UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

JANIE DOE, by her next friends and parents, JILL DOE and JOHN DOE,

Plaintiff,

v.

HANOVER COUNTY SCHOOL BOARD,

ROBERT J. MAY in his official capacity as Chair of the Hanover County School Board, and

MICHAEL B. GILL in his official capacity as Superintendent of Hanover County Public Schools,

Defendants.

Civil Action No. 3:24-cv-00493

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Janie is an eleven-year-old girl who will be entering the seventh grade this Fall. Janie loves playing tennis and would like to join her friends in trying out for the girls' tennis team at her middle school in August. But unlike her friends, Janie will not be able to try out for, and if successful play on, the girls' tennis team without intervention from this Court. Janie has been excluded from the team because she is transgender.

Last Fall, Janie tried out for and earned a spot on the girls' tennis team at her school. But before Janie ever set foot on the court for practice, the Hanover County School Board intervened—first requesting evidence of her "consistent expression as female"[1] and then denying her participation on the team "in effort to ensure fairness in competition for all participants."[2]

A couple months later, the School Board categorically banned all transgender students attending the county's public schools from participating in interscholastic athletics (among other extracurricular activities) in a manner consistent with their gender identity. The School Board instituted this categorical ban through an amendment to Hanover County School Board Policy Manual § 7-4.1 (the "Policy").[3] The revised Policy states that "[f]or any school programs, events, or activities (including extracurricular activities) that are separated by biological sex, *the*

[1] Letter from Chair Robert J. May to John Doe and Jill Doe (Sep. 5, 2023) [hereinafter, Chair May's September 5 Letter], attached as Exhibit 1.

[2] Letter from Chair Robert J. May to John Doe and Jill Doe (Sep. 14, 2023) [hereinafter, Chair May's September 14 Letter], attached as Exhibit 2.

[3] *See* Hanover Cnty. Sch. Bd., Policy Manual § 7-4.1 [hereinafter, Policy Manual] (emphasis added), attached as Exhibit 3.

appropriate participation of students will be determined by biological sex rather than gender or gender identity."[4]

The School Board has couched its exclusionary actions under the guise of ensuring fairness in competition, but it reaches far beyond this stated purpose in both practice and policy. Where the International Olympic Committee and National Collegiate Athletic Association have promoted policies that enable transgender athletes to participate in competitions consistent with their gender identity, the School Board sweepingly excludes all transgender students from participating in any athletic teams consistent with their gender identity—regardless of the circumstances. Indeed, the School Board's true motivation is laid bare by its other recent actions, such as requiring transgender students to submit a request to use school bathrooms that align with their gender identity and giving the School Board the authority to approve or deny such requests, or by banning books from school libraries that feature discussions of gender identity.

Having denied Janie the ability to participate on the girls' tennis team, the School Board has shut Janie out of interscholastic athletics altogether. It would be stigmatizing for Janie—just as it would be for a cisgender (non-transgender) girl—to be the only girl on the boys' tennis team. And for transgender girls, being designated a boy in this way can cause significant psychological harm. The School Board's decision to single out transgender students for separate and unequal treatment therefore causes emotional harm and deprives gender incongruent individuals of their dignity. And in Janie's case, the School Board's application of the Policy threatens irreparable harm, sidelining Janie and depriving her of the physical, social, and academic benefits that school sports offer.

[4] *Id.*

In both practice and policy, Defendants have discriminated, and will continue to discriminate, against Janie on the basis of sex and transgender status in violation of the right to equal protection guaranteed by the Fourteenth Amendment of the United States Constitution and of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Unless enjoined, the Policy will deny Janie equal educational opportunities and the multiple long-term benefits of participation in interscholastic athletics. And by singling out Janie for exclusion, it will perpetuate discrimination against her and exacerbate the psychological harm she has already suffered as a result of this stigmatization.

A preliminary injunction is clearly warranted in light of recent Fourth Circuit precedent holding that a West Virginia law with the purpose of categorically preventing transgender girls from playing on girls' sports teams may not be lawfully applied to a middle school girl who is transgender and wished to join her school's cross country and track teams. *B.P.J. by Jackson v. W. Va. St. Bd. of Educ.*, 98 F.4th 542, 563-565 (4th Cir. 2024). Janie's situation is nearly identical to B.P.J.'s, and the Fourth Circuit's decision squarely controls here. This Court should similarly enjoin the School Board from using the Policy to preclude Janie from trying out for, and playing on, girls' sports teams in Hanover County Public Schools. A preliminary injunction is necessary here to allow Janie to try out for the tennis team for the 2024 – 2025 school year while her legal claims are pursued in court. Any other result would be in plain contravention of settled Fourth Circuit law.

STATEMENT OF FACTS

A. The Science of Gender Identity and Janie's Transition

Gender identity is a well-established medical and psychological term that "refers to a person's deeply felt, internal, intrinsic sense of their own gender."[5] For some youth, gender identity appears fixed and is expressed at an early age.[6] It cannot be voluntarily altered by social or medical intervention.[7] Attempts to change a person's gender identity are not only futile but psychologically harmful.[8]

When a child is born, a sex designation is assigned. A person's sex encompasses numerous biological characteristics, such as genes, chromosomes, gonads, one's production of and reaction to specific hormones, internal and external genitalia, secondary sex characteristics, and gender identity.[9] Most people have a gender identity that aligns with the sex they were assigned at birth, but for people who are transgender, their gender identity does not align with their sex assigned at birth.[10] This is the case for Janie. She is a girl who is transgender, which means she is a girl who was assigned the sex of male at birth. Janie Decl. ¶ 4; John Decl. ¶ 5; Jill

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[5] Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health S1, S252 (2022), attached as Exhibit 6.

[6] *Id.* at S44.

[7] *APA Resolution on Gender Identity Change Efforts*, Am. Psych. Ass'n (Feb. 2021), attached as Exhibit 7.

[8] *Id.*

[9] Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869, 3875 (2017), attached as Exhibit 8.

[10] Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862 (2015), attached as Exhibit 9.

Decl. ¶ 5. Janie has known from a young age that she is a girl, and her family supports her by recognizing Janie as the girl she is. Janie Decl. ¶ 4-5; John Decl. ¶¶ 5-6; Jill Decl. ¶¶ 5-6.

Misalignment between gender identity and sex assigned at birth can create severe distress for transgender people.[11] Such distress can be diagnosed as "gender dysphoria," the clinically significant distress that results from "a marked incongruence between one's experienced/expressed gender and their assigned gender" at birth.[12] In August 2020, Janie established care with a clinical psychologist who specializes in caring for transgender individuals. Janie Decl. ¶¶ 6-7; John Decl. ¶ 7; Jill Decl. ¶ 7. In August 2021, following a year-long evaluation that included meeting with Janie as well as her parents and brother, the psychologist diagnosed Janie with gender dysphoria and advised that puberty blockers would be indicated when she reached the appropriate stage of puberty. Janie Decl. ¶¶ 6-8; John Decl. ¶ 7; Jill Decl. ¶ 7. In May 2022, Janie established care with a pediatric endocrinologist who confirmed this diagnosis. Janie Decl. ¶ 9; John Decl. ¶ 9; Jill Decl. ¶ 9.

For transgender people of all ages, being able to live and express themselves consistent with their gender identity is critical to their health and well-being.[13] For prepubertal children, treatment for gender dysphoria may involve social transition.[14] This is the process by which a person expresses themself consistent with their gender identity in their day-to-day life, such as through the use of one's name, pronouns, manner of dress and grooming, use of single-sex

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[11] *Id.* at 835.

[12] *What is Gender Dysphoria?*, Am. Psychiatric Ass'n (August 2022), attached as Exhibit 10.

[13] Am. Psych. Ass'n, *supra* note 10, at 846.

[14] *See* Coleman et al., *supra* note 5, at S60; Hembree et al., *supra* note 9, at 3870.

facilities, and participation in single-sex activities.[15] Since Fall 2020, when Janie was seven years old, she has asserted a definitive preference for she/her pronouns and presented as a girl to her family, friends, and school. Janie Decl. ¶ 5; John Decl. ¶¶ 5-6; Jill Decl. ¶¶ 5-6. In 2021, Janie changed her name legally and was issued a birth certificate by the Virginia Department of Health reflecting her sex as female. John Decl. ¶ 8; Jill Decl. ¶ 8.

For many adolescents with gender dysphoria, "the pubertal physical changes are unbearable" and "early medical intervention may prevent psychological harm."[16] Accordingly, when young people with gender dysphoria reach the onset of puberty, pubertal suppression may be prescribed.[17] Starting suppression early in puberty is advised to "prevent the irreversible development of undesirable secondary sex characteristics."[18] In September 2022, at the age of nine, Janie received a histrelin transplant, which suppresses her endogenous hormones and prevents further development of puberty associated with testosterone. Janie Decl. ¶ 10; John Decl. ¶ 10; Jill Decl. ¶ 10.

B. Participation in Interscholastic Athletics Yields Lifelong Benefits, Especially for Transgender Youth

Janie loves playing tennis. Janie Decl. ¶¶ 3, 17. And, like any other middle school girl, she wants the chance to play her favorite sport alongside her classmates and wear her school's uniform. Janie Decl. ¶¶ 12, 20-21. This is about more than having fun. Participation in interscholastic athletics yields lifelong benefits by promoting academic achievement in addition

[15] Am. Psych. Ass'n, *supra* note 10, at 863.

[16] Hembree et al., *supra* note 9, at 3880.

[17] *Id.*

[18] *Id.* at 3881.

to physical and mental health.[19] Transgender students, like all other students, derive these benefits from participation in school sports.[20]

The only way for Janie to experience the benefits of playing school sports is for Janie to play on the girls' team. Janie Decl. ¶¶ 19-20; John Decl. ¶ 25; Jill Decl. ¶ 25. Singling out Janie for different treatment than her cisgender peers—who are allowed to participate in interscholastic athletics consistent with their gender identity—denies Janie her gender identity and undermines her gender-affirming medical treatment. Janie Decl. ¶¶ 19-21; John Decl. ¶ 25; Jill Decl. ¶ 25. Indeed, preventing transgender youth from living and expressing themselves as they are can cause severe anxiety, depression, suicidal ideation, and self-harm.[21]

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[19] *See* Malm et al., *Physical Activity and Sports—Real Health Benefits: A Review with Insight into the Public Health of Sweden*, 7 Sports 1, 13-14 (2019) (participation in organized youth sports fosters a more active lifestyle as an adult, which in turn reduced morbidity and mortality), attached as Exhibit 11; Lumpkin & Favor, *Comparing the Academic Performance of High School Athletes and Non-Athletes in Kansas in 2008-2009*, 4 J. Sport Admin. & Supervision 41, 57 (2012) (finding correlation between interscholastic participation and academic performance), attached as Exhibit 12; Findlay & Coplan, *Come Out and Play: Shyness in Childhood and the Benefits of Organized Sports Participation*, 40 Can. J. Behav. Sci. 153, 158-159 (2008) (children who participated in sport had higher levels of self-esteem and reduced social anxiety), attached as Exhibit 13; Steiner et al., *Adolescents and Sports: Risk or Benefit?*, 39 Clinical Pediatrics 161, 163-164 (2000) (students who played sports had fewer mental and physical health problems), attached as Exhibit 14.

[20] The Trevor Project, *The Well-Being of LGBTQ Youth Athletes* 1 (Aug. 2020), ("One in three LGBTQ youth who participated in sports reported their grades as being mostly A's compared to one in four LGBTQ youth who did not participate in sports"; "LGBTQ youth who participated in sports reported nearly 20% lower rates of depressive symptoms … compared to those who did not."), attached as Exhibit 15; Clark & Kosciw, *Engaged or Excluded: LGBTQ Youth's Participation in School Sports and Their Relationship to Psychological Well-being*, 59 Psych. Schs. 95, 108 (2021) (finding that, "in general, LGBTQ youth had increased well-being and greater school belonging when they participated in school sports"), attached as Exhibit 16.

[21] Coleman et al., *supra* note 5, at S52-S53.

C. The School Board Has Excluded Janie from Her Middle School's Girls' Tennis Team

Janie tried out for the girls' tennis team at her middle school in August 2023 and was selected to join the team. Janie Decl. ¶ 12; John Decl. ¶¶ 13-14; Jill Decl. ¶¶ 13-14. Days later, on September 5, 2023, Janie's parents received a letter from Defendant Robert J. May, Chair of the School Board, noting that it had come to the School Board's attention that Janie was "born male" and requesting "medical documentation or verification" of Janie's "consistent expression as female."[22] May cited the Virginia Department of Education's *Model Policies on Ensuring Privacy, Dignity and Respect for all Students and Parents in Virginia's Public Schools* and the Virgina Attorney General's related opinion issued August 23, 2023.[23] May advised that Janie would "not be permitted to participate in practices or matches until a decision is rendered by the School Board."[24]

On September 11 and September 12, 2023, Janie's parents submitted documentation to the School Board evidencing that Janie had been undergoing clinically appropriate care related to her gender identity since August 2020, was diagnosed with gender dysphoria in August 2021, and was placed on puberty blockers in September 2022. John Decl. ¶ 18; Jill Decl. ¶ 19. Janie's parents received a second letter from May on September 14, 2023, informing them that "the School Board voted unanimously against permitting your student to participate on the middle school girls' tennis team in effort to ensure fairness in competition for all participants."[25] The

[22] Chair May's September 5 Letter, *supra* note 1.

[23] *Id.*

[24] *Id.*

[25] Chair May's September 14 Letter, *supra* note 2.

decision was devastating for Janie. Janie Decl. ¶ 16; John Decl. ¶ 21; Jill Decl. ¶ 22. Most of all, she was upset that she would not be able to play tennis alongside her friends or proudly wear the team's uniform together with them at school. Janie Decl. ¶¶ 16-17; John Decl. ¶ 21; Jill Decl. ¶ 22.

After singling Janie out and precluding her from playing on the girls' middle school tennis team, the School Board unanimously voted on November 14, 2023, to exclude all transgender students from participating in interscholastic athletics in a manner that is consistent with their gender identity.[26] The School Board revised its policy governing extracurricular activities, § 7-4.1, to add:

> For any school programs, events, or activities (including extracurricular activities) that are separated by biological sex, the appropriate participation of students will be determined by biological sex rather than gender or gender identity.… Reasonable modifications to this policy will be permitted only to the extent required by law.[27]

In requiring that "biological sex," rather than gender identity, be used to determine participation of students in school sports separated by sex, the amended policy precludes Janie, whose biological sex is misaligned with her gender identity, from participating. John Decl. ¶ 24; Jill Decl. ¶ 24. The School Board's policy treats Janie separately and unequally from cisgender girls. John Decl. ¶ 24; Jill Decl. ¶ 24.

After being banned from the girls' tennis team at her middle school, Janie was forced to seek opportunities for athletic participation outside of Hanover County Public Schools. Janie Decl. ¶ 17; John Decl. ¶ 27; Jill Decl. ¶ 27. Janie's parents found a private competitive tennis

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[26] Hanover Cnty. Sch. Bd., Minutes of Nov. 14, 2023 Meeting 4, attached as Exhibit 4; Hanover Cnty. Sch. Bd., Proposed Revisions: 7-4.1 Extracurricular Activities Policy 1, attached as Exhibit 5.

[27] Policy Manual § 7-4.1.

program, governed by the United States Tennis Association, where Janie was able to participate in accordance with her gender identity. John Decl. ¶ 27; Jill Decl. ¶ 27. Janie played in girls' competitive matches in Spring 2024. John Decl. ¶ 27; Jill Decl. ¶ 27. This came at a greater expense and logistical burden than was required for participation on the school team. John Decl. ¶ 27; Jill Decl. ¶ 27.

Despite the deeply painful experience of having been excluded from the girls' tennis team at her middle school in Fall 2023, Janie is resilient. John Decl. ¶ 29; Jill Decl. ¶ 29. She still desires to play tennis with her friends and represent her school. Janie Decl. ¶ 17; John Decl. ¶ 29; Jill Decl. ¶ 29. She wishes to try out for the team this Fall and, if she is again successful in earning a spot on the team, proudly represent her school. Janie Decl. ¶ 18; John Decl. ¶ 29; Jill Decl. ¶ 29.

On June 21, 2024, Janie's parents submitted to the School Board a renewed request that Janie be allowed to participate on the girls' tennis team in Fall 2024. John Decl. ¶ 31; Jill Decl. ¶ 31. Janie's parents enclosed a June 20, 2024 letter from Janie's endocrinologist evidencing Janie's continuing care and again confirming that Janie meets diagnostic criteria for gender dysphoria. John Decl. ¶ 31; Jill Decl. ¶ 31.

D. Preliminary Injunctive Relief is Needed

Tryouts for the girls' tennis team at Janie's middle school are expected to take place in late August 2024. John Decl. ¶ 33; Jill Decl. ¶ 33. The School Board previously concluded that Janie is not permitted to play tennis on the girls' team because she is transgender.[28] It went further with the November 2023 policy change to ensure that no transgender students can

[28] Chair May's September 14 Letter, *supra* note 2.

participate in sex-separated school sports consistent with their gender identity.[29] The School Board is expected to consider Janie's renewed request for participation on the girls' tennis team in a closed session at its board meeting on July 9, 2024. John Decl. ¶ 32; Jill Decl. ¶ 32.

The School Board is expected to deny the renewed request. John Decl. ¶ 32; Jill Decl. ¶ 32. Section 7-4.1 provides that "[r]easonable modifications … will be permitted only to the extent required by law."[30] While the Fourth Circuit's ruling in *B.P.J.* makes clear that policies like the one the School Board seeks to enforce against Janie are impermissible and violate federal law, the School Board has taken no steps to comply with that decision since it was issued in permitting Janie to participate on the girls' tennis team in Fall 2024. John Decl. ¶ 31; Jill Decl. ¶ 31. Indeed, while not directly at issue here, the School Board enacted a trans-exclusionary bathroom and locker room policy—and enforced that policy against Janie—more than two years after the Fourth Circuit found in *Grimm v. Gloucester County School Board* that a bathroom policy that prevented a transgender boy from using the boy's restroom violated Title IX. 972 F.3d 586, 618-619 (4th Cir. 2020); John Decl. ¶ 32; Jill Decl. ¶ 32. Thus, without a preliminary injunction, Janie will be unable to try out for or participate in school sports this Fall.

ARGUMENT

A preliminary injunction is warranted when a plaintiff: (1) is likely to succeed on the merits; (2) is likely to suffer irreparable harm in the absence of preliminary relief; (3) can show that the balance of hardships tips in plaintiff's favor; and (4) can show that an injunction is in the public interest. *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 256 (4th Cir. 2018)

[29] Policy Manual § 7-4.1.

[30] *Id.*

certiorari granted and judgment vacated sub nom., *Trump v. Int'l Refugee Assistance Project*, 138 S.Ct. 2710 (2018) (citing *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009)); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Plaintiffs "need not show a certainty of success" on the merits; a demonstration of likely success is sufficient. *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Typically, when the government is the defendant, "the last two factors merge" because "the government's interest is the public interest." *Kravitz v. United States Dep't of Commerce*, 366 F. Supp. 3d 681, 755 (D. Md. 2019). Further, "[t]the public interest always lies with the vindication of constitutional rights." *Bernstein v. Sims*, 643 F. Supp. 3d 578, 588 (E.D.N.C. 2022) (citing *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)).

I. Janie Is Likely To Succeed On The Merits Of Her Title IX And Equal Protection Claims

The merits questions at issue here are clearly decided by *B.P.J.* There, the Fourth Circuit squarely held that preventing a transgender girl nearly identically situated to Janie from playing girls' sports violated Title IX, making Janie's likelihood of success on the claim certain. *B.P.J. by Jackson v. W. Va. St. Bd. of Educ.*, 98 F.4th 542, 565 (4th Cir. 2024). And under *B.P.J.*, she is likely to succeed on the merits of her Equal Protection claim. *Id.*

A. Janie's Title IX Claim Is Likely To Succeed On The Merits

To succeed on her Title IX claim that she was improperly barred from the tennis team because of her gender, Janie must show that: (1) she was excluded from participation in an education activity or otherwise subjected to discrimination "on the basis of sex"; (2) that she was harmed by the improper discrimination; and (3) that the educational activity or program is a

recipient of federal financial assistance.[31] *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir 2020); *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 129-130 (4th Cir. 2022); *B.P.J.*, 98 F.4th, at 563 ("[O]nce a Title IX plaintiff shows she has been discriminated against in the relevant sense and suffered harm, no showing of a substantial relationship to an important government interest can save an institution's discriminatory policy.").

Under recent Fourth Circuit precedent, it is clear that the exclusion of Janie from playing girls' sports on the basis of her gender identity violates Title IX. *See B.P.J.*, 98 F.4th at 563 (excluding a transgender student from participating with the athletic team of their preferred gender violates Title IX). Because Janie presents nearly identical circumstances to those at issue in *B.P.J.*, that case squarely decides the question and Plaintiff is therefore likely to succeed on her Title IX claim.

1. Defendants' policy and practice exclude Janie on the basis of sex.

In *B.P.J.*, the Fourth Circuit was presented with the question whether West Virginia's policy prohibiting transgender students from participating in sports teams in alignment with their identity violated Title IX. Drawing on clear Fourth Circuit precedent, the court squarely held

[31] Hanover County Public Schools receive federal funding, and their athletic programs are thus subject to Title IX. *See* Hanover Cnty. Sch. Bd., FY2024-2025 Adopted Budget 13 (May 14, 2024) (showing the school district's revenues from federal sources). Title IX extends to the "furthest reaches of an institution's programs." *See Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (finding an athletic association subject to Title IX because it controlled recipient athletic programs and received dues from participating schools). Thus, the Fourth Circuit has applied Title IX to athletic programs which: (1) receive funding directly or indirectly; or (2) exert control over a program that receives such funding. *See Peltier*, 37 F.4th at 127; *see also NCAA v. Smith*, 525 U.S. 459, 468 (1999) ("Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX[.]"). If any part of a school system receives federal funding, every aspect of the system's operations is subject to Title IX, including athletic programs. *Alston v. Va. High School League, Inc.*, 144 F. Supp. 2d 526, 533 (W.D. Va. 1999).

that, in the case of a transgender girl nearly identically situated to Janie, such exclusion violates Title IX. *B.P.J.* 98 F.4th at 565.

As the Fourth Circuit explained, gender-identity discrimination is discrimination "on the basis of sex." *B.P.J.* 98 F.4th at 563 ("[D]iscrimination based on gender identity is discrimination 'on the basis of sex' under Title IX."); 20 U.S.C. § 1681(a); *see also Grimm*, 972 F.3d at 618 (bathroom policies precluding a transgender student from using their preferred bathroom violated Title IX); *see also Kadel v. Folwell*, 100 F.4th 122, 163-164 (4th Cir. 2024) (gender identity discrimination violates the Affordable Care Act, which incorporates Title IX's antidiscrimination provision); *see also Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) ("A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."); *see also Soule v. Conn. Ass'n of Sch.*, 90 F.4th 34, 74 n.5 (2d Cir. 2023) (en banc) (Perez, J., concurring) ("Near-universal authority suggests that Title IX permits or even requires funding recipients to accommodate students who are transgender according to their gender identities.").

To establish a Title IX claim, sex must have been the but-for cause of the discriminatory action. *See Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 236 (4th Cir. 2021) (collecting Supreme Court and Fourth Circuit cases interpreting "on the basis of sex" to require but-for causation). Title IX's prohibition on sex discrimination reaches differential treatment based on gender identity because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Grimm*, 972 F.3d at 616 (quoting *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 659 (2020)). When a recipient of federal funds deprives a transgender student access to an education program because of their

gender identity, the "discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions." *Id.* at 616.

Thus, in *B.P.J*, the Fourth Circuit found that an athletics policy that forbids transgender girls from participating on the team that corresponded with their gender violated Title IX as applied to at least a subset of transgender girls. 98 F.4th at 563-564. Similarly, in *Grimm,* the Fourth Circuit held that a bathroom policy that prevented a transgender boy from using the boy's restroom violated Title IX. 972 F.3d at 616. In each case, the court found it dispositive that the exclusionary policy could not be given effect without reference to the student's biological gender. *See Grimm*, 972 F.3d at 616 ("[T]he Board could not exclude Grimm from the boys bathrooms without referencing his 'biological gender' under the policy, which it has defined as the sex marker on his birth certificate."); *B.P.J.* 98 F.4th at 563 ("The Act forbids one—and only one—category of students from participating in sports teams 'corresponding with [their] gender': transgender girls." (ellipsis in original)).

The School Board's actions violate Title IX because the School Board treats similarly situated students differently because of their gender identity. *See B.P.J.*, 98 F.4th at 563 (policies which "require[] treating students differently even when they are similarly situated" violate Title IX). The Policy explicitly turns on the biological sex of the student, just as the policy in *B.P.J.* did. *Compare* Policy Manual § 7-4.1 ("[T]he appropriate participation of students will be determined by biological sex rather than gender or gender identity"), *with* W. Va. Code § 18-2-25d(b)(3) & (c)(2) (prohibiting "an individual whose biological sex determined at birth is male" from participating in "sports designated for … girls"). As in *B.P.J.*, the Board's policy forbids a category of students—transgender students—from participating in athletics with

the team that reflects their identity, and it does so "regardless of whether any given girl possesses any inherent athletic advantages based on being transgender." *See B.P.J.*, 98 F.4th at 563. And as a result, cisgender students are allowed to play on the team which represents their gender identity, while Janie alone cannot because she is transgender.[32]

Because Defendants could not enforce the Policy without referencing Janie's biological sex determined at birth, sex is a but-for cause of their decision to prevent Janie from trying out for the girls' tennis team. *See Grimm*, 972 F.3d at 616. It makes no difference that the same rule is applied to all students: "Title IX protects the rights of individuals, not groups." *B.P.J.*, 98 F.4th at 565 (*quoting* Peltier, 37 F.4th at 130). Nor can Defendants say that their conduct treats all cisgender boys and transgender girls the same because "that is just another way of saying the [policy] treats transgender girls differently from cisgender girls, which is—literally—the definition of gender identity discrimination." *Id.* at 556. The Board's policy bars Janie from participating with other girls solely based on her transgender status. Applying the Board's policy would "treat her worse than people to whom she is similarly situated, deprive her of any meaningful athletic opportunities, and do so on the basis of sex." *Id.* at 565.

2. Janie has suffered harm because of Defendant's unlawful discrimination.

A plaintiff's Title IX claim will succeed if she can establish "resulting harm" from the worse treatment she received. *B.P.J.*, 98 F.4th at 563. Janie has suffered medical, emotional, dignitary, and financial harm because of Defendants' discriminatory conduct. Janie has been

[32] Although the policy at issue in *B.P.J.* also treated transgender boys and transgender girls differently, allowing transgender boys to play boys' sports, the Fourth Circuit explicitly did not rely on this on this additional "second layer" of discrimination in its holding. 98 F.4th at 555-556. In any case, here the School Board discriminates against *two* groups of transgender students (transgender boys and girls), rather than just one.

living as a girl since she was seven years old, but Defendants' conduct would essentially require her to reverse her social transition to participate in Hanover County school athletics. *See* John Decl. ¶¶ 5, 25; Jill Decl. ¶¶ 5, 25; *cf. B.P.J.*, 98 F.4th at 564 ("The defendants cannot expect that B.P.J. will countermand her social transition, her medical treatment, and all the work she has done with her schools, teachers, and coaches for nearly half her life by introducing herself to teammates, coaches, and even opponents as a boy."). The Fourth Circuit has recognized that failing to follow a gender dysphoria treatment plan can have dire medical consequences. *See Grimm*, 972 F.2d at 595 ("Left untreated, gender dysphoria can cause, among other things, depression, substance use, self-mutilation, other self-harm, and suicide."); *Williams v. Kincaid*, 45 F.4th 759, 768 (4th Cir. 2022) ("Failure to follow an appropriate treatment plan for gender dysphoria can expose transgender individuals to a serious risk of psychological and physical harm.") (citing *Edmo v. Corizon, Inc.*, 935 F.3d 757, 771 (9th Cir. 2019)) (internal quotations omitted). Janie's social transition is a vital part of her gender dysphoria treatment plan, and Defendant's conduct exposes her to dire physical and psychological harm.

Janie faces further social, emotional, and financial harms. As the Fourth Circuit has recognized, "emotional and dignitary harm … is legally cognizable under Title IX and it requires no feat of imagination to appreciate the stigma of being unable to participate on a team with one's friends and peers." *B.P.J.*, 98 F.4th at 563-564 (citing *Grimm*, 972 F.3d at 617-618) (cleaned up). Since being removed from the girls' tennis team, Janie has been forced to join a private tennis program (one where she can play in a manner consistent with her gender identity) at personal expense. John Decl. ¶ 27; Jill Decl. ¶ 27. In addition to the financial and logistical burdens associated with private programs, being forced out of school-sponsored athletics has isolated Janie and prevented her from forming the camaraderie of participating in athletics within

her school community. *Grimm*, 972 F.3d, 617-618 ("The stigma of being forced to use a separate restroom is … sufficient to constitute harm under Title IX[.]"). Had Janie not joined a private tennis program and chosen to play middle school boys' tennis, despite being a girl, she would have been forced to play against boys with elevated levels of circulating testosterone that Janie lacks, exposing her "to the same risk of unfair competition … from which the defendants claim to be shielding cisgender girls." *B.P.J.*, 98 F.4th at 564. As the Fourth Circuit explained in *B.P.J.*: "offering [plaintiff] a 'choice' between not participating in sports and participating only on boys teams is no real choice at all." *Id.* at 565. Whether playing on the boys' team as the only girl or playing in a private league, the Board's policy "invites more scrutiny and attention from other students, very publicly branding" her "with a scarlet T." *Grimm* 972 F.3d at 617-618. (quotations omitted). This litany of harms easily suffices to meet this prong of plaintiff's Title IX claim. She is thus likely to succeed on the merits of her statutory claim.

B. Janie's Equal Protection Claim Is Likely To Succeed On The Merits

Janie is likely to succeed on her claim that the School Board is violating the Equal Protection Clause of the Fourteenth Amendment. A policy that discriminates against people based on their sex or transgender status must undergo heightened scrutiny to determine whether it violates the Equal Protection Clause. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 555-556 (1996) (hereinafter "*VMI*") (applying intermediate scrutiny to claims of discrimination against women in military college admissions); *Grimm* 972 F.3d at 608-610 (applying intermediate scrutiny to claims of discrimination against a transgender student in school bathroom policies); *Kadel* , 100 F.4th at 143 ("gender identity is a protected characteristic under the Equal Protection Clause" and thus is "subject to heightened scrutiny") *see also Karnoski v. Trump*, 926 F.3d 1180, 1200-1202 (9th Cir. 2019) (applying intermediate scrutiny to claims of discrimination against transgender individuals in the military).

The burdens of heightened equal protection scrutiny at the preliminary injunction stage "track the burdens at trial." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006) (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). Since the government has the burden at trial of showing that the "exacting" intermediate scrutiny requirements have been met, *VMI*, 518 U.S. at 533, Defendants must also bear this burden at the preliminary injunction stage.

1. The policy discriminates against transgender girls like Janie and triggers intermediate scrutiny.

The first step in determining whether there has been an equal protection violation is to identify the government classification at issue. *Village of Willbrook v. Olech*, 528 U.S. 562, 564 (2000). Here, the School Board action makes two sex- and gender-based classifications: (1) separating sports teams into boys' and girls' teams, and (2) allowing team participation based on one's assigned "biological sex rather than gender or gender identity." Policy Manual § 7-4.1. While the first classification—sex separation in Virginia public school athletics—is a longstanding and unchallenged practice, the second classification profoundly changes the status quo by categorically and unconstitutionally excluding transgender students from school athletics.

On its face, the Policy targets Janie and other transgender girls for differential treatment by only considering "biological sex" when determining a student's participation in school athletics. Policy Manual § 7-4.1. In so doing, the Board "guarantee[s] a particular outcome": that transgender students cannot play on the team consistent with their gender identity. *Grimm*, 972 F.3d at 626 (Wynn, J., concurring). This prevents Janie and other transgender girls from

participating in school athletics *altogether*, as the stigma associated with being the only girl on the boys' tennis team could cause "significant psychological harm."[33]

In addition to the text of the Policy, the School Board's past decisions confirm that it enacted the Policy with the intent to exclude girls who are transgender from participating on girls' sports teams. For example, the Policy was promulgated less than two months after the School Board unanimously voted to remove Janie from the girls' tennis team despite the fact she was selected for the team. John Decl. ¶¶ 20, 23; Jill Decl. ¶¶ 21, 23. And the School Board has made other recent policy decisions that target transgender students and undermine efforts to protect and include these students in public schools. For example, the School Board voted to prevent transgender students from using the school restrooms and locker rooms that align with their gender identity, Compl. ¶ 81, and also banned books that depict transgender individuals, *id.*

The School Board's decision to treat transgender girls differently from cisgender girls constitutes a clear gender-identity-based classification. The Fourth Circuit has consistently held that facial classifications based on gender identity trigger intermediate scrutiny. See *B.P.J.*, 98 F.4th at 556; *Grimm*, 972 F.3d at 607 (using heightened scrutiny because discrimination against transgender people involves "sex-based classifications" and because "transgender people constitute at least a quasi-suspect class"). Intermediate scrutiny is triggered automatically by a

[33] *Cf.* Coleman et al., *supra* note 5, at S52 ("Rejection by family, peers, and school staff (e.g., intentionally using the name and pronoun the youth does not identify with, not acknowledging affirmed gender identity, bullying, harassment, verbal and physical abuse, poor relationships, rejection for being [transgender or gender diverse], eviction) was strongly linked to negative outcomes, such as anxiety, depression, suicidal ideation, suicide attempts, and substance use." (citation omitted)).

facial classification, regardless of the reasoning behind the policy.[34] *B.P.J.*, 98 F.4th at 556 (citing *VMI*, 518 U.S. at 531). The gender-based discrimination in the Policy thus triggers heightened scrutiny.

2. The Policy fails intermediate scrutiny.

For the Policy to withstand an equal protection challenge, Defendants must show that the decision to bar Janie from playing on the girls' tennis team is substantially related to an important governmental interest. *VMI*, 518 U.S. at 524 (requiring that the government show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives"). The government's justification for the classification must be "exceedingly persuasive," and it cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* at 533.

a) The Policy is not substantially related to the state's asserted interest.

The School Board's sole stated reason for excluding Janie from the girls' tennis team was to "ensure fairness in competition for all participants."[35] Even conceding fairness is an important governmental interest, a policy of excluding transgender girls from girls' sports teams does not further this interest. The separation of school athletics into boys' and girls' teams, which existed

[34] Although the policy challenged in *B.P.J.* involved an additional sex-based classification that explicitly prohibited transgender girls from playing on the girls' teams but not transgender boys from playing on the boys' teams, the court found that intermediate scrutiny was triggered even without this "second layer" of discrimination. 98 F.4th at 555-556 (finding that intermediate scrutiny review is triggered for "two independent reasons": (1) the "differing treatment of cisgender girls and transgender girls," and (2) the "rule that people whose sex was assigned at birth as female may play on any team but people whose sex was assigned at birth as male may only play on male or co-ed teams").

[35] Chair May's September 14 Letter, *supra* note 2.

before the Policy, may be related to a fairness interest. But the permissibility of sex separation "says nothing about what happened in this case: separation of transgender students from their cisgender counterparts through a policy that ensures that transgender students may [participate in] neither male nor female [teams] due to the incongruence between their gender identity and their sex-assigned-at-birth." *Grimm*, 972 F.3d at 625 (Wynn, J., concurring).

The State's interest in competitive fairness does not allow the State to "protect[] one girl's ranking in any competition" or "ensur[e] that cisgender girls do not lose ever to transgender girls." *B.P.J.*, 98 F.4th at 560. And even if the State's interest is in broader competitive fairness, there is ample evidence that transgender girls—particularly those like Janie who have not undergone the "Tanner 2" stage of puberty—do not have an inherent competitive athletic advantage over cisgender girls. The Tanner 2 stage marks the point at which sex-based differences, including increased levels of circulating testosterone and ability to build muscle mass, begin to develop. *Id.* at 560-561. Janie, just like the plaintiff in *B.P.J.*, has never undergone the Tanner 2 stage. At age nine, Janie received a histrelin implant, which suppresses Janie's endogenous hormones and prevents further development of puberty associated with testosterone. John Decl. ¶ 10; Jill Decl. ¶ 10. Thus, Janie has not experienced physical changes, such as increased muscle mass, that could have given her a competitive advantage.[36] As the Fourth Circuit explained in *B.P.J.*, a young transgender girl like Janie does not possess a "meaningful competitive athletic advantage." 98 F.4th at 561 (reversing the district court's grant of summary judgment to the government, citing a factual dispute over whether the transgender

[36] In *B.P.J.*, the Fourth Circuit held that "the fact that those who do [have increased levels of circulating testosterone] benefit from increased strength and speed provides no justification—much less a substantial one—for excluding B.P.J. from the girls cross country and track teams" because she, like Janie, was receiving gender-affirming hormone therapy and had not undergone Tanner 2 puberty. 98 F.4th at 561.

plaintiff's lack of Tanner 2 puberty-based changes show there is no meaningful competitive advantage over cisgender girls).

Going further in the analysis, by drawing lines based on "biological sex" rather than "levels of circulating testosterone,"[37] the Policy is both over- and underinclusive. Differences in athletic abilities track more closely with levels of circulating testosterone than with "biological sex." The Policy is overinclusive because biological males are not always competitively advantaged. *See Hecox*, 2023 WL 11804896, at *12 (finding that the "physiological advantages that 'biological males' have over cisgender women" is a "false assumption"). Since Janie received treatment that reduced her testosterone levels, she is more similarly situated to cisgender girls with regard to athletic ability. *See B.P.J.*, 98 F.4th at 560-561 (explaining the connection between testosterone levels and sex-based differences in athletic performance and noting that a plaintiff who "never felt the effects of increased levels of circulating testosterone" thus did not benefit from that difference). The School Board's decision to focus on "biological sex" rather than levels of circulating testosterone further suggests that the State is more concerned with excluding transgender students than promoting competitive fairness. *See Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020), *aff'd in part, vacated in part, remanded*, 2023 WL 11804896 (9th Cir. Aug. 17, 2023) ("That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.").

Defendants cannot meet the stringent burden of showing that the Policy survives intermediate scrutiny as applied to Janie. The School Board's purported purpose for

[37] "Levels of circulating testosterone" is generally viewed as a more useful indicator of "sex-based differences in athletic performance" than "biological sex." *B.P.J.*, 98 F.4th at 560; *Hecox v. Little*, 2023 WL 11804896, at *14 (9th Cir. Aug. 17, 2023).

implementing the Policy embodies the "sheer conjecture and abstraction" that the Fourth Circuit has rejected in *Grimm*, 972 F.3d at 614, and masks their true objective in creating the Policy: to exclude transgender girls from girls' sports teams. This justification is so "marked by misconception and prejudice," *Id.* at 615 (quoting *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001)), that it would fail even rational basis review, *see City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) (unconstitutional discrimination does not require animus and "may result … from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves"). Janie is thus likely to succeed on her Equal Protection claim.

II. Plaintiff Will Suffer Irreparable Harm in the Absence of Injunctive Relief

Absent injunctive relief, Janie will be singled out for exclusion on the basis of her sex, rendering her unable to play school sports, and will therefore suffer irreparable harm. *Winter*, 555 U.S. at 22 ("plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction"). Courts routinely find that violations of Title IX constitute irreparable harm. *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771, 777 (S.D. W. Va. 2012) (collecting cases). And, with respect to the Equal Protection Claim, irreparable harm is presumed when a claim is based upon a violation of plaintiff's constitutional rights. *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right … constitutes irreparable harm for purposes of equitable jurisdiction.").

Monetary damages, which Janie does not seek, would be an inadequate remedy. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551

(4th Cir. 1994). Janie's middle school years are limited, and she has only one opportunity to play seventh grade tennis. *Doe*, 888 F. Supp. 2d at 778 (noting that plaintiff "will experience their middle school years only once during their life"). Indeed, Defendants have already deprived plaintiff of her ability to play tennis during one of her three years of middle school. If Janie is again denied the opportunity to try out for and compete on the girls' tennis team, she will lose out on another season of sport and fellowship, losing opportunities to build camaraderie and team-building skills at a critical point in her adolescent development.

Finally, by being denied the ability to participate solely on the basis of her gender identity, Janie will be subject to the state's "moral disapproval" of her identity. *Lawrence v. Texas*, 539 U.S. 558, 582-583 (2003) (O'Connor, J., concurring). Rather than protecting Janie from discrimination and unfair treatment, her own school district's actions further encourage bullying and ostracization from her peers and community. *See B.P.J.*, 98 F.4th at 563-564 ("[I]t requires no feat of imagination to appreciate '[t]he stigma of being' unable to participate on a team with one's friends and peers.'") (quoting *Grimm*, 972 F.3d at 617-618). The social, psychological, and emotional harms resulting from that discrimination are "[d]ignitary wounds [that] cannot always be healed with the stroke of a pen." *Obergefell v. Hodges*, 576 U.S. 644, 678 (2015). Indeed, Janie has already suffered psychological harm from being singled out by the School Board for disparate treatment based solely on her gender identity. Janie Decl. ¶¶ 13, 16; John Decl. ¶¶ 17, 21; Jill Decl. ¶¶ 18, 22. Absent injunctive relief, Janie will thus be seriously and irreparably harmed by her continued exclusion.

III. The Balance of Hardships and Public Interest Favor Injunctive Relief

The balance of hardships and the public interest also strongly favor injunctive relief. In evaluating the balance of hardships, courts "balance the competing claims of injury and must

consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citation omitted). Here, harm to Janie far outweighs any potential harm to Defendants, and weighs heavily in favor of injunctive relief. As explained above, Defendants' decision to exclude Janie from girls' tennis has deprived her, and will continue to deprive her, of opportunities to bond with her classmates, build important skills, and otherwise benefit from all the opportunities that team sports entail. John Decl. ¶ 26; Jill Decl. ¶ 26. It will also cause her pain and distress and feelings of exclusion and ostracization. John Decl. ¶¶ 17, 21; Jill Decl. ¶¶ 18, 22. Additionally, as Janie suffers from gender dysphoria, the School Board's decision to exclude her from the girls' tennis team will deprive her of opportunities to affirm her gender identity and will undermine her social transition. John Decl. ¶ 25; Jill Decl. ¶ 25.

Meanwhile, a preliminary injunction would not harm Defendants. Before Defendants' intervention, Janie tried out for, and was selected to play on, the girls' tennis team. It is their intervention, not any injunctive relief that the Court may award, that upended the status quo.

Lastly, it is always in the public interest to "uphold[] constitutional rights." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (internal quotation marks omitted). "[C]ompliance with Title IX," an important and longstanding federal civil rights statute, is also in the public interest. *Doe*, 888 F. Supp. 2d at 778; *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir. 2016) (Davis, J., concurring) ("Enforcing [plaintiff's] right to be free from discrimination on the basis of sex in an educational institution is clearly in the public interest"), *vacated and remanded on other grounds*, 580 U.S. 1168 (2017). The Policy and defendants' actions contravene the strong public interest in educational institutions that are free of discrimination of all kinds, including on the basis of gender identity.

CONCLUSION

For the reasons stated above, Janie respectfully requests that the Court grant her motion for a preliminary injunction and enjoin Defendants and their officers, employees, agents, and any other person acting under Defendants' direction, supervision, or control, from enforcing the Policy or taking any other action that has the effect of excluding her from participating on girls' sports teams on the basis of her gender identity.

Dated: July 3, 2024

Respectfully submitted,

/s/ Eden Heilman

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

JANIE DOE, by her next friends and parents, JILL DOE and JOHN DOE,

Plaintiff,

v.

HANOVER COUNTY SCHOOL BOARD,

ROBERT J. MAY in his official capacity as Chair of the Hanover County School Board, and

MICHAEL B. GILL in his official capacity as Superintendent of Hanover County Public Schools,

Defendants.

Civil Action No. 3:24-cv-00493

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2024, I electronically filed a true and correct copy of Plaintiff's Motion for Preliminary Injunction and accompanying documents with the Clerk of Court using the CM/ECF system. A copy of the foregoing will be sent to the following parties:

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