

Narrative Complaint on behalf of Minor Child [ \_\_\_\_\_ ]  
Concerning Violations of Title IX

May 22, 2018

Overview

The City Schools of Decatur, a “public charter school district,” constitutes the public school system of Decatur, Georgia. In July of 2016, the Superintendent of the City Schools of Decatur (“the Decatur Schools”), David Dude, promulgated to staff a policy that *required* all schools within the Decatur Schools to admit boys who identify as female into girls’ restrooms, locker rooms, and shower areas on school premises, and to house boys who identify as girls with girls on overnight school trips, based solely on the stated preference of the individual student (“the Policy”). Meanwhile, the Policy effectively precludes giving notice to girls who may suffer violations of privacy or fear as a result, or to their parents.

The Policy likewise requires admitting girls who “identify” as boys into boys’ restrooms, etc., but the asymmetrical psychological impact and actual risk imposed by the Policy on girls is obvious to common experience, and became all too real to the young girl on whose behalf this Complaint is filed.

To avoid any ambiguity or confusion, we use “sex” consistent with its established meaning under Title IX of being male or female as defined by human reproductive nature. “Boys” or “young men” refers to males, while “girls” or “young women” refer to females. As all students involved in this complaint are well under the age of majority, one may reasonably assume that each student has the genitalia natural to their sex. We do not address a situation of individuals who have undergone surgery such that they no longer have the genitals of their sex—a situation that so far as we are aware has not arisen within the Decatur City Schools.

The unexpected and unannounced presence of a boy in a girls’ restroom, locker room, shower area, or overnight hotel room has the obvious potential to cause—and has actually caused—violations of privacy, anxiety, and stress for girls. This foreseeable impact is all the more severe for girls who are survivors of previous incidents of sexual assault—not an insignificant proportion of girls. Further, by permitting boys to enter the girls’ restroom and other private areas based solely on the boy’s stated self-identification, the Policy creates risks of assaults and harassment of a sexual nature that would otherwise not exist. Despite these obvious risks, Superintendent Dude and the City Schools of Decatur Board of Education (“the Board”) did not undertake any analysis at all of the potential harm of this policy to girls, did not inform students or parents, and did not put in place any measures to protect girls against such harm.

Following adoption of the policy, Superintendent Dude and the Board were repeatedly warned through written statements and public comment that the Policy would unacceptably inflict the loss of privacy and loss of safe private spaces for girls. Yet the Decatur Schools have made no changes to the policy, nor put in place any safeguards to protect girls against violation of privacy and continual apprehension of such violation. In this way, the Decatur Schools have created a hostile environment for girls by eliminating their expectation of privacy from the opposite sex (in the very facilities intended to protect privacy), and have exhibited deliberate indifference towards that hostile environment for girls.

In fact, the Policy directly caused the sexual assault of complainant [ ] (“[Victim]” or “the Complainant”) in the girls’ restroom at Oakhurst Elementary School, one of the schools of the Decatur City Schools. There, in November 2017, a boy known to the school administration to identify as “gender fluid” (“the Assailant”) was permitted—pursuant to and as a direct result of the Policy—to enter the girls’ room while [Victim] was there. While the two young children were in the girls’ restroom alone together, the Assailant confronted [Victim], pushed her against a wall, and forcibly touched her genitals despite her protests, causing her both pain and fear. This sexual assault (“the Assault”), which was a foreseeable result of the Policy and would not have happened but for the Policy, discriminated against [Victim] based on her sex and created a hostile and intimidating environment in which [Victim] must fear repeated incidents of sexual harassment or assault in the future.

Unfortunately, the Decatur Schools, including Superintendent Dude and the leadership of the Oakhurst Elementary School, despite being notified of the Assault, have continued to discriminate against [Victim] by exhibiting deliberate indifference towards the sexual Assault, towards its harmful impact on [Victim]’s educational opportunities, and towards the risks of further assaults by the Assailant or others facilitated by the Policy. Among other demonstrations of deliberate indifference and inadequate care, the Decatur Schools failed to conduct a meaningful investigation; failed to discipline the Assailant; failed to notify the parent of [Victim] of her right to file a criminal complaint; refused to remove the Assailant from [Victim]’s class where she would have to see him daily; refused to offer any assurance that Assailant (or other boys) would not be permitted in the girls’ restroom with [Victim] again; failed to offer any assurance of protection going forward to [Victim]; failed to offer any psychological counseling or support services to [Victim]; and in sum ultimately made it untenable for [Victim] to remain at Oakhurst Elementary School, effectively forcing [Victim] to transfer to a different school in early 2018, disrupting her education and inflicting further emotional harm on her.

We provide details below.

## I. THE DECATUR CITY SCHOOLS POLICY IN CONTEXT

According to its web site, the Decatur Schools serve “all of the children and youth within the four square mile area of Decatur, Georgia” (approximately 5000 children), and

comprise nine schools, including five primary schools, one “4th/5th-grade Academy,” one middle school, and one high school. At the times described in this Complaint, Complainant attended one of the primary schools, Oakhurst Elementary School.

The Decatur Schools are recipients of federal funds covered by Title IX.

On May 13, 2016, the Obama Administration Department of Education issued its “Dear Colleague” letter advising schools, that, among other things, “When a school provides sex-segregated . . . facilities, transgender students must be allowed to . . . access such facilities consistent with their gender identity,” and “a school must allow transgender students to access housing consistent with their gender identity.” (The “5/13/16 Dear Colleague Letter”, at 3, 4.)

In an interview with *The Atlanta Journal Constitution* on July 24, 2016, Superintendent Dude told the community that all students were being accommodated reasonably under the then-existing policy that did not permit boys to enter girls’ restrooms or other private areas, stating that “we’ve been able to handle [transgender] requests . . . Mostly they use a faculty restroom or a referee’s restroom.”

But just two days later on July 26, Superintendent Dude sent an email to staff which read, in part:

“As we head into the new school year I want to ensure we are all on the same page regarding equal educational opportunities for our students; especially as it relates to gender identity. This has been a frequently discussed topic in education circles ever since the ‘Dear Colleague’ letter issued by the USDOE and the USDOJ (see attached). As I’m sure you know, our Board policy JAA states that we do not discriminate on the basis of . . . gender identity (among other things). To be clear, here are some examples of situations related to gender identity and how I expect them to be handled in compliance with this policy. For purpose of these examples, assume this student was assigned the sex of male at birth, and now identifies as female.

- This student should be treated the same as any other female student.
- She should not be identified as anything other than female.
- She should be addressed with female pronouns.
- She should be allowed to use the female restroom.
- She should be allowed to use the female locker room.

- She should be allowed to try out for ‘female’ sports.
- She should be allowed to room with other females on field trips.”

Superintendent Dude did not disclose this email to parents in the District, nor otherwise reveal that the Decatur Schools had abandoned the policy and practice that he described to the public on July 24.

On August 21, 2016, in a lawsuit to which the State of Georgia was a plaintiff, a federal district court entered a nationwide preliminary injunction prohibiting the U.S. Department of Education and the U.S. Department of Justice from “using the Guidelines [the 5/13/16 Dear Colleague Letter] or asserting the Guidelines carry weight in any litigation . . .”. *Texas et al. v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016).

On February 22, 2017, the Department of Education withdrew the 5/13/16 Dear Colleague letter on the grounds that that letter, issued under the prior Administration, did not explain how its position was “consistent with the express language of Title IX,” had been issued without “formal public process,” and had been enjoined nationwide in August of 2016 as inconsistent with Title IX. Further, the Department disclaimed further reliance on the positions taken in the 2016 Dear Colleague Letter.

Not until February 27, 2017, more than half a year after he had issued his directive to staff, did Superintendent Dude first disclose the Policy (including the language quoted above) to the public, and then only through a blog post on his Facebook page rather than through any of the normal channels used to communicate information and notice to parents. In his blog post, Superintendent Dude stated that his issuance of the Policy to school leadership “followed the release of guidelines from the President via the U.S. Departments of Education and Justice.” He then acknowledged that “Last week, the new President rescinded those guidelines,” but did not elaborate or explain, nor did he disclose that any use or reliance on 5/13/16 Dear Colleague Letter” by federal agencies had already been enjoined nationwide by a federal court. Instead, Superintendent Dude disclosed the Policy only to affirm it without change.

On June 21, 2017, a group of parents who joined together for this purpose under the name of “Concerned Parents of Decatur” (the “Parent Group”) met with Superintendent Dude to express concerns about the Policy. On July 24, 2017, the Parent Group wrote to Superintendent Dude and warned him that the Policy would violate students’ rights of bodily privacy, as well as of the core goal of Title IX of protecting “equal opportunities for biological females.”

On October 9, 2017, counsel for the Parent Group sent a letter to the School Board detailing the threats posed by the Policy to students’ privacy rights and safety, and to rights protected under Title IX.

On October 10, 2017, the Board held what proved to be a pro-forma session at which it allowed public comments on the Policy. Again, multiple parents and community

members warned the most senior leadership of the Decatur Schools that the Policy would result in the violation of students' right to bodily privacy. During this comment session, a former Chairman of the Georgia Board of Pardons and Paroles specifically warned that the Policy could allow "mischievous boys" to gain access into girls' restrooms for inappropriate purposes. However, the Board did not deliberate about these concerns, what validity they might have, and what if any changes to the Policy should be made. Instead, it acted with utter indifference to all such concerns: immediately following the session on October 10, 2017, without taking time to discuss the warnings given by parents and community members, the Board read a previously prepared statement affirming the Policy.

Complainant believes that investigation will discover extensive additional evidence of deliberate indifference towards the privacy rights and safety of ordinary girls and towards the hostile environment that violation of those rights would foreseeably create, in that Superintendent Dude and the Board engaged in repeated *ex parte* communications with transgender activists about their concerns for the educational environment for *transgender* students, while intentionally marginalizing parents who attempted to express concerns about the intimidating and hostile environment for *girls* that the Policy would create.

## II. IMPLICATIONS OF THE POLICY

We review in more detail below several aspects of the Policy that combine to violate the bodily privacy of girls and to create an intimidating, unsafe, and hostile environment for them.

### A. Intentional Appropriation of Girls' Privacy to Further School Policy Goals

The rationale of the Policy, at least in part, is that the Decatur Schools wish to "affirm" boys who in some sense identify as girls *by authorizing them to mingle with girls* in areas that are reserved to single-sex use precisely *because* these areas involve some degree of undress, personal hygiene, and proximity that is considered to be inappropriate, intrusive, or potentially embarrassing between individuals of the opposite sex. In other words, the violation of privacy of girls is not an unfortunate side effect of the policy—it is an essential *goal* of the policy. That is, the only reason that allowing a boy who identifies as a girl to enter these areas has any social and symbolic significance at all is because boys are properly excluded from these areas, and the only reason they are properly excluded is because it is *expected* that their presence would violate the girls' bodily privacy. In short, the bodies of girls are being used by the Decatur Schools as tools by which to pursue a policy of "affirming" boys who self-identify as girls. The impacted girls are essential props to this exercise in affirmation, not incidental bystanders.

### B. No Precautions or Standards

On its face, the Policy lets students choose their own bathroom. It turns solely on a student's self-declared (and perhaps fluid) "identity," without any requirement of certification by a psychiatrist or other physician. In fact, when [Victim]'s mother Ms.

[\_\_\_\_\_] asked a Decatur Schools administrator what a teacher would do under the Policy if she encountered a male student in the girls’ restroom or locker room, the response was that the teacher would do nothing more than ask the student, “Are you in the correct restroom?”

In other words, the Policy is being applied without any limitations or safeguards to protect girls from assault, invasion of privacy, or fear and apprehension of assault or loss of privacy.

Quite aside from students who may be in a difficult process of sorting out their understandings of sex and gender, girls and parents may reasonably fear the risk of simply misbehaving boys who may take advantage of blurred rules as to who is allowed in which restroom in order to intentionally violate the privacy of girls. Creative efforts by adolescent boys to spy on girls while they are undressed is no new thing in this world. The Policy expands that risk, and provides no safeguards against it.

C. No Notice to Affected Girls and Parents

Because the Policy requires that boys who identify as girls must be treated as girls for *all* purposes and may not be “identified as anything other than female,” the Policy does not permit any warning or notice to girls who may find themselves exposed to, or lodged with, such boys, nor would there be any warning to their parents. The experience of Complainant described below suggests that this is indeed how the Policy is being applied, as no notice was given to children or parents at Oakhurst Elementary School that the boy who assaulted [Victim] was authorized to enter the girls’ room as a result of the Policy.

D. Restrooms and Athletic Facilities

The Policy expressly requires schools to admit male students into girls’ privacy facilities, including restrooms, locker rooms, and showers.

Girls’ restrooms in the Decatur Schools have individual stalls in varying degrees of repair. Based on conversations with students, some of the stall walls have holes in them where screws have fallen out, or doors that do not close tightly. Locker rooms have common changing areas. Showers in the locker room of Decatur High School are individual, but with only curtains separating them from the common space.

As a result of the Policy, a girl in the Decatur Schools changing in the locker room, or stepping out of the shower after an athletic practice, or adjusting her clothes in front of the mirror in the restroom, must simply accept the possibility that a male may appear in front of her or behind her, when either or both are dressed or undressed. The likelihood that such situations will cause fear and anxiety is obvious—even assuming absolutely no ill intent on the part of the male student.

E. Lodging on Overnight Trips

The Decatur Schools sponsor field trips for students that involve overnight stays, including class trips to Washington D.C., team trips to tournaments, and even overseas trips for musical groups.

Under the Policy, a girl who goes on such a trip must accept the possibility that she will find herself lodged in a hotel room with a boy, without any notice to her, without the consent of her or her parents, and without any safeguards for her privacy or indeed safety. While it is our understanding that students are often permitted to choose their roommates for overnight trips, no school policy guarantees that such choices will be respected.

Given [Victim]'s young age, she has yet to attend a field trip, but as she continues her education within the Decatur Schools she will do so, and even the potential to be lodged with a boy will be particularly distressing to her given the actual assault she has already suffered as a result of the elimination of the protection of sex-specific private areas by the Policy.

F. Athletic Competitions

By its terms, the Policy means that boys who wish to “identify” as girls are fully entitled to join girls’ athletic teams and compete in girls’ athletic leagues and competitions. We are not aware that this has yet occurred in the Decatur school system, although it has of course occurred elsewhere.

Press reports indicate that where this *has* occurred, girls and women have (not surprisingly) found themselves at a competitive disadvantage, losing the opportunity for victory after fair competition<sup>1</sup>—and potentially eligibility for athletic collegiate scholarships—that has historically been one of the central goals of Title IX. The gains in equal opportunity in women’s sports under Title IX are directly threatened by requiring girls to compete against boys who self-identify as girls, whether or not they are being dosed with estrogen.

Again, given [Victim]'s young age, this aspect of the Policy has not yet affected her personally. Again, as she continues her education within the Decatur Schools, it will do so.

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<sup>1</sup> See <http://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html> ; see also <https://cycling.today/transgender-cyclist-dominates-womens-cycling-race/>

### III. THE POLICY RESULTED IN THE SEXUAL ASSAULT OF COMPLAINANT [VICTIM] IN A GIRLS' RESTROOM.

#### A. The Assailant Is Admitted to Girls' Restrooms at Oakhurst Elementary School Pursuant to the Policy.

On information and belief, the boy who assaulted [Victim] (“the Assailant”) had previously been identified to the administration of Oakhurst Elementary School as “gender fluid”—that is, as identifying sometimes as a boy, and at other times as a girl, or perhaps neither. On information and belief, [REDACTED].

As a result of his identification as “gender fluid” and the Policy described above, the administration and teachers of Oakhurst Elementary knowingly—indeed intentionally—permitted the Assailant to enter the girls’ room when he desired, subject to no special limitations or precautions. So far as [Mother] has been told, or we can determine from records provided by the school system in response to open records requests, this has remained the policy generally, and with respect to the Assailant, even after the Assault.

#### B. No Inquiry, No Notice

So far as we have been able to learn, leadership of the Decatur Schools, and of Oakhurst Elementary School, did not make any inquiry concerning what physical risks to girls might be created or increased by admitting the Assailant into the girls’ restrooms, nor what psychological stress his presence in the girls’ restroom might create for girls, including girls who are victims of previous sexual abuse.

No notice was ever given to parents at Oakhurst Elementary School about the Policy. No notice was ever given that any male students at Oakhurst were being admitted to the girls’ restrooms as a result of the Policy. No notice was given that a boy who claimed to be “gender fluid” was being allowed in the girls’ restroom while young girls were present.

#### C. The Sexual Assault

On November 14 or 15, 2017, five-year-old [Victim] was permitted to leave class to go to the restroom. While she was out of the room, the Assailant was also permitted to leave the classroom to go to the restroom, and followed [Victim] into the girls’ restroom. No one else was present.

As [Victim] was emerging from a stall, the Assailant pushed her against a wall, pushed his hand between her legs, and repeatedly felt and poked at her genitals, [REDACTED], while she struggled and called out for him to stop. No one came to help.

Upon returning to the classroom, neither child said anything to the teacher about the events in the restroom.

#### IV. INADEQUATE INVESTIGATION AND FOLLOW-UP AMOUNTING TO DELIBERATE INDIFFERENCE

The evening of November 16, [Victim] complained to her mother [Mother] about pain in her genital area. After some questioning, [Victim] told her mother about the events described above.

First thing in the morning of November 17 (the Friday before Thanksgiving break), [Mother] went to Oakhurst Elementary School and reported the Assault to the school nurse, [REDACTED], the school counselor, [REDACTED], and [Victim]'s classroom teacher, [REDACTED]. [Victim] was also present, and repeated the events described above.

By approximately 9:30 am, Decatur Police Officer M. Damico spoke with Principal Fowler, and with school social workers [REDACTED] and [REDACTED]. According to the Police Report, "It was determined that [REDACTED] would make referrals to [the Department of Family and Children Services ("DFCS")] and attempt to coordinate services for both the victim and suspect."

Later that day, [Mother] met a group of school officials including Oakhurst Principal Marcy Fowler. No officials have claimed—then or since—that the Assailant was in the girls' restroom without the knowledge or permission of the school. At this meeting, school officials refused to tell [Mother] what steps they were taking or would take to protect her daughter against any repetition of the assault she had suffered. They refused to offer any assurance that her daughter would not again be confronted by boys in the girls' restroom. They refused [Mother]' specific request that the school reassign the Assailant out of [Victim]'s class into a different classroom.

So far as we are able to tell, the Oakhurst Elementary leadership, and the Decatur Schools leadership as a whole, never initiated *any* significant investigation of this Assault. Indeed, an administrator at Oakhurst Elementary told [Mother] that no one associated with the school *ever* questioned the Assailant about the allegations—an essential step in even the most rudimentary investigation.

During the November 17 meeting, school representatives told [Mother] to take her daughter to a hospital to be examined, which she did. During an examination at the Children's Healthcare of Atlanta Hospital that day, [Victim] complained of vaginal pain. At no time, however, has the school offered any counseling or other support services to [Victim] to deal with trauma caused by the Assault, or the fears and troubling questions that such a sexual assault might raise for a young girl. During the week-long Thanksgiving break, no one from the school leadership contacted [Mother] to ask any questions about [Victim]'s condition, or offered any assistance.

The following week, [Mother] called repeatedly to speak with Principal Fowler, but received no return call from her until December 5. And although [Mother] has called Superintendent Dude's office repeatedly asking to speak with him about the sexual

assault of her daughter and the Decatur School's inadequate response, has visited his office in person, and has left a written note for him at his office asking to speak with him, she has never received a return call from Mr. Dude, nor or any opportunity to meet or speak with him.

As a result of the Assault, combined with the school's lack of response and refusal to provide assurances that measures to ensure [Victim]'s safety were being taken, [Mother] could not in good conscience continue exposing [Victim] to the known risks, and so withheld her from school during the week of November 27. Thus, [Victim] was directly and immediately deprived of the opportunity to receive education at her assigned school as a result of the school's inadequate and indifferent response to the sexual harassment she suffered.

On Friday, December 8, 2017, another meeting was held at Oakhurst that included [Mother], Principal Fowler, and others. During this meeting, [Mother] expressly objected to a boy with "gender issues" being allowed in the girls' restroom with her daughter. It was at this meeting that [Mother] was told that school policy left it to each child to determine what the "correct" restroom for him or her is. Indeed, Principal Fowler told [Mother] that a federal mandate under Title IX *required* that the district had to allow any child to go to the bathroom of the gender he or she identifies with. This was obviously untrue, since the Obama administration "Dear Colleague" letter had by then been retracted, and Superintendent Dude had circulated his email notifying staff of that fact. Again, school officials refused [Mother's] request that the Assailant be removed from her daughter's classroom, and refused to say what, if any, disciplinary action would be taken. Quite the reverse, they proposed removing [Victim] from her classroom.

Instead of taking affirmative action to investigate the Assault and to protect [Victim] and other girls against this now concrete threat of sexual harassment, it appears that Oakhurst Elementary School leadership contacted the Georgia DFCS and reported that a potential sexual assault had taken place in the school restroom, but inexplicably identified [Mother] as the responsible party. As a result of this baseless accusation by the school, DFCS personnel visited [Mother's] home, interviewed her young children apart from their mother, and contacted family and friends of the victim, inflicting further emotional distress on [Victim] and the entire family. Unsurprisingly, DFCS found *no* grounds for any further investigation of [Mother] or her family.

It is difficult to dismiss the troubling inference that—because the Assault and [Victim]'s complaint threatened to bring into sharp focus deep problems with a Policy to which the Decatur Schools leadership was strongly committed—that leadership refused to accord this complaint the seriousness that it deserved and that the law requires, and instead sought to retaliate against a low-income, African-American single mother and intimidate her into silence by sending the Department of Family and Child Services to her door to interrogate her children and inspect her home.

No representative of the Decatur Schools has ever informed [Mother], as parent of [Victim], of the result of any investigation of [Victim]’s complaint of a sexual assault, or that any discipline was imposed on the Assailant, or indeed of any final resolution of Complainant’s complaint at all. So far as Complainant is aware, no discipline at all was ever imposed on Assailant. Both with respect to discipline of the Assailant and remedying the Policy that made the Assault possible, it appears that the Decatur Schools simply decided “not to remedy the violation.” *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 277, 290 (1998).

Even after the Assault, Oakhurst Elementary School never informed other parents that a “gender fluid” boy was being admitted to the girls’ restroom, or that an assault by such a boy in the girls’ restroom had occurred. To the contrary, in a public statement to parents, the school affirmatively denied that this assault ever happened, causing further distress to the Complainant and her parent, and attempting to mislead other parents concerning risks resulting from the Policy.

Finally, [Mother] concluded that her daughter simply would not be protected at Oakhurst Elementary School against sexual assault and harassment made possible by the Policy. Accordingly, even though it would be disruptive to her daughter educationally and emotionally, [Mother] was forced to request a transfer to a different school so that [Victim] would not continue to be exposed to the Assailant, including in the girls’ restroom. In early January, 2018, [Victim] was transferred to Winona Park Elementary School, another school within the Decatur Schools. The reason given for the transfer was “unsafe school.” As a result of the Policy, this was an accurate statement.

#### V. IMPACT ON THE COMPLAINANT AND FORESEEABLE IMPACT ON OTHERS: A HOSTILE EDUCATIONAL ENVIRONMENT FOR GIRLS.

The adherence of Oakhurst Elementary School to the Policy either “caused” the assault suffered by [Victim] or “ma[d]e [her] liable or vulnerable to it.” *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43, 645 (1999). Following the Assault, [Victim] suffered nightmares, crying in her sleep and saying, “Stop! Stop!”. Following the Assault, Oakhurst Elementary School was a hostile environment for [Victim].<sup>2</sup>

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<sup>2</sup> *See Berry v. Chicago Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, “a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment”); *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that “One instance of conduct that is sufficiently severe may be enough,” which is “especially true when the touching is of an intimate body part.”)

Ultimately, the Decatur Schools’ refusal to remove the Assailant from [Victim]’s classroom,<sup>3</sup> and to provide assurances that the Assailant would not enter the girls’ restroom again, forced [Mother] first to hold [Victim] out of school while she hoped for an appropriate response and remedy from the Oakhurst Elementary School, then to move [Victim] to a different school within the Decatur City Schools system. Thus, the Policy combined with the Decatur Schools’ grossly inadequate response to the Assault prevented [Victim] from “continuing her education at [Oakhurst],” *see Hill v. Cundiff*, 797 F.3d 948, 975-76 (11th Cir. 2015), had a “negative effect on [her] ability to receive an education,” *see Davis*, 526 U.S. at 654, and inflicted additional emotional harm on this young girl.

Nor is this all; because the Policy is system-wide, it remains entirely possible that [Victim] will be forced to encounter boys in the girls’ restroom at her *new* school. A psychiatrist has advised that even if such an encounter does not involve an assault, it could be strongly emotionally troubling for a girl who has previously been the victim of sexual assault, let alone sexual assault in a girls’ restroom. As a result, the Decatur City Schools system has permitted and indeed enabled [Victim] to be harassed and discriminated against because of her sex, and has created a hostile rather than a safe educational environment for her on an ongoing basis, because of her sex.

Further, young victims of sexual assault often suffer long-term psychological harms, harms that in some cases manifest themselves years later. Although the Decatur Schools have offered no assistance in locating or paying for an appropriate psychologist, [Victim] has undergone a forensic evaluation with a psychologist who has recommended that [Victim] attend counseling with a therapist who has experience in treating sexual trauma in children, and it can be expected that [Victim] may need counseling from time to time over the long term as a result of the Assault she suffered.

[Victim] is of course just the most obvious victim of the Policy. While we may hope that actual assaults such as [Victim] suffered will be rare, all girls in the Decatur Schools, once they learn of the Policy—whether from others or because they themselves encounter a boy in a girls’ restroom or locker room—will have reason to fear that they cannot participate in school life without being at risk of loss of their bodily privacy, and without risk of the fear and apprehension that being confronted by a male person in what is expected to be a private female-only space is likely to induce. This fear and apprehension should not be a required part of the school experience of girls. And while *all* students have a protected right to bodily privacy, both sexual assault and the problem

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<sup>3</sup> “[S]eeing the perpetrator [at school] may be traumatic” for a victim of sexual assault. “Dear Colleague” letter dated April 4, 2011, from Russlynn Ali, Assistant Secretary for Civil Rights, Department of Education Office for Civil Rights (“4/4/11 Dear Colleague Letter”), at 13.

of “Peeping Toms” is a heavily one-way street.<sup>4</sup> The Policy thus creates a peculiarly troubling and hostile environment for girls.

## VI. VIOLATIONS OF TITLE IX

1. By adopting a Policy that permitted boys to enter girls’ restrooms, locker rooms, and other privacy areas, the Decatur Schools deprived all students of their constitutionally protected right of bodily privacy, and created an unsafe and hostile environment for girls in particular, and thus discriminated against girls;

2. By adopting the Policy without undertaking any analysis of the risk to girls, of the likely psychological impact on girls (including girls who are survivors of prior sexual assault or harassment), or of measures that could or should be taken to mitigate those adverse impacts on girls, the Decatur Schools acted with deliberate indifference towards those discriminatory impacts, including towards potential incidents of assault or harassment that might occur as a result of the Policy.

3. By leaving the policy unchanged, and failing to put in place any safeguards at all, after being warned by parents and community members that the Policy would deprive students of their rights to bodily privacy, create risks of harassment, and create an intimidating situation for girls in particular, the Decatur Schools acted with deliberate indifference and created a hostile and discriminatory educational environment for girls.

4. By allowing a boy known to be “gender fluid” [REDACTED] to enter the girls’ restroom at Oakhurst Elementary School, the Decatur Schools created an unsafe and hostile environment for girls and demonstrated deliberate indifference to that discriminatory environment and towards the risk of sexual assault or harassment of girls.

5. The Assault itself was sufficiently serious that it created a hostile educational environment for [Victim], thereby violating the duties of the Decatur Schools under Title IX.<sup>5</sup>

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<sup>4</sup> See, e.g., *Yu v. Vassar College*, 97 F. Supp.3d 448, 479 n. 26 (S.D.N.Y. 2015) (Vassar’s Director of the Office of Equal Opportunity and Affirmative Action (“EO/AA”), who oversees allegations of sexual misconduct, “has never seen a rape case at Vassar involving a male complainant and a female respondent.”)

<sup>5</sup> See *Revised Sexual Harassment Guidance*, DOE OCR, January 2001 (“2001 OCR Guidance”) at 6 (“a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.”); 4/4/11 Dear Colleague Letter at p. 3, *quoting Turner*, 595 F.3d at 686 (noting that “One instance of conduct that is sufficiently severe

6. The grossly inadequate and deliberately indifferent response of the Decatur Schools to the Assault effectively deprived [Victim] of the ability to continue her education at Oakhurst Elementary School, compounding the stress she suffered from the Assault by forcing her to break off friendships and suffer all the social and educational disruptions of a mid-year change of school abruptly after a traumatic event. This constituted sexual discrimination and deprivation of education opportunities.

7. The failure of the Decatur Schools to make an “adequate, reliable, and impartial investigation,” or indeed any meaningful investigation of the Assault in order to determine what occurred—including its complete failure to interview the alleged Assailant—was clearly unreasonable, violated the Decatur Schools’ obligation to provide an environment free from sexual harassment and discrimination, and thus constituted both sex discrimination and deliberate indifference to the discrimination and harassment inflicted by the Assailant. (*See* 4/4/11 Dear Colleague letter at 4, 9.)

8. The failure of the Decatur Schools to inform [Mother] of her right to file a formal complaint for sexual harassment on behalf of her daughter, and how to do so, violated its obligations under Title IX.

9. The failure of the Decatur Schools to inform [Mother] of her right to file a criminal complaint for sexual assault on behalf of her daughter violated its obligations under Title IX. (*See* 4/4/11 Dear Colleague letter at 10.)

10. The action of the Decatur Schools in making a report to DFCS identifying [Mother] as in some way responsible for the Assault, and causing an investigation to be initiated against her, constituted retaliation against her for complaining about the Decatur Schools’ handling of the Assault and for demanding a change to the Policy to exclude boys from girls’ restrooms so as to ensure a safe and nondiscriminatory educational environment for [Victim], in violation of its obligations under Title IX.

11. The failure of the Decatur Schools to take immediate action to eliminate the possibility of a recurrence of the sexual harassment and assault experienced by Complainant was unreasonable, makes [Victim] and all other girls who attend Decatur Schools more vulnerable to sexual harassment and assault in the future, and creates a hostile educational

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may be enough,” which is “especially true when the touching is of an intimate body part”).

environment,<sup>6</sup> all in violation of the Decatur Schools' obligations under Title IX.<sup>7</sup>

12. The failure of the Decatur Schools to "take any action to correct, reprimand, or discipline" the Assailant was clearly unreasonable and was thus discriminatory and violated its obligations under Title IX. *See Wells v. Hense*, 235 F. Supp. 3d 1, 9 (D.D.C. 2017).

13. The failure of the Decatur Schools to inform [Mother], on behalf of her minor child [Victim], of the outcome of its investigation and what sanction (if any) was imposed on the Assailant violated its obligations under Title IX. (*See* 4/4/11 Dear Colleague letter at 13.)

14. The Decatur School's refusal to provide adequate protection and assurances to [Victim] going forward, effectively forcing the victim rather than the perpetrator to leave Oakhurst, constituted sex discrimination, deliberate indifference to the discrimination and harassment inflicted by the Assailant, and deliberate indifference to the risk of further harassment and sex discrimination.<sup>8</sup>

15. The Decatur Schools' failure to offer immediate and ongoing counseling and mental health services to [Victim], as well as academics support services such as tutoring to help redress the disruption to [Victim]'s education, violated its obligations under Title IX. (*See* 4/4/11 Dear Colleague letter at 16.)

16. The failure of the Decatur Schools, after learning of the Assault, to review the Policy and make changes, constituted acts of deliberate indifference both to the discrimination and harassment suffered by [Victim], and to further and obviously foreseeable infliction of discrimination and harassment on other students in the Decatur Schools.

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<sup>6</sup> "[I]f, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex." 2001 OCR Guidance at 12.

<sup>7</sup> *See Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282, 1295-96 (11th Cir. 2007); 4/4/11 Dear Colleague letter at 4).

<sup>8</sup> *See Hill*, 797 F.3d at 975 ("Doe's withdrawal does not bar a finding that the Board denied her an opportunity to continue attending Sparkman."); *see also* 4/4/11 Dear Colleague letter at 16 (A school "should not, as a matter of course, remove complainants from classes . . . while allowing alleged perpetrators to remain.").

17. Each day that the Decatur Schools leave the Policy in place, up to the present, they exhibit deliberate indifference to these violations of the rights of students to privacy, to equal protection, and to be free from a hostile and discriminatory educational environment.

Respectfully submitted:



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