IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JANIE DOE, BY HER NEXT FRIENDS AND PARENTS, JILL DOE AND JOHN DOE,

Plaintiff,

v. Case No. 3:24-cv-00493-MHL

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.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiff expects the Hanover County School Board ("School Board") to deny her request to try out for and participate on the girls' tennis team at her middle school. Because the School Board has not yet made a decision on Plaintiff's request for a "reasonable modification" to Policy 7-4.1, Plaintiff's request for a preliminary injunction is premature. The School Board deferred a decision on her request to its August 13, 2024 meeting. Until the School Board acts, Plaintiff has not suffered an injury in fact to give rise to standing nor is her claim ripe. Therefore, the Court should deny the Motion for Preliminary Injunction.

II. FACTUAL BACKGROUND

In 2020, the General Assembly enacted Virginia Code section 22.1-23.3, which directed the Virginia Department of Education ("VDOE") to

> develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices and include information, guidance, procedures, and standards relating to [several matters].

Va. Code § 22.1-23.3(A).[1] Section 22.1-23.3(B) requires that school boards "adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education pursuant to subsection A." *Id.* § 22.1-23.3(B).

On July 18 2023, the VDOE published the Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools ("2023 Model Policies"). (Exhibit A.) VDOE published the 2023 Model Policies "to provide clear, accurate, and useful guidance to Virginia school boards that align with [Virginia Code § 22.1-23.3]." (*Id.* at 1.) With respect to athletics, the 2023 Model Policies state:

> For any athletic program or activity that is separated by sex, the appropriate participation of students shall be determined by sex rather than gender or gender identity. **[School Division] shall provide reasonable modifications to this policy only to the extent required by law**.

(*Id.* at 16 (alteration in original) (emphasis added).) The 2023 Model Policies define sex as "biological sex." (*Id.* at 5.) On August 23, 2023, the Virginia Attorney General issued an Advisory Opinion concluding that the 2023 Model Policies guidance on athletics complied with, as is relevant here, the Equal Protection Clause and Title IX. (Exhibit B at 3-6.)

About a week after the Attorney General issued the advisory opinion, Plaintiff tried out for and made the girls' 2023-2024 tennis team. (*E.g.*, ECF Doc. 18, at ¶¶ 13-14.) On September 5, 2023, the School Board notified Plaintiff's parents that, in light of the 2023 Model Policies,

[1] While the statute directs VDOE to establish model policies relating to "[s]tudent participation in sex-specific school activities and events and use of school facilities," it notes that "[a]ctivities and events do not include athletics." Va. Code § 22.1-23.3. Nevertheless, the Virginia Attorney General has opined that this statute authorizes VDOE to establish model policies regarding athletics because the list of topics is a nonexclusive list, and athletics are indisputably a common issue regarding transgender students. (Exhibit B at 4.)

the Attorney General's Advisory Opinion, and the School Board's current practice, "the School Board wishe[d] to carefully consider [Plaintiff's] participation on the girls' tennis team as [the School Board] work[ed] to determine the best interest of all participants on the team." (ECF Doc. 1-2.) The School Board requested information regarding Plaintiff's "consistent expression as female, including any medical documentation or verification that may exist concerning th[e] matter" and noted that the information would be considered in closed session at the School Board's September 12, 2023 meeting. (*Id.*)

On September 12, 2023, after considering the information Plaintiff's parents provided in response to the September 5 letter, the School Board denied Plaintiff's request to participate on the girls' tennis team "in effort to ensure fairness in competition for all participants." (ECF Doc. 1-3.) On November 14, 2023, the School Board approved revisions to School Board Policy 7-4.1 ("Policy") to comply with the 2023 Model Policies. (*See* ECF Doc. 1-6, at 4[2]; ECF Doc. 1-7, at 9; *see also* ECF Doc. 1-5, at 1 (relevant revision highlighted in green).) The Policy, like the 2023 Model Policies, included the following language, "Reasonable modifications to this policy will be permitted only to the extent required by law." (ECF Doc. 1-4 at 1.)

On April 16, 2024, the Fourth Circuit issued its decision in *B.P.J. v. West Virginia State Board of Education* ("*B.P.J.*"), 98 F.4th 542 (4th Cir. 2024), *petition for cert. filed*, Nos. 24-43, 24-44 (July 16, 2024). On June 12, 2024, the School Board Attorney notified counsel for Plaintiff's parents that the School Board would consider a renewed request for Plaintiff to try out for and participate on the girls' tennis team. (*See* Exhibit C.)[3] On June 21, Plaintiff's parents submitted a renewed request with a June 20, 2024 letter from Plaintiff's physician, a copy of the

[2] Citations using "ECF Doc." adopt the pagination associated with this Court's electronic filing system, rather than the pagination at the bottom of each page.

[3] This exhibit is subject to a Motion to Seal.

Fourth Circuit's decision in *B.P.J.*, and a reference to the documents previously submitted in September 2023. (*Id.*) The June 20, 2024 letter from Plaintiff's physician stated that Plaintiff was under continuing care and met the diagnostic criteria for gender dysphoria. (ECF Doc. 1, at ¶ 86; Exhibit D.)[4]

Plaintiff's request was discussed in a closed session of the School Board on July 9, 2024, and the School Board deferred a decision to its next meeting on August 13, 2024. Hanover Cnty. Bd. & Comm. Meeting Pub. Portal, *Hanover County School Board July 9, 2024 Meeting*, https://hanovercova.portal.civicclerk.com/event/1055/media, at 00:58-02:31, 02:47:50-02:48:02. The School Board will likely decide at that time whether Plaintiff will be permitted to try out for the girls' tennis team.

III. ARGUMENT

A plaintiff requesting a preliminary injunction, as with any other relief, must first demonstrate that the court has jurisdiction. Before turning to the merits of Plaintiff's Motion, therefore, the School Board addresses Plaintiff's lack of standing to request a preliminary injunction and the fact that such a request is not ripe for this Court's review. Not only does Plaintiff bear the burden on all four preliminary injunction factors, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), Plaintiff, as the party invoking this Court's jurisdiction, also bears the burden of establishing standing and ripeness, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (standing); *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) (ripeness).

A. Plaintiff lacks standing to request the preliminary injunction.

"The 'affirmative burden of showing a likelihood of success on the merits . . . necessarily includes a likelihood of the court's reaching the merits, which in turn depends on a likelihood

[4] This exhibit is subject to a Motion to Seal.

that plaintiff has standing.'" *Obama v. Klayman*, 800 F.3d 559, 565 (D.C. Cir. 2015) (quotation omitted); *Boyapati v. Loudon Cnty. Sch. Bd.*, No. 1:20-cv-1075 (AJT/IDD), 2020 WL 6797365, at *3 (E.D. Va. Oct. 7, 2020). "[T]o establish standing, a plaintiff must show (i) that [s]he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

At bottom, Plaintiff is requesting a preliminary injunction permitting her "to try out for the [girls'] tennis team for the 2024-2025 school year." (ECF Doc. 14, at 3.) Plaintiff's ability to participate on the girls' tennis team is relevant only if Plaintiff makes the team.

Team tryouts are scheduled to begin on August 26, 2024. The School Board's next meeting is scheduled for August 13, 2024, at which time the School Board likely will determine whether a reasonable modification to the Policy is required by law such that Plaintiff is permitted to try out for the girls' tennis team. At this juncture, therefore, Plaintiff's request for a preliminary injunction is premature, because Plaintiff has not been denied the opportunity to try out for the 2024-2025 girls' tennis team. In other words, Plaintiff has not been injured by the School Board or the Policy. Plaintiff's parents simply speculate that Plaintiff will be denied the opportunity to try out, alleging that "the School Board is expected to deny the renewed request." (ECF Doc. 14, at 17; ECF Doc. 17, at ¶ 32; ECF Doc. 18, at ¶ 32.)

Moreover, the Policy does not categorically prohibit Plaintiff from trying out for the girls' tennis team. The Policy permits "[r]easonable modifications . . . to the extent required by law." (ECF Doc. 1-4, at 1.) This caveat distinguishes the Policy from the statutes at issue in *B.P.J. v. West Virginia State Board of Education*, 550 F. Supp. 3d 347 (S.D.W. Va. 2021), and *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020). The statutes at issue there "categorically

barr[ed]" the plaintiffs from trying out for and participating on the team of their choice. *Hecox*, 479 F. Supp. 3d at 944-45 (citing Idaho Code Ann. § 33-6201 to -6206). *See B.P.J.*, 550 F. Supp. 3d at 352-53 ("Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.") (quoting W. Va. Code § 18-2-25d(c)(1)). The district court in *Hecox*, relying in part on the categorical bar in Idaho's law, held that a plaintiff had Article III standing because she was prohibited from trying out for the team, regardless of whether she ultimately made the team.[5] 479 F. Supp. 3d at 960.

The Policy here does not categorically prevent Plaintiff from trying out for the girls' tennis team. The Policy instead permits reasonable modifications as required by law. Notably, the School Board approved the Policy on November 14, 2023, about four months before the Fourth Circuit issued its decision in *B.P.J. v. West Virginia State Board of Education*, 98 F.4th 542 (4th Cir. 2024).

Because Plaintiff has not been denied the opportunity to try out for the girls' tennis team, Plaintiff has not suffered an injury required to establish Article III standing.

B. Plaintiff's requested preliminary injunction is not ripe.

A plaintiff also cannot obtain a preliminary injunction unless the requested relief is ripe for judicial review. *South Carolina v. United States*, 912 F.3d 720, 731 (4th Cir. 2019) (vacating a preliminary injunction because the plaintiff's claims were no ripe); *Carcaño v. McCrory*, 203

[5] The other plaintiff in *Hecox* had standing, the district court found, because Idaho's law created a process by which she would be subject to a "'dispute process,' a potentially invasive and expensive medical exam, loss of privacy, and the embarrassment of having her sex challenged." 479 F. Supp. 3d at 964. The Policy here does not contain such a provision. And although the West Virginia Board of Education addressed the plaintiff's lack of standing in *B.P.J.*, the Board argued that the plaintiff's injury was not traceable to the Board because it did not enforce the statute at issue. (No. 2:21-cv-316, ECF Doc. 48, at 1-2, 4-6 (S.D.W. Va. June 23, 2021).) The Board did not challenge whether the plaintiff suffered an injury.

F. Supp. 3d 615, 630 (M.D.N.C. 2016). Courts assess ripeness by "balanc[ing] the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." *Doe*, 713 F.3d at 758 (quotation omitted). A claim is not ripe "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation and quotation marks omitted); *Doe*, 713 F.3d at 758 ("A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties.") (quotation omitted).

In certain cases, issues of standing and ripeness may "boil down to the same question." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014). But standing and ripeness are distinguishable insofar as "standing involves the question of *who* may sue and ripeness involves *when* they may sue." *Wild Va. v. Council on Env't Quality*, 56 F.4th 281, 293 (4th Cir. 2022) (cleaned up) (quotation omitted).

Here, Plaintiff's request for a preliminary injunction is not ripe for the same reason Plaintiff lacks standing: neither the School Board nor the Policy has denied Plaintiff the right to try out for or participate on the 2024-2025 girls' tennis team. Thus, Plaintiff's requested preliminary injunction rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300 (quotation and quotation marks omitted).

C. Plaintiff is not entitled to a preliminary injunction.

A plaintiff requesting preliminary injunctive relief "must establish that [s]he is likely to succeed on the merits, that [s]he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (citations omitted). "[A] district court is entitled to deny

preliminary injunctive relief on the failure of any single *Winter* factor." *Vitkus v. Blinken*, 79 F.4th 352, 361 (4th Cir. 2023).

Moreover, a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (citation omitted). Preliminary injunctive relief is "a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (quotation omitted).

This is all the truer when a plaintiff—like Plaintiff here—is requesting a mandatory injunction. *See Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 209 (4th Cir. 2024). Mandatory injunctions are "disfavored in any circumstance" because they ask a court to depart from the status quo before "trial and final judgment, which is the traditional function of a preliminary injunction."[6] *Id.* (cleaned up) (quotations omitted). The Fourth Circuit has equated a mandatory injunction to "an (extra) extraordinary remedy that raises the stakes of an erroneous decision and erects a high bar for relief." *Id.* at 210.

1. <u>Plaintiff has not established a likelihood of success on the merits.</u>

Plaintiff asserts claims under Title IX and the Equal Protection Clause and requests declaratory and injunctive relief. (ECF Doc. 1, at ¶¶ 92-107; *id.* at 27.) The Motion does not show a likelihood of success on the merits of either claim.

[6] Plaintiff's Motion does not explicitly address the nature of the requested preliminary injunction, although two sentences imply that the preliminary injunction is prohibitory. (*See* ECF Doc. 14, at 25, 32.) That is not so. The School Board revised the Policy on November 14, 2023. (*See* ECF Doc. 1-4 at 1.) Plaintiff did not initiate this lawsuit until more than seven months later. (*See* ECF Doc. 1.) Thus, the revised Policy was the "status quo" when Plaintiff initiated this action. *See Pierce*, 97 F.4th at 209 (defining the "status quo" as a senate district map that "was uncontested for a month before [the p]laintiffs sued") (citation omitted). Any argument that Plaintiff seeks to preserve the status quo is also undermined by Plaintiff's inability to participate on the girls' tennis team before the Policy was revised on November 14, 2023. *See id.* at 209-10.

a. Plaintiff has not established a likelihood of success on the merits of her Title IX claim.

To prevail on a Title IX claim, a plaintiff must show:

1. that she was excluded from participation in an education program "on the basis of sex";

2. that the educational institution was receiving federal financial assistance at the time; and

3. that improper discrimination caused her harm.

Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) (citation omitted).

Discrimination "on the basis of sex" under Title IX, the Fourth Circuit has held, includes discrimination based on gender identity. *B.P.J.*, 98 F.4th at 563; *Grimm*, 972 F.3d at 616-17.[7] But "not every act of sex-based classification is enough to show legally relevant discrimination for purposes of Title IX. Instead, under Title IX, discrimination mean[s] treating [an] individual *worse than* others who are similarly situated." *B.J.P.*, 98 F.4th at 563 (internal quotation marks and quotation omitted) (first alteration in original) (emphasis in original).

The Policy at issue here, unlike the statutes at issue in *Hecox* and *B.P.J.*, permits reasonable modifications as required by law. *See B.P.J.*, 98 F.4th at 563 (noting that the statute applied "regardless of whether any given girl possesses any inherent athletic advantages based on being transgender"). There is no "categorical bar" to Plaintiff trying out for and participating

[7] Defendants do not concede that *B.P.J.* or *Grimm* were correctly decided and note that the defendants in *B.P.J.* have filed a Petition for Writ of Certiorari to the Supreme Court of the United States. Defendants further note that the United States District Court for the Eastern District of Kentucky has enjoined the United States Department of Education from "implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024), which is scheduled to take effect on August 1, 2024." *State of Tenn. v. Cardona*, -- F.Supp.3d ----, No. 2:24-072-DCR, 2024 WL 3019146, at *44 (E.D. Ky. June 17, 2024). This injunction applies to the Commonwealth of Virginia. *Id.* The Fifth Circuit has declined to stay the injunction pending appeal. *State of La. v. United States Dep't of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024).

on the girls' 2024-2025 tennis team. *See Hecox*, 479 F. Supp. 3d at 944. Indeed, tryouts do not begin until August 26, 2024, and the School Board is considering Plaintiff's renewed request to participate in light of the Fourth Circuit's holding in *B.P.J.* Thus, Plaintiff has not shown that the Policy likely will be applied to her in a discriminatory manner.

Plaintiff also has not shown that she is similarly situated to other students who will try out for the girls' tennis team. Plaintiff asserts, for example, that she has not undergone the Tanner 2 stage of puberty or experienced physical changes, such as increased muscle mass. (ECF Doc. 14, at 28.) But Plaintiff does not provide medical evidence to support this assertion. Not even the affidavits provided in support of Plaintiff's Motion include this information. (*See* ECF Docs. 16-19.) At best, a September 6, 2023 letter from Plaintiff's physician stated that Plaintiff received a histrelin implant to "prevent[] further development of puberty associated with testosterone." (ECF Doc. 1, at ¶ 67; Exhibit E.)[8] The letter does not state that Plaintiff has not undergone the Tanner 2 stage of puberty or experienced increased muscle mass, and possibly implies that Plaintiff experienced some development of puberty associated with testosterone. The June 20, 2024 letter submitted with Plaintiff's renewed request also does not mention Plaintiff's circulating testosterone levels. The letter simply states that Plaintiff met the diagnostic criteria for gender dysphoria at the time of her last evaluation. (ECF Doc. 1, at ¶ 86; Exhibit D.) At this stage, Plaintiff has not satisfied the similarly situated requirement. *See B.P.J.*, 98 F.4th at 563 (noting that the statute treated students differently "on a categorical basis, regardless of whether any given girl possesses any inherent athletic advantages based on being transgender") (citation omitted).

[8] This exhibit is subject to a Motion to Seal.

Finally, Plaintiff has not shown that the Policy will likely be applied to prevent her from trying out for or participating on the 2024-2025 girls' tennis team. Most of Plaintiff's argument instead focuses on past harm related to the School Board's pre-*B.P.J.* decision to prevent Plaintiff from participating on the 2023-2024 girls' tennis team. (*See* ECF Doc. 14, at 22-24.) But "[t]he purpose of a preliminary injunction is not to remedy past harm." *Action NC v. Strach*, 216 F. Supp. 3d 597, 644 (M.D.N.C. 2016) (quotation omitted).

In sum, Plaintiff has not established that she likely will succeed on the merits of her Title IX claim.

b. Plaintiff has not established a likelihood of success on the merits of her equal protection claim.

"The essence of an equal protection claim is that at least one person has been treated differently from another without sufficient justification." *B.P.J.*, 98 F.4th at 555 (citing *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). The Fourth Circuit has held that differential treatment based on gender identity must be justified by intermediate scrutiny, *i.e.*, whether the differential treatment is "substantially related to an important governmental interest." *Id.* at 556, 559.

Again, Plaintiff has not been denied an opportunity to try out for or participate on the 2024-2025 girls' tennis team. Nor does the Policy categorically bar Plaintiff from trying out for or participating on the team; the Policy instead permits reasonable modifications as required by law. Plaintiff asserts that the School Board "enacted the Policy with the intent to exclude girls who are transgender from participating on girls' sports teams." (ECF Doc. 14, at 26.) This assertion disregards the 2023 Model Policies' statement on athletics—which the Policy's revisions essentially mirror—and Virginia Code section 22.1-23.3(B)'s requirement that school boards adopt policies that are at least consistent with the VDOE's model policies. Va. Code

§ 22.1-23.3(B). The School Board approved revisions to the Policy to comply with the 2023 Model Policies, not to specifically exclude transgender students from participating on girls' sports teams.

Turning to the justification underlying the Policy, the Fourth Circuit has recognized a state's interest in competitive fairness. *See B.P.J.*, 98 F.4th at 560 (noting West Virginia's interest in "preventing 'athletic opportunities for women' from being 'diminished' by substantial displacement"). The Policy is substantially related to this interest because it recognizes separate athletic teams for boys and girls, while at the same time permitting reasonable modifications to those separate teams as required by law. The Policy is not "over- and underinclusive" as Plaintiff contends because the Policy permits decisions on an individual basis, rather than imposing a categorical bar like the statutes at issue in *B.P.J.* and *Hecox*.

Perhaps recognizing that the Policy is applied on a case-by-case basis, Plaintiff contends that she does not have a competitive advantage in athletics because she, like the plaintiff in *B.P.J.*, has not undergone the Tanner 2 stage of puberty and therefore does not have physical changes like increased muscle mass. (ECF Doc. 14, at 28.) Although *B.P.J.* was decided at the summary judgment stage, the "undisputed evidence" there "show[ed] B.P.J. ha[d] never gone through the Tanner 2 stage." *B.P.J.*, 98 F.4th at 560. Plaintiff offers no medical evidence here to support her assertion and instead cites two paragraphs from the declarations of her parents, neither of whom is identified as a medical professional. (ECF Doc. 14, at 28.) And "[a]ffidavits drafted by lawyers are poor substitutes for discovery, live testimony, and cross-examination." *Del. State Sportsmen's Ass'n v. Del. Dep't of State & Homeland Sec.*, --- F.4th ---- 2024 WL 3406290, at *3 (3d Cir. 2024).

On the question of whether "people whose sex is assigned as male at birth [and who do not undergo Tanner 2 stage puberty still] enjoy a meaningful competitive athletic advantage over cisgender girls," the Fourth Circuit held there was a genuine dispute of material fact. *Id.* at 561. Plaintiff has not shown that this question should be decided in her favor at this preliminary stage.

For these reasons, Plaintiff has not shown a likelihood of success on the merits of her equal protection claim.

2. Plaintiff has not established that she faces irreparable harm.

Extraordinary relief like a preliminary injunction cannot be granted "based only on a possibility of irreparable harm." *Winter*, 555 U.S. at 22. The plaintiff instead must show that "irreparable injury is *likely* in the absence of an injunction." *Id.* (emphasis in original).

The harm complained of here—harm that flows from Plaintiff's alleged inability to try out for the 2024-2025 girls' tennis team—is entirely speculative. Plaintiff has not been denied the opportunity to try out for the 2024-2025 girls' tennis team, and tryouts are scheduled to begin after the School Board's next meeting. Plaintiff's argument that she *will* be denied the opportunity is premised on the Policy and the School Board's September 2023 decision that Plaintiff could not participate on the girls' tennis team. (*See* ECF Doc. 17, ¶ 32; ECF Doc. 18, ¶ 32.) The Policy on its face does not preclude Plaintiff from trying out for the girls' tennis team because the Policy is subject to reasonable modifications. Additionally, the School Board's September 2023 decision predates the current version of the Policy and the Fourth Circuit's decision in *B.P.J.* Given these developments, Plaintiff cannot state she will be denied an opportunity in the future simply because she was denied an opportunity in the past.

Plaintiff notes that the denial of a constitutional right is "irreparable harm for purposes of equitable jurisdiction" and that courts have found violations of Title IX to constitute irreparable

harm. (ECF Doc. 14, at 30.) True, but Plaintiff has not demonstrated that she likely will be denied a federal right. Plaintiff has not clearly shown, therefore, that she likely will suffer irreparable harm from such a denial. *See Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (vacating a preliminary injunction because the plaintiff had not shown a likelihood of success on the merits of his constitutional claim). *See also Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 306 (D. Md. 2023); *Toure v. Hott*, 458 F. Supp. 3d 387, 407 (E.D. Va. 2020).

3. Plaintiff has not established that the equities weigh in her favor or that an injunction is in the public interest.

The third and fourth *Winter* factors "merge when the Government is the opposing party." *Pierce*, 97 F.4th at 225 (quotation omitted). Courts "must 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 (quotation omitted). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quotation omitted).

At this stage, there is no injury on Plaintiff's side of the scale. The School Board's next meeting is scheduled for August 13, 2024, at which time the School Board likely will decide whether Plaintiff can try out for the girls' tennis team. Tryouts for the girls' tennis team are scheduled to begin on August 26, 2024. Plaintiff will suffer no harm if this Court permits the School Board to consider Plaintiff's renewed request at the August 13, 2024 meeting—nearly two weeks before tryouts for the girls' tennis team begin.

On the other side of the scale, however, the School Board and public interest would suffer significant harm if this Court granted the preliminary injunction before the August 13, 2024 meeting. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." *Dixon v. City of St. Louis*,

950 F.3d 1052, 1056 (8th Cir. 2020) (quoting *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)). This "means that courts must approach the entire enterprise of federal judicial intrusion into the core activities of the state cautiously and with humility." *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1133 (N.D. Ill. 2020). "[E]ducation is perhaps the most important function of state and local governments." *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). And "[t]he educational process is a broad and comprehensive concept with a variable and indefinite meaning . . . not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity." *Albach v. Odle*, 531 F.2d 983, 985 (10th Cir. 1976).

Additionally, the equities favor maintaining the status quo. *See Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024) ("[A preliminary injunctions] purpose 'is merely to preserve the relative positions of the parties until a trial on the merits can be held.") (quotation omitted). Plaintiff is challenging an anticipated application of the Policy, which was in effect more than seven months before Plaintiff initiated this lawsuit. (*See* ECF Doc. 1.) This Court should not upend the status quo here by issuing the "(extra) extraordinary remedy" of a mandatory injunction. *See Pierce*, 97 F.4th at 210.

IV. CONCLUSION

For the above reasons, Plaintiff's Motion for Preliminary Injunction, (ECF Doc. 13), should be denied.

HANOVER COUNTY SCHOOL BOARD, ROBERT J. MAY, AND MICHAEL B. GILL

By Counsel

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CERTIFICATE

I hereby certify that on the 22nd day of July 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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