

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

DREW ADAMS, et al.,

*Plaintiff,*

v.

THE SCHOOL BOARD OF ST. JOHNS  
COUNTY, FLORIDA, et al.,

*Defendants.*

No. 3:17-cv-00739-TJC-JBT

**ORAL ARGUMENT REQUESTED**

**PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION  
AND SUPPORTING MEMORANDUM OF LAW**

Plaintiff Drew Adams (“Drew”), by and through his next friend and mother, Erica Adams Kasper, respectfully moves this Court for a Preliminary Injunction against Defendants The School Board of St. Johns County, Florida (“School Board”); Superintendent Tim Forson (“Superintendent Forson”), and Principal Lisa Kunze (“Principal Kunze”) (collectively, “Defendants” unless otherwise specifically identified), pursuant to Rule 65(a) of the Federal Rules of Civil Procedure and Local Rules 3.01(j) and 4.06. In support of this Motion, Drew relies upon the following Memorandum of Law and the supporting declarations from himself (“Drew Decl.”); Erica Adams Kasper (“Erica Decl.”); Diane Ehrensaft, Ph.D. (“Ehrensaft Decl.”); and Tara L. Borelli (“Borelli Decl.”).

**INTRODUCTION**

The Fourteenth Amendment’s Equal Protection Clause and Title IX of the Education Amendments Act of 1972 (“Title IX”) guarantee equal treatment, including for students like

Drew. Although he is a hard-working, high-achieving student about to enter his junior year, his school singles him out for differential treatment because he is transgender, branding him as unfit to use the communal restrooms that all other boys use. Defendants' policy prohibiting Drew from using the boys' restroom leaves Drew humiliated, anxious, and often in severe discomfort as he has to navigate his day to hold back one of life's most basic functions or, alternatively, miss classroom time because the gender neutral restrooms are not conveniently located. The School Board's discriminatory policy leaves Drew unable to fully participate in his education. This discrimination warrants that this Court preliminarily enjoin Defendants' discriminatory restroom policy, which, if not stopped, will once again subject Drew to discrimination and humiliation when his junior year starts on August 10, 2017.

Pursuant to L.R. 3.01(j), Plaintiff respectfully requests oral argument and estimates that no more than an hour total, or 30 minutes for each side, is needed.

### **FACTUAL BACKGROUND**

Drew is a 16-year-old honors student registered at Allen D. Nease High School ("Nease High School") in Ponte Vedra, Florida. Drew Decl. ¶¶ 2, 4. A current photograph of Drew is in his declaration at paragraph three. Drew plays four musical instruments and volunteers at the Mayo Clinic in Jacksonville, which he hopes will help prepare him to attend medical school someday. *Id.* ¶¶ 4-6. Drew hopes to become an adolescent psychiatrist and has won an award for his volunteerism in the community. *Id.* ¶¶ 5-6. Drew is a boy. *Id.* ¶ 7; Erica Decl. ¶ 3. Drew also is transgender, which in his case means that his sex assigned at birth was female, but his core gender identity is male. Drew Decl. ¶ 8; Erica Decl. ¶ 3; Ehrensaft Decl. ¶ 19. Although each person has multiple sex-related characteristics, gender

identity—a person’s core internal sense of their own gender—is the primary factor in determining sex. Ehrensaft Decl. ¶¶ 20-21. The medical consensus is that gender identity is innate and efforts to change it are unethical. *Id.* ¶ 26.

Drew has been diagnosed with gender dysphoria, the distress from the incongruence between a transgender person’s gender identity and sex assigned at birth. Drew Decl. ¶ 13; Erica Decl. ¶ 8; Ehrensaft Decl. ¶ 28. Treatments for gender dysphoria align the transgender person’s body and lived experience with the person’s true sex, through social and medical transition. Ehrensaft Decl. ¶¶ 33-39. These treatments do not change a transgender person’s sex, which is already determined by their gender identity. *Id.* ¶ 39. Ensuring that a transgender child is in an environment that does not undermine that treatment and respects the child’s gender identity is critical to the child’s healthy development. *Id.* ¶ 33. Such positive environments improve mental health and reduce the risk of self-harming or suicidal behaviors. *Id.* ¶¶ 31-33, 42-46. Because gender is a core aspect of a person’s identity, transgender children who are denied recognition of their gender identity, such as through exclusion from communal restrooms, experience that mistreatment as a profound rejection of their core self, which can have serious negative consequences for their development and their long-term health and well-being. *Id.* ¶¶ 42-46, 48.

To help align his body with his innate sex, Drew receives medical treatment through the Duke Child and Adolescent Gender Care clinic (“Duke Clinic”) in North Carolina. Drew Decl. ¶¶ 14-15. He was prescribed testosterone, and had a double-mastectomy to bring his body into alignment with his gender identity. *Id.* ¶¶ 16-17. By the time Drew began his freshman year at Nease High School, he was living full-time as a boy. *Id.* ¶ 18. He was

generally perceived and treated as a boy by students and staff alike. *Id.* ¶ 20.

Drew used boys’ restrooms without any incident—using one of the stalls on every occasion—until September 22, 2015, when he was pulled out of class to meet with three guidance counselors. *Id.* ¶¶ 20-21. Drew was informed that someone anonymously “reported” that he was using the boys’ restroom; as a result, he was instructed to use only a gender neutral restroom. *Id.* ¶ 21. Drew asked if he had done anything wrong, and was told “no.” *Id.* ¶ 22. Drew was deeply frustrated and upset by this change, but did not want to get in trouble or have any disciplinary reports on his record so he capitulated and has used the school’s gender neutral restrooms ever since. *Id.* ¶ 23.

While boys’ restrooms are located throughout the school, there previously have been only three generally accessible gender neutral restrooms for the entire school. *Id.* ¶ 26. Two are clustered together in the administrative building. *Id.* A third gender neutral restroom has been available only intermittently to students; for approximately half of Drew’s time at the school, this restroom has been restricted to staff. *Id.* ¶ 27. A new building with gender neutral restrooms will open this year, but it borders one side of the campus and is not centrally located. *Id.* ¶ 31. Drew usually has to walk past one, if not two, boys’ restrooms to get to the gender neutral restrooms. *Id.* ¶ 28. When Drew has had classes in portable classrooms, it could take well over 10 minutes to get to and from the gender neutral restrooms, requiring Drew to miss class time simply to use the restroom (something that otherwise would take only a few minutes). *Id.* ¶ 28. This creates a significant hardship because Drew must then weigh the importance of the information that he would miss in class against the anxiety, stress, and distraction that come with trying to hold his bladder. *Id.* This

Hobson's choice is not foisted on non-transgender boys. *Id.*

Drew started to avoid using the restroom and began restricting his fluid intake. *Id.*

¶ 29. Drew also held his bladder as much as he could, which was at times extremely uncomfortable. *Id.* Erica recalls Drew's needing to rush home to use the restroom at the end of the school day after holding his bladder for hours. Erica Decl. ¶ 14. Drew found some minor relief last year when an art class gave him access to a rare single-user restroom in the classroom. Drew Decl. ¶ 30. While he intends to take art class again, it could be scheduled for any period of the day; an early or late art class would once again leave him in the anxiety-provoking position of not having reliable or convenient access to a restroom. *Id.* And even when he did have art class in the middle of the day, he still had to cope with anxiety about needing to use the restroom during other parts of the day. *Id.*

Erica met with school officials to try to resolve the issue, but they indicated that their hands were tied by district policy. Erica Decl. ¶ 16. Erica met with district officials Associate Superintendent Cathy Mittelstadt and Deputy Superintendent Brennan Asplen in November 2015. *Id.* ¶ 17. Mr. Asplen repeatedly raised the issue of "biology" during the meeting, which he used to refer to genitals, asking what would happen if a transgender girl were to come out of a stall and "wave her penis around." *Id.* ¶¶ 17-18. Erica said words to the effect of, "Sir, I don't know what kind of bathrooms you've been in, but I've never seen a naked person in a bathroom." *Id.* ¶ 18. Erica pointed out that lewd behavior by *any* student is already against the law. *Id.* Mr. Asplen said "98% of the people in this district would not understand" if Drew were allowed to use the boys' restroom, and that he was more concerned

about legal action by the parent of a non-transgender child than by Drew. *Id.* ¶ 17.<sup>1</sup>

Erica met again with district officials on April 8, 2016, and brought Drew for an additional meeting with Ms. Mittelstadt on May 4, 2016, but received no resolution. *Id.*

¶¶ 20-21. At no point has any school or district official ever provided Erica or Drew with information suggesting that his use of the boys' restroom has harmed anyone. *Id.* ¶ 23.

When Drew is in all other settings outside of school, he uses the men's restroom, and to his knowledge there has never been any complaint or incident. Drew Decl. ¶ 32; Erica Decl. ¶

24. Drew has no interest in trying to invade anyone else's privacy in a restroom; he just wants to blend in, interact with his peers like an equal, and not be singled out as different.

Drew Decl. ¶ 32. Being banned from the boys' restrooms feels humiliating to Drew, because it teaches his peers that he is not worthy of the same dignity and respect as all other boys. *Id.*

¶¶ 25, 33-34. It also heightens the symptoms of his gender dysphoria. *Id.* ¶ 25.

## ARGUMENT

### I. Preliminary Injunction Standard.

A plaintiff is entitled to a preliminary injunction when he demonstrates: (1) a substantial likelihood of success on the merits; (2) that the plaintiff will suffer irreparable injury absent preliminary relief; (3) that the harms he will likely suffer outweigh any harm that defendant will suffer as a result of an injunction; and (4) that preliminary relief will not disserve the public interest. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). Each of those factors weighs strongly in Drew's favor.

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<sup>1</sup> Erica filed an administrative complaint in November 2015 with the U.S. Department of Education's Office for Civil Rights ("OCR") for violation of Title IX. *Id.* ¶ 19. The School Board declined mediation or to otherwise resolve the complaint, and OCR began to investigate it. *Id.*

## II. Drew Is Likely To Succeed On His Equal Protection Claim.

By barring Drew from boys’ restrooms at school, Defendants violate the constitutional guarantee that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Defendants’ policy facially discriminates against transgender students like Drew. Although all students must be able to access facilities that match their gender identity, only transgender students are denied such access under the policy, which requires that students use facilities according to their birth-assigned sex. This discriminates against transgender students because by definition their birth-assigned sex does not match their gender identity.

### A. Strict—or at least heightened—scrutiny applies to Defendants’ decision to exclude Drew from the boys’ restrooms.

Defendants’ discrimination against Drew triggers some form of heightened scrutiny for at least three reasons: (1) *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), establishes as a matter of law that discrimination against transgender people is sex discrimination because it inherently relies on gender stereotypes; (2) discrimination based on transgender status and gender transition necessarily classifies individuals based on sex; and (3) discrimination against transgender people bears all the indicia of a suspect classification.

#### 1. Eleventh Circuit precedent prohibits discrimination against transgender people as impermissible sex stereotyping.

“For close to a half century,” the Supreme Court “has viewed with suspicion laws that rely on . . . fixed notions concerning [a particular] gender’s roles and abilities.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1684 (2017) (alterations and citations omitted). As the Supreme Court has explained, “we are beyond the day when an employer could evaluate

employees by assuming or insisting that they matched the stereotype associated with their group.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

Accordingly, “gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). And “generalizations about ‘the way women are’” do not justify denying equal treatment to women who are “outside the average description.” *United States v. Virginia*, 518 U.S. 515, 550 (1996). The same is true for boys like Drew.

The Eleventh Circuit applied these concepts to hold that discrimination against transgender individuals is inherently rooted in sex stereotypes and triggers heightened scrutiny. *Glenn*, 663 F.3d at 1320. As *Glenn* recognized, sex discrimination is not limited to favoring one sex over another sex. *Id.* 1316-17. Instead, it includes any differential treatment on the basis of a sex-based consideration, such as preferring a woman who conforms to societal expectations of her gender over a gender-nonconforming woman. Stated differently, discrimination based on sex “is not only discrimination because of maleness and discrimination because of femaleness but also . . . discrimination because of the *properties or characteristics* by which individuals may be classified as male or female.” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016).

Accordingly, it is settled law in the Eleventh Circuit that discrimination against transgender people necessarily relies upon sex stereotypes, because “[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 (citation omitted); *see also id.* (“A person is defined as transgender precisely because of the perception that his or her



behavior transgresses gender stereotypes.”); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 884 (11th Cir. 2016) (reaffirming *Glenn*’s holding that “sex discrimination includes discrimination against a transgender person for gender nonconformity”); *Valentine Ge v. Dun & Bradstreet, Inc.*, No. 6:15-cv-1029-ORL-41GJK, 2017 WL 347582, at \*4 (M.D. Fla. Jan. 24, 2017) (“Sex discrimination includes discrimination against a transgender person for gender nonconformity.”) (citing *Chavez*).

Modern precedent, much of which invokes *Glenn*’s cogent reasoning, overwhelmingly agrees. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-cv-01537, 2017 WL 770619, at \*11 (W.D. Pa. Feb. 27, 2017) (“[D]iscrimination based on transgender status . . . is essentially the epitome of discrimination based on gender nonconformity. . . .”); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 869 (S.D. Ohio 2016) (appeal filed) (“[D]iscrimination on the basis of a transgender person’s gender non-conformity constitutes discrimination ‘because of sex.’”).<sup>2</sup>

*Glenn*’s binding decision compels the conclusion that Drew is likely to succeed on

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<sup>2</sup> *See also Smith v. Avanti*, No. 16-cv-00091, 2017 WL 1284723, at \*4 (D. Colo. Apr. 5, 2017); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at \*2 (D. Minn. Mar. 16, 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008); *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*8 (EEOC Apr. 20, 2012).

the merits of his Equal Protection claim. Defendants’ discriminatory rule codifies sex stereotypes into school policy by banishing those whose gender identity does not match their birth-assigned sex from the facilities that others are permitted to use. *Glenn* makes clear that such discrimination “is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.” 663 F.3d at 1319. *Glenn* applied this analysis to an employee who was fired because she was transgender, *id.* at 1314, and subsequent authority makes clear that under *Glenn* and its progeny discrimination in restrooms is no more tolerable. Echoing *Glenn*’s analysis that an “individual cannot be punished because of his or her perceived gender-nonconformity,” the court in *Whitaker*, 858 F.3d at 1049, held that exclusion of an individual from the restroom conforming to his or her gender identity “punishes that individual for his or her gender non-conformance.” *See also Evancho*, 2017 WL 770619, at \*16; *Highland*, 208 F. Supp. 3d at 877; *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1016 (D. Nev. 2016); *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at \*9 (EEOC Apr. 1, 2015).<sup>3</sup>

No coherent reading of *Glenn* allows the conclusion that Equal Protection shelters Drew as he crosses the school threshold, but falls dormant at the restroom door. Rather, as Section II(B) below explains, Defendants discriminatory policy furthers no adequate government interest, and Drew’s claims are likely to succeed on the merits.

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<sup>3</sup> Impermissible gender stereotyping is not inoculated because a policy purports to regulate genital characteristics rather than sex. *See Lusardi*, 2015 WL 1607756, at \*9 (finding it unlawful to bar a transgender woman from the restroom based on the belief that she was not “truly female” without genital surgery); *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).

**2. Discrimination based on transgender status and gender transition is sex-based.**

Although *Glenn*'s holding is sufficient to resolve whether Defendants' sex-based policy triggers heightened scrutiny, several additional bases support that holding:

***Transgender status.*** Policies distinguishing between transgender boys or girls, and non-transgender boys or girls, are sex discrimination for an additional reason: such policies allow students to be treated consistent with their gender identity *only* if that identity matches their sex assigned at birth. A policy that discriminates against students because their birth-assigned sex and gender identity do not match—*i.e.*, because they are transgender—necessarily discriminates based on sex. *See Schwenk*, 204 F.3d at 1201-02 (holding that conduct motivated by an individual's "gender or sexual identity" is because of "gender," which is interchangeable with "sex"); *Evancho*, 2017 WL 770619, at \*11 (holding that restroom exclusions discriminate based on "transgender status" because "Plaintiffs are the only students who are not allowed to use the common restrooms consistent with their gender identities"); *Fabian*, 172 F. Supp. 3d at 526-27; *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Rumble*, 2015 WL 1197415, at \*2; *Macy*, 2012 WL 1435995, at \*10.

Indeed, gender identity is not merely related to sex; from a medical perspective, it is the critical determinant of sex. Ehrensaft Decl. ¶¶ 20-21; *see also Evancho*, 2017 WL 770619, at \*13 ("[A]s to [transgender] [p]laintiffs, gender identity is entirely akin to 'sex' as that term has been customarily used in the Equal Protection analysis. It is deeply ingrained and inherent in their very beings."). Gender identity is not susceptible to voluntary change, and attempts to change a person's gender identity can lead to extreme psychological harm. Ehrensaft Decl. ¶ 26. That is why in situations where an individual's gender identity is

inconsistent with other sex-related characteristics, one’s gender identity determines one’s sex—not the discordant sex-related characteristics. *Id.* ¶ 20. For example, non-transgender individuals who have lost external genitalia in an accident have not somehow had their sex changed. *See Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011CN2993/2011CP2994 at 8 (Ill. Hum. Rts. Comm’n May 15, 2015) (Borelli Decl. Ex. A) (observing that the “absence of male genitalia does not make a female, as that could occur by illness or injury”; finding exclusion of transgender woman from women’s restrooms unlawful). Instead, gender identity continues to be the primary determinant of their sex; so too for transgender people. In sum, gender identity serves as the primary determinant of sex—not genitalia, gonads, or any other sex-related characteristic. *Cf. Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006) (noting that sex “is not a cut-and-dried matter of chromosomes”).

The central inquiry is whether “the discrimination is related to [] sex.” *Schwenk*, 204 F.3d at 1202; *accord Fabian*, 172 F. Supp. 3d at 525-26 (the dispositive inquiry is whether discrimination is “related to sex”). Accordingly, any argument that Defendants’ policy simply treats everyone consistently with their birth-assigned sex must fail because it ignores the key question of whether one’s sex has been taken into account, as is clearly the case here. *See Whitaker*, 858 F.3d at 1051 (rejecting school district’s claim that its exclusion treated boys and girls equally); *Roberts*, 215 F. Supp. 3d at 1015 (“Although CCSD contends that it discriminated against Roberts based on his genitalia, not his status as a transgender person, this is a distinction without a difference here.”); *cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting “the notion that the mere ‘equal application’ of a statute containing racial classifications” removes it from the Fourteenth Amendment’s prohibition of discrimination).

Here, it is clear that Defendants’ policy excludes Drew based on his sex. If one’s dress, hairstyle, and make-up usage constitute “sex-based considerations”—as *Price Waterhouse* confirms that they do—then the same necessarily holds true for a mismatch between gender identity, which gives rise to such outward expressions of gender, and birth-assigned sex. 490 U.S. at 242 (plurality opinion); *accord Smith*, 378 F.3d at 575; *Schroer*, 577 F. Supp. 2d at 306. Precedent makes clear that when the government draws lines related to whether a person’s gender identity aligns with the person’s birth-assigned sex, such line-drawing is sex-based and must be tested under heightened scrutiny.

***Gender transition.*** Discrimination based on gender transition is necessarily based on sex, just as discrimination based on religious conversion is necessarily 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*, 577 F. Supp. 2d at 306; *accord Fabian*, 172 F. Supp. 3d at 527; *Macy*, 2012 WL 1435995, at \*11. Similarly, Defendants may treat boys and girls equally as a general matter but nonetheless discriminate against those who undertake gender transition. By burdening transgender students based on expectations about how “real” boys or girls behave, Defendants’ policy discriminates based on sex. *Schroer*, 577 F. Supp. 2d at 306.

### **3. Discrimination against transgender people is subject to strict equal protection scrutiny.**

Even aside from its inextricable connection to sex discrimination, discrimination

based on transgender status is separately entitled to strict, or at least heightened scrutiny.<sup>4</sup>

The Supreme Court consistently has 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 (1976). In addition, the Supreme Court has 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 the individual'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); *see also Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-30 (Conn. 2008) (analyzing federal equal protection law to conclude that history of discrimination and ability to contribute to society are the two central considerations, and collecting authorities). While not all considerations need be present, *see Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012), here all four point in favor of some form of heightened scrutiny for laws or policies that discriminate based on transgender status.

Numerous federal courts have applied these considerations to recognize that discrimination against transgender people warrants close scrutiny. *See, e.g., Evancho*, 2017 WL 770619, at \*13; *Highland*, 208 F. Supp. 3d at 873-74; *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); *Norsworthy*, 87 F. Supp. 3d at 1119. This Court should do the same for the reasons explained below.

***History of discrimination.*** As courts have concluded, transgender people as a class

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<sup>4</sup> This argument was neither raised in nor decided by *Glenn*, and remains an open question.

have historically been subject to discrimination. *See, e.g., Evancho*, 2017 WL 770619, at \*13. Transgender people face “disturbing patterns of mistreatment and discrimination and startling disparities between transgender people . . . and the U.S. population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community.” *Executive Summary of the Report of the 2015 U.S. Transgender Survey* at 2 (2016) (“*U.S. Transgender Survey*”) (Borelli Decl. Ex. B). A majority of transgender students have experienced verbal, physical, or sexual attacks in schools because of their transgender status. *Id.* at 9.<sup>5</sup>

***Lack of relationship to ability to contribute to society.*** Transgender people “have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society.” *Evancho*, 2017 WL 770619, at \*13; *see also* Borelli Decl. Ex. C (American Psychiatric Association position statement that gender dysphoria “implies no impairment in judgment” or “social or vocational capabilities”). Transgender people contribute to every facet of society,<sup>6</sup> and no data suggests “that a transgender person, simply by virtue of transgender status, is any less productive” than others. *Adkins*, 143 F. Supp. 3d at 139.

***Discrete group with distinguishing characteristics.*** Transgender people are a discrete group with distinguishing characteristics. Ehrensaft Decl. ¶ 23. And one’s gender identity is “so fundamental . . . that a person should not be required to abandon [it]” as a

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<sup>5</sup> *See also Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) (concluding that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented”).

<sup>6</sup> Recognizing that transgender people are full contributors to the workplace, 82% of Fortune 500 companies prohibit discrimination against transgender people in their employment decisions. Human Rights Campaign Foundation, *Corporate Equality Index 2017* at 4 (Borelli Decl. Ex. D).

condition of equal treatment. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *see also* Ehrensaft Decl. ¶ 26 (efforts to change gender identity are unethical); Borelli Decl. Ex. E at 11-14 (attaching Substance Abuse and Mental Health Services Administration, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (2015)).

***Relative political powerlessness.*** At 0.6% of the population, transgender people constitute a small minority lacking meaningful power in the political arena.<sup>7</sup> In fact, recent years have seen an unprecedented assault on transgender people as state legislatures have introduced, and in some instances, passed legislation targeting transgender people for discrimination.<sup>8</sup> *See generally Adkins*, 143 F. Supp. 3d at 140.

Accordingly, this Court should evaluate Defendants' discrimination based on transgender status under strict or at least heightened scrutiny.

**B. Defendants' policy fails any heightened scrutiny, and indeed lacks even a rational basis.**

Defendants' discriminatory policy targeting Drew and other transgender students like him demands meaningful review as discrimination based on either sex or transgender status, a suspect classification. Under the heightened scrutiny required for all sex-based classifications, the government must demonstrate that its sex-based action is substantially related to an "exceedingly persuasive" justification. *Virginia*, 518 U.S. at 533 (quotation marks omitted). Under strict scrutiny, a law must be narrowly tailored to advance

<sup>7</sup> The Williams Institute, *How Many Adults Identify As Transgender In The U.S.?* (June 2016) (Borelli Decl. Ex. F).

<sup>8</sup> *See, e.g.,* Human Rights Campaign, *Anti-transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge* (Feb. 19, 2016) (Borelli Decl. Ex. G).



compelling state interests. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Under both, the “burden of justification is demanding and [] rests entirely on the State,” and constitutionality is judged based on the “the actual state purposes, not rationalizations for actions in fact differently grounded.” *Virginia*, 518 U.S. at 533, 535-36. “Moreover, the classification must substantially serve an important governmental interest *today*, for . . . ‘new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed.’” *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)) (alterations omitted). Defendants’ policy cannot meet either standard. Indeed, it cannot survive even the most deferential review.

Underscoring the lack of any proper government interest here, Defendants have yet to offer Drew any substantive justification for excluding him from the same access to restrooms that other boys receive. Erica Decl. ¶ 23. For months, Erica attempted to resolve the school’s policy directly with the administration. Defendants did not provide *any* basis—let alone a justified reason—suggesting that that Drew’s use of the boys’ restroom resulted in any harm to anyone. *Id.* And while this Court should consider only Defendants’ actual reasons for excluding Drew, such as Mr. Asplen’s absurd suggestion about a hypothetical transgender girl exposing her genitals, or concern about litigation by other parents—and not *post hoc* justifications—Drew addresses arguments offered by defendants in other similar cases to provide a thorough analysis for the Court.

Courts have rejected the argument that allowing transgender students to share multi-user restrooms affects the privacy of other students. *See, e.g., Whitaker*, 858 F.3d at 1052 (“This policy does nothing to protect the privacy rights of each individual student vis-à-vis

students who share similar anatomy and it ignores the practical reality of how [plaintiff], as a transgender boy, uses the bathroom: by entering a stall and closing the door.”); Drew Decl.

¶ 20 (Drew uses the stalls in male restrooms). As in other similar cases, there is no evidence that Drew ever “did, or threatened to do, anything to actually invade the physical or visual privacy of anyone else.” *Evancho*, 2017 WL 770619, at \*7; Drew Decl. ¶ 32. As Erica discussed with district administrators, such conduct would be prohibited by any student under school policy. *See also Highland*, 208 F. Supp. 3d at 874 (“There is no evidence that Jane herself, if allowed to use the girls’ restroom, would infringe upon the privacy rights of any other students”). In fact, Defendants’ policy undermines any interest in privacy by effectively outing students as transgender to their peers and school staff, making transgender students’ physiological features the subject of unwanted attention. Drew Decl. ¶ 29.

Courts also repeatedly have rejected the notion that affording transgender students equal access to multi-user restrooms raises any safety concerns for others. *See, e.g., Evancho*, 2017 WL 770619, at \*15 (noting the lack of any evidence that treating transgender students equally would encourage improper behavior in restrooms); *Highland*, 208 F. Supp. 3d at 877 n.15 (rejecting the argument that equal access to facilities by transgender students will “lead to disruption or safety incidents”). Notably, there has been no suggestion that Drew poses any safety concerns; to the contrary, when it comes to safety risks, transgender people themselves are the group most vulnerable to harassment and violence in sex-separated spaces such as restrooms. *U.S. Transgender Survey*, Borelli Decl. Ex. B at 14-15; *id.* Ex. H (attaching Miami Herald article explaining that the Miami-Dade and Broward County school districts allow transgender students equal access to multi-user restrooms as part of a

commitment to protect them from bullying and discrimination).<sup>9</sup>

Any potential interest in protecting non-transgender students' comfort is illegitimate. “[A]ssertions of emotional discomfort about sharing facilities with transgender individuals” share a common lineage with “similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation in housing, education, and access to public facilities like restrooms, locker rooms, swimming pools, eating facilities and drinking fountains.” *Dep’t of Fair Emp’t & Hous. v. Am. Pac. Corp.*, No. 34-2013-00151153, Order at 4 (Cal. Super. Ct. Mar. 13, 2014) (Borelli Decl. Ex. I); *Lusardi*, 2015 WL 1607756, at \*9 (“Some co-workers may be . . . embarrassed or even afraid, [but] . . . co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment.”). Such unfounded concerns—such as Mr. Asplen’s suggestion that 98% of parents would not understand if Drew were treated equally—amount to nothing more than “mere negative attitudes [and] fear,” which are not “permissible bases for” differential treatment, even under rational basis review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

### **III. Drew Is Likely To Succeed On His Title IX Claim.**

Title IX declares that “[n]o person in the United States 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.

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<sup>9</sup> One district administrator’s suggestion that transgender students might “wave” their genitals at other students, Erica Decl. ¶ 18, hardly bears a response, but suffice it to say that such behavior is not permissible behavior by any student, and transgender students are *particularly* likely to shield parts of their body that cause them the acute distress associated with gender dysphoria. Ehrensaft Decl. ¶ 49.

§ 1681(a).<sup>10</sup> To succeed on a Title IX discrimination claim, the student “must show that: (1) [he] was excluded from participation in an education program because of [his] sex; (2) the educational institution received federal financial assistance at the time of the exclusion; and (3) the discrimination harmed [him].” *Highland*, 208 F. Supp. 3d at 865.

As a recipient of federal financial assistance,<sup>11</sup> Defendant School Board is subject to Title IX’s strictures, and “[a]ccess to the bathroom is . . . an education program or activity under Title IX.” *Id.* at 865. Defendant School Board’s intentional exclusion of Drew from boys’ restrooms discriminates based on his sex under Title IX for all the reasons explained above. Courts rely upon a common body of law in analyzing discrimination claims, regardless of whether a claim arises under the Equal Protection Clause or a particular anti-discrimination statute. *See, e.g., Glenn*, 663 F.3d at 1315-18 (analyzing Equal Protection claim with reference to Title VII cases); *Whitaker*, 858 F.3d at 1049-50.

Without question, the discriminatory policy causes harm to Drew. Drew Decl. ¶¶ 25, 28-30, 34; Erica Decl. ¶¶ 22, 25-26. Consigning Drew to separate gender neutral restrooms does not mitigate the harm that the policy inflicts. Drew must live with the constant and degrading reminder that school officials do not view him as a “real” boy. Moreover, the gender neutral restrooms are much less accessible than the boys’ restrooms that all others use, and are segregated from the communal restrooms that his peers use. *Id.* ¶¶ 26-28. This

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<sup>10</sup> A Title IX regulation permits schools to maintain “comparable” separate restrooms for boys and girls. 34 C.F.R. § 106.33. Drew does not challenge that regulation; to the contrary, he seeks only equal access to the boys’ restrooms permitted by that regulation.

<sup>11</sup> *See* search results from USAspending.gov, reflecting federal financial assistance provided by the U.S. Department of Education to the St. Johns County School Board for fiscal years 2015, 2016, and 2017 (Borelli Decl. Ex. J).

forces Drew to miss class simply to travel to a restroom, or to deal with the extreme discomfort of holding his bladder, which in turn disrupts his ability to participate in class. *Id.* ¶ 28; Ehrensaft Decl. ¶ 48; *Whitaker*, 858 F.3d at 1045 (noting plaintiff was forced into the “unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or avoid use of the bathroom altogether at the expense of his health”).

Moreover, shunting transgender students like Drew into alternative facilities is stigmatizing and brands them as second-class students who are unfit to share communal spaces with others. *Id.* at 1050 (“Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.”); *Evancho*, 2017 WL 770619, at \*17 (giving “credence to the Plaintiffs’ assertions that they subjectively feel marginalized, and objectively are being marginalized, which is causing them genuine distress, anxiety, discomfort and humiliation”); *Highland*, 208 F. Supp. 3d at 870-71 (finding harm where student testified that she felt “stigmatized and isolated when she [wa]s forced to use a separate bathroom and otherwise not treated as a girl”) (footnote omitted). Such policies may lead transgender students to delay or minimize trips to the restroom, which, in turn, leads to increased risk for urinary tract infections and impacted bowels. *See* Drew Decl. ¶ 29; Ehrensaft Decl. ¶ 48. Title IX bars this harmful and humiliating exclusion on the basis of sex.

#### **IV. Drew Will Suffer Irreparable Harm If Defendants’ Discriminatory Restroom Policy Is Not Enjoined.**

This Court has recognized that interference with a student’s education constitutes irreparable harm meriting injunctive relief. *See Ray v. Sch. Dist. of Desoto Cty.*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987) (holding that separating three hemophiliac, HIV-positive

students into a different classroom, and denying access to integrated classroom, constituted irreparable harm).<sup>12</sup> So have other courts. *See, e.g., Alejandro v. Palm Beach State Coll.*, 843 F. Supp. 2d 1263, 1270-71 (S.D. Fla. 2011) (holding that the plaintiff student would suffer irreparable injury if defendant state college did not allow her psychiatric service dog in class, even though she had attended prior classes without the dog). This Court has likewise held that an allegation of ongoing unequal treatment in violation of Title IX demonstrates irreparable injury meriting a preliminary injunction. *Daniels v. Sch. Bd. of Brevard Cty.*, 985 F. Supp. 1458, 1461-62 (M.D. Fla. 1997) (holding that various unequal facilities for girls' softball team versus boys' baseball team warranted preliminary injunctive relief; where boys had restrooms accessible from field and girls did not, noting that "[e]qual access to restroom facilities is such a clearly established right as to merit no further discussion").

As a result of Defendants' policy, Drew is forced to choose between suffering through efforts to hold his bladder while trying to pay attention in class, or engaging in the humiliating exercise of racing to use a separate restroom at the expense of being in class with his classmates. Drew Decl. ¶ 28. As other courts have recognized, "no recovery could give back to [Drew] the loss suffered if he spent his [junior and] senior year focusing on avoiding using the restroom, rather than on his studies, his extracurricular activities and his college application process." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at \*4 (E.D. Wis. Sept. 22, 2016); *id.* at \*64 ("[P]laintiff's spending his last school year trying to avoid using the restroom, living in fear of being

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<sup>12</sup> As in *Ray*, the theoretical harms raised by school officials here are "*not* supported by the evidence in this case," and the "clear weight of the expert medical evidence and opinion is in favor of" providing an "integrated" experience at school. 666 F. Supp. at 1535; Ehrensaft Decl. ¶¶ 41-48.

disciplined, feeling singled out and stigmatized” cannot be “rectified by a monetary judgment, or even an award of injunctive relief, after a trial that could take place months or years from now.”); *see also Virginia Coll., LLC v. SSF Savannah Properties, LLC*, 93 F. Supp. 3d 1370, 1379 (S.D. Ga. 2015) (finding go-kart business above college irreparably harmed students by interfering with their concentration and learning).

Even apart from impeding Drew’s education—which itself is irreparable harm—the stigma of separation and exclusion causes non-compensable harm. No check can be written later to restore the equal dignity stripped from Drew by Defendants’ policy. “Courts have long recognized that disparate treatment itself stigmatizes members of a disfavored group as innately inferior . . . .” *Evancho*, 2017 WL 770619, at \*17; *id.* (the marginalization and humiliation imposed by school’s policy “cannot later be readily remedied by money relief”); *Whitaker*, 858 F.3d at 1045 (banishing plaintiff to gender-neutral restrooms “further stigmatized [him], indicating that he was ‘different’ because he was a transgender boy”); *Highland*, 208 F. Supp. 3d at 878 (finding that “stigma and isolation” of 11-year-old transgender girl from communal restrooms caused irreparable harm).

#### **V. The Balance Of Equities And Public Interest Weigh Heavily In Favor Of An Injunction.**

The “balance of equities tips especially sharply in” Drew’s favor because the relief he seeks is “narrowly tailored” to permit him to use the boys’ “restroom and does not even implicate locker rooms or overnight accommodations.” *Highland*, 208 F. Supp. 3d at 878. Additionally, as the record establishes, there are no potential privacy violations or safety risks. There is no evidence that Drew invaded others’ privacy or posed a safety risk during the six weeks that he used the boys’ restroom. While no student is harmed when Drew uses

the boys’ restroom, the harms inflicted on Drew from the exclusion are profound. Drew Decl. ¶¶ 24-25, 28-29, 32-34; Ehrensaft Decl. ¶¶ 42-46, 48.

The “public has no interest in enforcing an unconstitutional” policy, like the one at issue here. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Similarly, “the overriding public interest lay[s] in the firm enforcement of Title IX.” *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir.1993); *accord Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016). The public interest also is served by ensuring that schools are conducive to learning and preparing all students for a productive life—as occurs when transgender students are treated as full, equal members of the school community.<sup>13</sup> *Cf. Virginia Coll., LLC*, 93 F. Supp. 3d at 1380 (explaining that the public has an interest in seeing vocational colleges achieve their mission to educate students); Ehrensaft ¶¶ 32, 41-44.

## **VI. No Bond Should Be Required.**

Defendants will incur no financial damage if Drew is afforded equal access to the boys’ restroom. *See Whitaker*, 2016 WL 5239829, at \*7 (holding no bond required because defendants did not demonstrate any financial damage from allowing transgender student to use boys’ restrooms). In fact, requiring no bond is “particularly appropriate” where important federal rights are involved, as here. *Cf. Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335-36 (M.D. Fla. 2009) (involving alleged infringement of a fundamental right).

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<sup>13</sup> A number of Florida and other schools allow access to facilities in accordance with gender identity, including Broward County Public Schools (“Broward”), Leon County Schools, and Miami-Dade County Public Schools. *See Borelli Dec.*, Exs. H, K at 40-41, L, and M at 7-8. *See also Whitaker*, 858 F.3d at 1054-55 (relying on positive experiences of *amici curiae* school administrators from 21 states and the District of Columbia with restroom policies that respect students’ gender identity).



## CONCLUSION

“It is no answer under the Equal Protection Clause that those impermissibly singled out for differential treatment can . . . themselves ‘solve the problem’ by further separating themselves from their peers.” *Evancho*, 2017 WL 770619, at \*16. Drew respectfully requests that this Court preliminarily enjoin Defendants from excluding him from the boys’ restrooms at school.

Dated: July 19, 2017

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2017, I electronically filed the foregoing and all attachments with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing and all attachments to be served on all counsel of record.

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