18-13592-EE

IN THE

United States Court of Appeals for the Eleventh Circuit

DREW ADAMS,
Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
District Court Case No. 3:17-cv-00739-TJC-JBT

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Appeal No. 18-13592-EE

APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, and 28-1(b), Appellee certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action – including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case – includes the following:

1. Aberli, Thomas A. – Witness for Appellee
2. Achievement First Public Charter Schools – District Court Proposed *Amicus Curiae*
3. Adams, Drew – Appellee
4. Adams, Scott – Appellee's Father
5. Adkins, Deanna, M.D. – Expert witness for Appellee
6. Allen, Tommy – Board Member of Appellant
7. Alliance Defending Freedom – Counsel for *Amicus Curiae*
8. Altman, Jennifer G. – Counsel for Appellee
9. American Association of Child and Adolescent Psychiatry – District Court *Amicus Curiae*

10. American Academy of Nursing – District Court *Amicus Curiae*
11. American Academy of Pediatrics – District Court *Amicus Curiae*
12. American College of Physicians – District Court *Amicus Curiae*
13. American Medical Association – District Court *Amicus Curiae*
14. American Medical Women's Association – District Court *Amicus Curiae*
15. American Nurses Association – District Court *Amicus Curiae*
16. Association of Medical School Pediatric Department Chairs – District Court *Amicus Curiae*
17. Banks, Emily – District Court Proposed *Amicus Curiae*
18. Barden, Robert Chris – Counsel for Appellant, Terminated
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20. Barth, Morgan – District Court Proposed *Amicus Curiae*
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30. Campbell, James A. – Counsel for *Amicus Curiae*

31. Canan, Patrick – Board Member of Appellant

32. Carney, Karen – District Court Proposed *Amicus Curiae*

33. Carter, Heidi – District Court Proposed *Amicus Curiae*

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36. Chang, Tommy – District Court Proposed *Amicus Curiae*

37. Chapman, Peyton – District Court Proposed *Amicus Curiae*

38. Colter, Howard – District Court Proposed *Amicus Curiae*

39. Corrigan, Hon., Timothy J. – United States District Judge

40. Cyra, Sherri – District Court Proposed *Amicus Curiae*

41. Davis, Bryan – District Court Proposed *Amicus Curiae*

42. DeSelm, Lizbeth – District Court Proposed *Amicus Curiae*

43. DiBenedetto, Arthur – District Court Proposed *Amicus Curiae*

44. Doolittle, Kirsten L. – Counsel for Appellee

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46. Doss, Eric – District Court Proposed *Amicus Curiae*

47. Dyer, Karen – Counsel for District Court Proposed *Amicus Curiae*

48. Ehrensaft, Diane, Ph.D. – Expert witness for Appellee

49. Endocrine Society – District Court *Amicus Curiae*

50. Ewing, Gregory – District Court Proposed *Amicus Curiae*

51. Florida School Boards Insurance Trust – Insurance Carrier for Appellant

52. Forson, James (Tim) – Superintendent of the St. Johns County School District

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54. Flynn, Diana K. – Counsel for Appellee

55. GLMA – Health Professionals Advancing LGBT Equality – District Court *Amicus Curiae*

56. Gonzalez-Pagan, Omar – Counsel for Appellee

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58. Grijalva, Adelita – District Court Proposed *Amicus Curiae*

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67. Jenner & Block, LLP – Counsel for District Court *Amicus Curiae*

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69. Kasper, Erica Adams – Appellee's Next Friend and Mother

70. Kefford, Michelle – Principal of Charles W. Flanagan High School

71. Kellum, Nathan W. – Counsel for *Amicus Curiae*

72. Kenney, Tim – District Court Proposed *Amicus Curiae*

73. Kostelnik, Kevin C. – Counsel for Appellant

74. Kunin, Ken – District Court Proposed *Amicus Curiae*

75. Kunze, Lisa – Principal of Allen D. Nease High School

76. Laidlaw, Michael K. – *Amicus Curiae*

77. Lambda Legal Defense and Education Fund, Inc. – Counsel for Appellee

78. Lapointe, Markenzy – Counsel for Appellee

79. Las Cruces Public Schools – District Court Proposed *Amicus Curiae*

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81. Los Angeles Unified School District – District Court Proposed *Amicus Curiae*

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83. MacKenzie, Dominic C. – Counsel for *Amicus Curiae*

84. Majeski, Jeremy – District Court Proposed *Amicus Curiae*

85. McCaleb, Gary S. – Counsel for *Amicus Curiae*

86. McCalla, Craig – District Court Proposed *Amicus Curiae*

87. McRae Bertschi & Cole LLC – Counsel for *Amicus Curiae*

88. Meece, Gregory R. – District Court Proposed *Amicus Curiae*

89. Mignon, Bill – Board Member of Appellant

90. Miller, William C. – Counsel for Appellee

91. Mittelstadt, Cathy Ann – Deputy Superintendent for Operations of St. Johns County School District

92. Morse, James C., Sr. – District Court Proposed *Amicus Curiae*

93. Munson, Ziad W. – District Court Proposed *Amicus Curiae*

94. Nardecchia, Natalie – Counsel for Appellee, Terminated

95. OGC Law, LLC – Counsel for *Amicus Curiae*

96. O'Reilly, John – District Court Proposed *Amicus Curiae*

97. Palazzo, Denise – District Court Proposed *Amicus Curiae*

98. Pediatric Endocrine Society – District Court *Amicus Curiae*

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101. Ranck-Buhr, Wendy – District Court Proposed *Amicus Curiae*

102. RC Barden and Associates – Counsel for Appellant, Terminated

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105. Robertson, Cynthia Cook – Counsel for Appellee

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107. Santa, Rachel – District Court Proposed *Amicus Curiae*

108. Schaffer, Brian – District Court Proposed *Amicus Curiae*

109. Schommer, Monica – District Court Proposed *Amicus Curiae*

110. School Administrators from 29 States and the District of Columbia – District Court Proposed *Amicus Curiae*

111. School District of South Orange and Maplewood – District Court Proposed *Amicus Curiae*

112. Segal, Richard M. – Counsel for Appellee

113. Shah, Paru – District Court Proposed *Amicus Curiae*

114. Shirk, Sarah – District Court Proposed *Amicus Curiae*

115. Slanker, Jeffrey D. – Counsel for Appellant

116. Slough, Beverly – Board Member of Appellant

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124. Taymore, Cyndy – District Court Proposed *Amicus Curiae*

125. Teufel, Gregory H. – Counsel for *Amicus Curiae*

126. The School Board of St. Johns County, Florida – Appellant

127. Toomey, Joel – Magistrate Judge

128. Tyler & Bursch, LLP – Counsel for *Amicus Curiae*

129. Tyler, Robert H. – Counsel for *Amicus Curiae*

130. Upchurch, Bailey & Upchurch, P.A. – General Counsel to Appellant

131. Upchurch, Frank D. – General Counsel to Appellant

132. Valbrun-Pope, Michaelle – Executive Director of Student Support Initiative for Broward County Public Schools

133. Van Meter, Quentin L. – *Amicus Curiae*

134. Van Mol, Andre – *Amicus Curiae*

135. Vannasdall, David – District Court Proposed *Amicus Curiae*

136. Vaughn, Craig – District Court Proposed *Amicus Curiae*

137. Vitale, Julie – District Court Proposed *Amicus Curiae*

138. Washoe County School District – District Court Proposed *Amicus Curiae*

139. Weber, Thomas – District Court Proposed *Amicus Curiae*

140. Wilkens, Scott B. – Counsel for District Court *Amicus Curiae*

141. Women's Liberation Front – *Amicus Curiae*

The undersigned certifies that no publicly-traded company or corporation has an interest in the outcome of the case or appeal. The undersigned has previously entered this information into the web-based stock ticker symbol CIP, indicating that there is nothing to declare, and that web-based certification remains accurate as of the submission of this brief.

Dated: February 21, 2019

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted because this case raises important questions about the application of this Court's sex discrimination jurisprudence to protect transgender students, specifically whether the Fourteenth Amendment and Title IX safeguard a transgender boy's right to use the boys' school restroom on the same terms as all other boys.

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STATEMENT OF ISSUES

Whether the district court's opinion, issued after a three-day bench trial and entry of extensive findings of fact, should be affirmed in holding that:

A. The school board's policy of barring boys who are transgender, such as Drew Adams, from the boys' restroom violates equal protection guarantees of the Fourteenth Amendment.

B. The school board's policy of barring boys who are transgender, such as Drew Adams, from the boys' restroom violates Title IX of the Education Amendments of 1972.

STATEMENT OF THE CASE

At its heart, this case is about Drew Adams ("Drew" or "Plaintiff"), a senior at Nease High School ("Nease"). Drew used the boys' restroom for six weeks without disruption during his freshman year until Defendant barred him pursuant to a policy that prohibits transgender students from using restrooms that align with their gender identity. Doc. 192 at 1-2, 14, 19, 25. Following a three-day trial, the district court encapsulated the case as follows: "[w]hen confronted with something affecting our children that is new, outside of our experience, and contrary to gender norms we thought we understood, it is natural that parents want to protect their children. But the evidence is that Drew Adams poses no threat to the privacy or safety of any of his fellow students. Rather, Drew Adams is just like every other

student at Nease High School, a teenager coming of age in a complicated, uncertain and changing world. When it comes to his use of the bathroom, the law requires that he be treated like any other boy." Doc. 192 at 2-3.

Defendant-Appellant The School Board of St. Johns County, Florida ("Defendant") seeks review of the district court's judgment and Findings of Fact and Conclusions of Law. Docs. 192-193.

I. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW

In June 2017, Drew filed suit challenging Defendant's refusal to allow him to use the boys' restroom, pursuant to the Fourteenth Amendment's equal protection clause, U.S. Const. amend. XIV, § 1, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* Doc. 1. Drew sought declaratory and injunctive relief, and nominal damages. *Id.* Drew moved for a preliminary injunction, Doc. 22; the court denied that motion and set the matter for expedited trial. Doc. 50. Following this Court's decision in *Flanigan's Enterprises, Inc. of Ga. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1270 (11th Cir. 2017) (en banc), Drew amended his complaint to add a compensatory damages claim. Doc. 60 at 22. Defendant moved to dismiss Drew's Title IX claim, Docs. 54, 64, which was carried through trial. Doc. 59 at 1.

A three-day bench trial was held December 11-13, 2017. Doc. 192 at 4. Judge Corrigan subsequently conducted a site visit, inspecting every restroom on

Nease's campus. Doc. 192 at 4-5. In a 70-page opinion, the court entered extensive factual findings and conclusions of law, holding that the exclusion of Drew from the boys' restroom violates the Fourteenth Amendment's equal protection guarantee and Title IX. Doc. 192. On July 26, 2018, the court permanently enjoined Defendant from excluding Drew from the boys' restroom, and awarded $1,000 in compensatory damages. Doc. 193. Defendant did not seek to stay the judgment, which remains in effect.

II. STATEMENT OF FACTS

A. Medical Care for Transgender Adolescents

Drew is a boy and has a male gender identity. Doc. 192 at 2 ("At trial, [Drew] testified: 'I am a boy and I know that with every fiber of my being.'"). Because Drew's birth-assigned sex was female, however, he is transgender. Doc. 166-3 ¶ 19. As explained by Dr. Ehrensaft,[1] each person has a number of gender-related characteristics, *e.g.*, external genitalia, internal sex organs, chromosomal sex, neurological sex, and gender identity. Doc. 192 at 5. Historically, one's

[1] The district court accepted testimony from clinical psychologist Diane Ehrensaft, Ph.D., and endocrinologist Deanna Adkins, M.D., finding both qualified as experts. Doc. 192 at 6 n.12. Dr. Ehrensaft is a practicing developmental and clinical psychologist with 35 years of experience, specializing in children and adolescents experiencing gender dysphoria. Doc. 166-3 ¶ 3. Dr. Adkins is a Pediatric Endocrinologist at Duke University School of Medicine, and the founder and Director of the Duke Center for Child and Adolescent Gender Care. Doc. 166-2, 6:1-22. She is also Drew's treating endocrinologist. *Id.* at 11:22-24. Defendant offered no expert testimony at trial.

gender has been recorded at birth based on external genitalia. Doc. 192 at 6. For most people, the various components of gender are congruent, and their birth-assigned sex is accurate. Doc. 192 at 6. For others, however, including transgender people, not all gender markers align, and external genitalia are not an accurate proxy to determine gender. Doc. 192 at 6; Doc. 166-3 ¶ 19-20.[2] For that reason, neurological sex and related gender identity are the determinative factors of one's gender. Doc. 192 at 6; Doc. 166-3 ¶ 20.

Gender identity refers to an internal sense of belonging to a gender. Doc. 192 at 7; Doc. 119-1 at 6. Gender identity is not a choice and cannot be voluntarily altered; the medical community considers attempts to change the gender identity of others unethical. Doc. 192 at 9-10; Doc. 166-2, 14:10-13; Doc. 166-3 ¶¶ 21-22, 26. A transgender person is someone who "consistently, persistently, and insistently identifies as a gender different than the sex they were assigned at birth." Doc. 192 at 7 (internal quote omitted); Doc. 119-1 at 7. The lack of alignment between a transgender individual's gender identity and birth-assigned sex can cause significant distress. Doc. 192 at 7; Doc. 166-2, 15:8-12; *id.* 15:24-16:5; Doc. 166-3 ¶¶ 27-28. Gender dysphoria is the clinical diagnosis for this distress, as

[2] Because not all components of gender may be aligned, the Endocrine Society advises that the term "biological sex" is "imprecise and should be avoided." Doc. 151-4 at 7; Doc. 192 at 6 n.13; *see also* Doc. 166-2, 48:9-49:12 (Dr. Adkins' testimony that "biological sex" is not medically precise or accurate).

recognized by the Diagnostic and Statistical Manual of Mental Disorders, Doc. 192 at 7-8, and the World Health Organization's International Classification of Diseases, Doc. 166-3 ¶ 28 – the diagnostic and coding compendia for medical professionals.

Authoritative medical standards provide treatment protocols to relieve this distress and care for transgender individuals, Doc. 166-2, 24:6-25:5, including the World Professional Association for Transgender Health Standards of Care, Version 7. Doc. 166-3 ¶ 13; Doc. 192 at 8; *see also* Doc. 166-2, 17:17-24 (expert testimony regarding the Endocrine Society's "Endocrine Treatment of Gender Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline"); Doc. 151-4.

The standards of care for treatment of gender dysphoria include living consistently with one's gender identity in all aspects of one's life. Doc. 166-2, 22:25-23:12; *id.* 27:12-20; Doc. 166-3 ¶ 41. To accomplish this, transgender people undertake a process that may include social, legal, and medical transition to align all aspects of their life with their gender identity. Doc. 192 at 8; Doc. 166-2, 22:25-24:5; Doc. 166-3 ¶¶ 33-37.

B. Drew's Gender Identity and Transition

Though Drew's birth-assigned sex was female, Drew's parents noticed that from a young age, he rejected stereotypically feminine behaviors and attributes,

such as playing with dolls, favoring the color pink, or wearing dresses. Doc. 192 at 10. Instead, Drew preferred playing with race cars and dinosaurs. *Id*. When Drew reached puberty, he "hated" the aspects of his body that were becoming feminized. *Id.*; Doc. 166-2, 19:21-21:15. He experienced depression and anxiety, and began seeing a therapist and psychiatrist. Doc. 192 at 10.

Through therapy, Drew came to understand that his distress was the result of the lack of alignment between his gender identity and birth-assigned sex; he realized he was transgender and told his parents, who suspected as much. *Id.*; Doc. 160, 217:5-218:20; *id.* 217:7-9; Doc. 161, 87:13-24 (father's testimony that "over the years from the earliest memories, really, of Drew," he simply "wasn't acting like a girl"; he would "pitch a fit" about wearing dresses and did not wear one in a single family photo). Drew was diagnosed with gender dysphoria by his therapist, Doc. 192 at 11, which his endocrinologist's office confirmed. Doc. 166-2, 16:8-12.

Drew's mother and father secured numerous mental health and medical professionals to advise the family about the best course of action; these medical professionals prescribed treatment for Drew's social and medical transition. Doc. 151-16; Doc. 160, 89:25-90:7; *id.* 91:7-23; *id.* 93:12-94:8; *id.* 98:25-100:18; *id.* 105:7-106:3; *id.* 220:21-222:4; *id.* 227:25-228:16; *id.* 230:9-233:5; *id.* 238:7-18; Doc. 161, 88:6-12. Drew socially transitioned to live in all aspects as the boy that

he is, including cutting his hair, wearing typically male clothing, using male pronouns, wearing a chest binder (a garment which flattens breast tissue), and using male restrooms in public. Doc. 192 at 10-11.

The goal of medical transition is for the body to "completely appear [as] the gender that matches [one's] gender identity." Doc. 166-2, 27:21-28:9; *see also* Doc. 166-3 ¶¶ 36-37, 39. Drew's medical transition included hormone therapy, and eventually a mastectomy in 2017 to create a typically masculine chest and to eliminate the need to wear his chest binder. Doc. 192 at 11. Drew's hormone therapy will continue deepening his voice and cause him to grow facial hair. Doc. 166-2, 30:7-21.

Drew's legal transition included correcting his driver's license and birth certificate to reflect his male gender, pursuant to guidelines established by the Florida Department of Highway Safety and Motor Vehicles and the Florida Department of Health Office of Vital Statistics, respectively. Doc. 192 at 11-12; Doc. 147. Drew testified that updating his birth certificate "corrected a mistake that has been impacting my life since I was born," and means the State "recognizes me as who I am, a boy, and that means everything to me." Doc. 160, 109:15-20; *id.* 110:21-25.

Drew testified that the milestones in his transition have been "the happiest moments of [his] life." Doc. 160, 106:4-11; *id.* 106:24-107:9; *id.* 237:18-21

(mother's testimony that Drew was "ecstatic" about beginning hormone therapy). According to Drew's mother, coming out brought on an "absolutely remarkable" change in Drew. Doc. 160, 220:8-11. "He went from this quiet, withdrawn, depressed kid to this very outgoing, positive, bright, confident kid. It was a complete 180." *Id.*, 220:9-11. With every step of the transition, Drew feels even better: "I don't hate myself anymore. And I don't hate the person I am. I don't hate my body anymore." *Id.* at Doc. 160, 106:8-9.

Drew is widely known and accepted as male in all aspects of his life. Doc. 160, 109:21-23. This includes at Nease, where he has experienced support and respect from other students as a boy. Doc. 151-17, RFA 52; Doc. 160, 111:23-112:8; *id.* 127:11-14. Nease staff refer to Drew with male pronouns and treat him as male in every respect except access to restrooms. Doc. 192 at 27; Doc. 160, 170:16-25; Doc. 151-17, RFA 55.

C. Defendant's Policies for Transgender Students, and Exclusion of Them from Common Restrooms

Defendant educates approximately 40,000 students in 36 schools, serving grades K-12. Doc. 192 at 13. Defendant is aware of 16 transgender students in its schools, at least seven of whom would like to use restrooms matching their gender identity. Doc. 192 at 14; Doc. 162, 106:20-107:3. Nease's principal knows of five transgender students at Nease, including Drew. Doc. 192 at 14. Of the other four,

the general school population does not know they are transgender. Doc. 162, 141:24-142:3.

All individuals, regardless of whether they are transgender, need access to restrooms that match their gender identity. Drew used the boys' restrooms at the beginning of his freshman year for approximately six weeks. Doc. 192 at 25; Doc. 160, 112:22-113:3; *id.* 113:16-18. Drew uses the boys' restroom in every setting outside Nease, always using a stall, and without any problems. Doc. 160, 118:10-13; *id.* 202:18-22; *id.* 229:11-15. In every material respect, Drew is similarly situated to his male peers with respect to using communal restrooms. "When Adams uses the men's restroom, he walks in and enters a stall, closes and locks the door, relieves himself, exits the stall, washes his hands, and leaves." Doc. 192 at 11. Drew is not aware of any problems with his restroom use during his first six weeks at Nease and no male student complained. Doc. 160, 113:19-24. No one was unclothed in any of the restrooms, and no evidence was introduced at trial of any misconduct by Drew while using the boy's restroom. Doc. 160, 113:25-114:9.

Six weeks into Drew's freshman year, the school received a report from two female students that they had seen Drew entering the boys' restroom. Doc. 192 at 25. Not a single boy or boy's parent complained about Drew's restroom use. *Id.*; Doc. 162, 95:2-12; *id.* 102:7-24. No one ever claimed that Drew had engaged in

any misconduct while in the restroom. Doc. 151-17, RFA 25-26, 31-32; Doc. 160, 113:19-114:9.

Thereafter, Drew was instructed that he was banned from the boys' restroom and limited to gender-neutral or girls' restrooms. Doc. 192 at 25. School staff informed him that he had done nothing wrong. Doc. 160, 115:21-116:10. Drew later learned that this instruction was pursuant to (1) an unwritten policy, Doc. 162, 11:8-13, and (2) written guidelines entitled "St. Johns County School District Guidelines for LGBT Students–Follow Best Practices" (the "guidelines" or "policy"). Doc. 152-6.

1. Defendant's Unwritten Policy

Defendant's written policy requires students to use restrooms matching their "biological sex," Doc. 152-6, despite this term's inaccuracy. Doc. 166-2, 48:9-49:12. Each new student submits enrollment forms requiring the student to designate their sex. Doc. 192 at 13. This information is accepted "at face value" to determine "biological sex," Doc. 192 at 22; Doc. 162, 50:24-51:1, even though the forms allow students only to indicate whether they are male or female, and none refer to "biological sex" or transgender status. Doc. 192 at 13, 22; Docs. 152-28, 152-29, 152-30; Doc. 162, 12:19-21. Defendant does not track students' chromosomes, or internal or external sex organs, Doc. 151-17, RFA 62-68, or inspect students' anatomy before they use school restrooms, Doc. 151-17, RFA 69.

Defendant does not learn about the presence of transgender students in its schools unless it is reported, such as by self-disclosure. Doc. 161, 235:15-18; Doc. 162, 53:18-21.

If a transgender student indicates their birth-assigned sex on enrollment forms, that designation is "set in stone," and the student can never access restrooms matching their gender identity. Doc. 192 at 14; Doc. 161, 235:10-14; Doc. 162, 12:24-13:12. Thus, a transgender student who enrolled in the school system (perhaps at an early age) before being diagnosed with gender dysphoria and prescribed a transition process as treatment, can *never* correct their gender with the school. But if a transgender student enrolls with paperwork that matches their gender identity (*e.g.*, by transferring from another district), Defendant "will accept the student as being of that gender." Doc. 192 at 14. "Thus, unless there was a complaint, a transgender student could use the restroom matching his or her gender identity until he or she graduated, and the school would be none the wiser." Doc. 192 at 22. Asked whether this raises any concern from Defendant's perspective, Defendant's corporate representative answered, "As a practical matter, I would say no. The district does not play bathroom cop." *Id.*; Doc. 162, 53:5-14.

Notwithstanding the above, if a student *known* to be transgender used restrooms matching his or her gender identity, that would be considered misconduct, punishable under the student code of conduct. Doc. 192 at 14-15, 25.

2. Defendant's Written Guidelines

Defendant's guidelines allow transgender students to use gender-neutral restrooms in lieu of restrooms matching birth-assigned sex. Doc. 152-6; Doc. 161, 171:22-172:5; *id.* 247:21-248:1.[3] The guidelines were developed after now-retired Director of Student Services Sallyanne Smith formed a task force to study the issue. Doc. 192 at 15. Ms. Smith characterized the task force's research, and her own personal research, as extensive and robust. Doc. 192 at 15; Doc. 161, 147:6-7. The task force uncovered no privacy or safety issues in the schools with policies that treat transgender students equally. Doc. 161, 219:18-220:10; Doc. 162, 15:13-16:8; *id.* 31:1-5.

Although the guidelines do not respect transgender students' gender identity for restroom use, they recognize gender identity in a variety of other ways, requiring schools to: use respectful pronouns, Doc. 192 at 15-16; Doc. 152-6 at 1; update the name and gender on student records upon receipt of a court order, Doc. 192 at 16, Doc. 152-6 at 1; use a student's chosen name on unofficial school records even without a court order or birth certificate, Doc. 192 at 16, Doc. 152-6 at 1; allow transgender students to wear clothing matching their consistently-

[3] Defendant introduced two exhibits showing that the corporate representative had redlined the section about restrooms so that it was specifically directed at "transgender students." Docs. 152-20, 152-26 (both exhibits change "gender identity" to "transgender identity," and "students" to "transgender students"); Doc. 162, 56:12-60:23; *id.* 108:16-109:6.

asserted gender identity, Doc. 192 at 16, Doc. 152-6 at 2; allow students to publicly express their gender identity, Doc. 192 at 16, Doc. 152-6 at 1; and not unnecessarily disclose a student's transgender status to others, Doc. 192 at 16, Doc. 152-6 at 1. The guidelines cite the Florida High School Athletic Association ("FHSAA") policy, which binds Defendant as a member, and requires that students be allowed to participate in athletics consistent with their gender identity. Doc. 192 at 16; *id.* at 16 n.22; Doc. 152-6 at 2; Doc. 151-9.[4]

Defendant's witnesses conceded that the guidelines treat Drew differently (i) from other boys, who can use restrooms matching their male gender identity; and (ii) from non-transgender students, since the policy in effect relegates him to a gender-neutral restroom. Doc. 162, 32:6-11; *id.* 33:21-24; *id.* 118:10-13; *id.* 136:17-137:2.

D. The Harms Visited on Drew by Defendant's Restroom Policy

Social transition requires "using restrooms and other single-sex facilities consistent with that identity." Doc. 192 at 8 (quote omitted). The experts testified that failing to support a transgender student's gender identity sends a message –

[4] The FHSAA policy requires that transgender students be permitted to participate in athletic teams in accordance with their gender identity, regardless of the gender on their birth certificate or school records. Doc. 192 at 16 n.22; Doc. 151-9 at 48. This constitutes just one more way in which the State recognizes gender identity, in addition to the State's protocols for correcting gender markers on birth certificates and driver's licenses. Doc. 192 at 11-12; Doc. 147. FHSAA governs athletics in Florida public schools. Doc. 192 at 16.

both to the transgender student and others – that the transgender student is different from his or her peers and needs to be isolated from them in restrooms, causing the transgender student to experience shame, and potentially other harms as well. Doc. 166-3 ¶¶ 41-48; Doc. 160, 116:21-24; *id.* 117:17-21; *id.* 204:5-206:6; *id.* 204:19-20 (Drew's testimony that "it feels like the school doesn't think I'm even worthy of occupying the same space as my classmates"); *id.* 205:2-4 ("because I'm using a special bathroom and I'm oftentimes passing a men's bathroom, everybody knows I'm different, and I just want to fit in"); *see also id.* 56:8-14; Doc. 192 at 25, 27.

Additionally, the experts testified that refusing to allow a transgender person to use restrooms aligned with their core gender identity is detrimental and interferes with social transition. Doc. 166-2, 33:3-15; Doc. 166-3 ¶ 41; Doc. 160, 116:11-16 (Drew felt shocked, confused, and angry after being barred from the boys' restroom because, "I was living in every aspect of my life as a boy and now they're taking that away from me."); *id.* 278:14-17 (mother's testimony that the restroom exclusion "brings that social transition to sort of a screeching halt"; "everywhere else and every other aspect in his life he can be a normal boy. At school, he can't."). The Pediatric Endocrine Society recognizes that "not allowing students to use the restroom matching their gender identity promotes further discrimination and segregation of a group that already faces discrimination and safety concerns." Doc. 192 at 8; Doc. 151-6.

As Drew's endocrinologist, Dr. Adkins, prescribed that Drew complete his social transition by living consistent with his gender identity in all aspects of life, including restroom use. Doc. 166-2, 28:10-17; *id.* 33:8-11. Denying Drew access to the boys' restroom interferes with his prescribed medical treatment. *Id.* 33:12-15; *id.* 38:17-39:21. Being relegated to a gender-neutral restroom does not reduce the harm or stigma of being banned from the restroom matching one's gender identity. Doc. 166-2, 33:22-34:13; Doc. 166-3 ¶ 47.

Drew testified that being able to use the boys' restroom was profoundly important for him because "[i]t's a statement to everyone around me that I am a boy. It's confirming my identity and confirming who I am, that I'm a boy. And it means a lot to me to be able to express who I am with such a simple action because I'm just–I'm just like every other boy …" Doc. 160, 107:18-25. In contrast, being barred from the boys' restroom felt "humiliating" and "like a slap in the face." Doc. 160, 116:14; *id.* 117:4; *id.* 117:4-7; *id.* 277:25-278:4; *see also* Doc. 192 at 25. Drew said that walking past the boys' restroom to access the gender-neutral restroom felt "like a walk of shame," because "I know that the school sees me as less of a person, less of a boy, certainly, than my peers." Doc. 160, 204:10-12. Drew's father testified that Drew was "devastated" after the school barred him from the boys' restroom, returning him to the depression and anxiety he

experienced before he transitioned. Doc. 161, 92:13-22; *id.* 92:20-22; *see also* Doc. 166-2, 38:17-25.

Drew testified that he thought about his access to restrooms every day from the moment he woke up, planning his liquid consumption so that he could limit his need to use the restroom and avoid the stigmatization of a gender-neutral restroom. Doc. 192 at 26 (finding that Drew limited his daily fluid intake so that he used the restroom only once or twice per day); Doc. 160, 119:6-10; *id.* 277:20-22. At various points, Drew would hold his bladder to avoid having to use the gender-neutral restroom, making it harder to concentrate in class. Doc. 192 at 26; Doc. 160, 173:16-174:5; *id.* 277:16-18.

E. Defendant's Purported Governmental Interests

Defendant failed to introduce any evidence supporting its purported governmental interests in its policy, including claimed interests in privacy and safety. Doc. 192 at 20; Doc. 162, 110:22-111:10; Doc. 161, 172:13-15; *id.* 173:1-22. Indeed, Defendant's witnesses conceded that their concerns were speculative, grounded neither in their experience with Drew, nor their research into this area.

1. Privacy

Although Defendant claimed that privacy interests support its policy, Defendant offered no concrete concerns–only speculation that female students using restrooms to "refresh [their] makeup" and "talk to other girls" may feel

"uncomfortable" sharing a restroom with a transgender girl, or may want privacy to clean a stain on their clothing. Doc. 192 at 20. All boys' and girls' restrooms at Nease contain stalls with locking doors, Doc. 162, 31:22-25; *id.* 114:1-8; Doc. 151-17, RFA 57, and Defendant admitted that stalls provide privacy for anyone inside of them. Doc. 192 at 20. While Defendant has not yet installed partitions between urinals, Defendant conceded that it could. Doc. 162, 32:12-15; Doc. 192 at 23.[5] All students who use a girls' restroom at Nease do so by using a stall. Doc. 151-17, RFA 58. Any student who wants additional privacy in the boys' restroom can use a stall, and all students can use gender-neutral restrooms for additional privacy. Doc. 162, 31:22-32:8; *id.* 114:18-115:4; Doc. 151-17, RFA 59.

Despite the task force's research, Defendant's witnesses conceded they had learned of no privacy violations involving transgender students. Doc. 161, 219:18-220:10; Doc. 162, 15:13-16:8; *id.* 31:1-5. As the district court found, there were no reported instances of privacy breaches during the time Drew used the boys' restroom. Doc. 192 at 27.

2. Safety

Although Defendant appears to have abandoned this argument, Defendant suggested at trial that allowing transgender students to use the restroom matching

[5] Defendant disclaimed any interest in cost at trial. Doc. 161, 67:25-68:5; Doc. 192 at 20 n.25.

their gender identity might raise safety concerns. Defendant's first safety argument rested on the notion that transgender children are vulnerable to bullying, and separating them will keep them safe. Doc. 192 at 21; Doc. 162, 120:3-19. Second, Defendant suggested that under a rule treating transgender students consistent with their identity, a student with bad intentions could access a restroom to engage in misconduct. Doc. 162, 112:20-25. But Defendant conceded that the second concern was not its "primary point," nor could it identify any incident where this had occurred. *Id.* 112:25-113:1; *id.* 112:13-19. Defendant was not aware of any bullying violations involving restroom use by a transgender student in the district or anywhere else. Doc. 192 at 21-22.

Defendant also suggested that its policy and guidelines are intended to prevent boys and girls from being in an unsupervised restroom together. Doc. 192 at 21. The district court found, however, that Drew's claims are wholly unrelated to males and females sharing a restroom. Doc. 192 at 47. Additionally, the District has a code of conduct prohibiting any kind of misconduct or crime (Doc. 152-14 at 27-28, 31-38; Doc. 151-17, RFA 28), and Florida's criminal laws apply to any criminal conduct on campus. Doc. 162, 96:9-14; Doc. 152-14 at 27-28; Doc. 151-17, RFA 30.

Although this is unrelated to Drew's claims, Doc. 192 at 46-47, Ms. Smith argued that the task force was concerned about students who identify as "gender

fluid," suggesting this might allow a "football quarterback" to "come in and say I feel like a girl today and so I want to be able to use the girls' room." Doc. 161, 213:10-18; *id.* 214:1-4; *id.* 216:15-17; Doc. 162, 70:6-14. As the Court noted, however, the task force had not heard of any such incidents, Doc. 192 at 17, 21, and Defendant provided no evidence on this point. Doc. 162, 155:18-156:16. Defendant also conceded that transgender people are not more prone to committing misconduct than any other person. Doc. 162, 95:13-23.

F. Testimony from Officials at Schools with Policies That Treat Transgender Students Equally

Plaintiff introduced the testimony of three school administrators who had implemented policies providing equal treatment to transgender students. Doc. 192 at 28. Dr. Thomas Aberli served as Principal at Atherton High School in Louisville, Kentucky, when the school adopted a policy in 2014 that treats students equally on the basis of gender identity. Doc. 160, 20:4-15, *id.* 21:1-4, *id.* 22:11-21; Docs. 151-18, 151-19. Michaelle Valbrun Pope is the Executive Director for Student Support Initiatives for Broward County Public Schools ("BCPS") in Florida, which adopted a policy to provide equal treatment five years ago. Doc. 192 at 29; Doc. 161, 51:12-20; Doc. 151-8. BCPS is the sixth largest district in the nation, with more than 340,000 students including off-campus learning centers. Doc. 192 at 29; Doc. 161, 53:2-21. Michelle Kefford is the Principal of Charles

W. Flanagan High School, within BCPS. Doc. 161, 97:11-13. Ms. Pope and Ms. Kefford helped develop BCPS's non-discrimination policy and guidelines regarding transgender students (*id.* 54:5-6; *id.* 99:5-16), and Principal Kefford helps train educators within BCPS on the policy and serves as a point person for administrators and staff with questions about the policy (*id.* 100:14-20). Both of the relevant policies extend to restrooms and locker rooms, and BCPS's detailed guidelines also explain how to apply its requirement of equal treatment to overnight trips and other sex-separated activities and facilities. Doc. 151-19 at 2; Doc. 151-8 at 40-44.

Dr. Aberli, Ms. Pope, and Principal Kefford each testified that their policies treat all students equally based on their gender identity, and such policies were neither difficult nor costly to implement. *See* Doc. 192 at 29-32 (reviewing the testimony of each school administrator). None has experienced problems under their policies with privacy or safety. *Id.*

III. STANDARD OF REVIEW

Conclusions of law are reviewed by this Court *de novo*. *United States v. Vargas*, 848 F.3d 971, 973 (11th Cir. 2017). Although Defendant does not challenge any of the district court's factual findings, such findings are deferentially reviewed for "clear error." *Id.*

SUMMARY OF THE ARGUMENT

This case is about whether Defendant has a right to banish Drew Adams from boys' restrooms at school simply because he is transgender. After receiving three days of evidence at trial, the district court issued painstakingly detailed factual findings, acknowledging that schools have a particular interest in protecting their students, and that parents similarly want to ensure that their children are safe. But the court also found that Drew's use of the restroom is just like that of other boys in every relevant respect; and that while treating Drew equally to other boys causes no one else harm, discriminating against Drew inflicts profound injuries on him, marking him in the eyes of his peers as a second-class citizen.

Defendant contests none of the district court's factual findings, instead arguing that this Court's leading precedent in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) – which governs discrimination against transgender people – is inapplicable. But the district court correctly applied *Glenn* to find that Defendant's policy, which classifies transgender students for differential treatment on its face, discriminates based on sex. After an exacting review of the trial record, the court also found that Defendant's purported governmental interests in "privacy and safety are only conjectural (and therefore insufficient to survive intermediate scrutiny)." Doc. 192 at 44. Finally, the district court applied well-established principles of statutory construction to determine that Title IX also protects Drew

from the sex discrimination in Defendant's policy. Defendant offers no basis on appeal to disturb the court's well-supported factual findings and conclusions.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT HEIGHTENED SCRUTINY APPLIES TO DEFENDANT'S POLICY

Defendant asks this Court to disregard *Glenn v. Brumby*, its leading, foundational authority holding that discrimination against individuals because they are transgender is sex discrimination. *Glenn* has been the law of this circuit for nearly a decade, and its cogent reasoning has guided other federal courts to the same conclusion since it was decided. The Court should affirm the district court's application of *Glenn* to conclude that the sex-based classification in Defendant's policy requires heightened scrutiny. Alternatively, the district court's application of heightened scrutiny should be affirmed because the policy also discriminates based on transgender status, which warrants heightened review.

A. Heightened Scrutiny Applies Because Defendant's Policy Discriminates Based on Drew's Sex

For nearly a half century, courts have viewed laws that classify based on sex with suspicion. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017). Defendant freely admits its policy facially discriminates based on sex. Def.'s Br. 16-17. Defendant therefore had to prove that the policy substantially relates to an important governmental objective and had the "demanding" burden of proffering

an "exceedingly persuasive" justification. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Defendant failed to meet this test. The district court correctly found that Defendant's policy contains a sex-based classification for at least three reasons. First, on its face the policy "cannot be stated without referencing sex-based classifications." Doc. 192 at 35-36; *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (policy barring transgender students from sex-specific restrooms matching their gender identity "cannot be stated without referencing sex"). No matter how one describes the policy – *i.e.*, as being about access to boys' or girls' restrooms, or as dictating Drew's sex for purposes of restroom use – it is inescapably about sex.

Second, *Glenn* instructs that discrimination against a person because they are transgender is inherently discrimination based on sex stereotypes. Doc. 192 at 36 (citing *Glenn*, 663 F.3d at 1318-19). "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Glenn*, 663 F.3d at 1316. Accordingly, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Id.*; *see also Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 884 (11th Cir. 2016). The weight of circuit precedent agrees. *See Whitaker*, 858 F.3d at 1048; *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir.

2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000). In other words, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth," and excluding that individual from the restroom conforming to his or her gender identity "punishes that individual for his or her gender non-conformance." *Whitaker*, 858 F.3d at 1048-49.

Here, the district court recognized that it is Drew's "failure to act in conformity with his sex assigned at birth that is causing the School District to treat [him] differently." Doc. 192 at 49; *see also Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285–86 (W.D. Pa. 2017) ("discrimination based on transgender status in these circumstances is essentially the epitome of discrimination based on gender nonconformity"); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 869 (S.D. Ohio 2016); *cf. M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018).

Third, discrimination based on gender transition is also discrimination based on sex, just as discrimination based on religious conversion is necessarily discrimination based on religion. Firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion,'" even if the employer "harbors no bias toward either Christians or Jews

but only 'converts.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012); *accord Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018). Similarly, Defendant may treat boys and girls equally as a general matter but nonetheless discriminate against those who undertake gender transition, which is sex discrimination. *Schroer*, 577 F. Supp. 2d at 306.

In its attempt to defeat Drew's sex discrimination claim, Defendant repeats three arguments from its district court brief but provides no reason to disregard the district court's thorough rejection of each argument.

1. The District Court Correctly Found That *Glenn* Controls

Defendant strains to distinguish *Glenn*, first claiming "there is no evidence that Adams was treated differently because of his failure to conform to gender norms." Def.'s Br. 31. But because transgender people "contradict stereotypes of gender-appropriate appearance and behavior," there is "a congruence between discriminating against transgender … individuals and discrimination on the basis of gender-based behavioral norms." *Glenn*, 663 F.3d at 1316 (quote omitted). This is not the same, as Defendant inaccurately claims, as holding that "any time a transgender person is treated differently it is ipso facto discrimination." Def.'s Br. 31 n.10. To the contrary, both *Glenn* and the court below reasoned that it is when

individuals are treated differently *because they are transgender* that sex stereotyping is at play. Defendant's policy does precisely that. Doc. 192 at 36-37.

Defendant attempts to cabin *Glenn*'s application for three additional reasons, arguing that it is limited to employment, there is purportedly no animus here, and *Glenn*'s discussion of restrooms exonerates Defendant. Def.'s Br. 17-18. First, nothing about *Glenn* limits its reasoning to the workplace, and it has been relied upon by numerous courts considering the treatment of transgender students in common restrooms. *See, e.g.*, *Whitaker*, 858 F.3d at 1048.

Second, nothing in *Glenn* suggests that discrimination in restrooms is excusable as long as the government acted without overt hostility or animus. Def.'s Br. 18, 31. As Defendant admits, "when a policy facially discriminates, like the [Defendant's own] policy, there does not need to be independent evidence of discriminatory intent." Def.'s Br. 16-17. The facial discrimination here is plain in Defendant's written guidelines, which explicitly target "[t]ransgender students." Doc. 152-6. Even if intent to discriminate were somehow relevant, there can be no doubt that it exists here. *See* Docs. 152-20, 152-26 (showing Defendant's counsel specifically edited the guidelines to refer to "transgender" students); *see also* Doc. 192 at 37 n.37.[6]

[6] Defendant's argument that it did not discriminate for purposes of Drew's Title IX claim fails for the same reasons. Def.'s Br. 48-49. The exclusion of transgender

Third, *Glenn*'s discussion of restrooms does not help Defendant. To the contrary, *Glenn* modeled the analysis required here, which the district court diligently performed. Precisely as the district court did here, *Glenn* looked carefully at whether purported concerns about restroom use were actually borne out by the facts on the ground and concluded that such concerns were insufficient to justify the discrimination. *Glenn*, 663 F.3d at 1320-21; Doc. 192 at 39-53.

2. The District Court Correctly Found That the Policy Treats Transgender Students Differently

Defendant argues that there is no sex-based classification in its policy because restroom use is "determined on the basis of biology" for all students. Def.'s Br. 14; *id.* 13. But this ignores the evidence that "biological sex" is a misnomer. Undisputed expert testimony established at trial that gender identity itself has "biological underpinnings," Doc. 166-2, 47:9-11; *id.* at 48:3-6, or a "biological basis," Doc. 166-3 ¶ 25; Doc. 151-5 at 1. And medical experts reject the term "biological sex" as imprecise and inaccurate. Doc. 192 at 6. Defendant does not challenge those factual findings.

Any argument that Defendants' policy can evade review because it classifies *both* boys and girls based on a sex-based characteristic (such as one's so-called

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students from restrooms matching their gender identity is targeted and purposeful, not accidental. Doc. 192 at 37 n.37. The evidence need not show "ill will … on the part of [recipient]." *Elston v. Talladega County Bd. Of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993) (quote omitted).

"biological sex"), Def.'s Br. 13, 16, ignores the central question of whether one's sex has been taken into account. *See Whitaker*, 858 F.3d at 1051 (rejecting school district's claim that its exclusion treated boys and girls equally); *cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting "notion that the mere 'equal application' of a statute containing racial classifications" removes it from equal protection scrutiny).

Stated differently, Defendant cannot require that restroom use be determined by a sex-based characteristic such as birth-assigned sex (or "biological sex") – allowing non-transgender students to use restrooms matching their gender identity, but not transgender students – and then claim that sex has been erased from the equation. Discrimination based on sex "is not only discrimination because of maleness" or "femaleness," it is also "discrimination because of the *properties or characteristics* by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016). Defendant's policy selects a property or characteristic, *i.e.*, birth-assigned sex, that punishes transgender students and favors non-transgender students.

Nor is it an answer that Defendant discriminated not based on sex, but based on Drew's "female reproductive organs," Def.'s Br. 13 – a distinction without a difference. *See Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756, at *9 (E.E.O.C. Apr. 1, 2015) (finding it unlawful to bar a transgender woman

from the restroom based on belief that she was not "truly female" without genital surgery); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) ("Although CCSD contends that it discriminated … based on [plaintiff's] genitalia, not his status as a transgender person, this is a distinction without a difference.").[7]

Glenn itself rejects Defendant's argument: the employer found it "unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing" – far from excusing the discrimination, *Glenn* found that to be direct evidence of gender stereotyping. 663 F.3d at 1314, 1320-21. Ms. Glenn's anatomy had no relevance to her ability to perform her job; here too, Plaintiff's anatomy has no relevance to his ability to use the boys' restroom. Eliminating all doubt, Defendant's witnesses conceded at trial that Drew is treated differently *because* he is transgender, which is sex discrimination. Doc. 162, 32:6-11; *id.* 33:21-24; *id.* 118:10-13; *id.* 136:17-137:2.

[7] *See also Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065-66 (9th Cir. 2002) (explaining that any focus on sex-related anatomy, such as genitalia or breasts, "is inescapably 'because of . . . sex'") (citation omitted). Non-transgender individuals who have lost external genitalia in an accident have not somehow had their sex changed, or eliminated. *Cf.* Doc. 166-2, 41:22-44:14. Instead, gender identity continues to be the primary determinant of their sex; so too for transgender people.

3. The District Court Correctly Found That Drew Is Similarly Situated to Other Boys in All Relevant Respects

Defendant also claims that the district court erred because Drew is supposedly not similarly situated to other boys at Nease. Def.'s Br. 15. The cases Defendant cites, however, simply affirm the basic proposition that one need be similarly situated only in all *relevant* respects to the favored majority. *See, e.g.*, Def.'s Br. 15, 22. Drew proved at trial that his need to use the restroom is similar in every material respect to that of other boys. Doc. 192 at 11 ("When Adams uses the men's restroom, he walks in and enters a stall, closes and locks the door, relieves himself, exits the stall, washes his hands, and leaves."). The only difference between Drew and the non-transgender boys allowed to use the boys' restrooms is their birth-assigned sex. Defendant thus treats Drew differently from other boys "who are similarly situated" solely because he is transgender. *Evancho*, 237 F. Supp. 3d at 285.

Defendant claims that various Supreme Court decisions authorize differential treatment of transgender students based on physiological differences, but those cases all share a different theme: Where the government can provide equal access, it must, regardless of whether physiological differences might warrant accommodation. Def.'s Br. 22, 29-30. For example, defendants in *Virginia* argued that physiological differences and privacy justified excluding

women from the Virginia Military Institute ("VMI"). 518 U.S. at 522, 524-25. *Virginia*, however, *rejected* reliance on "physical differences" to justify the exclusion of women from VMI, and instead ended VMI's exclusion of women and required that privacy be addressed through any necessary alterations. 518 U.S. at 533, 550 n.19. The same result followed in *Faulkner v. Jones*, involving South Carolina's male-only military college. 10 F.3d 226, 228-29, 232 (4th Cir. 1993) (discussing separate restrooms for men and women and affirming that differential treatment may not be "based on stereotyped or generalized perceptions of differences").[8]

Defendant's reliance on cases like *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464 (1981), and *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), is also misplaced. While finding males and females differently situated for purposes of a statutory rape law, *Michael M.* reaffirmed that "differences between the sexes are sometimes relevant and sometimes *wholly irrelevant*." 450 U.S. at 497 n.4 (emphasis added). Where those differences are irrelevant – as here – "the discrimination should be treated as presumptively unlawful." *Id.* *Nguyen* involved differing requirements for men and women to prove parentage of children born

[8] Nor does *Frontiero v. Richardson*, 411 U.S. 677 (1973), excuse the discrimination here. Def.'s Br. 29. *Frontiero* explains why classifications based on sex are subject to intermediate scrutiny, in part because one's gender – which is integrally linked to gender identity – is immutable. 411 U.S. at 686. Nothing about that observation authorizes Defendant's discriminatory policy.

abroad. 533 U.S. at 64. *Nguyen* held that the ability of women to prove parentage through birth is not a stereotype, *id.* at 68, but Defendant's notion here that Drew cannot use the boys' restroom because of his birth-assigned sex clearly *is* based on stereotype, rather than the reality of his restroom use. *See also* Doc. 192 at 47-49 (district court's analysis distinguishing *Michael M.*, *Nguyen*, and *Virginia*).

Defendant cites the fact that Drew has a vagina, Def.'s Br. 7, 18, but that has nothing to do with the act of voiding one's bladder. The district court thus was correct in holding that there is no "difference [that] is relevant here." Doc. 192 at 49. Candidly stated, the stalls lock the same way, toilets flush the same way, and faucets work the same way, regardless of whether the boy using them is transgender.[9]

B. Alternatively, the District Court's Holding Should Be Affirmed Because the Policy Discriminates Based on Transgender Status

Although the district court found it unnecessary to reach Plaintiff's argument that discrimination on the basis of transgender status also requires heightened scrutiny, Doc. 192 at 38 n.38, the district court's application of heightened scrutiny should be affirmed for this alternative reason. The Supreme Court consistently has

[9] *Williams v. Kelly*, No. 17-cv-12993, 2018 WL 4403381 (E.D. La. Aug. 27, 2018), *report and recommendation adopted*, No. 17-cv-12993, 2018 WL 4386178 (E.D. La. Sept. 14, 2018), is not persuasive. Def.'s Br. 18-19. This out-of-circuit district court decision, issued on a motion to dismiss, says nothing about why this Court should reverse Judge Corrigan's post-trial factual findings that Drew is similarly situated to his peers.

applied some form of heightened scrutiny where the classified group has suffered a history of discrimination, and the classification has no bearing on a person's ability to perform in society. *See, e.g.*, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976). The Supreme Court has also sometimes considered whether the group is a minority or relatively politically powerless, and whether the characteristic is defining, or "immutable" in the sense of being beyond one's control or not one the government has a right to insist that an individual try to change. *See, e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). While not all considerations need be present, *see Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), all warrant heightened scrutiny for transgender status discrimination.

As the district court noted, there is a "documented history of discrimination against transgender individuals." Doc. 192 at 8 (citing Doc. 114); *id.* at 8-9 n.15 (collecting sources); *see also Whitaker*, 858 F.3d at 1051; *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018); *M.A.B.*, 286 F. Supp. 3d at 720 (D. Md. 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018); *Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

There is also "obviously no relationship between transgender status and the ability to contribute to society." Doc. 166-2, 13:2-5; Doc. 166-3 ¶ 32; *see also*

Evancho, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139. A person's gender identity is an innate, effectively immutable characteristic that cannot be expected to change as a condition of equal treatment. Doc. 166-2, 12:23-13:1; Doc. 166-3 ¶ 26. As the district court found, prior "attempts to force transgender people to live in accordance with" their birth-assigned sex "failed and caused significant harm." Doc. 192 at 9-10; Doc. 119-1 at 5; *see also Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139-40; Doc. 166-2, 12:23-13:1; Doc. 166-3 ¶ 26. Finally, "transgender people are unarguably a politically vulnerable minority." *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *see also Evancho*, 237 F. Supp. 3d at 288.[10]

II. THE DISTRICT COURT PROPERLY APPLIED HEIGHTENED SCRUTINY, WHICH NO PURPORTED GOVERNMENTAL INTEREST SURVIVES

Despite claiming its policy does not discriminate based on sex, *see* Sect. I(A) *supra*, Defendant concedes that the intermediate scrutiny applied by the district court is the correct standard. Def.'s Br. 21. Defendant complains instead

[10] Defendant argued below that heightened scrutiny for transgender status discrimination is foreclosed by *Kirkpatrick v. Seligman & Latz, Inc.*, 475 F. Supp. 145, 147 (M.D. Fla. 1979), *aff'd*, 636 F.2d 1047 (5th Cir. 1981). But *Kirkpatrick* upheld the firing of an employee because she was transgender – which could not stand under *Glenn* – and the Fifth Circuit held on review that it "need not reach this issue." 636 F.2d at 1049-50.

that the district court did not properly apply that test, "plac[ing] too high a burden" on Defendant. Def.'s Br. 33, 24. While it would have been appropriate to strictly scrutinize Defendant's policy on the basis of transgender status discrimination, that is not what the court did. Defendant's attempt to distort the court's analysis as requiring a "perfect fit" between means and ends, *id.* at 25, or the "least restrictive means" to achieve its governmental interests, *id.* at 27, is simply inaccurate. In fact, it is Defendant – not the district court – that misstates the appropriate standard. *Id.* at 33 (claiming that "there need only be a *reasonable* fit between the state action and the important governmental interest under the intermediate scrutiny analysis") (emphasis added). As the district court correctly recognized, under intermediate scrutiny, "the School Board must show that its gender classification is substantially related to a sufficiently important government interest." Doc. 192 at 38 (quotation marks omitted). That is all the district court required Defendant to show, nothing more and nothing less.

Defendant nonetheless confuses heightened scrutiny in two respects. First, Defendant complains that Drew "proffered absolutely no sex-neutral alternatives to the School Board's policy." Def.'s Br. 28. But the *government* "must carry the burden" to justify a sex-based classification – not Plaintiff. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Moreover, banning Drew from the boys' restroom and relegating him to gender-neutral restrooms – what Defendant

calls a "sex-neutral" approach – is not a solution to the constitutional violation. It *is* the constitutional violation. Doc. 192 at 45 (relegating transgender students to gender-neutral restrooms "invite[s] more scrutiny and attention" from peers, "very publicly brand[ing] all transgender students with a scarlet 'T' [which] they should not have to endure … as the price of attending their public school.") (quote omitted); *id.* at 25-27, 45-46.

Second, Defendant claims the district court failed to give appropriate deference to the role of a school district. Def.'s Br. 32-33. But to the contrary, the district court was "mindful that schools are traditionally locally controlled and that a federal court should tread lightly when asked to contravene a policy established by a local school board." Doc. 192 at 33. The court acknowledged that allowing transgender students access to restrooms matching their gender identity may not be "an easy step," "[b]ut neither was it easy when public restrooms were racially integrated." Doc. 192 at 33. Acknowledging the school's expertise is precisely what the district court did when it held a trial to receive evidence from Defendant, and personally toured the school facilities with Nease's principal. Defendant had every opportunity to share its expertise at trial, and its failure to persuade the trier of fact does not create legal error. Nor do Fourteenth Amendment guarantees recede simply because the government entity engaged in discrimination is a school. Doc. 192 at 1 (acknowledging school boards "are best situated to set school

policy"…. Nevertheless, the federal court also has a solemn obligation: to uphold the Constitution and laws of the United States."); *id.* at 3.[11] Defendant's argument that the district court's ruling "usurp[s]" its authority and the people's right to govern themselves fails for the same reason. Def.'s Br. 19-20. *See West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) (the purpose of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy").

A. Privacy Interests Do Not Justify Defendant's Discrimination Against Drew

The district court recognized a governmental interest in protecting student privacy, including in restrooms. Doc. 192 at 39. The court understood its obligation, however, to consider "the evidence at trial," Doc. 192 at 41, "weighed against the facts of the case and not just examined in the abstract." *Id.* (quote omitted). The evidence showed that "allowing transgender students to use the restrooms that match their gender identity does not affect the privacy protections already in place." Doc. 192 at 39. This is because Drew always uses a stall and has never encountered problems using male restrooms in public, no male students complained when he used the boys' restroom, nor had Defendant's task force ever

[11] Defendant's own authorities confirm this principle. Def.'s Br. 33 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985) (it is "indisputable … that the Fourteenth Amendment protects the rights of students against encroachment by public school officials"); and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (students do not "shed their constitutional rights … at the schoolhouse gate")).

heard of privacy problems caused by other schools' equal treatment of transgender students across the country, and the school official witnesses from Broward and Kentucky had never encountered privacy issues with their policies. Doc. 192 at 30-40.

Defendant claims that the right at stake "is the right to be free from exposing one's private and personal space and unclothed and partially clothed body to members of the opposite sex." Def.'s Br. 26. But this case has nothing to do with different-sex students sharing a common restroom, and no student is ever required to be exposed to others in a restroom, since any student seeking additional privacy can use stalls or gender-neutral restrooms. Doc. 192 at 40, 47. The district court rejected Defendant's claim below that transgender students might expose themselves to others, and Defendant appears to have abandoned this argument. Doc. 192 at 41. The evidence showed instead that "transgender students want to be discrete … so other students do not recognize them as anything but the gender with which they identify." *Id.*[12] Accordingly, Defendant's policy "'does nothing

[12] Nor are Defendant's vague references to students of varying ages sharing restrooms on campus persuasive. Def.'s Br. 32. Trial testimony showed that "[t]ransgender students typically seek privacy and discreteness in restroom use and try to avoid exposing any parts … that would reveal" inconsistent sex characteristics. Doc. 192 at 8; Doc. 166-3 ¶ 49; Doc. 192 at 29 (reviewing testimony from Ms. Pope with BCPS that "she has never heard of a transgender student exposing himself or herself in the restroom and that doing so would be inconsistent with aligning themselves with their gender identity and being accepted

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 [Adams], as a transgender boy, uses the bathroom: by entering a stall and closing the door.'" Doc. 192 at 41-42 (quoting *Whitaker*, 858 F.3d at 1052; collecting authorities).

Defendant also observes that the urinals at school do not have dividers. Def.'s Br. 25. But Defendant made binding admissions below that it could add dividers if it wished, Doc. 162, 32:12-15; that transgender students are not more prone to misconduct, Doc. 162, 95:13-23, Doc. 161, 119:13-16; and disclaimed any interest in cost, Doc. 161, 67:25-68:5. The district court thus found at least four reasons that this purported concern could not justify the school's policy: Drew always uses a stall, there is no evidence that a transgender boy would be any more curious about others' anatomy than any other male student, voyeurism is already subject to discipline, and any boy who wants more privacy can use a stall or gender-neutral restroom. Doc. 192 at 40-41.

Defendant's claimed privacy interest distills to an objection to the "mere presence" of a transgender student in the restrooms. *Whitaker*, 858 F.3d at 1052; *see* Def.'s Br. 27. A mere objection to sharing common restrooms with

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as that gender"); Doc. 192 at 30-31 (quoting testimony from Principal Kefford that "'people are afraid of what they don't understand,'" and the assumption that a transgender child wants to use the restroom for an ill-intentioned purpose is "'not the reality. The reality is this child . . . just want[s] to be accepted' as a member of the gender with which they identify").

transgender students is not sufficient where "the record demonstrates" that the claimed privacy interest "is based upon sheer conjecture and abstraction." *Whitaker*, 858 F.3d at 1052; *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 386-87 (E.D. Pa. 2017) (rejecting privacy violation claims based on sharing facilities with transgender students); *Students and Parents for Privacy v. United States Dep't of Educ.*, No. 16-cv-4945, 2017 WL 6629520, *6 (N.D. Ill. Dec. 29, 2017) (same).[13]

As the district court recognized, speculative concerns about potential future privacy violations – none of which have ever been committed by Drew or uncovered through the task force's research – are wholly insufficient as a matter of law. "[T]he classification must substantially serve an important governmental interest *today*, for in interpreting the equal protection guarantee, [the Supreme Court has] recognized that new insights and societal understandings can reveal

[13] This Court should not be persuaded by *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016), which is an outlier in this area. Def.'s Br. 26, 32 n.11. *Carcaño* relied on an "assum[ption] that the sexes are primarily defined by their differing physiologies," *id.* at 642 – which the court treated as a cramped outer limit for the protections afforded from sex discrimination. That analysis is incompatible with *Glenn* and, for that matter, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Of the cases involving transgender students that have cited *Carcaño*, none have followed that analysis. *See also* Doc. 192 at 49-50.

unjustified inequality that once passed unnoticed and unchallenged." Doc. 192 at 38-39 (quoting *Morales-Santana*, 137 S. Ct. at 1690).[14]

Because the trial record does not help Defendant, it focuses instead on hypothetical concerns that have no footing in reality. For example, Defendant suggests that treating transgender students like Drew equally would eliminate sex-separated restrooms. *See, e.g.*, Def.'s Br. 15-16 (speculating, incorrectly, that Drew's claim would make sex-separated restrooms "impermissible *in toto*"), *id.* 24. The district court properly rejected Defendant's "slippery slope" argument, Doc. 192 at 47, particularly since "[e]veryone" – including Drew and Defendant – "agrees that boys should use the boys' restroom at Nease and that girls should use the girls' restroom." Doc. 192 at 2. The court found "no evidence to suggest that [Drew's] identity as a boy is any less consistent, persistent and insistent than any other boy," and accordingly, treating him equally "will not integrate the restrooms between the sexes." Doc. 192 at 47. For that reason, the cases Defendant cites about one sex seeking access to restrooms of the other sex through janitorial jobs simply miss the mark. Def.'s Br. 26.

[14] *Morales-Santana* also flatly rejects Defendant's suggestion that the Fourteenth Amendment's protections should be restricted to the intent of "those who ratified" it. Def.'s Br. 20; *Morales-Santana*, 137 S. Ct. at 1690; *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

Defendant's purported concern about gender-fluid students also has no basis in reality. Defendant's witness, Ms. Smith, claimed that the task force was concerned about students who identify as gender-fluid, suggesting this might allow a "football quarterback" to "come in and say I feel like a girl today and so I want to be able to use the girls' room." Doc. 161, 213:10-18; *id.* 214:1-4; *id.* 216:15-17; Doc. 162, 70:6-14. But Defendant provided no actual evidence on this point, Doc. 162, 155:18-156:16. In fact, Ms. Smith conceded twice that – despite the task force's purportedly robust research – they were not aware of any such situations. Doc. 161, 213:19-23; *id.* 216:18-20; Doc. 192 at 31 (Principal Kefford "has never heard of a cisgender student pretending to be transgender to gain access to a bathroom opposite of their true gender identity"). Ms. Smith also conceded that any student who misbehaved "certainly would" be subject to discipline. Doc. 161, 214:10-14; Doc. 162, 31:6-21.

This case is *not* about gender-fluid students, but about whether to permit a transgender boy who has transitioned (and never intends to use a girls' restroom), to have access to the boys' restroom. Doc. 192 at 46. "Adams is not gender-fluid." *Id.* at 18 n.23. Accordingly, the district court did not address gender fluidity in its opinion, other than to address Defendant's contentions. *Id.* at 46-47 n.42-43 (observing there was no evidence that gender-fluid students had requested access to any particular restroom, or that any student had posed as gender-fluid to

gain entry to particular restroom, and that any misbehavior could be addressed through disciplinary means).

In fact, medical experts *define* transgender patients as being "*insistent, persistent, and consistent* over time in their cross-gender identification," Doc. 166-3 ¶ 27; Doc. 192 at 47, a definition apparent throughout the model policies that the task force examined. Docs. 151-11 at 4 ("consistently asserted" gender identity); 151-8 at 4 (same); 151-12 at 4 ("consistent and uniform assertion" of gender identity); 151-13 at 4 ("exclusively and consistently asserted" gender identity). Even *Defendant's own guidelines* define transgender individuals as having a "consistently asserted transgender identity," Doc. 152-6; thus, under Defendant's own rules, its far-fetched "football quarterback" scenario is a non-issue. In short, "[t]ransgender individuals are not gender-fluid and their sense of who they are is settled." Doc. 192 at 47. *See also Boyertown*, 276 F. Supp. 3d at 386-87, *aff'd*, 897 F.3d 518 (3d Cir. 2018) (rejecting arguments about gender-fluidity as a basis for discrimination).[15]

[15] Despite its arguments here, Defendant appears to agree that none of these issues justify its blanket exclusion of transgender students from the restroom. After the issuance of the district court's decision, Defendant adopted a new policy allowing other transgender students to receive approval to use restrooms matching their gender identity (*see* https://perma.cc/QN53-N358 at 7), belying its claim that it "cannot properly function" if the relief for Drew is affirmed. Def.'s Br. 47. Defendant's new policy is appropriate for judicial notice pursuant to Fed. R. Evid. 201, allowing a court to take judicial notice "at any stage of the proceeding."

Defendant also cites a series of cases involving involuntary exposure of one's genitals, including for example, searches of various kinds (*Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1989); *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Cir. 1992); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980)); or hidden filming (*Doe v. Luzerne Cty.*, 660 F.3d 169 (3d Cir. 2011)). Def.'s Br. 22-23. Those cases simply do not apply here, in the enclosed setting of a restroom, where any student may seek the privacy of a stall, as Drew always does. Doc. 192 at 43 n.40 (the district court agreed that students have an interest in protecting their bodily privacy, but found that "the evidence at trial established that student privacy will not be infringed by permitting [Drew] to use the boys' restrooms").

Finally, the stipulation by the parties that certain students and parents object to equal treatment of transgender students based on personal beliefs about privacy, Def.'s Br. 27, 33; Doc. 116 at 22, does not help Defendant. The government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes [and] fear" are not "permissible bases for" differential treatment, even under rational basis review); *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). The conjectural

views of some private individuals in the district do not satisfy the government's heavy burden under intermediate scrutiny. Doc. 192 at 44.

At bottom, Defendant invokes privacy breaches that never occurred in its experience with Drew – nor in any other school's experience, based on Defendant's own research, Doc. 192 at 15; Doc. 161, 147:6-7 – to justify its discriminatory exclusion. This comes nowhere close to the "substantially related" tailoring required between Defendant's discriminatory classification of Drew and its purported interest in privacy, and the district court correctly rejected this argument.

B. Defendant's Baseless Arguments About "Safety Concerns" Have Been Waived

Defendant appears to have abandoned its argument that treating transgender students equally implicates safety concerns, scarcely mentioning that in its brief. The district court found, based on undisputed facts, that there was *no* evidence that Drew or any other transgender student posed any safety risk to others. Doc. 192 at 21-22, 43. As for protecting vulnerable transgender students from bullying and harassment – previously identified as Defendant's primary concern – there was no evidence Drew had ever encountered safety risks either at school, or in any male restroom that he has used. *Id.* at 43. Even if this were a legitimate concern,

Defendant cannot justify discrimination against Drew under the guise of protecting his safety.

III. THE DISTRICT COURT CORRECTLY FOUND THAT DEFENDANT'S POLICY VIOLATES TITLE IX

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 education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Defendant receives federal funding and does not contest that "[a]ccess to the bathroom is [] an education program or activity under Title IX." Doc. 192 at 54 (quoting *Highland*, 208 F. Supp. 3d at 865).

Finding that "sex" is ambiguous under Title IX as applied to transgender students, the district court, after careful analysis of the relevant authorities (*see* Doc. 192 at 54-65), "follow[ed] the guidance of *Glenn* and other authorities cited above to conclude that the meaning of 'sex' in Title IX includes 'gender identity' for purposes of its application to transgender students." Doc. 192 at 55, 63 (citations omitted). Because Defendant's policy excludes Drew from the boys' restroom based on his transgender status, Defendant discriminates against him and causes him harm "on the basis of sex," in violation of Title IX. *Id.* at 65.

A. The District Court Appropriately Applied *Glenn* and Other Anti-Discrimination Cases in Interpreting Title IX

The district court correctly concluded that Title IX and its implementing regulations preclude Defendant's discrimination against transgender students "on the basis of sex," for the same reasons that it violates the Equal Protection clause – *i.e.,* because discrimination based on transgender status is inherently sex discrimination. *See* Doc. 192 at 55-65 (reviewing authorities).

Although Defendant argues that the district court ought not to have looked to Equal Protection and Title VII authorities to help interpret Title IX, Def.'s Br. 42-43, courts routinely draw upon a common body of law in analyzing discrimination claims, regardless of whether a claim arises under the Equal Protection Clause or an anti-discrimination statute such as Title IX. *Glenn*, for example, decided an Equal Protection claim but relied on both Equal Protection and Title VII authorities interchangeably to find that "the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." 663 F.3d at 1316 (quotation omitted).

As the district court observed, "[f]inding that Title IX does not define the ambiguous terms 'sex' and 'on the basis of sex' for purposes of their application to transgender students, many courts have looked to decisions interpreting other anti-discrimination statutes, particularly Title VII[.]" Doc. 192 at 61 (citing *Boyertown*,

893 F.3d at 195, n.103, withdrawn and opinion superseded on reh'g, 897 F.3d 518 (3d Cir. 2018); *Whitaker*, 858 F.3d at 1047-49; *M.A.B.*, 286 F.Supp. 3d at 713-15; *Grimm*, 302 F. Supp. 3d at 744-47; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616, n.1 (1999)). *See also Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000), *aff'd sub nom. Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001) (Equal Protection).

Despite Defendant's claim that schools are different in nature, fundamentally altering sex discrimination analysis under Title IX, Def.'s Br. 43, federal courts have disagreed. Indeed, "[i]n looking for Title IX guidance, the transgender school bathroom cases inevitably consider *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held in a Title VII case that discrimination on the basis of gender stereotype is sex-based discrimination," and its progeny, including *Glenn*, which turned to Title VII precedent for guidance when determining that "discrimination against a transgender individual because of [] gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." Doc. 192 at 62-63 (quoting *Glenn*, 663 F.3d at 1317; collecting authorities citing *Glenn* in Title IX context).

To the extent Defendant argues the *Glenn/Price Waterhouse* sex stereotyping analysis is misplaced, its own argument refutes that it did not discriminate against Drew for gender nonconformity. According to Defendant,

"Adams is structurally, biologically, and physically a female. It is for that reason alone that Adams was prohibited from using the boys' bathroom." Def.'s Br. 43-44. In other words, Defendant's policy excludes Drew from the boys' restroom "based on the belief that he is not acting in conformity with the sex he was assigned at birth," Doc. 192 at 62 – bearing out *Glenn*'s analysis that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," 663 F.3d at 1316.

The district court's application of *Glenn* and related authority was entirely appropriate and should be affirmed.[16]

B. Statutory Construction Rules Underscore That Title IX Broadly Prohibits Discrimination "on the Basis of Sex"

Based on the analysis above, the district court correctly concluded that Title IX's protections are not restricted to so-called "biological sex." Doc. 192 at 58. For one, it is analytically impossible to discriminate based on transgender status

[16] The outlier decisions holding otherwise – issued by courts not bound by *Glenn* – should not persuade this Court. *See* Def.'s Br. 37-38 (citing *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016), and *Texas v. United States*, 201 F. Supp. 3d 810, 832-33 (N.D. Tex. 2016), *order clarified*, No. 7:16-cv-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016)). As the district court explained at length, *Johnston* likely is no longer good law in its own circuit. Doc. 192 at 49-50. And other courts deciding claims like this one have found that the *Texas* analysis – which did not decide the claims in this case – "can charitably be described as cursory." *Highland*, 208 F. Supp. 3d at 863; *Students and Parents for Privacy*, 2016 WL 6134121, at *18, n.19 (the decision's "relatively conclusory analysis" renders it "unpersuasive").

without being motivated, at least in part, by sex. Defendants reiterate arguments from below that dictionary definitions of "sex" at the time of Title IX, and the statute's legislative history, unambiguously construed "sex" as "biological sex" – but neither argument has merit. Def.'s Br. 35-37. As the district court pointed out, the contemporary definitions of "sex" were neither uniform nor unambiguous. Doc. 192 at 56-57 (citing *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017); *Highland*, 208 F. Supp. 3d at 866; *Students and Parents for Privacy v. U.S.*, No. 16-cv-4945, 2016 WL 6134121, at * 17-18 (N.D. Ill. Oct.18, 2016)). Nor did the district court improperly focus on "the particular dispute in this case" to determine ambiguity, instead of the broader context of the statute. Def.'s Br. 38 (discussing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)). Indeed, the district court examined both, including the lack of any relevant definition in Title IX or its regulations. Doc. 192 at 55.

Similarly, Defendant's selective citation to Title IX's legislative history does not circumscribe Title IX's protections, as Defendant suggests. Def.'s Br. 39-40. Rather, as Justice Scalia wrote for a unanimous court, "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." *Oncale v. Sundowner Offshore Servs., Inc.*,

523 U.S. 75, 79 (1998). The district court correctly recognized that Title IX's "broad" language evidences Congress's intent to give the statute a "broad reach," and supports interpreting the term "sex" to include discrimination against a student because he is transgender. Doc. 192 at 64-65 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005)).

Finally, Defendant's statement that the district court's definition of "sex" was "based on uncorroborated, unsworn, hearsay testimony from an Amicus Brief filed two weeks before trial," Def.'s Br. 37, is misleading. As described above, the district court accepted extensive expert testimony from Dr. Ehrensaft and Dr. Adkins – which Defendant wholly failed to rebut – and looked to appropriate legal authorities to inform its interpretation of "sex" under Title IX as applied to transgender individuals. Perhaps recognizing that its defenses fail to justify discrimination against a transgender student like Drew – whose innate gender identity is persistently, consistently, and insistently male, Doc. 192 at 47 – Defendant fixates instead on the notion of "another gender" beyond male or female. Def.'s Br. 37, 41. This is simply an extension of Defendant's argument that allowing Drew to use the boys' restrooms will result in the elimination of sex-separated restrooms, which the district court correctly rejected. "This case is not about eliminating separate sex bathrooms; it is about whether to allow a transgender boy to use the boys' bathroom." Doc. 192 at 47; *id.* at 36 (finding that

Drew "identifies as a boy, is identified by others as a boy, is legally deemed by the state of Florida to be a boy, lives as a boy, uses the men's restroom outside of the school setting and is otherwise treated as a boy – except when it comes to his use of the school restrooms").

C. Title IX Regulations and Current OCR Guidance Do Not Support Defendant's Position

Defendant cites language in Title IX and its regulations permitting the provision of separate facilities for the sexes, but this does not authorize its discriminatory policy. Def.'s Br. 35. As the district court recognized, Drew does not contend that Nease cannot provide separate facilities – simply that he must be permitted to use the boys' restroom like all other boys. Doc. 192 at 58.[17]

Defendant also argues that the district court did not "give appropriate consideration" to OCR's current non-binding guidance, Def.'s Br. 44-47, on the apparent assumption that it somehow supports Defendant's position. It does not. OCR's 2017 guidance withdrew the agency's earlier guidance instructing that schools must allow transgender students to use sex-segregated restrooms and other facilities consistent with their gender identity. *See* Doc. 192 at 59. This did not, as

[17] Congress's subsequent use of the term "gender identity" in some other federal statutes does not mean that transgender students are unprotected by Title IX. Doc. 192 at 57-58. Nor does Congress's failure to expressly add "gender identity" to Title IX defeat the district court's analysis, since congressional inaction frequently lacks persuasive significance. Doc. 192 at 58.

Defendant supposes, indicate disagreement with the prior guidance – rather, as the district court pointed out, the 2017 guidance simply withdrew the earlier guidance for further study, expressly declining to take a new position. Doc. 192 at 59. The one constant remains the obligation to follow Title IX. An agency need not identify a "specific practice … as unlawful … before a plaintiff may bring a claim under Title IX." *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 329 (M.D. Pa. 2017). Cases decided since the 2017 guidance have accordingly continued to find that exclusion from a bathroom based on gender identity is discrimination "on the basis of sex" within the meaning of Title IX. *See* Doc. 192 at 60-61 (citing cases).

D. Recognizing That Title IX Protects Transgender Students Does Not Violate the Spending Clause

Defendant also argues – for the first time – that if Title IX protects transgender people from discrimination in restrooms and other sex-separated facilities, the statute offends the Spending Clause's requirement to provide fair notice of its conditions. *See* Def. Br. 47-48 (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981)). But "[i]t is the general rule … that a federal appellate court does not consider an issue not passed upon below," and this Court should decline to consider Defendant's newly minted argument. *Singleton v. Wulff*, 428 U.S. 106,

120 (1976); *see also Baumann v. Savers Federal Sav. & Loan Ass'n,* 934 F.2d 1506, 1512 (11th Cir. 1991).

Defendant's assertions that it is unconstitutional for the government to bar discrimination against transgender people in accessing facilities – as both Title IX and laws in numerous jurisdictions do – are meritless in any case. Recipients of federal funds have clear notice that Title IX encompasses *all* forms of sex discrimination. *Jackson*, 544 U.S. at 175, 182-83; *Davis*, 526 U.S. at 638-39. By arguing that Title IX must explicitly refer to "gender identity" to provide "adequate notice" under *Davis*, Defendant misreads *Pennhurst* and its progeny. *Pennhurst* does *not* require Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a statute. *Bennett v. Ky. Dep't of Educ*., 470 U.S. 656, 669 (1985). Nor must each violation be "specifically identified and proscribed in advance." *Id.* at 666. "[S]o long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

Title IX has an implied cause of action and does "not list any specific discriminatory practices" that are prohibited. *Jackson*, 544 U.S. at 175. "[A] State that accepts funds under [a statute with an implied cause of action] does so with the

knowledge that the rules for … liability will be subject to judicial determination." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 285 (2d Cir. 2003).

CONCLUSION

For all of the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted on February 21, 2019.

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Dated: February 21, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on February 21, 2019. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. A true and accurate copy of the foregoing will be dispatched for delivery via Federal Express to counsel for Defendant.

I further certify that seven paper copies of the brief with red covers and backing will be dispatched for delivery via Federal Express to:

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