UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD W. REYNOLDS and ERIN L. REYNOLDS, individually and on behalf of their minor children, A.R and E.R.; A.B., a minor child, by and through Next Friend, EDWARD W. REYNOLDS; MONICA C. SCHAFER; and CHRISTOPHER D. JOHNECHECK,

Plaintiff,

v

GREG TALBERG, CHRISTOPHER LEWIS, NANCY DEAL, SARAH BELANGER, KATHY HAYES, JOEL GERRING and WILLIAMSTON COMMUNITY SCHOOLS,

Defendants.
_____/

Judge Paul L. Maloney
Magistrate Judge Phillip J. Green
No. 18-00069

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DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(C)

INTRODUCTION

Plaintiffs, three students of the Williamston Community School District and five parents of District students, have filed suit against the District and seven Board of Education members regarding the District's adoption of certain School Board policies. Doc. 1, PgID 1-34, Ex. 1, Policies. Plaintiffs have not alleged a specific injury, or a discrete incident in connection with the policies. Rather, Plaintiffs' damage claim is hypothetical, as they anticipate that their rights *may* be violated in the future. The challenged policies protect all students from discrimination and bullying. Because the District's policies attempt to protect **all** students, Plaintiffs allege that the district is "promoting" a particular lifestyle. The suggestion is false.

In response to Plaintiffs' Complaint, Defendants move to dismiss under Fed. R. Civ. P. 12(c) for the following reasons: 1. Plaintiffs have not suffered an injury in fact, therefore they do not have a justiciable claim; 2. The policies are viewpoint neutral and related to a reasonable policy goal, and as a result, do not violate Plaintiffs' First Amendment Rights; 3. Plaintiffs have not identified "fundamental rights" that have been "substantially interfered with" as a result of "shocking" governmental action; 4. Plaintiffs have not alleged a violation of Title IX, since the statute does not specifically address transgendered students; 5. The District is required by the Michigan School Code to address bullying by school policy; and 6. The individual defendants are entitled to qualified immunity.

FACTS

On October 2, 2017 and November 6, 2017, the Williamston Community School District Board of Education adopted multiple policies that are attached as Exhibit A. On January 16, 2018, Plaintiffs filed suit relating to the content of the policies. Plaintiffs generally claimed that the policies *could* infringe upon their constitutional rights, and *could* constitute discrimination under multiple federal and state statutes.

Plaintiffs, however, have not alleged any specific injury or harm as a result of the policies. Plaintiffs have not alleged that they were discriminated against by identifying a discrete act. Plaintiffs, in other words, have not identified any incidents where one or more plaintiffs were punished for violating the policy, that they were harassed by district employees or students, or denied an opportunity provided by the district because of its enforcement of its policies. Rather, Plaintiffs only contend hypothetical injury that has not, and may not ever occur.

In crafting their argument, Plaintiffs have distorted and misstated the content of the policies. In truth, citing to multiple state and federal laws, the policies Plaintiffs attack seek to shield **all** students from any form of discrimination, including that based on sexual orientation and religion. The Policies do not single out one particular group of students. In relevant part, these policies state the following:

Policy 4900 Fair Employment Clause states that it is "the intent of the Board" to award contracts in excess of $15,000 to qualified contractors who do not "discriminate against any employee or applicant for employment because of age, sex, race, color, religion, creed, age, physical handicap, ancestry, national origin, sexual orientation, height, weight, or marital status."

Policy 7500 Guidance Program, states that "guidance and counseling services shall be available to any student and shall not discriminate against any student on the basis of sex, race, age, color, national origin, religion, sexual orientation, gender identity, gender expression, or disability."

Policy 8010 Equal Education Opportunity, provides that "[e]very child, regardless of race, creed, color, sex, national origin, religion, sexual orientation, gender identity, gender expression, cultural or economic background, or handicap, is entitled to equal opportunity for education development."

Policy 8011 Gender Identity states that the District "fosters an educational environment for **all** students that is safe, welcoming and free from stigma and discrimination." Although the policy already states it applies to all students, it clarifies that the safe environment shall be provided regardless of sex, social orientation, gender identity, or gender expression. The policy then continues that the district will accept the gender identity that each student asserts based on the student's legitimately held belief, and that the district will customize support to allow the

student equal access to the district's educational programs and activities. The policy concludes by acknowledging that parents of transgendered students are key determinants of their health, counseling and support services could be provided, and the district will keep the parents informed.

8040 School Admissions relates to the admissions of first time, resident, new resident, and nonresident students. As for nonresident students, the policy reads that those students shall not be "granted or refused enrollment based upon disability, religion, race, color, national origin, sexual orientation, gender identity, gender expression, sex, height, or weight, or generally, in violation of any state or federal law prohibiting discrimination."

8020-R Bullying identifies, with specificity, what constitutes bullying, aggressive behavior, intimidation and menacing behavior, and harassment. The Policy further states that bullying is conduct that has "an actual and substantial detrimental effect on a student's physical or mental health," and causes "substantial disruption in, or substantial interference with, the orderly operation of the school." The policy then provides a definition for harassment, and identifies that it could be based on certain characteristics. The policy states that "'[h]arassment' includes, but is not limited to, any act which subjects an individual or group to unwanted, abusive behavior of a nonverbal, verbal, written or physical nature, often on the basis of age, race, religion, color, national origin, marital status or disability, but may also include

sexual orientation, gender identity, gender expression, physical characteristics (e.g., height, weight, complexion), cultural background, socioeconomic status, or geographic location (e.g., from the rival school, different state, rural area, city, etc.)."

8720 Student Organizations allows students to form clubs and other organized groups outside the regular classroom environment. The policy continues that such meeting "[s]hall be open to all students without regard to race, creed, color, sex, sexual orientation, gender identity, gender expression, handicap, religion, or national origin."

Even a cursory review of the policies reveals that they do not effectuate the inflammatory results that Plaintiffs claim. The policies do not facially state that bathrooms and locker rooms will be shared by males and females. Not one of these policies compels plaintiffs, or anyone, to express a belief or statement. And the words "affirm" and "promote" are not in the language of the policies.

STANDARD OF REVIEW

Defendants seek dismissal of this matter pursuant to Federal Rule of Civil Procedure 12(c). "A Rule 12(c) motion for judgment on the pleadings for failure to state a claim upon which relief can be granted is nearly identical to . . . a Rule 12(b)(6) motion to dismiss." *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006) (citations omitted). When a Court is presented with a Rule 12(b)(6) or 12(c) motion, "it may consider the [c]omplaint and any exhibits attached thereto, public records,

items appearing in the record of the case and exhibits attached to the defendant's motion [for judgment on the pleadings], so long as they are referred to in the [c]omplaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). The Court must construe these documents "in the light most favorable to the plaintiff, accept all factual allegations as true," and determine whether the plaintiff has alleged "enough factual matter" to "state a claim to relief that is plausible on its face." *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "Where a complaint pleads facts that are merely consistent with a defendant's liability," it has failed to show that relief is plausible as opposed to a "sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted). The Court also "need not accept as true legal conclusions or unwarranted factual inferences. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

LAW AND ARGUMENT

I. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE NOT JUSTICIABLE. THERE IS NO ACTUAL INJURY IN CONTROVERSY

Plaintiffs' claims regarding the District's policies should be dismissed because they are nonjusticiable. Plaintiffs "lack an injury in fact because the [policies] have not yet been applied to them. Their injury is conjectural and hypothetical, rather than

concrete and particularized." See *Miller v. City of Wickliffe, Ohio,* 852 F.3d 497 (6th Cir. 2017), citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).[1]

Article III, Section 2 of the United States Constitution confines the jurisdiction of the federal courts to actual cases and controversies. U.S. Const. Art. III § 2, cl. 1; *Travelers Ins. Co. v. Obusek,* 72 F.3d 1148, 1153 (3d Cir.1995). Pursuant to this provision, the federal courts are prohibited from issuing advisory opinions. *Rhone–Poulenc Surftants & Specialties, L.P. v. I.R.S.,* 249 F.3d 175, 181–82 (3d Cir.2001) (citation omitted). Not only does the "case or controversy" language in Article III require that a case be live, it also "prohibits all advisory

[1] Three of Plaintiffs' causes of action are particularly deficient in this regard. Plaintiff's Count VII alleging a violation of the Michigan Constitution based on an alleged violation of FAPE (free appropriate public education) should be dismissed because plaintiffs have not alleged a specific discrete act violating rights. Rather, Plaintiff's alleged they remove their children from school in anticipation of an alleged violation caused by the district's policies. This cannot form the basis of a claim. It is well-established that plaintiffs cannot create their own cause of action. See e.g., *Polera v. Board of Ed. Of Newburgh,* 288 F.3d 478, 490 (2nd Cir. 2002)(holding that plaintiffs cannot argue administrative procedures are futile by sitting on their claims until administrative procedures can no longer work.); *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015), *vacated on other grounds*. Likewise, plaintiffs Elliott Larsen Civil Rights claim fails for not identifying a specific act. Claims brought under the ELCRA require a discrete form of sexual discrimination based only on sex, not gender. *Corley v Detroit Bd of Educ,* 470 Mich 274 (2004)(the ELCRA requires allegations that "inherently" pertain to sex, not just gender.) Id at 279-80. Plaintiff has not alleged any such claim here. Plaintiffs' Title IX claim speaks only to a purely hypothetical situation. Yet, the Supreme Court has made clear that Title IX discrimination claims require proof of actual discrimination. See *Davis v. Monroe Co. Board of Ed.*, 526 U.S. 629, 650, 119 S.Ct. 1661 (1999). Additionally, § 1983 liability attaches to a municipality only when the execution of its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," **inflicts the injury** upon the plaintiff. *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). There is no injury-in-fact in this case, as the District's policies have not been executed against any of the Plaintiffs.

opinions, not just some advisory opinions and not just advisory opinions that hold little interest to the parties or the public." *Fialka–Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 715 (6th Cir. 2011). Indeed, "[t]he oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions," *Coffin v. Malvern Fed. Sav. Bank*, 90 F.3d 851, 853 (3d Cir.1996) (citation omitted), and that they must refrain from "decid[ing] abstract, hypothetical or contingent questions." *Alabama State Fed. of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945).

Closely related to the prohibition on the issuance of advisory opinions is the ripeness doctrine. Like the prohibition on advisory opinions, the ripeness doctrine prevents courts from "entangling themselves in abstract disagreements" through abstention from making premature adjudication. *Abbott Lab. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), overturned on other grounds by, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). One of the basic principles governing whether a justiciable controversy exists is that the rendering of an opinion must be conclusive of an issue. See *Step–Saver Data Sys. v. Wyse Technology*, 912 F.2d 643 (3d Cir.1990); see also *Coffin*, 90 F.3d at 853–54 (utilizing the ripeness inquiry generally applicable to declaratory judgment actions because the motion to reconsider lien avoidance before the court was analogous to one seeking a declaration of rights). Essential to the conclusiveness inquiry is

whether the Court has been "presented with a set of facts from which it can make findings." *Travelers*, 72 F.3d at 1155. Absent the necessary facts, the Court is unable to engage in its required fact-finding role, and is instead left to render only an advisory opinion. Id.

In this case, there are no facts upon which to conclude a violation of Constitutional or statutory rights has occurred. Instead, Plaintiffs' lawsuit only complains of the language of new School District Policies that have not interfered with their education. Plaintiffs present at best a theoretical claim that their rights could eventually be violated, but a federal court has "no power to offer an advisory opinion, based on hypothetical facts." *Commodities Exp. Co. v. Detroit Int'l Bridge Co*., 695 F.3d 518, 525 (6th Cir. 2012).

Students and Parents for Privacy v. U.S. Department of Ed., et. al., 2017 WL 6629520 (N.D. IL. 2017),[2] illustrates the fact that the District's policies may never result in an actionable injury. In *Students and Parents for Privacy*, the Illinois District Court was confronted with a similar challenge to a school district's policies. There, the court found that the plaintiff's rights were not violated by the district's policies, and highlighted the fact that the plaintiff's concerns were speculative at best. In addressing the plaintiff's concerns that the school's policies specifically

[2] This case involved allegations of a Title IX violation and a Substantive Due Process claim based on an alleged violation of the students' fundamental rights to bodily privacy.

allowing transgender students access to facilities corresponding to their gender identity, the court found that the policies may not lead to a violation of the plaintiff's claimed privacy rights. The policies did not expressly force invasions of privacy. Further, the restrooms had stalls, which provided adequate privacy, and single-use facilities were available to students. The Court continued by acknowledging that "[a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall." Similarly, in this case, Plaintiffs have not identified a specific injury that occurred, and their anticipated "damages" may never occur. As a result, Plaintiffs' lawsuit should be dismissed.

II. EVEN IF PLAINTIFFS HAD ALLEGED A PARTICULAR INJURY, THEY HAVE NOT PLEAD VIOLATIONS OF THE LAW.

1. The Policies Do Not Violate Plaintiffs' First Amendment Rights.

"First Amendment rights must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U.S., at 268, n. 5, 102 S.Ct. 269. "Most students are minors, and school administrators must have authority to provide and facilitate education and to maintain order." *Sypniewski v. Warren Hills*

Regional Bd. of Educ., 307 F.3d 243, 252 (3rd Cir. 2002). Thus, the Supreme Court has cautioned courts to resist "substitut[ing] their own notions of sound educational policy for those of ... school authorities," for judges lack the on-the-ground expertise and experience of school administrators. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690.

While "students in public school do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Id. at 506, 89 S.Ct. 733, the "First Amendment rights of students in the public school 'are not automatically coextensive with the rights of adults in other settings.'" *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 266 (1986). Indeed, "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel*, 478 U.S. at 683, 106 S.Ct. 3159. "Thus, students retain the protections of the First Amendment, but the shape of these rights in the public school setting may not always mirror the contours of constitutional protections afforded in other contexts." *Sypniewski*, 307 F.3d at 253. Instead, the constitutional rights of students "must be 'applied in light of the special characteristics of the school environment[.]' " *Morse v. Frederick*, 551 U.S. 393, 397, 127 S.Ct. 2618, 2621, 168 L.Ed.2d 290 (2007) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266,

108 S.Ct. 562, 567, 98 L.Ed.2d 592 (1988) (quoting *Tinker*, 393 U.S. at 506, 89 S.Ct. at 736)).

A. <u>These Policies Are Viewpoint Neutral And Serve A Reasonable Purpose.</u>

The school setting is unique, and as a result, it is well established that public school areas may "put time, place, and manner restrictions on hallway speech so long as the restrictions are viewpoint neutral and reasonable in light of the school's interest in the effectiveness of the forum's intended purpose." *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir 2008).

The Supreme Court has established that policies aimed at promoting equality reasonably serve a public school's interest in providing an education to all, and are therefore reasonable purposes for a policy at a school district. *CLS v. Martinez*, 561 U.S. 661, 688-689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010). Likewise, school policies aimed at encouraging tolerance, cooperation, and learning among students are reasonable policy goals. Id. The question then becomes whether the policy is content neutral.

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). See also *Madsen v. Women's Health Center, Inc*., 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) ("[T]he fact that the injunction covered

people with a particular viewpoint does not itself render the injunction content or viewpoint based."). Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies," *CLS v. Martinez*, 561 U.S. at 696, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. St. Paul*, 505 U.S. 377, 390, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

The Supreme Court in *Christian Legal Services v. Martinez*, supra, recently examined a non-discrimination policy nearly identical to those challenged here, and found it to be content neutral, and constitutional. Nearly identical to the challenged language in this case, the school's Policy on Nondiscrimination (Nondiscrimination Policy), stated:

> "[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hasting's] policy on nondiscrimination is to comply fully with applicable law.
>
> "[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities." Id., at 220.

Like Plaintiffs in the instant matter, the Christian Legal Services plaintiffs complained that the policy violated their religious beliefs regarding homosexual conduct, and their right to free speech.

The Court found that the policy was viewpoint neutral, and did not violate constitutional rights, noting, "[i]t is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers." 561 U.S. at 695. The Court found that based on its face, the policy draws no distinction between groups based on their message or perspective; its requirement that all student groups accept all comers is textbook viewpoint neutral. Id. Still, the plaintiffs asserted that it systematically—and impermissibly—burdened most heavily those groups whose viewpoints are out of favor with the campus mainstream. The Court found that this argument fails because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661. Based on the school's requirement that student organizations accept all comers, the Court was satisfied that Hastings' policy was "justified without reference to the content [or viewpoint] of the regulated speech." Id., at 791, 109 S.Ct. 2746. It targets the act of rejecting would-be group members without reference to the reasons motivating that behavior. Id. at 695-696.

In *CLS v. Eck*, 625 F.Supp.2d 1026 (D. MT. 2009), the district court also found that a nearly identical school policy was content neutral and did not discriminate based on viewpoint. The non-discrimination provision in question stated in relevant part that "[s]tudents have the right to be free from discrimination, harassment, or intimidation based on actual or perceived; age, sex, nationality, creed, religion, color, race, sexual orientation, gender, identity and expression, disability, familial status, military service, or other purely arbitrary criteria." The court found there was no evidence that the non-discrimination policy was intended to target or single out religious beliefs. Rather it was a policy that was neutrally applied and intended for general application. The Court then concluded that the plaintiffs "may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation, but that does not convert the reason for [the school's] policy prohibiting the discrimination to be one that is religiously-based." Id. at 1032.

Similarly, the Policies in this case draw no distinction based on groups and applies to protect all students. As the Supreme Court stated, it is "hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all."[3] *CLS*, 561 U.S. at 695.

B. Limiting Speech Content In A School Setting Is Constitutional Under Certain Circumstances.

[3] For this reason, Plaintiffs' Count II regarding the Matt Epling Safe School Law should be dismissed. By its plain language, the District's policies apply to protect **all** students regardless of classification.

Even if the policies are construed to limit content, that alone does not render the policies unconstitutional. When it comes to pure student speech, *Tinker* provides the framework for assessing whether a particular speech restriction comports with the constitutional guarantee of free speech. Pursuant to *Tinker*, public schools possess authority to regulate student expression when speech "substantial[ly] disrupt[s]" school activities or "impinge[s] upon the rights of other students." *Tinker*, 393 U.S. at 514, 89 S.Ct. at 740. In determining whether a regulation interferes with the rights of other students, courts must ensure that school officials target truly harassing speech, not mere expressions of unpopular opinions, and the policies must not discriminate on the basis of student viewpoints.

Since *Tinker*, the Supreme Court has carved out a number of additional categories of speech that a school may restrict, even without the threat of a substantial disruption. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), the Supreme Court held that "there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school.' " *Fraser*, 478 U.S. at 685, 106 S.Ct. 3159. *Fraser* permits a school to prohibit words that "offend for the same reasons that obscenity offend." Id. In Ha*zelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), the Court found that a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech)

on the basis of any legitimate pedagogical concern. "Speech falling outside of these categories is subject to *Tinker's* general rule: it may be regulated … if it would substantially disrupt school operations or interfere with the right of others." *Saxe v. State College Area School Dist.*, 240 F.3d 200, 214 (3rd Cir. 2001).

Plaintiffs lawsuit alleges that the District's policies related to harassment of students violates First Amendment principles. Plaintiffs have not identified which Policy they claim limits speech. The only referenced policy that may *arguably* limit speech in any way protects all students from harassment and bullying, regardless of their classification.

School anti-bullying policies highlight "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech." *Zamecnik*, 636 F.3d at 877 (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir.2001)). Indeed, as a condition to receive federal funding, public school districts are required by Title VI and Title IX to respond to harassment of students in a manner that is not deliberately indifferent. Courts have relied upon the existence and enforcement of thorough policies prohibiting severe or pervasive harassment in making this determination.

In spite of this tension, student speech may be regulated if it comports with *Tinker*. Thus, well-crafted anti-bullying policies are constitutionally permissible when they focus on preventing either substantial disruption of school activities or

interference with the rights of other students. School policies may even ban harassing speech in anticipation of disruption, even if disruptive events have not yet occurred, because "*Tinker* does not require certainty, only that the forecast of substantial disruption be reasonable." *Lowery v. Euverard,* 497 F.3d 584, 592 (6th Cir.2007).

In *Glowacki v. Howell Public School Dist*., 2013 WL 3148272 (E.D. MI. 2013, J. Duggan), the Eastern District of Michigan addressed a nearby district's anti-bullying policy that restricted the content of speech, and found that it passed Constitutional muster. The challenged policy stated:

> "**School officials … should intercede to stop student speech that constitutes harassment aimed at a student or a group of students."** . . . Bullying is conduct that "is intended or that a reasonable person would know is likely to harm" students by "substantially interfering with educational opportunities, benefits, or programs of one [ ] or more students," "adversely affecting the ability of a student to participate in or benefit from the school district's educational programs or activities by placing the student in reasonable fear of physical harm or by causing substantial emotional distress," "having actual and substantial detrimental effect on a student's physical or mental health," or "causing substantial disruption in, or substantial interference with, the orderly operation of the school."

The Court found that the limitation on speech contained in the policy was valid because it defined bullying in terms that mirror the threshold which *Tinker* held that student speech may be restricted. Id. at 14. The policy prohibits conduct that is likely to cause substantial disruption or interfere with the rights of other students. Id. the policy, on its face, does not prevent students from expressing opinions that may be

unpopular or offensive. Id. Finally, the policy targets all bullying by all students; it did not only target certain students. The Court went on to call the plaintiff's challenge of the policy "both legally and factually frivolous." Id. at 14.

The bullying policy in this case is equally valid. The Williamston policy likewise prohibits conduct that is likely to cause substantial disruption or interfere with the rights of other students. See Policy 8020-R (bullying is conduct … causes "substantial disruption in, or substantial interference with, the orderly operation of the school."). It also targets all forms of harassment and bullying, not just conduct based on sexual orientation or gender identity.

Even if it is questionable whether the policy is overly broad, that is not enough to find it unconstitutional. To be clear, some degree of overreach alone will not render a law or policy invalid. Rather, a policy is unconstitutionally overbroad only if it regulates **substantially** more speech that the Constitution allows to be regulated, and a person to whom the policy constitutionally can be applied can argue that it would be unconstitutional as applied to others. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973)(where the Court acknowledged some overbreath with the challenged law, but upheld the law because it was "not substantially overbroad."); *Board of Airport Commrs of Los Angeles v. Jews For Jesus, Inc*., 482 U.S. 569, 574 (1987) ("A statute may be invalidated on its face . . . only if the overbreadth is substantial."). In *City Council v. Taxpayers for Vincent*, the Court upheld a

municipal ordinance that prohibited the posting of signs on public property and emphasize that "substantial overbreadth" was required in order for a law to be invalidated. 466 U. S. 789, 800 (1984). Here, in comparison to the above accepted school policies, the policies in question in this case do not "substantially" exceed constitutional limits. Plaintiff has not even alleged substantial overbreadth.

C. The Policies Do Not Infringe On Religious Freedom.

Plaintiffs also claim that the District's policies violated their right to the free exercise of religion. "[T]he threshold questions in analyzing a law challenged under the Free Exercise Clause are (1) is the law neutral, and (2) is the law of general applicability?" *First Assembly of God of Naples, Florida, Inc. v. Collier Cnty., Fla*., 20 F.3d 419, 423 (11th Cir.1994). The neutrality inquiry asks whether "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). The general applicability prong asks whether the government has "in a selective manner impose[d] burdens only on conduct motivated by religious belief." *880 Id. at 543, 113 S.Ct. 2217. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Id. at 531, 113 S.Ct. 2217. Rather, it needs only to survive rational basis review, see *Combs v. Homer–Center School Dist*., 540 F.3d

231, 242–43 (3d Cir.2008), under which it is presumed constitutional and the burden is on the plaintiff to prove that it is not rationally related to a legitimate government interest, *Deen v. Egleston*, 597 F.3d 1223, 1230–31 (11th Cir.2010). For the reasons stated above, the policies are viewpoint neutral, reasonably satisfy a legitimate governmental interest, which is to promote tolerance. As a result, the policies do not violate religious freedom principles.

Plaintiffs may argue that these policies impact their religious beliefs regarding homosexuality, but "some" impact is not enough to label a law or policy as unconstitutional. See *R.A.V.*, 505 U.S. at 390 ("Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, [w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.") Courts have repeatedly found laws that prohibit bigamy and polygamy valid, though it has an impact on religious beliefs. See e.g., *Adgeh v. Ohlahoma*, 434 Fed. Appx. 746, 747 (10th Cir. 2011) ("Mr. Adgeh claims that the Oklahoma statute prohibiting polygamy violates his First Amendment right to freedom of religion. As the district court recognized, his argument is precluded by clear precedent. See *Reynolds v. United States*, 98 U.S. 145, 166–67, 25 L.Ed. 244 (1878) (concluding that the government has the right to punish bigamy as a religious practice, though it cannot interfere with mere religious belief); see also *Potter v. Murray City*, 760 F.2d

1065, 1069–70 (10th Cir.1985) (holding that the state of Utah had a compelling interest in upholding and enforcing its ban on bigamy).")

2. Plaintiff's Count III Substantive Due Process Claims Fail.

Substantive due process rights guard against the government's arbitrary exercise of power without reasonable justification. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998). These claims are examined under a two-part analysis. First, a plaintiff must establish that she has been deprived of a life, liberty, or property interest sufficient to trigger the protections of the Due Process Clause in the first place. Only after identifying such a right does a court consider whether the government's deprivation of that right "shocks the conscience." *Id.* Here, Plaintiffs fail to allege the violation of any right sufficient to trigger the protections of the Due Process Clause, nor do they allege any conscience-shocking behavior that would support a substantive due process claim.

A. Plaintiffs Do Not Allege That Any Fundamental Right Has Been "Substantially" Burdened.

A fundamental constitutional right protected by the Due Process Clause is one that is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has mandated extreme caution in elevating individual liberty interests to the status of fundamental constitutional rights because recognizing such rights, "to a great extent, places the matter outside the arena of

public debate and legislative action" and risks transforming the Due Process Clause "into the policy preferences of the Members of the Court." *Id.* In determining whether a claimed right is fundamental, courts first require a "careful description" of the asserted interest. *Christensen v. Cnty. of Boone*, 483 F.3d 454, 462 (7th Cir. 2007). "[V]ague generalities . . . will not suffice." *Chavez v. Martinez*, 538 U.S. 760, 776 (2003). This requirement prevents "the reviewing court from venturing into vaster constitutional vistas than are called for by the facts of the case at hand." *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1240 (11th Cir. 2004).[4] Next, a reviewing court must determine whether that asserted interest is "fundamental" — that is, whether "it is so deeply rooted and sacrosanct that no amount of process would justify its deprivation." *Christensen*, 483 F.3d at 462. Once a court is satisfied that a fundamental right is at stake, it must then "determine whether the government has interfered 'directly' and 'substantially' with the Plaintiffs' exercise of that right." *Id.* (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978)).

[4] For example, in *Glucksberg*, a case challenging Washington's ban on assisted suicide, the Supreme Court refused to characterize the interest at stake as the "right to die" or "the right to choose a humane, dignified death"; instead, the Court narrowly phrased the question as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 722-23. Similarly, in *Reno v. Flores*, a case involving juvenile aliens challenging regulations governing their detention on due process grounds, the Court rejected several asserted fundamental rights, such as the right of "freedom from physical restraint" and the "right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives." 507 U.S. 292, 302 (1993). Instead, the Court narrowly characterized the right as "the right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.*

Here, Plaintiffs' factual allegations do not implicate any fundamental right protected by the Due Process Clause. Plaintiff's first generally claim that Defendants have infringed upon the parent "Plaintiffs' fundamental parental rights" to control and direct their child's upbringing and health decisions. Comp. ¶ 72. Plaintiffs next assert that Defendants have violated students' right to "privacy, personal identity and personal autonomy." Compl. ¶ 82. Plaintiffs allege that Defendants policies impinge on students' rights to participate in extracurricular activities and athletics, ¶ 86, and use the showers, lockers rooms, bathrooms and other facilities ¶ 85.

Some of Plaintiffs' claims are not of fundamental rights. For example, "[i]t is well-established that students do not have a general constitutional right to participate in extracurricular athletics." *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007). Plaintiffs have also plainly misstated facts about the content of the District's policies in order to create an alleged violation. In support of their claim that the parents' alleged fundamental right to direct the upbringing of their children has been impaired, in ¶ 72, Plaintiffs state that "Policy 8011, gives the school district unilateral authority to decide what is in the best interest of a child and the authority to refuse to notify a parent of the assertion of any gender or sexual orientation choice purportedly made by their child at school." That claim is false and stands in direct contradiction to the plain language of the policy. The policy states the exact opposite: "Parental and family support are key determinants of transgender and

nonconforming student health… School officials must consider the health, safety, and well-being of the student, as well as the responsibility **to keep parents informed**." See Policy 8011.

To be sure, courts have recognized that individuals may have privacy interests in the exposure of their unclothed bodies, but the scope of this interest is not limitless and does not include the situation where, as here, the individuals are not forced to expose their naked bodies and are, at most, at risk of incidental viewing if they decide not to use the alternative changing facilities made available to them. Instead, students choose whether to undress in a locker room or in an alternative changing facility. Plaintiffs' description of the "right to privacy" fails to narrowly and accurately define the interest that they actually seek to vindicate, which is an alleged right to change in a locker room from which transgender female students are excluded. There is, however, no such fundamental right, and Plaintiffs cannot merely use the word "privacy" and then automatically invoke the protections of the Due Process Clause. *See, e.g., Moran v. Beyer,* 734 F.2d 1245, 1246 (7th Cir. 1984) (explaining that "not every choice made in the context of marriage implicates the privacy and family interests . . . that the decision itself accedes to the status of a fundamental right"); *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (explaining that lower courts should not expand privacy rights that have not been clearly recognized by the Supreme Court).

B. Plaintiffs Do Not Allege That Any Fundamental Right Has Been "Substantially" Burdened.

Even if the Policy somehow implicated Plaintiffs' fundamental privacy rights, their substantive due process claim would fail because the Defendants have not interfered "directly" and "substantially" with those rights. *See Zablocki v. Redhail*, 434 U.S. 374, 387 n.12, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Montgomery v. Carr*, 101 F.3d 1171, 1124 (6th Cir. 1996). Courts have made clear that incidental effects on fundamental rights are not cognizable pursuant to the Due Process Clause. *Christensen*, 483 F.3d at 463 ("The Constitution prevents fundamental rights from being aimed at; it does not, however, prevent side effects that may occur if the government is aiming at some other objective."). For example, in *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir. 1985), the court concluded that regulations designed to keep undocumented immigrants out of the country that had the indirect effect of separating parents from children "do not bring the constitutional rights of family association into play" because these effects are mere "collateral consequences of regulations not directed at the family." The court explained that "regulations are not unconstitutional deprivations of the right of family association unless they regulate the family directly." *Id.*; *see also Johnson v. City of Kankakee*, 260 F. App'x 922, 925 (7th Cir. 2008) (applying directness test to privacy).

The same conclusion is warranted here, where Plaintiffs fail to plausibly allege how the District's policies "directly and substantially" infringed their rights

to privacy. Instead, Plaintiffs can complain only of the policies indirect effects, such as requiring students who want additional privacy to use alternative restroom and changing facilities at their option. These indirect effects most assuredly do not reach the level of a constitutional deprivation. To hold otherwise would mean that every inconvenience related to restroom and locker room usage would "carry the seed of a constitutional claim, and thus would improperly open '[b]reathtaking vistas of liability.'" *Walls v. Lombard Police Officers*, 2002 WL 548675, at *5 (N.D. Ill. Apr. 4, 2002) (quoting *Hameetman*, 776 F.2d at 643).

In short, Plaintiffs have entirely failed to plausibly allege that any fundamental rights to privacy have been substantially impaired. Accordingly, the rational basis test governs this Court's review of the Agreement and Guidance. *See Glucksberg*, 521 U.S. at 728. Under this test, the Court must simply ask if the government action bears "a reasonable relation to a legitimate state interest." *Id.* at 722. As stated above, the policies easily meet this standard. And even if the Court were to evaluate the Defendants' actions under the higher standard used to analyze substantial burdens on fundamental rights, Plaintiffs' claim would fail.

C. The Governmental Action Does Not Shock the Conscience.

As noted above, if a court finds that an individual's fundamental rights have been impaired, it then must ask "whether the governmental action can find 'reasonable justification in the service of a legitimate governmental objective,' or if

instead it more properly is 'characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Christensen,* 483 F.3d at 462 (quoting *Lewis,* 523 U.S. at 846-47). Conduct that "shocks the conscience" includes deliberate government action that is "arbitrary" and "unrestrained by the established principles of private right and distributive justice." *Maglaya v. Kumiga*, 2015 WL 4624884, at *7 (N.D. Ill. Aug. 3, 2015) (quoting *Lewis,* 523 U.S. at 846).

Here, far from being egregious or "conscience-shocking," the Defendants' actions serve the important government interests in protecting the right of all students to receive an education in an environment free from discrimination.

In considering whether these measures "shock the conscience," it is of central importance that this case arises in the context of a school. As the Supreme Court has explained, "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 656 (1995).

For example, in *Vernonia School District*, the Court upheld a school's policy of requiring students participating in interscholastic athletics to submit to random drug testing against a Fourth Amendment challenge. In upholding the policy, the Court emphasized the diminished privacy interests of students in public schools: "Central, in our view, to the present case is the fact that the subjects of the Policy

are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." 515 U.S. at 654. The Court noted that minors do not have the same rights as adults, explaining that they "lack some of the most fundamental rights of self-determination — including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will." *Id.*; *see also id.* at 657 ("Public school locker rooms . . . are not notable for the privacy they afford."). *Cf. Darryl H. v. Coler*, 801 F.2d 893, 901 n.7 (7th Cir. 1986) (recognizing that the "same basic analysis is utilized" for claims arising under the Fourth Amendment and the substantive due process clause); *Piekarczyk v. City of Chi. ex rel Daley*, 2006 WL 566449, at *3 (N.D. Ill. Mar. 3, 2006) (same for privacy claim). These precepts should guide the Court's inquiry here and make plain that, particularly when viewed in context, Defendants' efforts to protect the dignity of all students and promote a learning environment free from discrimination cannot be said to "shock the conscience." *Cf. Maglaya*, 2015 WL 4624884, at *7 ("[D]etermining the presence of a due process violation requires an appraisal of 'the totality of facts in a given case.'" (quoting *Lewis*, 523 U.S. at 850)).

3. The Williamston Policies Are Sufficiently Definite To Satisfy Due Process Requirements.

Plaintiffs also claim that the policies are unconstitutionally vague because they do not define terms like sexual orientation, gender identity, harassment, and bullying. First, Plaintiff's assertion is wrong. Harassment and bullying are both

defined under Policy 8260 – R: Bullying, in extensive detail. See policy page 2. Moreover, courts from this Circuit have already found that the remaining terms are sufficiently definitive to satisfy due process requirements. See *Hyman v. City of Louisville*, 132 F.Supp.2d 528, 545–47 (W.D.Ky.2001)

Due process demands that any statutory proscription be sufficiently precise "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citing *Grayned*, 408 U.S. at 110, 92 S.Ct. 2294.) Indeed, voiding a democratically enacted statute on grounds it is unduly vague is an extreme remedy. Facial invalidation for vagueness "is, manifestly, strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort." *California Teachers Ass'n v. State Bd. of Educ*., 271 F.3d 1141, 1155 (9th Cir.2001). When addressing a facial vagueness challenge, as here, the court "should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494–95, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); accord *Humanitarian Law Project v. U.S. Treasury Dept*., 578

F.3d 1133, 1146 (2009) (a statute will survive a facial vagueness challenge so long as "it is clear what the statute proscribes in the vast majority of its intended applications").

Relying on these principles, a District Court in this Circuit has determined the term "sexual orientation" is not unconstitutionally vague. See *Hyman v. City of Louisville*, 132 F.Supp.2d 528, 545–47 (W.D.Ky.2001) (relying on Black's dictionary definition, rejecting vagueness challenge to statute banning discrimination on the basis of sexual orientation), rev'd on other grounds, 53 Fed.Appx. 740 (6th Cir.2002). That court concluded, "[t]he definitions of 'sexual orientation' ... are consistent with the meanings attributed to those terms by common usage," namely heterosexuality, homosexuality, and bisexuality. Id. Similarly, the District's Policies use of this terminology in this case is likewise sufficiently definite to satisfy due process requirements.

4. Williamston's Policies Comport With Title IX.

Plaintiffs claim that the Williamston policies will potentially limit athletic opportunities, by allowing transgender girls to participate on female sports teams. This hypothetical circumstance – which has not happened – does not violate Title IX, as the statute does not speak to that issue.

At the outset, the Title IX claims against the individual Board members should be dismissed because there is no individual liability under Title IX. *Romero v. City of New York*, 839 F.Supp.2d 588, 617 (E.D. NY 2012).

Title IX was enacted under the Spending Clause. *Davis Next Friend LaShonda D. v. Monroe Cty. Bd.of Edu*., 526 U.S. 629, 640 (1999). Congress must clearly state the conditions of Spending Clause legislation, so States can knowingly decide whether to accept funding. *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003). Congress must speak "so clearly that [one] can fairly say that the State could make an informed choice." Id. Courts look to the plain language of statutes to decide the conditions Congress imposed. Id.

Title IX prohibits sex discrimination in education programs or activities by recipients of federal financial assistance. Consistent with the nondiscrimination mandate of the statute, implementing regulations prohibit recipients from, *inter alia*, providing "different aid, benefits, or services," or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31; 28 C.F.R. § 54.400. The regulations also explain that schools **may** "provide separate toilet, locker room, and shower facilities on the basis of sex" without running afoul of Title IX, so long as the "facilities provided for students of the one sex" are "comparable to [the] facilities provided for the other sex." 34 C.F.R. § 106.33; 28 C.F.R. § 54.410.

ED and DOJ's regulations do not address, however, how these regulations operate when a transgender student seeks to use sex-segregated facilities. Nor do they explain how a school should determine a transgender student's sex for purposes of access to those facilities. This ambiguity in the regulatory scheme is central to the issues before the Court. On the one hand, the regulations could mean that a school should determine "maleness or femaleness with reference exclusively to genitalia"; on the other, they could mean (as Defendants assert) that a school should "determin[e] maleness or femaleness with reference to gender identity." *Gloucester*, 2016 WL 1567467, at *6.

Plaintiffs seemingly ask the Court to ignore this ambiguity and conclude that the only reasonable interpretation of these provisions is that transgender girls must be treated as boys for purposes of sex-segregated facilities. But, as the Fourth Circuit rightly concluded, the regulations simply do not speak with such clarity. *See Gloucester*, 2016 WL 1567467, at *5, *6. As the Fourth Circuit noted, reducing "sex" solely to genitalia creates unresolvable ambiguities about how laws and regulations governing sex discrimination and the lawfulness of sex-segregated facilities would apply to "an intersex individual," and "an individual born with X-X-Y chromosomes," and "an individual who lost external genitalia in an accident." *Gloucester*, 2016 WL 1567467, at *6. The court further explained that "[m]odern definitions of 'sex' also implicitly recognize the limitations of a nonmalleable,

binary conception of sex. For example, Black's Law Dictionary defines 'sex' as '[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.' The American Heritage Dictionary includes in the definition of 'sex' '[o]ne's identity as either female or male.'" *Id.* at *7 n.11 (quoting Black's Law Dictionary 1583 (10th ed. 2014) and American Heritage Dictionary 1605 (5th ed. 2011)). Given this ambiguity, it is impermissible for a District to be held liable for violating the statute. *Charles,* 348 F.3d at 607, (Spending Clause legislation, such as Title IX, must be definite).

5. Contrary To Plaintiff's Assertions, The District Can Adopt Its Policies.

The Michigan School Code vests in School Boards of Education the authority to adopt policies, including policies prohibiting bullying. See MCL 380.1310b. Moreover, the Michigan Department of Civil Rights has adopted model LGBT Non-Discrimination for Michigan municipalities to model their own ordinances and policies to provide protection for LGBT individuals. The District's Policies do not exceed the bounds of the MDCR recommendation.

Plaintiffs argue that Defendants do not have legal authority to approve these Policies because the state legislature had repeatedly rejected attempts to expand civil rights protections beyond biological sex. This argument fails, as it is well-established that the legislature "does not express its intent by a failure to legislate." *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (citing *United States v.*

Estate of Romani, 523 U.S. 517, 534 (1998) (Scalia, J., concurring)); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). Indeed, an amendment can be rejected for the simple reason that the state legislature believes the proposed change is not needed because its substance is already included in the statute. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"). In any event, those legislative efforts did not address the question raised here — namely, how to determine the sex of a transgender student for purposes of access to sex-segregated facilities under Title IX's regulations.

6. The Individual Defendants Are Entitled To Qualified Immunity.

The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A "clearly established" right is one that is "sufficiently clear that

every reasonable official would have understood that what he is doing violates that right." *Reichle v Howards*, 132 S. Ct. 2088, 2093 (2011). Ultimately, the doctrine is designed to protect "all but the plainly incompetent who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Qualified immunity is an absolute defense to § 1983 claims. *Binay v. Bettendorf*, 601 F.3d 640, 647 (6th Cir. 2010). In passing on a given qualified immunity defense, the Court must determine:

1. Whether "the facts alleged show the officer's conduct violated a constitutional right"; and

2. Whether that right was "clearly established."

Mullenix v. Luna, 136 S. Ct. 305, 313, 193 L. Ed. 2d 255 (2015); *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Once a qualified immunity defense is raised, "the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Binay*, 601 F.3d at 647 (quoting *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006)). Notably, these questions can be answered by the court as a matter of law. *See Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996).

In light of the voluminous case law set forth above, it cannot be argued that the inverse is "clearly established." As such, the claim against the individuals should be summarily dismissed.

CONCLUSION

For the above stated reasons, Defendants request that this Court grant their Motion to Dismiss and dismiss the Plaintiffs' lawsuit in its entirety.

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Attorney for Defendants

DATED: February 12, 2018

CERTIFICATE OF ELECTRONIC SERVICE

TIMOTHY J. MULLINS states that on February 12, 2018, he did serve a copy of **Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(C)** via the United States District Court electronic transmission on the aforementioned date.

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