Dating Violence & LGBTQ Youth: Recent Updates in New York's Dignity for All Students Act

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Webinar Moderator:
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For Today’s Webinar:

- Dating Violence and LGBTQ Youth Overview
- Unique challenges/vulnerabilities
- Examples of Dating Violence among LGBTQ Youth
- Legal Remedies
- Federal & State Remedies
- Dignity for All Students Act (DASA) Updates
Day One partners with New York City youth to end dating abuse and domestic violence through community education, supportive services, legal advocacy and leadership development.

Serving the five boroughs of New York City, Day One uses an empowerment model that invests and involves young people in maintaining safe relationships for themselves and their peers.
One day this kid will get larger. One day this kid will come to know something that causes a sensation equivalent to the separation of the earth from its axis. One day this kid will reach a point where he senses a division that isn’t mathematical. One day this kid will feel something stir in his heart and throat and mouth. One day this kid will find something in his mind and body and soul that makes him hungry. One day this kid will do something that causes men who wear the uniforms of priests and rabbis, men who inhabit certain stone buildings, to call for his death. One day politicians will enact legislation against this kid. One day families will give false information to their children and each child will pass that information down generationally to their families and that information will be designed to make existence intolerable for this kid. One day this kid will begin to experience all this activity in his environment and that activity and information will compel him to commit suicide or submit to danger in hopes of being murdered or submit to silence and invisibility. Or one day this kid will talk. When he begins to talk, men who develop a fear of this kid will attempt to silence him with strangling, fists, prison, suffocation, rape, intimidation, drugging, ropes, guns, laws, menace, roving gangs, bottles, knives, religion, decapitation, and immolation by fire. Doctors will pronounce this kid curable as if his brain were a virus. This kid will lose his constitutional rights against the government’s invasion of his privacy. This kid will be faced with electro-shock, drugs, and conditioning therapies in laboratories tended by psychologists and research scientists. He will be subject to loss of home, civil rights, jobs, and all conceivable freedoms. All this will begin to happen in one or two years when he discovers he desires to place his naked body on the naked body of another boy.
Dating Violence & LGBTQ youth

Dating Violence - A pattern of controlling and sometimes violent behavior in casual or serious dating relationships involving young people. YDV affects people regardless of race, class, gender identity, gender expression or sexual orientation.

LGBTQ - Lesbian, Gay, Bisexual, Transgender, or Queer or Questioning
Barriers LGBTQ youth face when seeking help

- Distrust of Adults: law enforcement, legal systems, teachers, social workers, authority figures
- Services not designed with LGBTQ youth in mind
- Fear of Outing (Sexual Orientation, Gender Identity, Immigration Status)
- Fear of retribution from abusive partner
- Love of abusive partner
- Lack of victim/abuser screening and assessment
- Sex Shaming

- Fear of getting in trouble (with parents or others)
- Stigma
- Pressure from friends, family, community
- Fear of isolation/being alone
- Substituting Adult “wisdom” without youth input or empowerment
- Fear of Arrest (for self or partner)
- Small and/or Overlapping Communities
- Intersection of oppressions based on other experiences of Identity
- Difficulties in collecting evidence
Statistics on LGBTQ Youth and IPV

- 37% of LGBTQ youth reported Cyber Dating Abuse
  ○ (compared to 26% of heterosexual youth)

- 43% of LGBTQ youth reported Physical Dating Violence
  ○ (compared to 29% of heterosexual youth)

- 59% of LGBTQ youth reported Psychological Dating Abuse
  ○ (compared to 46% of heterosexual youth)

- 23% of LGBTq youth reported Sexual Coercion
  ○ (compared to 12% of heterosexual youth)

- Transgender youth are the most vulnerable to dating violence, with 89% reporting physical violence.

LGBTQ Youth Risk Factors

- LGBTQ youth are almost 3 times more likely to consider suicide than heterosexual youth.
- LGBTQ youth are 4.5 times more likely to attempt suicide than heterosexual youth.
- LGBTQ youth are 4.5 times more likely to make a suicide attempt resulting in injury, poisoning, or overdose that has to be treated by a doctor.
- 34% of LGBTQ youth reported being bullied on school property.
- LGBTQ youth are 120% more likely to experience homelessness
  - 26% of LGBTQ youth who “come out” to their families are thrown out of their homes because of conflicts with moral and religious values.
- People who identify as LGBTQ are more likely to be targets of hate crimes than any other minority Group.
Examples of Dating Violence among LGBTQ Youth

- **Outing/ Emotional Abuse** - Emotional and sexual intimacy is new to David, a high school senior, and on a few occasions his boyfriend has exceeded than he has been comfortable with. His boyfriend threatens David’s saying that he will out David to his family post intimate pictures and videos of them online if he ever leaves or cheats on him.

- **Physical Abuse** - Although they have been dating exclusively for 6 months, Shana’s partner, another high school student, is deeply suspicious of her. When they walk through the hallways at school together, her partner pinches on her side, leaving marks on her body. Sometimes, when they are alone, like in a school stairwell or in Shana’s apartment building, the violence Shana experiences is worse, her partner slaps her threatens that if she ever leaves her she will get “jumped”. Regardless, Shana still loves her partner, and because her partner is undocumented, does not want to call the police or report her to law enforcement.

- **Cyberharassment/Bullying** - After they broke up, Dee’s ex partner and his friends continued to taunt Dee, claiming that they are a “Thot”, and they use other racist and sexist slur to refer to them. Outside of Class, Dee’s Partner and friends create fake online profiles of Dee, and falsely claim that Dee spreads Sexually Transmitted Infections (STIs). Dee is not out to everyone that they identify as gender-fluid. Dee fears their ex partner will continue to spread lies about them.
Common issues facing LGBTQ students in schools (an intersectional lens)

- Discrimination (from students, teachers, other staff/admin)
- Harassment/school pushout
  - Experienced most acutely/often in conjunction with other forms of discrimination. E.g., young queer women of color are disciplined/harassed/pushed out at extremely high rates
- Speech and expression (GSAs, school events (prom), dress codes)
- Lack of understanding/invisibility (in curriculum, history, etc.)
Trans and Gender nonconforming students

- Names/Pronouns
- Sex Segregated Facilities
  - Gender Neutral options
  - Access to communal facilities
- Updating Records
- Privacy/Confidentiality
- Dress Codes/Gender Policing
- Sex Segregated Activities
What ENFORCEMENT options are there?

- Litigation
  - Federal: Title IX, Constitution, ADA, IDEA
  - State: Constitution, Civil Rights Law, Dignity For All Students Act (DASA)

- Administrative Action:
  - Federal: DOE OCR (historical)
  - NYS: “310 Appeal” (Educ. Law § 310); AG complaint
  - Local: NYC Examples

- Policy Advocacy
  - Model policies; NYSED Guidance; Local Guidance
LEGAL OVERVIEW: What types of protections?

- Federally, we’re mostly talking about Title IX’s prohibition on discrimination “because of sex”
- Other relevant federal protections:
  - Equal Protection Clause (“sex discrimination” and specific anti-trans discrimination)
  - FERPA: privacy
  - Constitutional privacy protections
  - ADA (disability discrimination); IDEA (bullying, FAPE)
Strong interpretations of “sex discrimination” to protect TGNC students

- Based on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and its progeny, a recent history of advocacy, litigation, and strategizing led to the May 2016 “Dear Colleague” DOE letter in CLE packet
  - Title IX complaints brought to OCR (Arcadia, etc.)
  - Doe v. Clenchy (Maine Supreme Court); Colorado civil rights complaint
  - G.G. v. Gloucester County
2016 Dear College Letter: forms of relevant prohibited discrimination

All of these are basically the interpretations we argue remain correct:

- Safe and nondiscriminatory environment (harassment, bullying)
- ID Documents, names, and pronouns
- Sex-segregated activities and facilities
- Privacy and education records (right to confidentiality and right to amend records)
Other federal protections

- As federal litigation progresses on Title IX (Grimm, Boyertown, etc.), other protections exist
- FERPA/privacy arguments:
  - Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999) (constitutional right to privacy in transgender status)
  - FERPA right to privacy in educational records and right to amend/correct
- ADA:
  - Trans exclusion written into the statute
  - BUT Blatt v. Cabela’s Retail (EDPA) (no categorical exclusion)
- IDEA:
  - Bullying based on disability/FAPE
  - T.K. v. NYCDOE (2d Cir. 2016) (bullying of autistic student)
State and Local Protections

- Dignity for All Students Act ("DASA"), passed in 2010 and implemented 2012, amended the Education Law
  - Created explicit protections based on "sexual orientation" and "gender identity and expression"
  - Affirmative obligations to combat harassment, avoid a hostile environment, report complaints, assign DASA coordinator
- NYC Chancellor's Reg. A-832 ("Respect For All"), local analog
- State Constitution, Civil Rights Law,
  - NOT Human Rights Law due to Court of Appeals decision (North Syracuse Cent. Sch. Dist. V. NYS Div. of Human Rights (2012)).
State and Local Guidance

- NYSED TGNC policy (and recent letters)
  - Safe and nondiscriminatory environment (harassment, bullying)
  - ID Documents, names, and pronouns
  - Sex-segregated activities and facilities
  - Privacy and education records (right to confidentiality and right to amend records)

- NYC DOE policy
  - LGBTQ liaison; GSA network; expanded trainings for teachers and staff; policing trainings; RFA materials
As a result of these developments, Department staff proposes to amend Commissioner's Regulation §100.2(kk)(1) to include illustrative examples of the types of incidents of harassment, bullying and/or discrimination which must be reported to the principal, superintendent, or designee when reported to or witnessed by a school employee. Specifically, the proposed amendment includes a definition of “report of harassment, bullying, and/or discrimination” to include, but not be limited to, the following examples:

- a report regarding the denial of access to school facilities including, but not limited to, restrooms, changing rooms, locker rooms, and/or field trips, based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or
- a report regarding application of a dress code, specific grooming or appearance standards that is based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or
- a report regarding the use of name(s) and pronoun(s) or the pronunciation of name(s) that is based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or
- a report regarding any other form of harassment, bullying, and/or discrimination, based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex.
Contact Information

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Dear Ms. Prince:

I write in response to your letter, sent via email to the U.S. Department of Education (the Department) on December 14, 2014, regarding transgender students’ access to facilities such as restrooms. In your letter, you mentioned statements in recent guidance documents issued by the Department concerning the application of Title IX of the Education Amendments of 1972 (Title IX) to gender identity discrimination. In addition, you identified a particular school district’s policy about access to restrooms and asked about the existence and distribution of any guidance by the Department about policies or practices regarding transgender students’ access to restrooms. Your letter has been referred to the Department’s Office for Civil Rights (OCR), and I am happy to respond.

As you know, OCR’s mission includes enforcing Title IX, which prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity and failure to conform to stereotypical notions of masculinity or femininity. OCR enforces and interprets Title IX consistent with case law, and with the adjudications and guidance documents of other Federal agencies.

1 See OCR’s April 2014 Questions and Answers on Title IX and Sexual Violence at B-2, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

2 See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII of the Civil Rights Act of 1964’s (Title VII) prohibition on sex discrimination bars discrimination based on gender stereotyping, that is “insisting that [individuals] matched the stereotype associated with their group”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of transgender police officer because he did not “conform to sex stereotypes concerning how a man should look and behave” stated a claim of sex discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (“[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (applying *Price Waterhouse* to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank’s refusal to provide a loan application was because plaintiff’s “traditionally feminine attire... did not accord with his male gender”); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that discrimination against transgender females — i.e., “as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity” — is actionable discrimination “because of sex” under the Gender Motivated Violence Act”).

3 See, e.g., U.S. Dept. of Justice, Memorandum from the Attorney General regarding the Treatment of...
The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation, and does not release information about its pending investigations. Nevertheless, it may be useful to be aware that in response to OCR's recent investigations of two complaints of gender identity discrimination, recipients have agreed to revise policies to make clear that transgender students should be treated consistent with their gender identity for purposes of restroom access. For examples of how OCR enforces Title IX in this area, please review the following resolutions of OCR investigations involving transgender students: Arcadia Unified School District, and Downey Unified School District.

OCR is committed to helping all students thrive at school and ensuring that schools take action to prevent and respond promptly and effectively to all forms of discrimination, including gender-identity discrimination. OCR staff is also available to


offer schools technical assistance on how to comply with Title IX and ensure all
students, including transgender students, have equal access to safe learning
environments.

If you have questions, want additional information or technical assistance, or believe that a
school is engaging in discrimination based on gender identity or another basis protected by the
laws enforced by OCR, you may visit OCR's website at www.ed.gov/ocr or contact OCR at
(800) 421-3481 (TDD: 800-877-8339) or at ocr@ed.gov. You may also fill out a complaint form
online at www.ed.gov/ocr/complaintintro.html.

I hope that this information is helpful and thank you for contacting the Department.

Sincerely,

James A. Ferg-Cadima
Acting Deputy Assistant Secretary for Policy
Office for Civil Rights
Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status. This letter summarizes a school’s Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school’s compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is significant guidance. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED’s Office of Elementary and Secondary Education, Examples of Policies and Emerging Practices for Supporting Transgender Students. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX’s requirements.

Terminology

- **Gender identity** refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.

- **Sex assigned at birth** refers to the sex designation recorded on an infant’s birth certificate should such a record be provided at birth.

- **Transgender** describes those individuals whose gender identity is different from the sex they were assigned at birth. A **transgender male** is someone who identifies as male but was assigned the sex of female at birth; a **transgender female** is someone who identifies as female but was assigned the sex of male at birth.
Gender transition refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations. The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments’ interpretation is consistent with courts’ and other agencies’ interpretations of Federal laws prohibiting sex discrimination.

The Departments interpret Title IX to require that when a student or the student’s parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student’s gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity. Because transgender students often are unable to obtain identification documents that reflect their gender identity (e.g., due to restrictions imposed by state or local law in their place of birth or residence), requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly. If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school’s failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX
requirements related to sex-based harassment, see guidance documents from ED’s Office for Civil Rights (OCR) that are specific to this topic.10

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student’s gender identity.11

3. Sex-Segregated Activities and Facilities

Title IX’s implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.12 When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.13

- **Restrooms and Locker Rooms.** A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.14 A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.15

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.16 A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.17 Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.18

- **Single-Sex Classes.** Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.19 When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools.** Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.20 Those schools are therefore permitted under Title IX to set their own
sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women’s college from admitting transgender women if it so chooses.

**Social Fraternities and Sororities.** Title IX does not apply to the membership practices of social fraternities and sororities. Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

**Housing and Overnight Accommodations.** Title IX allows a school to provide separate housing on the basis of sex. But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student’s voluntary request for single-occupancy accommodations if it so chooses.

**Other Sex-Specific Activities and Rules.** Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (e.g., in yearbook photographs, at school dances, or at graduation ceremonies).

### 4. Privacy and Education Records

Protecting transgender students’ privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students’ educational rights or opportunities by failing to take reasonable steps to protect students’ privacy related to their transgender status, including their birth name or sex assigned at birth. Nonconsensual disclosure of personally identifiable information (PII), such as a student’s birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA). A school may maintain records with this information, but such records should be kept confidential.

**Disclosure of Personelly Identifiable Information from Education Records.** FERPA generally prevents the nonconsensual disclosure of PII from a student’s education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information. Even when a student has disclosed the student’s transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may
violate FERPA and interfere with transgender students’ right under Title IX to be treated consistent with their gender identity.

Disclosure of Directory Information. Under FERPA’s implementing regulations, a school may disclose appropriately designated directory information from a student’s education record if disclosure would not generally be considered harmful or an invasion of privacy. Directory information may include a student’s name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. School officials may not designate students’ sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy. A school also must allow eligible students (i.e., students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student’s directory information.

Amendment or Correction of Education Records. A school may receive requests to correct a student’s education records to make them consistent with the student’s gender identity. Updating a transgender student’s education records to reflect the student’s gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

- Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student’s education records that is inaccurate, misleading, or in violation of the student’s privacy rights. If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor’s comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.

- Under Title IX, a school must respond to a request to amend information related to a student’s transgender status consistent with its general practices for amending other students’ records. If a student or parent complains about the school’s handling of such a request, the school must promptly and equitably resolve the complaint under the school’s Title IX grievance procedures.

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
Vanita Gupta
Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice
1 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term schools refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).


3 ED, Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), www.ed.gov/osee/osh/embrgingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

4 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED’s Title IX regulations. DOJ has also promulgated Title IX regulations. See 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. See 34 C.F.R. § 106.6(b).


6 See Lusardi v. Dep’t of the Army, Appeal No. 0120133395 at 9 (U.S. Equal Emp’t Opportunity Comm’n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.").

7 See G.G., 2016 WL 1567467, at *1 n.1 (noting that medical authorities “do not permit sex reassignment surgery for persons who are under the legal age of majority”).

8 34 C.F.R. § 106.31(b)(4); see G.G., 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles; Cruzan v. Special Sch. Dist. No. 1, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman “merely [to be] present in the women’s faculty restroom” created a hostile environment); Glenn, 663 F.3d at 1321 (defendant’s proffered justification that “other women might object to [the plaintiff’s] restroom use” was “wholly irrelevant”). See also Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (recognizing that “mere negative attitudes, or fear . . . are not permissible bases for” government action).
See, e.g., Resolution Agreement, in re Downey Unified Sch. Dist., CA, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, in re Tehachapi Unified Sch. Dist., CA, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). See also Lusardi, Appeal No. 0120133395, at *15 (“Persistent failure to use the employee’s correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment”).


34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

34 C.F.R. § 106.31.

34 C.F.R. § 106.33.

See, e.g., Resolution Agreement, in re Township High Sch. Dist. 211, IL, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy “access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.”).

34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school’s obligations regarding transgender athletes apply with equal force to the association.

The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled On the Team: Equal Opportunity for Transgender Student Athletes (2010) by Dr. Pat Griffin & Helen J. Carroll. See NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. The On the Team report noted that policies that may be appropriate at the college level may “be unfair and too complicated for the high school level of competition.” On the Team at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. Id. § 106.34(a)(1).

20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a “substantially
equal single-sex school or coeducational school).


23 See, e.g., Resolution Agreement, In re Arcadia Unified Sch. Dist., CA, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

24 See 34 C.F.R. §§ 106.31(a), 106.31(b)(4). See also, In re Downey Unified Sch. Dist., CA, supra n. 9; In re Cent. Piedmont Cmty. Coll., NC, supra n. 11.

25 34 C.F.R. § 106.31(b)(7).


29 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.


32 34 C.F.R. § 99.20.


34 See 34 C.F.R. § 106.31(b)(4).

35 34 C.F.R. § 106.8(b).
Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and

- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.
Dear Colleague Letter

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice
137 S.Ct. 1239
Supreme Court of the United States

GLOUCESTER COUNTY
SCHOOL BOARD, petitioner,
v.
G.G., By His Next Friend and
Mother, Deirdre GRIMM.

No. 16–273.
| March 6, 2017.

Synopsis
Case below, 822 F.3d 709.

Opinion
Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.

All Citations
137 S.Ct. 1239 (Mem), 197 L.Ed.2d 460, 85 USLW 3413, 85 USLW 3415, 17 Cal. Daily Op. Serv. 2049
858 F.3d 1034
United States Court of Appeals,
Seventh Circuit.

Ashton WHITAKER, BY his mother and next
friend Melissa WHITAKER, Plaintiff--Appellee,

v.
KENOSHA UNIFIED SCHOOL DISTRICT
NO. 1 BOARD OF EDUCATION,
et al., Defendants--Appellants

No. 16-3522
|Argued March 29, 2017
|Decided May 30, 2017

Synopsis
Background: Transgender student, by his mother and
next friend, brought action against board of education
and superintendent in her official capacity, alleging that
high school's unwritten policy, which barred him from
using the boys' bathroom after he started his female-to-male transition violated Title IX and the Equal
Protection Clause of the Fourteenth Amendment. Student
moved for preliminary injunction and school district
moved to dismiss for failure to state a claim. The
United States District Court for the Eastern District of
Wisconsin, Pamela Pepper, J., 2016 WL 5239829, 2:16-
cv-00943, denied motion to dismiss and granted motion
for preliminary injunction. School district appealed.

Holdings: The Court of Appeals, Williams, Circuit Judge,
held that:

[1] student sufficiently demonstrated that he was likely
to suffer irreparable harm in absence of preliminary
injunction;

[2] as a matter of first impression, transgender students
may bring sex-discrimination claims under Title IX based
upon a theory of sex-stereotyping;

[3] student was likely to succeed on Title IX sex
discrimination claim based upon a theory of sex-
stereotyping;

[4] heightened scrutiny, and not rational basis, applied to
student's equal protection claim;

[5] student was likely to succeed on his claim that school
district's policy violated equal protection; and

[6] balance of the harms weighed in favor of granting
preliminary injunction.

Affirmed.

*1038 Appeal from the United States District Court for
the Eastern District of Wisconsin. No. 2:16-cv-00943-PP
—Pamela Pepper, Judge.

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Ashton ("Ash") Whitaker is a 17 year-old high school senior who has what would seem like a simple request: to use the boys' restroom while at school. However, the Defendants, the Kenosha Unified School District and its superintendent, Sue Savaglio, (the "School District") believe that the request is not so simple because Ash is a transgender boy. The School District did not permit Ash to enter the boys' restroom because, it believed, that his mere presence would invade the privacy rights of his male classmates. Ash brought suit, alleging that the School District's unwritten bathroom policy violates Title IX of the Education Amendments Act of 1972 and the Fourteenth Amendment's Equal Protection Clause.

In addition to filing suit, Ash, beginning his senior year, moved for preliminary injunctive relief, seeking an order granting him access to the boys' restrooms. He asserted that the denial of access to the boys' bathroom was causing him harm, as his attempts to avoid using the bathroom exacerbated his vasovagal syncope, a condition that renders Ash susceptible to fainting and/or seizures if dehydrated. He also contended that the denial caused him educational and emotional harm, including suicidal ideations. The School District vigorously objected and moved to dismiss Ash's claims, arguing that Ash could neither state a claim under Title IX nor is it entitled to heightened scrutiny. And, because the School District's policy has a rational basis, that is, the need to protect other students' privacy, Ash's claims fail as a matter of law. We reject these arguments because Ash has sufficiently demonstrated a likelihood of success on his Title IX claim under a sex-stereotyping theory. Further, because the policy's classification is based upon sex, he has also demonstrated that heightened scrutiny, and not rational basis, should apply to his Equal Protection Claim. The School District has not provided a genuine and exceedingly persuasive justification for the classification.

Second, the School District argues that the district court erred in finding that the harms to Ash outweighed the harms to the student population and their privacy interests. We disagree. The School District has failed to provide any evidence of how the preliminary injunction will harm it, or any of its students or parents. The harms identified by the School District are all speculative and based upon conjecture, whereas the harms to Ash are well-documented and supported by the record. As a consequence, we affirm the grant of preliminary injunctive relief.
While Ash's birth certificate designates him as "female," he does not identify as one. Rather, in the spring of 2013, when Ash was in eighth grade, he told his parents that he is transgender and a boy. He began to openly identify as a boy during the 2013-2014 school year, when he entered Tremper as a freshman. He cut his hair, began to wear more masculine clothing, and began to use the name Ashton and male pronouns. In the fall of 2014, the beginning of his sophomore year, he told his teachers and his classmates that he is a boy and asked them to refer to him as Ashton or Ash and to use male pronouns.

In addition to publicly transitioning, Ash began to see a therapist, who diagnosed him with Gender Dysphoria, which the American Psychiatric Association defines as "a marked incongruence between one's experienced/expressed gender and assigned gender...." 4 Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 452 (5th ed. 2013). In July 2016, under the supervision of an endocrinologist at Children's Hospital of Wisconsin, Ash began hormone replacement therapy. A month later, he filed a petition to legally change his name to Ashton Whitaker, which was granted in September 2016.

For the most part, Ash's transition has been met without hostility and has been accepted by much of the Tremper community. At an orchestra performance in January 2015, for example, he wore a tuxedo like the rest of the boys in the group. His orchestra teacher, classmates, and the audience accepted this without incident. Unfortunately, the School District has not been as accepting of Ash's requests to use the boys' restrooms.

In the spring of his sophomore year, Ash and his mother met with his guidance counselor on several occasions to request that Ash be permitted to use the boys' restrooms while at school and at school-sponsored events. Ash was later notified that the administration had decided that he could only use the girls' restrooms or a gender-neutral restroom that was in the school's main office, which was quite a distance from his classrooms. Because Ash had publicly transitioned, he believed that using the girls' restrooms would undermine his transition. Additionally, since Ash was the only student who was permitted to use the gender-neutral bathroom in the school's office, he feared that using it would draw further attention to his transition and status as a transgender student at Tremper. As a high schooler, Ash also worried that he might be disciplined if he tried to use the boys' restrooms and that such discipline might hurt his chances of getting into college. For these reasons, *1041 Ash restricted his water intake and attempted to avoid using any restroom at school for the rest of the school year.

Restricting his water intake was problematic for Ash, who has been diagnosed with vasovagal syncope. This condition renders Ash more susceptible to fainting and/or seizures if dehydrated. To avoid triggering the condition, Ash's physicians have advised him to drink six to seven bottles of water and a bottle of Gatorade daily. Because Ash restricted his water intake to ensure that he did not have to utilize the restroom at school, he suffered from symptoms of his vasovagal syncope, including fainting and dizziness. He also suffered from stress-related migraines, depression, and anxiety because of the policy's impact on his transition and what he perceived to be the impossible choice between living as a boy or using the restroom. He even began to contemplate suicide.

In the fall of 2015, Ash began his junior year at Tremper. For six months, he exclusively used the boys' restrooms at school without incident. But, in February 2016, a teacher saw him washing his hands at a sink in the boys' restroom and reported it to the school's administration. In response, Ash's guidance counselor, Debra Tronvig, again told Ash's mother that he was permitted to only use the girls' restrooms or the gender-neutral bathroom in the school's main office. The next month, Ash and his mother met with Assistant Principal Holly Graf to discuss the school's policy. Like before, Ms. Graf stated that Ash was not permitted to use the boys' restrooms. However, the reason she gave this time was that he was listed as a female in the school's official records and to change those records, the school needed unspecified "legal or medical documentation."

Two letters submitted by Ash's pediatrician, identifying him as a transgender boy and recommending that he be allowed to use male-designated facilities at school were deemed not sufficient to change his designation. Rather, the school maintained that Ash would have to complete a surgical transition ... a procedure that is prohibited for someone under 18 years of age ... to be permitted access to the boys' restroom. Further, not all transgender persons opt to complete a surgical transition, preferring to forgo the significant risks and costs that accompany such procedures. The School District did not give any

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explanation as to why a surgical transition was necessary. Indeed, the verbal statements made to Ash's mom about the policy have never been reduced to writing. In fact, the School District has never provided any written document that details when the policy went into effect, what the policy is, or how one can change his status under the policy.

Fearing that using the one gender-neutral restroom would single him out and subject him to scrutiny from his classmates and knowing that using the girls' restroom would be in contradiction to his transition, Ash continued to use the boys' restroom for the remainder of his junior year.

This decision was not without a cost. Ash experienced feelings of anxiousness and depression. He once more began to contemplate suicide. Nonetheless, the school's security guards were instructed to monitor Ash's restroom use to ensure that he used the proper facilities. Because Ash continued to use the boys' restroom, he was removed from class on several occasions to discuss his violation of the school's unwritten policy. His classmates and teachers often asked him about these meetings and why administrators were removing him from class.

In April 2016, the School District provided Ash with the additional option of using two single-user, gender-neutral restrooms. These locked restrooms were on the opposite side of campus from where his classes were held. The School District provided only one student with the key: Ash. Since the restrooms were not near his classrooms, which caused Ash to miss class time, and because using them further stigmatized him, Ash again avoided using the bathrooms while at school. This only exacerbated his syncope and migraines. In addition, Ash began to fear for his safety as more attention was drawn to his restroom use and transgender status.

Although not part of this appeal, Ash contends that he has also been subjected to other negative actions by the School District, including initially prohibiting him from running for prom king, referring to him with female pronouns, using his birth name, and requiring him to room with female students or alone on school-sponsored trips. Furthermore, Ash learned in May 2016 that school counselors had considered instructing its guidance counselors to distribute bright green wristbands to Ash and other transgender students so that their bathroom usage could be monitored more easily. Throughout this litigation, the School District has denied that it considered implementing the wristband plan.

A. Proceedings Below

In the spring of 2016, Ash engaged counsel who, in April 2016, sent the School District a letter demanding that it permit him to use the boys' restroom while at school and during school-sponsored events. In response, the School District repeated its policy that Ash was required to use either the girls' restroom or the gender-neutral facilities. On May 12, 2016, Ash filed an administrative complaint with the United States Department of Education's Office for Civil Rights, alleging that this policy violated his rights under Title IX. To pursue the instant litigation, Ash chose to withdraw the complaint without prejudice.

On July 16, 2016, Ash commenced this action and on August 15, he filed an Amended Complaint alleging that the treatment he received at Tremper High School violated Title IX, 20 U.S.C. § 1681, et seq., and the Equal Protection Clause of the Fourteenth Amendment. That same day, Ash, in a motion for preliminary injunction, sought to enjoin the enforcement of the School District's policy pending the outcome of the litigation. The next day, the School District filed a motion to dismiss and filed its opposition to the preliminary injunction shortly thereafter.

After a hearing on the motion to dismiss, the district court denied the motion. The next day, it heard oral arguments on Ash's motion for preliminary injunction. A few days later, the district court granted the motion in part and enjoined the School District from: (1) denying Ash access to the boys' restroom; (2) enforcing any written or unwritten policy against Ash that would prevent him from using the boys' restroom while on school property or attending school-sponsored events; (3) disciplining Ash for using the boys' restroom while on school property or attending school-sponsored events; and (4) monitoring or surveilling Ash's restroom use in any way. This appeal followed.

In a separate appeal, the School District petitioned this court for permission to file an interlocutory appeal of the district court's denial of its motion to dismiss.
denying the motion to dismiss for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b), it revoked that certification when it concluded that it had erred by including the certification language in its initial order. Therefore, we *1043 denied the School District’s petition for interlocutory review of the motion to dismiss for lack of jurisdiction. See Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker, 841 F.3d 730, 731–32 (7th Cir. 2016). In the alternative, the School District urged this court to exercise pendent jurisdiction over the order denying the motion to dismiss because the district court had partially granted the preliminary injunction. But since we lacked jurisdiction to consider the petition for interlocutory appeal, we also lacked a proper jurisdictional basis for extending pendent jurisdiction. Id. at 732. Therefore, in this appeal, the School District was directed to seek pendent appellate jurisdiction, which it has now done.

II. ANALYSIS

The School District raises two issues on appeal. First, that this court should assert pendent jurisdiction over the district court’s decision to deny its motion to dismiss and second, that the district court erred in granting Ash’s motion for preliminary injunction. We will address each issue in turn.

A. Pendent Jurisdiction Is Not Appropriate

[1] Ordinarily, an order denying a motion to dismiss is not a final judgment and is not appealable. See 28 U.S.C. § 1291 (providing federal appellate courts with jurisdiction over appeals from all final decisions). But, the School District again urges us to assert pendent appellate jurisdiction to consider the denial of the motion to dismiss. We decline the invitation.

[2] Pendent appellate jurisdiction is a discretionary doctrine. Jones v. InfoCure Corp., 310 F.3d 529, 537 (7th Cir. 2002). It is also a narrow one. Abelesz v. OTP Bank, 692 F.3d 638, 647 (7th Cir. 2012), which the Supreme Court sharply restricted in Swint v. Chambers County Commission, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). After Swint, we noted in United States v. Board of School Commissioners of the City of Indianapolis, 128 F.3d 507 (7th Cir. 1997), that pendent appellate jurisdiction is a “controversial and embattled doctrine.” Id. at 510. Nonetheless, the Supreme Court recognized a narrow path for its use in Clinton v. Jones, 520 U.S. 681, 707 n.41, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), where it found that a collateral order denying presidential immunity was inextricably intertwined with an order that stayed discovery and postponed trial, and was therefore, reviewable on appeal.

[3] [4] [5] When applicable, the doctrine allows for review of an “otherwise unappealable interlocutory order if it is inextricably intertwined with an appealable one.” Montano v. City of Chicago, 375 F.3d 593, 599 (7th Cir. 2004) (quoting Jones, 310 F.3d at 536) (internal quotation marks omitted). This requires more than a “close link” between the two orders. Id. at 600. Judicial economy is also an insufficient justification for invoking the doctrine and disregard of the final-judgment rule. McCarter v. Ret. Plan For Dist. Managers of Am. Family Ins. Grp., 540 F.3d 649, 653 (7th Cir. 2008). Rather, we must satisfy ourselves that based upon the specific facts of this case, it is “practically indispensable that we address the merits of the unappealable order in order to resolve the properly-taken appeal.” Montano, 375 F.3d at 600 (quoting United States ex rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co., 909 F.2d 259, 262 (7th Cir. 1990)) (internal quotation marks omitted); see also Abelesz, 692 F.3d at 647 (“[P]endent appellate jurisdiction should not be stretched to appeal normally unappealable interlocutory orders that happen to be related—even closely related—to the appealable order.”). Such a high threshold is required because *1044 a more relaxed approach would allow the doctrine to swallow the final-judgment rule. Montano, 375 F.3d at 599 (citing Patterson v. Portch, 853 F.2d 1399, 1403 (7th Cir. 1988)).

As we discuss below, the district court determined that Ash sufficiently demonstrated a likelihood of success on the merits of his claims and that preliminary injunctive relief was warranted. In doing so, the district court referenced its decision to deny the School District’s motion to dismiss. The School District contends that this rendered the two decisions inextricably intertwined. Therefore, it reasons that pendent jurisdiction is appropriate because to engage in a meaningful review of the preliminary injunction order, the court must also review the denial of the motion to dismiss.

Merely referencing the earlier decision to deny the motion to dismiss, however, did not inextricably intertwine the
two orders. Certainly the legal issues raised in the motions overlapped, as both motions challenged, in different ways and under different standards, the likely merits of Ash's claim. Invoking pendent jurisdiction simply because of this overlap would essentially convert a motion for preliminary injunctive relief into a motion to dismiss, which would raise the threshold showing a plaintiff must make before receiving injunctive relief. For all practical purposes, this would mean that every time a motion to dismiss is filed simultaneously with a motion for preliminary injunction, this doctrine would apply. This makes no sense and we do not see a compelling reason for invoking the doctrine here.

B. Preliminary Injunctive Relief Was Proper

A preliminary injunction is an extraordinary remedy. See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of United States of Am., Inc., 549 F.3d 1079, 1085 (7th Cir. 2008) (noting that "a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.") (internal quotation marks and citation omitted). It is never awarded as a matter of right. D.U v. Rhoades, 825 F.3d 331, 335 (7th Cir. 2016). We review the grant of a preliminary injunction for the abuse of discretion, reviewing legal issues de novo, Jones v. Markiewicz-Qualkinbush, 842 F.3d 1053, 1057 (7th Cir. 2016), while factual findings are reviewed for clear error. Fed. Trade Comm'n v. Advocate Health Care Network, 841 F.3d 460, 467 (7th Cir. 2016). Substantial deference is given to the district court's "weighing of evidence and balancing of the various equitable factors." Turnell v. CenitMark Corp., 796 F.3d 656, 662 (7th Cir. 2015).

A two-step inquiry applies when determining whether such relief is required. Id. at 661. First, the party seeking the preliminary injunction has the burden of making a threshold showing: (1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits. Id. at 661–62. If the movant successfully makes this showing, the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests. Jones, 842 F.3d at 1058.

1. Ash Likely to Suffer Irreparable Harm

The moving party must demonstrate that he will likely suffer irreparable harm absent obtaining preliminary injunctive relief. See *1045 Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 787 (7th Cir. 2011). This requires more than a mere possibility of harm. Id. at 788. It does not, however, require that the harm actually occur before injunctive relief is warranted. Id. Nor does it require that the harm be certain to occur before a court may grant relief on the merits. Id. Rather, harm is considered irreparable if it "cannot be prevented or fully rectified by the final judgment after trial." Girl Scouts of Manitou Council, Inc., 549 F.3d at 1089 (quoting Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984)) (internal quotation marks omitted). Because a district court's determination regarding irreparable harm is a factual finding, it is reviewed for clear error. Id. at 1087.

On appeal, the School District argues that the district court erred in finding that Ash established that he would suffer irreparable harm absent a preliminary injunction. Although Ash proffered reports from two different experts regarding the harm caused to him by the School District's policy, the School District contends that neither expert was able to actually quantify this harm. Further, the School District notes that Ash's failure to take advantage of "readily available alternatives," namely the gender-neutral bathrooms, undermines his claim of irreparable harm. Lastly, the School District points to Ash's delay in seeking injunctive relief as indicative of the lack of irreparable harm.

The School District's arguments miss the point. The district court was presented with expert opinions that supported Ash's assertion that he would suffer irreparable harm absent preliminary relief. These experts opined that use of the boys' restrooms is integral to Ash's transition and emotional well-being. Dr. Stephanie Budge, a psychologist who specializes in working with adolescents and adults who have Gender Dysphoria, met with Ash and his mother, and in her report noted that the treatment Ash faced at school "significantly and negatively impacted his mental health and overall well-being."
Dr. Budge also noted that Ash reported current thoughts of suicide and that his depression worsened each time he had to meet with school officials regarding his bathroom usage. Ultimately, she opined that the School District's actions, including its bathroom policy, which identified Ash as transgender and therefore, “different,” were “directly causing significant psychological distress and place [Ash] at risk for experiencing life-long diminished well-being and life-functioning.” The district court did not clearly err in relying upon these findings when it concluded that Ash would suffer irreparable harm absent preliminary injunctive relief.

Further, the School District's argument that Ash's harm was self-inflicted because he chose not to use the gender-neutral restrooms, fails to comprehend the harm that Ash has identified. The School District actually exacerbated the harm, when it dismissed him to a separate bathroom where he was the only student who had access. This action further stigmatized Ash, indicating that he was “different” because he was a transgender boy.

Moreover, the record demonstrates that these bathrooms were not located close to Ash's classrooms. Therefore, he was faced with the unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or avoid use of the bathroom altogether at the expense of his health.

Additionally, Ash alleged that using the single-user restrooms actually invited more scrutiny and attention from his peers, who inquired why he had access to these restrooms and asked intrusive questions about his transition. This further intensified his depression and anxiety surrounding the School District's policy. Therefore, it cannot be said that the harm was “self-inflicted.”

Finally, Ash did not delay in seeking injunctive relief. He had used the boys' bathroom for months without incident, and he filed an administrative complaint with the Department of Education in April 2016, just weeks after the school began to enforce its policy once more. He made the decision to withdraw that complaint over the summer rather than initiate an administrative complaint does not undermine his argument that the policy was inflicting, and would continue to inflicts, irreparable harm.

2. No Adequate Remedies at Law

[15] The moving party must also demonstrate that he has no adequate remedy at law should the preliminary injunction not issue. Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 813 (7th Cir. 2002). This does not require that he demonstrate that the remedy be wholly ineffectual. Foodcomm Int'l v. Barry, 328 F.3d 300, 304 (7th Cir. 2003). Rather, he must demonstrate that any award would be “seriously deficient as compared to the harm suffered.” Id.

[16] While the School District focuses the majority of its arguments on why Ash's harm is not irreparable, it also argues that any harm he has allegedly suffered can be remedied by monetary damages. We are not convinced. While monetary damages are used to compensate plaintiffs in tort actions, in those situations the damages relate to a past event, where the harm was inflicted on the plaintiff through negligence or something comparable. But this case is not the typical tort action, as Ash has alleged prospective harm. He has asserted that the policy caused him to contemplate suicide, a claim that was credited by the expert report of Dr. Budge. We cannot say that this potential harm—his suicide—can be compensated by monetary damages. Nor is there an adequate remedy for preventable “life-long diminished well-being and life-functioning.” Therefore, we reject the School District's analogy to tort damages and find that Ash adequately established that there was no adequate remedy of law available.

3. Likelihood of Success on Merits

[17] A party moving for preliminary injunctive relief need not demonstrate a likelihood of absolute success on the merits. Instead, he must only show that his chances to succeed on his claims are “better than negligible.” Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir. 1999). This is a low threshold. U.S. Army Corps of Eng'rs, 667 F.3d at 782. Ash's Amended Complaint contains two claims—one pursuant to Title IX and the other pursuant to the Equal
Protection Clause of the Fourteenth Amendment. We will discuss each claim in turn.

i. Title IX Claim

Title IX provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681(a); see also 34 C.F.R. § 106.31(a). Covered institutions are, *1047 therefore, among other things, prohibited from: (1) providing different aid, benefits, or services; (2) denying aid, benefits, or services; and (3) subjecting any person to separate or different rules, sanctions, or treatment on the basis of sex. See 34 C.F.R. § 106.31(b)(2)-(4). Pursuant to the statute's regulations, an institution may provide separate, but comparable, bathroom, shower, and locker facilities. Id. § 106.33. The parties agree that the School District receives federal funds and is a covered institution.

The parties' dispute focuses on the coverage of Title IX and whether under the statute, a transgender student who alleges discrimination on the basis of his or her transgender status can state a claim of sex discrimination. Neither the statute nor the regulations define the term “sex.” Also absent from the statute is the term “biological,” which the School District maintains is a necessary modifier. Therefore, we turn to the Supreme Court and our case law for guidance.

First, under our own case law, we do not see a barrier to Ash's Title IX claim. Although not as often as some of our sister circuits, this court has looked to Title VII when construing Title IX. See e.g., Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997) (noting that "it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX."). The School District contends that we should do so here, and relies on our reasoning in Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), to conclude that Ash cannot state a claim under Title IX as a matter of law. Other courts have agreed with the School District's position. See Etsitty v. Utah Transit Auth., 502 F.3d 1194, 1198 (7th Cir. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

In Price Waterhouse, a plurality of the Supreme Court and two justices concurring in the judgment, found that the plaintiff had adequately alleged that her employer, in violation of Title VII, had discriminated against her for being too masculine. The plurality further emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." Id. at 251, 109 S.Ct. 1775. Thus, the Court embraced a broad view of Title VII, as Congress “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Id.; see also Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

The Supreme Court further embraced an expansive view of Title VII in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), where Justice Scalia, writing for a unanimous Court, declared that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” Id. at 79, 118 S.Ct. 998.
Following Price Waterhouse, this court and others have recognized a cause of action under Title VII when an adverse action is taken because of an employee's failure to conform to sex stereotypes. See, e.g., Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997), vacated on other grounds, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998); Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 201 (2d Cir. 2017); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263-64 (3d Cir. 2001); Nichols v. Actaea Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999). Our most recent application occurred when, sitting en banc, we held that a homosexual plaintiff can state a Title VII claim of sex discrimination based upon a theory of sex-stereotyping. Hively v. Ivy Tech Cnty. Coll. of Ind., 853 F.3d 339, 351-52 (7th Cir. 2017) (holding that a homosexual plaintiff may state a claim for sex-based discrimination under Title VII under either a sex stereotyping theory or under the associational theory).

The School District argues that even under a sex-stereotyping theory, Ash cannot demonstrate a likelihood of success on his Title IX claim because its policy is not based on whether the student behaves, walks, talks, or dresses in a manner that is inconsistent with any preconceived notions of sex stereotypes. Instead, it contends that as a matter of law, requiring a biological female to use the women's bathroom is not sex-stereotyping. However, this view is too narrow.

By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth. We are not alone in this belief. See Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). In Glenn, the Eleventh Circuit noted that “[a] person is defined as transgender precisely because of the perception that he or her behavior transgresses gender stereotypes.” Id. at 1316. The Eleventh Circuit reiterated this conclusion in a per curiam unpublished opinion, noting that “sex discrimination includes discrimination against a transgender person for gender nonconformity.” Chavez v. Credit Nation Auto Sales, LLC, 641 Fed.Appx. 883, 884 (11th Cir. 2016) (unpub.).

The Sixth Circuit has also recognized a transgender plaintiff's ability to bring a sex-stereotyping claim. In Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004), the plaintiff was diagnosed with Gender Identity Disorder, a condition later renamed Gender Dysphoria. Born a male, the plaintiff began to present at work with a more feminine appearance and mannerisms. He alleged in his complaint that as a result, his employer schemed to take action against him and ultimately subjected him to a pretextual suspension in violation of Title VII. While the district court concluded *1049 that because the plaintiff was transsexual he was not entitled to Title VII’s protections, the Sixth Circuit disagreed.

Instead, the Sixth Circuit noted that Price Waterhouse established that the prohibition on sex discrimination “encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.” Id. at 573 (citing Price Waterhouse, 490 U.S. at 251, 109 S.Ct. 1775). If Title VII prohibits an employer from discriminating against a woman for dressing too masculine, then, the court reasoned, Title VII likewise prohibits an employer from discriminating against a man who dresses in a way that it perceives as too feminine. In both examples the discrimination would not occur but for the victim's sex, in violation of Title VII. Id. at 574. Therefore, the plaintiff's status as transsexual was not a bar to his claim.

Here, however, the School District argues that this reasoning flies in the face of Title IX, as Congress has not explicitly added transgender status as a protected characteristic to either Title VII or Title IX, despite having opportunities to do so. See e.g., Student Non-Discrimination Act of 2015 S. 439 114th Cong. (2015). The Supreme Court has rejected this argument, stating that congressional inaction “lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (quoting United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962)) (internal quotation marks omitted); see also Hively, 853 F.3d at 344 (“It is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them.”). Therefore, Congressional inaction is not determinative.

Rather, Ash can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title *1050 IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act. Further, based on the record here, these gender-neutral alternatives were not true alternatives because of their distant location to Ash’s classrooms and the increased stigmatization they caused Ash. Rather, the School District only continued to treat Ash differently when it provided him with access to these gender-neutral bathrooms because he was the only student given access.

And, while the School District repeatedly asserts that Ash may not “unilaterally declare” his gender, this argument misrepresents Ash's claims and dismisses his transgender status. This is not a case where a student has merely announced that he is a different gender. Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity. This law suit demonstrates that the decision to do so was not without cost or pain. Therefore, we find that Ash has sufficiently established a probability of success on the merits of his Title IX claim.

### ii. Equal Protection Claim

[20] [21] Although we are mindful of our duty to avoid rendering unnecessary constitutional decisions, ISI Intl, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir. 2001), as amended (July 2, 2001), we will address Ash's Equal Protection claim as the district court determined that Ash also demonstrated an adequate probability of success on the claim to justify the preliminary injunction. The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). It therefore, protects against intentional and arbitrary discrimination. See Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). Generally, state action is presumed to be lawful and will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest. City of Cleburne, 473 U.S. at 440, 105 S.Ct. 3249.

[22] [23] [24] The rational basis test, however, does not apply when a classification is based upon sex. Rather, a sex-based classification is subject to heightened scrutiny, as sex “frequently bears no relation to the ability to perform or contribute to society.” Id. at 440–41, 105 S.Ct. 3249 (quoting Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973)) (internal quotation marks omitted); see also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). When a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is “exceedingly persuasive.” United States v. Virginia, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); see also Hayden ex rel. A.H. v. Greensburg Sch. Corp., 743 F.3d 569, 577 (7th Cir. 2014). This requires the state to show that the “classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” Virginia, 518 U.S. at 524, 116 S.Ct. 2264 (internal quotation marks
omitted). It is not sufficient to provide a hypothesized or post hoc justification created in response to litigation. Id. at 533, 116 S.Ct. 2264. Nor may the justification be based upon overbroad generalizations about sex. Id. Instead, the justification must be genuine. Id.

[25] *1051 If a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain a classification. See J.E.B., 511 U.S. at 138, 114 S.Ct. 1419 (rejecting the state's reliance on sex-based stereotypes as a defense to the discriminatory use of peremptory challenges during jury selection); see Glenn v. Brumby, 663 F.3d 1312, 1318 (11th Cir. 2011) (“All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.”).

As a threshold matter, we must determine what standard of review applies to Ash's claim. The School District urges us to apply the rational basis test, arguing that transgender status is not a suspect class. Applying that test, the School District contends that its policy is presumptively constitutional and that requiring students to use facilities corresponding to their birth sex to protect the privacy of all students is a rational basis for its policy. So, the School District maintains that Ash cannot demonstrate a likelihood of success on his Equal Protection Claim.

Ash disagrees. He argues that transgender status should be entitled to heightened scrutiny in its own right, as transgender people are a minority who have historically been subjected to discrimination based upon the immutable characteristics of their gender identities. Alternatively, he argues that even if transgender status is not afforded heightened scrutiny in its own right, the School District’s bathroom policy creates a sex-based classification such that heightened scrutiny should apply.

There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity. According to a report issued by the National Center for Transgender Equality, 78% of students who identify as transgender or as gender non-conformant, report being harassed while in grades K-12. See Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, Nat'l Center for Transgender Equality, at 33 (2011), available at http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. These same individuals in K-12 also reported an alarming rate of assault, with 35% reporting physical assault and 12% reporting sexual assault. Id. As a result, 15% of transgender and gender non-conformant students surveyed made the decision to drop out. Id. These statistics are alarming. But this case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny. It is enough to stay that, just as in Price Waterhouse, the record for the preliminary injunction shows sex stereotyping. We note as well that there is no requirement that every girl, or every boy, be subjected to the same stereotyping. It is enough that Ash has experienced this form of sex discrimination.

[26] [27] Here, the School District’s policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate. This policy is inherently based upon a sex-classification and heightened review applies. Further, the School District argues that since it treats all boys and girls the same, it does not violate the Equal Protection Clause. This is untrue. Rather, the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School District's bathroom policy if they choose to use a bathroom that conforms to their gender identity. This places the burden *1052 on the School District to demonstrate that its justification for its bathroom policy is not only genuine, but also “exceedingly persuasive.” See Virginia, 518 U.S. at 533, 116 S.Ct. 2264. That burden has not been met here.

The School District defends its bathroom policy by claiming it needs to protect the privacy rights of all 22,160 students. The mere presence of a transgender student in the bathroom, the School District argues, infringes upon the privacy rights of other students with whom he or she does not share biological anatomy. While this court certainly recognizes that the School District has a legitimate interest in ensuring bathroom privacy rights are protected, this interest must be weighed against the facts of the case and not just examined in the abstract, to determine whether this justification is genuine.

What the record demonstrates here is that the School District’s privacy argument is based upon sheer conjecture and abstraction. For nearly six months, Ash used the boys’
bathroom while at school and school-sponsored events without incident or complaint from another student. In fact, it was only when a teacher witnessed Ash washing his hands in the restroom that his bathroom usage once more became an issue in the School District's eyes. And while at oral argument, the School District asserted that it had received just one complaint from a parent, this is insufficient to support its position that its policy is required to protect the privacy rights of each and every student. Counsel for the School District cited to Ash's Amended Complaint for this assertion. The Amended Complaint, however, states that “some parents and other Kenosha residents began to speak out in opposition to Ash's right to use the boys' restrooms.” Am. Comp. ¶ 77. It further states that several community members spoke at a School Board meeting and voiced their opposition to a policy that would allow transgender students to use gender-appropriate restrooms. See id. (“One parent told the Board that he was opposed to permitting transgender students to use gender-appropriate restrooms...”). Nonetheless, neither party has offered any evidence or even alleged that the School District has received any complaints from other students. This policy does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door.

A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall. Nothing in the record suggests that the bathrooms at Tremper High School are particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate *1053 for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line. Therefore, this court agrees with the district court that the School District's privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.

Additionally, at oral argument, counsel for the School District clarified that the only way that Ash would be permitted to use the boys' restroom would be if he were to present the school with a birth certificate that designated his sex as male. But it is important to keep in mind that the School District has not provided a written copy of the policy. Nor is it clear that one even exists. And, before this litigation, Ash's mother was never told that she needed to produce a birth certificate. Instead, when she asked the School District to permit him to use the boys' restroom, the school's assistant principal told her that Ash could use the boys' restroom only if his sex was changed in the school's official records. To do so, Ash would need to submit unspecified legal or medical “documentation.” Despite explaining to the assistant principal that Ash was too young to have sex-reassignment surgery and presenting the School District with two letters from Ash's pediatrician, Ash was still not allowed to use the boys' restroom.

Further, it is unclear that the sex marker on a birth certificate can even be used as a true proxy for an individual's biological sex. The marker does not take into account an individual's chromosomal makeup, which is also a key component of one's biological sex. Therefore, one's birth certificate could reflect a male sex, while the individual's chromosomal makeup reflects another. It is also unclear what would happen if an individual is born with the external genitalia of two sexes, or genitalia that is ambiguous in nature. In those cases, it is clear that the marker on the birth certificate would not adequately account for or reflect one's biological sex, which would have to be determined by considering more than what was listed on the paper.

Moreover, while it is true that in Wisconsin an individual may only change his or her designated sex on a birth certificate after completing a surgical reassignment, see Wis. Stat. Ann. § 69.15(4), this is not universally the case. For example, as Ash's counsel pointed out during oral argument, in Minnesota, an individual may amend his or her birth certificate to reflect his or her gender identity without surgical reassignment. See Requirements for documents submitted to support the amendment of a birth record, MINNESOTA DEPT OF HEALTH, http://www.health.state.mn.us/divs/
4. Balance of Harms Favors Ash

[28] [29] Having already determined that the district court did not err in finding that Ash will suffer irreparable harm absent preliminary injunctive relief, we now must look at whether granting preliminary injunctive relief will harm the School District and the public as a whole. Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the harms faced by both parties and the public as a whole. See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc., 549 F.3d 1079, 1100 (7th Cir. 2008); see also Turnell v. CentiMark Corp., 796 F.3d 656, 662 (7th Cir. 2015). This is done on a "sliding scale" measuring the balance of harms against the moving party's likelihood of success. Turnell, 796 F.3d at 662. The more likely he is to succeed on the merits, the less the scale must tip in his favor. Id. The converse, however, also is true: the less likely he is to win, the more the balance of harms must weigh in his favor for an injunction to issue.

Id. Substantial deference is given to the district court's analysis of the balancing of harms. Id.

[30] The School District argues that the district court erred in determining that the balance of the harms weighed in favor of granting the injunction because it ignored the fact that the harm extends to 22,160 students in the School District whose privacy rights are at risk by allowing a transgender student to utilize a bathroom that does not correspond with his biological sex. Granting the injunction, the School District continues, also irrevocably harmed these students' parents, who are now denied the right to direct the education and upbringing of their children. Additionally, the School District asserts that the injunction harms the public as a whole, since it forces other school districts nationwide to contemplate whether they must change their policies and alter their facilities or risk being found out of compliance with Title IX. Noncompliance places their federal funding at risk. Based upon this record, however, we find the School District's arguments unpersuasive.

The School District has not demonstrated that it will suffer any harm from having to comply with the district court's preliminary injunction order. Nor has it established that the public as a whole will suffer harm. As noted above, before seeking injunctive relief, Ash used the bathroom for nearly six months without incident. The School District has not produced any evidence that any students have ever complained about Ash's presence in the boys' restroom. Nor have they demonstrated that Ash's presence has actually caused an invasion of any other student's privacy. And while the School District claims that preliminary injunctive relief infringes upon parents' ability to direct the education of their children, it offers no evidence that a parent has ever asserted this right. These claims are all speculative.

We are further convinced that the district court did not err in finding that this balance weighed in favor of granting the injunction when considering the statements made by amici, who are school administrators from twenty-one states and the District of Columbia. Together, these administrators are responsible for educating approximately 1.4 million students. Each administrator has experience implementing *1055 inclusive bathroom policies in their respective schools, and each has grappled with the same privacy concerns that the School District raises here. These administrators uniformly agree that

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the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in their combined experience, all students' needs are best served when students are treated equally.

Although the School District argues that implementing an inclusive policy will result in the demise of gender-segregated facilities in schools, the *amici* note that this has not been the case. In fact, these administrators have found that allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls. When considering the experience of this group in light of the record here, which is virtually devoid of any complaints or harm caused to the School District, its students, or the public as a whole, it is clear that the district court did not err in balancing the harms.

III. CONCLUSION

Appellants' motion to have this court assert pendent appellate jurisdiction over the district court's denial of Appellants' Motion to Dismiss is DENIED. The district court's order granting the Appellee's motion for a preliminary injunction is AFFIRMED.

All Citations

858 F.3d 1034, 343 Ed. Law Rep. 672

Footnotes

1. We will refer to the Plaintiff-Appellee as "Ash," rather than by his last name, as this is how he refers to himself throughout his brief.

2. We will refer to the School District's decision to deny Ash access to the boys' restroom as a "policy," although any such "policy" is unwritten and its exact boundaries are unclear.

3. Because Ash is a minor without a duly appointed representative, pursuant to Rule 17 of the Federal Rules of Civil Procedure, he may assert these claims only through a "next friend" or guardian ad litem.

4. We take judicial notice of the Diagnostic and Statistical Manual pursuant to Rule 201 of the Federal Rules of Evidence.

5. We will use the masculine pronoun to refer to the Smith plaintiff for the purpose of clarity, as this is how the Sixth Circuit referred to the Smith plaintiff throughout its opinion.

6. We note that the School District's reliance upon the privacy interests of all of its 22,160 students is odd given that the preliminary injunction order only pertains to Ash, a student at one of its high schools. Many of the School District's students attend schools other than Tremper and are therefore, totally unaffected by the district court's order.