UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRIVACY MATTERS, a voluntary unincorporated association; and **PARENT A**, president of Privacy Matters,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF EDUCATION; **JOHN B. KING, JR.,** in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE**; **LORETTA E. LYNCH**, in her official capacity as United States Attorney General, and **INDEPENDENT SCHOOL DISTRICT NUMBER 706, STATE OF MINNESOTA.**

Defendants.

Case No. __________________

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURY TRIAL REQUESTED

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Privacy Matters and its members (collectively referred to as the "Plaintiffs"), state as follows:

1. This case is about protecting the privacy of every student within Independent School District 706 ("Virginia School District" or "District" or "District Defendant")—privacy that the Defendants violate each school day through their new rules and policies that radically changed the meaning of

"sex" in Title IX. Defendants have unilaterally rejected the Title IX meaning of sex, which for 40 years has meant male and female: two objective, fixed, binary classes which are rooted in our human reproductive nature. In lieu of this unambiguous meaning of sex, Defendants inject a distinct and altogether different concept of gender identity which is subjectively discerned, fluid, and nonbinary. The Department of Education and Department of Justice ("Federal Defendants") acted without regard for statutory authority or required rule-making procedures, and created and promulgated a new *ultra vires* rule ("Federal Rule" or "Rule") through the artifice of issuing "guidelines" ("Federal Guidelines" or "Guidelines") and then enforcing those guidelines against several schools. And those enforcement actions notified all school districts nationwide that they must treat a student's gender identity as their sex for the purpose of Title IX if they wish to retain federal funding. The Federal Rule redefines "sex" in Title IX and requires school districts to regulate access to sex-specific private facilities such as locker rooms, restrooms, shower rooms, and hotel rooms on overnight school-sponsored trips by gender identity rather than by sex. Virginia School District fully adopted and implemented the Federal Defendant's Rule as their own policy ("District Policy" or "Policy"). The consequence of the Federal Rule and District Policy was ineluctable: adolescent girls, in the midst of disrobing within their private locker room, found an adolescent male in their midst.

The risk of such encounters, and the encounters themselves, merit prompt judicial intervention to strike the Defendants' rules and policies and protect Plaintiffs' bodily privacy.

JURISDICTION AND VENUE

2. This action arises under 42 U.S.C. §§ 1983 et seq. (the "Civil Rights Act"), 5 U.S.C. §§ 500 et seq. (the "Administrative Procedure Act" or the "APA"), 20 U.S.C. §§ 1681 et seq. ("Title IX"), the First, Fifth, and Fourteenth Amendments to the United States Constitution, Section 16 of the Minnesota State Constitution, and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq.

3. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1361, and 1367.

4. The Court has jurisdiction to issue the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57.

5. The Court has jurisdiction to award the requested injunctive relief under 5 U.S.C. §§ 702 and 703, 20 U.S.C. § 1683, 42 U.S.C. § 2000bb-1(c), 28 U.S.C. § 1343(a)(3), and Federal Rule of Civil Procedure 65.

6. The Court has jurisdiction to award nominal and compensatory damages under 28 U.S.C. § 1343(a)(4).

7. The Court has jurisdiction to award reasonable attorneys' fees and costs. 28 U.S.C. § 2412, 42 U.S.C. § 1988.

8. Venue lies in this district pursuant to 28 U.S.C. § 1391(b) and (e), because a substantial part of the events or omissions giving rise to all claims occurred in this district where the District Defendant is located.

PARTIES

Plaintiff Privacy Matters

9. All Plaintiffs are citizens of the United States and residents of St. Louis County, Minnesota.

10. Privacy Matters is a voluntary unincorporated association. Minn. Stat. Ann. § 540.151; *Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Avera Marshall,* 857 N.W.2d 695, 700 (Minn. 2014).

11. Privacy Matters is composed of 10 families of Virginia School District students and parents who are directly impacted by the Federal Defendants' Rule and the District Policy.

12. Parent A is the president of Privacy Matters.

13. Girl Plaintiffs A, B, D, E and F, all minors, are members of Privacy Matters, and are represented in this lawsuit by their parents, and next friends, Parents A, B, D, E and F. [1]

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[1] Girl Plaintiff C decided to excuse herself from this case due to perceived risks associated with being a plaintiff in this lawsuit.

14. Parents A, B, D, E and F are also members of Privacy Matters and as parents of Girl Plaintiffs A, B, D, E and F, respectively, are Plaintiffs in their own rights.

15. Girl Plaintiffs A, B, D, E and F all attended VHS in 2015-2016. Because of the Policy, Girl Plaintiff A will not return to VHS for fall 2016. Girl Plaintiff A will likely return to Virginia High School if the Policy is set aside. Girl Plaintiffs B, D, and E will continue at VHS.

16. Girl Plaintiffs A, B, D, E and F and their parents file this lawsuit and seek to proceed under pseudonyms to protect their identities. These Girl Plaintiffs are minors and, while Plaintiffs recognize it is common to use initials to protect a minor's identity, VHS is a small school – 1580 students in the entire District, pre-school to 12th grade – located in a small town – around 8,660 people – so the Girl Plaintiffs' initials or their parents' initials will likely identify the girls. Because the issues raised by this case are hotly contested in Virginia, MN and throughout the country, Girl Plaintiffs fear retaliation from their peers, faculty and administrators within their school, and the greater community, if their true identities are known. Plaintiffs consent to the use of a pseudonym to protect Student X's identity. *See infra* fn. 3.

17. The factual statements and allegations of law in this Verified Complaint may apply to a number of individual members of Privacy Matters.

For clarity, when used in this complaint: **"Plaintiffs"** refers to all members of Privacy Matters; **"Student Plaintiffs"** refers to all students, girls and boys, who are part of Privacy Matters; **"Parent Plaintiffs"** refers to all parents who are part of Privacy Matters; **"Girl Plaintiffs"** refers to all girl students who are part of Privacy Matters; and **"Boy Plaintiffs"** refers to all boy students who are part of Privacy Matters.

Defendant Department of Education

18. Defendant Department of Education ("DOE") is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulations at 34 C.F.R. Part 106.

Defendant Secretary John B. King, Jr.

19. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of the DOE. King is sued in his official capacity only.

Defendant Department of Justice

20. Defendant Department of Justice ("DOJ") is an executive agency of the United States government and is responsible for the enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106. Pursuant to Executive Order 12250, the DOJ has authority to bring actions to enforce Title IX, and it has brought such actions.

Defendant Attorney General Loretta E. Lynch

21. Defendant Loretta E. Lynch is the United States Attorney General. In this capacity she is responsible for the operation and management of the DOJ. Lynch is sued in her official capacity only.

Defendant Independent School District Number 706, State of Minnesota

22. Independent School District Number 706, State of Minnesota ("Virginia School District" or "District") is organized under the laws of the State of Minnesota and pursuant to those laws it may be sued in all courts including this one. Minn. Stat. Ann. § 123B.25 (2016).

23. The District comprises public educational institutions that provide male and female students a pre-school through 12th-grade education.

24. The District and its schools receive federal funds and so are subject to the requirements of Title IX.

25. District schools include VHS (7th to 12th grade), Roosevelt Elementary School (3rd to 6th grade), which is housed in the same building as VHS, and Parkview Learning Center (pre-school to 2nd grade).

26. District Defendant is responsible for the enforcement of policies through its Superintendent, administrators, teachers, and other employees.

INTRODUCTION

27. No student should be forced to use private facilities at school, like locker rooms and restrooms, with students of the opposite sex. No government agency should hold hostage important education funding to advance an unlawful agenda. And no school district should trade its students' constitutional and statutory rights for dollars and cents, especially when it means abandoning a common sense practice that long protected every student's privacy and access to education. Yet the Defendants have taken precisely these actions in this case.

28. Bypassing congressional intent, judicial rulings, and more than 40 years of Title IX history, the Federal Defendants decreed by unlawful agency fiat a new legislative rule that a school must treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations.[2]

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[2] The term "**sex**," as used in both Title IX and this Complaint, is a binary concept that refers to one's biological status as either male or female determined at birth and manifest by biological indicators such as chromosomes, gonads, hormones, and genitalia. *See, e.g.*, Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 1, http://www.apa.org/topics/lgbt/transgender.pdf ("*Sex* is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy."); Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM-5") (noting that sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia."). When "male" and

29. The Federal Defendants created and promulgated this new legislative rule through a series of Federal Guidelines that were sent to school districts between April 2014 and May 2016.

30. Contemporaneously, the Federal Defendants aggressively enforced the policies announced in these Guidelines, publically threatening to remove all federal funding from school districts that did not submit to their Guidelines.

31. This Rule made two radical changes to the law that are directly at issue in this case: It (1) redefined the term "sex" in Title IX to include gender identity, and (2) prohibited school districts from providing sex-specific facilities including locker rooms, shower rooms, restrooms, and hotel rooms on school sponsored trips.

32. Under the Rule, school districts must provide any male student who professes a female gender identity unrestricted use of girls' private

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"female" are used in this Complaint, they are used consistently with this definition. "**Gender identity**" as defined by the Department of Education "refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth." U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter: Transgender Students* 1 (May 13, 2016). **Exhibit A**. It is also subjective, fluid, and not rooted in human reproduction or tied to birth sex. Lawrence S. Mayer & Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, New Atlantis, at 87-93 (2016). When "gender identity" is used in this Complaint, it is used consistently with this definition.

facilities[3] and any female student who professes a male gender identity unrestricted use of boys' private facilities.

33. The Rule is *ultra vires* because it violates both substantive and procedural requirements of the Administrative Procedure Act ("APA").

34. The Rule is unlawful because it mandates a school policy that creates a sexually harassing hostile environment and violates privacy.

35. Responding to the extensive Federal Guidelines and enforcement, in February 2016, the District Defendant stopped its historic and lawful practice of sex-separating locker rooms and restrooms and adopted and implemented the Federal Defendants' Rule as District Policy.

36. The District Policy regulates all District schools, programs, and students pre-school through 12th grade.

37. The Policy was immediately effective and authorized a male high school student who professes a female gender identity, Student X,[4] unrestricted access to enter and use girls' private facilities, which he

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[3] The term "private facilities" in this Complaint includes locker rooms, shower rooms, restrooms, and housing on school-sponsored overnight trips.

[4] Plaintiffs wish to respect the anonymity of this student and so shall refer to him as Student X. Both Title IX and legal precedent regarding bodily privacy recognize that distinctions based on sex are necessary to protect privacy and prevent sex discrimination. Therefore, although Plaintiffs are aware that Student X professes a female gender identity, it is his male sex that is relevant to determining whether Plaintiffs' rights have been violated by Defendants' actions. Therefore, to respect the facts that are necessary knowledge for this Court's adjudication of Plaintiffs' claims, Plaintiffs use masculine pronouns to identify this male student throughout this Complaint.

promptly began doing while Girl Plaintiffs were present and using the same private facilities.

38. The Policy has had a severe and negative impact on students, including Girl Plaintiffs.

39. Girl Plaintiffs experience anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension and distress throughout their day knowing that to obtain an education they must attend to their most personal needs in private facilities unprotected from the entrance, presence, or exposure of a male.

40. Because of the Policy, Girl Plaintiffs do not feel secure in their own locker rooms, restrooms, or school.

41. Accordingly, some of the direct and natural consequences of the Policy have occurred and include:

- After attending Virginia High School ("VHS") last year, Girl Plaintiff A and F will not return to VHS in fall 2016 rather than continue using private facilities with a male student.
- Girl Plaintiffs A, B, and E, missed instructional class time or athletic practice time while trying to find a locker room or restroom where only girls' were likely to be present.

- Girl Plaintiffs A and E stopped using school restrooms for periods of time, holding their urine all day rather than use a restroom that is accessible to a male.
- Parent Plaintiffs A, B, D, E, F, and others observed their daughters' visible distress, including tearfulness, isolating behavior, and anger, over the Policy that forces them to use locker rooms and restrooms accessible to a male and used by him.

42. The anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension, and distress the Girl Plaintiffs' feel from the Policy is exacerbated by Student X's behavior in girls' private facilities, which includes:

- Student X commented on girls' bodies while in the girls' locker room, including asking Girl Plaintiff F her bra size and asking her to "trade body parts" with him both while he and Girl Plaintiff F were in the girls' locker room and outside the locker room in the gym.
- Student X dances to loud music with sexually explicit lyrics in the locker room while "twerking," "grinding," and lifting up his skirt to reveal his underwear.
- Student X changes his clothing by girls who try to seek additional privacy – both Girl Plaintiff A and Girl Plaintiff D started using a

secondary girls' locker room to seek additional privacy but both Girl Plaintiffs report that Student X came in and used the secondary locker room while they were in their underwear. Girl Plaintiff A also reports that Student X removed his pants near her, while she was changing and in her underwear.

43. The Policy violates Title IX, Girl Plaintiffs' constitutional privacy rights, as well as Plaintiffs' other constitutional and statutory rights.

44. Plaintiffs ask this Court to declare the Federal Rule and District Policy unlawful, set them aside, and order the other relief requested herein.

FACTUAL BACKGROUND

The Federal Defendants' Ultra Vires Rule.

Title IX.

45. Congress passed Title IX of the Education Amendments of the Civil Rights Act in 1972 pursuant to its Spending Clause power.

46. Title IX prohibited invidious sex discrimination.

47. Title IX was designed to "expand basic civil rights and labor laws to prohibit the discrimination against women which has been so thoroughly documented." 118 Cong. Rec. 3806 (1972) (statement of Senator Birch Bayh of Indiana).

48. Title IX states 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. § 1681.

49. Congress delegated authority to federal agencies to "effectuate the provisions of section 1681 of this title…by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute…" but specified that "no such rule, regulation, or order shall become effective unless and until approved by the President." 20 U.S.C. § 1682.

50. Regulations implementing Title IX in relevant part provide 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 academic, extracurricular…or other education program or activity operated by a recipient which receives Federal financial assistance," and that no funding recipient shall on the basis of sex "treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; … Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; … Deny any person any such aid, benefit, or service; … Subject any person to separate or different rules of behavior, sanctions, or other treatment; …[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R. § 106.31.

51. Title IX does not authorize the Federal Defendants to regulate the content of speech.

52. Regulation of the content of viewpoint of speech is presumptively unconstitutional under the First Amendment to the United States Constitution.

"Sex" in Title IX does not include gender identity.

53. Title IX and its implementing regulations use the term "sex" to categorize the persons protected from invidious discrimination by the law.

54. The term "sex" in Title IX and its implementing regulations means the immutable, genetic, reproductively-based binary male-female taxonomy. *See supra* fn. 1.

55. The text of Title IX demonstrates this male-female taxonomy by using terminology such as "both sexes," "one sex," and "the other sex."

56. Title IX and its implementing regulations do not use the term "gender identity," or alternate terms referring to the same concept, such as "transgender," or "transsexual."

57. Nothing in the text, structure, or legislative history of Title IX suggests or supports that the term "sex" in Title IX includes "gender identity."

58. Nothing in the text, structure, and drafting history of Title IX's implementing regulations suggests or supports that the term "sex" in these regulations includes "gender identity."

59. Senator Al Franken of Minnesota began in 2011 repeatedly introducing legislation modeled after Title IX to prohibit gender identity discrimination in schools.

60. Congress repeatedly failed to enact the legislation.

Title IX expressly permits sex-specific private facilities.

61. Title IX and its implementing regulations expressly permit sex-specific private facilities.

62. Title IX says "nothing contained herein shall be construed to prohibit any educational institution…from maintaining separate living facilities for the different sexes…." 20 U.S.C. § 1686.

63. The implementing regulations confirm that living facilities include restrooms, locker rooms, and shower rooms – "[school districts] may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

The Federal Defendants' create and promulgate the new Rule.

64. Despite more than 40 years of Title IX history enforcing the unambiguous term "sex" (meaning males and females), the Federal

Defendants recently created and promulgated a new Rule redefining "sex" in Title IX and its implementing regulations to include "gender identity."

65. The Federal Defendants' new Rule is succinctly stated this way: a school must "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." *Dear Colleague Letter: Transgender Students,* 2 (**Exhibit A**).

66. This Rule redefines "sex" in Title IX.

67. The Rule also prohibits sex-separated private facilities.

68. The Federal Defendants promulgated the Rule through a series of Federal Guidelines sent to school districts nationwide including:

- U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence,* 5 (Apr. 2014) (**Exhibit B**);
- U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,* 25 (Dec. 2014) (**Exhibit C**);
- U.S. Department of Education, Office for Civil Rights, *Title IX Resource Guide,* 1, 15, 16, 19, 21-22 (Apr. 2015) (**Exhibit D**); and
- *Dear Colleague Letter on Transgender Students* (**Exhibit A**).

69. Compliance with these Guidelines and the Rule they create is "a condition of receiving Federal funds." *Dear Colleague Letter: Transgender Students*, 2 (**Exhibit A**).

70. The Rule did not go through notice-and-comment rulemaking.

71. The Rule was not officially approved by the U.S. President.

72. The Federal Defendants provided no explanation for the Rule, including no basis for the decision to promulgate the Rule, no description of the factors relied upon to formulate the Rule, no recognition of the fundamentally different nature of sex and gender identity, and no recognition or explanation for the reversal of long-standing policy that permitted districts to separate private facilities by sex without regard to a student's professed gender identity.

73. The Federal Defendants also failed to substantively assess how the new Rule would impact privacy rights of all male and female students on a given campus.

The Federal Defendants enforce the new Rule.

74. The Federal Defendants enforced the Rule through public investigations, findings, and threats to revoke millions of dollars in federal funding from several school districts because they provided sex-specific private facilities. U.S. Department of Education, *Resources for Transgender and Gender Nonconforming Students: OCR Resolutions*.

http://www2.ed.gov/about/offices/list/ocr/lgbt.html (last visited August 10, 2016).

75. Township High School District 211 ("District 211") in Palatine, Illinois was one of the districts investigated.

76. The Office of Civil Rights for the DOE ("OCR") issued a Letter of Findings against District 211 in November 2015. Township High School District 211, 05-14-1055 (Office of Civil Rights November 2, 2015) (letter of findings). (**Exhibit E**).

77. That letter stated in relevant part that when OCR investigates Title IX complaints it looks for evidence of "discrimination based on sex, gender identity, or gender nonconformity." *Id.*

78. The Federal Defendants have no statutory authority to investigate a claim based on gender identity or gender nonconformity.

79. The letter also stated that District 211 violated Title IX by discriminating on the basis of gender identity because District 211 did not let a male student who professes a female gender identity use girls' locker rooms.

80. OCR then threatened to revoke $6 million in federal funding from District 211 if it continued to sex-separate private facilities.

81. In December 2015, District 211 signed an Agreement with OCR and granted the male student access to the girls' locker rooms. (**Exhibit F**).

82. Parents and students who suffer privacy and constitutional harm filed a federal lawsuit regarding that Agreement. *Students and Parents for Privacy v. Dep't of Educ.*, et al., No. 1:16-cv-04945 (N.D. Ill. filed May 4, 2016).

83. In May 2016, the DOJ sent letters to the North Carolina Governor and the University of North Carolina system threatening to revoke Title IX funding from North Carolina schools if the state and University System enforced a state law that mandates sex-specific private facilities in government buildings, including schools.

84. When the Governor resisted, the DOJ filed a federal lawsuit against the State.

85. That case is currently pending. *U.S. v. N.C.*, No. 1:16-cv-00425 (M.D. N.C. filed May 9, 2016).

86. These enforcement actions, with the Guidelines, sent a clear message to school districts nationwide, including Virginia School District, that they too could lose millions in federal funding for maintaining sex-specific private facilities, specifically authorized pursuant to Title IX.

Virginia School District's Unconstitutional Policy.

87. The Virginia School District closely monitored OCR's public investigation and findings against District 211.

88. Like District 211, Virginia School District lies within the jurisdiction of Region V of the OCR regional enforcement offices.

89. Like District 211, Virginia School District faced repeated requests from a male student, Student X, to use the girls' private facilities.

90. Also like District 211, Virginia School District maintained sex-specific private facilities, despite Student X's requests.

91. Student X is a male high school student at VHS.

92. Student X professes a female gender identity.

93. Student X will be in 10th grade for the 2016-2017 school year.

94. Starting around 2014, Student X began asking the District for unrestricted access to use the girls' locker rooms and restrooms at school.

95. From approximately 2014 to February 2016, the District provided Student X private accommodations to satisfy his private facility needs, while maintaining sex-specific private facilities to preserve the privacy of all other students.

96. Student X used his accommodations without complaint, stating publically on his YouTube channel that he "cannot complain" about them.

97. Nonetheless, from approximately 2014 to February 2016, Student X continued to ask for unrestricted access to girls' private facilities.

98. During 2014-2015, the District consistently maintained sex-specific private facilities in accord with Title IX while consistently providing private arrangements for Student X.

99. At times during 2014 and 2015, Student X used the girls' locker rooms without District permission.

100. This behavior included changing his clothing in an open locker room while Girl Plaintiff F and other girls were present and changing for PE.

101. Parent F and others timely complained to the District and the District reminded Student X not to use the girls' private facilities.

102. Because of Student X's repeated requests, and aware of the investigation against District 211, the Virginia School District superintendent, Dr. Stender, contacted the District 211 superintendent, Dr. Cates, in February 2016.

103. The two superintendents discussed OCR's investigation and Virginia School District's approach to Student X's request.

104. After their discussion, Dr. Cates sent Dr. Stender several documents: OCR's Letter of Findings against District 211, **Exhibit E**; an OCR letter related to the Agreement signed by District 211 to resolve the investigation, **Exhibit G**; a speech Dr. Cates gave regarding the Agreement, **Exhibit H**; and a related letter to parents and students in the Lake Zurich School District near District 211, **Exhibit I**. (Dr. Cates' email to Dr. Stender

sending these documents is included in **Exhibit I**. Correspondence from Dr. Stender to Dr. Cates is attached as **Exhibit J.**

105. Virginia School District officials reviewed OCR's aggressive enforcement actions against District 211, and they reasonably anticipated similar aggressive enforcement against their district if they did not grant Student X unrestricted access to girls' private facilities.

106. Accordingly, around February 2016, Virginia School District began a new policy and practice to adopt and implement the Federal Defendants' Rule.

107. Under the District Policy, any student in any District school, pre-school through 12th grade, has unrestricted access to private facilities based on the students' professed gender identity.

108. A student need not provide the District any medical or psychological confirmation of a diagnosis of gender dysphoria.

109. This Policy authorizes males to enter female-specific private facilities and vice versa for students aged three to eighteen.

110. The Policy abrogates the District's lawful and historic practice of providing sex-specific private facilities.

111. The Policy was immediately effective and authorized Student X to use girls' private facilities in the District, which he promptly began doing on a regular basis.

112. The District generally notified staff of the new Policy by emailing a letter on February 12, 2016 that stated in relevant part: "the DOE's position on students' access to the bathroom and locker room is very clear and states that a student has the right to use the locker room and bathroom of the students' affirmed gender identity;" that Virginia School District will follow this federal policy; and that OCR's legal findings against District 211 "serve as the baseline" for the District's decision in this matter.

113. The District did not notify parents or students of the new Policy.

114. However, when Parent A later learned of the Policy, she contacted the District and was told "in accordance with the recent U.S. Department of Education and Office of Civil Rights case, transgender students have the right to access the facility of their gender identity." **Exhibit K**.

115. Similarly, when Plaintiffs' counsel contacted the District regarding the Policy, attorneys for the District said the District would continue to give a male full access to the girls' locker rooms and restrooms as "[t]he District's approach to restroom and locker room use … purposefully adheres to the interpretation of sex discrimination law under Title IX adopted by the Department of Education, Office of Civil Rights ("OCR")…" and "OCR[']s interpretation of Title IX…is of great practical importance to the District, as OCR has the authority to investigate the District and such an

investigation would have significant financial consequences for the District…." **Exhibit L**.

The District Defendant's Policy Harms Girl Plaintiffs.

116. Because of the Policy, all girls' private facilities are open to unrestricted use by a male student.[5]

117. All Girl Plaintiffs are aware of the risk of entrance or presence of or exposure to, a male student each time they use a locker room or restroom.

118. Girl Plaintiffs object to this violation of their privacy, but must use the locker rooms and restrooms anyway for required physical education classes, athletics, and normal human needs.

119. Failure to use these facilities could result in disciplinary action, poor grades, or exclusion from athletics.

120. Because of the Policy, Girl Plaintiffs experience anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension and distress.

121. Girl Plaintiffs feel violated by the invasion of privacy and are insecure at school since it is District Policy that creates the situation.

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[5] Plaintiffs are not aware that Student X plans to attend any planned school-sponsored overnight trips. However, the Policy authorizes Student X to room in the girls' hotel rooms, including multi-occupant bedrooms, on any school-sponsored trip he attends. Various athletic and extracurricular teams travel, and some Girl Plaintiffs participate in such activities. This Complaint may be amended should additional claims arise in this context.

122. These daily persistent feelings of anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension, distress, violation of privacy and insecurity at school stay with Girl Plaintiffs and impact them throughout the day, distracting them from instructional time and discouraging their involvement in athletics and other activities.

123. The District authorized Student X to participate in girls' athletics, and he has participated in girls' basketball, girls' track, and Rifle Corps, changing in girls' locker rooms many times with Girl Plaintiffs per the Policy.

124. Plaintiffs understand that for the 2016-2017 school-year Student X is on the Rifle Corps, which started practicing and performing with the marching band over the summer.

125. Student X also joined the girls' volleyball team for fall 2016-2017, which has already begun to practice together.

126. Plaintiffs understand that Student X also intends to join girls' basketball in the winter, and girls' track in the spring, both of which are "no cut" sports, meaning anyone who signs up will participate.

127. Athletic team participation is a crucial part of Girl Plaintiffs' high school educational experience.

128. However, all Girl Plaintiffs now know that participation in athletics means sharing changing facilities with Student X.

129. Girl Plaintiffs did not know this when the District first granted Student X access to the girls' locker room in the middle of basketball season.

Girl Plaintiff B.

130. Girl Plaintiff B played on the girls' basketball team during winter 2016.

131. In late February 2016, Girl Plaintiff B was in the locker room preparing to change for practice when Student X walked into the locker room.

132. Girl Plaintiff B was shocked and embarrassed.

133. She had no idea that Student X could enter the girls' locker room.

134. Some girls in the locker room were undressed.

135. Girl Plaintiff B did not want to undress in front of a male student and she did not want to see him undress as she believed he entered the locker room to change for basketball practice.

136. Girl Plaintiff B quickly gathered her belongings and ran out of the locker room.

137. She alerted some other girls to Student X's presence, and the other girls ran out of the locker room with her.

138. The group of girls sought privacy in a restroom down the hall where they changed before and after practice that day.

139. Later that week in response to girls' concerns, the basketball coach told the team that girls could change in the main girls' locker room

near the gymnasium or a secondary locker room in the basement of the elementary school.

140. The elementary school locker room is located on the opposite side of the building shared by the high school and elementary school.

141. To use this locker room before basketball practice, a girl must retrieve her clothing from her locker, walk to the opposite side of the building, go down the stairs to the basement of the elementary school, change in the basement locker room, go back up the stairs, back across the school, stow her belongings, and then go to the gymnasium for practice.

142. After basketball practice, a girl must repeat the process, retrieving her clothing, walking across the school, down to the basement, change, and then walk back across the school to leave.

143. Despite the burdens associated with the elementary school locker room, Girl Plaintiff B and nearly half the girls' junior varsity basketball team changed in the secondary locker room in hope that their privacy would not be violated.

144. Student X changed in the main girls' locker room throughout the basketball season.

145. However, the Policy authorized his unrestricted use of either locker room and Girl Plaintiff B was aware of that whenever she used the elementary school locker room.

146. Although Girl Plaintiff B finished the few games left in the basketball season, she does not intend to return to basketball next year.

Girl Plaintiff A.

147. In Spring 2016, Student X joined the girls' track team.

148. Girl Plaintiff A was also on the team.

149. Girl Plaintiff A does not want to undress in front of a male student and she does not want to be present when a male student undresses, but she found herself in that situation because of the Policy.

150. For much of the season, the main girls' locker room was the only locker room open to Girl Plaintiff A and other girls.

151. Therefore, Girl Plaintiff A had to use the main locker room to change for track practice.

152. Student X also used the main girls' locker room.

153. Early in the season, Student X changed fully or partially in a restroom stall, but then after changing he would sit on a bench in the locker room while Girl Plaintiff A and other girls changed their clothes.

154. Later in the season, Student X changed in the open locker room and in front of Girl Plaintiff A and other girls, removing his clothing down to tight women's boyshort-style underwear.

155. To preserve her privacy, Girl Plaintiff A tried going to the locker room early to change in a restroom stall, but the stalls were often full.

156. She then tried to go early to change before Student X arrived, but often he would come in while she was still changing.

157. She also tried changing on the opposite side of the room, but Student X started moving throughout the locker room to change, dance, or sit, and he would make loud rude comments to other girls about Girl Plaintiff A and other girls who did not want to change near him.

158. Student X began dancing in the locker room while Girl Plaintiff A and others prepared for track practice.

159. Student X would dance in a sexually explicit manner – "twerking," "grinding" or dancing like he was on a "stripper pole" to songs with explicit lyrics, including "Milkshake" by Kelis.

160. On at least one occasion, Girl Plaintiff A saw Student X lift his dress to reveal his underwear while "grinding" to the music.

161. This behavior made Girl Plaintiff A uncomfortable, exacerbating the distress she already felt using a locker room open to and used by a male.

162. Parent A notified the District that she did not want her daughter using a locker room a male student had permission to enter and use.

163. She also told the District about Student X's lewd dancing and rude comments to her daughter.

164. The District did not discipline Student X for his comments or lewd behavior.

165. Instead, the District told Parent A that students, including Student X, are permitted to play music and dance in the locker room.

166. However, shortly after that incident, the District told Girl Plaintiff A and other girls they could change for track in either the main girls' locker room or a secondary locker room – the boys' basketball locker room – down the hall.

167. This boys' basketball locker room is not used by boys' teams during girls' track practice.

168. Like with the elementary school locker room, the Policy authorized Student X to use both locker rooms. This time he did.

169. Because Girl Plaintiff A wanted privacy and because she thought Student X would use the main girls' locker room, she began using the boys' basketball locker room to change for track practice.

170. Shortly after Girl Plaintiff A resorted to changing in the boys' basketball locker room, Student X started entering the boys' basketball locker room, periodically using it to get ready for practice.

171. On one such occasion, Student X walked into the boys' basketball locker room while Girl Plaintiff A was in her underwear and removed his pants while he was near her and other girls who were also changing.

172. This incident deeply upset Girl Plaintiff A. It signaled to her that there was no place in the school where she could preserve her privacy under the new Policy.

173. Girl Plaintiff A had historically enjoyed school and excelled at it, but as the track season wore on, Parent A heard Girl Plaintiff A talk of disliking school and she noticed her daughter increasingly withdrawing to personal space and isolating in her room after school, particularly on days when she encountered Student X in the locker room.

174. Girl Plaintiff A also avoided using restrooms when Student X was present. She did not want to attend to personal activities in a restroom where a male student could walk in.

175. Shortly after the District authorized the Policy, Student X walked into a girls' restroom while Girl Plaintiff A was using it.

176. At the time, she was surprised and embarrassed because she did not know the District authorized him to enter and use girls' restrooms.

177. Afterwards, Girl Plaintiff A stopped using school restrooms for approximately ten days, holding her urine all day.

178. Girl Plaintiff A subsequently learned that students could use the staff restrooms, and she tried to use those to attend to her personal needs.

179. However, there are only three staff restrooms – one on the first floor, one on the third floor, and one on the fourth floor – and they are located

at the far corners of the four-story school building, a long distance from the main student traffic areas.

180. Staff members continue to use the staff restrooms.

181. Students have four minutes between classes.

182. One of the first times Girl Plaintiff A used a staff restroom, it was in use when she arrived and she was late to class, missing instructional time. Her classroom teacher questioned her about being late.

183. For weeks after that incident, Girl Plaintiff A did not use any school restrooms, holding her urine all day.

184. Girl Plaintiff A continued to avoid using school restrooms if at all possible through the end of the school year.

185. When she could not avoid it, she used staff restrooms, but again she found them occupied at times.

186. On some such occasions, Girl Plaintiff A used the girls' restrooms open to Student X, despite her deep discomfort, to avoid tardiness and questioning from her teachers.

187. The Policy has caused Girl Plaintiff A so much stress that her parents have decided she cannot return to VHS for the 2016-2017 school year.

188. Girl Plaintiff A attended VHS last year and has many friends there, as well as an older brother attending there.

189. Girl Plaintiff A would like to continue going to school with her brother and her friends and if it were not for the Policy, she would continue attending high school at VHS.

190. If it were not for the Policy, one of her younger brothers would also be starting school at Parkview Elementary for the 2016-2017 school year.

191. Girl Plaintiff A's parents believe that, except for the Policy, the Virginia School District is a good district, with good schools, excellent teachers, and programs that would significantly benefit their children. They would like to be able to send their children to Virginia School District schools.

192. However, because of the Policy including the stress it causes Girl Plaintiff A and their concerns about their children's privacy rights, Girl Plaintiff A's parents have decided they must remove Girl Plaintiff A and her younger brother from the Virginia School District.

193. As of the week before school starts, Girl Plaintiff A's parents are not sure where they are going to send their children to school. Parent A home-schools some of her younger children.

194. Girl Plaintiff A's parents are seriously considering private school for their children, but the nearest private high school is 30 miles away in Hibbing, MN.

195. Due to the cost of tuition and the distance of the school, to place their children in private school, Parent A will have to abandon home-

schooling their other children and enroll them in the same private school, so Parent A can obtain a job in Hibbing to cover the added costs of tuition, travel, and related costs.

196. Parent A wants to continue schooling their younger children at home, but Parent A concluded that because of the Policy and the distress it causes Girl Plaintiff A because of the loss of their privacy, Girl Plaintiff A cannot continue in the District.

197. Girl Plaintiff A, and her younger brother, will likely return to Virginia High School if the Policy is set aside. If she does return because private facilities are sex-specific, she would use the girls' locker rooms and restrooms.

Girl Plaintiff D.

198. Girl Plaintiff D participated in track and field in Spring 2016 with Girl Plaintiff A and Student X.

199. Girl Plaintiff D did not know that the District authorized a male student to use the girls' locker room until Student X walked into the girls' locker room while she and other girls were changing.

200. When Parent D picked Girl Plaintiff D up from practice that day, he noticed she was teary-eyed and visibly shaken. She told him there was a boy in the locker room changing with her.

201. At first, Girl Plaintiff D tried to preserve her privacy by going to the locker room late and waiting, if necessary, for Student X to finish and leave before she disrobed.

202. Also, other girls started questioning her and bullying her about waiting until Student X left to undress.

203. In mid-season, when the District told girls they could also use the boys' basketball locker room, Girl Plaintiff D sought to find privacy there.

204. However, as happened to Girl Plaintiff A, Student X walked in to the boys' basketball locker room while Girl Plaintiff D was in her underwear.

205. Girl Plaintiff D was very upset by this incident, and when she reported the incident to her dad that night, she was again teary, emotionally distraught, and visibly shaken.

206. Parent D told the District that Student X walked into the boys' basketball locker room while his daughter was changing.

207. He told the District that he did not want a male student in his daughter's locker room.

208. Although the District told Parent D that District personnel would talk with Student X, the District admitted later that they had not spoken with Student X.

209. The District continued to authorize Student X to use both the main girls' locker room and the boys' basketball locker room throughout the season.

210. For fall 2016, Girl Plaintiff D joined the girls' volleyball team, which she currently plays on.

211. Student X also plays on the volleyball team.

212. Per the Policy, Student X has been using the girls' locker room for volleyball practice.

213. Because, volleyball season begins a few weeks before school starts, Girl Plaintiff D has been changing her clothes at home before going to practice so she will not have to use the girls' locker room with a male student.

214. That will not be an option for Girl Plaintiff D once school starts on September 6, 2016. Girl Plaintiff D knows she will have to use school locker rooms, which is already causing her stress and anxiety.

Girl Plaintiff E.

215. Girl Plaintiff E was emotionally distraught when she heard about the Policy.

216. She was not in PE or athletics with Student X at the time, but she did use school restrooms and did not want to use a restroom with a male.

217. Parent E promptly contacted the District. The District told Parent E that Girl Plaintiff E could use the three staff restrooms.

218. However, when Girl Plaintiff E went to use one of the staff restrooms, it was occupied and she was late to class.

219. The teacher and her peers questioned her about being late.

220. After that experience, Girl Plaintiff E stopped using the school restrooms, sometimes holding her urine all day, and sometimes using the locker room restroom during her PE class while Student X was in another class.

221. Girl Plaintiff E will use the girls' restrooms at school if the Policy is set aside.

Girl Plaintiff F.

222. Girl Plaintiff F was assigned to the same PE class as Student X, when the two were in eighth grade, during the 2014-2015 school year.

223. This class assignment occurred before the District Policy, but during the time that Student X repeatedly used the girls' locker room without District permission.

224. Both when inside the locker room and while outside in the gym, Student X asked Girl Plaintiff F and other girls' about their bra sizes.

225. Student X also repeatedly asked Girl Plaintiff F to "trade body parts" with him.

226. These questions and comments made Girl Plaintiff F very uncomfortable because of the close attention Student X paid to the private areas of her body.

227. This discomfort was exacerbated when Student X entered the locker room, because Girl Plaintiff F did not want to undress in front of him.

228. Parent F notified the District of Student X's comments to her daughter, but to her knowledge he was not disciplined associated with his comments.

229. Although the District did not authorize Student X to enter the girls' locker room in 2014-2015, the Policy now authorizes his entrance and use of the girls' locker room, and Girl Plaintiff F still does not want to undress in front of him or use the restroom with him.

230. Because of the Policy and bullying at school, Girl Plaintiff F has decided not to return to VHS and will take online courses instead, starting fall 2016.

The District Defendant's Policy Harms Student Plaintiffs.

231. Because of the Policy, all Student Plaintiffs experience anxiety and stress.

232. While the Girl Plaintiffs face the daily reality of a male student in their private facilities, Boy Plaintiffs know the Policy authorizes the same

situation for them – a female who professes a male gender identity could at any time use the boys' private facilities without notice to students or parents.

233. This risk makes Boy Plaintiffs anxious, stressed, embarrassed, intimidated, apprehensive and distressed.

234. All Student Plaintiffs have sincere religious or moral beliefs that they must practice modesty.

235. These beliefs include the moral standard that they not disrobe or attend to personal activities in a locker room or restroom in the presence of the opposite sex.

236. These beliefs also include the moral standard that they not be present when a member of the opposite sex disrobes or attends to personal activities in a locker room or restroom.

237. These beliefs are in conflict with the demands of the Policy.

The District Defendant's Policy Harms Parent Plaintiffs.

238. All Parent Plaintiffs object to their children using private facilities with students of the opposite sex.

239. All Parent Plaintiffs have sincere religious or moral beliefs about bodily privacy and sexual modesty that informs how they raise their children and the values they instill in their children.

240. All Parent Plaintiffs want to protect the privacy of their children and do not want their children to disrobe or attend to other personal activities in a private facility with the opposite sex.

241. All Parent Plaintiffs want to instill a sense of modesty in their children and do not want their children exposed to a person of the opposite sex while that person is disrobed or attending to personal activities in a private facility.

242. Parents A, B, D, E, and F all notified the District of their own objections to the Policy and of the distress suffered by each of their children over sharing private facilities with a male student.

243. The District continued imposing the Policy and offered no sex-separated private facilities to preserve Girl Plaintiffs' privacy.

244. Instead, shortly after the District imposed the Policy, the District held a school-wide, "anti-bullying" assembly that promoted the new Policy, focused heavily on the lesbian, gay, bisexual, transgender ("LGBT") community, and conveyed the message to Student Plaintiffs, including Girl Plaintiffs A and B, that the District views the Policy as part of its anti-bullying efforts such that any student who objects to the Policy will be viewed as a bully.

245. The District also sponsored a community education meeting for parents which some Student and Parent Plaintiffs attended, including Parent A and Girl Plaintiff A.

246. Again, the focus was on the LGBT community, promotion of the Policy, and the message that any objection to the Policy is intolerant, bigoted, and bullying against students who profess a gender identity incongruent with their sex.

247. The assembly and community meeting upset Girl Plaintiff A because she understood the message to be that the District will not protect her privacy and, instead, will continue to disregard the anxiety, embarrassment, and stress she feels as a direct result of the Policy.

248. This feeling is consistently expressed among the Student and Parent Plaintiffs in this lawsuit.

249. Plaintiffs are suffering and continue to suffer irreparable harm because of the Defendants' actions, including promulgating and enforcing the Federal Defendants' Rule and the District Defendant's Policy.

250. Plaintiffs have no adequate remedy at law.

ALLEGATIONS OF LAW

FIRST CAUSE OF ACTION AGAINST FEDERAL DEFENDANTS: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

251. Plaintiffs reallege all matters set forth in paragraphs 1 through

250 and incorporate them herein.

252. The Federal Defendants are agencies under the APA. 5 U.S.C. § 706(2)(D).

253. The Federal Defendants' Rule is a "rule" under the APA. 5 U.S.C. § 551(4).

254. The Rule is a final agency action, reviewable by statute, and Plaintiffs have no other adequate remedy at law. 5 U.S.C. § 704; 5 U.S.C. § 551(13); 20 U.S.C. § 1638.

255. Per the APA, a reviewing Court must "hold unlawful and set aside agency action" in four instances applicable to this case:

- One: if the agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C);

- Two: if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A);

- Three: if the agency action is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B); and

- Four: if the agency action is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

256. The Rule violates each of these four standards.

The Federal Rule Exceeds Statutory Authority.

257. An agency rule exceeds statutory authority if it alters an

unambiguous statutory provision.

258. The Federal Defendants' Rule – that a school must treat a student's gender identity as their sex for the purposes of Title IX and its implementing regulations – changes two clear and unambiguous provisions – (1) the Rule adds "gender identity" to the clear and unambiguous term "sex" in Title IX, and (2) the Rule prohibits sex-separating private facilities despite a clear and unambiguous provision in Title IX that expressly grants permission to maintain sex-specific private facilities.

The Rule adds "gender identity" to the clear and unambiguous term "sex" in Title IX.

259. The term "sex" as used in Title IX and its implementing regulations clearly and unambiguously means male and female, under the traditional binary, reproductively-based taxonomy consistent with one's birth sex.

260. Sex may be normatively discerned at birth, and even in the womb.

261. Sex does not include the non-binary concept of "gender identity."

262. Title IX and its implementing regulations use the term "sex" to categorize the persons protected from invidious discrimination by law.

263. The term "gender identity," and alternate terms referring to the same concept, such as "transgender" or "transsexual," do not appear in Title

IX or its implementing regulations.

264. The text, structure, and legislative history of Title IX do not suggest or support that the term "sex" in Title IX includes "gender identity."

265. Similarly, the text, structure, and drafting history of Title IX's implementing regulations do not suggest or support that the term "sex" in Title IX's implementing regulations includes "gender identity."

266. Instead, Title IX uses terminology such as "both sexes," "one sex," and "the other sex," indicating that "sex" in Title IX is binary and does not include the non-binary concept of "gender identity."

267. Additionally, Congress recognizes that "sex" in Title IX does not include "gender identity" by repeatedly considering legislation that would add Title IX-style protections for gender identity discrimination. Congress has repeatedly and overwhelmingly failed to enact this legislation.

The Rule prohibits sex-specific private facilities despite a clear and unambiguous provision expressly granting permission to sex-separate private facilities.

268. Title IX clearly, unambiguously and expressly allows sex-specific private facilities.

269. Title IX provides that "…nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686.

270. Title IX's implementing regulations interpret "living facilities" to include restrooms, locker rooms, and shower rooms, clearly and unambiguously stating that schools receiving federal funding "may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

271. Despite the clarity of Title IX, the Federal Defendants' Rule prohibits this sex-separation in its recent Guidelines, stating, for example, in the most recent "Dear Colleague Letter" that "when a school provides sex-separated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." *Dear Colleague Letter: Transgender Students*, 2 (**Exhibit A**).

272. The Federal Defendants also enforced their prohibition against District 211 in Palatine, Illinois, and the State of North Carolina, among others, threatening the loss of federal funds if these educational institutions continue to maintain separate locker rooms and restrooms based on sex.

The Rule should be set aside because it is in excess of statutory authority.

273. Because the Federal Rule changes a clear and unambiguous term and a clear and unambiguous provision in Title IX, and is contrary to the

plain language of Title IX, the Federal Defendants have exceeded their statutory authority, and the Rule should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2)(C).

The Federal Rule is Arbitrary, Capricious, An Abuse of Discretion, and Not in Accordance With Law.

274. The APA also requires a Court to set aside an agency rule if the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

275. An agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

276. An agency also acts arbitrarily and capriciously when it changes the longstanding understanding of federal law, without at the very least "display[ing] awareness that it is changing position" and showing "good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, No. 15-415, 2016 WL 3369424 at *7 (June 20, 2016), *quoting FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

277. Such a change requires "a reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by the prior policy" and "cognizan[ce] that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.*

278. The Federal Defendants' Rule fails all of these standards.

279. The Federal Defendants relied on a concept – "gender identity" – that Congress did not intend them to consider.

280. The Federal Defendants failed to consider important aspects of the problem, including the text, structure, and legislative and congressional history of Title IX (which all define "sex" according to the binary, reproductively-based taxonomy), the practical and constitutional harms created by mixing boys and girls in intimate settings, the fundamentally different nature of sex and gender identity, and the contradictions between the Rule and the objectives of the Title IX statute.

281. The Federal Defendants' Rule also changed two longstanding aspects of federal law – the meaning of "sex" in Title IX, and the permissibility of sex-specific private facilities – without any explanation or recognition of the change.

282. The Federal Defendants provided no explanation for the Rule when promulgated in the Guidelines.

283. Since then, the Federal Defendants have provided no explanation

that recognizes the changes to federal law, describes good reasons for the new Rule, explains the basis for disregarding the facts and circumstances that supported the prior policy, or addresses reliance interests in the prior policy.

284. The Rule is, therefore, arbitrary and capricious.

285. The Rule further violates 5 U.S.C. § 706(2)(A) because it is contrary to law or regulation. *See infra Second, Third, Fourth, Fifth, Sixth, and Seventh Causes of Action.*

286. For the above reasons, the Rule should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2)(A).

The Rule is Unconstitutional.

287. The APA further instructs courts to set aside agency rules that are "contrary to constitutional right, power, privilege, or immunity." *See* 5 U.S.C. § 706(2)(B).

288. The Federal Defendants' Rule violates Girl Plaintiffs' constitutional privacy rights. *See infra Third Cause of Action.*

289. The Federal Defendants' Rule violates Parent Plaintiffs' constitutional and fundamental liberty interest in controlling their children's upbringing and education. *See infra Fourth Cause of Action.*

290. The Federal Defendants' Rule violates Plaintiffs' constitutional and statutory rights to freely live out their religious and moral beliefs. *See infra Fifth, Sixth, and Seventh Causes of Action.*

291. The Federal Defendants' Rule also violates the Spending Clause of the United States Constitution, under which Title IX was enacted, because it fails to unambiguously state the conditions of funding so that recipients can voluntarily and knowingly decide whether to accept funding.

292. The Rule violates the Spending Clause because the threat to withdraw federal funds coerces compliance.

293. The Rule also violates the Spending Clause because it conditions the receipt of federal funds on violating constitutional rights of persons entitled to enjoy the benefits provided by the funding.

294. Based on these violations of the Spending Clause or any of the above violations of Plaintiffs' constitutional or statutory rights, the Rule should be declared unlawful and set aside per 5 U.S.C. § 706(2)(B).

The Rule Fails Procedural Requirements.

295. The APA requires Courts to declare unlawful and set aside any rule promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

296. This procedure includes notice-and-comment rulemaking for legislative or substantive (as opposed to interpretive) rules. 5 U.S.C. § 553(b)

297. It also requires the U.S. President to approve final Title IX rules, regulations, and orders of general applicability. 20 U.S.C. § 1682.

298. Notice-and-comment rulemaking requires an agency to: (1) issue

a general notice to the public of the proposed rule-making, typically by publishing notice in the Federal Register; (2) give interested parties an opportunity to submit written data, views, or arguments on the proposed rule, and for the agency to consider all relevant comments and respond to significant comments received; and (3) include in the promulgation of the final rule a concise general statement of the rule's basis and purpose.

299. Legislative rules establish new policy positions that the agency treats as binding, impose new rights or duties, create a new legal norm based on the agency's own authority, or expand the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created.

300. The Rule creates a new policy – that "sex" in Title IX includes gender identity.

301. The Rule imposes new rights for students who can now access opposite-sex private facilities based on their professed gender identity, and the Rule creates new duties for schools that must grant the above access or sacrifice federal funds.

302. The Rule creates a new legal norm and expands the footprint of Title IX by adding "gender identity" to Title IX, which for 40-plus years protected only sex (according to the proper, binary meaning of that term that refers to one's biological status as either male or female that is determined at

birth and manifested by certain biological indicators).

303. The Rule is therefore legislative.

304. The Federal Defendants promulgated the Rule through Guidelines and enforcement actions.

305. The Rule did not go through notice-and-comment rulemaking.

306. The Rule was not approved by the U.S. President.

307. Accordingly, the Rule should be declared unlawful and set aside pursuant to 5 U.S.C. § 706(2)(D).

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

SECOND CAUSE OF ACTION AGAINST DISTRICT DEFENDANT: VIOLATION OF TITLE IX

308. Plaintiffs reallege all matters set forth in paragraphs 1 through 307 and incorporate them herein.

309. The Virginia School District is a federal funding recipient for purposes of Title IX.

310. Student Plaintiffs are beneficiaries of and protected by Title IX.

311. There is an implied private right of action under Title IX that allows a student to bring suit for violations of the statute.

312. There is no requirement that a claimant exhaust administrative remedies before bringing a Title IX cause of action.

313. The Virginia School District's Policy adopts and implements the Federal Defendants' Rule.

314. The Policy denies Girl Plaintiffs access to educational programs – including classes, athletics, private locker rooms and private restrooms – which, in turn, excludes Girl Plaintiffs from educational programs and activities in violation of Title IX.

315. The Policy also places Girl Plaintiffs in a sexually harassing hostile environment that violates Title IX.

The Policy Excludes Girl Plaintiffs from Educational Programs.

316. Educational programs covered by Title IX include instructional classes, athletic teams, locker rooms and restrooms.

317. Girl Plaintiff A is not returning to Virginia High School for the 2016-2017 school year because of the Policy.

318. Girl Plaintiffs A, B, and E missed instructional time or athletic practice time because of the Policy.

319. Girl Plaintiffs A and E stopped using school restrooms for periods of time because of the Policy.

320. Each of these Girl Plaintiffs was excluded from an educational program because of the Policy, in violation of Title IX.

321. These Girl Plaintiffs, and likely others, will continue to suffer exclusion from educational programs in violation of Title IX as long as the Policy is in effect.

The Policy Creates a Sexually Harassing Hostile Environment.

322. Sexual harassment constitutes discrimination under Title IX when it is so severe, pervasive and objectively offensive that it deprives a plaintiff of access to the educational opportunities and benefits provided by his or her school.

323. Typically, a school district is liable for its indifference to known harassment that occurs under its control.

324. Moreover, when a district policy creates the sexual harassment, the school district is directly liable for intentional misconduct.

325. The Policy violates Title IX because it mandates an environment in which, every time a Girl Plaintiff uses private facilities — be it to change for mandatory PE class, prepare for extracurricular athletics, or attend to human personal needs in a restroom – she must use private facilities that are open to and used by a male student under the District's authorization.

326. This situation on its face creates a sexually harassing hostile environment that violates Title IX.

327. The Policy as applied to Girl Plaintiffs meets every element for a Title IX hostile environment claim.

328. District officials via their Policy harass Girl Plaintiffs by creating the risk and reality of a male entering and using their sex-specific private facilities, resulting in anxiety, embarrassment, intimidation, fear, apprehension, and stress.

329. The harassment is on the basis of sex because Girl Plaintiffs' female sex is the reason the District authorized a male to access their private facilities, and it is because of their female sex that Student X uses their private facilities.

330. The harassment is severe and pervasive because it impacts Girl Plaintiffs throughout their day, and certainly every time they use a locker room or restroom in the school.

331. The harassment is severe and pervasive because some Girl Plaintiffs have manifested severe emotional distress off-campus and at home because of the Policy.

332. Adolescents are particularly vulnerable and sensitive to the effects of the unwanted presence of the opposite sex in sex-specific private facilities.

333. It is objectively offensive to put a teenage girl in a situation in which she must sacrifice her modesty and privacy to pursue an education or participate in athletics.

334. The harassment deprives Girl Plaintiffs of access to educational

opportunities and benefits. Among other things, as a direct result of the Policy: Girl Plaintiff A will not return to the District, Girl Plaintiffs A, B, and E missed instructional time or athletic practice time, and Girl Plaintiffs A and E stopped using school restrooms for at least periods of time.

335. The harassment causes all of the Girl Plaintiffs anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension and distress that impacts them throughout their day.

336. The District knows of the harassment because it adopted and implemented the Policy and because Parent Plaintiffs notified District personnel of the Policy's impact on their daughters.

337. The District has authority to change its own Policy.

338. Instead, the District Defendants acted with deliberate indifference by maintaining the Policy and continuing to authorize Student X's unrestricted access to and use of girls' private facilities.

339. The District is, therefore, liable under Title IX for creating a hostile environment of pervasive sexual harassment for Girl Plaintiffs.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

THIRD CAUSE OF ACTION AGAINST FEDERAL DEFENDANTS AND THE DISTRICT DEFENDANT: VIOLATION OF THE FUNDAMENTAL RIGHT TO PRIVACY

340. Plaintiffs reallege all matters set forth in paragraphs 1 through

339 and incorporate them herein.

341. The Fifth Amendment protects citizens against violation of fundamental rights by federal actors. The Fourteenth Amendment protects citizens against violation of fundamental rights by state actors.

342. Fundamental rights are liberty interests deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty.

343. Each Girl Plaintiff has a fundamental right to bodily privacy that, at a minimum, includes protection from intimate exposure, or risk of intimate exposure, of her body and intimate activities to a male. It also includes the corollary protection from intimate exposure, or the risk of intimate exposure, to a male's body or intimate activities.

344. The fundamental right to bodily privacy is deeply rooted in the Nation's history and tradition and has long been recognized in the United States Constitution and federal and state statutory and common law.

345. The fundamental right to bodily privacy is also implicit in the concept of ordered liberty because a government that compels its citizens to disrobe or attend to intimate activities in the presence of the opposite sex violates the core of personal liberty.

346. Such an abridgement of fundamental rights is presumptively unconstitutional and can only be justified if it survives strict scrutiny under which the law must serve a compelling state interest by the most narrowly

tailored means.

347. The Rule violates each Girl Plaintiff's fundamental right to privacy because it requires each Girl Plaintiff to use private facilities open to, and used by, the opposite sex.

348. The Policy adopts and implements the Rule, and so violates each Girl Plaintiff's fundamental right to bodily privacy.

349. The Federal Defendants and the District Defendants have no compelling interest to justify this violation.

350. Nor has any Defendant used the least restrictive means of serving any interest that they may later articulate.

351. Accordingly, the Rule and the Policy fail strict scrutiny review and are unconstitutional.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

FOURTH CAUSE OF ACTION AGAINST THE FEDERAL DEFENDANTS AND DISTRICT DEFENDANT: VIOLATION OF PARENTS' FUNDAMENTAL RIGHT TO DIRECT THE UPBRINGING OF THEIR CHILDREN

352. Plaintiffs reallege all matters set forth in paragraphs 1 through 351 and incorporate them herein.

353. The Fifth Amendment protects citizens against violation of fundamental rights by federal actors. The Fourteenth Amendment protects

citizens against violation of fundamental rights by state actors.

354. Parent Plaintiffs have a fundamental right to make decisions concerning the care, custody, and control of their children and to direct the education and upbringing of their children.

355. This includes Parent Plaintiffs' right to instill moral and religious values in their children regarding bodily privacy and sexual modesty.

356. It also includes Parent Plaintiffs' right to protect their children from violation of their right to bodily privacy.

357. Government infringement of this fundamental right is presumptively unconstitutional.

358. The Rule prohibits schools from sex-separating private facilities.

359. The Policy adopts and implements the Rule, granting all students use of all opposite-sex private facilities based on professed gender identity.

360. Under the Policy, a male student, Student X, uses girls' locker rooms and restrooms with Girl Plaintiffs.

361. Parent Plaintiffs object to the Rule and Policy because they want to instill moral and religious values of bodily privacy and sexual modesty in their children and they want to protect their children from using locker rooms and restrooms with the opposite sex.

362. The Rule and Policy infringe Parent Plaintiffs' fundamental rights regarding their children.

363. The Rule and Policy are presumptively unconstitutional. *See supra Third Cause of Action*.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

FIFTH CAUSE OF ACTION AGAINST FEDERAL DEFENDANTS AND THE DISTRICT DEFENDANTS: VIOLATION OF THE FIRST AMENDMENT'S GUARANTEE OF FREE EXERCISE OF RELIGION

364. Plaintiffs reallege all matters set forth in paragraphs 1 through 363 and incorporate them herein.

365. The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion.

366. Laws that burden free exercise, but are not neutral or generally applicable, are presumptively unconstitutional.

367. Laws that burden free exercise and another constitutional right are presumptively unconstitutional.

368. Some Student Plaintiffs have a sincere religious belief that they must practice modesty, which includes a requirement that they not undress or use the restroom with the opposite sex.

369. Some Parent Plaintiffs have a sincere religious belief that they must teach their children to practice modesty and protect the modesty of their children. This includes a requirement that their children not undress or

use the restroom with the opposite sex.

370. The Federal Rule burdens these Student and Parent Plaintiffs' religious beliefs.

371. The Federal Rule is not neutral and generally applicable.

372. The Rule also burdens free exercise and Plaintiffs' other constitutional rights. *See supra Third and Fourth Cause of Action*.

373. Accordingly, the Rule is presumptively unconstitutional. *See supra Third Cause of Action.*

374. Because the Policy adopts and implements the Rule, the Policy also violates the First Amendment.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

SIXTH CAUSE OF ACTION AGAINST DISTRICT DEFENDANT: VIOLATION OF THE MINNESOTA CONSTITUTION Minn. Const. art. 1, §16

375. Plaintiffs reallege all matters set forth in paragraphs 1 through 374 and incorporate them herein.

376. The Minnesota Constitution provides that "[t]he right of every man to worship God according to the dictates of his conscience shall never be infringed," "nor shall any control of, or interference with the rights of conscience be permitted…" Minn. Const. art. I, § 16.

377. This state freedom of conscience clause provides broader

protection than the Federal Constitution.

378. Under this provision, any state regulation that burdens the exercise of sincere religious beliefs is presumptively unconstitutional.

379. The Policy burdens the exercise of Plaintiffs' sincerely held religious beliefs and their rights of conscience. *See supra Fifth Cause of Action.*

380. The Policy is therefore presumptively unconstitutional. *See supra Third Cause of Action.*

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

SEVENTH CAUSE OF ACTION AGAINST THE FEDERAL DEFENDANTS:
VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT, 42 U.S.C. § 2000bb

381. Plaintiffs reallege all matters set forth in paragraphs 1 through 380 and incorporate them herein.

382. A governmental entity violates the Religious Freedom Restoration Act ("RFRA") if it substantially burdens a plaintiff's religious exercise without a compelling reason.

383. Some Plaintiffs have sincerely held religious beliefs that are substantially burdened by the Rule. *See supra Fifth Cause of Action.*

384. The Federal Defendants have no compelling interest that would

justify violating Plaintiffs' religious exercise.

385. Additionally, the Federal Defendants have not used the least restrictive means to achieve any purported interest in burdening the Plaintiffs' exercise of religion in this manner.

386. The Rule violates RFRA.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendants, jointly and/or severally, as follows:

A. A declaration that the Federal Defendant's Rule is substantively unlawful under the APA as "in excess of statutory authority, or limitations, or short of statutory right."

B. A declaration that the Rule is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.

C. A declaration that the Rule is "contrary to constitutional right, power, privilege, or immunity" under the APA.

D. A declaration that the Rule is unlawful and must be set aside as created "without observance of procedure required by law" under the APA.

E. A declaration that the District Defendant's Policy impermissibly burdens Girl Plaintiffs' rights under Title IX to be free from discrimination on

the basis of sex by excluding Girl Plaintiffs from educational programs.

F. A declaration that the Policy impermissibly burdens Girl Plaintiffs' rights under Title IX to be free from discrimination on the basis of sex by creating a sexually harassing hostile environment.

G. A declaration that the Federal Defendants' Rule and the District Defendant's Policy impermissibly burdens Girl Plaintiffs' constitutional right to privacy.

H. A declaration that the Rule and the Policy impermissibly burdens some Student Plaintiffs' and Parent Plaintiffs' constitutionally guaranteed right to free exercise of religion under the Free Exercise Clause of the First Amendment.

I. A declaration that the Policy impermissibly burdens some Student Plaintiffs' and Parent Plaintiffs' rights to free exercise of religion under the Minnesota Constitution.

J. A declaration that the Rule impermissibly burdens some Student Plaintiffs' and Parent Plaintiffs' rights to free exercise of religion under federal Religious Freedom Restoration Act.

K. A preliminary and permanent injunction enjoining the Federal Defendants' Rule from having any legal effect.

L. A vacatur, as a consequence of each or any of the declarations aforesaid, as to the Defendants' promulgation, implementation, and

determination of applicability of the Rule and Guidelines – including U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence,* 5 (Apr. 2014); U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,* 25 (Dec. 2014); U.S. Department of Education, Office for Civil Rights, *Title IX Resource Guide,* 1, 15, 16, 19, 22-23 (Apr. 2015), and U.S. Department of Education and U.S. Department of Justice, *Dear Colleague Letter: Transgender Students* (May 2016) – and its terms and conditions, along with all related rules, regulations, guidance and interpretations, as issued and applied to the Virginia School District and similarly situated parties throughout the United States, within the jurisdiction of this Court.

M. A preliminary and permanent injunction enjoining the District Defendants' Policy and ordering the District Defendants to permit only females to enter and use the Districts' girls private facilities, including locker rooms and restrooms, and only males to enter and use the boys' private facilities, including locker rooms and restrooms.

N. An award of nominal damages in the amount of one (1) dollar, and compensatory damages, to each individual and associational plaintiff for the violation of Plaintiffs' constitutional and statutory rights, except those claimed under the APA;

O. An order that this Court retain jurisdiction of this matter for the purpose of enforcing any Orders;

P. An award of Plaintiffs' costs and expenses of this action, including a reasonable attorneys' fees award, in accordance with 28 U.S.C. § 2412, 42 U.S.C § 1988;

Q. An order that the requested injunctive relief be without a condition of bond or other security being required of Plaintiffs; and

R. All other relief to which the Plaintiffs may show themselves to be entitled, including attorneys' fees and costs of courts.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all counts and issues so triable.

Respectfully submitted this 7th day of September, 2016.

By: /s/ Renee K. Carlson

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**Pro Hac Vice Applications Forthcoming*

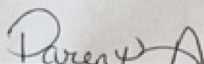
Attorneys for Plaintiffs

THIS DOCUMENT HAS BEEN ELECTRONICALLY FILED

DECLARATION UNDER PENALTY OF PERJURY

I, Parent A, a citizen of the United States and a resident of the State of Minnesota, as President of Privacy Matters, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 30 day of August, 2016, at Eveleth, Minnesota.



Parent A, President
PRIVACY MATTERS

DECLARATION UNDER PENALTY OF PERJURY

We, Parent A and Girl Plaintiff A, citizens of the United States and residents of the State of Minnesota, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 30 day of August, 2016, at Eveleth, Minnesota.

Parent A
Parent A

Girl Plaintiff A
Girl Plaintiff A

DECLARATION UNDER PENALTY OF PERJURY

We, Parent B and Girl Plaintiff B, citizens of the United States and residents of the State of Minnesota, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 24TH day of August, 2016, at VIRGINIA, Minnesota.

Parent B
Parent B

Girl Plaintiff B
Girl Plaintiff B

DECLARATION UNDER PENALTY OF PERJURY

We, Parent D and Girl Plaintiff D, citizens of the United States and residents of the State of Minnesota, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 2nd day of ~~August~~ September, 2016, at 9:09 pm Virginia, Minnesota.

Parent D

Parent D

Girl Plaintiff D

Girl Plaintiff D

DECLARATION UNDER PENALTY OF PERJURY

We, Parent E and Girl Plaintiff E, citizens of the United States and residents of the State of Minnesota, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 25th day of August, 2016, at Virginia, Minnesota.

Parent E

Parent E

Girl Plaintiff E

Girl Plaintiff E

DECLARATION UNDER PENALTY OF PERJURY

We, Parent F and Girl Plaintiff F, citizens of the United States and residents of the State of Minnesota, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of our knowledge.

Executed this 30th day of August, 2016, at Angora, Minnesota.

Parent F.
Parent F

Girl Plaintiff F
Girl Plaintiff F