on the merits and a probability of irreparable harm.").

Further, a court is to bear constantly in mind that an "[i]njunction is an equitable remedy which should not be lightly indulged in, but used sparingly and only in a clear and plain case." *Plain Dealer Publishing Co. v. Cleveland Type. Union # 53*, 520 F.2d 1220, 1230 (6th Cir. 1975). As a corollary of this principle, our Third Circuit Court of Appeals has observed that "upon an application for a preliminary injunction to doubt is to deny." *Madison Square Garden Corp. v. Braddock*, 90 F.2d 924, 927 (3d Cir. 1937). See also *Armstrong World Industries, Inc. v. Allibert*, No. Civ. 97-3914, 1997 U.S. Dist. LEXIS 19069, 1997 WL 793041, at *15 (E.D. Pa. Nov. 26, 1997) ("The 'extraordinary remedy' of a preliminary injunction is proper only in limited circumstances . . . Courts in this District and Circuit apply the equitable maxim that 'to doubt is to deny.'") (citing *Madison Square Garden Corp*.; *Graham v. Triangle Publications, Inc*., 233 F.Supp. 825, 829 (E.D. Pa. 1964), aff'd, 344 F.2d 775 (3d Cir. 1965); *Spirol Int'l Corp. v. Vogelsang Corp*., 652 F. Supp. 160, 161 (D.N.J. 1986)).

Moreover, it is plaintiff's burden to show that the "preliminary injunction must be the only way of protecting the plaintiff from harm." *Campbell Soup Co. v. ConAgra, Inc*., 977 F.2d at 91. Additionally, a "plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.' The 'requisite feared injury or harm must be irreparable – not merely serious or substantial,' and it 'must be of a peculiar nature, so that compensation in money cannot atone for it.'" *Id.* at 91-

92. No one factor will require granting relief. Rather, a district court "should endeavor to balance these four factors to determine if an injunction should issue." *Allegheny Energy*, 171 F.3d at 158.

Although all of the above-referenced factors are relevant, two are critical. A court may not grant injunctive relief, "regardless of what the equities seem to require," unless plaintiffs carry their burden of establishing both a likelihood of success and irreparable harm. *Adams v. Freedom Forge Corp*., 204 F.3d 475, 485 (3d Cir. 2000); accord *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 197 (3d Cir. 1990) (placing particular weight on the probability of irreparable harm and the likelihood of success on the merits, stating: "[W]e cannot sustain a preliminary injunction ordered by the district court where either or both of these prerequisites are absent." (quoting *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982)); *Morton v. Beyer*, 822 F.2d 364, 367 (3d Cir. 1987); *Freixenet, S.A. v. Admiral Wine & Liquor Co*., 731 F.2d 148, 151 (3d Cir. 1984); *American Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 366, 374 (3d Cir. 2012). See also *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 21, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (holding it was error to water down the irreparable harm requirement from "likelihood" to "possibility," even where likelihood of success was strong); *Talbert v. Corizon Medical*, 605 Fed. Appx. 86, 2015 U.S. App. LEXIS 9523, 2015 WL 3544517 (3d Cir. 2015) (summarily affirming denial of a preliminary injunction based on lack of irreparable harm).

Accordingly, for plaintiffs to sustain their burden of proof that they are entitled to a preliminary injunction under Federal Rule of Civil Procedure 65, they must demonstrate both a reasonable likelihood of success on the merits and that they will be irreparably harmed if the requested relief is not granted. *Abu-Jamal v. Price*, 154 F.3d 128, 133 (3d Cir. 1998). If the movant fails to carry this burden on either of these elements, the motion should be denied since

a party seeking such relief must "demonstrate both a likelihood of success on the merits and the probability of irreparable harm if relief is not granted." *Green v. Hawkinberry*, 2015 U.S. Dist. LEXIS 14597 *4, 2015 WL 507057 (W.D. Pa. Feb. 6, 2015) (citing, *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989)).

As to the specific relief sought, "[a] preliminary injunction can take two forms." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co*., 571 F.3d 873, 878 (9th Cir. 2009). First, "[a] prohibitory injunction prohibits a party from taking action and 'preserve[s] the status quo pending a determination of the action on the merits.'" *Id*. (quoting *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988)). Second, "[a] mandatory injunction 'orders a responsible party to take action.'" *Id*. at 879 (quoting *Meghrig v. KFC W., Inc*., 516 U.S. 479, 484, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996)) (internal quotation marks omitted). "A mandatory injunction 'goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Id.* (alterations in original) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)) (internal quotation marks omitted). In the instant matter, Plaintiffs are seeking mandatory relief in ordering the Defendants to permit single-sex facilities authorized under Title IX regulations to be used by Plaintiffs in concert with their gender identification. The purpose of a preliminary injunction is to preserve the status quo that existed between the parties prior to the filing of the underlying action. Courts disfavor preliminary injunctive relief that essentially grants a movant the ultimate relief he or she seeks. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).

The constitutional claims in this case raise novel and difficult questions in a context not clearly developed in the law. Plaintiffs' task of presenting the kind of "clear showing" necessary to justify preliminary relief, *Campbell Soup Co*., 91-92, is even more difficult because they raise novel issues. See *Capital Associated Indus. v. Cooper*, 129 F. Supp. 3d 281, 288– 89 (M.D.N.C.

2015) ("Where, as in this case, 'substantial issues of constitutional dimensions' are before the court, those issues 'should be fully developed at trial in order to [e]nsure a proper and just resolution.'" (quoting *Wetzel v. Edwards*, 635 F.2d 283, 291 (4th Cir. 1980))); see also *Gantt v. Clemson Agr. Coll. of S.C.*, 208 F. Supp. 416, 418 (W.D.S.C. 1962) ("On an application for preliminary injunction, the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.").

III. ARGUMENT

A. Plaintiffs Have Not Shown a Likelihood of Success on the Merits of Their Claims.[3]

1. Plaintiffs' Title IX Claim.

Plaintiffs' claim pursuant to Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681, *et seq.*) ("Title IX") is a simple exercise of statutory application. "Sex", as understood and as Congress intended, is a description of our male and female biological differences. School locker rooms, restrooms and similar intimate facilities serve an essential purpose: to provide a secluded place for boys and girls to change, shower and perform personal hygiene without intrusion of the opposite sex. There is no ambiguity in the term "sex" in Title IX as it references the biological indicators of male and female. See Am. Psychological Ass'n Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) (sex refers to the biological indicators of male and female (understood in the context of reproductive capacity) such as sex chromosomes, gonads, sex hormones, and non-ambiguous internal and external genitalia."). Title IX speaks with clarity to the issue of separation of sexes. See *Cannon v. University of Chicago*, 441 U.S. 677, 691 – 693

[3] Defendants have filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and brief in support of the same contemporaneously with this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief. For purposes of efficiency, Defendants hereby incorporate by reference their arguments asserted therein as to each of Plaintiffs' claims and the reasons why Plaintiffs have failed to state any claim upon which relief may be granted.

(1977) (recognizing that Congress drafted Title IX "with an unmistakable focus on the benefited class," and did not "write it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices"). See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

Title IX's general rule is that a funding recipient cannot treat people differently on the basis of sex unless expressly authorized by statute. Office of Civil Rights December 2014 *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities.* See also, Pagan Decl. Ex. T, p. 9 of 37. Separation of the sexes based upon biology is expressly authorized by Title IX's implementing regulations at 34 C.F.R. 106.33 which expressly permits a recipient to "provide toilet, locker room and shower facilities on the basis of sex [as long as] such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

Recently, in *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), Judge Kim R. Gibson was presented with the question of whether the University of Pittsburgh-Johnstown engaged in unlawful discrimination under Title IX and violated the Equal Protection Clause of the United States Constitution when it prohibited a transgender male student from using restrooms and locker rooms designated for men on campus. The Court concluded that "[t]he simple answer is no." *Id.* at 661.

In *Johnston*, the District Court found that the plaintiff failed to allege plausible claims for relief under Equal Protection and Title IX as a matter of law. *Id*. at 661. The Court, accepting all facts as true, found that Johnston identified as a transgender male. He understood his male gender identity at a very early age, informing his parents that he was a boy at the age of nine. Johnston

transitioned to living in accordance with his male gender identity and began to hold himself out as a male in all aspects of life. *Id*. at 662. Similar to Plaintiffs in the instant matter, Johnston underwent counseling related to his gender identity and received hormone treatment. *Id.* At the time of admission, he listed his sex as "female", but began taking classes and, at all times thereafter, consistently lived as a male. *Id.*

While at the University, Johnston consistently used the men's restrooms on campus. *Id* at 663. Following his enrollment in a men's weight training class, which was only attended by men, University officials informed Johnston that he could no longer use the men's locker room. *Id*. Johnston initially agreed to use a unisex facility, but later began to again use the men's locker room. He received a number of citations for disorderly conduct from campus police and was eventually brought up on disciplinary charges. *Id.* He was subsequently expelled as a result of the disciplinary infractions and lost his scholarship. *Id.*

In analyzing Johnston's Title IX claims, the Court held that Johnston had not alleged facts in violation of Title IX as the separation of sex-segregated restrooms and locker room facilities based on a student's natal or birth sex was permissible. "On a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Id.* at 676 (citing *Etsitty v. Utah Transit Auth*., 502 F. 3d 1215, 1222. (10th Cir. 2007)). As Judge Gibson held, "the exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited." *Id*.

As it currently stands, Title IX and its implementing regulations authorize schools such as the District to separate living facilities, restrooms, locker rooms and shower facilities on the basis

of biological sex. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843-44 (1984), where Congress has expressly delegated to an agency the power to "elucidate a specific provision of the statute by regulation", that agency's regulations should be accorded controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. See also *Neal v. Board of Trustees*, 198 F.3d 763, 770 (9th Cir. 1999); *Kelley v. Board of Trustees, Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995) (deferring to 34 C.F.R. § 106.41 and noting that "where Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference"). Thus, the Title IX regulation at 34 C.F.R. § 106.33 providing for separate sex-based facilities must be given *Chevron* deference.

The District has clearly complied with Title IX and its implementing regulations through the approval of Resolution #2. But, as it did so, it was nonetheless sensitive to Plaintiffs' gender transition, accommodating their requested name changes and pronoun use according to their gender identification, and establishing communication between the school, student and family in the event the student became a target of bullying and/or harassment. (See Pasquinelli Decl. ¶¶ 9 – 13; Bowman Decl. ¶¶ 22, 23). The District has made a good-faith effort to accommodate Plaintiffs and assist them in their transition, balancing its concern for their well-being with its responsibilities to all students. (Complaint, ¶¶ 38, 42, 53, 54, 56, 64, 65, 68 – 71, 73, see also Pasquinelli Decl. ¶¶ 12 – 16; Bowman Decl. ¶¶ 21 – 23, 25 – 26). The District has acted legally in implementing a Resolution that provides all students with physiological privacy and safety in restrooms and other sex-designated facilities. The School Board, in approving Resolution #2, was clearly complying with the unambiguous language of Title IX and its implementing regulations.

There exists no legal binding precedent on this Court concerning the meaning of the term "sex" as used in Title IX as including "gender identity." In fact, the state of the legal determination of the term "sex" was (and continues to be) in flux at the time of Plaintiffs' filing for injunctive relief. School districts everywhere are in limbo because of the disagreement over the meaning of "sex" and the issuance of "guidance" by the United States Department of Education ("DOE") and United States Department of Justice ("DOJ") demonstrating the agencies' emerging change in their position ("2016 DCL").[4]

Significantly, the above-referenced 2016 DCL is currently the subject of a nationwide injunction enjoining the DOE from enforcing its position that "sex" encompasses gender identity. See *Texas v. United States*, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016). Even more significantly, the very issue of whether or not the 2016 DCL upon which Plaintiffs rely should be given effect in light of 34 C.F.R. § 106.33 is currently before the United States Supreme Court. See, *G.G. v. Gloucester County Sch. Bd.*, 15 cv 00054, 2016 WL 3581852 (E.D. Va. June 23, 2016) Stay Pending Appeal Denied, 15 cv 00054, 2016 WL 3743189 (4th Cir. July 12, 2016) Mandate Recalled, Stay Granted No. 16-273, ___S. Ct. ___, 2016 WL 4131636 (August 3, 2016). Thus, Plaintiffs cannot meet their burden that they have a likelihood of success on the merits of their Title IX claim; specifically that the DOE and DOJ's interpretation of Title IX via the 2016 DCL is in accordance with law or entitled to any deference.

[4] On May 13, 2016, the DOE and the DOJ issued a joint guidance letter to all public schools, colleges and universities in the country receiving federal financial assistance indicating that all public schools are obligated to treat transgender students consistent with their gender identity in all respects including name and pronoun usage, restroom access and overnight accommodations. In the joint guidance, the DOE and DOJ sought to "clarify" that Title IX's prohibition on sex-based discrimination "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status." *Dear Colleague Letter on Transgender Students*, May 13, 2016, Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Dept. of Education, and Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Dept. of Justice.

Furthermore, Plaintiffs are in essence arguing for something that does not exist – multi-user unisex restrooms. The relief requested in Plaintiffs' Motion is an Order that would require the Defendants to alter the long-standing practice of single-sex designated restrooms. It is clear that what Plaintiffs' Motion seeks is an affirmative implementation of a particular use of the restrooms based on gender identity. This goes beyond maintaining the status quo. In short, Plaintiffs seek a mandatory injunction. "Because mandatory preliminary injunctions disturb rather than preserve the status quo, they are particularly disfavored and should not be issued unless the facts and law clearly favor the moving party." *Larami Corp. v. Lanard Toys, Ltd.*, 1992 U.S. Dist. LEXIS 1475 *, 1992 WL 20320 (E.D. Pa. Jan. 30, 1992) (citing *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976); *Anderson v. United States*, 612 F.2d 1112,1115 (9th Cir. 1979) ("In general, mandatory injunctions 'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'").

2. Plaintiffs' Equal Protection Claim.

Plaintiffs have likewise not shown that they have a likelihood of success on the merits of their claims for violation of their Equal Protection rights guaranteed by the Fourteenth Amendment. More specifically, Plaintiffs assert that Defendants have denied them access to sex segregated restroom facilities on the basis of gender identity, and that Defendants put in place a "policy" to effectuate this alleged discriminatory purpose.

"To state a claim under the Equal Protection Clause, a §1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Shoemaker v. City of Lock Haven*, 906 F. Supp. 230, 238 (M.D. Pa. 1995) (citations omitted). In other words, a plaintiff must demonstrate that he or she received different treatment

from that received by other individuals similarly situated. *Kuhar v. Greensburg—Salem Sch. Dist*., 616 F.2d 676, 677, n. 1 (3d Cir.1980). "In order for [individuals] to be deemed similarly situated, the individuals with whom a plaintiff seeks to be compared must have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the [defendant's] treatment of them for it." *Jones v. Hosp. of Univ. of P*A. 2004 WL 1773725, at *6 (E.D. Pa. August 5, 2004). Similarly situated [students] must "have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish the school's treatment of them for it." *Bailey v. United Airlines*, Civ. A. No. 97-5223, 2002 WL 1397476, at *9 (E.D. PA. June 26, 2002).

In the *Johnston* case, supra, the plaintiff alleged that the University of Pittsburgh violated the Equal Protection Clause by "treat[ing] [p]laintiff differently from other similarly situated students on the basis of his sex, including his transgender status and perceived failure to conform to gender stereotypes." 97 F. Supp. 3d at 666. Specifically, Johnston's complaint averred that non-transgender male students were permitted to use the men's locker room and restroom facilities on campus while he was denied access to the men's locker rooms and restrooms. *Id*. at 667-668. The University defendants argued that Johnston had not raised a cognizable claim for a violation of Equal Protection under the law. Judge Gibson viewed the issue as "relatively narrow with well-settled applicable legal principles" and dismissed Johnston's Equal Protection claim. *Id*. at 668.

While conducting his legal analysis, Judge Gibson identified two important, but competing, interests: 1) Johnston's interest in performing life's most basic and routine functions in an environment consistent with his gender identity; and 2) the University's related interest of providing its students a safe and comfortable environment for performing these same basic functions. *Id*. Judge Gibson, writing in 2015, recognized that society's views of gender, gender

identity, sex and sexual orientation have significantly evolved and that the legal landscape is transforming as it relates to gender identity, while also recognizing society's long-held tradition of performing such functions in sex-segregated basis based on biological sex or birth sex. *Id.*

The *Johnston* Court, citing to Supreme Court precedent, acknowledged that not all classifications based on sex are constitutionally impermissible. "The heightened review standard our precedent establishes does not make sex a proscribed classification . . . [p]hysical difference between men and women, however, are enduring; '[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" *Id.* at 669 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, (1998) ("[T]he statute (Title VII) does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny . . ."). As such, separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause. Thus, "while detrimental gender classifications by the government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes." *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring). This same legal framework is applicable to the facts of this matter.

As in the present matter, the *Johnston* plaintiff asserted discrimination "on the basis of sex." Judge Gibson held that the term "sex" in the context of Equal Protection and anti-discrimination statutes had been defined as biological sex assigned to a person at birth. *Id.* at 670-

71, citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("sex like race and national origin, is an immutable characteristic determined solely by the accident of birth."). Finding that Johnston's birth sex was female, the Court found his claims for sex discrimination were not cognizable as the law permits distinctions between male and female on the basis of birth sex. *Id.* at 671. Plaintiffs in the instant matter have self-identified in their Complaint their sex assigned at birth. For these same reasons, Plaintiffs' Equal Protection claims are not cognizable as distinctions between male and female for biological differences are permissible.

Furthermore, under the Fourteenth Amendment, no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Shuman ex rel. Shertzer v. Penn Manor School Dist.*, 422 F.3d 141, 151 (3d Cir. 2005) (quoting U.S. Const. amend. XIV, § 1.). However, this broad principle "must coexist" with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Romer v. Evans*, 517 U.S. 620, 631 (1996). As a result, the Supreme Court has "attempted to reconcile the principle with the reality" by prescribing different levels of scrutiny depending on whether a law "targets a suspect class." *Id.* Laws that do not target a suspect class are subject to rational basis review, and courts should "uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id*. By contrast, laws that target a suspect class, such as race, are subject to strict scrutiny. See *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 102 L. Ed. 854 (1989).

In the instant matter, the Plaintiffs allege that discrimination based on transgender status warrants heightened scrutiny. (Complaint, ¶ 205 – 210). However, as held by the Court in Johnston:

> First, neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect

> classification under the Equal Protection Clause. Accordingly, Plaintiff's discrimination claim is reviewed under the rational basis standard. This finding is consistent with numerous other courts that have considered allegations of discrimination by transgender individuals.
>
> Nevertheless, even if a heightened standard of review were to apply, the result would be the same as under rational basis here. Here, [the University's] policy of segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest.' Specifically, [the University] explained that is policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts. 97 F. Supp. 3d at 669 – 670. Thus, whether this Court applies rational basis review or the heightened standard of review urged by Plaintiffs, Plaintiffs have still failed to plead an Equal Protection Claim upon which relief can be granted.

Defendants contend that bodily privacy interests arise from physiological differences between men and women, and that sex should therefore be defined in terms of physiology for the purposes of bathrooms, showers and other similar facilities. Plaintiffs, by contrast, implicitly contend that bodily privacy interests arise from differences in gender identity, and that sex should therefore be defined in terms of gender identity concerning the use of these facilities. In support of their position, Plaintiffs submitted an expert declaration that, from a "medical perspective", external genitalia alone is not an accurate proxy for a person's sex and that gender identity is the most important and determinative factor. (Ehrensaft Decl. ¶ 18.)[5] Regardless of the "medical perspective", Supreme Court precedent and persuasive authority in this District Court support Defendants' position that physiological characteristics distinguish men and women for purposes

[5] In its case management Order dated October 24, 2016, this Court Ordered that the parties are to include in their filings any challenge to testimony based upon *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). Although Defendants do not challenge the affidavit testimony of Diane Ehrensaft, PhD based upon *Daubert* grounds at this time, for purposes of resolution of Plaintiffs' Motion for Preliminary Injunction, Defendants do not waive any such *Daubert* challenges concerning Dr. Ehrensaft or any other expert witnesses identified by Plaintiffs at the time of full disposition of this matter on the merits.

of bodily privacy. See, *Virginia 518 U.S. at 540 – 46,, 550 n. 19. (*"Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of physical training programs.") See also, *Johnston supra*.

Virginia is not the only Equal Protection case to distinguish between the sexes on the basis of physiology. In *Tuan Anh Nguyen v. Immigration and Naturalization Serv*., 533 U.S. 53 (2001), the Court upheld an Immigration and Naturalization Service ("INS") policy that imposed "a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother." *Id*. 59–60. The Supreme Court held that the government's "use of gender specific terms" is constitutionally permissible when the relevant law "takes into account a biological difference" between men and women. *Id.* at 64. The Supreme Court rejected the argument that the INS policy reflected stereotypes about the roles and capacities of mothers and fathers, stating that "the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis." *Id*. at 68. Instead, the Supreme Court found, "There is nothing irrational or improper in the recognition that at the moment of birth . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype." *Id.* Finally, the Court concluded:

> To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73.

The legal precedents in *Virginia* and *Nguyen* inform this Court that the challenged classification at issue in this instant matter – failing to treat transgender females and males concerning the use of restrooms the same as cisgender females and males – is not based upon gender stereotypes. The differences between females and males in relation to bodily excretion is a real one. Equal Protection does not forbid these distinctions. The privacy interests that justify the Defendants' passage of Resolution #2 arise from the physiological differences between females and males, not from improper, discriminatory classification. Accordingly, Plaintiffs have failed to show that they will succeed on the merits of their Equal Protection claim.

B. Plaintiffs Have Not Shown That They Will Suffer Irreparable Harm.

In order to demonstrate irreparable harm, a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the **only** way of protecting the plaintiff from harm. *Campbell Soup*, *supra*, p. 91) (emphasis added). "The law . . . is clear in this Circuit: In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Id*. at 91 (internal quotation marks and citations omitted). Furthermore, establishing a risk of irreparable harm is not enough for a preliminary injunction. A plaintiff has the burden of establishing a clear showing of immediate irreparable injury.

Additionally, "[t]he 'requisite feared injury or harm must be irreparable—not merely serious or substantial,' and it 'must be of a peculiar nature, so that compensation in money cannot atone for it.'" *Id*. at 91 – 92 (quoting *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)). Indeed, as the courts have also recognized, "[t]his is not an easy burden." *Adams*, 204 F.3d at 485. A plaintiff must "demonstrate a significant risk that he or she will experience harm

that cannot adequately be compensated after the fact by monetary damages." *Id*. at 484 – 85. Accordingly, it is clear that courts have "long held that an injury measured in solely monetary terms cannot constitute irreparable harm." *Checker Cab of Phila. Inc. v. Uber Techs., Inc*., 643 Fed. Appx. 229, 232, 2016 U.S. App. LEXIS 4484, 2016 WL 929310 (3d Cir. 2016) (citing *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co*., 562 F.3d 553, 557 (3d Cir. 2009)).

In order to merit the grant of a preliminary injunction, plaintiffs bear the burden of establishing a "clear showing of immediate irreparable injury". *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989). As indicated above, this is not an easy burden. For "a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future, [f]or the claimed injury cannot merely be possible, speculative or remote." *Dice v. Clinicorp, Inc*., 887 F. Supp. 803, 809 (W.D. Pa. 1995). Absent a showing of immediate, irreparable injury, the court should deny preliminary injunctive relief. *Tilley v. Allegheny County Jail*, 2010 U.S. Dist. LEXIS 40080 *19, 2010 WL 1664900 (W.D. Pa. Feb. 18, 2010). In this context, the word "irreparable" has a specific meaning and connotes "that which cannot be repaired, retrieved, put down again [or] atoned for." *Acierno v. New Castle County*, 40 F.3d 645, 655 (3d Cir. 1994) (citations omitted). Harm "is 'irreparable' where it 'cannot be prevented or fully rectified by the final judgment after trial." *Girl Scouts of Monitou Council Inc, v. Girls Scouts of the United States of America* 549 F. 3d 1079, 1089 (7th Cir.2008).

In the instant matter, Plaintiffs fail to carry this heavy burden. Plaintiffs, in a conclusory and generalized manner, offer that they are suffering from "significant educational, psychological, and physical harms" and that they will suffer and continue to suffer if Resolution #2 is not enjoined. (Plaintiffs' Motion, ¶¶ 3, 7). They also list a "host of irreparable harms" such as "distress, stigma, anxiety, depression, decreased academic performance and possible disciplinary actions."

(Plaintiffs' Memorandum, p. 12.). Plaintiffs reject the use of the District's unisex restrooms because, allegedly, anything short of achieving their end result causes "discomfort, anxiety, and distress."[6] (Evancho Decl. ¶ 48; Ridenour Decl. ¶ 35; A.S. Decl. ¶ 34).

In further rebuke of the Defendants' alternative of providing ten unisex restrooms throughout the High School, Plaintiffs contend that the unisex restrooms "marginalize and separates them from the rest of the student body and stigmatizes them." (Evancho Decl. ¶ 49; Ridenour Decl. ¶¶ 36 – 37; A.S. Decl. ¶ 35; M. Evancho, Decl. ¶ 25; G. Ridenour Decl. ¶ 44). They also offer that using the District's unisex restrooms causes them to "continually disclose their gender identity and outs them as transgender." (Evancho Decl. ¶ 49; Ridenour Decl.¶¶ 36 – 37; A.S. Decl. ¶ 35; M. Evancho Decl. ¶ 25; G. Ridenour Decl. ¶¶ 40 – 42). However, disclosure of what is already revealed (i.e. that Plaintiffs are transgender) cannot establish immediate irreparable harm. This alleged threat of forced disclosure or "outing" is a red-herring. Many District students have used and continue to use the multiple unisex restrooms prior to and following the approval of Resolution #2. (See Bowman Decl. ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8). Thus, there is no "stigma" or "marginalization" associated with the use of the unisex restrooms at the High School. (See Bowman Decl. ¶¶ 10 – 12; Pasquinelli Decl. ¶¶ 7 – 8).

In an additional disingenuous argument, Plaintiffs assert that their education is disrupted because "they are forced to expend additional time to simply find a restroom." (Plaintiffs' Memorandum of Law, p. 12). However, it is uncontroverted that the ten unisex restrooms are readily available to Plaintiffs in all sections of the High School wherein they attend classes. (See Bowman Decl. ¶¶ 9 – 12; Pasquinelli Decl. ¶¶ 7 – 8). Such generalizations of harm within a fill-

[6] Plaintiffs' argument that their use of the District's unisex restrooms results in marginalization and stigmatization is contradictory to Plaintiffs' argument that if a cisgender student ever feels uncomfortable being in the presence of a transgender student in the communal restroom then that student should simply use the unisex restroom.

in-the-blank complaint completely underscore the lack of irreparable harm and Plaintiffs' failure to meet their burden concerning the same. "Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995).

In this instant matter, Plaintiffs have also alleged psychological harm as a result of their feelings of discomfort and isolation in being barred from utilizing restrooms congruent with their gender identity. They have alleged general averments of discomfort, fright and isolation. (See Evancho Decl. at ¶¶ 48-50; see also Ridenour Decl.; A.S. Decl.). Plaintiffs make additional claims that they have avoided using District restrooms altogether due to this issue. (See Evancho Decl. ¶ 50; see also Ridenour Decl.; A.S. Decl.). Any harm that Plaintiffs allege due to their inability to use the District's restrooms is self-inflicted as the District has provided ten (10) unisex restrooms for all students to use. (See Miller Decl. ¶ 4; Bowman Decl. ¶¶ 4 – 6; Pasquinelli Decl. ¶¶ 3 – 5).

Injunctions will not be issued merely to allay the fears and apprehensions, or to soothe the anxieties, of the parties. Nor will an injunction be issued "to restrain one from doing what he [or she] is not attempting and does not intend to do." *Continental Group, Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) (citation omitted). Should Defendants be found liable for such harm, a contention with which Defendants strongly disagree, Plaintiffs may be compensated with monetary damages just the same as any other plaintiff who alleges mental anguish resulting from some injury. Such damages may be ascertained through the presentation of bills for psychiatric care or through the testimony of expert witnesses.

Plaintiffs have not only failed to demonstrate they will be injured absent enjoining the enforcement of Resolution #2 but also that any of their alleged injuries were not irreparable, i.e. that any injuries would not be rectified following judgment on the merits. Thus, an injunction

cannot be issued "simply to eliminate the possibility of a remote future injury." Id. at 655 (citation omitted) (see also *Green v. Hawkinberry*, 2015 U.S. Dist. LEXIS 14597 *, 2015 WL 507057 (W.D. Pa. Feb. 6, 2015)).

Plaintiffs also contend that irreparable harm is presumed when a party establishes a constitutional violation. Plaintiffs rely upon the Third Circuit case of *Murray v. Silberstein* for this proposition. 882 F. 2d 61 (3d Cir. 1989). First, this argument relies on the premise that Plaintiffs' underlying Title IX and Equal Protection claims have merit. As already set forth above, Plaintiffs cannot show at this juncture that they are likely to prevail on the merits of either claim.

Additionally, the *Murray* case does not support Plaintiffs' overreaching proposition. The extract referred to by Plaintiffs from the *Murray* opinion addresses the procedural history of the case and cites to a section of a memorandum that the plaintiff filed in support of his request for injunctive relief. *Murray*, 882 F. 2d at 63 (emphasis supplied). The Circuit Court did not reach the conclusion as asserted by Plaintiffs. The *Murray* plaintiff in his memorandum cited to the case of *Elrod v. Burns*. 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547(1976). In *Elrod*, the Supreme Court reasoned that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and that, in that instance "such injury was both threatened and occurring". In the instant matter, not only are there no such First Amendment freedoms at issue, but there are also not any injuries that are actually occurring (see above). An allegation of a violation of a Constitutional right does not meet this threshold burden.

At its core, this case involves allegations by Plaintiffs that they have suffered mental harm due to Defendants' purported violation of Title IX and the Equal Protection Clause of the United States Constitution. Other plaintiffs who likewise allege such psychiatric harm obtain monetary damages to compensate them for mental injuries. Although Plaintiffs' legal claims may be

relatively novel, their request for relief is not. The uncontroverted evidence is that the Plaintiffs (as well as all other District students) have alternative options for their use of the restrooms for private, bodily functions. As indicated above, Plaintiffs can take steps to avoid their speculative harms. Plaintiffs have provided no evidence that they actually now suffer or ever have suffered any of these harms. Once again, such emotional suffering is commonly compensated by monetary awards in our legal system. As Plaintiffs have failed to show that they are likely to suffer irreparable harm if the Defendants are not enjoined from enforcing Resolution #2, Plaintiffs' Motion for Preliminary Injunction must be denied.

C. Plaintiffs Have Not Shown That the Injuries They Allegedly Face Outweigh Those Which Would be Sustained by Defendants as a Result of the Injunctive Relief.

Whereas, in this instant case, Plaintiffs have not made their threshold showings of likelihood of success on the merits and irreparable harm, this Court must deny the requested injunction. *Girl Scouts*, 549 F.3d at 1086. Because of these failures, this Court is not required to address the balancing phase of the analysis. Assuming, *arguendo*, that this Court finds that Plaintiffs have established their initial threshold burdens addressed above (which it should not), Defendants contend that the balance of harms do not weigh in Plaintiffs' favor.

The balancing of harms test essentially requires the court to measure the harm to the plaintiff, if the preliminary relief is erroneously denied, and the harm to the defendant, if the preliminary relief is erroneously granted. See *Faheem-El v. Klincar*, 841 F.2d 712, 717 (7th Cir. 1988) (a preliminary injunction analysis "requires the district court to assess the probability that each party will prevail on the merits and the harm of granting or withholding relief during the pendency of the suit."). The harms to Plaintiffs here are the possible denial of their constitutional right to Equal Protection.

> Of course, entering into the balancing of the harms calculus is the likelihood, in fact, that the plaintiff's rights are also being violated. The measurement of whether a plaintiff's rights are being violated is conducted by considering the "reasonable probability of success on the merits" factor. However, the measurement of that factor must be considered within the context of the balancing of the harms test. Indeed, if it is highly likely that a plaintiff will succeed on the merits, it is more likely that he will suffer harms, i.e., he will suffer the denial of his rights. If, on the other hand, the Plaintiff makes a weak showing with respect to the strength of his case, the more unlikely it is that he or she will suffer harms if the injunctive relief is denied and, the more likely it becomes that the defendant will suffer harms if injunctive relief is erroneously entered.

Tilley v. Allegheny Jail, *24.

As set forth above, each of the Plaintiffs' allegations of harm do not meet the standards for injunctive relief. Additionally, Plaintiffs do not have a reasonable probability of success on the merits. However, the School District will be harmed if the long-standing use of restrooms based upon biology will be overturned. Rather than permitting the District to focus on the educational needs of its students, granting Plaintiffs' injunctive relief will force the District to focus on the use of its restroom facilities as an official practice that has not been done before. Based upon the rigorous debate during the School Board's deliberation process, the Defendants contend that public debate would now continue and distract from the educational programs until such time as an ultimate determination on this issue is made by this Court or otherwise. The resulting controversy would be detrimental to the District's students' education. Disrupting the status quo would distract from the District's primary mandate of providing the best education for its students. (Miller Decl. ¶ 23).

Such action equates to a mandatory injunction and would overturn the status quo. The status quo, as recognized by the United States Supreme Court via the issuance of its stay in the *G.G.* matter (see above) is consistent with the use of restrooms according to biology. In this instance, the District's High School offers Plaintiffs the alternative of ten (10) unisex restrooms

which do not stigmatize or marginalize their identities as such restrooms are routinely used by the entire student body. That is to say that the unisex restrooms are open to all students, and are used by both cisgender and transgender students.

D. Plaintiffs Have Not Shown That Injunctive Relief Would Not Adversely Affect Public Interests.

"In considering where the public interest lies, it is essential to evaluate the possible effects upon the public from the grant or denial of injunctive relief." *Oburn v. Shapp*, 521 F.2d 142, 152 (3d Cir. 1975). Entering a preliminary injunction against a local government's public servants clearly implicates the public's interests. *Illinois Psychological Assoc. v. Falk*, 818 F.2d 1337, 1340 (7th Cir. 1987) ("The public interest . . . a traditional consideration in deciding whether to grant or deny an injunction . . . and considerations of comity toward the states as sovereign entities (greatly diminished sovereigns, to be sure), support our conclusion that state action should not be set at naught, even temporarily, without a showing that the plaintiff's legal rights have probably been infringed."). *Tilley*, 2010 U.S. Dist. LEXIS 40080 *26, (W.D. Pa. Feb. 18, 2010) citing, *Illinois Psychological Assoc v. Falk*, 818 F. 2d 1337, 1340 (7th Cir. 1987).

Courts are restrained, when dealing with matters of school policy, by the long-established and salutary rule that the courts should not function as super school boards. The court will not interfere with the discretionary exercise of a school board's power unless the action was based on a misconception of law, ignorance through lack of inquiry into the facts necessary to form an intelligent judgment, or the result of arbitrary will or caprice. It is only when the board transcends the limits of its legal discretion that it is amenable to the injunctive processes of a court of equity. *Zebra v. School Dist of the City of Pittsburgh*., 449 Pa. 432, 437, 296 A.2d 748, 1972 Pa. LEXIS 394 (Pa. 1972) citing, *Landerman v. Churchill Area School District*, 414 Pa. 530, 534, 200 A. 2d 867, 869 (1964); *Deteweiler v. Hatfield Borough School District*, 376 Pa. 555, 566, 104 A. 2d 100,

116-117 (1954). The burden of showing such an abuse is a heavy one and rests with the party seeking the injunction. *Zebra*, 449 Pa. 432, 437 citing, *Hibbs v. Arensberg*, 276 Pa. 24, 26, 119 A. 727, 728 (1923). The Pennsylvania courts have set a high standard for reversal of a school board's discretionary decision:

> [T]he exercise of discretion by the school authorities will be interfered with only when there is a clear abuse of it, and the burden of showing such an abuse is a heavy one. In those few instances where the court has interfered with the administrative power of school boards, the interference was based on the school boards' manifestly illegal action in violating the express words of statutes defining their powers, or on facts clearly indicating bad faith and violation of their public duty.

Telly v. Pennridge Sch. Dist. Bd. of Sch. Dirs., 617 Pa. 473, 491, 53 A.3d 705, 2012 Pa. LEXIS 1860 (Pa. 2012) citing, Wilson v. Sch. Dist. of Philadelphia, 328 Pa. 225, 239, 195 A. 90, 98 (1937)

The above-cited evidence of record clearly establishes that the District inquired into the details of, including the safety and well-being concerns of the Plaintiffs that could result from, the passage of Resolution #2. An abuse of discretion by school authorities will not be found in unwise acts or mistaken judgment, but must spring from improper influence, a disregard of duty or a violation of law. *Uniontown Area School District v. Allen*, 4 Pa. Commw. 183, 285 A.2d 543 (Pa. Cmwlth. 1971). The above-cited evidence of record clearly establishes that the District conducted its investigative proceedings in a properly deliberative fashion. See *Save Small Schs v. Everett Area Sch. Dist*., 2008 Pa. Commw. Unpub. LEXIS 155, *17, 2008 WL 9399241 (Pa. Commw. Ct. 2008). There is no single, definitive legal authority to inform the Defendants' response to Plaintiffs' request to use the single-sex designated restrooms congruent with their gender identity.

Plaintiffs argue that the strong public interest in preventing sex discrimination and unequal treatment on the basis of sex weighs in favor of granting the preliminary injunction. This argument is without merit as Plaintiffs have failed to come forward with any evidence that Resolution #2

was the result of sex discrimination and that they are reasonably likely to prevail on the merits of their discrimination claims. The evidence also does not establish that the balance of hardships tipped sharply in their favor. The public interest does not favor forcing the District to change a long-standing societal practice of single-sex designated facilities; a practice recognized as legally compliant under Title IX regulations since 1980 (see 34 C.F.R. § 106.33). The dispute in this case centers on facilities of the most intimate nature, and involves minors. The District clearly has an important interest in protecting the privacy interests of all its students in these intimate facilities. See, e.g. *Virginia*, 518 U.S. at 550 n. 19 (separate facilities in coeducational institutions are "necessary to afford members of each sex privacy from the other sex"). Enjoining the enforcement of Resolution #2, as requested by Plaintiffs, adversely affects this important public interest.

IV. CONCLUSION

Plaintiffs have failed to carry their heavy burden to show an entitlement to an injunction. Among the many deficiencies is Plaintiffs' failure to establish irreparable harm. Plaintiffs have failed to show that any requests for relief in this Court are not adequate to protect their federal rights. It is Plaintiffs' burden to show that the "preliminary injunction is the only way of protecting the Plaintiffs from harm." See, *Campbell Soup Co*. supra.

Additionally, the claims in Plaintiffs' motion are largely duplicative of the claims in their Complaint. In this case, much, if not all, of the injunctive relief sought by Plaintiffs directly relates to the merits of the ultimate issues in this lawsuit. Since the ultimate issues in this lawsuit are inextricably intertwined with the assertions in this motion for injunctive relief, a ruling on the motion might be perceived as speaking in some way to the ultimate issues in this case. In such instances, the Court should refrain from prematurely granting such relief. *Green v. Hawkinberry*, 2015 U.S. Dist. LEXIS 14597,*9 2015 WL 507057 (W.D. Pa. Feb. 6, 2015) citing *Messner v.*

Bunner, 2209 U.S. Dist. LEXIS 128910, 2009 WL 1406986, *5 (W.D. Pa. 2009). Thus, Plaintiffs' request for injunctive relief is completely without merit, both legally and factually, and should not be granted.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 14th day of November, 2016, I have filed the foregoing **Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction** with the Clerk of Courts via the District Court Electronic Case Filing System which will send notification of such filings to the following counsel of record:

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