

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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KIMBERLEY TOOLEY as Next Friend	)	
of SETH TOOLEY,	)	
	)	
Plaintiff,	)	
	)	Case No. 2:14-cv-13466-AC-DRG
v.	)	
	)	Judge Avern Cohn
VAN BUREN PUBLIC SCHOOLS	)	Magistrate Judge David R. Grand
<i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	
	)	

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**STATEMENT OF INTEREST OF THE UNITED STATES**

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## INTRODUCTION

Seth Tooley (“Plaintiff”) is a 14-year-old student, who has attended several school districts in Michigan, including Defendant Wyandotte Public Schools (“Wyandotte”). Plaintiff is a transgender boy. He was assigned the female sex at birth, but his gender identity is male and he presents as a boy in all aspects of his life.<sup>1</sup> Plaintiff alleges that various defendants in this case, including Wyandotte, denied him equal treatment and benefits and subjected him to harassment based on sex in violation of Title IX of the Education Amendments of 1972 (“Title IX”), Title IV of the Civil Rights Act of 1964 (“Title IV”), and the Equal Protection Clause of the Fourteenth Amendment.<sup>2</sup> Wyandotte has moved to dismiss these claims, arguing, *inter alia*, that a transgender plaintiff may establish a claim for sex discrimination only through evidence that the defendant engaged in sex stereotyping. Wyandotte’s Mot. to Dismiss at 12-15 (“Wyandotte Motion”).

The United States files this Statement of Interest to assist the Court in evaluating Plaintiff’s claims of sex discrimination. Under Title IX and the Equal Protection Clause, discrimination based on a person’s nonconformity to sex

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<sup>1</sup> A transgender person has a gender identity (i.e., one’s internal sense of gender) that is different from the individual’s assigned sex at birth (i.e., the gender designation listed on one’s original birth certificate).

<sup>2</sup> Plaintiff’s claims under 42 U.S.C. § 1983 (Count I), Title IV (Count III), and the Fourteenth Amendment (Count V) each allege a denial of equal protection under these federal laws. Consequently, the United States refers to these collectively as claims brought under the Equal Protection Clause or as “Equal Protection claims.”

stereotypes, a person's gender identity, or a person's transgender status constitutes discrimination based on sex. As explained below, numerous courts that have addressed claims by transgender plaintiffs have recognized that sex-based discrimination may be established in all three of these ways. In this case, Plaintiff has alleged sufficient facts on each of these bases to survive Wyandotte's Motion to Dismiss. Indeed, a person may establish sex discrimination through discriminatory conduct based on gender identity or transgender status, regardless of whether there is evidence of sex stereotyping.

### **INTERESTS OF THE UNITED STATES**

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. The United States has a significant interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of discrimination and that the proper legal standards are applied to claims under Title IX and the Equal Protection Clause. The United States Departments of Education and Justice share responsibility for enforcing Title IX and its implementing regulations in the education context. *See* 20 U.S.C. § 1681 (2006); 34 C.F.R. Part 106 (2010); 28 C.F.R. Part 54 (2000). The Justice Department also can enforce the Equal



Protection Clause's ban on sex discrimination against public schools under Title IV. *See* 42 U.S.C. § 2000c.<sup>3</sup>

The United States thus respectfully submits this Statement of Interest to provide the correct legal standards governing sex discrimination claims under Title IX and the Equal Protection Clause.<sup>4</sup> Applying these standards, this Court should reject Wyandotte's Motion to Dismiss, as Plaintiff has sufficiently alleged

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<sup>3</sup> The United States has furthered its significant interests noted above by intervening or participating as *amicus curiae* in lawsuits involving claims of sex discrimination based on sex stereotyping and gender-based harassment against students under both Title IX and the Equal Protection Clause. *See, e.g.*, United States' *Amicus Curiae* Brief Supporting Plaintiffs-Appellants and Urging Reversal in *Carmichael v. Galbraith*, No. 12-11074 (5th Cir. Apr. 1, 2013), available at <http://www.justice.gov/crt/about/app/briefs/carmichaelbrf.pdf> ; United States' Complaint-in-Intervention, *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 0:11-cv-01999 (D. Minn. Mar. 6, 2012), available at <http://www.justice.gov/crt/about/edu/documents/anokacompint.pdf> ; and United States' Mem. as *Amicus Curiae* in Response to Defs. Mot. to Dismiss/Mot. for Summary Judgment, *Pratt v. Indian River Cent. Sch. Dist.*, No. 7:09-cv-00411 (N.D.N.Y. Jan. 3, 2011), available at <http://www.justice.gov/crt/about/edu/documents/prattamicus.pdf> . The Departments of Justice and Education have also enforced Title IX and Title IV in matters involving claims of sex discrimination against transgender students. *See, e.g.*, Resolution Agreement between United States & Arcadia Unified Sch. Dist., July 24, 2013, available at <http://www.justice.gov/crt/about/edu/documents/casesummary.php#arcadia>; Resolution Agreement between U.S. Dep't of Educ. Office for Civil Rights & Downey Unified Sch. Dist., Oct. 8, 2014, available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>.

<sup>4</sup> The United States is not taking a position on Plaintiff's other claims.

discrimination based on sex because of his gender identity, transgender status, and nonconformity to sex stereotypes.

## I. BACKGROUND

Plaintiff is a transgender student who started the sixth grade at Wilson Middle School in Wyandotte on or about December 4, 2012. First Am. Compl. at 12. Plaintiff alleges that Wyandotte denied him the treatment and benefits afforded to other male students and that he was subjected to severe and pervasive sex-based harassment in violation of Title IX, Title IV, and the Equal Protection Clause. *Id.* at 12-22. In particular, Plaintiff alleges that although his mother asked the school to allow him to use the boys' restroom, school personnel refused, requiring him instead to use "the staff ladies' room" or a unisex restroom, which was frequently closed and not accessible. *Id.* at 12-13, 15. As a result, a male classmate who spotted Plaintiff leaving the women's restroom laughed at him, called him a "fag," and asked, "Do you need a tampon sweetie?" *Id.* at 15-16. When Plaintiff's mother complained to a school employee about this event, the employee dismissed it as Plaintiff "being overly sensitive." *Id.* at 16. Later, this same classmate approached Plaintiff off school grounds and threatened, "You better run fag. Are you scared? I'll rape you straight," causing Plaintiff to run away so fast he fell, fracturing his elbow and hitting his ear and face. *Id.*

Plaintiff further alleges that school personnel addressed him as “Olivia,” his name assigned at birth, and referred to him using female pronouns despite his consistent presentation of his male gender identity and his mother’s requests that he be addressed using his preferred name and male pronouns. *Id.* at 12-14. In addition, Plaintiff alleges that school personnel, including the school principal and special education director, “outed” Plaintiff as transgender to students and parents of students who interacted with Plaintiff by referring to him as a female. *Id.* at 14-15. Consequently, some of these parents refused to allow their children to interact with Plaintiff. *Id.* at 15.

## II. ARGUMENT

### **A. Title IX and the Equal Protection Clause Prohibit Sex Discrimination Against All Persons, Including Transgender Individuals**

Any student may state a valid claim under Title IX and the Equal Protection Clause by alleging that the defendant denied or limited the student’s ability to participate in or benefit from the school’s programs or activities on the basis of sex. Plaintiff, like all other students in Wyandotte’s schools, is protected against sex discrimination under these laws. That he is a transgender boy does not remove him from the ambit of these protections.

Under Title IX, “[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(a); *see also* 34 C.F.R. § 106.31(a); 28 C.F.R. § 54.400(a). Title IX’s implementing regulations specifically prohibit recipients from engaging in differential or adverse treatment on the basis of sex, including *inter alia*, “[t]reat[ing] one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service,” “[p]rovid[ing] different aid, benefits, or services or provid[ing] aid, benefits, or services in a different manner,” “[d]eny[ing] any person any such aid, benefit, or service;” “[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment;” or “[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity.” 34 C.F.R. § 106.31(b) (emphasis added); 28 C.F.R. § 54.400(b) (emphasis added). The plain language of the statute thus affirms that Title IX protects all individuals from sex discrimination, including transgender individuals. *Cf. United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”) (quoting Webster’s Third New International Dictionary 97 (1976)).<sup>5</sup>

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<sup>5</sup> *See* OCR, Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (“OCR Sexual Violence Q&A”), at 5 (“[T]he actual or perceived sexual orientation or gender identity of the parties does not change a school’s [Title IX] obligations.”).

Similarly, this Court should reject any suggestion that Plaintiff fails to state a legally cognizable claim under Title IX or the Equal Protection Clause because “transgender” is not an explicit suspect classification under either law. Rather, as Plaintiff pleads in his First Amended Complaint, the relevant suspect classification in this case is *sex*, which courts have held includes gender, gender identity, transgender status, and nonconformity to sex stereotypes. *See infra* at II.B-II.C. Wyandotte argues that Plaintiff’s First Amended Complaint is devoid of allegations demonstrating that Wyandotte engaged in discrimination based on sex stereotypes. *See* Wyandotte Mot. at 12-15. Wyandotte does not address whether Plaintiff sufficiently alleges discrimination based on gender identity or transgender status. *See id.*; Wyandotte Reply at 4-6. The Court should review Plaintiff’s allegations of discrimination on all three of these bases as claims of sex discrimination under Title IX and the Equal Protection Clause. The fact that Plaintiff is transgender, and asserts discriminatory conduct related to his gender expression or gender identity, does not, as Wyandotte suggests, defeat his sex discrimination claims as a matter of law.

At this stage, the issue before this Court is whether Plaintiff has sufficiently alleged that Wyandotte discriminated against him based on his sex (including his gender identity, transgender status, and/or nonconformity to sex stereotypes) to state a plausible claim for relief under Title IX and the Equal Protection Clause.

For the reasons that follow, Plaintiff has adequately alleged discrimination on each of these bases.

**B. Title IX and the Equal Protection Clause Prohibit Discrimination Against an Individual Based on That Individual's Gender Identity or Transgender Status**

Wyandotte mistakenly argues that claims of sex discrimination by transgender individuals are limited to those alleging discrimination based on sex stereotyping. *See* Wyandotte Mot. at 12-15. While transgender persons may allege sex discrimination based on sex stereotyping under Title IX and the Equal Protection Clause, *see infra* at II.C, they may also allege discrimination based on gender identity and transgender status. As further explained below, Plaintiff alleges conduct by Wyandotte that could establish discrimination on each of these bases under the relevant case law. *See* First Am. Compl. at 12-16.

Similar to the language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, Title IX prohibits discrimination “on the basis of sex” in education. 20 U.S.C. § 1681(a). Federal courts routinely look to Title VII case law in construing Title IX’s anti-discrimination provisions. *See, e.g., Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (applying Supreme Court’s interpretation of sex discrimination under Title VII to Title IX); *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 n.2 (6th Cir. 2013) (“Title IX retaliation claims are analyzed using the same standards as Title VII.”); *Nelson v. Christian Bros.*

*Univ.*, 226 Fed. Appx. 448, 454 (6th Cir. 2007) (“Generally, courts have looked to Title VII . . . as an analog for the legal standards in both Title IX discrimination and retaliation claims.”).

“On the basis of sex” includes discrimination based on the fact that an individual is transgender (i.e., has a gender identity different from the person’s sex assigned at birth) or the perception that an individual has undergone, or is undergoing, a gender transition.<sup>6</sup> *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (holding that employer violated Title VII by refusing to hire transgender woman in response to her decision to transition). For example, in a case involving both Title IX and Title VII, the court found that discrimination against a transgender individual because the individual’s anatomy does not conform to his or her gender identity is actionable sex discrimination under both Title VII and Title IX. *See Kastl v. Maricopa Cnty. Comm. College Dist.*, No. Civ.02–1531PHX–SRB, 2004 WL 2008954, at \*2-3 (D. Ariz. June 3, 2004) (denying motion to dismiss Title VII and Title IX sex discrimination claims by transgender plaintiff denied access to restrooms, finding that “neither a woman with male genitalia nor a

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<sup>6</sup> A gender transition is the experience by which a transgender person goes from living and identifying as one’s assigned sex to living and identifying as the sex consistent with one’s gender identity. A gender transition often includes a “social transition,” during which an individual begins to live and identify as the sex consistent with the individual’s gender identity.

man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait”).

In a different Title VII case involving a transgender plaintiff, the court offered the following analogy to help explain how discrimination against an individual because he or she has undertaken a gender transition is sex discrimination:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion.

*Schroer*, 577 F. Supp. 2d at 306 (emphasis in original).

In other words, discrimination because one has changed or is changing his or her sex is discrimination on the basis of sex, and focusing on a “label” like “transgender” as a justification for denying that individual protection under sex discrimination law would be “blind” to the “statutory language itself.” *Id.* at 307; *see also Glenn v. Brumby*, 663 F.3d 1312, 1320-21 (11th Cir. 2011) (finding “ample direct evidence” that plaintiff, a transgender woman, had been discriminated against because of sex where defendant testified that his decision to fire her was based “on his perception of [plaintiff] as ‘a man dressed as a woman and made up as a woman,’ and ... ‘on the sheer fact of the transition’”); *Macy v.*



*Holder*, 2012 WL 1435995, at \*11 (EEOC Apr. 20, 2012) (concluding that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII,” in the same way that discrimination against an individual based on that person’s perceived religion or religious conversion is also prohibited under Title VII); *Rentos v. OCE-Office Sys.*, No. 95-civ-7908, 1996 WL 737215, at \*1, 8-9 (S.D.N.Y. Dec. 24, 1996) (denying defendant’s motion to strike transgender plaintiff’s sex discrimination claim alleging disparate treatment due to her “sex background and subsequent change”). As these cases recognize, it would be illogical to immunize a defendant from liability merely because the defendant “superimpose[s]” a transgender status on the plaintiff. *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004). This Court should reject any reliance on this long discredited argument. *See Schroer*, 577 F. Supp. 2d at 307 (finding that the analysis used by courts holding that changing one’s sex is not discrimination because of sex “is no longer a tenable approach to statutory construction”).

As recognized in the cases above, an individual’s gender identity is one aspect of an individual’s sex. *See, e.g., Smith*, 378 F.3d at 575; *Schroer*, 577 F. Supp. 2d at 306-07; *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006) (“sex is not a cut-and-dried matter of

chromosomes,” but extends to one’s “sexual identity”) (internal citation omitted). Consequently, discrimination on the basis of gender identity is, “*literally*,” discrimination on the basis of sex, even though the words “gender identity” or “transgender” are not explicitly mentioned in Title IX or the Equal Protection Clause. *See Schroer*, 577 F. Supp. 2d at 306-07; *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998) (holding that Title VII prohibits same-sex sexual harassment and explaining “[s]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); *accord Macy*, 2012 WL 1435995 at \*9-10 and n.10.

Wyandotte cites the Sixth Circuit’s decision in *Smith v. City of Salem* for the proposition that Plaintiff may bring a claim for sex discrimination, but only where there is evidence of sex stereotyping. *See* Wyandotte Mot. at 12-13 (citing *Smith*, 378 F.3d at 571-72). In *Smith*, however, the Sixth Circuit recognized that discrimination on the basis of gender identity is discrimination on the basis of sex: “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or *identify* with his or her gender” is discrimination on the basis of sex. 378 F.3d at 575 (emphasis added).<sup>7</sup>

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<sup>7</sup> Although terms like “transsexual” or “transgendered” have been used to describe transgender people, those terms are now disfavored. For this reason, the United States uses the term “transgender” consistently throughout this Statement of

Contrary to Wyandotte’s argument that Plaintiff’s claim must rest on evidence of sex stereotyping, Wyandotte Mot. at 12-15, Plaintiff may also prevail on his claims under Title IX and the Equal Protection Clause through evidence that he has been discriminated against on the basis of his transgender status or gender identity. As the Equal Employment Opportunity Commission explained in *Macy*, “evidence of gender stereotyping is simply one means of proving sex discrimination” that is available to transgender individuals. *Macy*, 2012 WL 1435995 at \*10. Discrimination against a transgender individual is sex discrimination “regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.” *Id.* at \*7.

The Department of Education has issued guidance similarly recognizing that Title IX protects transgender students against sex discrimination, including that based on their gender identity. *See* OCR Sexual Violence Q&A, at 5.<sup>8</sup> Courts

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Interest.

<sup>8</sup> *See also* OCR, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> (“OCR Single-Sex Classes and Activities Q&A”), at 25.

routinely look to federal guidance when construing Title IX and other federal civil rights laws enforced by the United States.<sup>9</sup> Thus, consistent with the case law and federal guidance, Plaintiff may state valid Title IX and sex-based Equal Protection claims for discrimination based on his gender identity and transgender status.

**C. Title IX and the Equal Protection Clause Prohibit Discrimination Against an Individual, Including a Transgender Individual, on the Basis of Sex Stereotypes**

This Court should also deny Wyandotte's Motion to Dismiss because Plaintiff has pled sufficient facts to establish a sex stereotyping claim. Wyandotte concedes that Plaintiff may make this type of claim; it simply challenges the sufficiency of his allegations regarding its engagement in sex stereotyping.

Wyandotte Mot. at 12-15.

The Supreme Court made clear in *Price Waterhouse v. Hopkins* that discrimination based on an individual's nonconformity to sex stereotypes is a form of sex discrimination prohibited by federal civil rights laws. 490 U.S. 228, 239-40, 250-51 (1989). The Supreme Court later held that the Equal Protection Clause also protects students from impermissible discrimination on the basis of sex, including based on sex stereotyping. *See United States v. Virginia* ("VMI"), 518 U.S. 515,

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<sup>9</sup> *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 647-48 (1999) (applying OCR's Title IX guidance when evaluating Title IX's application to student-on-student harassment); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 97 (2d Cir. 2012) (holding that OCR's guidance is entitled to "substantial deference" in interpreting Title IX).

533 (1996) (finding that state action “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females”). Subsequently, numerous federal courts of appeal have expressly recognized that discrimination based on sex stereotyping is an actionable form of sex discrimination under federal law. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729, 735-39 (6th Cir. 2005) (transgender plaintiff stated claim for sex discrimination under Title VII and Equal Protection Clause based on failure to conform to sex stereotypes).<sup>10</sup>

In *Smith*, the Sixth Circuit explicitly held that discrimination “because of sex” includes discrimination against transgender individuals on the basis of sex stereotypes. 378 F.3d at 575. Applying the Supreme Court’s holding in *Price Waterhouse* in the context of discrimination against a transgender woman, the *Smith* court explained that discrimination against the transgender plaintiff “is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman.” *Id.* The court emphasized that treatment “based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior;

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<sup>10</sup> *See also EEOC v. Boh Brothers Constr. Co.*, 731 F.3d 444, 454 (5th Cir. 2013) (sex stereotyping evidence may be used to establish sex discrimination claim where there is a perception that a plaintiff does not “conform to traditional gender stereotypes”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (same).

a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”

*Id.*

Indeed, since *Price Waterhouse*, while the issue has arisen in a variety of contexts, no court of appeals has categorically denied protections against sex discrimination to transgender individuals. To the contrary, in addition to the Sixth Circuit, the First, Ninth, and Eleventh circuits have all recognized that a transgender plaintiff may rely on evidence of sex stereotyping to establish discrimination on the basis of sex. *See Glenn*, 663 F.3d at 1318-20 (“All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.”); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214-15 (1st Cir. 2000) (same); *Schwenk v. Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000) (same).

Similarly, federal courts have consistently held that plaintiffs alleging discrimination based on nonconformity to sex stereotypes may state an actionable claim of sex discrimination under Title IX and the Equal Protection Clause. *See Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011) (denying defendant’s motion to dismiss because harassment based on nonconformity to sex stereotypes is a legally cognizable claim under Title IX and the Equal Protection Clause); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816,

823 (C.D. Ill. 2008) (holding that “[d]iscrimination because one’s behavior does not ‘conform to stereotypical ideas’ of one’s gender can amount to actionable discrimination ‘based on sex’” under Title IX) (internal citation omitted); *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 964-65 (D. Kan. 2005) (holding that sex stereotyping is a viable theory of sex discrimination under Title IX); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090-93 (D. Minn. 2000) (holding complaint of same-sex harassment based on sex stereotyping alleged viable Title IX same-sex harassment claim). The U.S. Department of Education also issued guidance stating that Title IX prohibits discrimination based on sex stereotypes. OCR Sexual Violence Q&A at 5-6 (“Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation.”).<sup>11</sup>

#### **D. This Case Should Proceed to Discovery to Resolve Questions of Fact**

Under the appropriate legal standards discussed above, Plaintiff has alleged sufficient facts to state a sex discrimination claim under Title IX and the Equal

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<sup>11</sup> See also OCR Single-Sex Classes and Activities Q&A at 25; OCR, Dear Colleague Letter: Bullying and Harassment (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (“OCR Bullying & Harassment DCL”), at 7-8; OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>, at v.

Protection Clause on the grounds that Wyandotte treated him differently from other male students because of his transgender status, gender identity, and nonconformity to sex stereotypes – all that is required of Plaintiff at this stage. This case should, therefore, proceed to discovery to resolve questions of fact regarding whether Wyandotte’s actions were discriminatory.

1. Plaintiff has alleged sufficient facts to establish a *prima facie* case of sex discrimination

Plaintiff has alleged facts that, when read in the light most favorable to him, are sufficient to establish a *prima facie* case of sex discrimination based on his gender identity, transgender status, and nonconformity to sex stereotypes. Specifically, Plaintiff alleges (and Wyandotte acknowledges in its Motion) that unlike other male students, he was denied access to the boys’ restrooms. First Am. Compl. at 12-13; Wyandotte Mot. at 14-15. School personnel required him to use “the staff ladies’ room” or a unisex restroom, which was often not accessible, despite notice from his mother and his therapist that he needed to be treated consistent with his gender identity. First Am. Compl. at 12-13, 15; Wyandotte Mot. at 14; *see* OCR Single-Sex Classes and Activities Q&A at 25 (When a school separates students on the basis of sex, the school “generally must treat transgender students consistent with their gender identity.”).

Courts have recognized that the denial of equal access to restroom facilities is sufficient deprivation to constitute a violation of Title IX and other sex



discrimination laws. *See Kastl*, 2004 WL 2008954, at \*3 (holding that it is a violation of both Title VII and Title IX “to create restrooms for each sex but to require a woman to use the men’s restroom if she fails to conform to the employer’s expectations regarding a woman’s behavior or anatomy, or to require her to prove her conformity with those expectations”); *Baker v. John Morrell & Co.*, 220 F. Supp. 2d 1000, 1011, 1014 (N.D. Iowa 2002) (holding that denial of equal access to restroom facilities can alter the terms and conditions of employment in violation of Title VII); *cf. DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000) (same).

In addition, Plaintiff alleges that he was harassed and singled out by school employees based on his gender identity, transgender status, and failure to conform to gender stereotypes. For example, when a male student saw Plaintiff leaving the women’s restroom, the student called Plaintiff a “fag” and asked, “Do you need a tampon sweetie?” First Am. Compl. at 15-16. When his mother complained, a school employee said Plaintiff was “being overly sensitive.” *Id.* at 16. This same student later threatened Plaintiff off campus with, “You better run fag. Are you scared? I’ll rape you straight.” *Id.* Plaintiff further alleges that school personnel “outed” him by informing students and their parents of his birth gender, referring to him as “Olivia,” and using feminine pronouns when referring to him in class. *Id.* at 12-15; Wyandotte Mot. at 14-15. At least in part due to these actions by

Wyandotte, Plaintiff alleges that students harassed and ostracized him. First Am. Compl. at 15-16.<sup>12</sup>

2. Wyandotte's motivation for treating Plaintiff differently from other male students is a question of fact that cannot be resolved at the motion to dismiss stage

In addition to incorrectly arguing that Plaintiff may only proceed on a sex discrimination claim if it involves sex stereotyping, Wyandotte attempts to address the merits of Plaintiff's claims by asserting justifications for several of his factual allegations. Wyandotte Mot. at 14-15. Most pertinent here, Wyandotte asserts that the district "advised" Plaintiff not to use the boys' restroom "for the sole reason that the boys' restroom only had urinals and stalls with no doors," and "that if the other boys saw [Plaintiff] using the bathroom given her [sic] unique circumstances, it may result in bullying and other safety concerns." *Id.* at 14. This unsupported justification goes beyond the allegations of Plaintiff's First Amended Complaint and should not be considered at the motion to dismiss stage. But even if it were, myriad fact questions nevertheless preclude dismissal.

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<sup>12</sup> These allegations also indicate that the hostile environment of which Plaintiff complains in Counts III and V was at least in part created by school employees, not just students. *See* First Am. Compl. at 12-16, 20-22. So while Wyandotte insists that "there is no legal theory that would hold the Wyandotte Defendants liable for the actions of the students who attend the District," Wyandotte Mot. at 15, Wyandotte is legally responsible for its own actions and the environment it creates or tolerates under the Equal Protection Clause and Title IX. Although Plaintiff has not directly asserted a hostile environment claim under Title IX, the facts alleged in the First Amended Complaint do not foreclose such a claim at the motion to dismiss stage.

At the merits stage, once Plaintiff has alleged sufficient facts to establish a *prima facie* case of sex discrimination under Title IX and the Equal Protection Clause, the burden then would shift to Wyandotte to demonstrate that its actions were legitimate, nondiscriminatory, and not pretextual under Title IX, *see, e.g., Fuhr*, 710 F.3d at 673-75, and meet the intermediate scrutiny standard under the Equal Protection Clause. *See VMI*, 518 U.S. at 531-34.<sup>13</sup> In considering whether Wyandotte has met that burden, this Court must assess whether: the safety interest asserted actually motivated Wyandotte to treat Plaintiff differently from other male students; Wyandotte's actions in fact advanced that interest; other nondiscriminatory actions could have furthered that interest;<sup>14</sup> and this stated interest was pretextual.

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<sup>13</sup> Heightened scrutiny applies to sex-based Equal Protection claims regardless of the sex or gender identity of the plaintiff. *See VMI*, 518 U.S. at 531-34; *Craig v. Boren*, 429 U.S. 190, 197-99 (1976); *Glenn*, 663 F.3d at 1315-17 (applying heightened scrutiny to transgender plaintiff's equal protection sex discrimination claim).

<sup>14</sup> For instance, rather than denying Plaintiff access to the boys' restroom based on a fear of potential harassment, Wyandotte could have responded promptly and effectively to any harassment that arose, as Title IX requires. *See* OCR Sexual Violence Q&A at 2-3; OCR Bullying & Harassment DCL at 2-3, 7-8. If the absence of doors on the stalls is the basis for Wyandotte's concern, it could put up doors to address this concern rather than require the Plaintiff to use a conspicuous restroom designated for female staff members. Whatever appropriate steps Wyandotte could take to address its concern about harassment, those steps should not penalize the student who was, or could be, harassed, such as by excluding the student from a restroom when reasonable alternatives exist. *Id.* at 3.

Plaintiff raises genuine questions of fact regarding each of these inquiries that cannot be resolved at the motion to dismiss stage. For example, as noted in Section II.D.1 above, Plaintiff has raised several allegations that create questions of fact as to whether Wyandotte's purported desire to protect him actually motivated its refusal to let him use the boys' restroom. These allegations include that Wyandotte: (1) forced him to use a conspicuously labeled women's restroom right next to the cafeteria where other students could see him coming and going; (2) told Plaintiff's mother that he was "being overly sensitive" when a student harassed him for using "the staff ladies' room"; (3) referred to him with feminine pronouns and by the name "Olivia" despite his maintaining a male gender identity; and (4) "outed" him as transgender to other students and parents of other students who then ostracized him. First Am. Compl. at 12-16.

Recent decisions by other federal courts indicate that where there are facts such as these, this Court should not take generalized arguments about restroom safety at face value without further development of the record. For instance, in *Glenn*, the Eleventh Circuit Court of Appeals concluded that the defendant's "purported concern that other women might object to [the transgender plaintiff's] restroom use" was "speculative" and failed to meet defendant's burden of showing a sufficiently important governmental objective to survive the heightened scrutiny

standard of review. 663 F.3d at 1321. The court, therefore, affirmed the district court's decision in favor of the plaintiff. *Id.* at 1315-19.

Additionally, this court should consider Wyandotte's asserted interest in protecting Plaintiff's safety in light of the fact that transgender students in many jurisdictions are using restroom facilities without issue. Across the country, transgender students use sex-segregated facilities consistent with their gender identity. *See, e.g., Doe v. Regional Sch. Unit 26*, No. Pen-12-582, 2014 WL 325906 (Me. Jan. 30, 2014) (holding that school district discriminated against transgender girl in violation of state law by denying her access to communal girls' facilities and requiring her to use the unisex staff restroom); *Mathis v. Fountain-Ft. Carson Sch. Dist. No. 8*, Colo. Civ. Rts. Div. Determination, Charge No. P20130034X, at 13-14 (June 17, 2013) (determining that school district discriminated against transgender girl by denying her access to girls' restrooms at school in violation of Colorado law, because none of district's articulated justifications were substantiated by sufficient evidence).

Based on the parties' pleadings, Plaintiff states viable claims of sex discrimination under Title IX and the Equal Protection Clause, and Wyandotte's actual motives and the permissibility of the means it adopted to advance those motives are questions of fact that cannot properly be resolved at the motion to dismiss stage.

## CONCLUSION

The United States respectfully requests that this Court hold that the prohibition of sex discrimination under Title IX and the Equal Protection Clause encompasses discrimination on the basis of transgender status, gender identity, and sex stereotyping. Further, this Court should find that Plaintiff has stated plausible claims for relief under Title IX and the Equal Protection Clause and deny Wyandotte's Motion to Dismiss these claims.

Respectfully submitted,

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